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No. 99374-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37240-5-III

STATE OF WASHINGTON, Respondent,

v.

M.Y.G., Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED ii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

IV. STATEMENT OF THE CASE 1

V. ARGUMENT 2

VI. CONCLUSION 9

CERTIFICATE OF SERVICE 10

AUTHORITIES CITED

State Cases

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007)....4

State v. Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015)....3

State v. D.P.G., 169 Wn. App. 396, 280 P.3d 1139 (2012)....7

State v. Evans, 177 Wn.2d 186, 298 P.3d 724 (2013)....4

State v. Heath, 168 Wn. App. 894, 279 P.3d 458 (2012)....5

State v. Lewis, 194 Wn. App. 709, 379 P.3d 129 (2016)....8

State v. M.C., 148 Wn. App. 968, 201 P.3d 413 (2009)....7

State v. P.M.P., 7 Wn. App. 2d 633, 434 P.3d 1083 (2019)....6

State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987)....8

Statutes

RCW 9.94A.010....7

RCW 9.94A.030(9)....5

RCW 13.40.127....5

RCW 13.40.127(3)....5

RCW 13.40.127(4)....5

RCW 13.40.127(5)....6

RCW 13.40.127(9)....6

RCW 13.40.127(10)....6

RCW 43.43.754....2, 9

RCW 43.43.754(1)(a)....3, 5, 8

RCW 43.43.754(7)....3

RCW 43.43.7541....8

Legislative Materials

Laws of 2014, c. 175 § 1 6

I. INTRODUCTION

The juvenile court entered an order of deferred disposition in M.Y.G.'s case that would result in dismissal of the charges if M.Y.G. complied with supervision requirements for nine months. The order required M.Y.G. to submit a DNA sample pursuant to RCW 43.43.754. Because the order deferring disposition is not a felony conviction, RCW 43.43.754 does not require the DNA collection imposed in this case and that portion of the order of deferred disposition should be stricken.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in requiring M.Y.G. to submit to DNA collection under RCW 43.43.754 upon entering an order of deferred disposition.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether an order of deferred disposition is a felony conviction requiring collection of DNA under RCW 43.43.754.

IV. STATEMENT OF THE CASE

The State charged M.Y.G. with two counts of theft of a motor vehicle. CP 1. He moved for a deferred disposition under RCW 13.40.127. CP 19, 24. Before the hearing, he lodged an objection to

requiring his DNA collection under RCW 43.43.754 and filed a memorandum in support of the objection. CP 10.

At the hearing on the motion, the trial court advised M.Y.G. that if he successfully completed the deferred disposition, he would not have convictions on his record. RP 6. As a condition of the deferred disposition, M.Y.G. stipulated to the admissibility of the police reports and acknowledged that if he did not successfully complete the conditions imposed, the reports would be used to find him guilty and an order of disposition would be entered with local sanctions imposed. CP 19-20. The State supported the deferred disposition but requested that DNA collection be imposed. RP 12-13.

The trial court granted the motion and entered an order of deferred disposition for a period of nine months. CP 25-26, RP 15. It ordered that M.Y.G. submit to DNA collection but stayed the imposition of the order pending the appeal. CP 28, RP 17. M.Y.G. now timely appeals and has been found indigent for that purpose. CP 36, 38.

V. ARGUMENT

The sole issue presented on appeal is whether RCW 43.43.754 applies to require collection of a juvenile's DNA for identification purposes when the juvenile court enters an order of deferred disposition.

Because a deferred disposition is not a final judgment in a case and because it is not equivalent to a conviction for a felony offense, RCW 43.43.754 does not apply. Accordingly, the order compelling M.Y.G. to submit to DNA collection should be stricken.

