Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-191

APRIL TERM, 2020

In re W.C., Juvenile*	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Family Division
	}	
	}	DOCKET NO. 41-9-18 Lejv
		Trial Judge: Megan J. Shafritz, Howard A. Kalfus, Specially Assigned

In the above-entitled cause, the Clerk will enter:

Juvenile, who was adjudicated a delinquent based on a petition alleging open and gross lewdness, appeals the family division's denial of his motion to dismiss the charge. We affirm.

The State filed the delinquency petition in August 2018 based on juvenile's conduct that occurred in February of that year. In a January 17, 2019 decision, following a contested merits hearing, the family division adjudicated juvenile a delinquent after concluding that the State had met its burden of proving that he committed the delinquent act of open and gross lewdness, in violation of 13 V.S.A. § 2601a(a). In March 2019, the Department for Children and Families (DCF), which opened a case concerning the incident, filed with the family division a disposition case plan recommending juvenile's direct placement with the BARJ (Balanced and Restorative Justice) program but no juvenile probation. That same month, juvenile filed a motion to dismiss the case in the interests of justice, pursuant to Vermont Rule of Criminal Procedure 48(b)(2). On April 2, 2019, another judge in the family division held a disposition hearing, during which the court considered juvenile's motion to dismiss. At the conclusion of the hearing, the court made a BARJ referral, which juvenile accepted. The court continued the disposition hearing without making a disposition order to determine if the BARJ program was appropriate and would not interfere with juvenile's plans to attend college out of state in the fall. In an order entered later that same day, the court noted the expectation "that if the motion to dismiss is granted (which would be without prejudice and conditioned upon Juvenile's successful completion of BARJ), another BARJ referral would be made by DCF as a 'pre-charge' referral and that Juvenile would admit to the act at BARJ." The following day, April 3, the family division issued its decision denying juvenile's motion to dismiss. In a May 7, 2019 decision, the court denied juvenile's motion to reconsider. At the continued disposition hearing held on June 4, 2020, the court dismissed the case without entering a disposition order based on the parties' agreement that juvenile had successfully completed the BARJ program, which was all that was required of him.

In its January 17 decision adjudicating juvenile a delinquent, the family division concluded that the following findings demonstrated that juvenile had committed the charged offense by making unwanted contact with the complainant's breasts and vaginal area. Juvenile and the complainant, who were both sixteen-year-old high school juniors at the time of the incident that led to the charge in this case, began dating in December 2017. During their relationship before the incident in question, on approximately ten occasions, the two engaged in intimate sexual activity, including kissing, touching each other's private parts without clothing, and oral sex. On the evening of February 23, 2018, juvenile and the complainant went on a dinner date, planning to go afterwards to a parking lot to engage in sexual activity. After dinner, however, the complainant told juvenile that she did not want to do that activity anymore. When juvenile asked why, the complainant responded, untruthfully, that she was having her period.

Around 8:30 or 9:00 that evening, juvenile drove complainant to her home, where they greeted the complainant's parents and brother before going downstairs to the complainant's bedroom to hang out. They had not previously engaged in sexual activity in the complainant's home. After a few minutes, the complainant joined juvenile on a piano bench. When juvenile asked her if she wanted to engage in sexual activity, she responded, "No, I'm just sitting beside you." Juvenile said, "Fine," and got up to sit on the complainant's bed. The complainant then joined juvenile on the bed with her sketch pad. After some conversation, the complainant moved so that she was sitting in between juvenile's legs, leaning back on his chest. At this point, juvenile touched the complainant twice, first on the top of her thighs, and then on her chest, over her clothes. The complainant pushed his hand away both times, saying, "No." Juvenile touched the complainant a third time, saying, "A boy's just got to have some fun." At some point, when the complainant was lying on her bed and staring at the ceiling, her sweatshirt came off, but she could not recall how. Juvenile touched the complainant's breasts and between her legs, over her clothing. He also kissed the complainant's breast for approximately five minutes. The complainant was thinking she did not want the touching to happen, but she did not say anything because she did not want to alert her parents. The two got up after they heard a loud noise upstairs. Juvenile asked the complainant if she liked it, and the complainant replied, "Yes," because she did not want juvenile to do it again.

