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COA NO. 52323-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEONTE A. SMITH,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In refusing to impose an exceptional sentence downward, the court erred in failing to fully and meaningfully consider the requisite factors informing the mitigating circumstance of youth.

2. The court erred in imposing discretionary costs on an indigent defendant, including supervision costs and collection costs. CP 157-58.

3. This notation in the judgment and sentence is unauthorized by statute: "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP 157.

Issues Pertaining to Assignments of Error

1. Appellant was a juvenile at the time of offense but was declined to adult court. The court imposed a standard range sentence of almost 10 years, rejecting the defense request for an exceptional sentence downward based on youth. Did the court err in failing to meaningfully consider appellant's individual circumstances and determine whether his youth at the time he committed the offense diminished his culpability?

2. Whether the court erred in imposing discretionary collection and supervision costs on appellant where a recent statutory amendment,

effective at the time of sentencing, prohibits imposition of discretionary costs on indigent defendants?

3. Whether the notation in the judgment and sentence directing accrual of interest on all legal financial obligations must amended to state that no interest shall accrue on non-restitution obligations from June 7, 2018 based on the controlling statute?

B. STATEMENT OF THE CASE

1. Plea

Keonte Smith was 16 years old at the time of offense. CP 34. The juvenile court declined jurisdiction. CP 184-95. In the adult division of the superior court, the State charged Smith with second degree human trafficking, promoting sexual abuse of a minor, and second degree unlawful possession of a firearm. CP 1-2; 2RP¹ 12. The information was ultimately amended to one count of trafficking as part of a plea deal. CP 33; 2RP 12-13. The court accepted Smith's guilty plea to that count. 2RP 22-23. Smith provided this statement in support of the plea: "Between 10/12016 and November 24, 2016, I benefitted financially (by receiving cash) from a venture where a person under 18 (H.H.) was caused to engage in prostitution (a commercial sex act). That person was my

¹ The verbatim report of proceedings is cited as follows: 1RP - 11/13/17; 2RP - three consecutively paginated volumes consisting of 3/5/18, 3/22/18 (plea entry), 6/4/18; 3RP - 3/22/18 (pre-plea); 4RP - 8/2/18.

girlfriend. I knew she was under 18 years old. This occurred in Pierce County, WA. We worked together in this venture." CP 42.

As part of the plea, the State recommended a sentence of 111 months, the low end of the standard range. CP 37. The defense argued for an exceptional sentence below the standard range "due to his age (16 years old) at the time of the offense under Houston-Sconiers." CP 37.

2. Defense argument for exceptional sentence and supporting facts

Defense counsel submitted a memorandum in support of the exceptional sentence request, which included interviews with Smith's mother and father, letters of support, and a forensic assessment by Dr. Roesch, a psychologist. CP 52-151. Smith's background was described. His upbringing was unstable. CP 102. Smith's father and mother were incarcerated for committing crimes at various times. CP 103, 139. Smith's father beat his mother. CP 76-79, 138. Smith witnessed the domestic violence. CP 54-55, 138, 141. He still has vivid memories and nightmares about it. CP 138, 141.

His mother abused drugs and alcohol. CP 53, 79, 85, 139. She used drugs in front of her son. CP 53-54, 79, 88-89, 139. Smith started using marijuana in the sixth grade. CP 140. By ninth grade, he smoked, took Xanax and drank alcohol daily. CP 140-41. Looking back on the

experience, Smith realized he used drugs to cope with depression. CP 141. He does not want to return to them. CP 141.

His parents frequently separated. CP 138. He moved around and lived in different households throughout his childhood. CP 102. He changed schools often and missed a lot of school. CP 103, 139. Smith was starting his junior year in high school when he arrested for the present offense involving H.H. CP 57.²

Smith and his older brother were close. CP 106. When Smith was 11 years old, his brother drowned in a lake, where his father had taken the kids after arguing with Smith's mother. CP 55, 93-94, 138. Smith was there when his brother died. CP 55-56, 106. A video shows Smith calling out for his father to help. CP 81. Smith could not swim. CP 138. He watched as others tried to find his brother and watched as they brought his lifeless body out of the water. CP 138. He is still haunted by what happened. CP 138.

