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COA NO. 52330-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY T. CLARK,

Appellant.

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

The Honorable Elizabeth Martin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to meaningfully consider an exceptional sentence downward based on youth as a mitigating factor.

2. Appellant received ineffective assistance of counsel because counsel failed to inform the court of its authority to impose an exceptional sentence downward based on youth.

3. The court erred in failing to recognize it had authority to impose an exceptional sentence by running the firearm enhancements concurrently.

4. The court erred in imposing discretionary costs on an indigent defendant, including supervision costs and collection costs. CP 95, 98.

5. 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 98.

Issues Pertaining to Assignments of Error

1. Is resentencing appropriate because the court had discretion to impose an exceptional sentence downward based on youth but did not recognize and exercise its discretion, or did not fully and meaningfully consider the factors related to youth as a mitigating circumstance?

2. Whether appellant was deprived of his right to effective assistance of counsel where youth constituted a basis on which to impose an exceptional sentence downward but defense counsel failed to inform the court of its authority to impose such a sentence on this basis?

3. Whether resentencing is appropriate because the court failed to recognize its discretion to run the firearm enhancements concurrently under the exceptional sentence provision of the Sentencing Reform Act?

4. 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?

5. Whether the notation in the judgment and sentence directing accrual of interest on all legal financial obligations must be amended to state that no interest shall accrue on non-restitution obligations, as mandated by the controlling statute?

B. STATEMENT OF THE CASE

1. First trial and appeal

Clark was 20 years old in 2011, when the offenses at issue occurred. CP 95. Testimony and psychiatric reports admitted at a pre-trial

hearing showed Clark is mildly mentally retarded. Ex. 25 at 9;[1] RP[2] (9/27/12) 24, 28; RP (10/4/12) 314. Records showed an extremely premature birth weight resulting in major developmental delays. Ex. 25 at 3; RP (10/4/12) 287. Two rounds of intelligence quotient (IQ) testing placed Clark in the first percentile, meaning 99 percent of individuals his age scored higher than he did. CP 45; RP (10/4/12) 268, 271-72.

His general cognitive ability was within the extremely low range of intellectual functioning. Ex. 25 at 5. His overall thinking and reasoning abilities are below approximately 99 percent of people his age. Ex. 25 at 5. Testing showed Clark had limited attention, concentration and short-term memory. Ex. 25 at 6-7; RP (10/4/12) 280-81. He had the communication and language skills of an eight- or nine-year-old child. Ex. 25 at 12; RP (10/4/12) 292-94. He was in an Individualized Education Program, a specialized school plan for children with disabilities. RP (10/4/12) 264. At the age of 17, his academic skills ranged from 2.6 to 4.6 grade equivalencies. Ex. 25 at 4. Clark has always resided with his parents. Ex. 25 at 3.

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[1] The reports were admitted as exhibits at the CrR 3.5 hearing. CP 150-51.

[2] The verbatim report of proceedings in the prior appeal under 45103-4-II is cited using this format: RP - (date) - page number.

Following a jury trial, Clark was convicted of premeditated first degree murder, first degree felony murder, first degree robbery, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful possession of a firearm. State v. Clark, 188 Wn. App. 1028, 2015 WL 3883513 at *1-2 (2015), aff'd, 187 Wn.2d 641, 389 P.3d 462 (2017). The trial court imposed the minimum standard range sentence on Clark — 447 months in prison. CP 12-13. Three firearm enhancements were run consecutively. Id.

Clark raised various arguments on appeal, including that the trial court improperly excluded expert testimony regarding Clark's intellectual deficits and the jury was improperly instructed on an uncharged alternative means for the robbery count. Clark, 2015 WL 3883513 at *1. The Court of Appeals reversed the robbery conviction due to the instructional error but otherwise affirmed. Id. The Supreme Court affirmed, holding the expert testimony was properly excluded because Clark's counsel did not assert a diminished capacity defense and it was not relevant to any other purpose. State v. Clark, 187 Wn.2d 641, 645, 389 P.3d 462 (2017).