The complainant did not tell anyone at the time what had happened. After the incident, juvenile and the complainant continued their relationship, but they did not go on any dates and did not speak frequently. Around the time of April school break, the complainant told juvenile that she did not want to date him any longer. When later that month juvenile texted the complainant and asked her if she remembered why she had broken up with him, she replied, referencing the February 23 incident, "There was a time when I said no and you didn't listen." Just before Memorial Day weekend in late May 2018, when it looked like she would be unable to avoid doing a lifeguard shift along with juvenile, the complainant told her mother what had happened in February. This led to a meeting at the school and an investigation by police and DCF.

Juvenile does not challenge any of these findings or conclusions. Rather, his sole argument on appeal is that the family division abused its discretion by not granting his motion to dismiss the delinquency petition in the interests of justice. Although there are separation-of-powers principles at stake because of the prosecutor's prerogative to determine whether to file charges, "the court nonetheless has the power to dismiss a case when it would be fundamentally unfair to continue the prosecution." State v. Fitzpatrick, 172 Vt. 111, 115 (2001) (quotation omitted); see V.R.Cr.P. 48(b)(2) (providing that court may dismiss indictment or information to "serve the ends of justice and the effective administration of the court's business"). A court

may dismiss a prosecution against the wishes of the prosecutor, however, "only in rare and unusual cases when compelling circumstances require such a result to assure fundamental fairness in the administration of justice." Fitzpatrick, 172 Vt. at 115; see State v. Gillard, 2013 VT 108, ¶ 27, 195 Vt. 259 (stating that court may dismiss prosecutions "only in extraordinary circumstances" so as "to ensure that it does not improperly interfere with the State's right to prosecute"). This Court has established a list of non-exclusive factors for the court to consider in determining whether dismissal with prejudice in the interests of justice is appropriate. See State v. Suave, 164 Vt. 134, 140-41 (1995) (stating that court should consider, when relevant, "such factors, which weigh the respective interests of the defendant, the complainant, and the community at large"). The decision whether to dismiss a case with prejudice in the interests of justice "involves an exercise of the court's discretion, reviewable in this Court only for an abuse of discretion." Fitzpatrick, 172 Vt. at 116. Thus, we will reverse the trial court's decision only if the court "has entirely withheld its discretion or where the exercise of its discretion was for clearly untenable reasons or to an extent that is clearly untenable." Id. (quotation omitted).

Juvenile argues that the family division abused its discretion in denying his motion to dismiss by: (1) mistakenly concluding that it could not require him to complete the BARJ program without moving to disposition; (2) finding that the potential negative collateral consequences of the adjudication were speculative in nature; (3) failing to recognize that the respective interests of juvenile, the complainant, and the community at large were closely aligned and warranted dismissal of the delinquency charge; and (4) basing its determination on whether juveniles charged with sex-related crimes, as a category, were entitled to relief rather than on the circumstances of this particular case. The State responds that the family division acted within its broad discretion in denying juvenile's motion.

Before responding to juvenile's individual arguments, we set forth the family division's reasoning in denying juvenile's motion. The court examined each of the Suave factors, finding that the following factors favored denial of juvenile's motion: (1) this was a very serious offense that would have a long-lasting impact on the complainant; (2) there was no doubt juvenile committed the delinquent act; (3) delinquency proceedings would serve the very important purpose of rehabilitating the offender, in which the public has a considerable interest; (4) the complainant's and her family's confidence in the judicial system would be eroded if the case were dismissed; (5) the case does not involve any misconduct on the part of law enforcement officials; (6) juvenile was not prejudiced by the passage of time since initiation of the proceedings; and (7) the complainant's requests to the court concerning juvenile suggested that she would not support dismissal of the case. The court found that possible negative collateral consequences stemming from the delinquency adjudication—particularly the potential for having to register as a sex offender in states in which he lived, studied, or even visited—were "purely speculative." The court further found that juvenile's positive attributes—having no prior adjudications; being a straight-A student, an athlete, and an artist; and engaging in extra-curricular activities to help others—while laudable, did not weigh either in favor of or against dismissal, considering his offense. The court acknowledged that the purpose of the disposition in this case would be achieved whether or not the case was dismissed because juvenile had committed to the BARJ program; however, in the court's view, this factor did not tip the scales either way in its Sauve analysis.

