

NO. 49152-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AARON ATA TOLEAFOA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 15-1-01426-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying defendant's request for an exceptional sentence below the standard range, when the record shows the court looked at defendant's individual circumstances and meaningfully considered whether defendant's youth diminished his capacity and culpability for his crimes?
2. Should the Court award appellate costs if the State substantially prevails on appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On April 13, 2015, the Pierce County Prosecutor's Office charged AARON ATA TOLEAFOA, hereinafter "defendant," with one count of Attempted Murder in the First Degree (firearm enhanced), one count of Assault in the First Degree (firearm enhanced), one count of Robbery in the First Degree (firearm enhanced), one count of Burglary in the First Degree (firearm enhanced), one count of Theft of a Firearm, one count of Theft of a Motor Vehicle, one count of Unlawful Possession of a Firearm in the Second Degree, one count of Taking a Motor Vehicle Without Permission in the Second Degree, one count of Obstructing a Law

Enforcement Officer, and one count of Making a False or Misleading Statement to a Public Servant. CP 1-5.¹

Defendant subsequently pled guilty to an Amended Information on March 30, 2016, charging him with one count of Attempted Murder in the Second Degree (firearm enhanced), one count of Robbery in the First Degree, one count of Burglary in the First Degree, Theft of a Motor Vehicle, and Taking a Motor Vehicle Without Permission in the Second Degree. CP 182-184, 185-195; RP 144-148. Defendant's standard range on the controlling charge – Attempted Murder in the Second Degree with a firearm enhancement – was 206.25 to 281.25 months confinement. CP 186, 325.

Sentencing was held on June 3, 2016. CP 322-334; RP 152-171. Defendant filed a sentencing memorandum and letters in support. CP 199-218, 219-321, 350-382. At sentencing, defendant requested an exceptional sentence of 15 years (or 180 months) confinement. CP 215-218; RP 156, 162. Defendant's attorney agreed that defendant engaged in a crime spree where he burglarized a home and stole an AR-15, "went looking for something to do" with his friends, engaged in the "incident with Ms. McDaniel," and "pointed the AR-15 at Mr. McCollaum's head... [and] shot." RP 158-159. However, defense argued that the court should

¹ Defendant was originally charged in juvenile court, but after a decline hearing, the juvenile court declined jurisdiction and transferred defendant to adult court. CP 202-203.

look at defendant's age and juvenile status and "consider... juveniles are more immature, more prone to negative influences, and peer pressure."

RP 158-160.

The State opposed defendant's request for an exceptional sentence, arguing that defendant engaged in "very violent adult-level crimes" where he ultimately shot victim David McCollaum in the chest, rendering his arm useless. RP 154-158. The State articulated:

[Defendant]... committed these crimes over enough period of time to have thought twice about it and to have decided not to have engaged in that final act... where he points a [gun] with a laser sight at the man's head and ultimately pulls the trigger while pointing the gun at him. That in the scope of cases that come before this Court is about the most serious thing that a person can do, and it certainly warrants adult-level punishment.

RP 155-156. The State recommended the high end of the standard range for a total of 281 months confinement. RP 156-158.

The court heard the argument of counsel and acknowledged that it received the sentencing materials submitted by defense. RP 153-164. The court also acknowledged that it had the discretion to impose an exceptional sentence below the standard range based on defendant's youth. RP 164, 166. Citing defendant's individual circumstances and the "sophisticated means" defendant used to commit his crimes, the court declined to impose an exceptional sentence downward and instead imposed a standard range sentence of 260 months. CP 322-334; RP 164-167. Defendant filed a timely notice of appeal. CP 335-337.

2. Relevant Facts

Defendant was 15 years old in October 2014 when he broke into a home and stole an AR-15 rifle; stole Mia McDaniel's vehicle at gunpoint; and shot David McCollaum in the chest. CP 1-5, 6-9, 182-184, 193, 199-202, 222-226; RP 148, 158-159. Evidence of defendant's guilt was summarized in the probable cause declaration. CP 6-9; *see also* CP 185-195, 199-202, 221-226. On October 1, 2014, defendant and a friend decided to burglarize defendant's girlfriend's neighbor's house. CP 6-9. They entered the residence through a window and stole: an AR-15 "tactical" rifle with green laser sight system, eight magazines, and a 2011 Toyota Tundra (among other things). *Id.* Defendant armed himself with the AR-15 and continued what would become a two-day crime spree. *Id.*

