No. 99379-3

No. 37166-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

I.A.S.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION.

I.A.S. entered into a deferred disposition in juvenile court, which would require the court to vacate the charges against him if he completed the terms of community supervision. Over his objection, the court ordered him to submit to the seizure of his DNA for inclusion in a law enforcement database at the time he entered the deferred disposition.

Contrary to the court's interpretation of the relevant statutes, the court is not authorized to collect a child's DNA sample until a disposition is final, as part of the ultimate sentence imposed. The court improperly ordered I.A.S. to provide a DNA sample when entering a deferred disposition, without regard to whether the case against him would be vacated and sealed in the near future.

B. ASSIGNMENT OF ERROR.

The court erroneously construed the DNA collection statute to require that I.A.S. must submit to the seizure of his DNA at the time he entered into a deferred disposition in juvenile court.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A person's biological fluids and the intimate identifying information contained in DNA are private affairs that the State may not collect in the course of a criminal case without a warrant, until a person is sentenced for a qualifying offense. A child's deferred disposition involves the temporary entry of a conviction, but it must be vacated and sealed if the child successfully completes its terms. In a deferred disposition for a child, do the governing statutes direct the court to collect a DNA sample only after the child has failed to complete the requirements of the deferred and the conviction becomes final?

D. STATEMENT OF THE CASE.

I.A.S. entered an agreed deferred disposition in juvenile court. RP 3, 9; CP 20. The probation officer supported the deferred disposition and asked the court to waive "the DNA fee and testing" during the deferred disposition. RP 11, 12. When Judge Rachelle Anderson accepted the deferred disposition, she told I.A.S. a deferred disposition "is designed for a young man just like yourself, to give you the opportunity to comply with

some conditions so that you can put this behind you, as if these matters were not pled guilty or committed." RP 18.

After imposing community service and restitution, the judge said, "there will have to be a $100 DNA fee and the collection of DNA." RP 19.

The prosecutor expressed confusion about the court's order of the DNA fee and collection. RP 20. He said his "position has been" that DNA collection and the DNA fee are not appropriate to order at the time of the deferred disposition. RP 20-21. The court explained it had recently been taking the position that DNA would be collected, but it would postpone the requirement to pay a fee for collection if the prosecution was not asking for it. RP 21.

Defense counsel objected and asked the court to reconsider. Both the defense attorney and prosecutor filed motions regarding whether the entry of a deferred disposition triggers a mandatory obligation to submit a DNA sample to law enforcement or whether this requirement only arises if a deferred disposition is unsuccessful and a final conviction and judgment entered.

The prosecution acknowledged other judges in Spokane County had reached different conclusions on the applicability of DNA collection for children in deferred dispositions. CP 32. It attached rulings from Judges Neal Rielly and Michael Price in other cases, who did not order children to submit a DNA sample unless the deferred disposition was unsuccessful. CP 42-43, 60. On the other hand, Judge Ellen Clark ruled the DNA sample is mandatory under the statute at the time a person enters a deferred disposition. CP 46.

Judge Anderson herself had previously delayed DNA collection until after the conclusion of a deferred disposition. Supp. CP _, sub. no. 43 (page 13 of attachment B, judge's ruling). In this other case, Judge Anderson ruled "from here forward if you have any case that are felonies that need to collect DNA, I'm not going to be ordering that at the time of the deferred." *Id*.

But Judge Anderson reversed her position in I.A.S.'s case. The judge reasoned that a deferred disposition is labeled a "conviction" when entered, although it will be vacated and the

records sealed if the terms of the deferred disposition are completed. CP 81.

The prosecutor noted "reasonable minds can reach differing legal conclusions." CP 32. He concluded that "ultimately an appellate court's going to have to . . . make some decisions" on this issue. RP 28. The court agreed to stay the requirement that I.A.S. submit a DNA sample so he could appeal the court's order. CP 81.

E. ARGUMENT.

The court improperly ruled I.A.S. is statutorily required to submit to the seizure of his DNA and its placement in a police database when he enters a juvenile court deferred disposition.