2. Second trial on remand

The robbery charge was retried on remand. The evidence presented at the second trial was consistent with the evidence produced at the first trial. See Clark, 188 Wn. App. 1028, 2015 WL 3883513 at *1-2

(summarizing facts from first trial). 16-year-old D.D. brought crack cocaine into Clark's residence on September 7, 2011. CP 88. Clark shot D.D. in the head and asked neighbors for help in selling the cocaine. CP 89. He put D.D.'s body in a garbage can. Id. He wanted to get the body out of the residence before his mother, with whom he lived, came home. 1RP[3] 57, 77. The gun and cocaine were later recovered by police from a toilet tank in the home. CP 89. The trial court, sitting as trier of fact, found Clark guilty of first degree robbery. CP 91.

3. Resentencing

Clark was resentenced on all counts. 2RP 5-6. The State recommended the same sentence that was originally imposed — the minimum term on all counts. 2RP 6-10. The State told the court "The defendant is only 20, but he wasn't a juvenile at the time of this offense, so the Court doesn't have to consider the juvenile factors that would weigh into his sentence in this matter." 2RP 9.

Defense counsel opened his sentencing presentation by saying "I did do some research in the mitigating factors, Your Honor. Did not find anything that was even remotely applicable here, mainly because my

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[3] The verbatim report of proceedings filed in the current appeal under 52330-2-II is referenced as follows: 1RP - seven consecutively paginated volumes consisting of 7/19/18, 7/23/18, 7/24/18, 7/25/18, 7/26/18, 7/30/18, 8/1/18; 2RP - 8/24/18.

client was, at the time, 20 years old. As the prosecutor has said, the juvenile factors do not come into play." 2RP 11. Counsel concurred with the prosecutor's recommendation that the low end of the standard range sentence be imposed. 2RP 13.

The court addressed the sentence previously imposed by Judge Nelson, saying "there were a lot of factors that went into that including the relative youth of Mr. Clark which is also balanced against the extreme youth of the victim. We also have factors including his cognitive abilities and some of those issues that were before the Court and that Judge Nelson would have been particularly familiar with." 2RP 14. "I believe that this is an appropriate sentence as recommended and as previously imposed by Judge Nelson which is essentially the low end on all charges plus the mandatory firearm enhancements." 2RP 15. The court thus sentenced Clark to the low end of the standard range on all counts to run concurrently, along with the firearm enhancements, which it ran consecutively to the longest base sentence and consecutive to one another. CP 99. The total sentence is 447 months, i.e., 37.25 years. CP 99-100. Clark appeals. CP 109.

C. ARGUMENT

1. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE COURT DID NOT RECOGNIZE ITS DISCRETIONARY AUTHORITY TO CONSIDER AN EXCEPTIONAL SENTENCE DOWNWARD.

Clark was 20 years old at the time of offense. Although an adult by chorological age, he still possessed the hallmark features of youth. Contrary to the prosecutor's and defense counsel's assertion, the court had discretionary authority to impose an exceptional sentence downward based on youth. The court's failure to exercise its discretion or meaningfully consider youth as a mitigator requires resentencing. Alternatively, Clark's attorney provided ineffective assistance of counsel in failing to inform the court that Clark's youth was a ground for an exceptional sentence.

Further, the court misapprehended its authority to run the firearm enhancements concurrently rather than consecutively. Resentencing is required to enable the court to exercise its discretion on the matter.

a. A sentencing court commits reversible error in not exercising its discretion to consider imposition of an exceptional sentence downward.

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. A defendant generally cannot

appeal a standard range sentence. RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But 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). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "The failure to consider an exceptional sentence is reversible error." Id. at 342.

