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Court of Appeals
Division II
State of Washington
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NO. 51279-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MALISHA MIRANDA MORALES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend, Judge

No. 17-1-00954-9

Brief of Respondent

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Rules

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

1. Must this Court dismiss defendant's due process claims pursuant to *Watkins* which explicitly held that automatic decline of juvenile court jurisdiction comports with due process?
2. Must defendant's challenge to the factual basis for her plea to drive-by shooting be rejected as each element of the offense is well supported by the record?
3. Whether the sentencing court properly considered defendant's youth as required by *Houston-Sconiers* before imposing a standard range sentence?

B. STATEMENT OF THE CASE.

On March 8, 2017, the Pierce County Prosecuting Attorney's Office charged Malisha Morales (hereinafter "defendant") with one count of Murder in the First Degree (RCW 9A.32.030(1)(b)) and five counts of Assault in the First Degree (RCW 9A.36.011(1)(a)), all counts with firearm enhancements, for the drive by shooting death of 15 year old

C.M.¹ and the assault of Joshua James (Harmon-Williams), D.S., J.C., and T.P. CP 1-4. Defendant was under the age of 18 at the time she committed the offenses. CP 1-4.

On November 22, 2017, defendant pleaded guilty to one count of Murder in the Second Degree by amended information. CP 8. In exchange for a reduction in charges, defendant agreed to a joint recommendation for a low-end standard range sentence. CP 9-20. As part of the plea negotiation process, the parties considered the mitigating factors outlined in *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 23, 391 P.3d 409 (2017) and determined a standard range recommendation appropriate. 11-22-17 RP 14.

In her Statement of Defendant on Plea of Guilty, defendant acknowledged the important rights she was giving up by pleading guilty and also affirmed understanding the consequences of her guilty plea, including the standard range and maximum sentence for each offense. CP 10-13. *See also*, 11-22-17 RP 2 (plea colloquy). Defendant also averred understanding the court did not have to follow anyone's recommendation as to sentencing and could impose an exceptional sentence if it deemed appropriate. CP 13. Defendant assured the court she was entering her plea

¹The State refers to the victims, C.M., D.S., J.C. and T.P. by their initials because they were minors at the time of the shooting. No disrespect is intended.

knowingly, intelligently, and voluntarily after consultation with her attorney. CP 18; 11-22-17 RP 10.

In her Statement of Defendant on Plea of Guilty, defendant provided the following factual basis to support her plea:

On March 3, 2017, in Pierce County, Washington, I unlawfully and feloniously with the intent to cause bodily harm or death to another person, drove a vehicle from which Billy Williamson and Zachary Glover fired guns which caused the death of another person, C.M. I am truly sorry for what has occurred.

CP 18. The court found a factual basis to support defendant's plea to the amended charges. CP 19.

The court accepted defendant's guilty plea, finding it to be made "freely and voluntarily, that [she] understand[s] all the rights [she's] giving up and all the consequence of [her] plea." CP 19; 11-22-17 RP 10.

During sentencing, the State informed the court of the agreement of the parties as to their agreed sentencing recommendation:

The State made an agreement with Ms. Morales, and these cases are pleading as a result today. We got a guilty plea of murder in the first degree. And in consideration for that, the State made a deal. And we're going to live up to our deal, Your honor. And the deal is the low end of the range, Your honor, along with 36 months community custody, \$500 dollar crime victim penalty assessment, \$200 cost, and \$100 DNA, Your Honor.

11-22-17 RP 14

After considering the recommendations of the parties and the mitigating circumstances associated with defendant's youth, the court imposed a low-end sentence within the standard range for a total of 123 months in custody. CP 30. Defendant filed a timely notice of appeal. CP 65.

C. ARGUMENT.

1. THIS COURT MUST DISMISS DEFENDANT'S DUE PROCESS CLAIMS PURSUANT TO **WATKINS** WHICH EXPLICITLY HELD THAT AUTOMATIC DECLINE OF JUVENILE COURT JURISDICTION DOES NOT VIOLATE DUE PROCESS.

The constitutionality of a statute is reviewed de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). The party challenging the constitutionality of a statute bears the burden of proving the statute is unconstitutional beyond a reasonable doubt. *State v. Leatherman*, 100 Wn. App. 318, 321, 997 P.2d 929 (2000).