Before his brother died, Smith enjoyed playing sports and being with friends. CP 141. After the drowning, Smith became withdrawn and depressed. CP 56, 141. His school performance deteriorated, and he

² Smith continued his education while confined and intends to obtain a General Education Diploma (GED) and eventually go to college. CP 57, 71, 103. He wants to open a barbershop after he is released, having been inspired by his mother's cosmetology school experience. CP 57, 103.

started getting into trouble at school more often. CP 57, 139. His father became distant. CP 106. Smith's mother later developed a relationship of "convenience" with a drug dealer, who gave Smith marijuana to sell to others. CP 82-83, 88, 139. She allowed Smith and his sister to smoke marijuana and drink alcohol in the house. CP 88. Smith's life spiraled downward, and he committed a series of non-violent offenses, including unlawful possession of a firearm, between December 2012 and 2016. CP 57-58, 140-41.

Smith met H.H. in September 2016 and the two began a dating relationship. CP 59. H.H. was involved in prostitution activity before meeting Smith. CP 60. In jail calls, Smith and H.H. talked about the prostitution activity. CP 59. She continued to engage in this activity while Smith was in custody and worked with others to assist her efforts. CP 59. In a defense interview, H.H. said she and Smith decided to make money together and it was a joint decision. CP 60. Counsel noted application of the human trafficking statute was awkward because both Smith and H.H. were kids. CP 61. The usual scenario was adults victimizing young girls and women. CP 61. Counsel argued there was no physical or emotional abuse inflicted on H.H., and the two juveniles worked together "without any force, fraud or coercion." CP 61.

As part of the sentencing recommendation, counsel cited case law regarding how the brains of children are still developing and how youth is a mitigating circumstance due to lessened culpability and greater capacity for change. CP 62-67. Counsel noted that part of the juvenile court's reasoning in sending Smith to adult court was because "the adult trial court will be required to consider youthful mitigating factors in a sentencing determination." CP 52, 195.

Dr. Roesch, a clinical psychologist who specializes in juvenile forensic evaluations, evaluated Smith in preparation for sentencing. CP 68, 137-47. Smith's test score for sophistication and maturity is at the 27th percentile, which is the low to middle range compared to other young offenders. CP 69, 144. "Individuals in his range of scores have a diminished capacity for judgment, do not tend to weigh the costs and benefits of a given behavior before acting, and do not fully understand the consequences of their actions." CP 69, 144. Smith did not have sufficient sophistication and maturity at the time of arrest to function autonomously. CP 69, 145.

Clinical scores show "he had difficulty appreciating the long-term consequences of decisions, was less capable of imagining risky consequences of decisions, and more likely to only consider a restricted number and range of consequences." CP 69, 145. Smith's statements to

the psychologist supported this assessment. CP 69, 145. That he spoke about H.H.'s prostitution activities during the jail calls knowing they were being recorded was another indicator of lack of maturity and sophistication at the time of offense. CP 69-70, 145-46. "As the research on brain development clearly shows, Keonte's capacities for reasoned decision making and controlling his impulses were not developed during his teen years prior to his arrest." CP 70, 146. "He did not have the maturity and cognitive development to appreciate the choices he was making." CP 70, 146.

His dysfunctional family situation also needed to be taken into account. CP 146. He never had the opportunity for a stable and predictable living situation. CP 146. He learned a delinquent lifestyle from the adults in his life. CP 146. "His parents and his mother's boyfriend were all engaged in antisocial behavior and this was the model Keonte learned from beginning with the early years of adolescence." CP 146. At the same time, Smith is amenable to treatment. CP 69, 144, 146. His ability to make better decisions and plan will continue to improve as he cognitively develops. CP 69, 146. A structured risk assessment showed Smith is a low to moderate risk to reoffend and a low risk for future violent behavior. CP 68, 141-43.

