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SUPREME COURT NO. 99276-2
COA NO. 52323-0-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEONTE A. SMITH,

Petitioner.

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

The Honorable Stephanie A. Arend, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Keonte Smith 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

Smith requests review of the split decision in State v. Keonte Amir Smith, Court of Appeals No. 52323-0-II (slip op. filed August 25, 2020). That decision, and the order denying reconsideration entered November 2, 2020, are attached as appendices.

C. ISSUES PRESENTED FOR REVIEW

1. Smith was 16 years old at the time of offense but was declined to adult court. The court imposed a standard range sentence of almost 10 years, rejecting the defense request for an exceptional sentence downward based on youth. Did the court err in failing to meaningfully consider each of the requisite factors of youth before imposing sentence?

2. Did the court err in imposing discretionary collection and supervision costs where (a) the relevant statute prohibits imposition of discretionary costs on indigent defendants and (b) the record shows the court did not intend to impose these obligations anyway?

D. STATEMENT OF THE CASE

Keonte Smith was only 16 years old at the time of offense. CP 34. The juvenile court declined jurisdiction. CP 184-95. In the adult division

of the superior court, Smith pleaded guilty to one count of second degree human trafficking. CP 33; 2RP 12-13, 22-23. Smith had caused his 16-year-old girlfriend to engage in prostitution by helping her set up "hotel dates" and sharing in the proceeds. CP 42, 186.

The defense requested an exceptional mitigated sentence based on youth and submitted a supporting memorandum, which included interviews with Smith's mother and father, letters of support, and a forensic assessment by Dr. Roesch, a psychologist. CP 37, 52-151. Smith's background was described. His upbringing was unstable. CP 102. Smith's father and mother were incarcerated for committing crimes at various times. CP 103, 139. Smith's father beat his mother. CP 76-79, 138. Smith witnessed the domestic violence. CP 54-55, 138, 141. He still has vivid memories and nightmares about it. CP 138, 141.

His mother abused drugs and alcohol. CP 53, 79, 85, 139. She used drugs in front of her son. CP 53-54, 79, 88-89, 139. Smith started using marijuana in the sixth grade. CP 140. By ninth grade, he smoked, took Xanax and drank alcohol daily. CP 140-41. Looking back on the experience, Smith realized he used drugs to cope with depression. CP 141. He does not want to return to them. CP 141.

His parents frequently separated. CP 138. He moved around and lived in different households throughout his childhood. CP 102. He

changed schools often and missed a lot of school. CP 103, 139. Smith was starting his junior year in high school when he was arrested. CP 57.

Smith and his older brother were close. CP 106. When Smith was 11 years old, his brother drowned in a lake. CP 55, 93-94, 138. Smith was there when his brother died. CP 55-56, 106. A video shows Smith calling out for his father to help. CP 81. Smith could not swim. CP 138. He watched as others brought his brother's lifeless body out of the water. CP 138. He remains haunted by what happened. CP 138.

Before his brother died, Smith enjoyed playing sports and being with friends. CP 141. After the drowning, Smith became withdrawn and depressed. CP 56, 141. His school performance deteriorated, and he started getting into trouble at school more often. CP 57, 139. His father became distant. CP 106. Smith's mother later developed a relationship of "convenience" with a drug dealer, who gave Smith marijuana to sell to others. CP 82-83, 88, 139. She allowed Smith and his sister to smoke marijuana and drink alcohol in the house. CP 88. Smith's life spiraled downward, and he committed a series of non-violent offenses, including unlawful possession of a firearm. CP 57-58, 140-41.

Smith met H.H. in September 2016 and the two began a dating relationship. CP 59. H.H. was involved in prostitution activity before meeting Smith. CP 60. In a defense interview, H.H. said she and Smith

decided to make money together and it was a joint decision. CP 60. Counsel noted application of the human trafficking statute was awkward because both Smith and H.H. were kids. CP 61. The usual scenario was adults victimizing young girls and women. CP 61. Counsel argued there was no physical or emotional abuse inflicted on H.H., and the two juveniles worked together "without any force, fraud or coercion." CP 61.

Dr. Roesch, a clinical psychologist, evaluated Smith. CP 68, 137-47. Smith's test score for sophistication and maturity was in the low to middle range compared to other young offenders. CP 69, 144. "Individuals in his range of scores have a diminished capacity for judgment, do not tend to weigh the costs and benefits of a given behavior before acting, and do not fully understand the consequences of their actions." CP 69, 144. Smith did not have sufficient sophistication and maturity at the time of arrest to function autonomously. CP 69, 145.

Clinical scores show "he had difficulty appreciating the long-term consequences of decisions, was less capable of imagining risky consequences of decisions, and more likely to only consider a restricted number and range of consequences." CP 69, 145. That he spoke about H.H.'s prostitution during jail calls knowing they were being recorded was another indicator of lack of maturity and sophistication. CP 69-70, 145-46. "As the research on brain development clearly shows, Keonte's capacities

for reasoned decision making and controlling his impulses were not developed during his teen years prior to his arrest." CP 70, 146. "He did not have the maturity and cognitive development to appreciate the choices he was making." CP 70, 146.

His dysfunctional family situation also needed to be taken into account. CP 146. He never had the opportunity for a stable and predictable living situation. CP 146. He learned a delinquent lifestyle from the adults in his life. CP 146. "His parents and his mother's boyfriend were all engaged in antisocial behavior and this was the model Keonte learned from beginning with the early years of adolescence." CP 146. At the same time, Smith is amenable to treatment. CP 69, 144, 146. His ability to make better decisions and plan will continue to improve as he cognitively develops. CP 69, 146. A structured risk assessment showed Smith is a low to moderate risk to reoffend and a low risk for future violent behavior. CP 68, 141-43.

Smith received mental health services in the community before his arrest, but it was hard for service providers to work with him because he moved around and his parents did not engage the program. CP 103-04, 140. Smith has since engaged in counseling. CP 71, 104.

A Team Child attorney who worked with Smith reported he "presents as youthful as any other teenager" and was "lacking in maturity

in terms of impulsivity and not being able to slow down his thinking to fully appreciate the risk involved and the impact his actions in the midst of them." CP 104. "He also seems highly susceptible to the influence of others in his life and in his decision making that led him here. Keonte did not have an independent mindset or feel actually capable of making decisions outside of the influence of others at sixteen years old." CP 104. Like the psychologist, the Team Child attorney stressed the need to "consider the impact of complex trauma on Keonte's adolescent development," which can affect children in all areas of social, cognitive and emotional development. CP 104.