The next day, defendant, armed with the AR-15, and two others were walking towards Pacific. *Id.* Defendant observed a white 1997 Ford Expedition that had been left running and unattended. *Id.* Defendant and his companions took the vehicle and drove away. *Id.*

As defendant and his companions were driving around, they noticed Mia McDaniel in her red 2011 Jeep Liberty. *Id.* Defendant and his companions approached Ms. McDaniel, pointed the AR-15 rifle directly at her, and ordered her out of her vehicle and onto the ground. *Id.* They took Ms. McDaniel's wallet and drove off in her vehicle. *Id.*

Later that same night, defendant and his companions noticed that the Jeep was low on gas and would not make their intended trip to Seattle.

Id. They decided to steal another vehicle. *Id.* Defendant and his companions dumped the white Ford Expedition and all rode in Ms. McDaniel's red Jeep Liberty. *Id.* Defendant was seated in the rear passenger seat and armed with the stolen AR-15. *Id.* While driving around, defendant and his companions observed a vehicle, which was occupied by the owner, David McCollaum. *Id.* Defendant pulled up along the side of Mr. McCollaum's vehicle and pointed the AR-15 with green laser sight directly at Mr. McCollaum. *Id.* When Mr. McCollaum reached for his own gun, defendant pulled the trigger and shot Mr. McCollaum in the chest. *Id.*

A few days later, a number of individuals called law enforcement to report shots fired within an apartment complex. *Id.* One of the callers reported seeing a young male carrying a black rifle crawl through an open window into the apartment directly below her. *Id.* Police responded and apprehended defendant as he attempted to flee the scene. *Id.* Defendant was identified by the caller as the young male carrying the rifle. *Id.* The rifle was recovered at the scene. *Id.* Defendant later admitted to the crimes summarized above, including shooting Mr. McCollaum with the AR-15 rifle. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE, BECAUSE THE COURT LOOKED AT DEFENDANT'S INDIVIDUAL CIRCUMSTANCES AND MEANINGFULLY CONSIDERED WHETHER YOUTH DIMINISHED DEFENDANT'S CAPACITY AND CULPABILITY FOR HIS CRIMES BEFORE IMPOSING A STANDARD RANGE SENTENCE.

Under the Sentencing Reform Act of 1981 (SRA), a sentencing court must generally impose a sentence within the standard range. RCW 9.94A.505(2)(a)(i); see *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). 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). One such mitigating circumstance is if “[t]he 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.”² RCW 9.94A.535(1)(e).

The SRA provides that a standard range sentence “shall not be appealed.” RCW 9.94A.585(1). “However, this prohibition does not bar a

² The statute further provides that “[v]oluntary use of drugs or alcohol is excluded.” RCW 9.94A.535(1)(e).

party's right to challenge the underlying legal conclusions and determinations by which a court comes to a particular sentencing provision. Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (internal citations omitted).

A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627 (2009) (citing *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)). A decision which applies the incorrect legal standard is a decision based on untenable grounds or made for untenable reasons. *Adamy*, 151 Wn. App. at 587 (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

A defendant may not appeal the imposition of a standard range sentence unless the court categorically refuses to exercise its discretion or denies an exceptional sentence based on impermissible reasons. *State v. Grayson*, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); *State v. McGill*, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002). The failure to consider an exceptional sentence authorized by law is an abuse of discretion subject to reversal. *Grayson*, 154 Wn.2d at 342. However, "[w]hen a court has considered the facts and concluded there is no legal or factual basis for an

exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling.” *McGill*, 112 Wn. App. at 100.

Here, defendant challenges his standard range sentence on the basis that the trial court failed to properly exercise its discretion by failing to meaningfully consider defendant’s youth as a mitigating circumstance at sentencing. Brief of Appellant at 9. The record does not support defendant’s claim. Rather, the record demonstrates that the court received and considered defendant’s mitigation evidence, was aware of its authority to impose an exceptional sentence below the standard range, and meaningfully considered defendant’s level of sophistication and maturity when making its decision.

