

NO. 44821-1-II

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

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STATE OF WASHINGTON,

Appellant,

v.

LAUREN LUCILLE WRIGHT,

Respondent.

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

The Honorable Jennifer Forbes, Judge

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in imposing an exceptional downward sentence based on Ms. Wright's inability to appreciate the wrongfulness of her conduct.
2. The trial court did not err in imposing electronic home monitoring as an exceptional sentence downward for a violent offense.

Response to Issues Presented on Appeal

1. Did the trial court did err in imposing an exceptional downward sentence based on Ms. Wright's inability to appreciate the wrongfulness of her conduct?
2. Did the trial court did not err in imposing electronic home monitoring as an exceptional sentence downward for a violent offense?

B. STATEMENT OF THE CASE

Findings and Conclusions of Law for Sentencing

The trial court entered findings and conclusions on sentencing in support of the exceptional sentence downward. CP72-77. The Court cited Ms. Wrights inability to appreciate the wrongfulness of her conduct due to her age, a teenager just 18 years old three weeks

before the accident, the lack of rehabilitation or punishment value with incarceration, and aberrant behavior. Id.

For the purpose of this response to the state's appeal, Ms. Wright accepts the state's statement of facts set forth in its opening brief at pages 3-16 (State's opening brief).

C. ARGUMENT

1. THE TRIAL COURT LEGALLY EXERCISED ITS DISCRETION IN IMPOSING AN EXCEPTIONAL SENTENCE DOWNWARD OF ELECTRONIC HOME MONITORING BASED ON APPELLANT'S INABILITY TO APPRECIATE THE WRONGFULNESS OF HER CONDUCT AND BASED ON ABERRANT BEHAVIOR.

Lauren Wright, a teenager, was unable to appreciate the wrongfulness of her conduct that caused the vehicular assault and assault in the third degree, and was aberrational behavior based on her age and immaturity. The trial court cited Ms. Wright's youth and failure to appreciate the consequences of her behavior as mitigating factors in support of imposing the exceptional sentence downward. COL XII; FOFV, VII, XI, XII, XIII. CP 72-77. However termed, these factors constitute aberrant behavior and an inability to appreciate the

wrongfulness of her conduct; legitimate basis that the trial court relied on in imposing an exceptional sentence downward.

A court must generally impose a sentence within the standard sentence range. Under RCW 9.94A.120(1), the court may impose a sentence above or below the standard range for reasons that are “substantial and compelling.” RCW 9.94A.120(2); *State v. Alexander*, 125 Wn.2d 717, 724-725, 888 P.2d 1169 (1995). In addition to the statutory mitigating factors, there are judicially recognized “substantial and compelling” reasons to justify a downward departure. *Alexander*, 125 Wn.2d at 725-727.

Review of an exceptional sentence is governed by RCW 9.94A.585(4). An appellate court may reverse only if it finds (1) using a clearly erroneous standard, that the reasons supplied by the sentencing court are not supported by the record before the judge; (2) using a de novo standard, that those reasons do not justify a sentence outside the standard sentence range for that offense; or (3) using an abuse of discretion standard, that the sentence imposed was clearly excessive or too lenient. *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001); *State v. Branch*, 129 Wn.2d 635, 645–46, 919 P.2d 1228 (1996) (quoting *State v. Garza*, 123 Wn.2d 885, 889,

872 P.2d 1087 (1994)).

Under the first prong, the Court will reverse an exceptional sentence only if the trial court's reason is clearly erroneous; meaning that there is insufficient evidence to persuade a fair-minded person of the truth of the mitigating factor. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

The SRA contains a list of aggravating and mitigating factors “which the court may consider in the exercise of its discretion to impose an exceptional sentence.” RCW 9.94A.535. *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). This list is not exclusive, rather any such reasons must first, not have been considered in determining the standard range, and second, the factor must “distinguish the defendant's crime from others in the same category[] and make the crime more, or less, egregious.” *Fowler*, 145 Wn.2d at 405; *Alexander*, 125 Wn.2d at 725-727; *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993), *citing*, *State v. Grewe*, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991) (Grewe test); *Fowler*, 145 Wn.2d 405; *State v. Akin*, 77 Wn.App. 575, 584, 892 P.2d 774 (1995).

