SUPREME COURT NO. 98815-3
COA NO. 52330-2-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY T. CLARK,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth Martin, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Anthony Clark asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Clark requests review of the decision in State v. Anthony Tyrone Clark, Court of Appeals No. 52330-2-II (slip op. filed March 17, 2020, order on reconsideration entered June 23, 2020), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether a standard range sentence may be appealed where the sentencing court fails to recognize its authority or fails to follow requisite procedure and, if so, whether resentencing is appropriate because the court had discretion to impose an exceptional sentence downward based on youth but did not recognize and exercise its discretion, or did not consider the requisite factors related to youth as a mitigating circumstance?

2. Whether petitioner was deprived of his right to effective assistance of counsel where youth constituted a basis on which to impose an exceptional sentence downward but defense counsel failed to inform the court of its authority to impose such a sentence on this basis?

3. Whether courts have discretion to run firearm enhancements concurrently under the exceptional sentence provision of the Sentencing Reform Act based on the mitigating factor of youth and, if so, whether

resentencing is appropriate because the court failed to recognize its discretion to do so?

D. STATEMENT OF THE CASE

1. First trial and appeal

Clark was 20 years old in 2011, when the offenses at issue occurred. CP 95. Testimony and psychiatric reports admitted at a pre-trial hearing showed Clark is mildly mentally retarded. Ex. 25 at 9;[1] RP[2] (9/27/12) 24, 28; RP (10/4/12) 314. Records showed an extremely premature birth weight resulting in major developmental delays. Ex. 25 at 3; RP (10/4/12) 287. Intelligence quotient (IQ) testing placed Clark in the first percentile, meaning 99 percent of individuals his age scored higher than he did. CP 45; RP (10/4/12) 268, 271-72.

His general cognitive ability was within the extremely low range of intellectual functioning. Ex. 25 at 5. His overall thinking and reasoning abilities are below approximately 99 percent of people his age. Ex. 25 at 5. Testing showed Clark had limited attention, concentration and short-term memory. Ex. 25 at 6-7; RP (10/4/12) 280-81. He had the communication and language skills of an eight- or nine-year-old child. Ex. 25 at 12; RP (10/4/12) 292-94. He was in an Individualized Education Program, a

[1] Reports were admitted as exhibits at the CrR 3.5 hearing. CP 150-51.
[2] The verbatim report of proceedings in the prior appeal under 45103-4-II is cited using this format: RP - (date) - page number.

specialized school plan for children with disabilities. RP (10/4/12) 264. At the age of 17, his academic skills ranged from 2.6 to 4.6 grade equivalencies. Ex. 25 at 4. Clark resided with his parents. Ex. 25 at 3.

Following a jury trial, Clark was convicted of premeditated first degree murder, first degree felony murder, first degree robbery, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful possession of a firearm. State v. Clark, 188 Wn. App. 1028, 2015 WL 3883513 at *1-2 (2015), aff'd, 187 Wn.2d 641, 389 P.3d 462 (2017). The trial court imposed the minimum standard range sentence on Clark — 447 months in prison. CP 12-13. Three firearm enhancements were run consecutively. Id.

Clark raised various arguments on appeal, including that the trial court improperly excluded expert testimony regarding Clark's intellectual deficits and the jury was improperly instructed on an uncharged alternative means for the robbery count. Clark, 2015 WL 3883513 at *1. The Court of Appeals reversed the robbery conviction due to the instructional error but otherwise affirmed. Id. The Supreme Court affirmed, holding the expert testimony was properly excluded because Clark's counsel did not assert a diminished capacity defense and it was not relevant to any other purpose. State v. Clark, 187 Wn.2d 641, 645, 389 P.3d 462 (2017).

2. Second trial on remand

The robbery charge was retried on remand before a different judge. The evidence presented at the second trial was consistent with the evidence produced at the first trial. See Clark, 188 Wn. App. 1028, 2015 WL 3883513 at *1-2 (summarizing facts from first trial). 16-year-old D.D. brought crack cocaine into Clark's residence on September 7, 2011. CP 88. Clark shot D.D. in the head and asked neighbors for help in selling the cocaine. CP 89. He put D.D.'s body in a garbage can. Id. He wanted to get the body out of the residence before his mother, with whom he lived, came home. 1RP[3] 57, 77. The gun and cocaine were later recovered by police from a toilet tank in the home. CP 89. The trial court, sitting as trier of fact, found Clark guilty of first degree robbery. CP 91.

3. Resentencing

Clark was resentenced on all counts. 2RP 5-6. The State recommended the same sentence that was originally imposed — the minimum term on all counts. 2RP 6-10. The State told the court: "The defendant is only 20, but he wasn't a juvenile at the time of this offense, so

[3] The verbatim report of proceedings filed in the current appeal under 52330-2-II is referenced as follows: 1RP - seven consecutively paginated volumes consisting of 7/19/18, 7/23/18, 7/24/18, 7/25/18, 7/26/18, 7/30/18, 8/1/18; 2RP - 8/24/18.

the Court doesn't have to consider the juvenile factors that would weigh into his sentence in this matter." 2RP 9.

Defense counsel opened his sentencing presentation by saying "I did do some research in the mitigating factors, Your Honor. Did not find anything that was even remotely applicable here, mainly because my client was, at the time, 20 years old. As the prosecutor has said, the juvenile factors do not come into play." 2RP 11. Counsel concurred with the prosecutor's recommendation that the low end of the standard range sentence be imposed. 2RP 13.

The court addressed the sentence previously imposed by Judge Nelson, saying "there were a lot of factors that went into that including the relative youth of Mr. Clark which is also balanced against the extreme youth of the victim. We also have factors including his cognitive abilities and some of those issues that were before the Court and that Judge Nelson would have been particularly familiar with." 2RP 14. "I believe that this is an appropriate sentence as recommended and as previously imposed by Judge Nelson which is essentially the low end on all charges plus the mandatory firearm enhancements." 2RP 15. The court thus sentenced Clark to the low end of the standard range on all counts to run concurrently, along with the firearm enhancements, which it ran

consecutively to the longest base sentence and consecutive to one another. CP 99. The total sentence is 447 months, i.e., 37.25 years. CP 99-100.

On appeal from resentencing, Clark argued the trial court abused its discretion in failing to meaningfully consider an exceptional sentence downward based on youth as a mitigating factor and Clark's counsel was ineffective in failing to inform the court of its authority to impose an exceptional sentence downward on this basis. Clark also contended the trial court erred in failing to recognize it had authority to impose an exceptional sentence by running the firearm enhancements concurrently. The Court of Appeals held Clark could not appeal his standard range sentence, there was no ineffective assistance, and the trial court lacked discretion to impose an exceptional mitigated sentence on the firearm enhancements. Slip op. at 2, 8-9.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE COURT DID NOT RECOGNIZE ITS DISCRETIONARY AUTHORITY TO CONSIDER AN EXCEPTIONAL SENTENCE DOWNWARD.