In response to juvenile's motion to reconsider, the family division acknowledged that it had misconstrued a chart juvenile presented concerning sex-offense registration laws in other states. The court conceded that "most states may require [juvenile] to register," but that it would take a separate legal analysis of each state to determine if registration was required, and thus this potential negative collateral consequence remained speculative in nature. The court opined

that a delinquency adjudication in this case would serve the purposes of protecting public safety and connecting juveniles to services that reduce the risk of reoffending. The court rejected juvenile's argument that he could complete the BARJ program without a delinquency adjudication, stating that nothing obligated juvenile to complete the program and that if it dismissed the adjudication, "there is no basis for a disposition order and, consequently, nothing in place to obligate [juvenile] to take the steps necessary to repair the harms he has caused, to develop the competencies necessary to avoid or at least reduce the risk of re-offending and to protect the community." According to the court, the delinquency adjudication "therefore, serves a critical purpose for the victim, the community and for [juvenile] himself."

Juvenile first argues that the court erroneously assumed it could not require him to successfully complete the BARJ program without a disposition order. In fact, juvenile notes, that is exactly what happened here—he completed the BARJ program, and the court dismissed the case without issuing a disposition order. In support of his argument, juvenile relies primarily on 33 V.S.A. § 5232(b)(7),[*] which allows the court to refer a juvenile adjudicated a delinquent "directly to a youth-appropriate community-based provider . . . includ[ing] a balanced and restorative justice program," and requires "return" of the juvenile "to the court for disposition" if the provider does not accept the juvenile into the program or the juvenile fails to satisfactorily complete the program.

As noted, in response to juvenile's motion to reconsider, the court opined that, absent a delinquency adjudication, there would be no basis for a disposition order and no obligation for juvenile to complete the BARJ program. On its face, this assessment is not inconsistent with § 5232(b)(7), which is one of several options available to the court for juveniles found to be delinquent. Section 5232(a) of Title 33, entitled, "Disposition order," provides that "[i]f a child is found to be a delinquent child, the court shall make such orders at disposition as may provide for" the child's supervision and rehabilitation, the community's protection, accountability to the victims and community, and the development of competencies enabling the child to become a responsible member of the community. Section 5232(b) sets forth various disposition options, including § 5232(b)(7), that will allow the court to carry out the purposes set forth in § 5232(a).

To be sure, the challenged reasoning in the family division's April 3 decision does not at first glance appear to be entirely consistent with the court's April 2 order, in which it acknowledged the expectation that if it were to grant the motion to dismiss without prejudice and conditioned upon juvenile's successful completion of BARJ, DCF would make a new pre-charge referral to the BARJ program that would require juvenile to admit the underlying act. The assumption in that statement was that, if juvenile failed to successfully complete the program, the State could refile the charge. We conclude, however, that any tension between this statement in the court's April 2 order and the court's reasoning in its April 3 decision denying juvenile's motion to reconsider does not warrant reversal of the court's decision. Although juvenile would certainly have the incentive to successfully complete the program under the scenario set forth in the court's April 2 order, the court's reasoning that, absent a delinquency adjudication—a necessary predicate for a disposition order—"there is nothing to obligate" juvenile to complete the program is accurate. Moreover, the challenged statement was not a primary basis for the court's decision to deny the motion to dismiss. Indeed, in its April 3 order, the court denied juvenile's motion to dismiss while acknowledging juvenile's commitment to complete the BARJ program even if it granted his motion to dismiss. The court

[*] The State argues that juvenile waived this argument by not citing the statute to the court in the delinquency proceedings. Because we conclude that juvenile's reliance on the statute is unavailing, we need not consider whether juvenile properly preserved this argument.

denied juvenile's motion to dismiss primarily based on its assessment of the factors set forth in Suave.