The Washington Supreme Court recently held that automatic juvenile decline does not violate a juvenile defendant's substantive or procedural due process rights. *State v. Watkins*, 191 Wn.2d 530, 423 P.3d 830 (2018). In *Watkins*, the defendant, a 16-year-old, was charged with first degree burglary who was automatically transferred to adult court under former RCW 13.04.030(1). *Id.* Before trial, he objected to the automatic decline of juvenile court jurisdiction as a violation of his federal

due process rights and as cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Id.* Watkins noted that there is no constitutional right to be tried in juvenile court or to a hearing before declination of juvenile court jurisdiction. *Id.* at 536 (citing *State v. Boot*, 130 Wn.2d 553, 569-572, 925 P.2d 964 (1996)). The court recognized that recent state and federal cases emphasize “that juveniles are developmentally different from adults and that these differences are relevant to juvenile defendants’ constitutional rights.” *Id.* at 544. But trial courts have discretion to consider the mitigating circumstances of youth to impose any sentence below the applicable range: “Put simply, automatic decline does not violate a juvenile defendant’s substantive due process right to be punished in accordance with his or her culpability because adult courts can take into account the ‘mitigating circumstances of youth at sentencing.’” *Id.* at 544-546 (quoting *State v. Houston Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017)). The court also held that automatic decline comports with procedural due process. *Id.* at 542.

Watkins controls here. Defendant makes the same argument as that made in *Watkins*. Brief of Appellant at 6. Given that the Supreme Court has explicitly held that automatic decline of juvenile court jurisdiction comports with substantive and procedural due process, defendant’s claim

fails. As such, this Court should dismiss her claim and affirm her conviction.

2. DEFENDANT'S CHALLENGE TO THE FACTUAL BASIS FOR HER PLEA TO DRIVE-BY SHOOTING SHOULD BE REJECTED AS EACH ELEMENT OF THE OFFENSE ARE WELL SUPPORTED BY THE RECORD.

"There is a strong public interest in the enforcement of plea agreements when they are voluntarily and intelligently made." *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). Adherence to the rule verifies charges are understood, which helps ensure voluntary pleas are entered. *In RE: Hews*, 108 Wn.2d 579, at 591-92, 741 P.2d 983 (1987); *Matter of Hilyard*, 39 Wn. App. 723, 727-28, 695 P.2d 596 (1995). Yet voluntariness can be proved through other means. *Id.*; *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996); *State v. Holsworth*, 93 Wn.2d 148, 153-57, 607 P.2d 845 (1980).

For a plea to be voluntary, a defendant need only be aware of: (1) the offense(s)' essential elements; (2) the trial rights waiver, i.e., silence, confrontation, and trial by jury; and (3) the direct consequences. *Id.* A knowing rights waiver is proved by advisement and unequivocal waiver. *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014). Awareness of essential elements can be established through direct or circumstantial evidence, like proof of familiarity with the charging document. *See Hews*,

108 Wn.2d at 595. Similar exposure to a properly drafted CrR 4.2(g) plea statement can prove the requisite awareness of direct consequences. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

"[T]he factual basis [] may come from any source the [] court finds reliable, not just the admissions of [a] defendant." *State v. Newton*, 87 Wn.2d 363, 371-72, 552 P.2d 682 (1976); *State v. Zumwalt*, 79 Wn. App. 124, 901 P.2d 319 (1995).

A defendant must prove there was an insufficient factual basis for the trial judge to accept a challenged plea. *State v. Easterlin*, 159 Wn.2d 203, 210, 149 P.3d 366 (2006). "CrR 4.2 does not define what constitutes a factual basis for a plea[.]" *State v. Zhao*, 157 Wn.2d 188, at 198, 137 P.3d 835 (2006). Nor does it require the trial court be convinced of a defendant's guilt beyond a reasonable doubt. *Id.* There must only be sufficient evidence from any reliable source for a jury to find guilt. *Id.* To make this finding, a court may consider any reliable information in the record. *State v. Osborne*, 102 Wn.2d 87, 95-96, 684 P.2d 683 (1984). An acknowledged statement in a written plea admitting conduct supporting conviction for the charged offense(s) can itself provide a sufficient factual basis for a plea. *See Easterlin*, 159 Wn.2d at 210.

Specific-transcribed colloquies are preferred, but not required. *Zhao*, 157 Wn.2d at 200-01. Written plea statements are prima facie proof

of voluntariness when their truth is ratified by defendants aware of their terms. CrR 4.2(d). *State v. Perez*, 33 Wn. App. 258, 261–62, 654 P.2d 708 (1982). Voluntariness is the constitutional concern served by the factual basis rule. When a judge inquires of the defendant and becomes satisfied of voluntariness on the record, the presumption of voluntariness is "well-nigh irrefutable." *Perez*, 33 Wn.App. at 261–62.

At a plea hearing, the trial court may consider any reliable source of information in the record to determine if sufficient evidence supports the plea. *State v. Saas*, 118 Wn.2d 37, 43-44, 820 P.2d 505 (1991); *Osborne*, 102 Wn.2d at 95. Reviewing courts look to the circumstances surrounding the plea to identify the supporting record. *Zhao*, 157 Wn.2d at 201. Neither direct evidence nor reference in specific colloquy is required. *Id.*; *Osborne*, 102 Wn.2d at 96 ("Although the record [] makes no specific mention of the [] affidavit [], numerous references are made to [] statements [] therein").

