37240-5-III

No. 99374-2

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEFENDANT

v.

M.Y.G., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Statutes

I. APPELLANT'S ASSIGNMENT OF ERROR

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.

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 September 27, 2019, M.Y.G., a minor, was charged with two counts of theft of a motor vehicle. CP 1. M.Y.G. 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 September 4, 2019. CP 25-26. Defendant objected to collection of DNA and the court stayed collection pending appeal. CP 28. Defendant timely appealed. CP 36.

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 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 it is imposed "at sentencing, by including [it] in the judgment and sentence as a legal financial obligation," and argues that this applies to the DNA collection itself being authorized only as part of sentence. Appellant's Br. at 8. 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.[1] 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 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,

[1] 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.

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 9.94A.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 21. 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 argues that "the structure of the DNA statute also strongly suggests that the obligation to submit a DNA sample arises at sentencing or disposition, not before," because the DNA fee is required as part of sentence and 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." Appellant's Br. at 8. There are at least two reasonable responses to this argument, either of which would be sufficient to rebut it. First, it may be the case that juveniles who successfully complete their

deferred disposition derive the benefit of doing so by saving money on otherwise imposed legal financial obligations, and the DNA sampling program is sufficiently funded by the fees imposed in other cases. Second, the court has the authority to impose the DNA testing fee outlined in RCW 43.43.7541 when DNA samples are ordered, even outside the context of a sentence imposed at disposition. It is important to note that the statute states that "every sentence … must include a [DNA] fee," but that this is not logically equivalent to saying that a DNA fee may *only* be imposed as part of sentence. While this precise issue is not before the court, it is reasonable to interpret the statutory scheme as allowing courts the discretion to impose (or not impose) the DNA fee in situations other than as part of a relevant sentence.

Finally, defendant argues that the rule of lenity should apply to the timing of DNA collection. Appellant's Br. at 4. But this is putting the cart before the horse; 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. Defendant argues that RCW 43.43.754 is ambiguous because, *inter alia*, "'conviction' is not defined in Chapter 43.43 RCW, nor in the Juvenile Justice Act," *Id*. However, conviction is defined in the criminal code, and that definition specifically references Title 13, in which the Juvenile Justice Act resides.

RCW 9.94A.030. To argue that a statute is ambiguous because the legislature didn't intend "conviction" to mean a conviction is to attempt to manufacture ambiguity where there is the opposite.

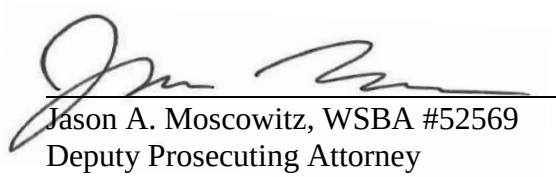
V. CONCLUSION

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.

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 2 day of June, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. M.Y.G. Appellant.	NO. 37240-5-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 2, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
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6/2/2020 **(Date)** Spokane, WA **(Place)** **(Signature)**

SPOKANE COUNTY PROSECUTOR

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