"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) (citing Grayson, 154 Wn.2d at 342). "A trial court errs when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" Id. (quoting State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998)). A court thus abuses its discretion when it fails to meaningfully consider a possible mitigating circumstance. O'Dell, 183 Wn.2d at 696-97.

b. Youth is a mitigating factor for a young adult.

The science on brain development has advanced. The law has followed. It is now established that chronological age is not determinative of mental development. The hallmark qualities of youth that mandate protection in the sentencing context persist into one's 20s.

The underpinning for this realization began with a trio of U.S. Supreme Court decisions. In Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), the Court held the death penalty for juveniles is unconstitutional. In so holding, the Court recognized "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Id. at 574.

The Court later held life without parole sentences for juveniles convicted of nonhomicide offenses are unconstitutional. Graham v. Florida, 560 U.S. 48, 68-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The Graham court pointed out "criminal proceedings that fail to take defendants' youthfulness into account at all would be [constitutionally] flawed." Id. at 76. It recognized "parts of the brain involved in behavior control continue to mature through late adolescence." Id. at 68.

More recently, the U.S. Supreme Court held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller v. Alabama,

567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." Id.

Miller relied on the characteristics of youth summarized in Roper. Miller, 567 U.S. at 472. In Roper, the Court identified three general differences between adults and juveniles central to an Eighth Amendment analysis.

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, 543 U.S. at 569 (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. Miller recognized these features of adolescence do not disappear upon the arrival of one's 18th birthday, which is why it observed "youth is more than a chronological fact." Id. at 476 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)).

Roper, Graham and Miller relied on developments in psychology and neuroscience showing "'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. With these differences, the penological justifications for imposing the harshest sentences were diminished for juveniles. Id.

In O'Dell, the Washington Supreme Court took the logic and scientific basis of these decisions and extended them to young adults, recognizing "we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." O'Dell, 183 Wn.2d at 693.

O'Dell held "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." Id. at 698-99. The scientific studies underlying Miller, Roper, and Graham established a "clear connection between youth and decreased moral culpability for criminal conduct" and "this connection may persist well past an individual's 18th birthday." Id. at 695. O'Dell reasoned the same characteristics of youth based on the same scientific findings relied on by Miller, Roper, and Graham require a sentencing court to consider whether a youthful defendant should receive an exceptional sentence below the standard range under the Sentencing Reform Act (SRA), even if the defendant was over the age of 18 at the time of offense. Id. at 689, 691-92, 695.

The Court relied on the scientific research revealing "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). O'Dell quoted from one study that "[t]he 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." Id. at 692 n.5 (quoting A. Rae Simpson, MIT Young Adult Development

Project: Brain Changes, Mass. Inst. of Tech. (2008). O'Dell quoted another finding that "[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." Id. (quoting Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Ann. N.Y. Acad. Sci. 77 (2004)). In sum, "[u]ntil 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).

The Supreme Court has consistently applied the Miller principle that "children are different." State v. Bassett, 192 Wn.2d 67, 81, 428 P.3d 343 (2018) (quoting Miller, 567 U.S. at 481). The Bassett court cited O'Dell as an application of the principle that "children are different." Id.

c. The court committed reversible error in not meaningfully exercising its discretion to consider imposition of an exceptional sentence downward based on youth.

Here, the prosecutor dismissed the notion that Clark's youth should be considered a mitigating circumstance. 2RP 9. Defense counsel flat out told the court that no mitigating factor even "remotely" applied. 2RP 11. Defense counsel was wrong as a matter of law and the attorneys on both

sides misled the court about its sentencing discretion. Based on this erroneous guidance, the trial court was not informed it had discretion to impose an exceptional sentence downward based on youth. Clark was 20 years old at the time of offense. O'Dell establishes that the mitigating qualities of youth persist into one's 20s. The trial court did not consider imposition of an exceptional sentence because no party provided legal authority as a basis for it do so. "This failure to exercise discretion is itself an abuse of discretion subject to reversal." O'Dell, 183 Wn.2d at 697.

