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No. 99379-3

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEFENDANT

v.

I.A.S., APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUE PRESENTED

Is a juvenile who enters a deferred disposition for a felony crime required to submit a DNA sample upon the court's acceptance of the deferred disposition agreement, or only upon revocation?

III. STATEMENT OF THE CASE

On July 30, 2019, I.A.S., then a minor, was charged with theft of a motor vehicle, DUI, and failure to remain at the scene of an accident. CP 5. The State subsequently amended the information, adding a single count each of second degree burglary and second degree theft. CP 10. I.A.S. requested a deferred disposition on his case, as authorized by RCW 13.40.127. CP 19. Spokane County Superior Court, Juvenile Division, Judge Anderson, granted the defendant's motion and entered a finding of guilty on the amended charges, with disposition to be deferred until October 1, 2020. CP 25-26. After objection and motion for reconsideration, defendant was ordered to submit a DNA sample in accordance with RCW 43.43.754. CP 80. Collection of DNA was stayed pending appeal. CP 81. Defendant timely appealed. CP 83.

During the pendency of the appeal, the defendant has experienced difficulty complying with the terms of the deferred disposition order. The court has twice modified the defendant's sentence. CP 93-96.¹ After a third allegation of non-compliance, the court has set a revocation hearing for May 12, 2020. CP 97-101.

IV. ARGUMENT

Standard of review.

The interpretation of statute is a question of law reviewed *de novo*. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

A. RCW 43.43.754, BY ITS PLAIN LANGUAGE, REQUIRES THAT ALL PERSONS CONVICTED OF A FELONY, INCLUDING JUVENILES, HAVE A DNA SAMPLE TAKEN.

Every adult or juvenile convicted of a felony, or certain enumerated misdemeanors, must have a DNA sample taken for the purpose of identification. RCW 43.43.754. Such collection is constitutionally permissible, *State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208, 212 (2007); even if the convicted person is a juvenile, *State v. S.S.*, 122 Wn. App. 725, 727, 94 P.3d 1002 (2004). No private affair is disturbed by these collections “because collecting identifying information from convicted felons does not

¹ A supplemental designation of clerk's papers is being filed contemporaneously herewith. The court's sub number 30 should be CP 93-94; sub number 39, CP 95-96; sub number 49, CP 97-100; and sub number 50, CP 101.

infringe on a privacy interest that convicted felons of this state have held, or should be entitled to hold, safe from government trespass.” *Surge*, 160 Wn.2d at 74. Conviction means an adjudication of guilt pursuant to Title 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty. RCW 9.94A.030.

In *Surge*, the Supreme Court compared the collection of DNA to the collection of fingerprints (which remain on file subsequent to an arrest, even if a defendant is later found not guilty or has a case vacated or sealed). Specifically, the court stated: “It is a well established practice of government to collect fingerprints from convicted felons for identification purposes. We find no distinction between that practice and the collection of DNA.” 160 Wn.2d at 74.

The plain language of RCW 43.43.754 states that a conviction triggers the requirement to provide a DNA sample. Immediately adjacent to the statute requiring a DNA sample be taken is the statute which imposes the fee associated with such sampling. RCW 43.43.7541 provides for a \$100 DNA testing fee to be imposed as part of a sentence in any case which requires DNA collection from a defendant who has not previously had their DNA collected pursuant to a prior conviction. Defendant notes that this fee is mentioned in the context that “every sentence imposed ... must include” it, and argues that this applies to the DNA collection itself being authorized

only as part of sentence. This is incorrect, and comparison of the language used in RCW 43.43.754 and RCW 43.43.7541 is illustrative. RCW 43.43.754, the statute which mandates DNA collection, uses the term “conviction” as the triggering event for the requirement. Conversely, RCW 43.43.7541 specifies the fee for such collection be imposed as part of “sentence.” The legislature is presumed to both know the law in the area in which it is legislating and know the definitions of words used in statutes. *State v. Torres*, 151 Wn. App. 378, 385, 212 P.3d 573 (2009). Here, different terms were chosen in sequential statutes, implying that the triggering event for each statute is different.² If the legislature had intended the two triggering events in these statutes to be synonymous with imposition of sentence, as defendant argues, the same terms would have been used. Because they were not, the plain meaning dictates otherwise.