A factual basis for the plea is plain in the plea as well as the attending colloquy. Through Paragraph 11, defendant explained her guilt for the drive-by shooting that resulted in C.M.'s death:

On March 3, 2017, in Pierce County, Washington, I unlawfully and feloniously, with the intent to cause bodily harm or death to another person, drove a vehicle from which Billy Williamson and Zachary Glover fired guns

which caused the death of another person, C.M. I am truly sorry for what has occurred. [initialed M.M.]

CP 18. This paragraph supports each offense. RCW 9A.36.045; RCW 9.41.010(1)(a). Defendant's reiterated the factual basis in her plea colloquy:

[Court:] Is that a true and correct statement of what you did that makes you guilty of this crime?

[Defendant:] Yes, Your Honor.

11-22-17 RP 9. That statement with paragraph 11 meets CrR 4.2(d)'s factual-basis rule. *E.g., Easterlin*, 159 Wn.2d at 210. Thus, through both her written statement and colloquy, she admitted the truth of facts that support the offense.

Defendant claims that the factual basis of her plea is insufficient because “nothing in Malisha’s plea statement admitted” conduct constituting accomplice liability. Brief of Appellant at 15. But that element is explicitly supported by paragraph 11:

I unlawfully and feloniously, with the intent to cause bodily harm or death to another person, drove a vehicle from which Billy Williamson and Zachary Glover fired guns which caused the death of another person, C.M.

CP 18. She confirmed this statement's accuracy in her plea colloquy. 11-22-17 RP 9. Additionally, defendant claims that the factual basis for her

plea was insufficient because “it failed to determine whether Malisha understood the nature of the charge in relation to the facts.” Brief of Appellant at 15. This claim fails where it is squarely contradicted by the record. Defendant initialed and thereby acknowledged that she understood the elements of the offense in her Statement of Defendant on Plea of Guilty, which states that “The elements of this crime are as set out in the Amended Information dated 11/17/17 a copy of which I hereby acknowledge previously receiving and reviewing with my lawyer.” CP 10 (Paragraph 4). Defendant further admitted in her plea colloquy that she understood the nature of the offense, stating:

[Court]: Do you understand the elements of that crime that the State would have the burden of proving beyond a reasonable doubt if you chose to take the case to trial?

[Defendant]: Yes, Your Honor.

11-22-17 RP 5. Defense counsel further stated that he’d gone over the elements of the offense with defendant and believed that she understood them, stating, “She’s been advised of the maximum penalties for the offense of murder in the second degree, the elements that the State would have the[sic] prove.” 11-22-17 RP 2. The court found that defendant knowingly, intelligently and voluntarily entered into her plea. 11-22-17 RP 10. Where the record amply supports that defendant made a knowing,

intelligent and voluntary plea to the crime of murder in the second degree, this Court should dismiss defendant's claim and affirm her conviction.

3. THE SENTENCING COURT PROPERLY IMPOSED A STANDARD RANGE SENTENCE AFTER CONSIDERING THE ***HOUSTON-SCONIERS*** FACTORS RELATED TO DEFENDANT'S YOUTH.

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). A standard range sentence "shall not be appealed." RCW 9.94A.585(1). "However, this prohibition does not bar a 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).

In *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017), the Supreme Court held that trial courts must consider mitigating qualities of youth when sentencing juvenile defendants and "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." Relying on *Miller v. Alabama*, 567

U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the court provided guidance on how to exercise such discretion in juvenile sentencing. *Id.* at 23. Sentencing courts must consider the following factors when sentencing juvenile defendants:

1. “[M]itigating circumstances related to the defendant’s youth – including age and its ‘hallmark features,’ such as the juvenile’s ‘immaturity, impetuosity, and failure to appreciate risks and consequences.’”
2. “[F]actors like the nature of the juvenile’s surrounding environment and family circumstances, the extent of the juvenile’s participation in the crime, and ‘the way familial and peer pressures may have affected him [or her].’”
3. “[H]ow youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.”

Id. (quoting *Miller*, 132 S. Ct. at 2468). See also, *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017) (“We hold that while not every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range, every juvenile offender facing a literal or de facto life-without-parole sentence is automatically entitled to a Miller hearing.”); *State v. O’Dell*, 183 Wn.2d 680, 688-89, 696, 358 P.3d 359 (2015) (holding a sentencing court may consider a defendant’s youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines under the SRA).