Smith received mental health services in the community before his arrest, but it was hard for service providers to work with him because he moved around and his parents did not engage the program. CP 103-04, 140. Smith has since engaged in counseling. CP 71, 104.

A Team Child attorney who worked with Smith reported he "presents as youthful as any other teenager;" "lacking in maturity in terms of impulsivity and not being able to slow down his thinking to fully appreciate the risk involved and the impact his actions in the midst of them." CP 104. "He also seems highly susceptible to the influence of others in his life and in his decision making that led him here. Keonte did not have an independent mindset or feel actually capable of making decisions outside of the influence of others at sixteen years old." CP 104. Like the psychologist, the Team Child attorney stressed the need to "consider the impact of complex trauma on Keonte's adolescent development," which can affect children in all areas of social, cognitive and emotional development. CP 104.

Smith has a high capacity for change. CP 104. In a letter to the court, Smith expressed remorse and accepted responsibility for his conduct. CP 72; CP 149-51. He explained "I was selfish and naive, not thinking about the trauma HH may have already experienced in her life." CP 72, 149. Since being in custody, he worked on "self improvement, self

awareness, and self control," as well as "acknowledging the decision a[n] individual makes comes with consequences." CP 72, 150.

Defense counsel pointed out that in March 2018, the legislature passed E2SSB 6160, which revised the Juvenile Justice Act and limited the crimes eligible for decline from juvenile court. CP 70. The change in the law took effect in June 2018, after Smith's plea hearing. CP 70. The trafficking charge he faced in juvenile court, which subjected him to a decline hearing, is no longer eligible for declination under the new law. CP 70. Counsel maintained "the fact that the legislature has now eliminated these crimes as a basis for removing a juvenile respondent to adult jurisdiction is highly relevant to this court's sentencing determination." CP 70. The change in the law, along with the requirement that the court consider Smith's age at the time of offense, supported "a sentence that is more aligned with the sentence Smith would be facing in juvenile court." CP 70. He would have faced 25-32 months in Juvenile Rehabilitation if sentenced in juvenile court. CP 71. In adult court, he faced a standard range of 111-147 months. CP 71.

Smith asked for an exceptional sentence of 36 months. CP 72. Counsel argued an exceptional sentence based on youth was appropriate because Smith was less capable of mature judgment than an adult. CP 71. He had an unrealistic view of what was likely to happen and lacked an

adult's ability to consider and weigh the consequences of his actions. CP 71. He did not understand the larger implications for why prostitution and the sex trade are highly detrimental to those involved in it. CP 71.

3. Sentencing

At the sentencing hearing, the court confirmed it had read all the sentencing material except for the psychologist's curriculum vitae. 4RP 6-7, 35. Defense counsel reiterated the arguments made in her written submission. 4RP 6-23. The prosecutor opposed the request for an exceptional sentence, telling the court he was "not here to discuss Keonte Smith's upbringing or his life." 4RP 23-31, 33-34. According to the prosecutor, Smith was more mature than defense counsel made him out to be, counsel minimized the impact on H.H., Smith's criminal behavior was escalating, and he was already given a break in having the other charges dropped as part of the plea bargain. 4RP 23-31.

After the attorneys finished their presentations, the court said it was "not going to address everything because it's 4:00." 4RP 35. The court understood the law to be that it must consider a defendant's age but no particular outcome was dictated. 4RP 35-36. "[T]he Supreme Court said it is an abuse of discretion to not consider whatever factors the defense wants to bring forward as it relates to youthfulness," but the sentencing court was "free to decide whatever I want." 4RP 36.

The court then touched on "a few of the facts." 4RP 36. It expressed concern that this was the second time Smith had been charged with unlawful possession of a firearm. 4RP 36-37. "[W]hen they talk about juvenile and brain development, and impulsivity and all that, it's not -- it's me looking at this criminal act but certainly looking at his behavior over time as well. This is not somebody just engaging in something where they had an error in judgment one time, made a mistake; the Court should take that into consideration." 4RP 37.

