

FILED
Court of Appeals
Division II
State of Washington
2/6/2019 2:53 PM
NO. 51673-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PETER ABARCA,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY

REPLY BRIEF OF APPELLANT.

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
<u>Table of Authorities</u>	iii
A. ARGUMENT IN REPLY	1
1. COUNSEL’S FAILURE TO RECOGNIZE THAT HIS CLIENT’S YOUTHFULNESS GAVE THE SENTENCING JUDGE DISCRETION TO ORDER AN EXCEPTIONAL SENTENCE DOWNWARD VIOLATED MR. ABARCA’S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL	1
B. CONCLUSION	3

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Kyllo</i> , 166 Wash.2d 856, 215 P.3d 177 (2009)	2
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	2
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	1, 2, 3
<i>In re Pers. Restraint of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	2
<i>State v. Phuong</i> , 174 Wn. App. 494, 299 P.3d 37 (2013).....	3

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	2

A. ARGUMENT IN REPLY

1. COUNSEL'S FAILURE TO RECOGNIZE THAT HIS CLIENT'S YOUTHFULNESS GAVE THE SENTENCING JUDGE DISCRETION TO ORDER AN EXCEPTIONAL SENTENCE DOWNWARD VIOLATED MR. ABARCA'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel filed a sentencing memorandum citing *State v. O'Dell*, 183 Wn.2d 680, 688–89, 358 P.3d 359 (2015). Clerk's Papers (CP) 67-71. In *O'Dell*, the Court acknowledged the importance of considering a defendant's age as a potential mitigating circumstance in sentencing adults under the Sentencing Reform Act. *O'Dell*, 183 Wn.2d at 689.

Sentencing courts must consider youthfulness as a mitigating factor even when sentencing for crimes committed as an adult. *O'Dell*, 183 Wn.2d at 696. The *O'Dell* Court reversed a young adult's sentence and remanded for consideration of whether his youth justified a sentence below the standard range. *O'Dell*, 183 Wn.2d at 698-99. The Court concluded: "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant," and "the sentencing court must exercise its discretion to decide when that is." *O'Dell*, 183 Wn.2d at 698-99.

In this case, at the February 2018 sentencing hearing, Mr.

Abarca's counsel argued that Abarca's youthfulness was a mitigating factor that support a sentence below the State's recommendation. RP (2/26/18) 101-02. However, Mr. Abarca well within the parameters outlined in *O'Dell*. Mr. Abarca was born on July 6, 1997 and was just 19 years old at the time of the first charged offense on June 11, 2017. CP 1. Defense counsel emphasized Mr. Abarca's youth at sentencing. RP (2/26/18) at 101-02.

The federal Sixth Amendment protects defendants from ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel at sentencing, Mr. Abarca must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Prejudice would occur here if, but for his counsel's deficient performance, there is a reasonable probability that his sentence would have been differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *State v. Kylo*, 166 Wash.2d 856, 868, 215 P.3d 177 (2009). 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). Counsel's failure to make an argument based on *O'Dell* deprived the court of its opportunity to exercise its discretion regarding an exceptional sentence below the standard range, which was not requested by counsel.

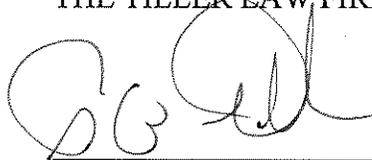
Confidence in the outcome is undermined. *Phuong*, 174 Wn. App. at 547. Mr. Abarca's sentence must be vacated and the case remanded for a new sentencing hearing. *Id.* Upon resentencing, the trial court must consider whether Mr. Abarca's youth justifies ordering a mitigated sentence below the standard range. *O'Dell*, 183 Wn.2d at 696-699.

B. CONCLUSION

For the reasons discussed above and in the opening brief, Mr. Abarca respectfully requests this Court remand his case for re-sentencing.

DATED: February 6, 2019.

Respectfully submitted,
THE TILLER-LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Peter Abarca

CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Petitioner to Clerk of Court of Appeals and to Mr. Randall Sutton, Kitsap County Prosecutor's Office, and mailed copies, postage prepaid on February 6, to appellant, Peter Abarca:

Mr. Randall Avery Sutton
Kitsap Co. Prosecutor's Office
614 Division St
Port Orchard, WA 98366-4614
rsutton@co.kitsap.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Peter Abarca
DOC #406011
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

LEGAL MAIL/SPECIAL MAIL

DATED: February 6, 2019.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

THE TILLER LAW FIRM

February 06, 2019 - 2:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51673-0
Appellate Court Case Title: State of Washington, Respondent v. Peter Abarca, Appellant
Superior Court Case Number: 17-1-01045-4

The following documents have been uploaded:

- 516730_Briefs_20190206141412D2491758_6273.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 20190206144935759 reply.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us
- jcross@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20190206141412D2491758