Smith has a high capacity for change. CP 104. In a letter to the court, Smith expressed remorse and accepted responsibility for his conduct. CP 72; CP 149-51. He explained "I was selfish and naive, not thinking about the trauma HH may have already experienced in her life." CP 72, 149. Since being in custody, he worked on "self improvement, self awareness, and self control," as well as "acknowledging the decision a[n] individual makes comes with consequences." CP 72, 150. Smith continued his education while confined and intends to obtain a General Education Diploma and eventually go to college. CP 57, 71, 103. He wants to open a barbershop after he is released. CP 57, 103.

At the sentencing hearing, the court confirmed it had read the sentencing material. 4RP 6-7, 35. The court said it was "not going to address everything because it's 4:00." 4RP 35. The court understood it must consider a defendant's age and "whatever factors the defense wants to bring forward as it relates to youthfulness," but was "free to decide whatever I want." 4RP 35-36.

The court then touched on "a few of the facts." 4RP 36. Although Smith did not plead guilty to unlawfully possessing a firearm, the court expressed concern that this was the second time Smith had been charged with that offense. 4RP 36-37. "[W]hen they talk about juvenile and brain development, and impulsivity and all that, it's not -- it's me looking at this criminal act but certainly looking at his behavior over time as well. This is not somebody just engaging in something where they had an error in judgment one time, made a mistake; the Court should take that into consideration." 4RP 37. The court also considered the charges that were dropped as part of the plea bargain, "especially for someone who previously was convicted of possessing a firearm." 4RP 37-38. Smith was aware that possessing a firearm was illegal and he was aware that prostitution was illegal, although he "may not have appreciated the full ramifications of that, how serious it was or what the extent of the sentencing might be." 4RP 38-39.

The court was unpersuaded that talking about the illegal activity during the jail calls was "just because of youthfulness" because "we have adults in here all the time who know that their calls are being recorded." 4RP 39. "[T]here's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct. So I don't think that supports an exceptional sentence downward." 4RP 39-40. The court imposed a standard range sentence of 111 months. CP 157; 4RP 41.

On appeal, Smith argued the court erred in failing to fully and meaningfully consider the mitigating factors of youth under the legal standard set forth in State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). See Brief of Appellant at 12-25; Reply Brief at 1-3. In a split decision, the two-judge majority held the trial court committed no error and Smith could not challenge the decision on appeal. Slip op. at 10-13. The dissenting judge would have remanded for meaningful consideration of the Houston-Sconiers factors not addressed by the trial court. Slip op. at 16-19 (Glasgow, J., dissenting in part). The Court of Appeals rejected Smith's argument that the supervision and collection costs imposed as part of his sentence should be stricken. See Brief of Appellant at 26-31; Motion to Reconsider; Slip op. at 14; Order Denying Reconsideration.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT FAILED TO FULLY AND MEANINGFULLY CONSIDER THE MITIGATING FACTORS OF YOUTH IN DECLINING TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD.

The trial court sentenced Smith, who has no history of violent crime, to almost 10 years in prison for a non-violent offense committed when he was 16 years old. The trial court's rejection of Smith's request for an exceptional mitigated sentence based on youth cannot stand on appeal because the court failed to address each of the factors that it is required to address in exercising its discretion on the matter. The Court of Appeals decision affirming the trial court's decision conflicts with Supreme Court precedent, warranting review under RAP 13.4(b)(1).

In considering the mitigating qualities of youth, courts "must address" the differences between children and adults in order to comply with the Eighth Amendment of the U.S. Constitution. State v. Houston-Sconiers, 188 Wn.2d 1, 19, 391 P.3d 409 (2017). "Houston-Sconiers established a category of punishments that are prohibited: adult standard SRA ranges and enhancements that would be disproportionate punishment for juveniles who possess diminished culpability. It also established a mechanism necessary to effectuate that substantive rule: sentencing courts must consider the mitigating qualities of youth and have discretion to

impose sentences below what the [Sentencing Reform Act] mandates." In re Pers. Restraint of Ali, 196 Wn.2d 220, 237, 474 P.3d 507 (2020).

The mitigating circumstances of youth that must be considered include "age and its 'hallmark features,' such as the juvenile's 'immaturity, impetuosity, and failure to appreciate risks and consequences.'" Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller v. Alabama, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). "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.

In other words, when tasked with sentencing a juvenile, the court "must conduct a meaningful, individualized inquiry" into whether the defendant's youth should mitigate his or her sentence. State v. Solis-Diaz, 194 Wn. App. 129, 132, 376 P.3d 458 (2016), rev'd on other grounds, 187 Wn.2d 535, 387 P.3d 703 (2017). "[A] sentencer [must] follow a certain process — considering an offender's youth and attendant characteristics — before imposing a particular penalty." State v. Bassett, 198 Wn. App. 714, 725, 394 P.3d 430 (2017) (quoting Miller, 567 U.S. at 483), aff'd, 192

Wn.2d 67, 428 P.3d 343 (2018). And that process requires consideration of the circumstances set forth in Houston-Sconiers. Bassett, 198 Wn. App. at 725. This is not a passive exercise. The court must actively assess, on the record, why the requisite factors for consideration do or do not support the exceptional sentence request.

The court here did not "fully and meaningfully" consider Smith's "individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability." Solis-Diaz, 194 Wn. App. at 141. The court did not comply with the standard for exercising discretion set forth in Houston-Sconiers and its progeny.

The trial court expressed its belief that "there's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct," while simultaneously acknowledging Smith "may not have appreciated the full ramifications of that, how serious it was or what the extent of the sentencing might be." 4RP 38-40. The court thus obliquely recognized Smith's "failure to appreciate risks and consequences," Houston-Sconiers, 188 Wn.2d at 23, but only in a cursory fashion. As observed by the dissent: "When discussing the first factor, the trial court did not mention or address Dr. Ronald Roesch's conclusion that Smith's youth and lack of maturity would have caused him to fail to

appreciate the consequences of his crime, including the potential impacts on his girlfriend." Slip op. at 17.

