

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	DIVISION ONE
)	
v.)	No. 67150-2-I
)	
R.E.S.,)	
D.O.B. 12/28/1991,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	FILED: September 10, 2012
_____)	

Dwyer, J. — In State v. Tucker, 171 Wn.2d 50, 246 P.3d 1275 (2011), our Supreme Court established that even in the absence of a motion by the State to revoke a deferred disposition for lack of compliance, no vacation of a juvenile's conviction is required simply because a juvenile court deferred disposition period has expired. This is such a case. R.E.S. was arrested on the day before his deferred disposition review hearing. Although no motion to revoke his deferred disposition for lack of compliance with the conditions of the deferral was filed, he is not entitled to have the juvenile court vacate his conviction and dismiss the case given that the court did not find, and could not have found, compliance with

the terms of the order of deferral. Accordingly, we affirm.

I

In August 2009, R.E.S. was charged in juvenile court with residential burglary, in violation of RCW 9A.52.025. On November 18, 2009, the juvenile court granted R.E.S. a deferred disposition, finding him guilty of residential burglary and continuing the disposition for eight months until July 18, 2010. The conditions of R.E.S.'s community supervision included an order not to have any "new probable cause referrals or criminal law offenses." The juvenile court set the review hearing for July 1, 2010, and extended juvenile court jurisdiction until November 18, 2010.

R.E.S. was arrested on June 30, 2010, the day before his scheduled review hearing in juvenile court. Having turned 18 the previous December, R.E.S. was thereafter charged as an adult with one count of attempted residential burglary, one count of possessing stolen property in the third degree, and eight counts of trafficking in stolen property in the first degree. These crimes occurred in June 2010, during the period of the deferred disposition on the juvenile charge.

On July 1, 2010, R.E.S. did not appear at the scheduled review hearing in juvenile court because he was in custody as the result of his arrest the day before.¹ Defense counsel agreed to the entry of an order continuing the review

¹ The record suggests that the court and the attorneys present knew of R.E.S.'s arrest and incarceration.

hearing until July 12, 2010.

At the hearing on July 12, 2010, R.E.S. was again absent. Those present were aware that R.E.S. was being held on a charge of attempted residential burglary. Nevertheless, the juvenile probation counselor (JPC) submitted a report in which he recommended that R.E.S.'s juvenile case be dismissed as a completed deferred disposition.² Defense counsel did not move to vacate the conviction at this hearing; instead, he agreed with the State's request to continue the deferred disposition.³ The juvenile court entered an order continuing the deferred disposition and R.E.S.'s supervision to October 25, 2010, and extending juvenile court jurisdiction to January 31, 2011, so that the juvenile court case would "track with [the] new charge."

R.E.S. remained in custody on the new charges and, as a result, did not appear at three rescheduled review hearings, held on October 11, November 4, and December 2, 2010.⁴ Despite the juvenile court's requests, he was not transported to these hearings. Because R.E.S. was not present, the juvenile court repeatedly continued the review hearing and extended the deferred disposition.

² The JPC's report is not in the record. Although R.E.S. asserts that the JPC's report was filed on July 1, 2010, the juvenile court stated that the JPC's report was filed in connection with the July 12, 2010 review hearing.

³ Defense counsel further stated that "it would be probably most prudent to track it with . . . the new charge and—just to have that resolved."

⁴ During this period of time, R.E.S. pleaded guilty to one count of attempted residential burglary, three counts of trafficking stolen property in the first degree, and one count of possessing stolen property in the third degree, and was sentenced to 16.5 months total confinement as to all counts. That judgment was recently affirmed by this court. State of Washington v. Ronnie Earl Seymour, No. 66959-1-I, 2012 WL 3000657, at *1 (Wn. App. July 23, 2012).

At the review hearing on November 4, 2010, for the first time, defense counsel requested that the juvenile court vacate R.E.S.'s conviction and dismiss the case. The juvenile court did not grant defense counsel's request and instead extended the deferred disposition and set the review hearing for a later date.⁵ At the review hearing on December 2, 2010, those present, including the juvenile court, knew that R.E.S. had pleaded guilty to the adult charges. Defense counsel again moved to dismiss, arguing that the JPC had recommended dismissal on July 1, 2010. The juvenile court requested that defense counsel file a written motion, and continued the hearing until December 20, 2010. R.E.S.'s counsel thereafter filed a motion to dismiss nunc pro tunc with a dismissal date "prior to November 12, 2010."

