SUPREME COURT NO. 98716-5

NO. 36880-7-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CALLAN WESSELS,

Petitioner.

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

The Honorable Gary Libey, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Callen Wessels seeks review of the Court of Appeals' unpublished (and divided) decision in State v. Wessels, filed June 2, 2020 ("Op."), which is appended to this petition

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by failing to treat the petitioner's youth as a mitigating factor, and by instead appearing to treat it as an aggravator, in evaluating the petitioner's request for an exceptional sentence downward?

2. Did counsel provide ineffective assistance by failing to cite to relevant state and federal authority on the mitigating characteristics of youth that would have supported the petitioner's request for exceptional sentence downward?

3. May the petitioner raise—contrary to the Court of Appeals' decision—a challenge to a standard range sentence on these grounds?

C. STATEMENT OF THE CASE

1. **Trial court proceedings and sentence**

The State charged 21-year-old Callen Wessels with vehicular homicide, hit and run, reckless driving, and second

degree perjury. CP 12-15.[1] The charges stemmed from a single-vehicle accident occurring in July of 2018. Wessels managed to walk away from the collision, but the passenger, Wessels's friend, was killed. CP 8; RP 95.

Wessels agreed to plead guilty to the first two charges, which would result in an offender score of one on each charge. The other charges would be dismissed. CP 26. The State agreed to recommend a 100-month prison sentence, reflecting the midpoint of the 86- to-114-month standard range for vehicular homicide. CP 26, 30. According to the plea agreement, Wessels could argue for any lawful sentence. CP 26.

At the May 2019 sentencing hearing, the State argued the midpoint of the standard range should be imposed. RP 12-14.

The decedent's friends and family members urged the court to impose the maximum sentence. RP 16-39.

After the State's presentation, several friends, family, and community members addressed the court on Wessels's behalf.

[1] RCW 46.61.520(1)(a); RCW 46.52.020(4)(a); RCW 46.61.500(1); RCW 9A.72.030(1). As for the perjury charge, the State alleged that in the aftermath of the collision—when Wessels was injured and still under the effects of alcohol—he lied to law enforcement about the vehicle being stolen and driven by someone else. CP 3-4.

Many highlighted Wessels's remorse. RP 39-79. Those speaking on Wessels behalf included a retired physician, an ophthalmologist, who urged the court to consider that young people are terrible drivers and poor decisionmakers. He highlighted hat the reason for this is biological—their brains are not fully developed. RP 52-53.

Defense counsel argued that, rather than the midpoint of the standard range, an exceptional sentence downward was appropriate. RP 80-83. Counsel pointed to a vehicular homicide prosecution in another county in which a 21-year-old had received an exceptional sentence downward. In that case, the prosecutor had agreed to the exceptional sentence downward. RP 83-86. Wessels was also deserving of leniency. RP 86-87. But the prosecutor only wished to make him an example. RP 87.

In response, the prosecutor argued that Wessels had benefitted from dismissal of the perjury charge. RP 90-91. In addition, **nothing about Wessels differentiated him from other defendants** such that departure from the standard range was appropriate. RP 91. Despite Wessels's family and community support, he had made a series of bad decisions

(driving drunk, driving recklessly, failing to check on his passenger, fleeing the scene, and lying to police). RP 92. Under the circumstances, the middle of the standard range was appropriate. RP 92.[2]

The court sentenced Wessels to 114 months, the high end of the standard range, which was 14 months higher than the State's recommended sentence. The court made no statement regarding Wessels's request for an exceptional sentence downward. RP 97-100.

The court recognized that Wessels was young and had several positive attributes. RP 97. The court also recognized that "vengeance" was not the justice system's goal. RP 98. But deterrence of drunk driving was important. RP 98. The court noted that the period between Memorial Day and Labor Day is a dangerous time for young people on the roads. RP 98. Young people needed to understand that if they drove drunk and hurt someone, punishment would follow. RP 99. The court continued

[2] In a contentious exchange, defense counsel accused the prosecutor of relying on unproven facts. RP 94. The prosecutor, on the other hand, pointed out that Wessels had agreed the court could consider the facts as he had argued. RP 93; see CP 33 (statement on plea form indicating court could consider police reports and statement of probable cause).