1. *The purpose of a deferred disposition in juvenile court is for children to avoid the lasting consequences of a criminal conviction*.

Children receive many protections not available to adults when they are prosecuted for and convicted of criminal offenses. *State v. S.J.C.*, 183 Wn.2d 408, 422, 352 P.3d 749 (2015). These additional protections for children stem from the rehabilitative focus of juvenile court proceedings, as opposed to the goals of

deterrence and punishment that are the root of adult criminal prosecutions. *Id.* at 422.

The legislature "has always treated juvenile court records as distinctive and deserving of more confidentiality than other types of records." *Id.* at 417. Unlike adults, children are entitled to have their initials used in a case caption due to their recognized privacy interests, even when they are found guilty and sentenced for criminal offenses. RAP 3.4. Children who are convicted and sentenced in juvenile court are entitled to sealing of their juvenile conviction records when they are 18 years old, unless they were sentenced for certain serious offenses. RCW 13.50.260(1)(a). For deferred dispositions, children are entitled to immediate sealing when they satisfy the terms of a deferred disposition, without waiting until they turn 18. *State v. H.Z.-B.*, 1 Wn. App. 2d 364, 367, 405 P.3d 1022 (2017).

The opportunity to enter a deferred disposition is another difference between juvenile and adult felony cases. RCW 13.40.127. Children are eligible for a deferred disposition based on their lack of criminal history and the less serious nature of the charged offenses. RCW 13.30.127(1).

When entering a deferred disposition, the accused child admits the police reports support a finding of guilt. RCW 13.40.127(3). In return, the court will "defer the finalization of [the] case" for up to one year while the child participates in community supervision. RP 5; RCW 13.40.127(5). After the child satisfies the conditions of community supervision, the court must vacate the provisionally entered conviction and seal the case file. *H.Z.-B.*, 1 Wn. App. 2d at 371.

The deferred disposition statute dictates certain mandatory and other optional terms of community supervision. The court must impose restitution if it is applicable to a case. RCW 13.40.127(5). The court "may" order a mental health or substance abuse assessment and related treatment. *Id*. In cases involving unlawful possession of a firearm, the court "shall" require the child to participate in qualifying therapy or aggression training programs. *Id*.

A deferred disposition is not a "disposition" in terms of finally settling a criminal case. *State v. M.C.*, 148 Wn. App. 968, 972, 201 P.3d 413 (2009). In *M.C.*, the court ruled the victim penalty assessment may not be imposed at the time a deferred

disposition is entered. *Id*. By statute, the penalty assessment must be imposed "[w]hen any juvenile is adjudicated of any offense in any juvenile offense disposition under Title 13 RCW." *Id*. at 970, quoting RCW 7.68.035(1)(b). A deferred disposition is not an actual disposition as this term is used in criminal cases. *Id*. at 972. Instead, "the actual disposition will occur at some future time, depending on the juvenile's future conduct." *Id*.

The deferred disposition statute does not direct courts to collect a biological sample for DNA testing. As the court acknowledged here, the statute is "silent" regarding the seizure of the child's DNA as a condition of the deferred disposition. CP 81.

2. The statutory scheme does not direct the court to mandate children supply the State with DNA samples at the time they enter a deferred disposition.

The court's authority to impose a sentence or otherwise mandate sentencing conditions must stem from statute. *State v. Bacon*, 190 Wn.2d 458, 464, 415 P.3d 207 (2018). Courts may not develop their own sentencing procedures. *State v. Pillatos*, 159 Wn.2d 459, 469, 480, 150 P.3d 1130 (2007). The power to

impose sentences and conditions of a sentence "must be granted by the legislature." *Bacon*, 190 Wn.2d at 464.

The legislature must be "clear and definite" when it establishes penalties from a criminal conviction. *State v. Weatherwax*, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017). Penal statutes are strictly construed. *Id*. When two possible constructions of a statute are permissible, the rule of lenity requires the court to construe the statute in favor of the defendant and against the State. *State v. Parent*, 164 Wn. App. 210, 213, 267 P.3d 358 (2011).