The juvenile court heard oral arguments on R.E.S.'s motion to dismiss nunc pro tunc on December 22, 2010.⁶ R.E.S. argued that his case should have been dismissed on July 1, 2010 because he had not received any notice that he violated the terms of his community supervision and neither the State nor the JPC had moved to revoke his deferred disposition. Although the State filed a motion to revoke R.E.S.'s deferred disposition on December 20, 2010, it subsequently withdrew the motion. Instead, the State contended that, at that time, the court lacked the authority to act on the deferred disposition at all,

⁵ Commissioner Garratt, who presided at the hearing, declined to dismiss the case, noting that "[o]ne of the basic premises of a deferred disposition is not committing any new offenses. . . . [It] would be against Juvenile Court policy and commonsense to dismiss a matter when there are serious felonies pending that were committed during the time of the deferral period."

⁶ On December 20, 2010, R.E.S. was transported and appeared at the hearing, which was continued until December 22, 2010.

because the deferred disposition period had expired.

On January 26, 2011, Judge Michael Trickey issued a written ruling, holding that the extensions of the deferred disposition were invalid because R.E.S. had not been present when they were ordered.⁷ The juvenile court noted that no request to dismiss or to revoke was made until after the deferred disposition period had expired. Accordingly, the juvenile court ruled that it no longer had jurisdiction and lacked the authority to revoke the deferred disposition or to vacate the adjudication of guilt. Thus, the juvenile court thereafter entered an “order of dismissal without vacating the adjudication.”⁸

R.E.S. appeals.

II

R.E.S. contends that, because no motion to revoke his deferred disposition was brought before the expiration of the deferred disposition period, the juvenile court abused its discretion by failing to vacate his conviction and dismiss the case with prejudice. However, because the juvenile court’s decision was consistent with both the relevant statute and our Supreme Court’s decision in Tucker, there was no error.

The Juvenile Justice Act of 1977, RCW 13.40, grants a juvenile court

⁷ See In re Pers. Restraint of Morris, 19 Wn. App. 613, 615, 576 P.2d 1333 (1978).

⁸ R.E.S. moved for reconsideration on March 1, 2011 following our Supreme Court’s decision in Tucker. 171 Wn.2d 50. The juvenile court granted the motion for reconsideration, and subsequently granted R.E.S.’s motion to vacate his conviction and dismiss the case, effective July 19, 2010, the date on which the deferred disposition was originally set to expire. The juvenile court explicitly based its new ruling on the holding in Tucker. On April 1, 2011, our Supreme Court corrected its opinion in Tucker upon denial of reconsideration, Tucker, 171 Wn.2d 50, prompting the State to move for reconsideration in the case at hand. Thereafter, the juvenile court granted the State’s motion and reinstated its order of dismissal without vacating the adjudication of guilt. It also denied R.E.S.’s supplemental motion for reconsideration.

discretion to determine both whether a juvenile has complied with the terms of a deferred disposition order and whether the juvenile should have a conviction vacated and the case dismissed. State v. J.A., 105 Wn. App. 879, 887, 20 P.3d 487 (2001). A trial court abuses its discretion where its decision is manifestly unreasonable or is based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court can also abuse its discretion by failing to exercise it. State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003) (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)); State v. Perdanq, 38 Wn. App. 141, 146, 684 P.2d 781 (1984).

The Juvenile Justice Act grants a juvenile court discretion to, under certain circumstances, defer disposition of a juvenile offender's conviction for up to one year while the juvenile is placed under community supervision. Former RCW 13.40.127 (2009). The juvenile court may impose conditions of supervision as it deems appropriate. Former RCW 13.40.127(5). "A juvenile's lack of compliance shall be determined by the judge upon written motion by the prosecutor or the juvenile's juvenile court community supervision counselor," and a finding of a failure to comply results in the court entering an order of disposition. Former RCW 13.40.127(7). On the other hand, the juvenile's convictions are to be vacated and the case dismissed upon the juvenile court's finding of full compliance at the end of the deferred disposition period. Former RCW 13.40.127(9). Specifically, "[a]t the conclusion of the period set forth in the order of deferral and upon a finding by the court of full compliance with

conditions of supervision and payment of full restitution, the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice." Former RCW 13.40.127(9).