> I know Mr. Wessels has pled guilty and is intending to be accountable. What's the accountability here. And I think that . . . when people hear, "Well, he got off light," or, "the judge gave him a sentence that doesn't sound too bad," . . . that message just sounds like, "Hm, that's not really that serious of an offense. We can go ahead and go out and party and drive drunk, and if somebody gets killed, it was an accident, and we're from a good family, and we're not going to be responsible."
>
> But I don't see it that way. . . . I see it that this is a manifest problem in society. . . .
>
> [M]y theory in justice is that the community needs a deterrent effect on crime, and the only way to put a deterrent effect on crime . . . and to make society safe is to impose the maximum 114 months. . . . I see that as a . . . fair sentence. [I]t needs to be a deterrent on other people from having their family have to appear in this court and go through the same thing that these two families have gone through.

RP 99-100.

As stated, the court imposed the maximum sentence.

2. **Appeal**

Wessels appealed, raising the issues identified above. Specifically, he argued that the trial court appeared to treat youth as an aggravating factor rather than a mitigating factor. The court was unlikely to have done so, had it been aware of recent

science-based case law. E.g. Brief of Appellant at 11-12; Reply Brief of Appellant at 3.

A divided Court of Appeals rejected Wessels's claims. According to the lead opinion, RCW 9.94A.585[3] precluded review of Wessels's sentence, ostensibly because the trial court was not **required** to consider Wessels's youth under State v. O'Dell, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) ("[A]ge is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence."). See Op. (two-judge lead opinion) at 4-5. Further, counsel was not ineffective, in part because "[t]he record contains no evidence Mr. Wessels was impulsive or immature for his age"—which, again, was 21 years old. Id. at 5. Moreover, Wessels could not show prejudice because the trial court did not seem inclined to impose a lower sentence. Id. at 6.

In his dissenting opinion, Judge George Fearing stated that RCW 9.94A.585(1) did not prohibit a challenge to the underlying legal rationale for the sentence, particularly where

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

the trial court lacked understanding of the governing law. Op. (Fearing, J., dissenting) at 1 (citing State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)).

Further,

> At the time of his criminal misconduct, Callen Wessels was 21 years of age. Youth alone does not demand that the sentencing court lower the offender's sentence. [O'Dell, 183 Wn.2d at 695-96]. Nevertheless, at least as to youth below the age of 21, the sentencing court should consider whether youth diminished the offender's culpability. [Id.] A lack of maturity and an undeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions. Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
>
> A youth's immaturity extends to age 25. A National Institutes of Health study shows that the region of the brain that inhibits risky behavior does not fully form until the age of 25. United States v. Gall, 374 F. Supp. 2d 758, 762 (S.D. Iowa 2005) (citing Elizabeth Williamson, Brain Immaturity Could Explain Teen Crash Rate, WASH. POST, Feb. 1, 2005, at A01), rev'd, 446 F.3d 884 (8th Cir. 2006), rev'd, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The prefrontal cortex does not have nearly the functional capacity at age 18 as it does at age 25. In re Palmer, 33 Cal. App. 5th 1199, 1210, 245 Cal. Rptr. 3d 708, review granted, 445 P.3d 1004 (Cal. 2019). Thus, regardless of the specific crime at issue, juvenile offenders are categorically less culpable than adult offenders, and the chronological age of a minor is itself a relevant mitigating factor of great weight.