Another factor is "the extent of the juvenile's participation in the crime." Id. (quoting Miller, 567 U.S. at 477). The court determined the two worked together but that H.H. was the victim. 4RP 41. The court noted Smith had a previous firearm conviction and remarked Smith's criminal activity was not a one-time mistake, suggesting it wasn't impulsive for this reason. 4RP 37. The court did not otherwise address Smith's immaturity in any meaningful sense. The court did not acknowledge or incorporate the forensic psychologist's observations and conclusions about Smith's immaturity into its decision.

The court completely failed to address "the nature of the juvenile's surrounding environment and family circumstances" and "the way familial and peer pressures may have affected him." Houston-Sconiers, 188 Wn.2d at 23. Smith's family circumstances were bleak, his household unstable. CP 102-03, 138-39. Smith had no control over his family circumstances. He was exposed to domestic violence and criminal activity from an early age. CP 76-79, 85, 88-89, 138-39, 141. He was exposed to criminal activity as well. His mother was a drug user. CP 79, 85, 88-89, 139. It is no surprise that Smith, as a child looking to a parent for guidance, followed her example. CP 88, 140-41. His mother's later

boyfriend was a drug dealer and gave drugs to Smith to sell to others. CP 82-83, 88, 139. Smith's parents both engaged criminal activity leading to incarceration. CP 103, 139. Criminal activity was normalized for him. Smith learned from those around him that engaging in criminal activity was an acceptable way to live. He did not have appropriate role models from which to learn how to act in the community. CP 146. His parents provided little supervision or discipline. CP 146. He did not have a social support system. CP 143. He did not have an adequate community support to help him navigate his difficult family circumstances. CP 103-04, 140. None of this was addressed by the court in sentencing Smith.

Where a court is required to consider the requisite factors when sentencing a juvenile, "silence does not constitute reasoning." In re Pers. Restraint of Domingo-Cornelio, 196 Wn.2d 255, 268, 474 P.3d 524 (2020) (citing State v. Ramos, 187 Wn.2d 420, 444, 387 P.3d 650 (2017) (courts must "thoroughly explain [their] reasoning" as to why a juvenile deserves a life without parole sentence, "specifically considering the differences between juveniles and adults" in the process)).

Further, one of the singular "family circumstances" not addressed by the court is the devastating impact of his older brother's death. CP 93-94, 106, 138, 141. Trauma informs Smith's development. CP 104. In sentencing Smith, the court proceeded as if it did not matter. At

sentencing, the prosecutor told the court that he was "not here to discuss Keonte Smith's upbringing or his life." 4RP 23. That was the prosecutor's prerogative. Unfortunately, the court did not discuss Smith's upbringing or life either. Unlike the prosecutor, the court did not have the freedom to ignore Smith's background. The law mandates its consideration.

The court also completely failed to consider "any factors suggesting that the child might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23. The psychologist found Smith amenable to treatment. CP 69, 144, 146. The Team Child attorney who worked with him concurred in this assessment. CP 104. Smith expressed remorse for his actions, expressed willingness to change, and had engaged counseling. CP 71, 104, 149-51. In sentencing Smith to nearly 10 years in prison, the court made no mention of his prospects for rehabilitation.

In State v. Delbosque, 195 Wn.2d 106, 115-20, 456 P.3d 806 (2020), the trial court's sentencing decision of a juvenile was reversed because some findings were unsupported. The majority in Smith's case thought Delbosque was distinguishable because it involved a Miller-fix hearing and "[o]ur Supreme Court has not extended the level of scrutiny required at a Miller hearing to a standard sentencing hearing." Slip op. at 11. This is a false dichotomy. There is one heightened standard and it is to be applied whenever a juvenile is sentenced.

The majority's conclusion is particularly troubling in light of what happened in State v. Morales, where Judge Arend – the same judge who sentenced Smith – declined to impose an exceptional mitigated sentence based on the juvenile's youth. State v. Morales, 12 Wn. App. 2d 1078, 2020 WL 1696949, at *4 (2020) (unpublished), review granted, cause remanded, 195 Wn.2d 1030, 468 P.3d 614 (2020). Division Two originally affirmed because Judge Arend recognized she had discretion to impose an exceptional sentence and considered Morales's youth, various declarations on behalf of Morales, and the Houston-Sconiers decision. State v. Morales, 12 Wn. App. 2d 1078, 2020 WL 1696949, at *4 (2020) (unpublished), review granted, cause remanded, 195 Wn.2d 1030, 468 P.3d 614 (2020). This Court granted review and remanded for reconsideration in light of Delbosque. 195 Wn.2d 1030.

On remand, Division Two reversed itself and held Judge Arend abused her discretion in failing to meaningfully consider Morales's youth on the record at sentencing. State v. Morales, __ Wn. App. 2d __, 51279-3-II, 2020 WL 7040658 (slip op. filed Dec. 1, 2020) (unpublished). Division Two reasoned "Delbosque makes clear that sentencing courts must meaningfully consider on the record how the characteristics of youth may mitigate the culpability of a juvenile offender." Morales, 2020 WL 7040658, at *1. Morales was not a Miller-fix case. Yet the majority in

Smith's case declared Delbosque was not controlling because it was a Miller-fix case. What gives?

Domingo-Cornelio was not a Miller-fix case either. There, the Supreme Court declared "[u]nless the court meaningfully considers youth and knows it has absolute discretion to impose a lower sentence, we cannot be certain that an adult standard range was imposed appropriately on a juvenile under Houston-Sconiers." Domingo-Cornelio, 196 Wn.2d at 268. In this regard, the dissent's critique is spot on: "Absent some discussion on the record, I do not know how we can evaluate whether the trial court fulfilled its duty to *meaningfully* consider the Houston-Sconiers factors, where the trial court failed to even mention two-thirds of the factors. Smith's family circumstances, history of trauma, and prospects for rehabilitation were arguably the most significant factors at play in Smith's sentencing." Slip op. at 18.

The trial court did not fully address Smith's immaturity in any meaningful sense, failing to incorporate the forensic psychologist's observations and conclusions about Smith's immaturity into its decision. Houston-Sconiers, 188 Wn.2d at 23. The court completely failed to address "the nature of the juvenile's surrounding environment and family circumstances" and "the way familial and peer pressures may have affected him." Id. (quoting Miller, 567 U.S. at 477). The court also

outright failed to address "any factors suggesting that the child might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23; compare State v. Backstrom, __Wn. App. 2d__, __P.3d__, No. 77134-5-I, 2020 WL 6867960, at *2 (slip op. filed Nov. 2, 2020) (no abuse of discretion where the trial court "explicitly, thoughtfully, and carefully considered" each of the required factors, including the potential for rehabilitation).