R.E.S. asserts that a motion to dismiss the case was properly filed by his JPC on July 1, 2010 and the juvenile court erred by failing to rule on this motion. In Tucker, our Supreme Court contemplated whether a report filed by a community supervision officer qualified as a motion to revoke the juvenile offender's deferred disposition. 171 Wn.2d at 53. In that case, the court held that the officer's mere recommendation failed to satisfy CR 7(b) and was not a motion, because it did not seek current relief and did not state the basis for relief with particularity. 171 Wn.2d at 53. Here, the JPC's report is not in the record, and is therefore not reviewable according to the standards applied in Tucker. Furthermore, the record reflects that the juvenile court did not consider this report to be a motion. Rather, the court noted that "[n]o request to dismiss was made until November 4, 2010". Accordingly, there is no support in the record for R.E.S.'s contention that the JPC moved to vacate his conviction and to dismiss the case in July 2010.

As a result, the juvenile court's decision not to make a determination of R.E.S.'s compliance or rule on a motion to dismiss the case in July 2010 was reasonable because no one requested that it do so. To the contrary, R.E.S.'s counsel repeatedly requested continuances.⁹

⁹ Although R.E.S. was absent from the review hearings, he was represented by counsel, who opted *not* to move to dismiss. Instead, R.E.S.'s counsel moved to continue the hearings and extend the deferred disposition during hearings held on July 12, 2010 and October 11, 2010.

Moreover, the juvenile court was under no statutory obligation to find full compliance and vacate R.E.S.'s convictions simply because no motion to revoke had been filed. The statute granting the juvenile court discretion to vacate a juvenile offender's conviction *mandates* that the court do so *only* "upon a finding by the court of full compliance." Former RCW 13.40.127(9). Here, no such finding was made by the juvenile court.

Indeed, our Supreme Court's decision in Tucker demonstrates that the juvenile court is *not required* to make a finding of full compliance at the conclusion of a deferred disposition, despite the State's failure to timely move to revoke the deferred disposition. In Tucker, the juvenile court had continued the matter past the two-year time frame during which Tucker could complete her deferred disposition. 171 Wn.2d at 52. The State did not file a motion to revoke Tucker's deferred disposition before it terminated, and therefore the juvenile court lost jurisdiction to adjudicate her compliance once the deferred disposition period ended. Tucker, 171 Wn.2d at 53. Thus, the Supreme Court reversed the Court of Appeals and vacated the juvenile court's untimely order revoking the deferred disposition. Tucker, 171 Wn.2d at 54. It did not, however, remand the case to the juvenile court to vacate Tucker's convictions. Tucker, 171 Wn.2d at 54. Instead, where no motion to revoke was timely filed and no finding of full compliance was made, the deferred disposition simply expired, with the court

Defense counsel's actions were apparently designed to avoid the juvenile court's issuance of an arrest warrant and to delay resolution in the hope that the adult charges would be favorably resolved. As noted by the juvenile court, this decision "was a legitimate trial/litigation strategy and not ineffective assistance of counsel since all parties were waiting to see what happened with the adult prosecution for Attempted Residential Burglary."

neither entering a disposition nor vacating the conviction and dismissing the case. Tucker, 171 Wn.2d at 54.

The procedural history in R.E.S.'s case mirrors that in Tucker. In both cases, review hearings were continued past the end of the deferred disposition because the parties were uncertain as to the status of the juvenile's compliance with the terms of the deferred disposition. Here, as in Tucker, no motion to revoke or to dismiss was filed and no finding of full compliance was made before the juvenile court's jurisdiction expired. Thus, in applying the principle in Tucker to the instant case, the juvenile court did not abuse its discretion by concluding that, although it had lost jurisdiction, R.E.S. was not entitled to have his conviction vacated on the basis that no motion to revoke had been filed. While R.E.S. insists that the juvenile court abused its discretion by failing to exercise it, the juvenile court *did* exercise its discretion by choosing not to, sua sponte, find full compliance and vacate R.E.S.'s conviction.¹ Doing so was clearly reasonable under our Supreme Court's ruling in Tucker.¹¹

R.E.S. nonetheless contends that the facts in this case can be distinguished from those in Tucker because, here, the loss of jurisdiction was caused by the jail's failure to transport him to the scheduled hearings rather than

¹ Cf. Smith, 118 Wn. App. at 293-94 (holding that trial court's decision not to grant Drug Offender Sentencing Alternative sentence constituted an exercise of discretion).