Here, defendant was under the age of 18 at the time she committed her crime. Under *Houston-Sconiers*, the court was therefore required to consider mitigating circumstances related to defendant's youth at sentencing. The record establishes that the court did just that, and after considering such mitigating circumstances the court elected to impose a standard range low end sentence.

Defendant presented the court with the relevant information needed for the court to properly consider the mitigating qualities of defendant's youth at sentencing. Defense counsel filed a Declaration RE: Statements Defendant of Support on Behalf of [Defendant]. CP 58-63. The declaration included a letter from a volunteer with Youth for Christ who worked with defendant. CP 58-63. The letter blames defendant's mother and grandmother for "failing [her] miserably" and indicates that her issues stem from drug use and temperament. CP 58-63. The declaration also includes a letter and report card from one of defendant's teachers who indicates that she is a positive student who works hard and diligently. CP 58-63. Defense counsel echoed these mitigating qualities at sentencing, stating the following:

Ms. Morales was born in Tacoma. It's a fractured family, your Honor. She was raised with a single mom for a while. She was a student in good standing at Spanaway Lake High School. Tenth grade she dropped out. She was 14 to 15, and she went onto the street. So, she was essentially surviving on the street. One can

imagine at that – a young girl at that age, what issues she had to confront. Regardless of that, she had no criminal history. She was never before the Court in any manner. But she did get involved in some drug use, Your Honor, which started with some opiates and then turned into heroin. Although that wasn't an issue in this particular case, she had been exposed to that... She'd had a tough life, Your Honor, but she certainly has accepted her responsibility for what had happened here.

11-22-17 RP 14-15.

After considering the above, the sentencing court ruled as follows:

But for her age, the Court would not be inclined to – despite the fact that she has zero criminal history, the Court would not be inclined to go along with the low end recommendation in this case because, as I read the declaration of probable cause and as I read the fact statement of her involvement, while she didn't pull the trigger herself, she is the kind of the critical player, if you will, in the event that occurred on that day. And but for her involvement, I don't think there would have been a shooting much less a murder.

So it is only because of the Houston Sconiers case and the supreme court's order that the Court must – as Mr. Curtis points out – consider your age and the impact that has on your ability to exercise good judgment that the Court is going to go along with the joint recommendation for the low end.

I would agree that no sentence is going to bring Chase back. But I do – believe that Houston Sconiers stands for the proposition that with age, someone who's youthful, we have hopefully, a greater likelihood of rehabilitation. And certainly, the documents that Mr. Meske has presented based upon her – the time she's spent in juvenile court so far has suggested that she's moving forward now doing the right things.

The fact that you have – had a – are the child of a single mother, you know, there's lots of children of single mothers who don't go out there and either shoot someone or drive the car to a shooting. Right?

But it appears, based upon the documents that Mr. Meske gave the Court and the statements that he made a minute ago about your being on

the streets and so forth, that – you also really didn't have any kind of adult guidance to assist you or to make sure that you were doing what you should have been doing, which is basically being in school, being a student, you know, and growing up so that you would hopefully have the opportunity to make better decisions in the future.

11-2-17 RP 18-20 (emphasis added). The court was not required to impose an exceptional mitigated sentence; rather, the court was required to consider mitigating qualities of defendant's youth at sentencing, which it did. The court properly exercised its discretion in imposing a standard range sentence after considering the factors mandated by *Houston Sconiers*.

Defendant claims that the trial court abused its discretion because it failed to consider her youth and upbringing as a mitigating factor. Brief of Appellant at 16. This claim fails as the record reflects that her youth was the primary factor in the Court imposing the low-end standard sentence. 11-2-17 RP 18-20. The Court stated, "So it is only because of the Houston Sconiers case and the supreme court's order that the Court must – as Mr. Curtis points out – consider your age and the impact that has on your ability to exercise good judgment that the Court is going to go along with the joint recommendation for the low end." 11-2-17 RP 19-20. Specifically, defendant claims that the trial court failed to consider the factors of rehabilitation and impetuosity. Brief of Appellant at 20. These claims fail as the Court took into consideration rehabilitation and

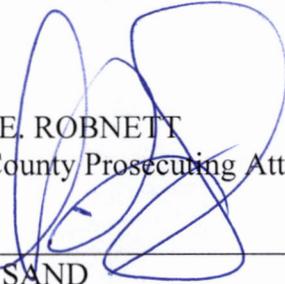
impetuosity in acknowledging defendant's performance in school, her lack of guidance, upbringing and age. Accordingly, this Court should affirm defendant's sentence.

D. CONCLUSION.

For the foregoing reasons, this Court should dismiss defendant's claims and affirm her conviction.

DATED: May 6, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



ROBIN SAND
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WSB # 47838

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.

5.6.19
Date

Shenke
Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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