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**JURISDICTION** : CHILDREN'S COURT OF WESTERN AUSTRALIA  
IN CRIMINAL

**CITATION** : DLD -v- THE STATE OF WESTERN AUSTRALIA  
[2018] WACC 4

**CORAM** : WAGER DCJ

**HEARD** : 29 JUNE 2018

**DELIVERED** : 27 JULY 2018

**PUBLISHED** : 27 JULY 2018

**FILE NO/S** : CCBU 569 of 2017  
CCBU 887 of 2017  
CCBU 571 of 2017  
CCBU 1151 of 2017  
CCBU 1152 of 2017

**BETWEEN** : DLD  
Applicant

AND

THE STATE OF WESTERN AUSTRALIA  
Respondent

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*Catchwords:*

Section 40 review - Distinction between application to relieve young person of prior conviction and the making of an order in consequence of a finding on a subsequent conviction

*Legislation:*

*Children's Court of Western Australia Act 1988*

*Criminal Code*

*Criminal Law Amendment (Home Burglary and other Offences) Act 2015*

*Young Offenders Act 1994*

*Result:*

Application dismissed

**Representation:**

*Counsel:*

Applicant : Ms M A Huber

Respondent : Mr S M Stocks

*Solicitors:*

Applicant : Aboriginal Legal Service of Western Australia (Inc.)

Respondent : Office of the Director of Public Prosecutions

**Case(s) referred to in decision(s):**

Harris v the State of Western Australia [2005] WASCA 147

R v P (A Child)(1997) 94 A Crim R 593

State of Western Australia v AZG [2010] WACC 12

**WAGER DCJ:**

1           This is an application brought on behalf of DLD pursuant to s40 of the *Children's Court of Western Australia Act 1988* (CCA) for a review of a 12 month Intensive Youth Supervision Order with Detention known as a Juvenile Conditional Release Order (JCRO) imposed on DLD by Her Honour Magistrate Coleman on 13 April 2018.

2           Section 40 of the CCA relevantly states:

**40. Review by President of certain sentences**

(1) Subject to this Act, where the Court, when constituted so as not to consist of or include a judge, makes a finding that a charge against a child is proved and makes an order against or in relation to the child in consequence of that finding, the Court when constituted by the President may, of its own motion or upon an application made under subsection (2), reconsider the order and —

(a) confirm the order; or

(b) discharge the order and substitute any other order that the Court, if it had been constituted by the President, could have made in relation to the offence.

3           DLD had entered a plea of guilty to prosecution notices BU 569, 571, 887 and 1151 to 1152 of 2017. A Youth Justice report and related reports were requested. I am satisfied that the offences to which pleas of guilty were entered were proven and DLD came to be dealt with in consequence of the finding of guilt when he was sentenced by Her Honour.

4           Her Honour ultimately dealt with the offences by dismissing charges of stealing related to the aggravated burglary offences pursuant to s66 of the *Young Offenders Act 1994* (YOA). Her Honour cancelled a JCRO in respect of prosecution notice 569 and 571. Her Honour imposed a 12 month JCRO in respect of all remaining charges to run concurrently with each other. Apart from an assault public officer offence DLD received the 12 month JCRO for aggravated home burglary offences committed contrary to s401(2)(a) of the Criminal Code. 869 of 2017 for which a JCRO was cancelled was for an aggravated home burglary that occurred on 11 and 12 May 2017. 1151 and 1152 of 2017 occurred on

26 December 2017 and were aggravated home burglaries on the same home on the same date.

5 DLD was aged 11 years and 11 months when he committed 869 of 2017 and was aged 12 years and 5 months when he committed 1151 and 1152 of 2017. The offences were committed with older co offenders and were at the lower end of the scale for aggravated home burglary offences.

6 Even after a charge against a child is proven a conviction does not inevitably result. Section 55 of the YOA sets out when a conviction is to be recorded. Relevantly, s55 states:

**55. Conviction, when to be recorded**

(1) If the court —

- (a) finds a young person guilty of a Schedule 1 offence or a Schedule 2 offence; or
- (b) finds a young person guilty of any offence and imposes a custodial sentence,

the court is required to record a conviction unless it is prevented from doing so by subsection (5) or it is satisfied that there are exceptional reasons for not doing so.

7 Although an offence contrary to s401(2)(a) of the Criminal Code is not a schedule 1 offence or a schedule 2 offence, DLD had, as a result of earlier breaches, had a JCRO imposed and breached. A JCRO is an Intensive Youth Supervision Order with Detention and accordingly a custodial sentence because it is a sentence with a detention component: *R v P (A Child)*(1997) 94 A Crim R 593.