¹¹ Furthermore, the judge retains full discretion "in determining what constitutes compliance with a deferred disposition order" in the context of both former RCW 13.40.127(7) and former RCW 13.40.127(9). J.A., 105 Wn. App. at 881. Where the legislature has granted the juvenile court discretion to determine compliance, it could not have also intended that the juvenile court be deprived of its discretion to determine whether to vacate the conviction of a juvenile offender who was arrested, charged, and later convicted of committing crimes during his deferred disposition period, solely because the State failed to file a motion to revoke.

by his deliberate choice to continue the hearings. These failures, he avers, resulted in the delays that eventually caused the juvenile court to lose jurisdiction, thus depriving him of the opportunity to have his conviction vacated at a review hearing held in July, before the end of his deferred disposition.¹²

However, R.E.S. suffered no prejudice as a result of his absence because, even if he had been transported to the July 1 review hearing, the juvenile court could not have found that he had fully complied with the terms of his deferred disposition.¹³ Although a juvenile court has discretion to find full compliance despite de minimis or technical failures to comply, J.A., 105 Wn. App. at 881, in this case, such a finding would likely have constituted an abuse of discretion. R.E.S. had committed crimes. See State of Washington v. Ronnie Earl Seymour, No. 66959-1-I, 2012 WL 3000657, at *1 (Wn. App. July 23, 2012) (affirming superior court's judgment of guilty on charges arising from June 2010 criminal behavior). Given that, even before his convictions, probable cause findings were entered by the superior court, the juvenile court could not reasonably have found that R.E.S. had complied with the terms of his deferred disposition, had an evidentiary hearing been held. Accordingly, we reject

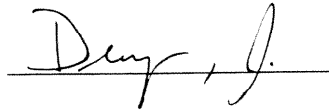
¹² R.E.S. also argues that, unlike the respondent in Tucker, he "was directly prejudiced" by the juvenile court's decision, because his juvenile conviction contributed to his offender score in the adult superior court matter.

¹³ Contrary to R.E.S.'s insistence that his compliance was "undisputed," Judge Trickey stated in his order of dismissal that, "[s]ince all parties knew of a pending adult criminal matter since at least July 12, 2010, the court was not then and is not now required to make any findings of substantial compliance, regardless of any motion to revoke the deferred disposition." His conclusion is consonant with Commissioner Garratt's statements at the November 4 review hearing, in which she noted that it would be "against Juvenile Court policy and commonsense to dismiss a matter when there are serious felonies pending that were committed during the time of the deferral period." Even defense counsel acknowledged that R.E.S. had "completed everything that he was supposed to do on the deferred *but for the pending charges*." (Emphasis added.)

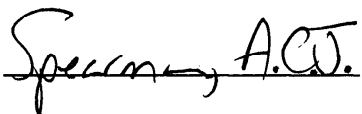
R.E.S.'s contention that the juvenile court would have been required to vacate his conviction if not for the jail's failure to transport him to scheduled juvenile court hearings.

Because the juvenile court did not err by declining to find that R.E.S. had fully complied with the terms of his deferred disposition, no further action by the juvenile court was required in July 2010. Given that the juvenile court no longer had jurisdiction over the matter when R.E.S. moved to vacate and to dismiss in November 2010 and December 2010, the juvenile court did not err by dismissing the case without vacating the adjudication.

Affirmed.

A handwritten signature in cursive script, appearing to read "Dery, J.", written over a horizontal line.

We concur:

A handwritten signature in cursive script, appearing to read "Sperry, A.W.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Schweiler, J.", written over a horizontal line.