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NO. 52479-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB DUENAS,
Appellant.

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

Pierce County Cause No. 17-1-04393-3

The Honorable Kitty-Ann Van Doorninck, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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SUPPLEMENTAL ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Duenas was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing.
2. Defense counsel provided ineffective assistance by unreasonably failing to argue Mr. Duenas's youthfulness as a mitigating factor at sentencing.
3. Mr. Duenas was prejudiced by his attorney's deficient performance.

SUPPLEMENTAL ISSUE: A defense attorney provides ineffective assistance of counsel by failing to bring applicable mitigating factors to the court's attention during sentencing. Did Mr. Duenas's attorney provide ineffective assistance by failing to argue that his client's youth posed a mitigating factor when Mr. Duenas was nineteen-years-old at the time of the alleged offenses?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Duenas was nineteen-years-old at the time of the alleged offense in this case. *See* RP 513. Even so, his attorney did not argue during his sentencing hearing that his status as a youthful offender represented a mitigating circumstance in his case. *See* RP (9/28/18).

ARGUMENT

I. MR. DUENAS’S DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE AT SENTENCING BY FAILING TO RAISE MR. DUENAS’S YOUTHFULNESS AS A MITIGATING FACTOR WHEN HIS CLIENT WAS NINETEEN-YEARS-OLD AT THE TIME OF THE ALLEGED OFFENSES.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Kylo*, 166 Wn.2d at 862.¹

A criminal defendant has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct.

¹ Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5(a). Generally, one cannot appeal a standard-range sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). But that rule does not apply to appeals addressing (a) a sentencing court’s mistaken belief that a mitigating factor did not apply or (b) ineffective assistance of counsel by counsel’s failure to research and raise an applicable mitigator. *Id.*

1197, 51 L.Ed.2d 393 (1977); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009), *as amended* (Sept. 17, 2009). This includes a duty to investigate and present evidence and argument relating to mitigating factors. *See, e.g., Becton v. Barnett*, 2 F.3d 1149 (4th Cir. 1993).

A defense attorney provides ineffective assistance of counsel by failing to recognize and point the sentencing court to appropriate legal authority permitting leniency in sentencing. *Adamy*, 151 Wn. App. at 588 (*citing State v. McGill*, 112 Wn. App. 95, 101, 47 P.3d 173 (2002)).

This is because “[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority.” *McGill*, 112 Wn. App. at 102. “Nor can [the court] exercise its discretion if it is not told it has discretion to exercise.” *Id.*

An accused person is prejudiced by such a failure when there is a reasonable probability that the sentencing court would have imposed a more lenient sentence if the applicable mitigating factor had been properly raised. *Id.* This prejudice standard does not require the sentencing court to overtly express discomfort with the sentence imposed. *See McFarland*, 189 Wn.2d at 59. Rather, reversal is required so long as “the record suggests at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so.” *Id.*

Mr. Duenas was nineteen years old at the time of the alleged offenses in this case. *See* RP 513. The trial court should have been required to consider whether Mr. Duenas’s youthfulness (and attendant impulsivity) constituted mitigating factors for sentencing purposes. *State v. O’Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

But defense counsel never brought the issue up or requested that it be considered a mitigating factor. *See* RP (9/28/18). Mr. Duenas’s attorney provided ineffective assistance of counsel.

Recent advances in brain science have revealed “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.” *O’Dell*, 183 Wn.2d at 692 (*citing Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77 (2004)).

These characteristics of the still-developing adolescent brain cause young people to be “overrepresented statistically in virtually every category of reckless behavior.” *Roper*, 543 U.S. at 569 (*citing* Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992)); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Young adults' relative lack of control over their conduct and environment means that "their irresponsible conduct is not as morally reprehensible" as that of a fully-mature adult. *Roper*, 543 U.S. at 570; *O'Dell*, 183 Wn.2d at 692. This diminished blameworthiness and "the distinctive attributes of youth" "diminish the penological justifications for imposing the harshest sentences." *O'Dell*, 183 Wn.2d at 692 (citing *Miller v. Alabama*, 567 U.S. 460, 477-78, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham*, 560 U.S. at 71; *Roper*, 543 U.S. at 571).

Additionally, a young person's "inability to deal with police officers or prosecutors (including during a plea agreement) or his incapacity to assist his own attorneys" also create a greater likelihood that a young person will be convicted of a more serious offense in circumstances under which an older adult would only have sustained a less serious conviction. *Miller*, 567 U.S. at 477-78 (citing *Graham*, 560 U.S. at 78; *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)).

Because the parts of the brain involved in behavior control remain undeveloped "well into a person's 20s," these advances in adolescent brain science apply to younger adults, in addition to juveniles. *O'Dell*, 183 Wn.2d 691 (citing Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 152 & n.252

(2009) (collecting studies); Giedd, 1021 Ann. N.Y. Acad. Sci. 77); *Roper*, 543 U.S. at 574.

As a result, the Washington Supreme Court has ruled that a sentencing court must be permitted to consider youth as a mitigating factor in cases involving offenses committed shortly after a person reaches legal adulthood. *O'Dell*, 183 Wn.2d at 696.²

While an offender is never 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.” *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007). A sentence imposed without proper consideration of “an authorized mitigated sentence” qualifies as a “‘fundamental defect’ resulting in a miscarriage of justice.” *McFarland*, 189 Wn.2d at 58 (*citing Mulholland*, 161 Wn.2d at 332).

Mr. Duenas was entitled to request a mitigated sentence based on his youth and impulsivity at the time of the alleged offenses. *O'Dell*, 183 Wn.2d at 696. His defense attorney provided ineffective assistance of counsel by failing to recognize and request that the sentencing court take

² This type of discretion is also required by art. I, § 14 of the Washington Constitution. *See State v. Houston-Sconiers*, 188 Wn.2d 1, 19, 391 P.3d 409 (2017).

those attributes into consideration. *Adamy*, 151 Wn. App. at 588; *McGill*, 112 Wn. App. at 101.

Mr. Duenas was prejudiced by his defense counsel's negligence because there is "at least the possibility that the sentencing court would have considered [imposing a lesser sentence] had it properly understood its discretion to do so." *McFarland*, 189 Wn.2d at 59. Given defense counsel's failure to point to Mr. Duenas's youthfulness as a mitigating factor, the sentencing court was left with no mitigating factors to consider at all.

Mr. Duenas's defense attorney provided ineffective assistance of counsel at sentencing by unreasonably failing to raise his client's youth and impulsivity at the time of the alleged offenses as a mitigating factor. *Id.* Mr. Duenas's case must be remanded for resentencing with that factor properly considered. *Id.*

CONCLUSION

In the alternative to the issues raised in Mr. Duenas's Opening Brief, defense counsel provided ineffective assistance at sentencing by failing to raise Mr. Duenas's youthfulness at the time of the alleged offenses as a mitigating sentencing factor. Mr. Duenas's case must be remanded for resentencing.

Respectfully submitted on June 3, 2019,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on June 3, 2019.



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