> Miller v. Alabama, 567 U.S. 460, 471-72, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); Eddings v. Oklahoma, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 3 (1982). During Callen Wessels' sentencing hearing, an ophthalmologist mentioned that car rental companies will not rent vehicles to individuals under the age of 25.
>
> At the conclusion of the lengthy sentencing hearing and when announcing its sentence, Callen Wessels' trial court referenced a news story lamenting the one hundred days between Memorial Day and Labor Day because of the conduct of young drivers during this window of time. Because of a recess in school and the good weather, young people drink and drive during the summer months. The sentencing court wished to implant fear in a young person's mind that killing someone while driving intoxicated will result in a substantial time in prison. For these reasons, the sentencing court imposed the maximum sentence.
>
> Callen Wessels' sentencing court was not required to grant an exceptional sentence below the standard range or even decrease the sentence within the standard range because of Callen Wessels' youth. **But the sentencing court could not employ youth as a factor in increasing the sentence to the high end of the standard range. The sentencing court thereby employed a mitigating factor as an aggravating factor contrary to law, and the court accordingly abused its discretion.**

Op. (Fearing, J., dissenting) at 1-3 (emphasis added).

The dissenting judge "would remand for the sentencing court to reassess the length of the sentence based on youth being

a factor favoring Callen Wessels, not a factor to increase Wessels' punishment." Id. at 3.

Wessels now asks that this Court grant review, reverse the Court of Appeals lead opinion, and, consistent with the well-reasoned dissenting opinion, remand for resentencing.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. **Review is appropriate under RAP 13.4(b)(1) and (4).**

Review is appropriate under RAP 13.4(b)(1). The two-judge lead opinion conflicts with precedent from this Court, including, specifically, McFarland, 189 Wn.2d 47, and O'Dell, 183 Wn.2d 680. Review is also appropriate under RAP 13.4(b)(4) because the issue involves a matter of substantial public interest in this rapidly developing area of law.

2. **The trial court failed to consider Wessels's youth as a mitigating factor, and instead appeared to treat it as an aggravator, in evaluating the request for a mitigated sentence**.

The trial court failed to consider Wessels's youth as a mitigating factor in evaluating his request for an exceptional sentence downward. Instead, the court appeared to treat youth

as an aggravator. This constituted an abuse of discretion. This Court should grant review, reverse the Court of Appeals, and remand for resentencing.

In general, a party cannot appeal a sentence within the standard range. State v. Brown, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008); see also RCW 9.94A.585(1). The rationale for this rule is that a trial court that imposes a sentence within the range set by the legislature cannot, as a matter of law, abuse its discretion as to sentence length. Brown, 145 Wn. App. at 78.

But, contrary to the Court of Appeals' lead opinion, a defendant may appeal a sentence when a trial court failed to exercise its discretion or relied on an impermissible basis for its refusal to impose an exceptional sentence downward. McFarland, 189 Wn.2d at 56. Remand is the appropriate remedy when a court imposes a sentence without properly considering an authorized mitigated sentence. Id. at 58-59.

The trial court may impose an exceptional sentence below the standard range if it finds mitigating circumstances by a preponderance of the evidence. RCW 9.94A.535(1). Youth and its attendant characteristics tend to mitigate culpability. See In re

Pers. Restraint of Light-Roth, 191 Wn.2d 328, 336, 338 n.3, 422 P.3d 444 (2018) (youth as basis for requesting an exceptional sentence downward is consistent with Sentencing Reform Act; moreover, United States Supreme Court cases have supported youth as a mitigator since the publication of Roper v. Simmons, 543 U.S. 551). Thus, where the sentencing court finds that a defendant's youth and immaturity contributed to his offense, the court may reduce the sentence on that basis. State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015).

In O'Dell, 183 Wn.2d 680, this Court noted that certain attributes common to youthful offenders—including, of relevance here, poor consequence assessment and judgment, impulsivity, and susceptibility to peer pressure—can support an exceptional sentence below the standard range. Id. at 691-92. Citing studies that show adolescent brain development continues "well into a person's 20s," this Court explained the "penological justifications" for harsh sentences are weaker before the defendant attains cognitive maturity. Id. (quoting Miller, 567 U.S. 460).

This reasoning reflects two principles from the case law on youthful offender sentencing. First, punishment and deterrence

are less effective when a person lacks self-control. Miller, 567 U.S. at 472. Second, behaviors that stem from immaturity are, by definition, likely to lessen with age. Id. at 472-73.

