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Court of Appeals Nos. 51469-9-II; 51459-1-II

In the
Court of Appeals for the State of Washington
Division Two

STATE OF WASHINGTON,

Respondent,

v.

AZIAS DEMETRIUS ROSS,

Appellant.

APPELLANT'S REPLY BRIEF

Appeal From Pierce County Superior Court No. 12-1-03305-8

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I. INTRODUCTION

On March 22, 2018, this Court consolidated Appellant Azias Ross' ("Mr. Ross[']s") pending Personal Restraint Petition (case no. 51459-1-II) with his direct appeal (case no. 51469-9-II). However, in its Response Brief, the State has failed entirely to address the arguments raised in Mr. Ross' companion Personal Restraint Petition. Consequently, the State has conceded these arguments and Mr. Ross is automatically entitled to reversal of his convictions due to these concessions.

Mr. Ross also filed a timely direct appeal with this Court following the trial court's failure on remand to recognize its discretion to impose a new sentence. The fundamental issue on direct appeal is whether the trial court in fact had discretion to impose a new sentence on remand. This issue, in turn, depends on whether the instructions on remand called for "purely ministerial" changes to the sentence. Mr. Ross argued in his Opening Brief that, by instructing the court to "resentence" Mr. Ross on remand, the scope of the instructions went beyond the "purely ministerial." In its Response Brief, the State provides no substantive response to this fundamental argument. Because the State concedes this ultimate issue, and because Mr. Ross' argument is nonetheless correct on the merits, the court on remand abused its discretion and Mr. Ross is entitled in the alternative to yet another remand for resentencing.

II. ARGUMENT

A. The State has Conceded All Issues Raised in Mr. Ross' Personal Restraint Petition by Failing to Respond.

In his Personal Restraint Petition in case no. 51459-1-II, Mr. Ross asserted, in addition to the arguments raised in this direct appeal, that (1) his convictions were obtained in violation of his Confrontation Clause rights by virtue of the introduction of co-defendant Nolan Chouap's statement incriminating Mr. Ross, (2) the convictions are tainted by prosecutorial misconduct in presenting the jury with slides displaying Mr. Ross' name with an arrow pointing to the word "guilty", (3) Mr. Ross was denied his right to effective assistance of counsel due to trial counsel's failure to object to a set of jury instructions and special verdict forms that did not apply the "beyond a reasonable doubt" standard to firearm findings, (4) Mr. Ross was denied his right to effective assistance of counsel due to trial counsel's failure to request an exceptional sentence downward based on the mitigating factor of youth at his initial sentencing, and (5) Mr. Ross was denied his right to a fair trial by the cumulative effect of the foregoing errors.

On March 22, 2018, this Court consolidated Mr. Ross' Personal Restraint Petition with his direct appeal in case no. 51469-9-II. Therefore, in its Response Brief, the State was required to respond to the issues raised in both the Personal Restraint Petition and the direct appeal.

However, the State has failed entirely to respond to the arguments raised in Mr. Ross' Personal Restraint Petition. Therefore, the State has conceded each of these arguments. See State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (holding that the State conceded a defendant's double jeopardy argument on appeal by failing to respond to it). Because Mr. Ross has raised grounds for reversing his convictions in his Personal Restraint Petition, and the State has conceded each of those issues, Mr. Ross is automatically entitled to reversal of his convictions and remand for further proceedings.

B. The State Fails to Respond Substantively to the Fundamental Issue on Appeal – that the Court had Discretion Under RAP 2.5(c) to Impose a New Sentence on Remand.

Alternatively, Mr. Ross is entitled to the relief requested in his direct appeal. In response to Ross' argument that the trial court abused its discretion by failing to recognize the existence of its discretion to resentence on remand, the State asserts that the trial court's actions are not appealable because "[t]he trial court did not exercise any appealable discretion when it resentenced the defendant." (Resp. Br. at 7.) This argument misses the point entirely.

It is undisputed that the trial court exercised no discretion on remand. It is also undisputed that the trial court believed it had no discretion to exercise in the first instance. 1.26.2018 RP 33-35. The issue

is whether this belief was correct. The State utterly fails to address that issue, and, as such, should be deemed to have conceded it. See Ward, 125 Wn. App. at 143-44 (holding that the State conceded a defendant's double jeopardy argument on appeal by failing to respond to it).

As set forth in Ross' Opening Brief, RAP 2.5(c) allows the Superior Court, at any resentencing, to revisit any issues that the appellate court has not explicitly rejected unless the case was remanded for a "purely ministerial purpose". State v. Kilgore, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009); State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993). Because the instructions on remand in this case required the court to impose new sentences on two counts, the matter was remanded for resentencing rather than for a "purely ministerial purpose." The State fails to present any substantive argument to the contrary.

Because the trial court had discretion to impose an entirely new sentence pursuant to RAP 2.5(c), but believed it had no such discretion, it abused its discretion. See In re Pers. Restraint of Rowland, 149 Wn. App. 496, 507-08, 204 P.3d 953 (2009) (a failure to recognize the existence of discretion automatically constitutes an abuse of discretion). Therefore, Mr. Ross is entitled to a new sentencing hearing in which the resentencing court duly acknowledges and properly exercises its discretion to impose a new sentence.

C. The Resentencing Court's Abuse of Discretion Prejudiced Mr. Ross Due to the Fact that Mr. Ross' Sentence is Unlawful, Unjust, and Unconstitutional Under Current Law.