The court also took into consideration the charges that were dropped as part of the plea bargain, "especially for someone who previously was convicted of possessing a firearm." 4RP 37-38. Smith was aware that possessing a firearm was illegal and he was aware that prostitution was illegal, although he "may not have appreciated the full ramifications of that, how serious it was or what the extent of the sentencing might be." 4RP 38-39.

The court was unpersuaded that talking about the illegal activity during the jail calls was "just because of youthfulness" because "we have adults in here all the time who know that their calls are being recorded." 4RP 39. "[T]here's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct. So I don't think that supports an exceptional sentence downward." 4RP 39-40.

The court agreed with the prosecutor that H.H. was injured and said some of defense counsel's argument sounded like the victim was being blamed. 4RP 40-41. The court did not know how to define "coercion" in this context, but H.H. did not engage in the activity on her own, and Smith admitted as much in his plea. 4RP 41. With that last observation, the court said, "I think I've hit on everything that I would like to hit on." 4RP 41. The court imposed a standard range sentence of 111 months with 18 months of community custody. CP 157; 4RP 41. It waived non-mandatory fees due to indigency. 4RP 41. This appeal follows. CP 165-76.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO FULLY AND MEANINGFULLY CONSIDER THE MITIGATING FACTOR OF YOUTH IN DECLINING TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD.

The court sentenced Smith, who has no history of violent crime, to almost 10 years in prison for a crime committed when he was 16 years old. The court's rejection of Smith's request for an exceptional sentence downward based on youth cannot stand on appeal because the court failed to address factors that it is required to address in exercising its discretion on the matter. Remand for resentencing is therefore appropriate.

a. Youth is a mitigating factor that can support an exceptional sentence downward.

"[C]hildren are different." State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting Miller v. Alabama, 567 U.S. 460, 481, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). "That difference has constitutional ramifications: 'An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" Id. at 8 (quoting Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), citing U.S. Const. amend. VIII).

A court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the Sentencing Reform Act], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. In State v. O'Dell, 183 Wn.2d 680, 688-89, 358 P.3d 359 (2015), the Supreme Court held youth is a mitigating circumstance that can support an exceptional sentence below the sentencing guidelines under the Sentencing Reform Act (SRA). The Supreme Court reaffirmed the holding in Houston-Sconiers, 188 Wn.2d at 24.

Houston-Sconiers and O'Dell relied on U.S. Supreme Court decisions that identified three general differences between adults and

juveniles. Houston-Sconiers, 188 Wn.2d at 18-20, n.4; O'Dell, 183 Wn.2d at 691-93.

First, juveniles more often display "[a] lack of maturity and an underdeveloped sense of responsibility," often resulting in "impetuous and ill-considered actions and decisions." Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). This susceptibility means that their "irresponsible conduct is not as morally reprehensible as that of an adult." Roper, 543 U.S. at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)).

Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Roper, 543 U.S. at 569. This "vulnerability and comparative lack of control over their immediate surroundings" give juveniles "a greater claim than adults to be forgiven for failing to escape negative influences." Id. at 570.

Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles . . . less fixed." Id. Thus, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id. at 570.

Developments in psychology and neuroscience showed "'fundamental differences between juvenile and adult minds' — for example, in 'parts of the brain involved in behavior control.'" Miller, 567 U.S. at 471-72 (quoting Graham, 560 U.S. at 68). These differences lessened a juvenile's moral culpability, Roper, 543 U.S. at 571, and enhanced the prospect of reformation, Miller, 567 U.S. at 472.

The scientific studies underlying Miller, Roper, and Graham established a "clear connection between youth and decreased moral culpability for criminal conduct." O'Dell, 183 Wn.2d at 695. They "reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." Id. at 692 (footnote citations omitted). "Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." Id. at 693 (quoting amicus with approval).

b. The court committed reversible error in not addressing factors that must be considered in sentencing juveniles.