Alternatively, even if it can be said that the court recognized it had discretion to impose an exceptional sentence downward based on youth, the court still erred in failing to make a meaningful inquiry into whether Clark's youth justified an exceptional sentence downward. When tasked with sentencing a youthful offender, 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).

Here, the court made a passing reference to Clark's "relative youth" having been considered at the original sentencing, without specifying how this was so. 2RP 14. In fact, the court at the first sentencing did not consider Clark's youth at all in handing down the sentence. RP (6/14/13) 22. Defense counsel at the first sentencing only argued for an exceptional

down based on RCW 9.94A.535(1)(e) — "the 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." CP 152-57; RP (6/14/13) 17-19. The State opposed the defense request on this basis. CP 158-67; RP (6/14/13) 6-9. Defense counsel's failure to request an exceptional sentence downward based on youth at the first sentencing is unsurprising because O'Dell had not yet been decided. The court's lack of consideration for Clark's youth in imposing the original sentence is unsurprising for the same reason. O'Dell was not there to provide guidance.

There is no such excuse for what happened on resentencing. The court, in currently imposing the sentence, did not take into account "the observations underlying Miller, Graham, Roper, and O'Dell 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." Solis-Diaz, 194 Wn. App. at 140. It did not fully and meaningfully" consider Clark's "individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability." Id. at 141. Under Solis-Diaz, this is error.

Defense counsel did not argue for an exceptional sentence downward based on O'Dell. The error is still subject to review.

McFarland is instructive. In that case, McFarland argued for the first time on appeal that the sentencing court erred by failing to recognize its discretion to impose an exceptional mitigated sentence by running multiple firearm-related sentences concurrently. McFarland, 189 Wn.2d at 49. The Court of Appeals refused to consider this issue, noting that the sentencing judge "cannot have erred for failing to do something he was never asked to do." Id. The Supreme Court reversed and remanded for resentencing to allow the trial court the opportunity to consider whether to impose a mitigated sentence by running the firearm-related sentences concurrently. Id. at 50. "What the Court of Appeals did not consider is the authority of an appellate court to address arguments belatedly raised when necessary to produce a just resolution. Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." Id. at 57. The same values are served in Clark's case. Under McFarland, the argument can be raised for the first time on appeal.

"Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173

(2002). Resentencing is appropriate where "the record suggests at least the possibility" that the sentencing court would have considered a different sentence had it understood its authority to do so. McFarland, 189 Wn.2d at 59. In McFarland, the Supreme Court remanded for resentencing because the trial court "indicated some discomfort with his apparent lack of discretion." Id. at 58-59; see also In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007) (remanding where statements on the record "indicated some openness toward an exceptional sentence"); McGill, 112 Wn. App. at 100-01 (remanding for resentencing because the trial court's comments indicated it may have considered an exceptional sentence if it had known it could, and because the reviewing court was unsure the sentencing court would have imposed the same sentence had it known an exceptional sentence was available).

As in McFarland, there is at least a possibility that the trial court would have imposed a downward exceptional sentence based on O'Dell had it properly understood its discretion to do so and meaningfully considered the requisite factors. It imposed the low end of the standard range on all counts, showing a desire to impose the minimum punishment called for by the laws governing standard sentences and enhancements. While the court said this was the appropriate sentence, its determination of what was appropriate was made within the confines of a standard range

sentence. 2RP 15. An exceptional sentence downward was not meaningfully considered and the court imposed the standard range sentence without consideration of youth as a mitigating factor. The sentencing process was thereby skewed. Had the court been aware of its discretion to go below the standard range based on the mitigating circumstance of youth, or meaningfully considered youth as a mitigator at sentencing, it is at least a possibility that the court would have exercised its discretion in Clark's favor. Clark requests remand for resentencing so that the trial court may meaningfully consider an exceptional sentence downward based on youth.

d. In the alternative, defense counsel was ineffective in failing to inform the court of its authority to impose an exceptional sentence downward based on youth.