8 For this reason convictions for s401(2)(a) offences had been recorded against DLD.

9 The fact that DLD had three convictions for offences contrary to s401(2)(a) meant that he was a young person who was considered a third strike offender because he was a repeat offender. Section 401B of the Criminal Code sets out how prior convictions for s401(2)(a) are to be considered:

401B. Term used: repeat offender

- (1) For the purposes of this Chapter, a person who is being sentenced for a home burglary (the *current offence*) is a *repeat offender* if the person has at least 3 relevant convictions.
- (2) For the purposes of subsection (1) —
  - (a) the person’s conviction for the current offence, if it is a relevant conviction, is to be counted; and
  - (b) each of the person’s relevant convictions is to be counted, regardless of whether the home burglary to which it relates was committed before or after the date of any previous relevant conviction; and
  - (c) each of the person’s relevant convictions is to be counted, regardless of whether it has been counted on the occasion of sentencing for a previous home burglary to determine whether the person was, on that occasion, a repeat offender.

10 Section 401A defines relevant conviction:

**401A. Term used: relevant conviction**

- (1) For the purposes of this Chapter, subject to subsections (2), (3) and (4), a person’s conviction for a home burglary is a *relevant conviction* for that person if —
  - ....
  - (b) the home burglary was committed on or after the commencement day and —
  - (iii) at the time of the home burglary the person had not reached 16 years of age, and either —
    - (I) it is the person’s first conviction for a home burglary (the person’s first relevant conviction); or
    - (II) it is the person’s first conviction for a home burglary committed after the date on which the person’s first relevant conviction was recorded (the

person's second relevant conviction);  
or

(III) it is a conviction for a home burglary committed after the date on which the person's second relevant conviction was recorded....

(3) For the purposes of this section, convictions for 2 or more home burglaries committed on the same day on or after the commencement day are to be treated as a single conviction.

11 Section 401(4)(b)(ii) confirms that if the sentence is being imposed after the proclamation of the *Criminal Law Amendment (Home Burglary and other Offences) Act 2015* then:

(i) if the person had not reached 18 years when the current offence is committed notwithstanding the YOA section 46(5a) the court must impose either -

(i) a term of imprisonment of at least 12 months; or (II) a term of detention under the Young Offenders Act 1994 of at least 12 months; or

(II) a term of detention under the *Young Offenders Act 1994* of at least 12 months,

as the court thinks fit.

12 Accordingly given that Her Honour had convicted DLD of a third subsequent offence and that the prior strike appeared as a conviction on his record Her Honour had no option but to impose a term of detention of at least 12 months.

13 However, counsel representing DLD at the sentencing hearing before Her Honour had made an application before proceeding to address the court in mitigation of sentence to have the prior conviction recorded against DLD in respect of a s401(2)(a) offence to not be regarded as a conviction for any purpose.

14 The application was made pursuant to s189(3) of the YOA. Section 189 relevantly states:

**189. Certain offenders to be regarded as not convicted**

(1) This section does not apply to, or in relation to, a person convicted of murder, attempt to murder or manslaughter.

- (2) If a young person is convicted of an offence and a period of 2 years has expired since —
- (a) the discharge of any sentence imposed as a result of the conviction, or every sentence if more than one sentence was imposed; or
  - (b) the date of conviction, if no sentence that required to be discharged was imposed as a result of the conviction,

the conviction is not to be regarded as a conviction for any purpose, except as provided in this section.

- (3) On the application of the person concerned the court, if it thinks that special circumstances exist, may declare that subsection (2) applies in relation to a conviction of a young person even though the period of 2 years mentioned in that subsection has not expired.

15 Section 189 of the YOA was not amended as part of the suite of amendments relevant to the *Criminal Law Amendment (Home Burglary and other Offences) Act 2015*.

16 There is no reason why a magistrate could not exercise their discretion to make an order pursuant to s189(3) of the YOA in respect of a prior recorded conviction. In *Harris v the State of Western Australia* [2005] WASCA 147 the Court of Appeal (WA) in the judgement of the Court considered whether a judge sitting in the District Court could exercise her discretion in respect of s189(3) in relation to an earlier conviction for a s401(2)(a) offence recorded in the Children's Court. In that case the court was of the opinion that the District Court had the necessary jurisdiction. The sentencing judge had erred in concluding that she could not make a declaration in respect of the prior conviction.

17 A magistrate presiding in the Children's Court could exercise her discretion and make a declaration pursuant to s189(3) if she considered such an order to be appropriate thereby reducing the number of strikes to be considered at sentencing to two.

18 There is no definition of the term "special circumstances" required before such a declaration could be made: *Harris v SOWA* at [4].

19 In dealing with DLD Her Honour heard from counsel on 29 March 2018 and 13 April 2018. Her Honour had the Youth Justice Services Breach by Reoffending report dated 12 January 2018, the Court Update report dated 29 March 2018, the FASD C.A.R.E report of Clinical

Associate Professor Dr Mutch dated 26 March 2018 (comprising 39 pages) and DLD's court sentencing record. I have considered all of the material and I accept the following.