"[Y]outh can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." O'Dell, 183 Wn.2d at 696. A defendant can demonstrate that youth was a factor even through the testimony of lay witnesses. Id. at 697-98.

Of note in this case, this Court also held that a trial court errs when it fails to exercise its discretion to consider a defendant's age; this failure "is itself an abuse of discretion." Id. at 696-97. A court "must conduct a meaningful, individualized inquiry" into whether the defendant's youth should mitigate the 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); see also State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) ("While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the [sentencing] court to consider such a sentence and to have the alternative actually considered.").

Here, as the dissenting judge recognized, there was evidence before the sentencing court—particularly through the statements by the retired ophthalmologist—suggesting that Wessels was less culpable due to his youth. RP 52-53. And although defense counsel was not so focused in her presentation, she did argue Wessels's youth warranted leniency. RP 84.

But the prosecutor argued that nothing about Wessels differentiated him from other defendants. RP 91-92. And the court's remarks indicate it never meaningfully considered Wessels's youth and its attendant characteristics as a basis for an exceptional sentence downward. Solis-Diaz, 194 Wn. App. at 141.

Wessels acknowledges that age is not a "per se" mitigating factor. But a trial court should take into account the observations underlying relevant United States Supreme Court cases that generally show, among youthful offenders, a reduced sense of responsibility, increased impetuousness, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life. See O'Dell, 183 Wn.2d at 695-96 (discussing sentencing of very young adult). And as the dissent recognized, the trial court certainly should not have

treated Wessels's youth as an aggravating factor, rather than a mitigating factor.

This Court should grant review, determine that RCW 9.94A.585(1) does not preclude review of Wessel's claim, find an abuse of discretion, and remand for resentencing.

3. Defense counsel provided ineffective assistance by failing to cite to relevant case law that supported the requested mitigated sentence.

Relatedly, defense counsel provided ineffective assistance at sentencing by inexplicably failing to cite relevant state and federal authority that supported an exceptional sentence downward. This Court should grant review and reverse the Court of Appeals on this ground as well.

The federal and state constitutions each guarantee the right to effective representation. U.S. CONST. amend. VI; CONST. art. 1, § 22. An accused person is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). A claim of ineffective assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Wessels satisfies both Strickland prongs. First, counsel's failure to cite to relevant case law on youthful offender sentencing fell below a minimum standard for reasonable attorney conduct. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-91). Trial counsel failed in that obligation. In Kyllo, for example, this Court found that counsel's proposal of defective pattern instructions was both unreasonable and prejudicial, considering that by the time of Kyllo's trial occurred, case law indicated the pattern instruction was flawed. Kyllo, 166 Wn.2d at 866.

As stated above, the relevant case law holds that youth and its accompanying characteristics—including poor consequence assessment and judgment, impulsivity, and susceptibility to peer

pressure—tend to mitigate culpability. This has been the law at least since O'Dell was decided.

Twenty-one-year-old Wessels, despite possessing several positive traits, demonstrated these youthful failings by drinking and driving and then engaging in the actions that spiraled out of control. The retired ophthalmologist even touched upon the biological basis for such deficiencies in his presentation to the court. RP 52.

Unfortunately, the sentencing court appeared not to recognize the significance of these characteristics. This is likely because, in the defense presentation, counsel failed to cite to O'Dell, the United States Supreme Court cases from which derives, or to any of the science underlying the reasoning in those decisions. RP 78-90, 92-94.

Although counsel's performance is presumed reasonable, a defendant can rebut that presumption by showing that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). There was no strategic reason for counsel to fail to cite relevant case law supporting an exceptional sentence downward.

Counsel failed even to mention such authority when faced with the prosecutor's argument that nothing differentiated Wessels from other defendants. RP 91-92.

As Wessels argued in the Court of Appeals, an argument under O'Dell could have easily coexisted with the argument counsel did make—an argument notably lacking the legal underpinnings of the O'Dell line of cases.[4] Wessels, despite possessing several positive traits, clearly demonstrated poor consequence assessment and judgment, impulsivity, and susceptibility to peer pressure by drinking and driving on the night in question. See O'Dell, 183 Wn.2d at 692.

His behavior that night, manifesting the youthful characteristics identified above, is consistent with his efforts at improvement since then.

The possibility, indeed, likelihood, that young people will improve as they progress into their 20s is one of the reasons that courts treat children and young people differently than adults for purposes of sentencing. Id. at 692 and 692 n.5 (citing Terry A.

[4] Counsel mainly argued that another court in another county had, by agreement, imposed an exceptional sentence downward. RP 83-86.

Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 NOTRE DAME L. REV. 89, 152 & n. 252 (2009) (collecting studies); MIT Young Adult Development Project: Brain Changes, MASS. INST. OF TECH., http://hrweb.mit.edu/worklife/youngadult/brain.html (last visited Aug. 4, 2015) ("The brain isn't fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car."); Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANN. N.Y. ACAD. SCI. 77 (2004) ("The dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s" (formatting omitted)); see also Solis-Diaz, 194 Wn. App. at 139-40.

Moving to the second Strickland prong, Wessels can show prejudice. Had defense counsel cited relevant case law on youthful offender sentencing, it is reasonably likely a different sentence would have been imposed. Benn, 120 Wn.2d at 663.

The trial court recognized that Wessels's youth contributed to his crime. But, as the dissent recognized, the court treated

Wessels's youth as an aggravating rather than mitigating factor. RP 98. This is likely because counsel's deficient performance left the trial court uninformed as to recent developments in case law. The long road in reaching O'Dell reflects that perceived common sense is not always consistent with science. And "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." McGill, 112 Wn. App. at 102. Specific to this context, a trial court must conduct a meaningful, individualized inquiry into whether the defendant's youth should mitigate the sentence. Solis-Diaz, 194 Wn. App. at 141 (citing O'Dell, 183 Wn.2d at 696).

In a similar vein—as Wessels argued in the Court of Appeals—the trial court may well have thought twice about making an example of Wessels and, more broadly, thought twice about the usefulness of the court's message to the intended youthful audience. RP 99-100. The usefulness of such a message must be called into question when the audience is likely to be hampered by the same deficits as the defendant.

As it stands, Wessels will not see the light of day until his 30s. With the benefit of the O'Dell argument—available to, but ignored by, defense counsel—and the resulting individualized inquiry, the trial court could easily have viewed the standard range sentence as excessive.

For this reason, as well, this Court should grant review, reverse the Court of Appeals, and remand for resentencing.

E. CONCLUSION

This Court should accept review under RAP 13.4(b)(1) and (4) and reverse the Court of Appeals.

DATED this 1st day of July, 2020.

Respectfully submitted,

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APPENDIX

FILED
JUNE 2, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. CALLEN C. WESSELS, Appellant.	)))))))))	No. 36880-7-III UNPUBLISHED OPINION

PENNELL, C.J. — Callen Christopher Wessels appeals his standard range sentence for vehicular homicide and hit and run. We affirm.

FACTS

Two months after his 21st birthday, Callen Wessels got drunk at a party and drove away in his truck. While speeding past another vehicle, Mr. Wessels flipped his truck and crashed into a ditch. The truck's cab was crushed. Mr. Wessels was able to get out of the truck and leave the area. But his passenger, 19-year-old-Jared Lee, was not so lucky. Mr. Lee died as a result of the crash. When Mr. Wessels fled the scene, he left Mr. Lee behind, to be discovered later by first responders.

The police caught up with Mr. Wessels at his house. When questioned about what happened, Mr. Wessels lied. He claimed he was not involved in the crash. Instead, he insisted he had been carjacked at gunpoint. The police were unconvinced. Mr. Wessels was arrested and booked into jail.

Once at the jail, Mr. Wessels was read his rights and interviewed a second time. During the second interview, Mr. Wessels eventually admitted to dishonesty. Mr. Wessels agreed that he was the driver at the time of the crash. However, he suggested Mr. Lee had done something to interfere with the truck's operation immediately before the crash. Mr. Wessels was charged with vehicular homicide, hit and run, reckless driving, and perjury.

