102313-8

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH RICHMOND, Appellant.	No. 38841-7-III PETITION FOR REVIEW

I. IDENTITY OF PETITIONER

Joseph Richmond, Appellant/Petitioner, seeks the relief designated in Part II.

II. COURT OF APPEALS DECISION

On July 27, 2023, the Court of Appeals affirmed Mr. Richmond's sentence. A copy is attached.

III. ISSUES PRESENTED FOR REVIEW

Did the sentencing court abuse its discretion by mistakenly not applying the subjective prong of the test for self-defense and consequently declining to give mitigating effect to Mr. Richmond's claim of failed self-defense? Do the guarantees of due process, the prohibition against cruel punishment, and the right to a meaningful appeal require

that a judge explain, either orally or in writing, the factual and legal reasons for their decision not to impose an exceptionally lenient sentence?

IV. STATEMENT OF THE CASE

Joseph Richmond was convicted of murder after a jury concluded, based on the instructions given, that he was not acting in perfect self-defense.

After direct review and because of *State v. Blake*, 197 Wash. 2d 170, 481 P.3d 521 (2021), Mr. Richmond was resentenced with a corrected offender score. At resentencing, Richmond sought an exceptional sentence below the standard range based on "failed self-defense" and premised on the facts presented at trial.[1]

The Court of Appeals previously summarized the facts from trial:

> Dennis Higginbotham went to Joseph Richmond's property with two other individuals, Veronica Dresp and Lonnie Zackuse. Ms. Dresp was Mr. Richmond's estranged girlfriend. Ms. Dresp had asked Mr. Higginbotham and Ms. Zackuse to accompany her to

[1] The jury verdict was not informed by special interrogatories. Consequently, it is impossible to determine whether jurors considered and rejected self-defense or found that the defense did not apply because Richmond was a first aggressor.

Mr. Richmond's property so that she could remove some of her belongings.

When the trio arrived at Mr. Richmond's home, Ms. Dresp knocked on the door. Although there was no answer, Ms. Dresp could see Mr. Richmond inside. Ms. Dresp felt angry. She wanted to retrieve her belongings. Ms. Dresp advised Mr. Richmond that if he did not open the door, she would kick it down. She also told him she would break into the shed. To that end, she retrieved a crowbar from Mr. Higginbotham's van. As Ms. Dresp followed through on her promise to break into the shed, a police officer arrived at the scene in response to a call from Mr. Richmond.

The officer talked to Ms. Dresp and Mr. Richmond. It appears this helped mitigate the situation. With the officer's input, it was agreed Ms. Dresp would return the following day to retrieve her belongings from inside the residence. It was also agreed Ms. Dresp could immediately remove some belongings from a car parked on the property. With a plan for the removal of Ms. Dresp's property in place, the officer left, believing she had resolved the situation to the best of her ability.

Once the officer was gone, Ms. Dresp began removing items from the car with the help of Mr. Higginbotham and Ms. Zuckuse. Mr. Higginbotham's presence appeared to upset Mr. Richmond. Mr. Richmond began yelling, and an oral argument ensued between the two men. Although he was much smaller than Mr. Richmond, Mr. Higginbotham stated he was not afraid of Mr. Richmond. He said he was at the property only to help Ms. Dresp retrieve her belongings. Mr. Higginbotham was carrying a flashlight in his hand at this point in time. According to Ms. Dresp and Ms. Zackuse, Mr. Higginbotham appeared more frustrated than angry.

Mr. Higginbotham started walking toward Mr. Richmond as the two men argued. However, Ms. Dresp urged Mr. Higginbotham

away. Mr. Higginbotham and Mr. Richmond exchanged additional words and then Mr. Richmond went inside his house.

Mr. Richmond's return to the house was a relief. It appeared the hostility had come to an end. Unfortunately, this turned out not to be true. Instead, Mr. Richmond ran out of his house, armed with a two-by-four piece of lumber that was nearly four feet in length. Mr. Richmond and Mr. Higginbotham then started exchanging more words. Mr. Richmond warned Mr. Higginbotham not to come any closer to him. When Mr. Higginbotham took a step forward, Mr. Richmond struck Mr. Higginbotham with the two-by-four. According to Ms. Dresp and Ms. Zackuse, Mr. Richmond held the two-by-four like a baseball bat and swung it at Mr. Higginbotham's head. After he was hit, Mr. Higginbotham spun around and fell face first on the ground.