Clark was 20 years old at the time of offense. Although an adult by chronological age, he still possessed the hallmark features of youth. Contrary to the assertions of the prosecutor and defense counsel, the court had authority to impose an exceptional sentence downward based on youth.

The court's failure to exercise its discretion or meaningfully consider youth as a mitigator requires resentencing. Alternatively, Clark's attorney provided ineffective assistance of counsel in failing to inform the court that Clark's youth was a ground for an exceptional sentence. Clark seeks review under RAP 13.4(b)(3) and (b)(4).

a. The court committed reversible error in not meaningfully exercising its discretion to consider imposition of an exceptional sentence downward based on youth.

In O'Dell, this Court held "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." State v. O'Dell, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015). Because young adults and juveniles possess the same hallmark qualities of youth, "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." O'Dell, 183 Wn.2d at 693. There is a "clear connection between youth and decreased moral culpability for criminal conduct" and "this connection may persist well past an individual's 18th birthday." Id. at 695. "Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned

decisions than they will when they enter their late twenties and beyond." Id. at 693 (quoting amicus with approval).

The Court of Appeals held Clark could not appeal his sentence because the trial court recognized its discretion to impose an exceptional sentence but decided to impose a standard range sentence. Slip op. at 6. The record does not bear this out. No one requested an exceptional sentence downward and the court did not sua sponte consider one.

The prosecutor dismissed the notion that Clark's youth should be considered a mitigating circumstance. 2RP 9. Defense counsel flat out told the court that no mitigating factor even "remotely" applied. 2RP 11. Defense counsel was wrong as a matter of law and the attorneys on both sides misled the court about its sentencing discretion. Based on this erroneous guidance, the trial court was not informed it had discretion to impose an exceptional sentence downward based on youth.

The trial court made a passing reference to Clark's "relative youth" having been considered at the original sentencing, without specifying how this was so. 2RP 14. In fact, the court at the first sentencing did not consider Clark's youth at all in handing down the sentence. RP (6/14/13) 22. Defense counsel at the first sentencing only argued for an exceptional down based on RCW 9.94A.535(1)(e) — "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her

conduct to the requirements of the law, was significantly impaired." CP 152-57; RP (6/14/13) 17-19. The State opposed the defense request on this basis. CP 158-67; RP (6/14/13) 6-9. Defense counsel's failure to request an exceptional sentence downward based on youth at the first sentencing is unsurprising because O'Dell had not yet been decided. The court's lack of consideration for Clark's youth in imposing the original sentence is unsurprising for the same reason. O'Dell was not there to provide guidance. Clark was 20 years old at the time of offense. O'Dell establishes that the mitigating qualities of youth persist into one's 20s. The trial court at resentencing did not consider imposition of an exceptional sentence because no party provided legal authority as a basis for it do so.

After being told there was no basis for an exceptional sentence, the court did not exercise its discretion to consider youth as the basis for an exceptional sentence. This sentencing error is subject to appellate review. "The failure to consider an exceptional sentence is reversible error." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). "A trial court errs when it operates under the 'mistaken belief that it did not

have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" Id. (quoting State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998)). A court thus abuses its discretion when it fails to meaningfully consider a mitigating circumstance based on youth. O'Dell, 183 Wn.2d at 696-97.

b. The court failed to address the factors that must be considered in sentencing youthful defendants.

Even if it can be said that the court recognized it had discretion to impose an exceptional sentence downward based on youth, the court still erred in failing to make a meaningful inquiry into whether Clark's youth justified an exceptional sentence downward.

"[C]hildren are different." State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting Miller v. Alabama, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). "That difference has constitutional ramifications: 'An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" Id. at 8 (quoting Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), citing U.S. Const. amend. VIII).

In State v. Bassett, 192 Wn.2d 67, 81, 428 P.3d 343 (2018), the Supreme Court again embraced the proposition that "children are different" and cited O'Dell, which held "age may well mitigate a defendant's culpability, even if the defendant is slightly older than 18." Id.

In Houston-Sconiers, the Court emphasized that the sentencing court must consider certain factors. Houston-Sconiers, 188 Wn.2d at 23. "[I]n exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its 'hallmark features,' such as the juvenile's 'immaturity, impetuosity, and failure to appreciate risks and consequences.'" Id. (quoting Miller, 567 U.S. at 477). "It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and 'the way familial and peer pressures may have affected him [or her].'" Id. (quoting Miller, 567 U.S. at 477). "And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated." Id.

Because the mitigating qualities of youth apply to young adults under O'Dell, it follows that sentencing court must consider the requisite factors informing sentencing decisions involving not only juveniles but

young adults like Clark. The trial court here did not consider any of the requisite factors of youth in sentencing Clark.

Again, the Court of Appeals held Clark could not appeal his standard range sentence. Slip op. at 6. But a defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). Further, a party may challenge the "determinations by which a court comes to apply a particular sentencing provision." State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (2017) (quoting State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)). The trial court's failure to follow the required procedure in sentencing a youthful defendant makes the sentence challengeable on appeal.

c. Defense counsel was ineffective in failing to inform the court of its authority to impose an exceptional sentence downward based on youth.

Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. This right holds at the sentencing stage. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

The performance of Clark's attorney was deficient because he failed to properly advise the court of its sentencing authority. Deficient performance is that which falls below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Competent counsel would know the trial court had authority to order an exceptional sentence downward based on youth. Counsel has a duty to know the relevant law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The relevant law is O'Dell.

Defense counsel outright told the court that no mitigating factor even remotely applied to the case. 2RP 11. Counsel's failure to find and apply legal authority relevant to a client's defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015). Competent counsel would have researched the law and cited O'Dell as a basis to impose an exceptional downward sentence based on youth. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." State v. McGill, 112 Wn. App. 95, 102, 47 P.3d 173 (2002).

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The Court of Appeals assumed deficiency but held Clark cannot establish prejudice because the trial court understood it had discretion to impose an exceptional sentence downward and acknowledged Clark's youth. Slip op. at 7-8. On the contrary, the record does not show the court understood it had discretion to impose an exceptional sentence downward based on youth because both attorneys erroneously told the court such a sentence was unavailable because the mitigator did not apply. 2RP 9, 11. The court made a fleeting reference to "youth" but only in relation to the standard range sentence it was being asked to impose. 2RP 14-15.

In McGill, defense counsel was ineffective in failing to cite authority showing the court had discretion to impose an exceptional sentence downward and in failing to request the court to exercise its discretion based on that authority. McGill, 112 Wn. App. at 101-02. Remand for the trial court to exercise its principled discretion was appropriate where the court's comments indicated it would have considered an exceptional sentence had it known it could. Id. at 100-01.

The same holds true here. As in McGill, defense counsel failed to cite to the relevant authority and thereby inform the court of its decision-making authority. As a result, the court was unaware of its discretion to impose an exceptional sentence based on O'Dell. As in McGill, it is possible the trial court would have imposed a different sentence had it known an exceptional sentence on this basis was an option. Because Clark was prejudiced by his attorney's failure to advise the court of its discretion, remand for resentencing is required.

