

No. 49672-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Carlos Avalos,

Appellant.

Clallam County Superior Court Cause No. 14-1-00125-7

The Honorable Judge Christopher X. Melly

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial judge erred by refusing to consider Mr. Avalos's youthfulness when ordering that the current sentence run consecutively to previously imposed sentences.
2. The trial court's refusal to consider youthfulness as a mitigating factor resulted in a sentence imposed in violation of the Eighth and Fourteenth Amendment ban on cruel and unusual punishment.
3. The failure to consider youthfulness as a mitigating factor violated the state constitutional prohibition against cruel punishment set forth in Wash. Const. art. I, §14.

ISSUE 1: A defendant's youthfulness is a mitigating factor that allows a sentencing judge to deviate from any sentencing provision, including mandatory provisions for consecutive sentences. Did the trial court fail to exercise its discretion when it ordered that the current sentence "shall run consecutively with the sentence [of] ... 120 months [previously] imposed"?

4. Mr. Avalos was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
5. Defense counsel provided ineffective assistance by failing to recognize that the trial judge had discretion to order that the sentence imposed run concurrently with prior sentences.
6. Defense counsel provided ineffective assistance by failing to cite applicable authority requiring consideration of youth as a mitigating factor.
7. Defense counsel provided ineffective assistance by failing to seek concurrent sentencing.

ISSUE 2: An accused person is entitled to the effective assistance of counsel at sentencing. Did defense counsel provide ineffective assistance by failing to recognize and argue that the court had discretion to order concurrent sentencing?

8. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals

decline to impose appellate costs because Mr. Avalos is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While imprisoned at the Department of Corrections' Clallam Bay facility, 19-year-old Carlos Avalos assaulted a corrections officer. Motion for Determination of Probable Cause filed April 22, 2014, Appendix B, pp. 1-4, Supp. CP. At the time, he was serving a 10-year sentence for an offense committed in a juvenile facility. Motion for Determination of Probable Cause filed April 22, 2014, Appendix B, p. 1, Supp. CP.

Following his conviction for second-degree assault, Carlos Avalos appealed. Opinion, mandated September 21, 2016, p. 1, Supp. CP. Among other arguments, he contended that the trial court had failed to consider whether two prior juvenile convictions (entered when he was just 10 years old) comprised the same criminal conduct. Opinion, mandated September 21, 2016, pp. 1, 9-10, 12, Supp. CP. The Court of Appeals agreed, vacated his sentence, and remanded the case for resentencing. Opinion, mandated September 21, 2016, pp. 1, 9-10, 12, Supp. CP.

At the resentencing hearing, Mr. Avalos asked the court to consider his youthfulness as a mitigating factor, and to impose a sentence at the bottom of the standard range.¹ CP 12. However, in his written sentencing memorandum, defense counsel cited no authority in support of

¹ He had made this same argument at the original sentencing hearing. Defense Sentencing Memorandum filed March 3, 2015, p. 2, Supp. CP.

this request.² CP 12. Nor did he argue that the court could order that the sentence run concurrent to the prior sentence. CP 12-13.

Instead, Defense counsel erroneously told the court that the sentence “must be imposed consecutively to the sentence Mr. Avalos is currently serving.” CP 12. This echoed the state’s position, with which defense counsel had also agreed at the original sentencing hearing. State’s Sentencing Memorandum filed February 23, 2015, p. 4, Supp. CP; Defense Sentencing Memorandum filed March 3, 2015, p. 2, Supp. CP.

At the resentencing hearing, the court briefly addressed defense counsel’s request for a low-end sentence. RP 5. The court denied the request, and again imposed the high end of the standard range “for the reasons stated [at the original sentencing hearing].”³ RP 5; *see* Judgment and Sentence filed March 10, 2015, Supp. CP; Order Amending Judgment and Sentence filed November 22, 2016, Supp. CP.

Mr. Avalos again appealed. CP 8.

² He also argued that lengthy periods of solitary confinement as a juvenile likely impacted his client’s brain development and maturity, and cited articles supporting this position. CP 12-13.

³ At the resentencing hearing, the court had before it a felony conviction that had not previously been submitted. CP 21. As a result, the sentencing court’s same-criminal-conduct finding did not change the standard sentence range. CP 21-22; RP 1-6.

ARGUMENT

I. MR. AVALOS’S YOUTHFULNESS AT THE TIME OF THE OFFENSE REQUIRED THE TRIAL COURT TO EXERCISE ITS DISCRETION IN DETERMINING WHETHER TO RUN THE SENTENCE CONCURRENTLY OR CONSECUTIVELY TO SENTENCES PREVIOUSLY IMPOSED.