In response to Mr. Ross' argument that the trial court's abuse of discretion was prejudicial because he should have received an exceptional sentence downward based on the mitigating factor of youth, the State makes the confounding argument that Mr. Ross is not entitled to resentencing because he did not request an exceptional sentence and because he received a standard range sentence. (Resp. Br. at 8-10.) In advancing this argument, the State references only the original sentencing proceedings in 2014, a year before the Washington Supreme Court issued its decision in State v. O'Dell, 183 Wn.2d 680, 693, 358 P.3d 359 (2015). The State ignores the fact that, on remand, Mr. Ross clearly intended to seek an exceptional sentence based on this intervening authority. However, he was not given this opportunity because the court on resentencing insisted erroneously that it had no authority to do anything other than to reduce the sentences imposed on Counts I and XI to their statutory maximums. 1.26.2018 RP 33-35. The failure to recognize and exercise its discretion constituted an abuse of discretion and prejudiced Mr. Ross because he should have received a mitigated sentence pursuant to the controlling law at the time of resentencing.

1. The resentencing court abused its discretion by failing to “meaningfully consider” the mitigating factor of youth.

Again, the State fails to address the fundamental issue – whether the court on resentencing, had it properly recognized the existence of its discretion to impose a new sentence, may have imposed a lesser sentence than the 507 month sentence he is currently serving for his relatively minor role in offenses taking place when he was 19 years old. The holding in O’Dell is clear that defendants like Mr. Ross are entitled to have the sentencing courts “meaningfully consider” the mitigating factor of youth in imposing a sentence. O’Dell, 183 Wn.2d at 689. It is also clear that the resentencing court following remand did not consider Mr. Ross’ youth at all, meaningfully or otherwise. Instead, it believed incorrectly it had no discretion to do so. 1.26.2018 RP 33-35.

As set forth hereinabove, the court had discretion to impose a new sentence on remand pursuant to RAP 2.5(c). Its failure to recognize that discretion, and its failure to “meaningfully consider” the mitigating factor of youth, constituted an abuse of discretion. See O’Dell, 183 Wn.2d at 689; In re Pers. Restraint of Rowland, 149 Wn. App. at 507-08. This is a straightforward proposition that the State fails to substantively address.

Furthermore, because there are numerous factors in the record suggesting that Mr. Ross should have received an exceptional sentence downward based on his youth, particularly given the patently cruel 507

month sentence Mr. Ross received for driving two individuals to and away from burglary targets and trafficking stolen goods when he was 19 years old, Mr. Ross was prejudiced by the court's failure to recognize the existence of its discretion.

The State's argument that the initial sentencing court did not abuse its discretion is wholly irrelevant. The present appeal is not an appeal from the sentence initially imposed in 2014, which this Court has already reversed as unlawful. The present appeal is an appeal from the likewise unlawful sentence imposed on January 26, 2018. The State's argument that the 2014 sentencing court did not abuse its discretion in imposing a standard range sentence is inapposite. The 2018 sentencing court did abuse its discretion by failing to "meaningfully consider" Mr. Ross' youth as a mitigating factor and failing to recognize it had authority to do so, and the State provides no argument to the contrary.

2. The resentencing court abused its discretion by failing to consider concurrent imposition of firearm enhancements.

Likewise, the State provides no argument to rebut Mr. Ross' argument that the resentencing court further abused its discretion by failing to recognize the existence of its discretion to impose firearm enhancements concurrently pursuant to State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017). Pursuant to McFarland, the resentencing court had discretion to impose Mr. Ross' 378 months in firearm enhancements

concurrently based on the mitigating factor of youth. By failing to recognize the existence of this discretion, the resentencing court abused its discretion. See McFarland, 189 Wn.2d 47; In re Pers. Restraint of Rowland, 149 Wn. App. at 507-08. Mr. Ross was prejudiced by this abuse of discretion because a court properly applying controlling law should have reduced the unconscionable impact consecutive imposition of firearm enhancements had on Mr. Ross' sentence in light of the mitigating factor of youth.

3. The resentencing court's abuses of discretion also violated Mr. Ross' Eighth Amendment right to be free from cruel and unusual punishment.

Finally, the State fails to meaningfully respond to Mr. Ross' argument that his sentence violates the Eighth Amendment, instead baldly asserting only that Washington's Eighth Amendment jurisprudence regarding cruel sentencing of young offenders applies only to juveniles. (Resp. Br. at 9.) For the reasons set forth in Mr. Ross' Opening Brief, this position is untenable and leads to imposition of a bright line rule that cannot withstand the reasoning in O'Dell and its scientific underpinnings. O'Dell, 183 Wn.2d at 692 n. 5.¹ Accordingly, not only did the

¹ (citing Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 Notre Dame L. Rev. 89, 152 & n.252 (2009) (collecting studies); MIT Young Adult Development Project: Brain Changes, Mass. Inst. of Tech., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug. 4,

resentencing court abuse its discretion by (1) failing to recognize the existence of its discretion to impose a new sentence pursuant to RAP 2.5(c), (2) failing to “meaningfully consider” the mitigating factor of youth, and (3) failing to consider concurrent imposition of firearm enhancements based on the mitigating factor of youth, but it also violated Mr. Ross’ Eighth Amendment right to be free from cruel and unusual punishment.

III. CONCLUSION

Because the State has conceded the arguments raised in Mr. Ross’ Personal Restraint Petition by failing to respond, Mr. Ross respectfully requests that the Court accept the State’s concessions, reverse his convictions, and remand for further proceedings.

Alternatively, for the reasons stated herein and in Mr. Ross’ Opening Brief, Mr. Ross respectfully requests that this Court reverse his sentence and remand this matter for full resentencing on all counts.

2015) (“The brain isn’t fully mature at ... 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”); Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004) (“[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s” (formatting omitted)).

Respectfully submitted this 11th day of September, 2019.

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CERTIFICATE OF SERVICE

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on September 11, 2019, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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