2. WHETHER FIREARM ENHANCEMENTS ARE SUBJECT TO A MITIGATED EXCEPTIONAL SENTENCE IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST WARRANTING REVIEW.

This Court recently held enhancement statutes do not bar sentencing courts from considering the mitigating qualities of juveniles at sentencing, even in adult court. Houston-Sconiers, 188 Wn.2d at 21 n.5, 24-26. It is time for this Court to address the related question of whether courts have discretion to consider the mitigating qualities of youth in imposing firearm enhancements on young adults that retain the same qualities of youth. Clark seeks review under RAP 13.4(b)(3) and (b)(4).

a. To comply with constitutional demands, the enhancement statute must be construed to permit an exceptional mitigated sentence based on youth.

The Sentencing Reform Act (SRA) seeks to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history" and "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(1), (3). The SRA "structures, but does not eliminate, discretionary decisions affecting sentences." RCW 9.94A.010.

Consistent with the overarching principle of structured discretion, a court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. The exceptional sentence statute, RCW 9.94A.535, does not categorically prohibit any type of sentence from eligibility for a mitigated term.

However, in State v. Brown, 139 Wn.2d 20, 27-28, 983 P.2d 608 (1999) the Supreme Court held by a 5-4 vote that the statute on deadly weapon enhancements bars an exceptional sentence below the standard range for that enhancement.

Subsequent decisions addressing youth as a mitigating circumstance have eroded Brown. In Houston-Sconiers, the Supreme Court held "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile

defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not." Houston-Sconiers, 188 Wn.2d at 21. The juveniles in that case received firearm enhancement sentences. Id. at 8. The Court held enhancement statutes do not bar sentencing courts from considering the mitigating qualities of youth at sentencing, even in adult court. Id. at 24-26. Houston-Sconiers overruled Brown insofar as it interpreted statutes to bar such discretion with regard to juveniles. Id. at 21, n.5.

Houston-Sconiers abrogates the reasoning of the majority opinion in Brown. It shows that despite statutory language indicating firearm enhancements must be imposed to run consecutively to the base sentence, such mandatory language must yield to the imperative that the mitigating qualities of youth must be considered at sentencing. In this circumstance, the SRA was not intended to mandate the harshest possible terms in all cases, but to allow for court discretion based on the particulars of a certain defendant. Houston-Sconiers "went so far as to question *any* statute that acts to limit consideration of the mitigating factors of youth during sentencing." State v. Gilbert, 193 Wn.2d 169, 175, 438 P.3d 133 (2019).

Houston-Sconiers rooted its holding in the "children are different" principle found in the Eighth Amendment prohibition against cruel and unusual punishment. Id. at 8. Criminal procedure laws that fail to take

youthfulness into account are flawed. Id. Regarding sentencing enhancements, the Court interpreted the SRA to allow for mitigated exceptional sentences to avoid an Eighth Amendment violation. Id. at 24-26. The Court emphasized "that we do not read our state statutes as contrary to our Eighth Amendment holding." Houston-Sconiers, 188 Wn.2d at 23-24. It cited the holding in O'Dell that "a sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA." Id. at 24.

The holding in Houston-Sconiers encompasses sentencing of juveniles, but it is now established that chronological age is not determinative of mental development. The hallmark qualities of youth that mandate constitutional protection in the sentencing context persist into one's early 20s. The mitigating factor of youth can apply to young adults. O'Dell, 183 Wn.2d at 698-99.

As recognized by O'Dell, the age of 18 is not a meaningful dividing line between those who are less culpable by reason of youth and those who are not. Young adults and juveniles by chronological age share the same hallmark qualities of youth. Because we now know "that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18," O'Dell, 183 Wn.2d at 693, the same mitigating qualities of

youth that require discretionary enhancement sentences for juveniles should apply to young adults who harbor the same mitigating qualities.

Courts have a duty to construe a statute so as to uphold its constitutionality. Houston-Sconiers, 188 Wn.2d at 24 (citing State v. Furman, 122 Wn.2d 440, 458, 858 P.2d 1092 (1993)). In Houston-Sconiers, the Court concluded the legislature did not intend to mandate a sentence that ran afoul of the Eighth Amendment. Id. at 26. To avoid a constitutional violation, the enhancement statute should likewise be interpreted to permit a mitigated exceptional sentence based on the youthful qualities of a young adult.

b. The court abused its discretion in failing to recognize firearm enhancements are subject to an exceptional mitigated sentence.

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." McFarland, 189 Wn.2d at 56. "A trial court errs when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998). In this circumstance, the failure to exercise discretion is an abuse of discretion. O'Dell, 183 Wn.2d at 697.

The trial court in Clark's case imposed the low end of the standard range on all counts and ordered the enhancements to run consecutively. Id. CP 99-100. The court explained "the underlying charges all run concurrent to each other, however, by law, the firearm enhancements are flat time. That is run consecutive to those." 2RP 15. The court believed the firearm enhancements must run consecutively by law. It did not understand that enhancements can be run concurrently as part of an exceptional sentence. The court's failure to understand its sentencing authority when imposing an exceptional sentence requires a new sentencing hearing.

F. CONCLUSION

For the reasons stated, Clark requests that this Court grant review.

DATED this 23rd day of July 2020.

Respectfully submitted,

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_____

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Filed
Washington State
Court of Appeals
Division Two

June 23, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY TYRONE CLARK, Appellant.	No. 52330-2-II ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING UNPUBLISHED OPINION IN PART

Appellant filed a motion for reconsideration of the opinion filed on March 17, 2020 in the above entitled matter. After consideration, we grant appellant's motion and amend the opinion in part as follows:

On page 2, paragraph 2, lines 4 to 6, we remove the following sentence: "Accordingly, we affirm Clark's sentence and LFOs related to the supervision assessment and collection costs, but remand to the trial court to amend the interest accrual provision." We replace it with "Accordingly, we affirm Clark's sentence, strike the supervision assessment and collection costs, and remand for the trial court to amend the interest accrual provision."

On page 4, paragraph 2, line 8, after "The trial court found Clark indigent," we add the following language, "The trial court stated, "I believe that the crime victim penalty assessment is mandatory. I will waive all other fees in this case." VRP (Aug. 24, 2018 at 15-16)."

On page 10, paragraphs 4 and 5, and page 11 paragraphs 1 through 4, we remove the following language:

B. *Supervision Assessment*

Clark argues that the trial court improperly imposed a supervision assessment. We disagree.

Here, Clark's supervision assessment was imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of Corrections]." The supervision assessment is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007 (2019).