A defendant generally cannot appeal a standard range sentence imposed under the SRA. RCW 9.94A.585(1); State v. Williams, 149

Wn.2d 143, 146, 65 P.3d 1214 (2003). "However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (quoting Williams, 149 Wn.2d at 147), cert. denied, 138 S. Ct. 467, 199 L. Ed 2d 355 (2017). Further, a defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). In considering the mitigating qualities of youth, courts "must address" the differences between children and adults in order to comply with the Eighth Amendment. Houston-Sconiers, 188 Wn.2d at 19.

This is not a case where the court erred in failing to recognize it had discretion to impose an exceptional sentence downward. The record shows the court understood it had discretion. The court, however, erred in failing to make a full, meaningful inquiry into whether Smith's youth justified an exceptional sentence downward. It erred in failing to consider

requisite factors in determining whether an exceptional sentence based on youth was appropriate.

"[S]entencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not." Houston-Sconiers, 188 Wn.2d at 21. But the exercise of that discretion is not unbridled. It is structured. Relying on Miller, Houston-Sconiers provided "guidance" to trial courts on "how to use" their discretion in sentencing juveniles. Id. at 23. The Court emphasized that the sentencing court *must consider* certain factors. Id.

"[I]n exercising full discretion in juvenile sentencing, the court must consider mitigating 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.'" Id. (quoting Miller, 567 U.S. at 477). "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 pressures may have affected him [or her].'" Id. (quoting Miller, 567 U.S. at 477). "And it must consider how youth

impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated." Id.

In other words, when tasked with sentencing a juvenile, the court "must conduct a meaningful, individualized inquiry" into whether the defendant's youth should mitigate his or her sentence. State v. Solis-Diaz, 194 Wn. App. 129, 132, 376 P.3d 458 (2016), rev'd on other grounds, 187 Wn.2d 535, 387 P.3d 703 (2017). The court must thus take into account "the observations underlying Miller, Graham, Roper, and O'Dell that generally show among juveniles a reduced sense of responsibility, increased impetuosity, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life." Solis-Diaz, 194 Wn. App. at 140.

In short, "a sentencer [must] follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." State v. Bassett, 198 Wn. App. 714, 725, 394 P.3d 430 (2017) (quoting Miller, 567 U.S. at 483), aff'd, 192 Wn.2d 67, 428 P.3d 343 (2018). And that process requires consideration of the factors set forth in Houston-Sconiers and Miller. Bassett, 198 Wn. App. at 725.

The court here did not "fully and meaningfully" consider Smith's "individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability." Solis-

Diaz, 194 Wn. App. at 141. The court did not comply with the standard for exercising discretion set forth in Houston-Sconiers, Solis-Diaz and Bassett.

The court remarked Smith's criminal activity was not a one-time mistake, suggesting it wasn't impulsive for this reason. 4RP 37. The court also expressed its belief that "there's nothing about this that suggests to me that he did not understand or appreciate the wrongfulness of his conduct," while acknowledging Smith "may not have appreciated the full ramifications" of what he was doing. 4RP 38-40. The court thus recognized Smith's "failure to appreciate risks and consequences." Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller, 567 U.S. at 477). This supports an exceptional sentence downward. On the other hand, the court did not find Smith acted impulsively, which is relevant to consideration of the juvenile's "impetuosity." Id. (quoting Miller, 567 U.S. at 477).

Another factor is "the extent of the juvenile's participation in the crime." Id. (quoting Miller, 567 U.S. at 477). The court rejected any attempt to put the onus for the prostitution activity on H.H., determining Smith "did it with her in the sense of she was working with him and he admitted as much." 4RP 41.

The court did not find Smith's inculpatory admissions during the jail calls to be evidence of "youthfulness" because adults do the same thing. 4RP 39. But the court did not otherwise address Smith's "immaturity" in any meaningful sense. Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller, 567 U.S. at 477). The court did not incorporate the forensic psychologist's observations and conclusions about Smith's immaturity into its decision. They were not even acknowledged by the court.

The court completely failed to address "the nature of the juvenile's surrounding environment and family circumstances" and "the way familial and peer pressures may have affected him." Id. (quoting Miller, 567 U.S. at 477). Smith's family circumstances were bleak, his household unstable. CP 102-03, 138-39. Smith had no control over his family circumstances.