The Court of Appeals wrote: "Smith did not assign error to any finding made by the trial court or contend that any finding made by the trial court was not supported by substantial evidence. As such, the factual findings are verities on appeal." Slip op. at 11. The court's oral opinion rendered at sentencing is not a "finding of fact," so Smith cannot be faulted for failing to assign error to any oral finding. State v. Williamson, 72 Wn. App. 619, 623, 866 P.2d 41 (1994). Indeed, "a party may not assign error to the oral findings of the trial court." State v. Hales, 44 Wn. App. 749, 752, 723 P.2d 490 (1986); Sweeten v. Kauzlarich, 38 Wn. App. 163, 169, 684 P.2d 789 (1984) (statements in an oral decision do not "constitute proper grounds for assignments of error.").

That said, Smith in his appellate briefing challenged the trial court's oral decision piece by piece in service of his argument that the court did not comply with the controlling legal standard. The nature of his argument, and his challenge to the trial court's decision, was and is

perfectly clear. The Court of Appeals, though, believed "[w]ithout challenging the trial court's findings for lack of substantial evidence, our inquiry is limited to whether the court categorically refused to consider Smith's youth or relied on an impermissible basis when denying his request for an exceptional sentence." Slip op. at 11. Artificially limiting review in this manner does not comport with precedent. "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). The applicable law is the standard set forth in Houston-Sconiers and its progeny. Discretion is abused when the court misapplies the law. Delbosque, 195 Wn.2d at 116. The trial court here misapplied the law in failing to meaningfully consider each of the mandated factors in sentencing a juvenile. The court cannot be deemed to have followed controlling law when it wholly fails to consider at least three of the mandated factors on the record.

Smith reiterates his request that a different judge should resentence him on remand to comply with the appearance of fairness. State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

2. THE SUPERVISION AND COLLECTIONS COSTS MUST BE STRICKEN BECAUSE SMITH IS INDIGENT AND THE TRIAL COURT DID NOT INTEND TO IMPOSE THEM.

Courts cannot order indigent defendants to pay costs. RCW 10.01.160(3). The Court of Appeals refused to remand to strike the supervision fee or the collection fee on the theory that neither is a "cost" under RCW 10.01.160. Slip op. at 14; CP 157-58. The point is debatable. Division One held community custody fees are discretionary legal financial obligations (LFOs) whether or not they fall within the definition of "costs" under RCW 10.01.160 and, as such, should be waived for an indigent defendant. State v. Reyes-Rojas, __Wn. App. 2d__, 80137-6-I, 2020 WL 6708241, at *3 (slip op. filed Nov. 16, 2020) (unpublished).

Regardless of whether these LFOs are "costs," the record shows the trial court did not intend to impose them. The Court of Appeals decision conflicts with State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020), a case decided after the briefing was completed in Smith's case but cited in his motion to reconsider. Review is warranted under RAP 13.4(b)(2).

In Dillon, the Court of Appeals struck the supervision fee because the record showed the trial court intended to impose only mandatory LFOs. Dillon, 12 Wn. App. 2d at 137, 152. The record in Smith's case is

comparable. Defense counsel requested waiver of nonmandatory LFOs due to indigency. RP 21. The court found Smith indigent and the waived the discretionary two-thirds portion of the trafficking fee. RP 41; RCW 9A.40.100(4). The court noted the \$500 crime victim assessment was mandatory, "but *everything else now*, the filing fee is not mandatory any longer; it's waived with a finding of indigency. Attorney's fees, of course, is also waived." RP 41 (emphasis added). The court also waived the \$100 DNA fee. RP 41-42. The supervision and collection fees were boilerplate parts of the judgment and sentence and the court did not mention them at sentencing. CP 157-58; Dillon, 12 Wn. App. 2d at 152. Given the court's express ruling on the record that it found Smith indigent and, aside from mandatory LFOs, was waiving "everything else," it is plain the court did not intend to impose any discretionary LFOs. RP 41. The remedy is remand to strike these LFOs. Dillon, 12 Wn. App. 2d 137, 152.

F. CONCLUSION

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

DATED this 2nd day of December 2020.

Respectfully submitted,


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APPENDIX A

August 25, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEONTE AMIR SMITH,

Appellant.

No. 52323-0-II

UNPUBLISHED OPINION

CRUSER, J. — Keonte Smith appeals his sentence for second degree human trafficking. Smith argues that the trial court abused its discretion when failing to fully and meaningfully consider his youth as a mitigating factor during sentencing, and the community custody supervision fee, collection fee, and the interest accrual provision on his nonrestitution legal financial obligations (LFOs) should be stricken from his judgment and sentence.

We hold that the trial court considered Smith’s youth as a mitigating factor and acted within its discretion when it denied his request for an exceptional sentence downward and affirm his sentence. However, we remand to the trial court to vacate the interest accrual provision on his nonrestitution LFOs from Smith’s judgment and sentence.

FACTS

On November 24, 2016, law enforcement received a complaint regarding an unwanted person in a motel room. Upon their arrival to the motel room, law enforcement found Smith in the room with a handgun next to him. Smith was arrested and placed in detention.

While Smith was in detention, law enforcement reviewed recorded detention phone calls between Smith and his girlfriend, HH. HH met Smith two months prior to Smith’s arrest. In several

of the phone calls, Smith and HH discussed prostitution and prostitution-related activities. During multiple phone conversations, HH spoke of “bringing money in” and told Smith about other males who wanted HH to work on their “team.” Clerk’s Papers (CP) at 186. Smith expressed frustration about HH pairing up with other males. Smith told HH that it was not “safe” to go on hotel dates while he was in detention and that if she needs help, to call his sister or a mutual friend. *Id.* Smith directed HH to put money on his phone account in detention and warned her that she better not be “with someone else.” *Id.* at 187. At the time, HH was 16 years old and Smith was 17 years old.

After Smith’s arrest, the defense interviewed HH. During the interview, HH stated that she and Smith jointly decided to engage in prostitution when they “decided to make money together.” *Id.* at 60. HH explained that Smith would help her set up dates and get hotel rooms. HH kept all the money and would not give any to Smith, although he often would steal some of the money for himself. HH also put some of the money she made on dates on Smith’s phone account while he was in detention.