Ms. Dresp went to Mr. Higginbotham's aid, and Ms. Zackuse called 911. Meanwhile, Mr. Richmond ran out of the back of his house and drove away in a truck. As he left, Mr. Richmond threatened to shoot everyone if they did not leave the property.

When emergency personnel arrived at the scene, it was determined Mr. Higginbotham had suffered "severe head trauma." 3 Report of Proceedings (RP) (Feb. 4, 2016) at 513. Mr. Higginbotham was unconscious and eventually transported to Harborview Medical Center in Seattle. He died shortly thereafter. Examiners found no evidence of any weapons on Mr. Higginbotham's body or in his clothing. An autopsy concluded Mr. Higginbotham's death was caused by a blunt force injury to his head.

State v. Richmond, 3 Wash. App. 2d 423, 426–28, 415 P.3d 1208 (2018).

At sentencing, Richmond sought an exceptionally lenient sentence based on a legal claim of "failed self-defense" and relying on the facts

adduced at trial. The judge rejected Richmond's claim. His only explanation, speaking directly to Richmond, was as follows:

> You're not right in my view, but you're not wrong. Right? I mean, you got a lot of it right, but you're seeing it through your perspective, which I don't know what other perspective you could look at it from really. You're the only person that was in your shoes at that moment, and so it does make sense that you would give us that viewpoint.

RP 26. The court then indicated that it was rejecting the defense request to depart below the range. *Id.* No written findings were entered.

IV. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Sentencing Court Abused Its Discretion by Incorrectly Evaluating Mr. Richmond's Failed Self-Defense Claim and by Failing to Express Its Factual Findings. The State Constitution Requires a Judge to Give Reasons for Rejecting a Requested Exceptional Sentence Below the Range.

"That's some catch, that Catch-22." Conrad, Joseph, *Catch 22* (1961).

This Court should not leave Mr. Richmond and other similarly situated defendants who are denied exceptionally lenient sentences with the burden of proving that the sentencing judge misapplied the law in a material way while simultaneously relieving those judges of

any obligation to say anything about why they denied that request. Review is warranted because the lower court decision is premised on conflicting caselaw and also involves a constitutional issue of substantial public interest.

To briefly summarize the dilemma presented in this case, the Court of Appeals recognized that where a reviewing court finds an impermissible basis to refuse to impose an exceptionally lenient sentence a new sentence will be ordered. Richmond agrees. However, in order to prevail, the lower court held an appellant must point to affirmative evidence (written or oral findings) that the court's decision was premised on a misapprehension of the law. Once again, Richmond agrees.

However, the Court of Appels then held: "There is no statutory requirement that a court provide reasons for *refusing* to impose an exceptional sentence." *Opinion*, p. 14 (emphasis in original). See also *id*. at 12 ("When sentencing an adult like Mr. Richmond, in a noncapital case, there is no constitutional or statutory requirement that a court that denies a below-standard range sentence explain the weight given

to an alleged mitigating factor or enter findings."). Despite acknowledging that "(i)n cases in which an impermissible basis for refusing to impose such a sentence is found, it is because the appellant is able to point to evidence in the record that there was or could have been a categorical refusal or misapprehension by the court of its discretion (*id*. at 12); the lower court simultaneously concluded that a sentencing judge is not required to provide any such evidence. "(A)y, there's the rub!" Shakespeare, Wm., *Hamlet* (1603).

Richmond humbly contends that the law should not endorse this contradiction. It is hardly an onerous requirement to require a judge to explain their reasons for denying a request for an exceptional sentence so that review is both possible and meaningful. Otherwise, the message to a judge is "the less said the better," a directive at odds with due process, the right to a meaningful appeal, and justice.

Caselaw requires what Richmond requests, albeit in slightly different contexts. A sentencing court abuses its discretion when it fails to give mitigating effect to mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (capital case where Court held "neither may

the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence," and later adding "chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.").

A sentencing court further abuses its discretion when it fails to explain, in response to a request for an exceptionally lenient sentence, whether it considered, weighed, and gave mitigating effect to mitigating evidence in arriving at its sentence. A sentencing court is never required to impose an exceptionally lenient sentence, but it is also not free to ignore or give mitigating weight when there is some evidence of a "failed defense." While self-defense may be an all-or-nothing proposition at trial, it exists in gradations at sentencing.