The Sentencing Reform Act of 1981 (SRA) permits structured discretionary sentencing. RCW 9.94A.010. The act has multiple goals

beside punishment of the offender, including proportionate sentencing, promoting respect for the law by providing for just punishment, and providing an opportunity for the offender to improve herself. *Id.* To satisfy and meet this goal, the trial court must be able to exercise discretion in both exceptional sentences upward and downward. RCW 9.94A.535(1)(e) specifically permits an exceptional downward based on:

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. ....

This factor was upheld in a case where a battered woman killed her abuser. *State v. Pascal*, 108 Wn.2d 125, 136–37, 736 P.2d 1065, 1071–72 (1987). In *State v. Statler*, 160 Wn.App. 622, 248 P.3d 165, *review denied*, 172 Wn.2d 1002 (2011), the Court affirmed the imposition of an exceptional sentence downward based on the sentencing court's consideration of Mr. Statler's age, the amount of time Mr. Statler was receiving in comparison to the two co-defendants, and the fact that no victims were seriously injured in the crime. *Statler*, 160 Wn.App. at 630. Therein, the Court determined that the use of age relative to the factor regarding his minimal participation

in the crime was a valid consideration for imposing the exceptional sentence downward. *Statler*, 160 Wn.App. at 639–40.

This Court in *State v. Ha'mim*, 132 Wn.2d 834, 940 P.2d 633 (1997), also indicated that a defendant's age can be used when considering a specific factor related to age. *Ha'mim*, 132 Wn.2d at 846-847. In *Ha'mim*, the Court held that the trial court erred by considering Ha'mim's age alone, without showing how his age related to the other factors applied—Ha'mim was induced to commit the crime and was not predisposed to criminal behavior. *Id.*

In *State v. Nelson*, 108 Wn.2d 491, 740 P.2d 835 (1987), the sentencing court imposed an exceptional sentence downward, relying on the statutory mitigating factor that the defendant, *with no apparent predisposition to do so, was induced by others to participate in the crime*. RCW 9.94A.390(1)(d); *Nelson*, 108 Wn.2d at 494-95.(emphasis added). The trial court used the defendant's lack of any prior criminal history (beyond that used to compute the standard range) as evidence to support its conclusion that Mr. Nelson had no prior disposition to commit the robbery. The Supreme Court affirmed the trial court's imposition of an exceptional sentence below the standard range and explained that the accomplice involved in the

robberies had planned the crimes, and that

[t]he complete lack of misdemeanors, beyond the absence of felonies that renders a zero offender score ... is appropriate for the sentencing judge to consider, *in that it supports a finding that the defendant lacked the predisposition* to commit the crimes.

*Nelson*, 108 Wn.2d at 498 (emphasis added). Under *Nelson*, lack of predisposition, alone, cannot be used as a mitigating factor to impose a sentence below the standard range for a crime. *Nelson*, 108 Wn.2d at 499. Rather,

[l]ack of predisposition *and inducement by others* to commit the crime is one of the mitigating factors listed under RCW 9.94A.390. Therefore, as a matter of law, this factor justifies the imposition of a nonstandard sentence.

*Nelson*, 108 Wn.2d at 499 (emphasis added).

The “lack of predisposition” to commit a crime is relevant only in combination with the finding that the defendant was “induced” to commit the crime. *Id.* The lack of the individual's previous inclination to commit the crime, together with the fact that he or she was induced by someone else to participate in the crime, may reduce the culpability of the defendant; the statutory mitigating circumstance recognizes this and allows sentencing courts to deviate from the

standard range set by the SRA. RCW 9.94A.390(1)(d).

In *Alexander*, another case involving a judicially recognized mitigating factor, the defendant was involved in a controlled police buy involving an “extraordinarily small amount” of cocaine. The Court determined that under the first prong of the *Grewe*, test, this was not considered by Legislature in determining standard range sentence. *Alexander*, 125 Wn.2d at 725-727. The Court also determined that under the second prong of the *Grewe* test, the extraordinarily small amount of cocaine distinguished Alexander’s case from other cases and supported a substantial and compelling reason for a downward departure. *Alexander*, 125 Wn.2d at 727.