The State charged Smith with second degree human trafficking, promoting commercial sexual abuse of a minor, and second degree unlawful possession of a firearm. The State moved for the juvenile court to decline juvenile jurisdiction pursuant to former RCW 13.40.110(2) (2009). After considering testimony from multiple witnesses, arguments from counsel, and the pleadings, the court granted the State’s motion and ordered Smith to be transferred for adult criminal prosecution. Among other considerations, the court noted that the adult court would be required to consider youth as a mitigating factor at sentencing in the event Smith was convicted.

Smith pleaded guilty to second degree human trafficking and the State dropped all other charges.

The trial court calculated Smith's offender score as 2.5. Based on that offender score, Smith faced a standard range sentence of 111 to 147 months of incarceration and 18 months of community custody. Smith requested an exceptional sentence of 36 months of incarceration followed by 18 months of community custody. In juvenile court, second degree human trafficking carries of sentence of 103 to 129 weeks of confinement.

Smith submitted a 75 page sentencing memorandum to the court. In his sentencing memorandum, Smith highlighted revisions to the Juvenile Justice Act that took effect in June 2018, less than a year after Smith was denied juvenile jurisdiction.¹ The legislature revised the act to eliminate the crime of second degree human trafficking as a basis for declining juvenile jurisdiction to a respondent. Smith argued that the change supported an exceptional sentence aligned with a sentence Smith would be facing if sentenced in juvenile court.

Also in his sentencing memorandum, Smith provided information about his upbringing. Throughout his childhood, Smith's father was in and out of jail. His mother used drugs extensively and drank heavily. His mother often left Smith with others or would abandon him with strangers. Smith witnessed his father abuse his mother starting at a young age. Smith remembers his father stuffing a sock into his mother's mouth and beating her when he was a toddler. Smith frequently witnessed his father beat his mother with his fists, a belt, or other objects. His mother was often

¹ Under former RCW 13.40.110(2)(a) (2009), a decline hearing was mandatory if a juvenile defendant was charged with a class A felony. Second degree human trafficking is a class A felony. RCW 9A.40.100(3)(b). The statute was revised by *Laws of 2018 ch. 162, § 4*. The revised version omits this requirement, but came into effect in June 2018. *See* former RCW 13.40.110(2) (2018). The State moved for the court to decline juvenile jurisdiction in September 2017.

hospitalized, and his father was often arrested for these assaults. Smith stated he frequently has nightmares about the violence.

Smith's childhood worsened when he was 12 years old. Smith's father took Smith and his older brother to a lake to swim after his parents got into an argument. Smith could not swim, but remembers watching others frantically search for his brother in the lake after his brother was heard screaming for help and seen flailing his arms. Their efforts were unsuccessful. Smith remembers watching a rescue team bring his brother's body out of the water 45 minutes later. Smith expressed how he suffers daily trauma from this event, including nightmares of how his brother looked when the rescue team pulled his body from the water.

After this incident, Smith became depressed and anxious. He started doing poorly in school and he dropped out of his sports teams. Smith described becoming less social and getting into trouble more often. Less than six months after his brother's death, Smith was arrested for his first offense at age 13. Smith has been in and out of custody ever since.

Also, after his brother's death, Smith's father moved out of the home. His mother moved another man into the home, who was a known drug dealer and former pimp. He would give Smith drugs to sell so that Smith could earn his own money. Smith started using marijuana in sixth grade; by ninth grade, Smith used marijuana, Xanax, and alcohol on a daily basis.

Smith presented a forensic assessment by Dr. Ronald Roesch, a clinical psychologist, for consideration by the court during sentencing. Smith had "very high scores on the Anxiety and Depression scales." *Id.* at 141. Roesch concluded that Smith was a low to moderate risk for recidivism and low risk for future violent behavior. The factors that elevated these risks were not in Smith's control, which included his unstable and abusive home life, negative adult role models,

and lack of social support network, which forced Smith to leave his home to survive at an early age. Roesch also noted that Smith had a low risk for violent behavior because prior to his arrest, Smith did not have a history of violent behaviors or anger issues.

Roesch concluded that Smith's level of maturity and sophistication was lower than other youth offenders. He noted that young individuals with Smith's maturity and sophistication "have a diminished capacity for judgment, do not tend to weigh the costs and benefits of a given behavior before acting, and do not fully understand the consequences of their actions." *Id.* at 144.

[Smith] did not have at the time of his arrest, sufficient sophistication or maturity to function autonomously. His scores on the Sophistication-Maturity scale described earlier in this report indicated that he had difficulty appreciating the long-term consequences of decisions, was less capable of imagining risky consequences of decisions, and more likely to only consider only a restricted number and range of consequences. In terms of his involvement in the behavior that led to his charge of human trafficking, it does not appear that he perceived the magnitude or the long-term consequences of this offense. Indeed, it appears that he may not have grasped that what he was doing was wrong, either morally or criminally. As noted earlier in this report, [Smith] said "it never crossed my mind that I could get in big trouble. I didn't think of the consequences." He told me "I didn't think I could get arrested for what I was doing. I didn't know there were charges for that." Certainly, ignorance of the law is not an excuse for engaging in this criminal act, but his thinking does reflect his lack of maturity and sophistication. A review of the telephone calls he made from detention reflects this lack of appreciation. He was aware his calls were monitored yet he did not try to be discrete in discussing the acts of prostitution with H.H.

Id. at 145-46.

Roesch also explained Smith's low maturity and sophistication level as related to his cognitive development.

In my clinical opinion, although [Smith] was living what appeared to be an adult lifestyle when he was arrested at age 16, he did not have the maturity and cognitive development to appreciate the choices he was making. He was clearly engaged in a delinquent lifestyle, and had been since age 13. This type of lifestyle is virtually all he learned through the adults in his life. . . . As the research on brain development clearly shows, [Smith's] capacities for reasoned decision making and controlling

his impulses were not developed during his teen years prior to his arrest. He was also using drugs quite heavily, which I expect was further clouding his judgment about his life choices.

Id. at 146.

The assessment also concluded that Smith scored above most young offenders in amenability to treatment. Roesch submitted that Smith “is certainly amenable to treatment, as indicated by his scores on the Treatment Amenability scale . . . and his participation in treatment since he has been in detention. He has a number of problems that would benefit from treatment but his problems are not particularly difficult to treat.” *Id.* at 146.