Some facts are indisputably mitigating, authorizing the possibility of an exceptional sentence. *Eddings, supra; State v. Bassett,* 192 Wash. 2d 67, 88, 428 P.3d 343, 353 (2018) ("(T)he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

First, the case for retribution is weakened for children because the heart of the retribution rationale relates to an offender's blameworthiness and children have diminished culpability.") (internal citations and quotation marks removed). Self-defense, even failed self-defense, necessarily either decreases or justifies a defendant's actions.

The SRA provides certain "failed defenses" may constitute mitigating factors supporting an exceptional sentence below the standard range. *State v. Hutsell*, 120 Wash.2d 913, 921, 845 P.2d 1325 (1993); *State v. Jeannotte*, 133 Wash. 2d 847, 851, 947 P.2d 1192 (1997). As explained in D. Boerner, *Sentencing in Washington,* § 9.12(c),

> The Guidelines contain a number of mitigating factors applicable in situations where circumstances exist which tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all. The inclusion of these factors as mitigating factors recognizes that there will be situations in which a particular legal defense is not fully established, but where the circumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present. Allowing variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime is wholly consistent with the underlying principle.

RCW 9A.16.020(3) recognizes the right to defend "(w)henever used by a party about to be injured" "in preventing or attempting to prevent an offense against his or her person, or a malicious trespass" "in case the force is not more than is necessary." RCW 9A.16.030 further provides: "Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent." Washington law does not impose a duty to retreat. *State v. Allery*, 101 Wash.2d 591, 598, 682 P.2d 312 (1984) (a defendant is entitled to a no duty to retreat instruction when evidence supports a finding that the defendant was assaulted in a place where the defendant was lawfully entitled to remain).

To be entitled to jury instructions on self-defense, the defendant must produce some evidence demonstrating self-defense. *State v. Walden*, 131 Wash. 2d 469, 473, 932 P.2d 1237 (1997). Here, the judge

at trial determined that Richmond produced sufficient evidence of self-defense to merit an instruction.[2]

Evidence of self-defense is evaluated from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him. *State v. Walden*, 131 Wash. 2d 469, 474, 932 P.2d 1237, 1239 (1997). In other words, self-defense must be evaluated from the defendant's point of view as conditions appeared to her at the time of the act. *State v. McCullum*, 98 Wash.2d 484, 656 P.2d 1064 (1983). The factfinders must understand that, in considering the issue of self-defense, they must place themselves in the shoes of the defendant and judge the legitimacy of his actions in that light.

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[2] It is true that the court also gave an instruction telling jurors they could decide whether Richmond was the aggressor. A first aggressor is not entitled to consideration of a claim self-defense at trial. *State v. Wasson*, 54 Wash. App. 156, 160, 772 P.2d 1039 (1989). However, that does not negate or otherwise eliminate the claim of failed or imperfect self-defense at sentencing.

Here, the factfinder is the sentencing judge. At sentencing, the judge stated to Richmond:

> …but you're seeing it through your perspective, which I don't know what other perspective you could look at it from really. You're the only person that was in your shoes at that moment, and so it does make sense that you would give us that viewpoint.

RP 26. The court then indicated that it was rejecting the defense request to depart below the range.

The sentencing judge's remarks reflect an unwillingness to employ the subjective standard component of self-defense. The judge stated that he understood why Richmond, who had just given his allocution, claimed he was acting in self-defense, but that Richmond was wrong, at least in part, because he was viewing his actions from his own point of view. Richmond's perspective is not wrong. Instead, the law of self-defense requires a judge not just to recognize why Richmond is "standing in his shoes" when he explains his state of mind at the time, he acted but requires the judge to "stand in the same shoes" as part of the evaluation of self-defense. It is certainly correct that the judge was then entitled to evaluate the reasonableness of Richmond's actions, but

by removing the subjective element the judge unlawfully diminished the mitigating value of the evidence.

Without considering the subjective component, the sentencing judge's evaluation of the objective component was irreparably compromised. While an objective factfinder could conclude that Richmond used too much force, the evaluation of the proper use of force must be informed by Richmond's subjective state of mind. Without considering that information, the sentencing court inevitably decreases or devalues the degree of force that Richmond was entitled to use.