However, the supervision assessment is not a discretionary "cost" merely because it is a discretionary LFO. Rather, the supervision assessment fails to meet the RCW 10.01.160(2) definition of a "cost" because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Because the supervision assessment is not a cost under RCW 10.01.160, the trial court was not required to conduct an inquiry into Clark's ability to pay under RCW 10.01.160(3). *See State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (distinguishing fines from costs).

C. *Collection Costs*

Similarly, Clark argues that the trial court improperly imposed collection costs. We disagree.

A court may use collection services to recover unpaid LFOs. RCW 36.18.190. The cost of the collection service is paid by the debtor. RCW 36.18.190. Collection costs are discretionary. RCW 36.18.190; Clark, 191 Wn. App. at 374.

Here, the trial court ordered that Clark "shall pay the cost of services to collect unpaid legal financial obligations per contract or statute." CP at 98. These collection costs were imposed under RCW 36.18.190, RCW 9.94A.780, and RCW 19.16.500. Although collection costs are discretionary, they do not meet the definition of "cost' in RCW 10.01.160(2) because these costs were not specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. As such, the trial court was not required to conduct an inquiry into Clark's ability to pay.

We replace it with:

> B. *Supervision Assessment and Collection Costs*
>
> Clark argues we should strike the supervision assessment and collection costs in light of *State v. Dillon*, 12 Wn. App. 2d 133, 456 P.3d 1199 (2020). We agree.
>
> In *Dillon*, Division One of this court held that when the record shows that the sentencing court intended to impose only mandatory LFOs, the appellate court may strike any of the discretionary fees that were inadvertently imposed. 12 Wn. App. 2d at 152. There, the trial court intended to impose only mandatory LFOs. *Dillon*, 12 Wn. App. 2d at 152. However, the trial court imposed a Department of Corrections (DOC) supervision assessment, which was "buried in a lengthy paragraph" of form language. *Dillon*, 12 Wn. App. 2d at 152. Because the record showed that the trial court intended to impose only mandatory LFOs, Division One struck that cost. *Dillon*, 12 Wn. App. 2d at 152-53.
>
> Here, at sentencing, the trial court stated, "I believe that the crime victim penalty assessment is mandatory. I will waive all other fees in this case." VRP (Aug. 24, 2018 at 15-16). The DOC supervision assessment and the collection costs imposed here were listed in preprinted boilerplate language. It appears that the imposition of this assessment and cost was inadvertent. We adopt *Dillon*'s reasoning and strike the supervision assessment and collection costs.

On page 12, paragraph 1, lines 1 and 2, we remove the following language: "We affirm Clark's sentence and LFOs related to the supervision assessment and collection costs, but we remand for the trial court to amend the interest accrual provision." We replace it with "We affirm Clark's sentence, strike the supervision assessment and collection costs, and remand for the trial court to amend the interest accrual provision."

We do not amend any other portion of the opinion or the result. Accordingly, it is

SO ORDERED.

Worswick, J.

We concur:

, C.J.

L[illegible], C.J.

Cruser, J.

Filed
Washington State
Court of Appeals
Division Two

March 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY TYRONE CLARK, Appellant.	No. 52330-2-II UNPUBLISHED OPINION

WORSWICK, J. — This is the second time Anthony T. Clark's case has come before this court. A jury convicted Clark of first degree murder,[1] first degree robbery,[2] unlawful possession of a controlled substance with intent to deliver,[3] and second degree unlawful possession of a firearm.[4] Clark appealed, and we affirmed his convictions with the exception of first degree robbery.[5] Following remand, Clark's first degree robbery charge was tried to the bench. The trial court found Clark guilty and resentenced him on all four convictions to the low end of the standard range. Clark appeals his second sentence.

[1] RCW 9A.32.030(1)(a).

[2] RCW 9A.56.190; 9A.56.200(1)(a)(i).

[3] RCW 69.50.401(2)(a).

[4] RCW 9.41.040(2)(a)(iv).

[5] The case was appealed to our Supreme Court, which affirmed our holding. *State v. Clark*, 187 Wn.2d 641, 656, 389 P.3d 462 (2017).

Clark argues that the trial court abused its discretion by not imposing an exceptional sentence downward. Alternatively, Clark argues that his trial counsel provided ineffective assistance by not arguing for an exceptional sentence downward based on his youth. Finally, Clark argues that the trial court impermissibly imposed certain legal financial obligations (LFOs), namely a supervision assessment, collection costs, and an interest accrual provision. The State argues that Clark is precluded from appealing a standard range sentence, but concedes that the trial court improperly imposed the interest accrual provision.

We hold that Clark cannot appeal his standard range sentence and that Clark failed to demonstrate that he received ineffective assistance of counsel. Regarding LFOs, we accept the State's concession regarding the interest accrual provision, but hold that the supervision assessment and collection costs were properly imposed. Accordingly, we affirm Clark's sentence and LFOs related to the supervision assessment and collection costs, but remand to the trial court to amend the interest accrual provision.

FACTS

I. FIRST TRIAL, SENTENCING, AND APPEAL

In 2011, Clark shot and killed a 16-year-old boy. Clark discharged a single round into the back of the boy's head, and placed the boy's body in a garbage can. Clark asked his neighbors to hide the body and to help sell the cocaine Clark had taken from the boy's body. Clark was 20 years old.

A jury found Clark guilty of first degree murder, first degree robbery, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful

possession of a firearm. The jury also returned a special verdict, finding Clark committed three counts while in possession of a firearm.

At sentencing, Clark requested an exceptional sentence downward. Based on his low IQ and developmental disability, Clark argued that he had a reduced capacity to appreciate the wrongfulness of his conduct. The State responded that no evidence at trial supported the contention that Clark's mental deficiencies affected his ability to appreciate the wrongfulness of his conduct or comply with the law. The trial court sentenced Clark to 447 months, which was within the standard range and included three consecutive firearm enhancements.

Clark appealed.[6] We affirmed three of Clark's convictions, but reversed and remanded his first degree robbery conviction.

II. THE PRESENT BENCH TRIAL, RESENTENCING, AND APPEAL

After a bench trial before a different judge, the trial court found Clark guilty of first degree robbery, with a firearm enhancement. At the resentencing hearing for all four convictions, the State argued for a sentence within the standard range, asking for the trial court to impose the same sentence from Clark's first sentencing. The State told the trial court that it did not know if Clark was asking for a sentence other than the standard range and then argued that Clark be sentenced to the low end of the standard range. The State emphasized the violent and heinous nature of Clark's crimes and noted that Clark was 20 years old at the time. The State said that Clark was not a juvenile, "so the Court doesn't have to consider the juvenile factors that would weigh into his sentence." Verbatim Report of Proceedings (VRP) (Aug. 24, 2018) at 9.

[6] *State v. Clark*, No. 45103-4-II, slip op. at 1 (Wash. Ct. App. June 23, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2045103-4-II%20%20Unpublished%20Opinion.pdf.

The State also alluded to Clark's competency and "sophistication" as potential mitigating factors, but asked for a standard range sentence based on the brutality of these crimes and Clark's capability to commit other crimes. VRP (Aug. 24, 2018) at 9-10.