The court heard arguments from counsel. Smith’s counsel largely summarized and reiterated the information provided in Smith’s sentencing memorandum. The prosecutor summarized Smith’s criminal history and asked the court to impose a standard range sentence, arguing that Smith was getting older and more violent. The prosecutor also argued that the court should decline Smith’s request for an exceptional sentence because the State already factored in Smith’s youth when the State dismissed Smith’s other charges as part of the plea deal. The prosecutor recommended a sentence of 111 months, the bottom of the sentencing range.

In its oral ruling, the court stated that it read Smith’s sentencing memorandum and that “to the extent that anybody is reviewing this decision at some later date, I have considered all of it.” Verbatim Report of Proceedings (VRP) (Aug. 2, 2018) at 35. The court acknowledged its duty to consider Smith’s youth. The court expressed concern that this was the second time Smith had been charged with possession of a firearm. Smith had pleaded guilty to possession of a firearm and served 98 days in detention in 2015. The court stated that the possession of a firearm charge

speaks to a number of issues including, you know, whether this is something that -
- you know, when they talk about juvenile and brain development and impulsivity

and all of that, it's not -- it's me looking at this criminal act but certainly looking at his behavior over time as well. This is not somebody just engaging in something where they had an error in judgment one time, made a mistake; the Court should take that into consideration.

Id. at 37.

The court stated that it would take into consideration the fact that the State dropped charges due to Smith's youth when making a plea deal. The court further stated,

Throughout all of these documents, I didn't really hear and I don't really believe, honestly, a credibility issue; that Mr. Smith didn't understand that possessing a firearm was against the law since he previously had been charged with it, and I don't believe that he thought that prostitution was not against the law. He may not have appreciated the full ramifications of that, how serious it was or what the extent of the sentencing might be. And why I get to that conclusion is in part because of something that I read about the phone calls, listening to the phone calls, that he was on a recorded line, but didn't appreciate that someone could listen to it and, therefore, it could result in charges. You know, we have adults in here all the time who know that their calls are being recorded. . . . So I don't think, quite frankly, I'm not persuaded that that is something that is just because of youthfulness.... [T]hey're aware that it's being recorded. I think he was aware that prostitution is illegal, maybe didn't fully appreciate how serious it was, but . . . there's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct.

Id. at 38-39. The court found that HH was the ultimate victim and was injured by Smith's criminal acts.

The court was unpersuaded that Smith should receive an exceptional sentence. The court sentenced Smith to 111 months confinement followed by 18 months of community custody, a sentence within the standard range. The court found that Smith was indigent and waived discretionary LFOs. The court imposed a collection fee, the interest accrual provision, and community custody supervision fees as determined by the Department of Corrections.

Smith appeals his sentence.

DISCUSSION

I. YOUTH AS A MITIGATING FACTOR

Smith argues that the trial court abused its discretion by failing to fully and meaningfully consider Smith's youth as a mitigating factor when it determined that Smith's youth did not justify an exceptional sentence. We disagree.

A. LEGAL PRINCIPLES

In general, a party cannot appeal a sentence within the standard range. *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). "However, a defendant may appeal the process by which a trial court imposes a sentence." *In re Pers. Restraint of Marshall*, 10 Wn. App. 2d 626, 635, 455 P.3d 1163 (2019) (emphasis omitted). By challenging the process, a defendant challenges the trial court's refusal to exercise its discretion or the legal conclusions and determinations that form the basis of the court's refusal to impose an exceptional sentence. *Id.* (quoting *State v. Ramos*, 187 Wn.2d 420, 433, 387 P.3d 650 (2017)). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis omitted). Therefore, remand is the appropriate remedy when a trial court imposes a sentence without meaningfully considering an authorized mitigated sentence. *Id.* at 342-43.

Under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, a court may impose a sentence outside the standard sentence range for an offense if it finds "that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535 (2016). A sentencing court must find that the mitigating circumstances that justify a sentence below the standard range

are established by a preponderance of evidence. *Ramos*, 187 Wn.2d at 434. One of the possible factors that a sentencing court may use to justify an exceptional downward sentence is a defendant's youth. *State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015).

Courts have "an affirmative duty to ensure that proper consideration is given to the juvenile's 'chronological age and its hallmark features.'" *Ramos*, 187 Wn.2d at 443 (quoting *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). Those features include (1) mitigating circumstances of youth, including the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the juvenile's environment and family circumstances, the juvenile's participation in the crime, or the effect of familial and peer pressure; and (3) how youth impacts any legal defense, as well as any factors suggesting that the child might be rehabilitated. *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017) (quoting *Miller*, 567 U.S. at 477).

Courts are required to consider these differences during sentencing in order to comply with the Eighth Amendment. *Id.* at 19. When doing so, courts must "fully and meaningfully" inquire into the individual circumstances of the particular juvenile offender. *State v. Solis-Diaz*, 194 Wn. App. 129, 141, 376 P.3d 458 (2016) (citing *O'Dell*, 183 Wn.2d at 696), *rev'd in part on other grounds*, 187 Wn.2d 535, 387 P.3d 703 (2017). However, "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *O'Dell*, 183 Wn.2d at 695. Trial courts retain full discretion when considering the imposition of an exceptional sentence based on mitigating circumstances associated with youth. *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 314, 440 P.3d 978 (2019).

B. ANALYSIS

Smith relies on *State v. Delbosque*, 6 Wn. App. 2d 407, 430 P.3d 1153 (2018), *rev'd in part on other grounds*, 195 Wn.2d 106, 456 P.3d 806 (2020), in support of his claim that the trial court did not meaningfully consider his request for an exceptional sentence. Delbosque committed aggravated first degree murder in 1993 when he was 17 years old and received a mandatory sentence of life in prison without parole. *Id.* at 410. Following a resentencing hearing pursuant to the *Miller*-fix statute² in 2016, the trial court sentenced Delbosque to a minimum term of 48 years. *Id.* at 410, 412. The court stated that it considered the appropriate factors but determined that Delbosque's attitude toward others was "reflective of the underlying crime," and that the crime "was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity." *Id.* at 416-18.

On appeal, Delbosque successfully argued that insufficient evidence supported the trial court's findings, and the Supreme Court affirmed. *Delbosque*, 195 Wn.2d at 120. The Supreme Court reiterated that when considering a defendant's youth at a *Miller* hearing, a sentencing court "must *meaningfully* consider how juveniles are different from adults." *Id.* at 121 (alteration from original) (quoting *Ramos*, 187 Wn.2d at 434).