On the other hand, consideration of the subjective point of view makes this a remarkably close case of complete self-defense and a highly mitigated case for sentencing. Richmond was on his property. Richmond had already called the police, who had departed. Higginbotham approached Richmond, even after Richmond told Higginbotham not to do so while Richmond was holding a board.

Q Okay. And then what did Dennis do after Joe said that?

A I mean, he took a step closer.

Q And that's when—Dennis got struck with the board.

A Right.

T(rial)RP at 381-82.

It may be that the judge concluded that Richmond was a first aggressor because he armed himself. After all, the prosecutor argued at trial it was not reasonable for Mr. Richmond to come out of. s house with the two-by-four given that the situation appeared to have calmed down. "Who's the aggressor?" the prosecutor asked. TRP at 1126. "The defendant is the aggressor. He doesn't get—You don't even get to the question of self-defense." *Id.* In her final statements to the jury, the prosecutor argued Mr. Richmond stirred the "whole thing up" and took "it to a next level by coming out of his house, armed with a board, screaming at them. He doesn't get to claim self-defense." *Id.* at 1165. However, while those remarks may have been proper argument at trial, a first aggressor does not lose his right to imperfect self-defense at trial.[3]

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[3] The direct appeal dissent concluded otherwise:

> The testimony of Veronica Dresp fails to support a conclusion or inference that Joseph Richmond provoked a reaction in Dennis Higginbotham that required Richmond to act in self-defense. None

Or it may be that the sentencing judge found that Mr. Richmond used too much force—*i.e.*, that a reasonable person would not have used deadly force. In other words, what the judge said reveals a legal error and abuse of discretion. What the judge did not say, may reveal further errors.

The existence of a mitigating fact does not remove a judge's discretion in deciding how much *weight* to give to those facts. However, when presented with undeniable mitigation and a request for an exceptional sentence a judge's exercise of discretion must include

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> of the testimony states that Richmond ran toward Higginbotham in a threatening manner. If one reads the entirety of Dresp's trial testimony, one questions whether Richmond ran at all. The testimony suggests he walked out of the house. Dresp spoke figuratively when using the word "running," and then the State's attorney later employed the same verb when questioning. Dresp also testified that Richmond "came out and—stepped off the porch," language that does not connote "running." RP at 381. Dresp states Richmond and Higginbotham later stepped toward one another, testimony that confirms that at least Richmond did not run at Higginbotham. Even if we assume that Richmond ran out of the house, which we should do based on principles of review, the trial still lacked testimony that Richmond ran toward Higginbotham in a threatening manner.

Richmond, 3 Wash. App. 2d at 441–42 (Fearing, J. dissenting).

acknowledging the mitigating quality of that fact and then explain how the court weighed that fact along with other facts. In other words, when a judge fails to explain how he viewed and weighed the evidence at sentencing, otherwise there is an unacceptable risk that the court either ignored the fact or ignored the mitigating value of that fact.

Of course, it is impossible to know because the judge did not explain beyond telling Richmond that his assessment of the situation was wrong. The court did not explain whether it found that Richmond was a first aggressor and, if so, whether the judge then incorrectly concluded that, like the jury, he could not consider and/or give mitigating weight to the self-defense claim. The court did not explain, if it concluded that Richmond used too much force, how much force was reasonable. A defendant who uses what turns out to be deadly force and who reasonably could have only held the board in a threatening manner is differently situated from a defendant who reasonably used force that caused pain or injury to another. However, this Court is left in the dark because the judge did not explain its ruling, except to say that Richmond's perspective was wrong.

If this Court concludes that the error is not apparent, it should conclude that the statutory prohibition impermissibly interferes with the state constitutional right to appeal.

Wash. Const. art. I, § 22 gives criminal defendants the right to appeal "in all cases." On the other hand, statutory law provides that length of a criminal sentence imposed by a superior court is not subject to appellate review, so long as the punishment falls within the correct standard sentencing range. See, *e.g.*, RCW 9.94A.585(1) ("A sentence within the standard sentence range for the offense shall not be appealed."). This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986), 718 P.2d 796 (1986).

However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. *State v. Mail,* 121 Wash.2d 707, 712, 854 P.2d 1042 (1993) (permitting appellate review of

a criminal sentence where a defendant can demonstrate that the "sentencing court had a duty to follow some specific procedure required by the [Sentencing Reform Act], and that the court failed to do so"). RCW 9.94A.585(1) "does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." *State v. Williams,* 149 Wash.2d 143, 147, 65 P.3d 1214 (2003).