Clark's counsel stated, "I did do some research in the mitigating factors, Your Honor. Did not find anything that was even remotely applicable here, mainly because my client was, at the time, 20 years old. As the prosecutor has said, the juvenile factors do not come into play." VRP (Aug. 24, 2018) at 11. Clark's counsel also mentioned Clark was in special education classes. Clark's counsel stated, "We would go along with the prosecutor's recommendation, Your Honor, low end of everything. We think that's appropriate here." VRP (Aug. 24, 2018) at 13.

The trial court referenced Clark's first sentence, noting that it was "a low-end sentence, and there were a lot of factors that went into that including the relative youth of Mr. Clark which is also balanced against the extreme youth of the victim. We also have factors including his cognitive abilities." VRP (Aug. 24, 2018) at 14. The trial court stated that "this is an appropriate sentence as recommended and as previously imposed by [the prior judge] which is essentially the low end on all charges plus the mandatory firearm sentencing enhancements." VRP (Aug. 24, 2018) at 15. The trial court imposed 291 months, plus an additional 156 months for the firearm enhancements, for a total of 447 months. The trial court found Clark indigent. The trial court imposed certain LFOs, namely a supervision assessment and collection costs. The trial court also imposed an interest accrual provision on his LFOs.

Clark appeals his sentence.

ANALYSIS

I. EXCEPTIONAL SENTENCE DOWNWARD

Clark argues that the trial court failed to exercise its discretion or meaningfully consider Clark's youth as a basis for imposing an exceptional sentence downward. Alternatively, Clark argues that his trial counsel provided ineffective assistance by failing to argue Clark's youth as a mitigating factor to support an exceptional sentence downward. The State argues that Clark is precluded from appealing a standard range sentence. We agree with the State and hold that Clark cannot appeal his standard range sentence. We also hold that Clark's trial counsel did not provide ineffective assistance.

A. *Clark Cannot Appeal His Standard Range Sentence*

The State argues that because Clark failed to argue for an exceptional sentence downward during sentencing, Clark cannot raise this argument on appeal. We agree that Clark cannot appeal his standard range sentence.

In general, a party cannot appeal a sentence within the standard range. *State v. Brown*, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008); RCW 9.94A.585(1).[7] The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot abuse its discretion as to the length of the sentence as a matter of law. *Brown*, 145 Wn. App. at 78. However, a defendant may appeal a standard range sentence when a trial court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). It is error for a trial

[7] RCW 9.94A.585 (1) provides, "A sentence within the standard sentence range, under RCW 9.94A.510 or 9.94A.517, for an offense shall not be appealed."

court to categorically refuse to impose an exceptional sentence downward or to mistakenly believe that it does not have such discretion. *McFarland*, 189 Wn.2d at 56.

Here, RCW 9.94A.585(1) prevents Clark from appealing his standard range sentence. Although Clark did not specifically request an exceptional sentence downward, the trial court recognized Clark's youth, heard argument regarding mitigating factors, and then exercised its discretion to impose a sentence within the standard range. The trial court did not refuse to exercise its discretion or mistakenly believe it lacked discretion to deviate from the standard range. Thus, Clark cannot appeal his standard range sentence.

B. *Clark's Trial Counsel Was Not Ineffective for Failing To Argue for An Exceptional Sentence Downward Based on Clark's Youth*

Alternatively, Clark argues that his trial counsel provided ineffective assistance by failing to argue Clark's youth as a mitigating factor to support an exceptional sentence downward. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Defense counsel's obligation to provide effective assistance applies to sentencing. *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013). We review ineffective assistance of counsel claims de novo. *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018). To demonstrate that he received ineffective assistance of counsel, Clark must show both (1) that defense counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. *Linville*, 191 Wn.2d at 524. Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Prejudice ensues if the result of the proceeding

would have been different had defense counsel not performed deficiently. *Estes*, 188 Wn.2d at 458. Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Although no defendant is entitled to an exceptional downward sentence, every defendant is entitled to ask the sentencing court to consider such a sentence and to have it actually considered. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The SRA (Sentencing Reform Act of 1981)[8] has always provided a defendant an opportunity to raise his youth for the purpose of requesting an exceptional sentence downward. *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018). Additionally, the SRA provides the trial court with the ability to exercise its discretion in considering youth as a mitigating factor. *Pers. Restraint of Light-Roth*, 191 Wn.2d at 336. However, "age is not a per se mitigating factor" that automatically entitles young defendants to an exceptional sentence downward. *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015).

Here, even assuming that counsel's failure to raise youth as a mitigating factor was deficient performance, Clark cannot show prejudice. Nothing in the record shows that the result of the sentencing hearing would have been different. The record reveals that the trial court understood it had discretion to impose an exceptional sentence downward. The State's arguments at sentencing were clearly in opposition to an exceptional sentence downward based on Clark's youth. Further, the trial court acknowledged Clark's youth. Because Clark cannot

[8] Ch. 9.94A RCW.

show that he would have received a different sentence had counsel raised youth as a mitigating factor, we hold that Clark did not receive ineffective assistance from his trial counsel.

II. CONSECUTIVE FIREARM ENHANCEMENTS

Clark argues that the sentencing court abused its discretion when it failed to recognize that firearm enhancements can be subject to exceptional downward sentences. Clark equates a firearm *enhancement* under RCW 9.94A.533 with a firearm-related *conviction* to argue that a sentencing court can impose concurrent firearm enhancements. We disagree.

RCW 9.94A.533(3)(e) provides that the firearm enhancement, if applicable, is mandatory and shall run consecutively to all other sentencing provisions, "[n]otwithstanding any other provision of law." Judicial discretion to impose exceptional sentences does not extend to firearm enhancements. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

Here, the sentencing court correctly recognized that it had no authority to shorten the duration of Clark's firearm enhancement. Clark argues that *Brown* is wrong and wholly overruled by *Houston-Sconiers*. Clark is mistaken. Although *Houston-Sconiers* modified *Brown*, it did so only with respect to juvenile offenders and Eighth Amendment considerations. *Houston-Sconiers*, 188 Wn.2d at 34. The Court did not modify *Brown*'s applicability to adult defendants.

Clark also relies on *McFarland*, 189 Wn.2d at 55, to argue that trial courts may impose exceptional sentences downward for firearm enhancements. However, *McFarland* does not apply to Clark's sentence because Clark's sentence was based on consecutive firearm *enhancements* under RCW 9.94A.533(3), while *McFarland* addressed consecutive sentences

imposed for firearm-related *convictions* under RCW 9.94A.589(c).[9] In *McFarland*, our Supreme Court held that when multiple firearm-related convictions result in a presumptive sentence that is clearly excessive under RCW 9.94A.589(1)(c), the trial court may run the sentences for firearm-related convictions concurrently as part of an exceptional mitigated sentence under RCW 9.94A.535(1)(g). 189 Wn.2d at 55. RCW 9.94A.535(1)(g) states, "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010."

