

FILED
Court of Appeals
Division II
State of Washington
6/20/2019 1:12 PM

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

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

The State claims Clark cannot raise the sentencing error on appeal and remand for resentencing is not required because Clark did not request an exceptional sentence downward based on youth. Brief of Respondent (BOR) at 7-15.

While it is true that defense counsel did not argue for an exceptional sentence downward, the error is still subject to review. State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017) shows why. In that case, "defense counsel did not request and the sentencing court did not consider imposing an exceptional sentence downward." Id. at 51. The trial court imposed a standard range sentence. Id. at 49. 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. Id. at 49. Echoing the State's argument in Clark's case, 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. at 51. The

Supreme Court nonetheless remanded for resentencing to allow the trial court the opportunity to consider whether to impose a mitigated sentence. 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.

In Clark's case, both the prosecutor and defense counsel told the trial court that "juvenile factors" need not be considered and did not come into play. 2RP 9, 11. Counsel told the court that no mitigating factor was even "remotely applicable." 2RP 11. The court therefore did not consider imposing an exceptional sentence downward based on youth and instead only considered the appropriate standard range sentence. 2RP 14-15. The court was misled into believing an exceptional mitigated sentence was not an option. As argued, the court had discretion to consider an exceptional sentence downward based on youth but the court did not exercise its discretion on the matter. The court did, however, impose the low end of the standard range, which shows it may have been amenable to imposing a lesser sentence had the exceptional sentence option been presented as a viable option. 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. Under McFarland, Clark's argument can be raised for the first time on appeal because resentencing would serve the values of "proportionality and consistency." Id. at 57.

The State's reliance on State v. George, 197 Wn. App. 1077, 2017 WL 700786 (2017) to reach a contrary conclusion is unavailing. BOR at 9. As an unpublished case, George is not precedent. More importantly, George predates McFarland. McFarland provides the appropriate guidance here.

The State also contends the trial court was aware that it could take youth into consideration at sentencing and so there is no error. BOR at 14. The record, though, shows the court considered Clark's youth only in relation to an appropriate standard range sentence. 2RP 14-15. After being told there was no basis for an exceptional sentence, the court did not exercise its discretion to consider youth as the basis for an exceptional sentence. This sentencing error is subject to appellate review.

b. 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.

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). The State claims defense counsel was not deficient because he researched the law and concluded no mitigating factor applied. BOR at 16-17. Counsel did some research, but his conclusion that no mitigating factor applied was objectively unreasonable. On appeal, Clark argues his youth is an applicable mitigating factor. Clark cites relevant authority in support of the argument. Defense counsel either did not find this authority or unreasonably concluded that the mitigating factor did not apply to Clark despite authority showing otherwise. Tellingly, the State on appeal does not dispute this mitigating factor is applicable to Clark's case.

In the absence of counsel arguing for an exceptional sentence downward, Clark received a standard range sentence of 37 years. CP 99-100. That sentence dwarfs the number of years Clark has even been alive. 13 years of that sentence consist of multiple, consecutive firearm enhancements that must be served as flat time. CP 99-100. Given the sheer length of the standard sentence, it was objectively unreasonable for defense counsel not to seek to alleviate its harshness by advocating for a lesser sentence. The State says a defendant is not required to seek an exceptional sentence based on youth. BOR at 17. But in State v. McGill, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002), 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. The same reasoning applies to Clark's situation. For defense counsel to essentially tell the court that an exceptional mitigated sentence was not an option is neither zealous nor competent advocacy.

The State also contends Clark cannot show prejudice because the trial court considered a standard range sentence to be appropriate. BOR at 18. To establish prejudice, Clark need not show counsel's deficient performance more likely than not altered the outcome. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He need only show lack of confidence in the outcome. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). After being told by defense counsel that no mitigating circumstance applied, the trial court expressed its belief that the absolute low end of the standard range was appropriate. 2RP 15. This shows the court did not want to punish Clark any more than required. Had the court been presented with argument to support an exceptional mitigated sentence, the court may have exercised its discretion in Clark's favor. The circumstances are such that confidence in the outcome is undermined, requiring remand for resentencing.

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.

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

There is no dispute Clark is indigent. The State, however, contends the supervision fee is not a discretionary cost and therefore the court did not err in ordering Clark to pay it. BOR at 25-26. The State relies on the distinction between mandatory, waivable and discretionary community custody conditions set forth in RCW 9.94A.703 to argue a waivable cost is not a discretionary cost. The State's position does not hold up.

The supervision fee is a legal financial obligation (LFO).¹ In the context of LFOs, the only relevant distinction is between mandatory LFOs and discretionary ones. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The court has no choice but to impose mandatory LFOs,

¹ See RCW 9.94A.030(31) (defining "legal financial obligation" as "a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and *any other financial obligation that is assessed to the offender as a result of a felony conviction.*") (emphasis added).

regardless of ability to pay. Id. While the sentencing court must "make an individualized inquiry into the defendant's ability to pay discretionary legal financial obligations," no such inquiry is needed for mandatory obligations. State v. Shelton, 194 Wn. App. 660, 673-74, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017) (addressing former and since amended statutes regarding imposition of filing fee and DNA fee). The court thus has no authority to waive mandatory LFOs.

Discretionary LFOs, on the other hand, can be waived and, if the defendant is indigent, must be waived. "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations, such as court costs and fees, as a sentencing condition, it must consider the defendant's present or likely future ability to pay." Lundy, 176 Wn. App. at 103. Trial courts must "conduct an individualized inquiry into the financial circumstances of each offender before levying *any discretionary LFOs*." State v. Ramirez, 191 Wn.2d 732, 739, 426 P.3d 714 (2018) (emphasis added).

Because the court has the authority to waive the supervision fee under RCW 9.94A.703(2)(d), the fee by definition is a discretionary LFO, not a mandatory one. As such, it triggers inquiry into ability to pay and, in the case of an indigent defendant like Clark, outright prohibition on the fee.

House Bill 1783 "amends former RCW 10.01.160(3) to categorically prohibit the imposition of any discretionary costs on indigent defendants." Ramirez, 191 Wn.2d at 739.

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

The State claims financial collection costs are not discretionary costs and so the court did not err in imposing them. BOR at 26-27. Precedent recognizes collection costs are discretionary costs. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015); see also In re Pers. Restraint of Cargill, 3 Wn. App. 2d 1040, 2018 WL 2021805 at *1-2 (2018) (unpublished)² (where defendant indigent, vacating the portion of the judgment and sentence imposing collection costs).

c. Review is appropriate

The State suggests this Court should not review the LFO issues because they were not raised below. BOR at 23-24. "In the wake of [State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)], appellate courts have heeded its message and regularly exercise their discretion to reach the merits of unpreserved LFO arguments." State v. Glover, 4 Wn. App.

² GR 14.1(a) permits citation to unpublished decisions as non-binding, persuasive authority.

2d 690, 693, 423 P.3d 290 (2018). There is no compelling reason to treat Clark differently.

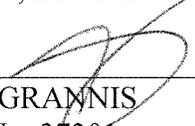
B. CONCLUSION

For the reasons stated above and in the opening brief, Clark request reversal of the sentence, remand for resentencing, and correction of the judgment and sentence.

DATED this 20th day of June 2019

Respectfully Submitted,

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June 20, 2019 - 1:12 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52330-2
Appellate Court Case Title: State of Washington, Respondent v. Anthony T. Clark, Appellant
Superior Court Case Number: 11-1-03699-7

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