Thus, even where a statute appears to broadly prohibit any direct appeal, certain appeals must be allowed pursuant to article I, section 22. *State v. Delbosque*, 195 Wash. 2d 106, 126, 456 P.3d 806, 817 (2020).

Mr. Richmond contends that the record here reveals the type of error that can be reviewed on appeal where a standard range sentence is imposed. The constitutional right to appeal should not turn on whether a sentencing judge says to little or enough to expose the required error. If a judge refuses categorically to impose an exceptional sentence below the standard range under any circumstances, but never affirmatively says so, those cases where an exceptional sentence was

requested and denied all constitute abuses of discretion and are also all unreviewable.

The right to appeal, enshrined in our state constitution, cannot so easily be eliminated in practice.

VI. CONCLUSION

"But when notice is a person's due, process which is a mere gesture is not 'due process.'" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). This Court should grant review.

CERTIFICATE OF WORD COUNT

This motion has 3490 words.

DATED this 27th day of August 2023

Respectfully Submitted:

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOSEPH A. RICHMOND, Appellant.	)	No. 38841-7-III UNPUBLISHED OPINION

SIDDOWAY, J. — Having been granted a third resentencing for a 2016 conviction of felony murder after *State v. Blake*,[1] Joseph Richmond requested an exceptional mitigated sentence, relying on his failed trial defense of self-defense. The resentencing court entertained the request and reduced Mr. Richmond's sentence more than another court might have based on the reduced offender score, but it rejected his request for a sentence below the standard range.

Mr. Richmond appeals, asking us to hold that sentencing courts must not only entertain a request for a below-standard range sentence but also—if they deny the request—must explain the weight given to the alleged mitigating factor and enter findings that can be tested for completeness and evidentiary support on appeal.

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

The authority on which Mr. Richmond relies is decisions involving death penalty sentencing and sentencing of juveniles, where the federal and state constitutions require a demonstration of close consideration of case-specific mitigating circumstances. When sentencing an adult like Mr. Richmond,[2] in a noncapital case, there is no constitutional or statutory requirement that a court that denies a below-standard range sentence explain the weight given to an alleged mitigating factor or enter findings. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In September 2014, Mr. Richmond caused the death of Dennis Higginbotham by swinging a two-by-four piece of lumber like a baseball bat, striking Mr. Higginbotham's head and causing severe head trauma. *State v. Richmond*, 3 Wn. App. 2d 423, 427-28, 415 P.3d 1208 (2018). Mr. Higginbotham died at Harborview Medical Center. The violence occurred after Mr. Richmond's estranged girlfriend arrived at his home to collect belongings, accompanied by Mr. Higginbotham and a female friend. *Id.* at 426. When Mr. Richmond did not provide the cooperation his ex-girlfriend was requesting, she threatened to break into a shed. At that point, Mr. Richmond called police, an officer arrived and mediated an apparent solution, and the officer left. *Id.* at 426-27. Mr. Richmond and Mr. Higginbotham resumed arguing, however, and Mr. Richmond entered his house, emerged with the two-by-four, and continued arguing with Mr. Higginbotham.

[2] Mr. Richmond was 29 years old at the time he committed the second degree murder.

Id. at 427-28. As they argued, Mr. Richmond warned Mr. Higginbotham not to come any closer to him. When Mr. Higginbotham nonetheless took a step in Mr. Richmond's direction, Mr. Richmond swung the fatal blow. *Id.* at 427-28. With Mr. Higginbotham's death, Mr. Richmond was charged with felony murder.

At trial, Mr. Richmond relied on a theory of self-defense. The trial court gave the jury full self-defense instructions as well as an initial aggressor instruction. *Id.* at 429. The jury found Mr. Richmond guilty. *Id.* at 430. He received a standard range sentence of 240 months of confinement.

Mr. Richmond appealed, making several assignments of error. A majority of this court affirmed the conviction over a dissent that agreed with Mr. Richmond's challenge to the giving of a first aggressor instruction. *Id.* at 423. The case was remanded to the trial court for a comparability analysis of a crime committed in Idaho that had been included in Mr. Richmond's offender score. *Id.* at 437. Mr. Richmond petitioned the Washington Supreme Court for review, which was denied. *State v. Richmond*, 191 Wn.2d 1009, 424 P.3d 1223 (2018).