Based on the plain language of RCW 9.94A.535, the statute applies only when a sentence under RCW 9.94A.589 is clearly excessive. Because Clark's sentence was imposed based on the firearm enhancements in RCW 9.94A.533(3), he would not be eligible for an exceptional sentence under RCW 9.94A.535(1)(g), and the reasoning in *McFarland* does not apply. Accordingly, the trial court did not abuse its discretion or misunderstand its authority regarding the firearm enhancements.

III. LEGAL FINANCIAL OBLIGATIONS

Clark argues that the trial court improperly imposed a supervision assessment and collection costs because he is indigent. Clark also argues that the trial court impermissibly imposed interest on his LFOs. The State concedes that the interest accrual provision is impermissible. We hold that the trial court properly imposed a supervision assessment and collection costs. We also accept the State's concession regarding interest insofar as it applied to nonrestitution LFOs.

[9] RCW 9.94A.589(1)(c) lists these crimes as first or second degree unlawful possession of a firearm, theft of a firearm, and possession of a stolen firearm.

RCW 10.01.160(3) now provides that the trial court shall not order a defendant to pay *costs* if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). Similarly, RCW 9.94A.760 now provides that the trial court cannot order "costs" as described in RCW 10.01.160 if the defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 10.01.160(2) limits costs "to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." Recent legislation also prohibits trial courts from imposing interest accrual provisions on the nonrestitution portions of LFOs on indigent defendants. RCW 10.82.090.

A. *Interest Accrual Provision*

Clark argues, and the State concedes, that the trial court improperly imposed an interest accrual provision on nonrestitution LFOs. RCW 10.82.090 differentiates between restitution and nonrestitution LFOs. Trial courts are now prohibited from imposing an interest accrual provision on nonrestitution LFOs when a defendant is indigent. RCW 10.82.090.

Here, the trial court imposed an interest accrual provision on all LFOs. We accept the State's concession and remand for the trial court to amend the interest accrual provision to comply with RCW 10.82.090.

B. *Supervision Assessment*

Clark argues that the trial court improperly imposed a supervision assessment. We disagree.

Here, Clark's supervision assessment was imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of

Corrections]." The supervision assessment is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019).

However, the supervision assessment is not a discretionary "cost" merely because it is a discretionary LFO. Rather, the supervision assessment fails to meet the RCW 10.01.160(2) definition of a "cost" because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Because the supervision assessment is not a cost under RCW 10.01.160, the trial court was not required to conduct an inquiry into Clark's ability to pay under RCW 10.01.160(3). *See State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (distinguishing fines from costs).

C. *Collection Costs*

Similarly, Clark argues that the trial court improperly imposed collection costs. We disagree.

A court may use collection services to recover unpaid LFOs. RCW 36.18.190. The cost of the collection service is paid by the debtor. RCW 36.18.190. Collection costs are discretionary. RCW 36.18.190; *Clark*, 191 Wn. App. at 374.

Here, the trial court ordered that Clark "shall pay the cost of services to collect unpaid legal financial obligations per contract or statute." CP at 98. These collection costs were imposed under RCW 36.18.190, RCW 9.94A.780, and RCW 19.16.500. Although collection costs are discretionary, they do not meet the definition of "cost' in RCW 10.01.160(2) because these costs were not specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. As such, the trial court was not required to conduct an inquiry into Clark's ability to pay.

We affirm Clark's sentence and LFOs related to the supervision assessment and collection costs, but we remand for the trial court to amend the interest accrual provision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Lee, A.C.J.

Cruser, J.

Filed
Washington State
Court of Appeals
Division Two

March 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY TYRONE CLARK, Appellant.	No. 52330-2-II UNPUBLISHED OPINION

WORSWICK, J. — This is the second time Anthony T. Clark's case has come before this court. A jury convicted Clark of first degree murder,[1] first degree robbery,[2] unlawful possession of a controlled substance with intent to deliver,[3] and second degree unlawful possession of a firearm.[4] Clark appealed, and we affirmed his convictions with the exception of first degree robbery.[5] Following remand, Clark's first degree robbery charge was tried to the bench. The trial court found Clark guilty and resentenced him on all four convictions to the low end of the standard range. Clark appeals his second sentence.

[1] RCW 9A.32.030(1)(a).

[2] RCW 9A.56.190; 9A.56.200(1)(a)(i).

[3] RCW 69.50.401(2)(a).

[4] RCW 9.41.040(2)(a)(iv).

[5] The case was appealed to our Supreme Court, which affirmed our holding. *State v. Clark*, 187 Wn.2d 641, 656, 389 P.3d 462 (2017).

Clark argues that the trial court abused its discretion by not imposing an exceptional sentence downward. Alternatively, Clark argues that his trial counsel provided ineffective assistance by not arguing for an exceptional sentence downward based on his youth. Finally, Clark argues that the trial court impermissibly imposed certain legal financial obligations (LFOs), namely a supervision assessment, collection costs, and an interest accrual provision. The State argues that Clark is precluded from appealing a standard range sentence, but concedes that the trial court improperly imposed the interest accrual provision.

We hold that Clark cannot appeal his standard range sentence and that Clark failed to demonstrate that he received ineffective assistance of counsel. Regarding LFOs, we accept the State's concession regarding the interest accrual provision, but hold that the supervision assessment and collection costs were properly imposed. Accordingly, we affirm Clark's sentence and LFOs related to the supervision assessment and collection costs, but remand to the trial court to amend the interest accrual provision.

FACTS

I. First Trial, Sentencing, and Appeal

In 2011, Clark shot and killed a 16-year-old boy. Clark discharged a single round into the back of the boy's head, and placed the boy's body in a garbage can. Clark asked his neighbors to hide the body and to help sell the cocaine Clark had taken from the boy's body. Clark was 20 years old.

A jury found Clark guilty of first degree murder, first degree robbery, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful

possession of a firearm. The jury also returned a special verdict, finding Clark committed three counts while in possession of a firearm.

At sentencing, Clark requested an exceptional sentence downward. Based on his low IQ and developmental disability, Clark argued that he had a reduced capacity to appreciate the wrongfulness of his conduct. The State responded that no evidence at trial supported the contention that Clark's mental deficiencies affected his ability to appreciate the wrongfulness of his conduct or comply with the law. The trial court sentenced Clark to 447 months, which was within the standard range and included three consecutive firearm enhancements.

Clark appealed.[6] We affirmed three of Clark's convictions, but reversed and remanded his first degree robbery conviction.