In order for the court to conclude that deviation from the standard range is warranted due to a significant impairment of a defendant's capacity, it must find proof, based upon the evidence, that the defendant's condition significantly impaired her capacity to appreciate the wrongfulness of his conduct or conform her conduct to the requirements of the law. *State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

In *Rogers*, the defendant was a 50-year-old, highly-educated former schoolteacher and school principal who committed armed

bank robbery. The court imposed an exceptional sentence below the standard range finding, based on testimony and a psychologist's report, that the defendant was "under severe emotional and psychological stress at the time the offense was committed" and his judgment was "exceptionally impaired, his thinking irrational and his behavior impulsive." *Rogers*, 112 Wn.2d at 184.

The Supreme Court concluded that: accepting the trial court's finding that Rogers was under severe emotional and psychological stress when he committed the bank robbery; there was no proof that the stress Rogers experienced significantly impaired his capacity to appreciate the wrongfulness of his conduct. *Rogers*, 112 Wn.2d 185. Therefore, the court reversed, observing that the test under RCW 9.94A.535(1)(e) is "stringent" and if a trial court relies on the statutory language of RCW 9.94A.535(1)(e), there must be proof to meet that standard. *Id.*

Here, unlike in *Rogers*, where the defendant was under transitory stress, the record supports the finding that Wright's developmental level as a teenager, with a teenage brain, inhibited her ability to appreciate the wrongfulness of her conduct. The record also supports the finding that incarceration would serve no beneficial

purpose; and the behavior was aberrant. (FOF X, XI, XII, XIII). CP V72-77. The inability to appreciate the wrongfulness of conduct, is a valid consideration for the mitigating factor of aberrant behavior that relates to the crime committed and distinguish it from other crimes of the same statutory category; *State v. Law*, 154 Wn.2d 85, 98, 110 P.3d 717 (2005); *Statler*, 160 Wn.App. at 639–40.

Here, Ms. Wright's youthful age alone is not a proper mitigating factor to support a more lenient sentence. However, the trial court did not rely on her age alone. Rather the trial court correctly considered Ms. Wright's age to support the exceptional sentence under the mitigating factor regarding her capacity to appreciate the wrongfulness of her conduct or conform it to the legal requirements of the law. RCW 9.94A.535(1)(e).

Recently, in a landmark decision, the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) abolished the death penalty for youth under eighteen years old as cruel and unusual punishment. *Roper*, 543 U.S. at 575. The Court emphasized the inherent immaturity of youth and strongly indicated in that decision that sentencing courts should consider the circumstances attendant upon youth. *Roper*, 543 U.S. at

569-70. While lengthy, the following language from *Roper* unequivocally explains that youthful offenders differ from adult offenders and should therefore be treated differently.

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” [*Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) ].... It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” *Arnett, Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent....

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.... This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment....

The third broad difference is that the character of a

juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed....

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” [*Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion) ]. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.... The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, “[t]he 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.” [*Johnson*, 509 U.S. at 368].

*Roper*, 543 U.S. at 569–70 (some alterations in original).

While *Roper* addressed the death penalty, other federal courts have addressed exceptional sentences and interpreted “aberrant

behavior” for teenagers as distinct from little or no criminal history. *United States v. Rojas-Millan*, 234 F.3d 464, 475 n. 7 (9th Cir.2000).

If a federal trial court determines that there are significant factors that the Federal Sentencing Guidelines do not adequately address, it may exercise its discretion and grant a downward departure. *Rojas-Millan*, 234 F.3d at 475. 18 U.S.C. § 3553(b);1, (limited by *U.S. v. Booker*, 543 U.S. 220, 258-250, 125 S.Ct. 738, 160 L.Ed.2d 621 (2012)) specifically provides downward departures for “aberrant behavior” as mitigating circumstances “not adequately taken into consideration by the Sentencing Commission”. *Id.* While the federal guidelines agree with our state sentencing guidelines that a first offense is not grounds for an exceptional downward sentence, the fact of a first offense may be relevant to determining if the offense was “aberrant behavior”. *Rojas-Millan*, 234 F.3d at 475, n.7, citing,

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1 Application of these criteria indicates that we must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure), see 18 U.S.C. § 3553(b)(1) (2000 ed., Supp. IV), and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range, see § 3742(e) (2000 ed. and Supp. IV).