He was exposed to domestic violence and criminal activity from an early age. CP 76-79, 85, 88-89, 138-39, 141. He was exposed to criminal activity as well. His mother was a drug user. CP 79, 85, 88-89, 139. It is no surprise that Smith, as a child looking to a parent for guidance, followed her example. CP 88, 140-41. His mother's later boyfriend was a drug dealer and gave drugs to Smith to sell to others. CP 82-83, 88, 139. Smith's parents both engaged criminal activity leading to incarceration. CP 103, 139. Criminal activity was normalized for him. Smith learned

from those around him that engaging in criminal activity was an acceptable way to live. He did not have appropriate role models from which to learn how to act in the community. CP 146. His parents provided little supervision or discipline. CP 146. He did not have a social support system. CP 143. He did not have an adequate community support to help him navigate his difficult family circumstances. CP 103-04, 140. None of this was addressed by the court in sentencing Smith.

Further, one of the singular "family circumstances" not addressed by the court is the devastating impact of his older brother's death. CP 93-94, 106, 138, 141. Trauma informs Smith's development. CP 104. In sentencing Smith, the court proceeded as if it did not matter.

At sentencing, the prosecutor told the court that he was "not here to discuss Keonte Smith's upbringing or his life." 4RP 23. That was the prosecutor's prerogative. Unfortunately, the court did not discuss Smith's upbringing or life either. Unlike the prosecutor, the court did not have the freedom to ignore Smith's background. The law mandates its consideration.

The court also completely failed to consider "any factors suggesting that the child might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23. The psychologist found Smith amenable to treatment. CP 69, 144, 146. The Team Child attorney who worked with

him concurred in this assessment. CP 104. Smith expressed remorse for his actions and expressed willingness to change. CP 149-51. In sentencing Smith to nearly 10 years in prison, the court made no mention of his prospects for rehabilitation.

Looming over the proceeding is the fact that Smith would not be even be subject to an adult sentence and would at most be facing a sentence until the age of 21 had he not been declined from juvenile court before the law on decline changed in 2018. CP 70; RCW 13.40.110 (Laws of 2018, ch. 162 § 4). The court did not consider the arbitrariness of Smith being too late to take advantage of the change in the law. 2RP 40. But it is worth pointing out the law changed in the wake of judicial decisions recognizing the principle that children are different and that those differences call for greater understanding and leniency. The legislature has determined that those juveniles who commit the offense of human trafficking are not subject to decline from juvenile court and thus not subject to an adult sentence. The change in the decline law underscores why courts must meaningfully address the diminished culpability of youth in crafting an appropriate sentence.

State v. Delbosque, ___ Wn. App. 2d. ___, 430 P.3d 1153, 1156 (2018) is instructive because it too involves consideration of the same requisite factors of youth for sentencing purposes. In Delbosque, the

superior court held an evidentiary hearing under RCW 10.95.030 (the Miller-fix statute)³ and entered an order imposing a minimum term of 48 years with a maximum term of life imprisonment. Id. at 1155-56. The Court of Appeals held "the superior court"s findings regarding Delbosque having an attitude towards others reflective of the underlying crime, and of Delbosque's permanent incorrigibility and irretrievable depravity are not supported by substantial evidence." Id. at 1156.

It further held "the superior court failed to comply with the Miller-fix statute when setting Delbosque's minimum term." Id. Although "the superior court clearly understood what it was required to consider, its findings demonstrate that it failed to meaningfully consider the evidence within the proper context of the diminished culpability of youth as required by the Miller-fix statute." Id. at 1160. It was error to "not address how any of the factors it analyzed related to the poor executive functioning or increased risk taking" and "the greater prospects for reform from a crime committed while Delbosque was a child." Id. at 1161. The superior court thus "failed to comply with the Miller-fix statute by failing to specifically consider the 'diminished culpability of youth.'" Id.