II. THE PRESENT BENCH TRIAL, RESENTENCING, AND APPEAL

After a bench trial before a different judge, the trial court found Clark guilty of first degree robbery, with a firearm enhancement. At the resentencing hearing for all four convictions, the State argued for a sentence within the standard range, asking for the trial court to impose the same sentence from Clark's first sentencing. The State told the trial court that it did not know if Clark was asking for a sentence other than the standard range and then argued that Clark be sentenced to the low end of the standard range. The State emphasized the violent and heinous nature of Clark's crimes and noted that Clark was 20 years old at the time. The State said that Clark was not a juvenile, "so the Court doesn't have to consider the juvenile factors that would weigh into his sentence." Verbatim Report of Proceedings (VRP) (Aug. 24, 2018) at 9.

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The State also alluded to Clark's competency and "sophistication" as potential mitigating factors, but asked for a standard range sentence based on the brutality of these crimes and Clark's capability to commit other crimes. VRP (Aug. 24, 2018) at 9-10.

Clark's counsel stated, "I did do some research in the mitigating factors, Your Honor. Did not find anything that was even remotely applicable here, mainly because my client was, at the time, 20 years old. As the prosecutor has said, the juvenile factors do not come into play." VRP (Aug. 24, 2018) at 11. Clark's counsel also mentioned Clark was in special education classes. Clark's counsel stated, "We would go along with the prosecutor's recommendation, Your Honor, low end of everything. We think that's appropriate here." VRP (Aug. 24, 2018) at 13.

The trial court referenced Clark's first sentence, noting that it was "a low-end sentence, and there were a lot of factors that went into that including the relative youth of Mr. Clark which is also balanced against the extreme youth of the victim. We also have factors including his cognitive abilities." VRP (Aug. 24, 2018) at 14. The trial court stated that "this is an appropriate sentence as recommended and as previously imposed by [the prior judge] which is essentially the low end on all charges plus the mandatory firearm sentencing enhancements." VRP (Aug. 24, 2018) at 15. The trial court imposed 291 months, plus an additional 156 months for the firearm enhancements, for a total of 447 months. The trial court found Clark indigent. The trial court imposed certain LFOs, namely a supervision assessment and collection costs. The trial court also imposed an interest accrual provision on his LFOs.

Clark appeals his sentence.

ANALYSIS

I. EXCEPTIONAL SENTENCE DOWNWARD

Clark argues that the trial court failed to exercise its discretion or meaningfully consider Clark's youth as a basis for imposing an exceptional sentence downward. Alternatively, Clark argues that his trial counsel provided ineffective assistance by failing to argue Clark's youth as a mitigating factor to support an exceptional sentence downward. The State argues that Clark is precluded from appealing a standard range sentence. We agree with the State and hold that Clark cannot appeal his standard range sentence. We also hold that Clark's trial counsel did not provide ineffective assistance.

A. *Clark Cannot Appeal His Standard Range Sentence*

The State argues that because Clark failed to argue for an exceptional sentence downward during sentencing, Clark cannot raise this argument on appeal. We agree that Clark cannot appeal his standard range sentence.

In general, a party cannot appeal a sentence within the standard range. *State v. Brown*, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008); RCW 9.94A.585(1).[7] The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot abuse its discretion as to the length of the sentence as a matter of law. *Brown*, 145 Wn. App. at 78. However, a defendant may appeal a standard range sentence when a trial court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). It is error for a trial

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court to categorically refuse to impose an exceptional sentence downward or to mistakenly believe that it does not have such discretion. *McFarland*, 189 Wn.2d at 56.

Here, RCW 9.94A.585(1) prevents Clark from appealing his standard range sentence. Although Clark did not specifically request an exceptional sentence downward, the trial court recognized Clark's youth, heard argument regarding mitigating factors, and then exercised its discretion to impose a sentence within the standard range. The trial court did not refuse to exercise its discretion or mistakenly believe it lacked discretion to deviate from the standard range. Thus, Clark cannot appeal his standard range sentence.

B. *Clark's Trial Counsel Was Not Ineffective for Failing To Argue for An Exceptional Sentence Downward Based on Clark's Youth*

Alternatively, Clark argues that his trial counsel provided ineffective assistance by failing to argue Clark's youth as a mitigating factor to support an exceptional sentence downward. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Defense counsel's obligation to provide effective assistance applies to sentencing. *State v. Rattana Keo Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013). We review ineffective assistance of counsel claims de novo. *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018). To demonstrate that he received ineffective assistance of counsel, Clark must show both (1) that defense counsel's performance was deficient and (2) that the deficient performance resulted in prejudice. *Linville*, 191 Wn.2d at 524. Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Prejudice ensues if the result of the proceeding

would have been different had defense counsel not performed deficiently. *Estes*, 188 Wn.2d at 458. Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry. *State v. Classen*, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Although no defendant is entitled to an exceptional downward sentence, every defendant is entitled to ask the sentencing court to consider such a sentence and to have it actually considered. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The SRA (Sentencing Reform Act of 1981)[8] has always provided a defendant an opportunity to raise his youth for the purpose of requesting an exceptional sentence downward. *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018). Additionally, the SRA provides the trial court with the ability to exercise its discretion in considering youth as a mitigating factor. *Pers. Restraint of Light-Roth*, 191 Wn.2d at 336. However, "age is not a per se mitigating factor" that automatically entitles young defendants to an exceptional sentence downward. *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015).

Here, even assuming that counsel's failure to raise youth as a mitigating factor was deficient performance, Clark cannot show prejudice. Nothing in the record shows that the result of the sentencing hearing would have been different. The record reveals that the trial court understood it had discretion to impose an exceptional sentence downward. The State's arguments at sentencing were clearly in opposition to an exceptional sentence downward based on Clark's youth. Further, the trial court acknowledged Clark's youth. Because Clark cannot

[8] Ch. 9.94A RCW.

show that he would have received a different sentence had counsel raised youth as a mitigating factor, we hold that Clark did not receive ineffective assistance from his trial counsel.

II. CONSECUTIVE FIREARM ENHANCEMENTS

Clark argues that the sentencing court abused its discretion when it failed to recognize that firearm enhancements can be subject to exceptional downward sentences. Clark equates a firearm *enhancement* under RCW 9.94A.533 with a firearm-related *conviction* to argue that a sentencing court can impose concurrent firearm enhancements. We disagree.

RCW 9.94A.533(3)(e) provides that the firearm enhancement, if applicable, is mandatory and shall run consecutively to all other sentencing provisions, "[n]otwithstanding any other provision of law." Judicial discretion to impose exceptional sentences does not extend to firearm enhancements. *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

Here, the sentencing court correctly recognized that it had no authority to shorten the duration of Clark's firearm enhancement. Clark argues that *Brown* is wrong and wholly overruled by *Houston-Sconiers*. Clark is mistaken. Although *Houston-Sconiers* modified *Brown*, it did so only with respect to juvenile offenders and Eighth Amendment considerations. *Houston-Sconiers*, 188 Wn.2d at 34. The Court did not modify *Brown*'s applicability to adult defendants.