*United States v. Dickey*, 924 F.2d 836, 838 (9th Cir.1991); *United States v. Green*, 105 F.3d 1321, 1323 (9th Cir.1997); *United States v. Lam*, 20 F.3d 999, 1003-04 (9th Cir.1994).

All of the federal circuits recognize aberrational behavior as a factor that may, in the appropriate case, justify an exceptional sentence downward. Elizabeth Williams, Annotation, *Downward Departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) Based on Aberrant Behavior*, 164 A.L.R. Fed. 61, §§ 2, 3 (2000).

Aberrant behavior justifies a downward sentence in this case, and this Court should recognize that some crimes represent the truly unusual behavior of individuals who are generally nonviolent, law-abiding citizens committing crimes under unusual circumstances. Similar to the federal approach, the State Courts of Appeal should hold that a trial court may, in its discretion, impose an exceptional sentence downward based upon aberrant behavior. Reference to the federal factors supporting this mitigating factor is illustrative. In deciding whether Ms. Wright could appreciate the wrongfulness of her conduct and whether aberrant behavior justifies a downward sentence, this Court should consider that Ms. Wright, was a teenager,

just eighteen years old three weeks before accident. It is common knowledge that teenagers' brains are not fully formed and that they often feel invincible, i.e. unable to appreciate the seriousness of their behavior.

In *Fowler*, the State Supreme Court only rejected “aberrational behavior” in that case because it was no more than lack of criminal history, which alone did not justify a downward sentence. *Fowler*, 145 Wn.2d at 407-408. The Supreme Court in *Fowler*, did not consider “aberrational behavior” coupled with an offender’s inability to appreciate the wrongfulness of her conduct.

The SRA does not eliminate sentencing discretion. A sentencing judge is still in the best position to make case by case assessments to determine whether there are substantial and compelling reasons to impose a sentence outside the standard sentencing range. The Legislature has left that discretion to the sentencing judge where aggravating circumstances call for punishment beyond the presumptive sentence. It has also left that discretion where mitigating circumstances call for punishment less than the presumptive sentence. In this case, the trial court, in the best position to assess Ms. Wright and an appropriate sentence, properly

exercised his discretion in imposing an exceptional downward sentence based on her inability to appreciate the wrongfulness of her conduct evidenced by her age and aberrant behavior. These are legitimate non-statutory mitigating factors, particularly when applied to teenagers. *Roper, supra*. This Court should not second guess the trial judge, but should affirm her sentencing decision, which like *Roper*, properly considered, Ms. Wright's immaturity.

2. THE TRIAL COURT WAS AUTHORIZED TO IMPOSE ELECTRONIC HOME MONITORING AS AN EXCEPTIONAL SENTENCE FOR VEHICULAR ASSAULT AND ASSAULT IN THE THIRD DEGREE.

Generally, RCW 9.94A.734(1)(c) prohibits the imposition of Electronic Home Monitoring (EHM) for offenders convicted of a violent offense. However, the commission of a violent offense does not preclude an exceptional sentence downward. *State v. Fitch*, 78 Wn.App. 546, 552–53, 897 P.2d 424 (1995). If an exceptional sentence is appropriate, the trial court has substantial discretion in determining the duration and nature of sentence, including the imposition of EHM in lieu of incarceration. *State v. Smith*, 124 Wn.App. 417, 436–38, 102 P.2d 158 (2004), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007). Because the trial court determined that an

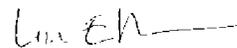
exceptional sentence was appropriate, it had the discretion to impose EHM.

D. CONCLUSION

Ms. Wright respectfully requests this Court affirm her exceptional downward sentence of home monitoring.

DATED this 14th day of November 2013.

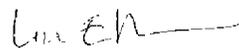
Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County prosecutor's office [kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us) and Lauren Wright 5688 E Collins Port Orchard WA 98366 a true copy of the document to which this certificate is affixed, on November 14, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



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