

No. 49152-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

AARON ATA TOLEAFOA,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-01426-1
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it failed to meaningfully consider youthfulness as a mitigating factor as directed by the Washington and United States Supreme Courts.
2. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where youthfulness can diminish a juvenile offender's culpability and can constitute a mitigating factor justifying the imposition of an exceptional sentence, did the trial court meaningfully consider youth and its attributes when it failed to consider whether 15-year old Aaron Toleafoa's behavior and decision making were a product of his youthful immaturity? (Assignment of Error 1)
2. Where the differences between young offenders and adult offenders can constitute a mitigating factor justifying the imposition of an exceptional sentence, did the trial court meaningfully consider youth and its attributes when it failed to address the differences between 15-year old Aaron Toleafoa and adult offenders? (Assignment of Error 1)

3. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Appellant does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

III. STATEMENT OF THE CASE

Following a hearing in juvenile court where the judge declined jurisdiction, the State charged Aaron Ata Toleafoa in Superior Court with attempted first degree murder (RCW 9A.32.030) while armed with a firearm (RCW 9.94A.530); first degree assault (RCW 9A.36.011) while armed with a firearm (RCW 9.94A.530); first degree robbery (RCW 9A.56.190, .200) while armed with a firearm (RCW 9.94A.530); first degree burglary (RCW 9A.52.020) while armed with a firearm (RCW 9.94A.530); theft of a firearm (RCW 9A.56.020, .300); theft of a motor vehicle (RCW 9A.56.020); unlawful possession of a firearm (RCW 9.41.040); taking a motor vehicle without permission (RCW 9A.56.075); obstructing a law enforcement officer (RCW 9A.76.020); and making a false statement to a public servant (RCW 9A.76.175). (CP 1-5, 102-03)

According to the declaration of probable cause, on October 1, 2014, someone broke into the home of Rogelio Campos and stole his AR-15 rifle (a “tactical” rifle with a green laser mounted on top), eight magazines and his 2011 Toyota Tundra truck. (CP 6) Then, on October 2, 2014, Charles Banks’s 1997 Ford Expedition was taken from his driveway when he left it running to charge its battery. (CP 6) Later that night, Mia McDaniel called police to report having been robbed at gunpoint, and that the suspects took her 2011 Jeep Liberty and her tote bag, containing her driver’s license, cellular phone, wallet and credit cards. (CP 6-7) A short time later, David McCollaum was shot while he sat in his car, by someone carrying an AR-15 rifle with a green laser scope. (CP 7) The State alleged that Tolefoa and several other individuals participated in these crimes. (CP 6-9) At the time, Tolefoa was just 15 years of age. (CP 200, 324)

Tolefoa subsequently entered a guilty plea to an Amended Information charging attempted second degree murder while armed with a firearm, first degree robbery, first degree burglary, theft of a motor vehicle, and taking a motor vehicle without permission. (CP 182-84; 185-95; RP 141-42, 145-48)

Tolefoa asked the court to impose an exceptional sentence

below the standard range based on the mitigating factor of his youth. (CP 199-218; RP 158-60) The trial court denied the request, stating:

But let me just say I think, Mr. Toleafoa, you were not living the life of a 15-year-old when you committed this offense. You have a child that you fathered. You were out running the streets involved in a whole variety of activities. You were not residing primarily under your family roof to the extent that they were in control of you, and you were not in school at the time. You were out causing problems. You made some horrific decisions in this case.

You victimized multiple people, not only Mr. McCollaum, but Ms. McDaniel, who having a gun pointed at your head and ordered out of your vehicle by a complete stranger is about as terrifying as it can get, except for then it gets escalated where you actually shoot the person whose vehicle you wanted to steal.

....

You didn't show any remorse for Mr. McCollaum. You didn't do anything to come to his aid at the time. You took off....

You didn't turn yourself in and say, "I don't know what I was thinking. I'm sober now. I want to take responsibility for what I did." That wasn't what occurred at all. You continued the same pattern of behavior that you had exhibited when you were shooting Mr. McCollaum.

So this is not a case in my mind where I could say that your behavior was that of a juvenile who doesn't have a well-formed brain at that point and doesn't have the ability to appreciate the wrongfulness of his conduct....

[N]othing that you were doing on the night that you shot Mr. McCollaum indicated that you were participating in any prosocial activities that were typical for a juvenile. You had exceeded the role of a

juvenile when you made this decision, and I think that it's reflected in the fact that you're dealing with a serious range and a serious adult consequences for adult-like behavior.

(RP 164-66)

The court imposed a standard range sentence totaling 260 months of confinement. (CP 225, 228-29; RP 166-67) Toleafoa timely filed a Notice of Appeal. (CP 335-37)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PROPERLY CONSIDER YOUTH AS A MITIGATING FACTOR.