The first resentencing resulted in a reduced offender score and a reduction in the period of confinement to 231 months. The court also provided Mr. Richmond with partial relief from his legal financial obligations (LFOs) in light of the Washington Supreme Court's then-recent decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Mr. Richmond again appealed. This court rejected Mr. Richmond's new

challenges to terms of his community custody but remanded for a second resentencing because he had not received the full relief from his LFOs required by *Ramirez*.

Mr. Richmond thereafter filed a personal restraint petition that raised issues of prosecutorial misconduct and ineffective assistance of counsel. This court rejected both claims.

In the meantime, our Supreme Court decided *Blake*, which declared Washington's strict liability drug possession statute unconstitutional. Since simple possession convictions had been included in his offender score, Mr. Richmond sought and was determined to be entitled to another resentencing.

At the outset of this third resentencing hearing, Mr. Richmond's lawyer told the court that he intended to request consideration of a mitigating factor and asked if the State disputed that a *Blake* resentencing was a full resentencing. The prosecutor agreed it was a full resentencing. The court commented:

> It wouldn't be much of a resentencing if we were just going to take the old sentence and knock it down a chunk. It wouldn't be a real hearing in my book. So I think that Mr. Richmond's entitled to make whatever argument he wants to. . . . So go right ahead, sir.

2 Rep. of Proc. (RP) at 8.[3]

[3] Mr. Richmond's motion to transfer the verbatim report of proceedings of his trial and original sentencing for inclusion in the record for this appeal was granted, and we refer to it as "1 RP." We refer to the separate verbatim report of proceedings of his third resentencing as "2 RP."

Mr. Richmond's lawyer proceeded to make a well-organized presentation that did not challenge the jury's verdict but argued that even where a defense fails, there can be gradations to blameworthiness. He pointed to six circumstances that he argued distinguished the killing of Mr. Higginbotham from many other homicides charged as second degree murder. His presentation prompted no disagreement or skepticism from the judge, who thanked him for the argument, adding, "Well done." 2 RP at 14.

In the prosecutor's response, she pointed out that the resentencing judge had been the trial judge and recounted evidence from the trial that she argued belied a characterization of Mr. Richmond as less blameworthy than others convicted of felony murder.[4] She pointed out that vacating Mr. Richmond's prior simple possession conviction reduced his standard range by nine months and asked the court to limit the reduction of Mr. Richmond's term of confinement to the same nine months. A nine month reduction would have resulted in a 222 month term of confinement.

Given a chance to speak, Mr. Richmond spoke at some length, without interruption.

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[4] At Mr. Richmond's original sentencing, defense counsel had not asked for an exceptional sentence, but had asked for a low-end sentence in light of the facts that Mr. Richmond had been at his home and "really felt threatened." 1 RP at 1200. In announcing a sentence above the mid-point at that time, the court said:

> And Mr. Richmond, I heard your testimony. And even under your version, I didn't think that your use of the force that was used would have been reasonable under the circumstances.

1 RP at 1207.

When Mr. Richmond was done, the court commented that its position following *Blake* was that it "would give an entirely new sentencing hearing, [if] people wanted one, and that's what we've been doing [here]." 2 RP at 24. After thanking Mr. Richmond and his lawyer for their presentations and making a few comments about the importance of listening to everyone and the regrettably tragic outcome of Mr. Richmond's and Mr. Higginbotham's encounter, the court said, addressing Mr. Richmond:

> And you're not wrong in everything you said about the facts in this case. You're not right in my view, but you're not wrong. Right? I mean, you got a lot of it right, but you're seeing it through your perspective, which I don't know what other perspective you could look at it from really. You're the only person that was in your shoes at that moment, and so it does make sense that you would give us that viewpoint.
>
> But I do not find that the evidence supports a mitigating sentence. I think a standard range sentence is still appropriate. And it was a standard range of 165 to 265, a 430 [sic] was the mid point before. I went a little above that last time. This time I'll go mid point of 204. So that will be the sentence that the Court imposes today, 204 months.

2 RP at 25 (alteration in original). Mr. Richmond appeals.

ANALYSIS

Mr. Richmond assigns error to the rejection of his request for an exceptional sentence. Before we turn to his two challenges to the court's decision-making, we review the structuring of a sentencing court's discretion by the legislature.