² Following *Miller*, the Legislature enacted RCW 10.95.030(3)(b), which provides in relevant part,

In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

Delbosque is distinguishable from Smith’s case. First, Smith was not sentenced following a *Miller* hearing. We recognize that trial courts, whether conducting a resentencing hearing pursuant to the *Miller*-fix statute or an ordinary sentencing proceeding, have the affirmative duty to address the differences between adults and youths, and to “fully and meaningfully” inquire into the individual circumstances of the particular juvenile offender. *Solis-Diaz*, 194 Wn. App. at 141 (citing *O’Dell*, 183 Wn.2d at 696); *see also Houston-Sconiers*, 188 Wn.2d at 19; *Ramos*, 187 Wn.2d at 434. Based on our guidance from the Supreme Court, *Miller* hearings involve the heightened scrutiny that accompanies the sentencing of juveniles under RCW 10.95.030. *See State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (2019) (When conducting a resentencing hearing under the *Miller*-fix statute, the court must “tak[e] care to thoroughly explain its reasoning.”); *see also Ramos*, 187 Wn.2d at 443 (“[A] court conducting a *Miller* hearing must do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified.”). Our Supreme Court has not extended the level of scrutiny required at a *Miller* hearing to a standard sentencing hearing.

Second, Smith did not assign error to any finding made by the trial court or contend that any finding made by the trial court was not supported by substantial evidence. As such, the factual findings are verities on appeal. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Without challenging the trial court’s findings for lack of substantial evidence, our inquiry is limited to whether the court categorically refused to consider Smith’s youth or relied on an impermissible basis when denying his request for an exceptional sentence. *See Marshall*, 10 Wn. App. 2d at 635 (quoting *Ramos*, 187 Wn.2d at 433). Here, Smith alleges that the trial court abused its discretion by failing to even consider the evidence he presented before deciding against imposing an

exceptional sentence. We disagree with Smith and hold that the trial court properly exercised its discretion.

At Smith's sentencing hearing, the court heard extensive argument from counsel. Before imposing Smith's sentence, the trial court stated that it was "not going to address everything," but it fully reviewed and considered Smith's lengthy sentencing memorandum and his mitigating evidence. VRP (Aug. 2, 2018) at 35. The trial court also confirmed that it was familiar with *Houston-Sconiers* and its duty to consider Smith's age as a potential mitigating factor.

The trial court's ruling referenced juvenile brain development and impulsivity. The court noted that Smith had previously been convicted of possession of a firearm. As a result, the court stated that the offense at issue was not an isolated mistake or a one-time lapse in judgment, and therefore consideration of possible impulsivity on Smith's part did not weigh in favor of an exceptional sentence. The court also found that Smith understood that possession of a firearm and prostitution were against the law, but that Smith "may not have appreciated the full ramifications of that, how serious it was or what the extent of the sentencing might be." *Id.* at 39. Last, the court found that Smith's potential inability to understand the seriousness and the consequences of his actions did not diminish his culpability to the point that an exceptional sentence should be imposed. Ultimately, the court was not persuaded that the evidence Smith presented warranted a departure from the standard range.

The record demonstrates that the trial court did not exceed the limits of its considerable discretion in imposing a standard range sentence. The court stated on the record that it fully considered the evidence Smith submitted, and it heard extensive argument from Smith. The court was well apprised of the law and aware of its duty to consider youth as a mitigating factor at

sentencing. Although Smith takes issue with the court's ruling, his criticisms ultimately go to the *decision* the court reached rather than the manner in which the court exercised its discretion. We are mindful of the concerns expressed by the dissent about the harshness of Smith's sentence. The sentence he received stands in stark contrast to the sentence he would have received had he been prosecuted in juvenile court under the current version of the decline statutes. RCW 13.40.110; RCW 9.94A.030(47). However, our inquiry on appeal is not whether we agree with the judgment of the trial court, but whether the trial court refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. Khanteechit*, 101 Wn. App. 137, 140, 5 P.3d 727 (2000). Accordingly, we conclude that the trial court acted within its discretion when it imposed a low-end standard range sentence.

We hold that because the court did not abuse its discretion, Smith may not appeal his standard range sentence.

II. LEGAL FINANCIAL OBLIGATIONS

Smith argues that the trial court erred when imposing the collection fee, the community custody supervision fee, and the interest accrual provision because he is indigent. We agree with Smith as it relates to the nonrestitution interest accrual provision. We disagree with Smith as it relates to the supervision fee and collection fee because they are not costs under RCW 10.01.160(2). However, because this matter will be remanded to address the interest accrual provision, the trial court is permitted on remand to reconsider imposition of these discretionary LFOs.

Smith argues that the interest accrual provision for nonrestitution LFOs should be stricken because the provision is no longer authorized by statute. The trial court imposed interest on the

nonrestitution LFOs from the date of judgment, August 2, 2018. But RCW 10.82.090(1) now provides that as of June 7, 2018, “no interest shall accrue on nonrestitution [LFOs].” The amended version of RCW 10.82.090(1) applies to Smith because he was sentenced after June 7, 2018. Because the statute now prohibits interest on nonrestitution LFOs, the interest accrual provision in Smith’s judgment and sentence must be stricken. RCW 10.82.090(1).

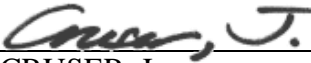
Smith also argues that the community custody supervision fee and collection fee should not be imposed on him as an indigent defendant because they are discretionary LFOs. “House Bill 1783 amend[ed] the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing.” *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). While neither the supervision fee nor the collection fee are considered a “cost” under RCW 10.01.160(2), we encourage the trial court to reconsider the imposition of these fees on remand in light of *Ramirez*. See *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015).³

³ Smith also argues that we should reassign his case to a different judge on remand to preserve the appearance of fairness because whether to impose an exceptional sentence is entirely discretionary. Because we hold that the trial court properly considered Smith’s sentencing request, the court will not be asked to exercise its discretion on remand. Therefore, we do not address his argument and deny his request for reassignment on remand.

CONCLUSION


We affirm Smith's standard range sentence, but we remand to the trial court to strike the nonrestitution interest accrual provision from Smith's judgment and sentence.