Under the SRA, a sentencing court must generally sentence a defendant within the standard range. State v. Graham, 181 Wn.2d 878, 882, 337 P.3d 319 (2014); RCW 9.94A.505(2)(a)(i). However, “[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). The diminished culpability of youth may serve as a mitigating factor. See RCW 9.94A.535(1)(e); State v. Ronquillo, 190 Wn. App. 765, 769, 361 P.3d 779 (2015); Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); State v. O’Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).

That is because children are “constitutionally different from adults for purposes of sentencing.” Miller, 132 S. Ct. at 2464. 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. Miller, 132 S. Ct. at 2464.

These scientific studies “reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.” O’Dell, 183 Wn.2d at 692 (footnote citations omitted); see *also* Miller, 132 S. Ct. at 2468 (the hallmark features of youth that diminish a juvenile’s blameworthiness under the Eighth Amendment include immaturity, impulsivity, and failure to appreciate risks and consequences).

Thus, a sentencing court must consider a juvenile offender’s “youth and attendant characteristics” before determining the penalty, and not simply examine his acts during the incident. Miller, 132 S. Ct. at 2471. The judge must “meaningfully consider youth

as a possible mitigating circumstance.” O’Dell, 183 Wn.2d at 696.¹

Furthermore, 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 youth and its characteristics differentiates youthful offenders from older offenders. O’Dell, 183 Wn.2d. at 693. It is “misguided” to equate adolescent failings with those of older offenders. Roper v. Simmons, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Thus, the relevant question is to what degree did Toleafoa’s youth differentiate him and his offense from other adult offenders. The trial court did not attempt to answer that question with the relevant analysis.

The trial court stated that Toleafoa was “not living the life of a 15-year-old” and was not engaged in “activities that were typical for a juvenile.” (RP 164, 166) But whether he was participating in

¹ 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. A defendant 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). And O’Dell concluded that a sentencing court’s failure to fully consider youthfulness as a mitigating factor is reviewable. 183 Wn.2d at 697.

activities considered normal for juveniles is not the relevant inquiry. And the relevant cohort is not even other youthful offenders. Rather, the court must compare Toleafoa to all other offenders convicted of the same offenses, the vast majority of which are, by virtue of Toleafoa's age, necessarily older. Within that group, the relevant question is whether Toleafoa's youthfulness differentiates him and his offenses from these older offenders. The trial court instead just compared Toleafoa's maturity and lifestyle to other young people. At no point did the court consider how Toleafoa's maturity, culpability, and decision making abilities (or lack thereof) compared to adult offenders. By failing to do so, the trial court did not give effect to the mandate of the SRA, Miller or O'Dell.

Beyond this faulty analysis, 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 Toleafoa's likelihood for rehabilitation that may occur simply from maturation as compared to older adult offenders. Instead, the trial court simply focused on

Toleafoa's past behavior and the consequences of that behavior, and did not consider Toleafoa's ability to appreciate those consequences or to make mature decisions about his life when he was just 15 years old.

The court failed to consider that immature judgment and impetuosity—classic traits of youth—may have contributed to Toleafoa's conduct. The trial court “did not meaningfully consider youth as a possible mitigating circumstance” and therefore failed to properly exercise its discretion at sentencing. O'Dell, 183 Wn.2d at 696-97. Toleafoa's case should be remanded for a new sentencing hearing. O'Dell, 183 Wn.2d at 697.

C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.²

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will

² In State v. Sinclair, Division 1 concluded a defendant should object to the imposition of appellate costs in the opening brief. 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). More recently, in State v. Grant, this Court disagreed with Sinclair and held that an appellant should object to the imposition of costs through a motion to modify a commissioner's ruling ordering costs. 2016 WL 6649269 at *2 (2016). But Toleafoa has included an objection to costs in this brief in the event that a higher court adopts the Sinclair reasoning at a future time, and because this Court also noted in Grant that “a defendant may continue to properly raise the issue of appellate costs in briefing or a motion for reconsideration consistently with Sinclair.” 2016 WL 6649269 at *2.

award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Toleafoa’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Toleafoa owns no

property or assets, has no savings, and has no job and no income. (CP 342) Toleafoa is a juvenile and will be incarcerated for over 21 years, foreclosing many of the usual opportunities to gain educational and professional experience. (CP 328-29; RP 166-67) And the trial court declined to order any discretionary LFOs at sentencing in this case after finding that Toleafoa was unlikely to have the ability to repay such costs. (CP 326-27; RP 168) Thus, there was no evidence below, and no evidence on appeal, that Toleafoa has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Toleafoa is indigent and entitled to appellate review at public expense. (CP 346-47) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). See also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (noting that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Toleafoa's financial situation has improved or is likely to improve. Toleafoa is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

This Court should remand this matter for a new sentencing hearing to permit the court to meaningfully consider Toleafoa's

youthfulness as a mitigating factor. Lastly, this Court should decline any future request to impose appellate costs.

DATED: December 29, 2016



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CERTIFICATE OF MAILING

I certify that on 12/29/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Green Hill Juvenile Detention Center, 375 S.W. 11th Street, Chehalis, WA 98532.



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