By statute, after a person is convicted of an enumerated offense and as part of the sentence, the court must order an eligible person to submit to a seizure of their DNA for purposes of DNA analysis. RCW 43.43.754(1), (5).

The authority of law to collect this biological sample and obtain a DNA analysis rests on the person's status following a conviction. *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2007); Const. art. I, § 7. It is impermissible for the State to require a person to submit to DNA testing, without a warrant, just because a person has been arrested or charged with a crime.

State v. Garcia-Salgado, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). The individual privacy interests in DNA, and the right to be free from unwarranted seizures, limit the State's authority to obtain a person's DNA sample.

As the trial court recognized in this case, the deferred disposition statute does not direct the court to order a child submit to the State's collection of their DNA as part of the community supervision for a deferred disposition. CP 81. The DNA collection statute does not mention deferred dispositions. RCW 43.43.754. It does not dictate the court shall order the seizure of DNA from a child completing a deferred disposition.

The governing statute directs a court to collect a biological sample for DNA analysis after a person has been sentenced, not at the time of conviction. RCW 43.43.754(1)(a) provides that a biological sample "must" be collected for DNA analysis from any person convicted of an adult felony or juvenile equivalent. But it also authorizes the actual collection of the sample only after the sentence is imposed. RCW 43.43.754(5).

RCW 43.43.754(5) provides that these biological samples "shall be collected" in a certain "manner." This mandatory

manner of collecting DNA is based on *where* the person is serving a term of confinement, following the imposition of a sentence. *Id*.

For a person serving a term of confinement in a state or a jail facility, that facility "shall be responsible for obtaining the biological sample." RCW 43.43.754(5)(a), (c). When the person does not "serve a term of confinement" in either a state or jail facility as part of the sentence, the local police department is responsible for collection. RCW 43.43.754(5)(b), (6).

A separate statute also directs the court to order a person pay a fee for collecting the DNA and maintaining the database. RCW 43.43.7541. This fee is authorized only when a sentence is imposed. *Id*.

By placing the obligation to collect the DNA sample on the place of confinement after sentence is imposed, and authorizing a fee for collecting DNA only as part of a person's sentence, the statutory scheme shows the legislature intended the obligation to submit to DNA to be part of a person's sentence.

The statutory scheme dictates that the court's authority to collect a DNA sample for a child who has entered a deferred disposition occurs upon the final imposition of a sentence, following an unsuccessful deferred disposition.

3. The trial court incorrectly construed the statute to require DNA collection at the time a child enters a deferred disposition based on a misreading of the controlling statutes.

The trial court focused on the deferred disposition statute's reference to the entry of the deferred as a "conviction." CP 81. It reasoned that the DNA collection statute lists people who must supply a DNA sample as those who have been convicted or adjudicated guilty of an equivalent juvenile offense, and concluded the entry of any conviction triggers the requirement that a person must immediately provide a DNA sample to the government. *Id*.

The court acknowledged that the conviction entered as part of a deferred disposition is only temporary. *Id*. It must be vacated and sealed upon successful completion of community supervision. *Id*.

The court erred by focusing on the label of conviction as the critical step from which DNA collection flows. The DNA collection statute directs the manner in which the collection "shall" occur. RCW 43.43.754(1), (5), (6). The statute mandates the jail or prison to collect the DNA based on where the person is serving the sentence imposed. RCW 43.43.754(5). For people who are not serving a term of confinement, the court must set "a reasonable period of time" for the person to report to a local law enforcement office to provide the biological sample. RCW 43.43.754(6).

A person such as I.A.S. falls into this final category. He has not been ordered to serve any term of confinement as part of his deferred disposition. The statute directs the court to set a "reasonable period of time" for I.A.S. to provide his DNA to a local police office. RCW 43.43.754(6). It is reasonable, and consistent with the purposes of the deferred disposition statute for juveniles, to delay the submission of a biological sample until the deferred disposition has been resolved.