Children are constitutionally different from adults under the Eighth Amendment. U.S. Const. Amend. VIII; *State v. Houston-Sconiers*, No. 92605-1, slip op. at ___ (Wash. Mar. 2, 2017).⁴ Sentencing courts must take into account a defendant’s youthfulness when imposing sentence. *Id.* Judges have absolute discretion to deviate from harsh statutory requirements when sentencing a youthful offender. *Id.*

Furthermore, sentencing courts must consider youthfulness as a mitigating factor even when sentencing for crimes committed as an adult. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). This is so because the “clear connection between youth and decreased moral culpability for criminal conduct... may persist well past an individual’s 18th birthday.” *Id.*, at 695.

This decreased moral culpability results from “fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial

⁴ The state constitutional ban on cruel punishment provides greater protection than the Eighth Amendment. Wash. Const. art. I, §14; *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 733 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001). Even if the federal constitution did not require consideration of youthfulness under these circumstances, the state constitution would.

behaviors, and susceptibility to peer pressure.” *Id.*, at 692.⁵ Accordingly, the penological justifications for harsh sentencing statutes are less applicable for youthful offenders. *Id.*

The legislature did not consider youthfulness when setting sentences for offenders over the age of 18. *Id.*, at 693. Because of this, youthfulness qualifies as a mitigating factor that can justify departure from even a mandatory sentencing practice. *Id.*; *Houston-Sconiers*, slip op. at

—.

Mr. Avalos asked the sentencing court to take into account his youthfulness when imposing sentence.⁶ CP 12-13. He pointed out that much of his childhood has been spent in custody, and noted that long periods of solitary confinement likely impacted his brain development and his maturity. CP 12-13.⁷

Under these circumstances, the sentencing judge was required to consider Mr. Avalos’s youthfulness at sentencing, and had discretion to

⁵ These neurological differences are well documented in studies published in recent years. *Id.*

⁶ Defense counsel apparently failed to recognize that Mr. Avalos’s youthfulness qualified as a mitigating factor that could support an exceptional sentence below the standard range. *See* CP 12. This error did likely caused no prejudice, since the trial court twice elected to impose a high-end sentence. However, counsel’s failure to recognize the court’s discretion to order concurrent sentences did prejudice Mr. Avalos, as argued below.

⁷ Defense counsel failed to recognize that the court had the option of ordering the sentence to run concurrent with prior sentences. CP 12, 13; see also Defense Sentencing Memorandum filed March 3, 2015, p. 2, Supp. CP (“The State is correct that the SRA requires that any sentence Mr. Avalos receives on this case must run consecutively to any sentence that is currently being served.”) Counsel’s request was for a low-end sentence.

deviate from the harsh requirements of RCW 9.94A.589(2)(a). *Houston-Sconiers*, slip op. at ___; *O'Dell*, 183 Wn.2d at 696.⁸ That provision ordinarily directs that a sentence for a felony committed while the offender was serving time on a prior felony “shall not begin until expiration of all prior terms.” RCW 9.94A.589(2)(a). Because of Mr. Avalos’s youthfulness, the judge had discretion to run the sentence concurrent with the prior term. *Houston-Sconiers*, slip op. at ___; *O'Dell*, 183 Wn.2d at 696.

The judge did not exercise his discretion. Since both parties believed the court was bound by the statute,⁹ the judge did not consider ordering concurrent sentencing. RP 1-6. This failure to exercise discretion amounted to an abuse of discretion. *O'Dell*, 183 Wn.2d at 697 (citing *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005)). It also violated the Eighth and Fourteenth Amendments, and Wash. Const. art. I, §14.

The order directing that the sentence “shall run consecutively with the sentence [of] ... 120 months imposed on 7/25/12” must be vacated, and the case remanded for the trial court to consider whether Mr. Avalos’s youthfulness at the time of the crime warrants ordering the sentence to run

⁸ See also *In re Mulholland*, 161 Wn.2d 322, 327–328, 331, 166 P.3d 677 (2007) (addressing RCW 9.94A.589(1)(b)).

⁹ CP 12, 13; State’s Sentencing Memorandum filed February 23, 2015, p. 4, Supp. CP.

concurrent with the prior sentence. *Houston-Sconiers*, slip op. at __; *O'Dell*, 183 Wn.2d at 696.

