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NO. 51511-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAKOTA MIKALLE COLLINS, APPELLANT

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

No. 16-=1-2182-6

Brief of Respondent

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

1. Is the defendant precluded from a direct appeal when the sentencing court imposed a lawful standard range sentence after applying the correct and applicable law? (Appellant's Assignment of Error No. 2)

2. Even if this court were to review the defendant's standard range sentence, did the trial court properly consider all of the mitigation materials submitted by the defendant regarding his youth and did the court meaningfully consider all necessary factors regarding the defendant's youth before imposing the sentence? (Appellant's Assignment of Error No. 2)

3. Given the Washington Supreme Court's recent decision in ***State v. Watkins***[1], is the defendant's due process claim without merit when he was subject to automatic adult jurisdiction? (Appellant's Assignment of Error No. 1)

[1] 423 P.3d 830, 833 (2018)

B. STATEMENT OF THE CASE.

On May 31, 2016, Dakota Collins, hereinafter "defendant," was charged by information with murder in the first degree. CP 1-2. At the time of the offense the defendant was 17 years old. *Id.* On September 15, 2017, the defendant entered a plea of guilty to amended charges of murder in the second degree, attempted robbery in the first degree, and two counts of unlawful possession of a firearm in the second degree. CP 272-274, 276-287. The facts of the murder as outlined in the probable cause declaration were presented to the court as follows:

> On May 18, 2016, at approximately 4:30 a.m., Pierce County Sheriff's Deputies were dispatched to the area of S. 127th St. and Pacific Ave. in Parkland. When they arrived, they found a man lying on the ground on the sidewalk in front of an auto parts store. The man was not moving, had blood pooling under his head and shoulders area, and did not appear to be breathing. The man was confirmed deceased, and he was later identified as Lorenzo Parks.
>
> Deputies spoke to a male witness, who told them he heard what sounded like an argument and a "scuffle," so he went to investigate and found a group of males fighting. When he heard a gunshot, he ran back towards his apartment, then later returned to the scene and found one man lying on the ground.
>
> Another witness told the deputies she and a friend were walking on Pacific Avenue when she saw four black males and a white female "harassing" another black male. She walked through that group, and when she was a little distance away, she heard a gunshot. She turned around and

saw the group of males running west away from where they had been.

Based on the totality of the investigation, deputies contacted several local businesses and obtained surveillance camera video. There were several stores in the immediate area, including an AM/PM store and a Shell gas station, which had video from the relevant time period that showed several young black males with a white female. Deputies were able to identify the female through a school resource officer from a local high school. When the deputies interviewed that girl, she was able to identify several of the defendants, either by name or nickname.

As the investigation continued, deputies formally interviewed one of the above defendants. That defendant said the defendants were at Jones' apartment the evening of May 17, drinking and hanging out. They made a couple trips to local stores and shoplifted things to eat. That included the AM/PM and a Walgreens store. In the early morning hours of May 18, Collins and Brantley came over to the apartment.

Collins had a pistol with him that was described as a black .45 caliber semi-automatic pistol. There are several photos of the group of defendants taken that night that were located on social media, including one in which the handle of a pistol can be seen in Collins' pants.

The group decided to go out and rob someone instead of continuing their shoplifting ventures. When they were out, they came across victim Parks. The group told him to give them everything in his pockets, and Parks turned his pockets inside out to show them he had no money. During this interaction, Collins pointed his pistol at, and eventually shot, victim Parks. Parks died from the resulting gunshot wound. The group ran from the scene of the shooting back to Jones' apartment. In order to get to the apartment from where the shooting happened, the group would have run in the direction the earlier witness saw and described them running.

> Two of the defendants, Jones and Brantley, have been arrested. The State is requesting arrest warrants for the remaining defendants, Baylis, Collins, Mapp, D. Robinson, and R. Robinson.

CP 3-4; 10/5/17 RP 37-38.

On October 5, 2017, the parties appeared for sentencing. RP 22. The defendant submitted briefing to the court in advance of sentencing. CP 291-409. The defendant asked the court to impose a sentence of 96 months after it considered, among other things, the mitigating circumstances of the defendant's youth, his acceptance of responsibility, and the chance of the defendant becoming a productive member of society following his release from custody. *Id.* (page 2). The defendant submitted approximately 94 pages of appendices regarding the defendant's personal history for the court to consider at sentencing. The attached documents were as follows:

Appendix A	Intake Summary Report for Referral, Child Protective Services
Appendix B	Intake Summary Report for Referral, Child Protective Services
Appendix C	Child's Medical and Family Background Report
Appendix D	Guardian Ad Litem's Report to the Court
Appendix E	DSHS Individual Service and Safety Plan Summary
Appendix F	Articles Titled "Kids Exposed to Meth in Womb Can Struggle with Behavior Problems", "Mom's

	Meth Use May Affect Kids' Behavior", "Children exposed to methamphetamine before birth have increased cognitive problems", and "Abnormal stress response seen in toddlers exposed to meth in womb"
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Appendix I	Money Order; Article Titled "Southeastern Military Academy under fire from DCF for abuse allegations, possible violation", "Judge rules Southeastern Military Academy in Port St. Lucie has until 2014 to come into full complia", "Military-style children's home still open despite troubling complaints"
Appendix J	Psychiatric Evaluation of Defendant by Dr. April Gerlock

The documentation submitted by the defendant included support for his claim that he was born to a drug-addicted mother, that he was in the foster care system, and that he suffered abuse at a boarding school. The documents provided by the defendant also indicated that he had been "doing very well" in foster care and that he was intelligent and verbal for his age. CP 291-409.