If the deferred disposition is successfully completed, the conviction must be vacated and there would be no requirement

to order DNA collection and analysis. *State v. J.O.*, 165 Wn. App. 570, 575, 265 P.3d 991 (2011). If the conviction is not vacated, the child will be obligated to provide a DNA sample.

4. Ambiguity in the statutory scheme governing DNA collection for children who enter deferred dispositions must be resolved in favor of the children whose convictions are not final.

A statute is ambiguous when more than one interpretation of the plain language is reasonable. *Weatherwax*, 188 Wn.2d at 154, quoting *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). One indication of ambiguity occurs when different judges consider the same statute and interpret it differently. *Id.*

Several judges in Spokane construed the statutes at issue differently, as the parties documented in their briefing. Judges Rielly and Price, and Judge Anderson initially, ruled in other cases that any DNA collection would be deferred until final disposition of the case. CP 42-43, 81; Supp. CP _, sub. no. 43 (attachment B, p. 13). These judges explained the statutory mandate was not clearly imposed until final disposition and the interests of rehabilitation and privacy that underlie juvenile

court proceedings favor postponing the DNA collection obligation until the end of the deferred. In these other cases, the judges stayed the obligation to provide a DNA sample until the final disposition in the case.

But Judge Anderson changed her mind in I.A.S.'s case. She ruled the existence of a "conviction" as a deferred disposition mandates the imposition of DNA collection at the time the deferred is entered.

If the statutory scheme is capable of two interpretations for juvenile cases involving deferred dispositions, the rule of lenity controls. The statute must be interpreted in the light most favorable to the defendant. Under the rule of lenity, I.A.S. may not be required to submit to the collection of his DNA until the deferred disposition is final. If he does not successfully complete the conditions of the deferred disposition, the court shall order him to submit to the collection of his DNA in a reasonable time.

The legislature knows how to expressly require an affirmative obligation for a person who enters a deferred disposition. The entry of a deferred disposition alone triggers the prohibition on restoration of firearm rights under RCW

9.41.040(3). *State v. S.G.*, 11 Wn. App. 2d 74, 77, 451 P.3d 726 (2019). The plain language of the controlling statute states that "[n]otwithstanding ... any other provision of law," the prohibition on restoring firearm rights applies to any person "convicted" in adult or juvenile court, regardless of what happens at "sentencing or disposition, post-trial or post-fact-finding motions, and appeals." RCW 9.41.040(3) further explicitly states that its provisions apply to any conviction, "includ[ing] *a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state*." (emphasis added).

When comparable statutes show "the legislature knew how to include" an obligation triggered by the entry of a deferred disposition, the "absence of such language" indicates the legislature intentionally limited its application to exclude pending deferred dispositions. *State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003); *S.G.*, 11 Wn. App. 2d at 78. The DNA collection statute contains no express language mandating the collection of DNA from a person whose "conviction" stems from

the entry of a deferred disposition, unlike the firearms prohibitions in RCW 9.41.040(3).

5. The collection of DNA from a child who enters a deferred disposition may be imposed only when the disposition is final.

As other Spokane County judges ruled, a child's obligation to provide a biological sample for DNA analysis occurs if the deferred disposition is not successfully completed and the conviction vacated. CP 42-43, 51, 60. The court lacks authority to require the submission of a DNA sample when a deferred disposition is successful and the conviction vacated. *J.O.*, 165 Wn. App. at 575. If the deferred disposition is not successful, the sentencing consequences, including the collection of a DNA sample, are enforced.

This Court should reverse the trial court's order requiring I.A.S. to submit a biological sample for DNA analysis at the time he entered the deferred disposition.

F. CONCLUSION.

The court's order requiring I.A.S. to supply his DNA to law enforcement should be reversed. On remand, the court may not impose a DNA collection obligation unless I.A.S. does not successfully complete the deferred disposition.

DATED this __ day of March 2020.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 37166-2-III
	)	
I.A.S.,	)	
	)	
JUVENILE APPELLANT.	)	

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