I. A SENTENCING COURT'S DISCRETION IN SENTENCING IS THAT WHICH HAS BEEN GIVEN AND STRUCTURED BY THE LEGISLATURE

The fixing of legal punishments for criminal offenses is a legislative function and includes the power of the legislature to provide a minimum and maximum term within which a trial court can exercise discretion. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986) (quoting *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909)). The power of the legislature in this respect "'is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment.'" *Id.* (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937)).

In the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the legislature has provided that "[t]he court *may* impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535 (emphasis added). It has provided that "[t]he court *may* impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1) (emphasis added). The SRA provides a nonexclusive list of mitigation circumstances, one being that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). This, and several other mitigating factors, are recognized as supporting mitigation for a "failed defense." *State v. Jeannotte*, 133 Wn.2d

847, 851, 947 P.2d 1192 (1997) (citing *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993)). The provisions do not infringe on a judicial power because a trial court's discretion in sentencing "is that which is given by the Legislature." *Ammons*, 105 Wn.2d at 181. "The Legislature's structuring of the trial court's discretion does not infringe upon a judicial power." *Id.*

RCW 9.94A.585(1) provides that "[a] sentence within the standard sentence range . . . for an offense shall not be appealed." This does not offend the Washington State Constitution's guarantee in article I, section 22 of a right to appeal in criminal cases,[5] because our Supreme Court has given the statute a limiting construction. In *Ammons*, the court held that the statutory provision, then codified as RCW 9.94A.210(1) (1984), "only preclud[es] appellate review of challenges to the *amount of time imposed* when the time is within the standard range," and "[w]hen the sentence given is within [that] range then as a matter of law there can be no abuse of discretion." 105 Wn.2d at 182-83 (emphasis added); *accord State v. Delbosque*, 195 Wn.2d 106, 126, 456 P.3d 806 (2020). An appellant is not precluded from challenging on appeal the procedure by which the sentence within the standard range was imposed. *Ammons*, 105 Wn.2d at 183.

Mr. Richmond's appeal does not challenge the 204-month confinement imposed by the resentencing court; it challenges one substantive and one procedural aspect of the

[5] Article I, section 22 provides in relevant part, "In criminal prosecutions the accused shall have . . . the right to appeal in all cases."

court's decision denying his request for an exceptional sentence. We therefore need not review his third assignment of error, which applied only if we deemed his appeal foreclosed by RCW 9.94A.585(1).

II. MR. RICHMOND FAILS TO DEMONSTRATE THAT THE RESENTENCING COURT RELIED ON AN IMPERMISSIBLE REASON OR FOLLOWED AN IMPERMISSIBLE PROCEDURE

Mr. Richmond's first and second assignments of error are related. He complains that the resentencing court abused its discretion by (1) "declining to apply the first-step subjective test and consequently failing to give mitigating effect to Mr. Richmond's claim of failed self-defense" and (2) "fail[ing] to make adequate oral and/or written findings explaining its decision not to accord mitigating effect of Mr. Richmond's defensive actions." Br. of Appellant at 1.

One aspect of Mr. Richmond's argument on this score is his contention that if a sentencing court denies a request for an exceptional mitigated sentence, it "abuses its discretion when it fails to give mitigating effect to mitigating evidence" or fails to "acknowledge[e] the mitigating quality of [a mitigating] fact and then explain how the court weighed [it and] other facts." Br. of Appellant at 4, 12. The only authority he cites for the proposition that a sentencing court must acknowledge mitigating evidence, weigh it, explain how it weighed it, and then give it mitigating effect, are decisions dealing with the death penalty or with juveniles.

He cites *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), in which the United States Supreme Court reviewed the death penalty imposed on Eddings. At age 16, Eddings used his father's shotgun to shoot and kill an Oklahoma highway patrol officer who pulled over a car that Eddings and several younger companions were using to run away from their homes. By the time of Eddings's sentencing, the plurality opinion in *Lockett v. Ohio* had held that the Eighth and Fourteenth Amendments to the United States Constitution required that the sentencer in a death penalty case must "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings*, 455 U.S. at 110 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion)). The sentencing judge and appellate court in Eddings's case considered his youth as a mitigating factor but refused to consider, as mitigating, evidence of Eddings's difficult, troubled family history and emotional disturbance. *Id.* at 115.