II. DEFENSE COUNSEL’S FAILURE TO RECOGNIZE THAT HIS CLIENT’S YOUTHFULNESS GAVE THE SENTENCING JUDGE DISCRETION TO ORDER A CONCURRENT SENTENCE VIOLATED MR. AVALOS’S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). An attorney has “the duty to research the relevant law.” *Id.* An unreasonable failure to do so constitutes deficient performance. *Id.*, at 868.

Here, defense counsel erroneously told the court that the sentence “must be imposed consecutively to the sentence Mr. Avalos is currently serving.” CP 12. Although likely true at the time of the original sentencing, this was no longer correct when Mr. Avalos appeared for resentencing.¹⁰

At the time of the resentencing hearing, the Supreme Court had decided that an adult offender’s youthfulness can justify an exceptional

¹⁰ Prior to *O'Dell*, an adult offender’s age could not be considered as a mitigating factor. *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997); see also *O'Dell*, 183 Wn.2d at 696, disavowing *Ha'mim*.

sentence downward.¹¹ *O'Dell*, 183 Wn.2d at 696. The *O'Dell* decision issued while Mr. Avalos's appeal was pending.

Defense counsel cited no authority supporting his request to have the court consider his client's youthfulness. CP 12-13. Although controlling authority did not exist at the time of the first sentencing hearing, *O'Dell* was decided more than a year before the resentencing hearing.¹² *O'Dell, supra*.

Instead of updating his sentencing materials to reflect the change in the law, defense counsel submitted a sentencing memorandum nearly identical to the one previously submitted. *Compare* Defense Sentencing Memorandum filed March 3, 2015, Supp. CP, with CP 9-14. Nor did counsel's oral presentation raise *O'Dell* or even include any substantive discussion of the defense sentencing request. *See* RP 2 ("Well, Your Honor, I put forth my argument in the brief.")

¹¹ Furthermore, it has long been the law that courts can order concurrent sentences despite the existence of a statutory provision mandating consecutive sentencing. *Mulholland*, 161 Wn.2d at 327-328.

¹² Even at the first sentencing hearing, counsel could have cited the federal cases discussed by the *O'Dell* court, would have outlined the basis for his argument that Mr. Avalos's youthfulness and lack of maturity merited lenient treatment. *See O'Dell*, 183 Wn.2d at 685-698 (discussing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)).

Counsel's failure to recognize the court's discretion, to cite available authority in support of the proffered mitigating factor, and to argue for concurrent sentences amounted to deficient performance. *Kyllo*, 166 Wn.2d at 862, 868.

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*, at 868. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Phuong*, 174 Wn. App. 494, 547, 299 P.3d 37 (2013).

Both parties erroneously told the trial court that a consecutive sentence was mandatory. CP 12-14; State's Sentencing Memorandum filed February 23, 2015, p. 4, Supp. CP; Defense Sentencing Memorandum filed March 3, 2015, p. 2, Supp. CP. Although the court remained firm in its decision to impose a 70-month prison term, nothing suggests the judge would have refused to consider a request for concurrent sentences, had counsel properly supported such a request.

Counsel's failure to make the proper argument deprived the court of its opportunity to exercise its discretion. RP 1-6. Confidence in the outcome is undermined. *Phuong*, 174 Wn. App. at 547. Mr. Avalos's sentence must be vacated and the case remanded for a new sentencing hearing. *Id.* Upon resentencing, the trial court must consider whether Mr.

Avalos’s youth justifies ordering concurrent sentences. *O’Dell*, 183 Wn.2d at 696-699; *Mulholland*, 161 Wn.2d at 327–328.

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

The Court of Appeals should decline to award appellate costs because Mr. Avalos “does not have the current or likely future ability to pay such costs.” RAP 14.2. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Avalos indigent at the end of the proceedings in superior court. CP 56. That status is unlikely to change, especially with the addition of two felony convictions and imposition of a 60-month prison term. CP 48. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

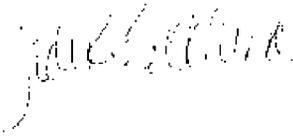
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, Mr. Avalos's sentence must be vacated and the case remanded to the sentencing court with instructions to consider his youthfulness at the time of the offense in deciding if his sentence should run concurrently with prior sentences.

Respectfully submitted on March 15, 2017,

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CERTIFICATE OF SERVICE

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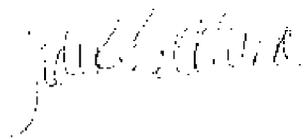
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 15, 2017.



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