Next, juvenile argues that the family division abused its discretion by not giving sufficient weight to the potential negative consequence of him having to register as a sex offender in other states. According to juvenile, the court underestimated the possibility of him having to register as a sex offender and failed to appreciate that if he wound up having to do so, it would be directly at odds with the core purpose of juvenile proceedings. See 33 V.S.A. § 5102(a)(1) (providing that delinquency orders shall not be "deemed a conviction of a crime," "impose any civil disabilities sanctions ordinarily resulting from a conviction," or "operate to disqualify the child in any civil service application or appointment"); see also id. § 5101(a)(2) (stating that one purpose of juvenile proceedings is "to remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior" and to provide rehabilitation which protects the community, provides accountability, and enables juveniles to became responsible and productive members of the community).

We find no abuse of discretion. In its decision denying juvenile's motion to reconsider, the family division acknowledged that it had misread juvenile's chart regarding other states' laws on registering as a sex offender and that most states "may" require a juvenile to register. Nonetheless, the court concluded that whether juvenile would ultimately have to register as a sex offender in another state in the future remained speculative. This is an accurate assessment of the evidence presented at the delinquency proceedings. Juvenile's original motion to dismiss cited several examples of statutes in other states but acknowledged that additional research would be required to determine if registration would be necessary under the circumstances of this case. Juvenile was adjudicated a delinquent based on a misdemeanor offense, and it is not clear what states, if any, would require registration by a juvenile in this situation. Nor has juvenile made any attempt to demonstrate that he would be required to register in any particular state in which he had a particular interest. Although juvenile has shown that it is possible at some time in the future he might have to register as a sex offender in another state, none of his filings demonstrate that he will have to do so.

Juvenile further argues that the family division disregarded the unique circumstances of this case—the fact that his interests and those of the complainant and prosecution were closely aligned because the goals of the delinquency proceeding would be accomplished by his completion of the BARJ program prior to dismissal of the case. Juvenile argues that the prosecutor and DCF got everything they wanted—a referral to the BARJ program. He also argues that the court failed to consider his argument that he was essentially seeking a process akin to a deferred sentence in a criminal case, which any adult could be granted in similar circumstances. Finally, he argues that the court failed to consider a letter submitted by the therapist to whom juvenile was referred and who urged the court not to limit juvenile's considerable capacities to make positive societal contributions. We find these arguments unavailing. The court was plainly aware of the facts and arguments upon which juvenile relies, but it did not consider them to constitute extraordinary circumstances sufficient to warrant dismissal in the interests of justice. See State v. Cushing, 2015 VT 114, ¶ 12, 200 Vt. 646 ("The court does not have to mention every factor that was not critical to its decision." (quotation and alterations omitted)); State v. Prior, 174 Vt. 49, 52 (2002) (stating that trial court's decision not to base decision on one factor "does not indicate an abuse of discretion").

Finally, juvenile briefly argues that the court failed to consider his individual circumstances but instead focused on whether juvenile defendants, as a category, were entitled to relief. We find no merit to this argument. The court considered juvenile's individual

circumstances in the context of applying the Suave factors. The court's comments about juveniles in general—for example, that juvenile's arguments regarding negative collateral consequences would apply to many juveniles adjudicated delinquent for sex-related offenses—were in response to juvenile's arguments and aimed at explaining, in part, its determination that this case did not involve extraordinary circumstances warranting relief under Rule 48(b)(2).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice