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Division I
State of Washington

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No. 74415-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SEAN O'DELL,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION AND ISSUE PRESENTED

In Sean O'Dell's prior appeal the Supreme Court concluded the trial court could rely on youthfulness alone as a mitigating factor to impose a mitigated exceptional sentence. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). The Court reached this conclusion upon finding the attributes of youth, such as risk-taking, impulsivity, immaturity, and increased likelihood for rehabilitation as compared to older offender, could significantly mitigate a young offender's culpability. On remand the trial court nominally considered Sean's youthfulness but did not engage in the analysis directed by the Supreme Court. Indeed, the trial court rested its analysis in large measure on the analysis and conclusions of the dissenting opinion in *O'Dell*. Sean asks this Court to remand the matter for a new sentencing hearing before a new judge to engage in the analysis directed by the Supreme Court's mandate.

B. ASSIGNMENT OF ERROR

The trial court abused its discretion when it failed to meaningfully consider youthfulness as a mitigating factor as directed by the Supreme Court.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Supreme Court held that each of the differences between young offenders and other adult offenders can constitute a mitigating factor justifying the imposition of an exceptional sentence. Where the

trial court did not address the differences between Sean and other adult offenders, did the court meaningfully consider youth and its attributes as directed to by the Supreme Court?

D. STATEMENT OF THE CASE

Ten days after his 18th birthday, Sean O'Dell committed the offense of second degree rape of a child. 183 Wn.2d at 683. In light of the scientific evidence regarding adolescent brain development, and its significance to criminal sentencing, Sean asked the trial court to impose a mitigated exceptional sentence. *Id.* at 685. The trial court concluded it could not consider Sean's youth as a mitigating factor. *Id.*

On appeal the Supreme Court reversed, disavowing its prior precedent to the extent it precluded consideration of the attributes of youth as mitigating factors. *Id.* at 696. The Court held that the differences between youthful offenders and other adult offenders may justify a mitigated sentence. *Id.* at 693. The court remanded the matter for resentencing "in accordance with this opinion." *Id.* at 699.

At resentencing, Sean again asked for a mitigated exceptional sentence. Rather than address the differences between a young person like Sean and other adult offenders, the court compared Sean to other young people, concluding he was "not immature for his age." RP 42.

Rather than address the increased likelihood for rehabilitation, the court focused on its conclusion that Sean knew right from wrong. RP 43.

The court imposed the same sentence it originally imposed. RP 44-45.

E. ARGUMENT

The sentencing court abused its discretion when it failed to properly consider youth as a mitigating factor.

1. Youthfulness is a substantial and compelling basis for a mitigated sentence.

Children are “constitutionally different from adults for purposes of sentencing.” *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012). They are categorically less blameworthy and more likely to be rehabilitated. *Id.*; *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The principles underlying adult sentences -- retribution, incapacitation, and deterrence -- do not to extend juveniles in the same way. *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 132 S. Ct at 2464. Scientists have documented their lack of brain development in areas of judgment. *Id.* Also, children cannot control their environments. *Id.* at 2464, 2468. They are more vulnerable to and less able to escape from poverty or abuse and have

not yet received a basic education. *Id.* Most significantly, juveniles' immaturity and failure to appreciate risk or consequence are temporary deficits. *Id.* at 2464. As children mature and "neurological development occurs," they demonstrate a substantial capacity for change. *Id.* at 2465.

Recognizing "youthfulness" is more than merely chronological age; *O'Dell* extended these principles to circumstances where youthful offenders commit offenses as adults. 183 Wn.2d at 695-96. Examining decisions like *Miller* and the science underlying them, the Court held youthfulness, by itself, is a valid mitigating factor upon which a court may impose an exceptional sentence. *Id.* at 696.

Culpability is not defined by the defendant's participation in the offense. Instead, among the relevant factors the judge should consider as mitigation are: (1) immaturity, impetuosity, and failure to appreciate risks and consequences; (2) lessened blameworthiness and resulting diminishment in justification for retribution; and (3) the increased possibility of rehabilitation. *O'Dell*, 183 Wn.2d at 692-93. The court concluded each of these "differences" between adults and young offenders could justify an mitigated sentence. *Id.* at 693.

2. Sean may appeal the trial court's failure to comply with the Supreme Court's mandate to meaningfully consider youthfulness as a mitigating factor.

Generally, a standard range sentence may not be appealed.

RCW 9.94A.585(1). That statute, however, does not place an absolute prohibition on the right of appeal. Instead, the statute only precludes review of challenges to the amount of time imposed when the time is within the standard range. *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A defendant, however, may challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993).

When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998).

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 considered.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)

(emphasis in original).

O'Dell concluded a court's failure to fully consider youthfulness as a mitigating factor is an abuse of discretion. 183 Wn.2d at 697. Moreover, where an appellate court remands a case for resentencing, the trial court must comply with the appellate court's mandate. RAP 12.2 states that "[u]pon issuance of the mandate of the appellate court ... the ... decision made by the appellate court ... governs all subsequent proceedings in the action."

O'Dell concluded youth by itself is a mitigating factor. The Court remanded the matter directing the court to resentence Sean after giving meaningful consideration to the differences between young and adult offenders. As set forth below, the trial court did not do as the Supreme Court directed.

3. *The mitigating value of youthfulness is about more than just knowing right from wrong.*

Miller addressed at length the "hallmark features" of youth, "immaturity, impetuosity, and failure to appreciate risks and consequences." 132 S. Ct. at 2468. Critically, the Court noted that beyond a youth's lessened "moral culpability," the transitional nature of adolescence means it is much more likely a young person's "deficiencies will be reformed" as his "neurological development occurs." *Id.* at 2464-65

In assessing whether any fact is a valid mitigating factor the trial court's task is to determine whether that fact differentiates the current offense and offender from those in the same category. *O'Dell*, 183 Wn.2d at 690. What makes youthfulness a mitigating factor is the degree to which it distinguishes youthful offenders from older offenders. *Roper* observed it is "misguided" to equate adolescent failings with those of older offenders. 543 U.S. at 570. It is precisely the "differences" between youthful and other offenders which are the valid mitigating factors. 183 Wn.2d. at 693. Thus, the relevant question is to what degree did Sean's youth differentiate him and his offense from other adult offenders. The trial court did not engage in that analysis.

The trial court stated "I don't see him as immature for his age." RP 42. The relevant cohort is not just other youthful offenders, people "his age," but all other offenders convicted of the same offense, the vast majority of which are by virtue of Sean's age at the time of offense necessarily older. Within that group, the relevant question is whether Sean's youthfulness differentiates him and his offense for the offense of these older individuals. The trial court instead just compared his maturity to other young people. At no point, did the court consider how Sean's maturity, culpability, and decision making measured against

adult offenders, the vast majority of which are older than him. In doing so, the trial court did not give effect to *O'Dell's* mandate.

Beyond that, the trial court failed to give effect to the Supreme Court's caution, that the hallmark attributes of youth are transient. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570. The trial court never assessed Sean's likelihood for rehabilitation brought about simply by maturation as compared to older adult offenders.

Instead, the trial court focused on whether Sean's youthfulness diminished his capacity to appreciate right from wrong. Saying "looking at his immaturity . . . this is a young man that was taught right and didn't do it." RP 43. The court said "He was brought up right. He knew right from wrong. And he didn't follow that right and wrong on that particular night . . ." RP 44.

The ability to understand right and wrong is not the sum of the analysis required by *O'Dell* or *Miller*. Youthful offenders may well understand right and wrong and yet impetuously make the wrong choice. There could be little doubt that the juvenile defendants in *Miller* understood murder was wrong. That, however, does not account for the

fact that immature judgment and impetuosity, classic traits of youth, contributed to their conduct. More importantly, merely knowing right from wrong does not account for the significant remaining deficits in young people. The trial court's focus on knowing right from wrong is not a proper consideration of youth as a mitigating factor as required by *O'Dell*.

In addition, in making its ruling, the trial court read at length from the dissenting opinion in *O'Dell* relying on it as setting forth the "facts" of the case. RP 36-37. The trial court highlighted the dissent's evaluation of Sean's maturity and susceptibility to peer pressure, endorsing that as its own analysis. *Id.* It goes without saying that a dissenting opinion is not the view of the majority of the court as to the facts or analysis. The dissent is in no way a proper base for the trial court to rest its analysis upon, or to use as a guide to its analysis. The dissent does not represent the mandate of the Supreme Court which now governs this case. The fact the trial court acknowledged it was relying on the dissent does not excuse its analysis. The trial court's reliance on the dissent is in itself an abuse of discretion.

4. *The Court should remand this case for resentencing before a new judge.*

When a judge makes a sentencing decision without factoring in all necessary information, the judge's continued involvement creates an

appearance of unfairness and the remedy is remand before a different judge. *City of Seattle v. Clewis*, 159 Wn. App. 842, 851, 247 P.3d 449 (2011). When a judge pronounces a sentence before it has heard and considered all available information, the remedy is remand for further proceedings before a different judge. *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996) (“the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court announced the sentence it intends to impose the remedy is to send the defendant before a different judge for a new sentencing hearing.”).

As this Court held in *State v. Crider*, 78 Wn. App. 849, 899 P.2d 24 (1995), and affirmed in *Aguilar-Rivera*, 83 Wn. App. at 203,

Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant’s perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

Crider, 78 Wn. App. at 861. It is appropriate to reassign this case to a different judge who has not already twice announced a sentence, so that Sean is not disadvantaged in his request for a sentence that fully weighs the attributes of youth and his potential for rehabilitation.

F. CONCLUSION

This Court should remand this matter for a new sentencing hearing before a different judge, to permit the court to meaningfully consider Sean's youthfulness as a mitigating factor.

Respectfully submitted this 8th day of June, 2016.

s/ Gregory C. Link
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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 74415-1-I
)	
SEAN O'DELL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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