At the sentencing hearing, the State argued to the court that it believed ***State v. Houston-Sconiers***, 188 Wn.2d 1, 391 P.3d 409 (2017), required the court to consider the information provided by the defendant.

RP 27. The sentencing court then indicated—multiple times—that it was considering all factors and materials presented by the defendant. RP 76. The court stated, "And I want you to know that I appreciate the materials that she has put forward, and that has given me—that I've given a great deal of thought to that." *Id.* The court also stated "I do think that *Houston-Sconiers*[2] requires the Court to consider all of the factors, not just the act itself." *Id.* The court then imposed a standard range sentence on each count. CP 410-422.

The defendant filed a timely notice of appeal. CP 423-436.

C. ARGUMENT.

1. THE DEFENDANT RECEIVED A STANDARD RANGE SENTENCE THAT IS NOT REVIEWABLE.

A standard range sentence cannot be appealed. RCW 9.94A.585(1). A defendant may appeal a standard range sentence if 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

[2] 188 Wn.2d 1, 391 P.3d 409 (2017)

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.

The defendant in this case received a standard range sentence on each count. The defendant relies on ***State v. O'Dell***, 183 Wn.2d 680, 358 P.3d 359 (2015); Brief of Appellant, page 16, fn. 5. In ***O'Dell***, the sentencing court found that it could not even consider the defendant's youth as a mitigating factor because ***State v. Ha'mim***, 82 Wn. App. 139, 916 P.2d 971 (1996), *affirmed*, 132 Wn.2d 834, 940 P.2d 633 (1997) precluded him from doing so. ***O'Dell***, 183 Wn.2d 680 at 685. The Court of Appeals held that ***Ha'mim*** did not bar trial courts from considering a defendant's youth at sentencing. *Id.* at 689.

In this case, unlike ***O'Dell***, the sentencing court was not under the mistaken understanding that it was precluded from considering the defendant's youth or from imposing an exceptional sentence downward. On the contrary, the sentencing court reiterated several times that it was considering *all* of the information presented by the defendant and the mitigating quality of the defendant's youth. The trial court was not erroneous in its understanding of what sentence it had the option of imposing and was aware that it could impose an exceptional sentence, and

still elected to impose a standard range sentence. Because the trial court was not mistaken as a matter of law and did not fail to follow any prescribed procedure, the defendant is precluded from challenging his standard range sentence and this court should decline further review.

2. EVEN IF THIS COURT WERE TO REVIEW THE DEFENDANT'S STANDARD RANGE SENTENCE, THE TRIAL COURT PROPERLY CONSIDERED 94 PAGES OF MATERIALS SUBMITTED BY THE DEFENSE REGARDING THE DEFENDANT'S YOUTHFULNESS, STATED THAT THE MATERIALS WERE CONSIDERED, AND IMPOSED A LAWFUL 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.[3]" RCW 9.94A.535(1)(e).

[3] The statute further provides that "[v]oluntary use of drugs or alcohol is excluded."

As argued above, the SRA provides that 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).

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)).

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 19. The record does not support

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RCW 9.94A.535(1)(e).

defendant's claim. On the contrary, the record demonstrates that the court received and considered 94 pages of the 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. The sentencing court was also aware of ***Houston-Sconiers*** and the factors it was to consider when sentencing the defendant to a standard range sentence on each count.

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***[4], ***Graham***[5], ***Roper***[6], and ***O'Dell***[7] that generally show among juveniles a reduced sense of responsibility, increased impetuousness, 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).

Most recently, in ***State v. Houston-Sconiers***, 188 Wn.2d 1, 391 P.3d 409 (2017), *citing* ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the court set factors for the

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[4] ***Miller v. Alabama***, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).
[5] ***Graham v. Florida***, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).
[6] ***Roper v. Simmons***, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
[7] ***State v. O'Dell***, 183 Wn.2d 680, 358 P.3d 359 (2015).

court to consider when sentencing a juvenile in adult court. ***Houston-Sconiers***, 188 Wn.2d 1 at 23. The court held that the factors for the sentencing court to consider include the defendant's age, immaturity, impetuosity, and failure to appreciate risks and consequences. *Id.* The sentencing court is also to consider "factors like the nature of the juvenile's surrounding circumstances, the extent of the juvenile's participation in the crime, and the familiar and peer pressures that may have affected the juvenile." *Id.*

As argued above, in this case the trial court did not categorically refused to exercise its discretion in considering all of the factors surrounding both the defendant's youth and the extent of participation in the crime. On the contrary, the sentencing court heard extensive argument and evidence regarding the defendant's youth and the facts of the case. At sentencing, the State indicated that ***Houston-Sconiers*** required the court to consider the information provided by the defense. 10/5/17 RP 27. The defense explicitly listed the factors for the sentencing court to consider:

> What the court has before it is the declaration of probable cause and brief statements here and there about the incident itself, but there's nothing else, other than what I've provided, that really actually speaks to what made this young man do the thing that he has pled guilty to. And

> because *Houston-Sconiers* tells the Court to take into consideration all the mitigating factors, the Court must consider the mitigating circumstances related to the defendant's youth, including the age and its hallmark features, such as the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences. It must also consider factors 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 pressure may have affected him or her.