The statute that governs the trial court's order for M.Y.G. to submit to DNA collection for identification purposes is RCW 43.43.754. CP 28. It reads, in pertinent part, "(1) A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual convicted of a felony . . .." The sample may thereafter be retained by the forensic laboratory or submitted to the FBI combined DNA index system and used for future testing and prosecution. RCW 43.43.754(7). The question presented in this appeal is whether the trial court's order of deferred disposition is a felony conviction within the meaning of the statute. Because it is not, RCW 43.43.754(1)(a) does not apply and the order for DNA collection should be stricken.

Answering the question requires the court to interpret the meaning of "convicted" set forth in RCW 43.43.754(1)(a). The reviewing court's goal in interpreting a statute is to ascertain the legislature's intent by examining the statute's plain language and its context in the statutory scheme. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). If

the plain language of the statute is unambiguous, the inquiry ends and the statute is enforced in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Only if the statutory language is ambiguous does the court then turn to legislative history and canons of statutory construction to discern the legislative intent. *Id.* at 110-11. One of these canons of construction is the rule of lenity, which requires the court to interpret an ambiguous penal statute in favor of the defendant. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

Here, the term "conviction" is not defined in Chapter 43.43 RCW, nor in the Juvenile Justice Act, Chapter 13.40 RCW. The question for this court is whether the term unambiguously includes entry of an order deferring disposition. Because a reasonable interpretation of "conviction" in this context would apply only when a conviction is finalized in a disposition order, the rule of lenity should apply here and preclude DNA collection when the juvenile has the opportunity to avoid the felony conviction by complying with the requirements of the deferred disposition.

Admittedly, the term "conviction" is defined in the Sentencing Reform Act, applicable to adult felony convictions, as "an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a

finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). For purposes of calculating the offender score in an adult sentencing, the Court of Appeals has held that a sentence withholding adjudication constitutes a conviction. *State v. Heath*, 168 Wn. App. 894, 901, 279 P.3d 458 (2012), *review denied*, 177 Wn.2d 1008 (2012). However, because there are significant differences between the use and treatment of convictions in adult sentencings and in juvenile proceedings, as well as the legislative goals applicable to adult and juvenile offenders, the term "conviction" used in RCW 43.43.754(1)(a) should not be construed to include an order deferring disposition in a juvenile proceeding. Instead, a juvenile adjudication of guilt is only a "conviction" for DNA collection purposes when the adjudication is formalized in a disposition order.

A deferred disposition is established under RCW 13.40.127. Under that provision, the juvenile must stipulate to the admissibility of the facts contained in the police report, acknowledge that the report will be used to support a finding of guilt and impose a disposition if the juvenile fails to comply with supervision conditions, waive rights to a speedy disposition and to call and confront witnesses, and acknowledge the consequences of conviction and disposition. RCW 13.40.127(3). Following these acts "and entry of a finding or plea of guilt," the court defers entering the disposition order. RCW 13.40.127(4). Instead, the

court places the juvenile on supervision subject to appropriate conditions. RCW 13.40.127(5).

A the conclusion of the supervision period, if the juvenile has satisfied the supervision terms and at least made a good faith effort to pay the full amount of any restitution owed, the "conviction shall be vacated and the court shall dismiss the case with prejudice." RCW 13.40.127(9). Upon successful completion of a deferred disposition, the case is administratively sealed after the juvenile's 18th birthday once the full restitution order has been paid. RCW 13.40.127(10). Once sealed, the proceedings are treated as though they never occurred and the offender is considered as not having previously been convicted. *State v. P.M.P.*, 7 Wn. App. 2d 633, 643-44, 434 P.3d 1083 (2019); RCW 13.50.260(6)(a).

Both the deferred disposition alternative and the sealing provisions applicable to juvenile records reflect an enhanced legislative interest in preserving the privacy of juveniles in order to promote rehabilitation for youthful mistakes. *See* Laws of 2014, c. 175 § 1 (finding that "[t]he primary goal of the Washington state juvenile justice system is the rehabilitation and reintegration of former juvenile offenders" and declaring that these interests outweigh public availability of juvenile court records). These are different interests than those applicable to offenders

who continue to commit crimes into adulthood, for whom a prior history of criminal behavior as a juvenile is relevant to present punishment. *See* RCW 9.94A.010 (setting forth purposes of adult sentencing including proportionate and just punishment, protecting the public, preserving state resources, and reducing recidivism).