³ In 2014, the Washington legislature responded to Miller by enacting the Miller-fix statute, which requires a sentencing court to take into account the factors identified in Miller before sentencing a 16- to 18-year-old offender to life without parole or early release. Delbosque, 430 P.3d at 1156 n.1.

Smith's case does not involve resentencing under the Miller-fix statute, but his youth does trigger a parallel requirement that the court, when called upon to do so, must fully and meaningfully consider the requisite factors informing the diminished culpability of youth in deciding whether to impose an exceptional sentence downward. Like the sentencing court in Delbosque, the court here apparently understood what it was required to consider, having read Houston-Sconiers before the sentencing hearing. 2RP 30. But in rendering its sentencing decision, it failed to address all of the requisite factors. It failed to comply with the controlling standard for exercising its discretion by failing to fully and meaningfully consider the diminished culpability of youth. This Court should therefore remand for a resentencing hearing.

c. On remand, a different judge should resentence Smith.

Due process requires not only that there be an absence of actual bias but that justice must satisfy the appearance of justice. State v. Madry, 8 Wn. App. 61, 62, 504 P.2d 1156 (1972); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

Under the appearance of fairness standard, remand to a different judge is appropriate where facts in the record show "the judge's impartiality might reasonably be questioned." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). A party may thus seek reassignment for the first time on appeal where the trial judge "will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue." Id. (quoting State v. McEnroe, 181 Wn.2d 375, 387, 333 P.3d 402 (2014)).

The discretionary nature of a trial court's decision heightens appearance of fairness concerns. When the trial court's decision is reviewed for abuse of discretion instead of de novo, there is a greater risk of prejudice. Tatham v. Rogers, 170 Wn. App. 76, 104-06, 283 P.3d 583 (2012). Conversely, "even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally *not* available as an appellate remedy if the appellate court's decision effectively limits the trial court's discretion on remand." McEnroe, 181 Wn.2d at 387.

Reassignment to a different judge on remand is required here to preserve the appearance of fairness. First, whether to impose an exceptional sentence downward is entirely discretionary. The risk of prejudice is at its zenith in this regard. Second, the judge could reasonably

be expected to have substantial difficulty in overlooking her previously expressed findings on the matter. See State v. Sledge, 133 Wn.2d 828, 846, 947 P.2d 1199 (1997) (vacating trial court's disposition and remanding to trial court where Sledge may choose to withdraw his guilty plea or have new disposition hearing before another judge in light of previous judge's expressed view of disposition). The judge has already expressed an opinion on the merits of Smith's sentencing request and otherwise prejudged the issue. A different judge should preside over further proceedings on remand to comply with the appearance of fairness.

2. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS ON SMITH BECAUSE HE IS INDIGENT AND ALSO LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS.

The recently amended statute on legal financial obligations (LFOs) prohibits the imposition of discretionary costs on indigent defendants. Here, the court imposed collection costs and cost of supervision. CP 157-58. Because Smith is indigent, these discretionary costs must be stricken. The law on interest has changed as well, no longer applying to non-restitution costs. The interest provision in the judgment and sentence must be corrected.

- a. **The record shows Smith's indigency at the time of sentencing, and discretionary costs cannot be imposed on those who are indigent.**

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of discretionary costs on indigent defendants. "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3). This language became effective on June 7, 2018. Smith was sentenced on August 2, 2018. CP 154.

The statute defines "indigent" as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose "available funds are insufficient to pay any amount for the retention of counsel" in the matter before the court. RCW 10.101.010(3).

By the time of sentencing, Smith had been in jail for 574 days. CP 158. At the sentencing hearing, defense counsel asked the court to waive "any non-mandatory financial obligations" because Smith was indigent. RP 21. Counsel noted Smith had never had a job. RP 34. The court

found Smith indigent. RP 41. It waived two-thirds of the \$10,000 trafficking fee, the maximum waiver allowed by law. RP 41; RCW 9A.40.100(4). It noted the \$500 crime victim assessment was mandatory, "but everything else now, the filing fee is not mandatory any longer; it's waived with a finding of indigency. Attorney's fees, of course, is also waived." RP 41. The court also waived the \$100 DNA fee because it was previously ordered. RP 41-42. Defense counsel's motion for order of indigency notes Smith was found indigent in September 2017 and counsel was appointed. CP 177. Counsel was not aware of any changes in Smith's financial status. CP 177. The court entered an order of indigency for appeal. CP 178-79. At the time of sentencing, Smith met the indigency standard under RCW 10.101.010(3)(c) and (d).

b. The cost of community supervision is discretionary and therefore must be stricken from the judgment and sentence.