In holding that the Oklahoma court was constitutionally required to consider the evidence as a mitigating factor, the *Eddings* court quoted *Lockett*'s recognition that the imposition of death by public authority is profoundly different from all other penalties. *Id.* at 110. In addition to holding that the death penalty "is so profoundly different from all other penalties," the plurality opinion in *Lockett* had stated "[t]he need for treating

each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." 438 U.S. at 605. The case was remanded for consideration of the evidence by the Oklahoma court. The decision is unhelpful to Mr. Richmond, because Mr. Richmond's case is not a capital case.

The other case on which Mr. Richmond relies is *State v. Bassett*, 192 Wn.2d 67, 73, 428 P.3d 343 (2018), which held that sentencing juvenile offenders to life in prison without the possibility of parole or early release constitutes cruel punishment and is unconstitutional under article I, section 14 of the Washington Constitution. That holding was limited to juvenile offenders, based on the increasing scientific recognition and national consensus that children are less criminally culpable than adults. Mr. Richmond was nowhere near being a juvenile when he committed his crime.

Eddings and *Bassett* fall within the limited "cruel" or "cruel and unusual" punishment area in which *Ammons* observed that the legislature's power to structure judicial sentencing discretion yields to the courts' obligation to apply the federal and state constitutions. Unlike in *Eddings* and *Bassett*, in Mr. Richmond's case, there is no constitutional command that required the resentencing court to justify its weighing and application of mitigating facts identified by the defendant. Outside the limited context of constitutionally-commanded consideration of mitigation, Washington decisions have repeatedly held, "[N]o defendant is entitled to an exceptional sentence below the standard range." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *accord State v.*

Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), *aff'd*, 169 Wn.2d 571, 238 P.3d 487 (2010); *State v. Lemke*, 7 Wn. App. 2d 23, 27, 434 P.3d 551 (2018).

A corollary, of course, is that "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342 (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). A trial court abuses its discretion when it refuses categorically to impose an exceptional sentence below the standard range under any circumstances or consider it for a class of offenders—both are, effectively a failure to exercise discretion. *Id.* Another example of an impermissible basis for denying such a sentence occurs where the court operates under the mistaken belief that it lacks discretion. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). In cases in which an impermissible basis for refusing to impose such a sentence is found, it is because the appellant is able to point to evidence in the record that there was or could have been a categorical refusal or a misapprehension by the court of its discretion.

No categorical refusal or misapprehension of the court's discretion is demonstrated here. At most, Mr. Richmond seizes on the resentencing court's comments to him about looking at things "through your perspective," and characterizes that as revealing an "unwillingness to employ the subjective standard component of self-defense." Br. of Appellant at 8.

We construe the court's comments very differently. Mr. Richmond said almost nothing about self-defense, per se, during his allocution. He started off by disputing that he could fairly have been characterized as a first aggressor. He disputed the prosecutor's argument that the evidence most strongly suggested that he was the aggressor. He reminded the court that he called for police help. He reminded the court that it had excluded toxicology evidence of Mr. Higginbotham's blood alcohol level and methamphetamine use that Mr. Richmond believed proved Mr. Higginbotham was the aggressor. He talked about his original sentence being excessive. He talked about his family missing him. He expressed regret.

The resentencing court had instructed the jury correctly on the subjective aspect of self-defense.[6] There is no reason to believe that when the court said to Mr. Richmond at the third resentencing, "[Y]ou got a lot of it right, but you're seeing it through your perspective," 2 RP at 25, the statement revealed the court's confusion about substantive

[6] The court's instruction 17 told jurors that homicide is justifiable when, among other factors, "the slayer employed such force and means [as] a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident." 1 RP at 1114.

Its instruction 18 told jurors, "A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger or great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for a homicide to be justifiable." *Id.*

law. In context, the resentencing court was talking about Mr. Richmond's inability to view objectively what the State had proved at trial.

Finally, Mr. Richmond contends that written findings and conclusions of law were required. He cites no supporting authority. RCW 9.94A.535 provides that "[w]henever a sentence outside the standard range is *imposed*, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." (Emphasis added.) There is no statutory requirement that a court provide reasons for *refusing* to impose an exceptional sentence. By negative implication, written findings are not required in that event.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Pennell, J.

ALSEPT & ELLIS

August 27, 2023 - 9:57 AM

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