Mr. Wessels pleaded guilty to vehicular homicide and hit and run, pursuant to a plea agreement. The State agreed to recommend a sentence of 100 months' imprisonment. This sentence was within the standard range of 86 to 114 months. Mr. Wessels reserved the right to argue for any lawful sentence.

The sentencing hearing was lengthy. Testimonials were presented on behalf of Mr. Wessels and Mr. Lee. Mr. Lee's family requested the judge impose the maximum possible sentence. They shared not only their grief at losing Mr. Lee, but also their outrage that Mr. Wessels had fled the scene and lied about his conduct. Mr. Wessels's

friends and family spoke to Mr. Wessels's many good qualities. They described Mr. Wessels as a kind, hardworking, and helpful person who made an uncharacteristically poor decision on the night of the accident. None of Mr. Wessels's supporters described him as impulsive or immature. In fact, Mr. Wessels's high school friend, Carlene Hatfield, described Mr. Wessels as "the most responsible out of all" of her group of friends. Report of Proceedings (May 28, 2019) at 62.

At the close of the testimonials, Mr. Wessels's attorney asked for an exceptional sentence downward. Defense counsel drew attention to Mr. Wessels's youth and the support of his family and friends. She referenced an incident in a neighboring county where a similar offense has resulted in a sentence of 18 months' probation.

The sentencing judge acknowledged Mr. Wessels's youth and the fact drinking is somewhat common in people Mr. Wessels's age. Nevertheless, the judge voiced concern over the prevalence of drunk driving among young people. The judge prioritized deterrence over other sentencing concerns. It selected a high-end sentence of 114 months as necessary for community safety.

Mr. Wessels timely appeals his sentence.

ANALYSIS

Appeals of standard range sentences are generally prohibited. RCW 9.94A.585(1). A sentencing judge has almost unfettered discretion to impose a standard range sentence. Appellate review turns not on whether we agree or disagree with the sentencing judge's decision. Instead, review turns on whether the defendant can establish legal error such as (1) a categorical refusal to award an exceptional sentence downward under any circumstance, (2) reliance on a constitutionally improper basis for sentencing (sex, race, religion, etc.), or (3) failure to recognize discretion to impose an exceptional sentence downward. *See State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); *State v. Garcia-Martinez*, 88 Wn. App. 322, 328-29, 944 P.2d 1104 (1997).

Mr. Wessels has not established a basis for appellate relief. The sentencing judge could have imposed a lower sentence, but it was not required to do so. *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) ("[A]ge is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence."). The judge considered the testimonials presented by Mr. Wessels, listened to defense counsel's arguments in favor of mitigation, and then opted to issue a sentence rooted in deterrence. This decision was a permissible exercise of sentencing discretion.

The sentencing judge's decision to focus on deterring young adults from drunk driving was not a legal error warranting relief on appeal. Youth is a possible mitigating factor, but it is not a suspect classification. Regardless of whether a deterrence message aimed at young adults might have been effective, we have no legal basis for questioning the judge's justification for a standard range sentence.

In addition to directly attacking his sentence, Mr. Wessels claims his attorney was ineffective in failing to cite case law authorizing an exceptional sentence downward based on youth. To establish a claim of ineffective assistance, Mr. Wessels must demonstrate deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The record supports neither.

The record does not show deficient performance. Mr. Wessels's attorney emphasized Mr. Wessels's youth and asked for an exceptional sentence downward. There are not facts suggesting more could be done. The record contains no evidence Mr. Wessels was impulsive or immature for his age. Given this circumstance, cases addressing downward departures based on youth were not directly applicable and would not have aided Mr. Wessels's leniency plea. *O'Dell*, 183 Wn.2d at 691 (recognizing that mitigated culpability for individuals over 18 may exist as to "specific individuals" over 18 with "particular vulnerabilities" such as "impulsivity, poor judgment, and susceptibility to

outside influences"); *see also State v. Moretti*, 193 Wn.2d 809, 824, 446 P.3d 609 (2019) (leniency under *O'Dell* depends on the existence of evidence that "youth contributed to the commission" of the defendant's offense).