B. A DEFERRED DISPOSITION, WHILE ACTIVE, IS A CONVICTION FOR THE PURPOSES OF RCW 43.43.754, EVEN IF SUBSEQUENTLY VACATED.

The Juvenile Justice Act of 1977 was intended to keep juvenile offenders accountable for their actions, while also providing for rehabilitation and reintegration of juvenile offenders, and protecting the

² While RCW 43.43.7541 states that every applicable sentence shall include the DNA fee mentioned, this does not logically preclude the DNA fee from being assessed in other appropriate circumstances. However, this issue is not before the court.

citizenry from criminal behavior. RCW 13.40.010. Furthering these goals, qualifying juvenile offenders may avail themselves of a deferred disposition for certain criminal offenses. RCW 13.40.127. “When a deferred disposition is granted, the respondent is found guilty upon stipulated facts, and disposition is deferred pending satisfaction of conditions of supervision that the court specifies. If the juvenile completes all supervision conditions, the conviction will be vacated and the case dismissed with prejudice.” *State v. D.P.G.*, 169 Wn. App. 396, 399, 280 P.3d 1139 (2012).

While a juvenile offender may successfully complete the requirements of the deferred disposition agreement and subsequently receive a vacation of their conviction, until that process occurs, their conviction exists. A conviction includes a finding of guilt, plea of guilty, or adjudication of guilt. RCW 9.9A.030. The deferred disposition statute itself acknowledges the existence of the conviction, stating: “A deferred disposition shall remain a conviction *unless the case is dismissed and the conviction is vacated* pursuant to (b) of this subsection or sealed pursuant to RCW 13.50.260.” RCW 13.40.127(9)(c) (emphasis added). Indeed, the fact that a conviction occurs and remains in place until and unless vacated is part of the statement made by the juvenile requesting a deferred disposition. CP 22. Even the order granting a deferred disposition reflects that a conviction has occurred and will remain until vacated, stating that

“[t]he court found the Defendant guilty.” CP 25. The same document orders the taking of DNA, in accordance with RCW 43.43.754.

The collection of a DNA sample at the time of a juvenile’s entry into a deferred disposition finds analogy with firearms prohibition and notification to the Department of Licensing (DOL), both of which also occur when the court makes a finding of guilty and authorizes a deferred disposition. *See* CP 28-29. RCW 9.41.040(3) refers to firearm rights and the relevant portion reads:

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been “convicted,” whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including, but not limited to, sentencing or disposition, post-trial or post-fact-finding motions, and appeals. Conviction includes 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.

The language clearly requires that juvenile defendants entering a deferred disposition agreement be prohibited from possessing firearms at the time of their entry into that agreement, not disposition. Conviction triggers the event, regardless of what may happen in the future.

Similarly, in the situation where a defendant has been convicted of a crime that requires DOL be notified of the offense, this too is required to be ordered by the court at the time of conviction, not disposition.

RCW 46.20.285 requires DOL to “revoke the license of any driver ... upon receiving a record of the driver’s conviction of any of the following offenses ... (4) Any felony in the commission of which a motor vehicle is used.” The plain language indicates that it is conviction which triggers the revocation, not disposition.

Defendant argues that DNA collection is part of the sentence and so should not be imposed until disposition, but this is simply incorrect. RCW 43.43.754 mandates the collection of a DNA sample from anyone convicted of a felony, not as a punitive measure, or only as part of a sentence, but as an independent requirement imposed on the convicted individual. This requirement stands alone, regardless of any sentence that may or may not eventually be imposed. Because it is the conviction that triggers the requirement of a DNA sample, and because a conviction exists for a juvenile undergoing a deferred disposition, the plain meaning of the law requires that a juvenile convicted of a felony submit a DNA sample upon entry of the deferred disposition agreement.