Clark also relies on *McFarland*, 189 Wn.2d at 55, to argue that trial courts may impose exceptional sentences downward for firearm enhancements. However, *McFarland* does not apply to Clark's sentence because Clark's sentence was based on consecutive firearm *enhancements* under RCW 9.94A.533(3), while *McFarland* addressed consecutive sentences

imposed for firearm-related *convictions* under RCW 9.94A.589(c).[9] In *McFarland*, our Supreme Court held that when multiple firearm-related convictions result in a presumptive sentence that is clearly excessive under RCW 9.94A.589(1)(c), the trial court may run the sentences for firearm-related convictions concurrently as part of an exceptional mitigated sentence under RCW 9.94A.535(1)(g). 189 Wn.2d at 55. RCW 9.94A.535(1)(g) states, "The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010."

Based on the plain language of RCW 9.94A.535, the statute applies only when a sentence under RCW 9.94A.589 is clearly excessive. Because Clark's sentence was imposed based on the firearm enhancements in RCW 9.94A.533(3), he would not be eligible for an exceptional sentence under RCW 9.94A.535(1)(g), and the reasoning in *McFarland* does not apply. Accordingly, the trial court did not abuse its discretion or misunderstand its authority regarding the firearm enhancements.

III. LEGAL FINANCIAL OBLIGATIONS

Clark argues that the trial court improperly imposed a supervision assessment and collection costs because he is indigent. Clark also argues that the trial court impermissibly imposed interest on his LFOs. The State concedes that the interest accrual provision is impermissible. We hold that the trial court properly imposed a supervision assessment and collection costs. We also accept the State's concession regarding interest insofar as it applied to nonrestitution LFOs.

[9] RCW 9.94A.589(1)(c) lists these crimes as first or second degree unlawful possession of a firearm, theft of a firearm, and possession of a stolen firearm.

RCW 10.01.160(3) now provides that the trial court shall not order a defendant to pay *costs* if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). Similarly, RCW 9.94A.760 now provides that the trial court cannot order "costs" as described in RCW 10.01.160 if the defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 10.01.160(2) limits costs "to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision." Recent legislation also prohibits trial courts from imposing interest accrual provisions on the nonrestitution portions of LFOs on indigent defendants. RCW 10.82.090.

A. *Interest Accrual Provision*

Clark argues, and the State concedes, that the trial court improperly imposed an interest accrual provision on nonrestitution LFOs. RCW 10.82.090 differentiates between restitution and nonrestitution LFOs. Trial courts are now prohibited from imposing an interest accrual provision on nonrestitution LFOs when a defendant is indigent. RCW 10.82.090.

Here, the trial court imposed an interest accrual provision on all LFOs. We accept the State's concession and remand for the trial court to amend the interest accrual provision to comply with RCW 10.82.090.

B. *Supervision Assessment*

Clark argues that the trial court improperly imposed a supervision assessment. We disagree.

Here, Clark's supervision assessment was imposed under RCW 9.94A.703(2)(d), which states, "Unless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [Department of

Corrections]." The supervision assessment is a discretionary LFO. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), *review denied*, 193 Wn.2d 1007 (2019).

However, the supervision assessment is not a discretionary "cost" merely because it is a discretionary LFO. Rather, the supervision assessment fails to meet the RCW 10.01.160(2) definition of a "cost" because it is not an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. Because the supervision assessment is not a cost under RCW 10.01.160, the trial court was not required to conduct an inquiry into Clark's ability to pay under RCW 10.01.160(3). *See State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (distinguishing fines from costs).

C. *Collection Costs*

Similarly, Clark argues that the trial court improperly imposed collection costs. We disagree.

A court may use collection services to recover unpaid LFOs. RCW 36.18.190. The cost of the collection service is paid by the debtor. RCW 36.18.190. Collection costs are discretionary. RCW 36.18.190; *Clark*, 191 Wn. App. at 374.

Here, the trial court ordered that Clark "shall pay the cost of services to collect unpaid legal financial obligations per contract or statute." CP at 98. These collection costs were imposed under RCW 36.18.190, RCW 9.94A.780, and RCW 19.16.500. Although collection costs are discretionary, they do not meet the definition of "cost' in RCW 10.01.160(2) because these costs were not specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision. As such, the trial court was not required to conduct an inquiry into Clark's ability to pay.

We affirm Clark's sentence and LFOs related to the supervision assessment and collection costs, but we remand for the trial court to amend the interest accrual provision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Lee, A.C.J.

Cruser, J.

From:	OFFICE RECEPTIONIST, CLERK
To:	"Casey Grannis"
Cc:	coa2; Div-2 eDoc Managers; "kristie.barham@piercecountywa.gov"
Subject:	RE: State v. Anthony Clark, No. 52330-2-II, petition for review for filing
Date:	Monday, July 27, 2020 8:03:15 AM

Received 7/27/2020

From: Casey Grannis [mailto:grannisc@nwattorney.net]
Sent: Saturday, July 25, 2020 6:46 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: coa2 <coa2@courts.wa.gov>; Div-2 eDoc Managers <Div-2eDocManagers@courts.wa.gov>; 'kristie.barham@piercecountywa.gov' <kristie.barham@piercecountywa.gov>
Subject: State v. Anthony Clark, No. 52330-2-II, petition for review for filing

Attached is the petition for review for State v. Anthony Clark, No. 52330-2-II . The appellate filing portal has not been allowing filings, a problem I became aware of July 23 when trying to file the present petition. The portal allows the user to log in, but when a valid case number is entered, an error page comes up and the filing cannot proceed. For this reason, the petition in Mr. Clark's case was unable to be filed through the portal on July 23. My office has been unable to file anything through the portal since then. As per the email from the Supreme Court clerk (see below), I am now filing the petition via email, and ask that it be accepted due to a technological problem with the portal. If anything further is needed, please let me know. Thank you.

Casey Grannis
#37301
Nielsen Koch, PLLC
Attorney for Petitioner

From: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Sent: Friday, July 24, 2020 9:46 AM
To: Casey Grannis <grannisc@nwattorney.net>
Subject: RE: Filing portal not working - petitions for review

Dear Mr. Grannis:

If you have trouble filing through the portal, we will accept the filings via attachment to email. If you can include information about the portal issue when you file something (include the information in the comment field if using the portal or in your email), we can likely accommodate the late filing. We will make this determination as to each filing and, if a motion for extension of time is needed, we will let you know.

Susan L. Carlson, Clerk

From: Casey Grannis [mailto:grannisc@nwattorney.net]
Sent: Friday, July 24, 2020 9:03 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Filing portal not working - petitions for review

Greetings,

Petitions for review in State v. Anthony Clark, COA No. 52330-2-II and State v. Kalob Kindt, COA No. 52792-8-II, were due July 23. My office was unable to file them because the appellate courts portal was down. It appears the portal is still having problems. I'm sure the Supreme Court is aware of the issue. Will motions for extension be required to file once the portal is up and working again, or is the Court going to recognize a grace period corresponding to the time that the portal is down?

Sincerely,
Casey Grannis
Nielsen Koch, PLLC
206-623-2373