Mr. Wessels also fails to show prejudice. This is not a case where the sentencing judge lamented Mr. Wessels's sentence as excessive. We have no reason to think the judge would have changed its sentencing decision had defense counsel provided citations to *O'Dell* or similar cases.

CONCLUSION

The judgment and sentence is 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.

Pennell, C.J.

I CONCUR:

Lawrence-Berrey, J.

No. 36880-7-III

FEARING, J. (dissenting) — I agree with the majority that RCW 9.94A.585(1) generally bars appellate review of a sentence within the standard range. Callen Wessels' sentencing court sentenced Wessels within the standard range, although at the highest end of the range. Nevertheless, RCW 9.94A.585(1) does not completely forestall appellate review of a sentence falling within the standard range.

Trial judges have considerable discretion under the Sentencing Reform Act of 1981, chapter 9.94A RCW, but still must act within its strictures. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). While no defendant is entitled to challenge a sentence within the standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). Remand for resentencing is often necessary when a sentence is based on a trial court's erroneous interpretation of or belief about the governing law. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

At the time of his criminal misconduct, Callen Wessels was 21 years of age. Youth alone does not demand that the sentencing court lower the offender's sentence. *State v. O'Dell*, 183 Wn.2d 680, 695-96, 358 P.3d 359 (2015). Nevertheless, at least as to youth below the age of 21, the sentencing court should consider whether youth diminished the offender's culpability. *State v. O'Dell*, 183 Wn.2d at 695-96. A lack of maturity and an undeveloped sense of responsibility often result in impetuous and ill-considered actions and decisions. *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

A youth's immaturity extends to age 25. A National Institutes of Health study shows that the region of the brain that inhibits risky behavior does not fully form until the age of 25. *United States v. Gall*, 374 F. Supp. 2d 758, 762 (S.D. Iowa 2005) (citing Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, *WASH. POST*, *Feb. 1, 2005, at A01)*, *rev'd*, 446 F.3d 884 (8th Cir. 2006), *rev'd*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The prefrontal cortex does not have nearly the functional capacity at age 18 as it does at age 25. *In re Palmer*, 33 Cal. App. 5th 1199, 1210, 245 Cal. Rptr. 3d 708, *review granted*, 445 P.3d 1004 (Cal. 2019). Thus, regardless of the specific crime at issue, juvenile offenders are categorically less culpable than adult offenders, and the chronological age of a minor is itself a relevant mitigating factor of great weight. *Miller v. Alabama*, 567 U.S. 460, 471-72, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1

(1982). During Callen Wessels' sentencing hearing, an ophthalmologist mentioned that car rental companies will not rent vehicles to individuals under the age of 25.

At the conclusion of the lengthy sentencing hearing and when announcing its sentence, Callen Wessels' trial court referenced a news story lamenting the one hundred days between Memorial Day and Labor Day because of the conduct of young drivers during this window of time. Because of a recess in school and the good weather, young people drink and drive during the summer months. The sentencing court wished to implant fear in a young person's mind that killing someone while driving intoxicated will result in a substantial time in prison. For these reasons, the sentencing court imposed the maximum sentence.

Callen Wessels' sentencing court was not required to grant an exceptional sentence below the standard range or even decrease the sentence within the standard range because of Callen Wessels' youth. But the sentencing court could not employ youth as a factor in increasing the sentence to the high end of the standard range. The sentencing court thereby employed a mitigating factor as an aggravating factor contrary to law, and the court accordingly abused its discretion.

I have the highest regard and respect for my colleague, the sentencing judge, but I dutifully dissent. I would remand for the sentencing court to reassess the length of the sentence based on youth being a factor favoring Callen Wessels, not a factor to increase Wessels' punishment.

I Dissent:

Fearing, J.

Fearing, J.

NIELSEN KOCH P.L.L.C.

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