Washington law recognizes that a criminal defendant’s youth may potentially serve as a mitigating circumstance. In *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), the Washington Supreme Court considered age as a mitigating factor in terms of sentencing. In *O’Dell*, the 18-year-old defendant was convicted of second degree rape of a child and given a standard range sentence of 95 months. *O’Dell*, 183 Wn.2d at 683. The defendant requested an exceptional sentence below the standard range based on his age and immaturity (specifically, that “defendant’s capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired by youth”). *Id.* at 685. Witnesses testified that O’Dell acted younger than his

actual age and that his bedroom contained childish objects such as toys and stuffed animals. *Id.* at 697-98. The trial court ruled that under case law, it could not consider O’Dell’s age as a mitigating factor and imposed a standard range sentence. *Id.* at 685-86.

On review, the Supreme Court held that “youth can... amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range... a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like [Mr.] O’Dell, who committed his offense just a few days after he turned 18.” *Id.* at 696. The court reasoned that complete refusal to consider youth as a mitigating factor does not take into account the “impulsivity, poor judgment, and susceptibility to outside influences... of specific individuals.” *Id.* at 691. However, the court also reiterated that “age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence.” *Id.* at 695 (citing *State v. Ha’mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997)). Because the trial court erroneously believed it could not consider O’Dell’s age as a possible mitigating factor, the Supreme Court overturned O’Dell’s sentence and remanded for resentencing. *Id.* at 699.

In *State v. Solis-Diaz*, 194 Wn. App. 129, 133, 376 P.3d 458 (2016), reversed on other grounds by *State v. Solis-Diaz*, 387 P.3d 703 (2017), the 16-year-old defendant was tried as an adult in connection with a gang related drive-by shooting. He was charged with and convicted of

six counts of first degree assault (firearm enhanced), one count of drive-by shooting, and one count of second degree lawful possession of a firearm. *Solis-Diaz*, 194 Wn. App. at 133. The judge rejected the defendant's request for an exceptional sentence below the standard range, stating, among other things, that he believed case law prohibited the court from considering the defendant's youth as a mitigating factor. *Id.* at 135. The judge imposed a standard range sentence of 1,111 months in prison. *Id.* at 133.

On appeal, the *Solis-Diaz* court, citing *O'Dell*, held that the trial court abused its discretion in categorically refusing to consider the defendant's youth as a mitigating factor in sentencing. *Id.* at 138, 144. The court noted, "[t]he same logic and policy that led the Supreme Court to require the consideration of the youth of a young adult offender would apply with magnified force to require the same of Solis-Diaz, who committed his crimes while a juvenile." *Id.* at 138. *See also, State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015) (citing *O'Dell* and holding that defendant's youthfulness could be a possible mitigating factor justifying an exceptional sentence below the standard range, where defendant was 16 years old when he committed crimes of first degree murder, attempted first degree murder and second degree assault while armed with firearm).

The court went on to discuss how the sentencing court on remand should consider whether Solis-Diaz's youth diminished his culpability and

capacity thereby justifying an exceptional sentence below the standard range. *Solis-Diaz*, 194 Wn. App. at 139-41.

In short, a sentencing court must take into account the observations underlying *Miller*³, *Graham*⁴, *Roper*⁵, and *O'Dell*⁶ that generally show among juveniles a reduced sense of responsibility, increased impetuosity, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life. Against this background, the sentencing court must consider whether youth diminished Solis-Diaz's culpability and make an individualized determination whether his "capacity to appreciate the wrongfulness of his conduct or [to] conform that conduct to the requirements of the law" was meaningfully impaired.

A sentencing court's inquiry into the individual circumstances of a particular juvenile offender should take into account that offender's level of sophistication and maturity. Evidence suggesting that the offender thought and acted like a juvenile may indicate that the offender's culpability was less than that necessary to justify imposition of a standard range sentence.

Id. at 140-41 (internal citations omitted).

Unlike the trial courts in *O'Dell* and *Solis-Diaz*, the trial court in this case did not categorically refuse to exercise its discretion in considering defendant's youth as a mitigating factor. Rather, the court expressly acknowledged that it had the discretion to impose an exceptional

³ *Miller v. Alabama*, --- U.S. ---, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

⁴ *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

⁵ *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

⁶ *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

sentence downward based on defendant's youth. The trial court stated during sentencing:

Well, one of the purposes of the Sentencing Reform Act is to take into consideration people's offender scores, take into consideration other factors that may be mitigating. Certainly the age of the defendant when he committed an offense may be a mitigating factor, if the ability to appreciate right and wrong... I recognize that I have the ability to find a reason to grant an exceptional sentence downward. I don't believe this is a case where an exceptional sentence downward should be granted.

RP 164, 166.