The court imposed 18 months of community custody. CP 158. The judgment and sentence states: "while on community placement or community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC." CP 158.

RCW 9.94A.703(2)(d) states "*Unless waived by the court, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department.*" (emphasis added). Given the language authorizing

the court to waive the cost, this Court recently noted the cost of community custody is discretionary. State v. Lundstrom, ___ Wn. App. 2d ___, 429 P.3d 1116, 1121 n.3 (2018).

Discretionary costs cannot be imposed on an indigent defendant. RCW 10.01.160(3). When legal financial obligations are impermissibly imposed, the remedy is to strike them. State v. Ramirez, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018). The cost must be stricken from the judgment and sentence because it is discretionary and Smith is indigent. In light of the court's remarks at sentencing, it probably did not intend to impose the community supervision cost. RP 41. This provision is buried in the boilerplate language of the judgment and sentence. CP 158. "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018). Intentional or not, the inclusion of this cost in the judgment and sentence is unauthorized and must be stricken.

c. Collection costs are discretionary and therefore must be stricken from the judgment and sentence.

The judgment and sentence also provides "The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute." CP 157 (citing RCW 36.18.190; RCW 9.94A.780;

RCW 19.16.500). Each of the three statutes cited in the judgment and sentence provide discretionary authority.

RCW 36.18.190 states "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services." RCW 36.18.190 (emphasis added). Use of the word "may" shows the cost is discretionary. State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 691, 370 P.3d 989 (2016).

RCW 9.94A.780(7) states that if a county clerk assumes responsibility for community custody fees assessed by the Department of Correction, "the clerk *may* impose a monthly or annual assessment for the cost of collections." (emphasis added). This subsection provides discretionary authority to another party, here a county clerk, to assess collection costs. The court has no authority to require the clerk to impose collection costs.

RCW 19.16.500(1) provides general authority to government entities, including counties, to retain private collection agencies. RCW 19.16.500(1)(a). Government entities "may add a reasonable fee" for collections. RCW 19.16.500(1)(b) (emphasis added). Thus, this statute also provides only discretionary authority to impose collection costs.

The court's general authority to impose costs, and the specific authority cited by the written order, all provide discretionary authority to impose collection costs. Discretionary costs imposed on an indigent defendant are prohibited by RCW 10.01.160(3). The remedy is to strike this cost provision from the judgment and sentence. Ramirez, 191 Wn.2d at 749-50.

d. The notation in the judgment and sentence regarding interest on legal financial obligations is unauthorized by statute.

The judgment and sentence states: "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP 157. This is an inaccurate statement of the applicable law. The judgment and sentence must be amended to state that nonrestitution legal financial obligations will not accrue interest from June 7, 2018.

Smith was sentenced on August 2, 2018. CP 154. The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." This statute was amended as part of HB 1783's overhaul of the LFO system. Laws of 2018, ch. 269 § 1. The

judgment and sentence, then, must be modified to reflect that no interest shall accrue on non-restitution LFOs as of June 7, 2018 in accordance with RCW 10.82.090(1).

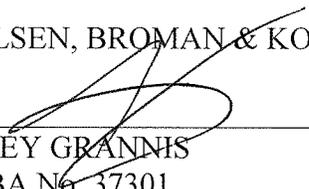
D. CONCLUSION

For the reasons stated, Smith request reversal of the sentence and remand for resentencing before a different judge. Smith also requests correction of the judgment and sentence.

DATED this 19th day of February 2019

Respectfully Submitted,

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