10/5/17 RP 37-38.

The court indicated that it considered the factors identified by ***Houston-Sconiers*** and the defendant. It stated:

> I agree with Ms. Ko that I don't think the *Houston-Sconiers* or the line of cases leading up to it supports the idea that if the State amends the charges or recommends something below the high end of the range, that that's taking into consideration youth and age and all of those things that *Houston-Sconiers* talks about. But I do think that the Court isn't going to ignore that, because clearly I would have expected that that's part of what is taken into consideration by the State. But I believe that the Court shouldn't defer to the State and assume that they did that, but do its own assessment of that.
>
> . . .
>
> I do think that *Houston-Sconiers* requires the Court to consider all of the factors, not just the act itself.
>
> . . .
>
> And to Mr. Collins, considering all of these factors, including all of these factors, including all of the goals of sentencing that I've already touched on, of what is a just punishment, what will be a deterrent, what it would take to rehabilitate you—which I honestly didn't hear a lot about—

> and how do we protect the public, I do think a sentence within the standard range is appropriate, plus the firearm sentencing enhancement and a period of community custody.

10/5/17 RP 74-77.

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 sentence downward based on defendant's youth and considered all of the factors outlined in ***Houston-Sconiers***. The court had before it not only the 94 pages of mitigation outlining the defendant's youthfulness and childhood trauma, but also had before it the declaration for determination of probable cause, which outlined the seriousness of the defendant's conduct and the fact that he was the shooter. The facts of this case are drastically more severe than those of ***Houston-Sconiers***. In this case the defendant was seen with a pistol before the murder. CP 3-4. The defendant and a group of associates attempted to rob the victim and when the victim had no money to give them, the defendant himself shot the victim. *Id.* The defendant had a separate gun with him at the time of his arrest. 10/5/17 RP 56. The State conceded below that the defendant was

encouraged to shoot the victim by one of his co-defendants, James Mapp. *Id.* at 56.

After taking into consideration *all* of the factors and evidence presented, the record demonstrates that the court properly exercised its discretion in imposing a standard range sentence. 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'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. Defendant's standard range sentence should be affirmed as the trial court meaningfully considered all of the factors addressed in ***Houston-Sconiers***.

3. THE DEFENDANT'S ASSERTION THAT HE WAS DENIED HIS DUE PROCESS WHEN HIS CASE WAS TRANSFERRED TO ADULT COURT WITHOUT AN INDIVIDUALIZED INQUIRY IS WITHOUT MERIT AS THE SUPREME COURT RECENTLY HELD IN ***STATE V. WATKINS.***

"The Washington State Legislature created our juvenile court system and therefore has the power to define its jurisdiction." ***State v. Watkins***, 423 P.3d 830, 833 (2018) (citing RCW 13.04.021). "There is no constitutional right to be tried in juvenile court." *Id.* (reaffirming ***In re Pers. Restraint of Boot***, 130 Wn.2d 533, 925 P.3d 964 (1994)). Automatic decline does not implicate the Eighth Amendment's prohibition on cruel and unusual punishment because adult court jurisdiction is not punishment. *Id.* at 835. A non-punitive statute that does not trigger punishment cannot logically violate a right against cruel and unusual punishment. ***Boot***, 130 Wn.2d at 569. Nor does the statute infringe upon due process for that right is protected by adult courts. *Id.*

The defendant argues that due process requires a hearing before juvenile court jurisdiction is declined. Brief of Appellant, page 9. The Washington Supreme Court specifically rejected such argument and found that a trial court was not required to make an individualized assessment of whether juvenile jurisdiction should be retained. *Id.* at 833-834.

The defendant also asserts that ***In re Boot***, 130 Wn.2d 553, 925 P.2d 964 (1996), which upheld the constitutionality of former RCW 13.04.030(1), is not longer good law. Brief of Appellant, page 14. ***Watkins*** disagreed with that claim. The court held that ***Boot***'s reasoning was "sound" and had not been undermined by subsequent Eighth Amendment decisions, including ***State v. Houston-Sconiers***, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). Because the defendant's due process claim was fully rejected in ***Watkins***, it is without merit in this case.

D. CONCLUSION.

For the above stated reasons, the State requests that this court affirm the defendant's conviction and sentence.

DATED: October 15, 2018

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ ECF 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.

10/15/18 Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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