If trial counsel's failure to request an exceptional sentence downward based on O'Dell is deemed to preclude finding court error on appeal, then Clark's ineffective assistance claim will need to be considered. Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v.

Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

The performance of Clark's attorney was deficient because he failed to properly advise the court of its sentencing authority. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Competent counsel would know the trial court had authority to order an exceptional sentence downward based on youth. Counsel has a duty to know the relevant law. Id. at 862. The relevant law is O'Dell.

Defense counsel outright told the court that no mitigating factor even remotely applied to the case. 2RP 11. Counsel's failure to find and apply legal authority relevant to a client's defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015). Competent counsel would have researched the law and cited O'Dell as a basis to impose an exceptional downward sentence based on youth. "A trial court cannot make an informed decision if it does not

know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." McGill, 112 Wn. App. at 102. The failure to inform the court that it had authority to order an exceptional sentence downward based on O'Dell cannot be explained as a legitimate tactic.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In McGill, defense counsel was ineffective in failing to cite authority showing the court had discretion to impose an exceptional sentence downward and in failing to request the court to exercise its discretion based on that authority. McGill, 112 Wn. App. at 101-02. Remand for the trial court to exercise its principled discretion was appropriate where the court's comments indicated it would have considered an exceptional sentence had it known it could. Id. at 100-01.

The same holds true here. As in McGill, defense counsel failed to cite to the relevant authority and thereby inform the court of its decision-making authority. As a result, the court was unaware of its discretion to impose an exceptional sentence based on O'Dell. As in McGill, it is possible the trial court would have imposed a different sentence had it known an exceptional sentence on this basis was an option. Because

Clark was prejudiced by his attorney's failure to advise the court of its discretion, remand for resentencing is required.

e. The court abused its discretion in failing to recognize firearm enhancements are subject to an exceptional sentence.

The SRA seeks to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history" and "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(1), (3). The SRA provides structure to sentencing, "but does not eliminate[ ] discretionary decisions affecting sentences." RCW 9.94A.010. Thus, a court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

The exceptional sentence statute, RCW 9.94A.535, does not categorically prohibit any type of offense or sentence from eligibility for a reduced term. Exceptional sentences may be imposed even when the standard range appears to mandate consecutive terms.

Mulholland held that the SRA gives trial courts discretion to impose a mitigated sentence of concurrent terms for serious violent offenses, even though RCW 9.94A.589(1)(b) states that sentences for these offenses "shall" be consecutive. Mulholland, 161 Wn.2d at 329-31.

The mandatory language of RCW 9.94A.589(1)(b) did not render the exceptional sentence provisions of RCW 9.94A.535 inapplicable. Id. at 328-30. The trial court's erroneous belief it lacked discretion to impose concurrent sentences constituted a fundamental defect justifying collateral relief in that case. Id. at 332-33.

"Building on the logic of Mulholland," McFarland held "in a case in which standard range consecutive sentencing for multiple firearm-related convictions 'results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],' a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences." McFarland, 189 Wn.2d at 55. The Hard Time for Hard Crime Act, which was aimed at singling out firearm-related offenses for presumptively harsh penalties, "does not preclude exceptional sentences downward." Id. at 54.

RCW 9.94A.533(3) provides firearm enhancements "shall" be imposed consecutively. This statute explains the standard range sentence for firearm enhancements requires consecutive terms, notwithstanding other sentencing provisions, which is a deviation from the typical presumption of concurrent sentences that applies under the standard range. State v. Brown, 139 Wn.2d 20, 27-28, 983 P.2d 608 (1999). Brown held the statute adding deadly weapon enhancements bars an exceptional

sentence below the standard range for that enhancement. Id. But as Justice Madsen explained in State v. Houston-Sconiers, 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, J., concurring), Brown misconstrued the controlling statutory language. The statutory scheme does not prohibit a court from imposing an exceptional sentence that includes a firearm or deadly weapon enhancement. Indeed, it may amount to cruel and unusual punishment to misinterpret the statutory scheme in this fashion. Id. at 36-37. Brown's misinterpretation of the statutory scheme is both incorrect and harmful because it requires courts to impose sentences far longer than a court believes the SRA otherwise mandates. Id. at 39-40.