With a deferred disposition, the juvenile gives up certain rights and commits to abide by court-imposed conditions in exchange for a chance to emerge from the process without a criminal record. The disposition is thus postponed and does not occur at all unless the juvenile violates the terms of the deferral. *State v. M.C.*, 148 Wn. App. 968, 972, 201 P.3d 413 (2009); *State v. D.P.G.*, 169 Wn. App. 396, 399, 280 P.3d 1139 (2012). But there is no provision in the DNA collection statutes that provides for a juvenile's biological sample to be removed from state or federal databases upon successful completion of a deferred disposition and dismissal of the pending criminal charges. It thus runs contrary to the legislative goals of privacy and rehabilitation to place non-convicted juveniles' biological identities into a database of criminal offenders when those juveniles may end up with no criminal record after successfully completing the deferred disposition.

Further, the structure of the DNA statute also strongly suggests that the obligation to submit a DNA sample arises at sentencing or disposition, not before. The DNA database program is funded by imposing collection fees on defendants convicted of felonies pursuant to RCW 43.43.7541. *State v. Lewis*, 194 Wn. App. 709, 719-20, 379 P.3d 129, *review denied*, 186 Wn.2d 1025 (2016), *abrogated on other grounds in State v. Anderson*, 9 Wn. App. 2d 430, 447 P.3d 176 (2019). But there is no provision for assessing the fees arising from DNA collection except at sentencing, by including them in the judgment and sentence as a legal financial obligation. RCW 43.43.7541. It would be an odd and absurd result for the legislature to intend to fund the program by assessing fees against individuals required to submit samples, but require samples without providing a mechanism for them to be paid for. *See State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) ("Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided."). Consequently, RCW 43.43.7541 provides additional support for the argument that a "conviction" does not occur under RCW 43.43.754(1)(a) requiring submission of a DNA sample until a disposition order is entered in a juvenile case.

For these reasons, the statutory term "convicted of a felony" used in RCW 43.43.754(1)(a) should not be construed as applying to the entry

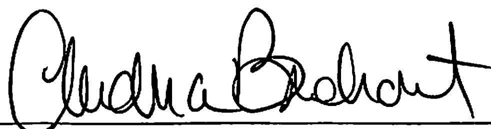
of a deferred disposition, which is not a final resolution of a case. That interpretation is inconsistent with the nature of a deferred disposition as providing a juvenile with an opportunity to *avoid* conviction, with the legislative purpose of affording privacy to justice-involved juveniles to enable their rehabilitation and reintegration, and with the goal of funding the DNA database by assessing fees against those required to submit samples in their sentences. Accordingly, the trial court lacked authority to require M.Y.G. to submit a DNA sample under RCW 43.43.754 upon entering an order deferring disposition in his case.

VI. CONCLUSION

For the foregoing reasons, M.Y.G. respectfully requests that the court STRIKE the requirement that he submit a sample of his DNA to the State for entry into its database of criminal offenders from his order deferring disposition.

RESPECTFULLY SUBMITTED this 23 day of April, 2020.

TWO ARROWS, PLLC



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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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12709 N. Palomino Lane
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And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal to the following:

Larry D. Steinmetz
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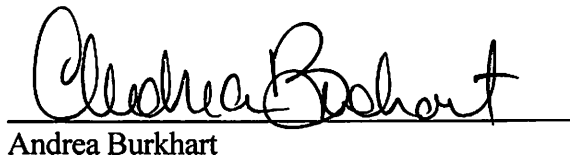
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 23 day of April, 2020 in Kennewick, Washington.



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