- 20 DLD was 12 years old at the time of sentencing. His offending occurred when he was aged 11 and 12. He had spent 93 days in custody at Banksia Hill Detention Centre (BHDC) prior to sentence. DLD had suffered significant medical issues and endured difficulties at BHDC that included developing a fungal infection in a wound, contracting scabies and head lice and receiving a burn injury to his foot that was not treated properly and consequently led to pain and suffering.
- 21 DLD's background has been an extremely impoverished one. He witnessed high levels of domestic violence during his formative years. Consistent with the FASD report exposure to violence has severely affected DLD. DLD's contact with his mother has been sporadic. She has significant substance abuse issues that have become more serious in recent times and she has been absent. DLD's father is serving a term of imprisonment for serious violence related offences.
- 22 The multidisciplinary assessment completed by FASD C.A.R.E Clinical Services reveals that DLD has proven significant impairments in academic achievements. His extremely low performance on reading and numeracy tasks and his history of educational issues warranted a provisional diagnosis of "specific learning disorder (in reading)". A full diagnosis could not be given until DLD has received a minimum 6 months one on one targeted intensive intervention.
- 23 DLD's difficulties in areas of verbal reasoning, memory retrieval, behaviour regulation and language disorder will present as vulnerabilities for the rest of his life. Further testing or investigation may reveal further diagnoses. He requires an individualised education plan, education support and teaching assistance and a speech pathologist working in collaboration with school educators. Educational psychologists and mentors were recommended as being interventions provided as soon as possible.
- 24 DLD has substance use issues that need to be addressed during specialised one on one counselling.
- 25 DLD had abnormal vision and a history of a penetrating eye injury that requires review. He appears to suffer from hearing impairment and needs to have his hearing abilities tested by an audiologist. DLD is uncoordinated in his upper and lower limbs on the left side.

26 DLD relies on the care of his grandparents. His grandfather is currently in receipt of a disability pension. His grandparents have a number of other children residing with them due to the inability of the childrens' parents to care for them. DLD has struggled to attend school in the past and still struggles to do so, however his grandfather is being encouraged to apply for appropriate funding for DLD and has undertaken to attempt to have DLD receive the testing and supports he requires. There is a greater chance of DLD being able to attend school and have his special needs met following the preparation of the current reports given the undertakings made by DLD's grandfather.

27 Given DLD's level of impairment it is relevant that he has always offended with older co-offenders. Although he has been the subject of previous court orders the limited supports in his life have meant that he has not been able to complete the orders successfully. It is noted that the record of criminal convictions relevant to DLD commenced with a Juvenile Justice Team referral on 2 September 2016 however due to non-compliance and re-offending DLD was sentenced to the current 12 month JCRO within 18 months of the noted JJT diversion.

28 DLD's time in BHDC, his personal antecedence, his very young age and prospects of rehabilitation are matters that, consistent with the general principles of juvenile justice that are identified in s7 of the YOA, could have been taken into account when considering whether special circumstances existed in DLD's case in relation to the s189(3) YOA application.

**Can this matter be dealt with by s40 CCA review?**

29 Counsel for the defence properly concedes that DLD cannot properly be relieved of the impact of conviction in relation to the three aggravated home burglary matters dealt with by the Magistrate on 13 April 2018. The s189(3) YOA application was not a part of the sentencing process. The application was made in respect of matters that were not before Her Honour. They were not offences that had been proven and for which Her Honour made an order in consequence of that finding.

30 In *the State of Western Australia v AZG* [2010] WACC 12 His Honour Judge Reynolds (as he then was) said in respect of the application of s40 CCA at [12]:

Section 40(1) contains two preliminary requirements, both of which need to be satisfied before there can be a review of an order. They are (1), a

finding that a charge against a child is proved, and (2), the making of an order against or in relation to the child in consequence of that finding

31 His Honour said at [22]:

I think that Parliament intended the power of the President to review orders by magistrates and JPs to be wide ranging.

32 In that case His Honour was considering whether s40(1) of the CCA empowered the President to conduct a review of the Magistrate's decision to refer a matter to the Juvenile Justice Team. His Honour was of the view that the two requirements of s40(1) had not been satisfied. Given the limitations of s40 the decision to refer the matter could not be reviewed.

33 In this case the s189(3) YOA application was made prior to sentencing submissions in respect of the charges upon which a finding against DLD had been proven. The application was not in consequence of the finding of guilt relevant to the sentencing hearing. The two requirements in s40(1) empowering the President to conduct a review of the Magistrate's decision have not been met.

34 Accordingly the application to review the sentence imposed brought on DLD's behalf is dismissed.

35 I note that in the case of *the State of Western Australia v AZG* His Honour Judge Reynolds said in relation to the limitations on s40 review matters at [47]:

Can I also add in conclusion that I think that this situation is not desirable and that there should be legislative amendment to correct it.

36 Eight years on I agree with His Honour's observation. It would be desirable for the President to have wider powers of review. I do not however presently have the power to review the decision of Her Honour in respect of s189(3) of the YOA.

WAGER DCJ

I certify that the preceding paragraph(s) comprise the reasons for decision of the Children's Court of Western Australia.

RS  
COURT OFFICER

9 NOVEMBER 2018