Properly understood, neither RCW 9.94A.533 nor RCW 9.94A.535 prohibit the imposition of an exceptional mitigated sentence for firearm enhancements. RCW 9.94A.533 does not mention exceptional sentences and does not preclude their potential availability. While the presumptive standard range for firearm enhancements provides for consecutive terms under RCW 9.94A.533, courts are not precluded from considering the applicability of a reduced term under the exceptional sentence statute to avoid an excessive sentence.

This Court recently remanded for resentencing because the trial court mistakenly believed it had no choice but to the run the firearm enhancements consecutively. State v. Holcomb, __Wn. App. 2d__,

49730-1-II, 2018 WL 5977987, at *6 (slip op. filed Nov. 14, 2018) (unpublished).[4] The record suggested the trial court, had it understood it had the discretion to run the firearm enhancements concurrently as part of an exceptional, mitigated sentence, may have done so. This Court therefore remanded for resentencing despite Holcomb never requesting an exceptional, mitigated sentence. Id.

Clark requests the same relief. The court imposed the low end of the standard range on all counts. CP 99-100. It ordered the enhancements to run consecutively. Id. The court explained "the underlying charges all run concurrent to each other, however, by law, the firearm enhancements are flat time. That is run consecutive to those. It is in part because there are so many firearm sentencing enhancements that the Court believes the underlying charges should carry the minimum range of the standard sentencing range." 2RP 15. The court believed the firearm enhancements must run consecutively by law. It did not understand that enhancements can be run concurrently as part of an exceptional sentence. The court's failure to understand its sentencing authority when imposing an exceptional sentence requires a new sentencing hearing.

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[4] GR 14.1(a) permits citation to unpublished decisions for their persuasive value.

2. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS ON CLARK DUE TO INDIGENCY 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. Because Clark 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 Clark'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 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. Clark was sentenced on August 24, 2018. CP 95.

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).

At sentencing, defense counsel asked the court to waive costs because Clark "is never going to be able to work, . . . is never going to be able to afford to pay any of that back." 2RP 12. His earliest release date was 2048. 2RP 12. Aside from restitution and the mandatory victim penalty assessment, the court waived fees. 2RP 15-16. The court found Clark's indigency made "payment of nonmandatory legal financial obligations inappropriate." CP 97. The court entered an order of indigency for appeal. CP 113-14. The declaration in support of the indigency motion shows Clark was unemployed, had no income, no money and no assets. CP 111-12. Clark was indigent under RCW 10.101.010(3)(c). The record further shows that Clark was on supplemental security income due to a disability. RP (3/18/13) 661-62, 1376-77, 1382-83. This is another basis for indigency. RCW 10.101.010(3)(a) (disabled assistance benefits).

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

The court imposed 36 months of community custody. CP 100. The judgment and sentence states: "while on community placement or community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC." CP 95. 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." RCW 9.94A.703(2) (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).

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 of supervision must be stricken from the judgment and sentence because it is discretionary and Clark is indigent. RCW 10.01.160(3). In light of the court's remarks at sentencing, it probably did not intend to impose the community supervision cost. This provision is buried in the boilerplate language of the judgment and sentence. CP 95. "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 98 (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 indigent defendants 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 98. This is an inaccurate statement of the applicable law. The judgment and sentence must be amended to state that non-restitution legal financial obligations will not accrue interest from June 7, 2018.

Again, Clark was sentenced on August 24, 2018. CP 95. 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 legal financial obligation 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, Clark request reversal of the sentence, remand for resentencing, and correction of the judgment and sentence.

DATED this 8th day of February 2019

Respectfully Submitted,

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