Additionally, the court was aware of the relevant case law regarding youth as a possible mitigating factor. Defendant cited to *O'Dell* and *Ronquillo* in his sentencing memorandum. CP 199-218, 219-321. The court acknowledged that it received defendant's sentencing memorandum. RP 153. The court also referenced the *O'Dell* case when making its ruling. RP 164-165.

Here, the sentencing court fully and meaningfully considered defendant's individual circumstances and rightfully determined that defendant's youth did not diminish his capacity and culpability at the time he pointed the firearm at Mr. McCollaum's head and pulled the trigger (and committed his other offenses). The record demonstrates that the court properly exercised its discretion.

In considering defendant's level of sophistication and maturity and whether defendant thought and acted like a juvenile, as discussed in *Solis-Diaz*, the court noted that defendant had fathered a child. RP 164. Defendant was not in school at the time he committed the offenses. RP 164. Defendant was not residing primarily with his family. RP 164. The court found that defendant was "not living the life of a 15-year-old" when he committed his crimes, but rather was "out causing problems" and "running the streets involved in a whole variety of activities." RP 164.

Defendant victimized multiple people; he pointed a gun at the head of one person and actually shot another person. RP 164. Defendant did not show any remorse for his shooting victim or come to his aid. RP 165. Rather, defendant "took off" and was apprehended days later after "firing the [same] gun in the apartment complex." RP 165. Additionally, the court found that defendant used "sophisticated means of both breaking into the neighbor's home, stealing the rifle, stealing his car, driving around, then finding new vehicles to use during the course of the evening." RP 165.

Based on the above, the court found:

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. You certainly did.

I've read letters saying that you were raised in a family that had values, that had expectations, that had some sense of rules, that had some church activities and other things, but that wasn't the life that you were leading. Other than playing basketball... nothing 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 165-66.

An abuse of discretion occurs if the court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *Adamy*, 151 Wn. App. at 587 (citing *Cunningham*, 96 Wn.2d at 34). The record in this case shows the trial court's decision to deny defendant's request for an exceptional sentence was not an abuse of discretion. The court considered whether youth diminished defendant's culpability and made an individualized determination that defendant's capacity to appreciate the wrongfulness of his conduct was *not* meaningfully impaired. The court's actions were not manifestly unreasonable or based upon untenable grounds or reasons. Defendant is unable to show the trial court abused its discretion in denying his request for an exceptional sentence below the standard range based on defendant's youth. Rather, the court properly

exercised its discretion in imposing a standard range sentence.

Defendant's standard range sentence should be affirmed.

2. THE STATE WILL NOT SEEK APPELLATE COSTS IF IT SUBSTANTIALLY PREVAILS ON APPEAL, BECAUSE DEFENDANT WAS FOUND INDIGENT FOR PURPOSES OF APPEAL AND RCW 10.73.160 NO LONGER AUTHORIZES THE IMPOSITION OF APPELLATE COSTS ON JUVENILE OFFENDERS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). In this case, the State will not be seeking appellate costs. RAP 14.2 was recently amended, effective January 31, 2017, to read as follows:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay...*

(emphasis added). Here, the trial court found defendant indigent for purposes of appeal. CP 346-347.

Additionally, RCW 10.73.160 no longer authorizes imposition of appellate costs on a juvenile offender. *See* RCW 10.73.160. The statute was amended, effective July 24, 2015, to reflect this change. Laws of 2015, ch. 265 § 22 provides, in relevant part:

Sec. 22. RCW 10.73.160 and 1995 c 275 s 3 are each amended to read as follows:

<< WA ST 10.73.160 >>

(1) The court of appeals, supreme court, and superior courts may require an adult ~~or a juvenile offender~~ convicted of an offense ~~or the parents or another person legally obligated to support a juvenile offender to pay~~ appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction ~~or sentence or a juvenile offender conviction or disposition~~. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant ~~or juvenile offender to pay~~.

(3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence. ~~An award of costs in juvenile cases shall also become part of any order previously entered in the trial court pursuant to RCW 13.40.145.~~

Defendant was a juvenile offender. Based on the above, the State will not seek appellate costs against defendant under RCW 10.73.160.

D. CONCLUSION.

For the forgoing reasons, the State respectfully requests this Court to affirm defendant's sentence.

DATED: February 27, 2017.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-27-17 Therese Kal
Date Signature

PIERCE COUNTY PROSECUTOR

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