C. RCW 43.43.754 IS NOT AMBIGUOUS AND SO THE CANONS OF CONSTRUCTION DO NOT APPLY.

Statutory interpretation is a question of law. *Keller*, 143 Wn.2d 267. If a statute is clear on its face, the meaning is derived from its plain language. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). “A

statute is unclear if it can be reasonably interpreted in more than one way. However, it is not ambiguous simply because different interpretations are conceivable.” *Id.* at 954-55. An unambiguous statute is not subject to judicial construction. *Id.* at 955. A reviewing court will not “insert words into a statute where the language, taken as a whole, is clear and unambiguous.” *Id.*

Defendant argues that RCW 43.43.754 is ambiguous and asks the court to effectively insert additional language into the law. Where the statute says “conviction,” defendant’s arguments invite the court to read “final conviction” or “conviction after [deferred] disposition.” To conceptually add such language when the plain meaning is different and unambiguous would be inappropriate. If the legislature wishes to adopt defendant’s position, it need only amend the statute. Barring that, the plain meaning controls. Until, and unless, a vacation occurs, a juvenile undergoing a deferred disposition has still been convicted of a felony and is subject to the requirement of a DNA sample.

Defendant claims that “[b]y 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 DNA to be part of the person’s sentence.” Appellant’s Br. at 11. This

ignores the other option for collection, for those not serving or not yet serving a period of detention (in the case of a potential revocation): the local police department or sheriff's office. RCW 43.43.754(5)(b).

Defendant also argues that because RCW 43.43.754(6) provides for a "reasonable period of time" to effect the sample collection, that it is reasonable to wait until the conclusion of a deferred disposition (typically 12 months) before ordering such collection. Appellant's Br. at 13. This strains the meaning of the word "reasonable" in this context. Finally, defendant argues that the rule of lenity should apply to the timing of DNA collection. Appellant's Br. at 14. The rule of lenity, like the canons of construction generally, does not apply in this situation because the statute is not ambiguous, nor is the DNA sample requirement punitive.

D. DEFENDANT'S CLAIM MAY BE TECHNICALLY MOOT.

At the time the State submitted its response brief on May 7, 2020, the Juvenile Court was considering whether it would revoke the defendant's deferred disposition; the revocation hearing was set for May 12, 2020. Should that event occur, the defendant's case would technically be moot.

An issue is moot if a court can no longer provide effective relief. *In re Mines*, 146 Wn.2d 279, 283, 45 P.3d 535 (2002). An appellate court may reach the merits of a "technically moot" issue, however, if it involves a matter of continuing and substantial public interest. *State v. Hunley*,

175 Wn.2d 901, 907, 287 P.3d 584 (2012). This Court decides whether an issue involves a matter of continuing and substantial public interest according to three factors: (1) the public or private nature of the issue, (2) the need for a judicial decision to guide public officers in future cases, and (3) the issue's likelihood of reoccurrence. *Hunley*, 175 Wn.2d at 907.

Although the defendant's case may be technically moot if the juvenile court revokes defendant's deferred disposition, the State agrees that this is a matter that should be reviewed by this Court – it is a matter of public interest, capable of reoccurrence, and a decision is necessary to guide public officers in future cases.³

V. CONCLUSION

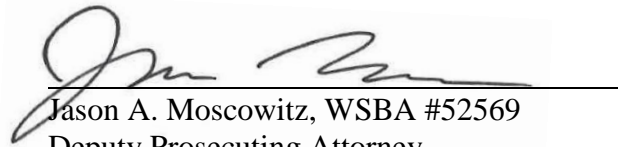
Because defendant was convicted of a felony, he must submit a DNA sample. That defendant's conviction occurred as part of a juvenile deferred disposition does not entitle him to delay the collection of the DNA sample until revocation of the deferred disposition. RCW 43.43.754 is not ambiguous, and, by its plain meaning, requires defendant to comply with collection.

³ The State is aware of several other cases where this issue has been or will be raised. See *State v. M.Y.G.*, No. 37240-5-III; *State v. E.R.M.*, No. 37312-6-III.

The trial court correctly ruled that, upon entry of a deferred disposition agreement, defendant was obliged to submit a DNA sample. Accordingly, the State respectfully requests that this Court affirm the lower court's ruling.

Dated this 7 day of May, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Jason A. Moscovitz", is written over a horizontal line. The signature is fluid and cursive.

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

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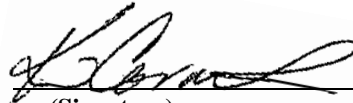
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 7, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Nancy Collins
wapofficemail@washapp.org

5/7/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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