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.



CRUSER, J.

I concur:



MAXA, P.J.

GLASGOW, J. (dissenting in part)—Keonte Amir Smith was 16 years old when he committed second degree human trafficking. He helped set up “hotel dates” that his 16-year-old girlfriend, HH, was going on, and he shared proceeds from these dates. Clerk’s Papers (CP) at 186. Smith did not use force or intimidation to commit this crime. Smith stole money from HH at least once while she was asleep, but otherwise she said that they worked together.

Smith pleaded guilty only to second degree human trafficking. Nevertheless, at sentencing, the trial court focused on his charge of possession of a firearm, concluding that this charge indicated his criminal behavior was escalating, even though there was no evidence that Smith had used force or violence or had any history of violence. The trial court also focused on its assessment of whether Smith knew that his actions were illegal, concluding that because this was not his first offense, his crime could not be attributed to the impulsivity of youth.

As the majority succinctly explains, in order to comply with the Eighth Amendment, a court at sentencing has “an affirmative duty to ensure that proper consideration is given to the juvenile’s ‘chronological age and its hallmark features.’” *State v. Ramos*, 187 Wn.2d 420, 443, 387 P.3d 650 (2017) (quoting *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). A sentencing court must consider: (1) mitigating circumstances of youth, including the juvenile’s “‘immaturity, impetuosity, and failure to appreciate risks and consequences;” (2) the juvenile’s environment and family circumstances, the juvenile’s participation in the crime, or the effect of familial and peer pressure; and (3) how youth impacted any legal defense, as well as any factors suggesting that the child might be rehabilitated. *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017) (quoting *Miller*, 567 U.S. at 477).

Significantly, a court that is sentencing a juvenile must “fully and meaningfully consider” the individual circumstances of the particular juvenile offender. *State v. Solis-Diaz*, 194 Wn. App. 129, 141, 376 P.3d 458 (2016) (citing *State v. O’Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015)), *rev’d in part on other grounds*, 187 Wn.2d 535, 387 P.3d 703 (2017). Here, the trial court expressly discussed only the first *Houston-Sconiers* factor and otherwise simply stated that it had “considered” Smith’s sentencing memorandum and counsel’s arguments at the hearing, pointing out that “it’s 4:00.” Verbatim Report of Proceedings (Aug. 2, 2018) (VRP) at 35. This lack of discussion leaves this court unable to determine whether the *Houston-Sconiers* factors were *meaningfully* considered.

When discussing the first factor, the trial court did not mention or address Dr. Ronald Roesch’s conclusion that Smith’s youth and lack of maturity would have caused him to fail to appreciate the consequences of his crime, including the potential impacts on his girlfriend.

More importantly, the latter *Houston-Sconiers* factors were significant here, but the trial court seems to have ignored them. As the majority explains, Smith’s environment and family circumstances were remarkably difficult and this likely had a significant impact on his ability to engage in good decision-making as a teenager. Smith’s father was in and out of jail and prison for assaulting his mother, while his mother consistently drank heavily and used drugs. His mother’s boyfriend actively encouraged Smith to sell drugs. The important adults in Smith’s life modeled only criminal activity and poor decision-making.

In addition, Smith suffered significant and complex trauma as a child, something the trial court did not even acknowledge when explaining its sentencing decision. As a toddler, he witnessed his father violently assault his mother, and these assaults continued throughout his

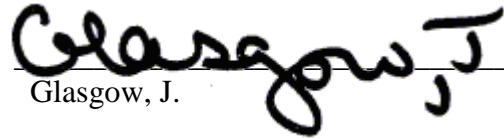
childhood. Smith witnessed the immediate aftermath of his brother's sudden death. It was shortly after this tragedy that Smith started getting onto trouble.

It is remarkable that Smith has avoided becoming violent, despite his family history. Dr. Roesch explained that Smith "is certainly amenable to treatment, as indicated by his scores on the Treatment Amenability scale . . . and his participation in treatment since he has been in detention. He has a number of problems that would benefit from treatment but his problems are not particularly difficult to treat." CP at 146. A structured risk assessment showed a low to moderate risk to reoffend and a low risk of violent behavior in the future. The trial court did not discuss at sentencing the chances that Smith could be rehabilitated or his capacity for change.⁴

I recognize that no appellate court has yet required that sentencing judges discuss each *Houston-Sconiers* factor on the record when sentencing a juvenile in adult court. And I recognize that the trial court here said on the record that it had "considered" all of the information provided to it. VRP at 35. But it sentenced a child to almost 10 years in prison for a nonviolent crime—a child with no history of violence at all—without mentioning his significant childhood trauma or an expert's assessment that he was amenable to treatment, making rehabilitation possible. Absent some discussion on the record, I do not know how we can evaluate whether the trial court fulfilled its duty to *meaningfully* consider the *Houston-Sconiers* factors, where the trial court failed to even mention two-thirds of the factors. Smith's family circumstances, history of trauma, and prospects for rehabilitation were arguably the most significant factors at play in Smith's sentencing.

⁴ Had Smith's case been adjudicated in juvenile court, something that would now be required under the current version of the decline statutes, he would have been sentenced to less than three years. RCW 13.40.110; RCW 9.94A.030(47).

As a result, I would remand for meaningful consideration of the remaining *Houston-Sconiers* factors on the record and resentencing if warranted. I respectfully dissent.


Glasgow, J.

APPENDIX B

November 2, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEONTE AMIR SMITH,

Appellant.

No. 52323-0-II


ORDER DENYING MOTION FOR
RECONSIDERATION

APPELLANT moves for reconsideration of the Court's August 25, 2020 unpublished opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Glasgow, Crusier

FOR THE COURT:



CRUSER, J.

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State of Washington
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State v. Keonte Smith

No. 52323-0-II

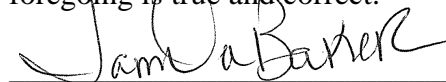
Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Keonte Smith 409895
Airway Heights Corrections Center
PO Box 209
Airway Heights, WA 99001-

Containing a copy of the Petition for Review, in State v. Keonte Smith,
Cause No. 52323-0-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Jamila Baker
Done in Seattle, Washington

12/2/2020

Date

NIELSEN KOCH P.L.L.C.

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Appellate Court Case Title: State of Washington, Respondent v. Keonte A. Smith, Appellant
Superior Court Case Number: 17-1-03573-6

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