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Court of Appeals
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NO. 52500-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

QIUORDAI TAYLOR,

Appellant.

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

The Honorable Kitty-Ann van Doorninck,

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to recognize and exercise its discretion to resentence appellant and take into consideration appellant's youth when imposing the firearm and deadly weapon enhancements.

2. Defense counsel was ineffective in failing to alert the trial court to its discretion to conduct a full resentence hearing on remand.

Issues Pertaining to Assignments of Error

1. The trial court imposed exceptional downward sentences on the 17-year-old appellant, sentencing him to zero months for 10 of his 11 convictions. Appellant was sentenced to 11 consecutive firearm and deadly weapon enhancements however, totaling 564 months. Pursuant to a Court of Appeals opinion, appellant's case was remanded to strike one of the firearm enhancements for insufficient evidence. On remand, the trial court concluded that the Court of Appeals had not authorized a full resentence hearing. Is remand for another resentencing required because the trial court failed to recognize and exercise its discretion to conduct a full resentencing hearing, taking into consideration the appellant's youth in determining whether to impose the firearm and deadly weapon enhancements?

2. Defense counsel failed to correct the trial court's mistaken belief that it had no discretion to conduct a full resentence hearing

concerning imposition of the firearm and deadly weapon enhancements against appellant. Where appellant is serving a de facto life sentence, did the failure to correct the trial court's mistaken belief deny appellant his constitutional right to effective representation?

B. STATEMENT OF THE CASE

Appellant Qiuordai Taylor was convicted by a jury in 2016 of 11 felony counts. CP 17-32. The jury also returned special verdicts finding that 10 of the felony offenses were committed with a firearm and one of the offenses was committed with a deadly weapon. CP 17-32.

Taylor was 17-years-old at the time of the alleged offenses on November 18, 2014. CP 1-6, 11-16. The trial court entered exceptional downward sentences, imposing zero months for each count except the manslaughter count (count I), for which Taylor was sentenced to 102 months in prison. The trial court also imposed consecutive firearm sentencing enhancements on each count. CP 17-32; 2RP¹ 63-66. Taylor was sentenced to a total prison term of 666 months. CP 17-32.

Taylor appealed his 2016 convictions, raising several issues on appeal. CP 33-49. In a January 2018 unpublished opinion, this Court

¹ This brief refers to the verbatim report of proceedings as follows: 1RP -- September 14, 2018; 2RP -- March 26, 2016. Taylor has filed a contemporaneous motion asking this Court to transfer the March 25, 2016 verbatim report of proceeding from appeal number 48796-9-II to Taylor's current appeal.

upheld Taylor's convictions but remanded his case to the trial court to address two sentencing errors. CP 50-93. The Court of Appeals concluded there was insufficient evidence to support the firearm enhancement that was imposed against Taylor on count I and accordingly ordered that enhancement be dismissed. CP 52-53, 69-72. The Court of Appeals also concluded that the judgement and sentence improperly listed a firearm enhancement on Taylor's conviction for second degree assault with a knife (count XI). This Court noted the second degree assault was charged, and found by a jury, to have been committed with a deadly weapon rather than a firearm. The Court of Appeals ordered the judgment and sentence to be corrected to reflect a deadly weapon enhancement instead of a firearm enhancement. CP 91-92.

On September 18, 2018, Taylor reappeared before the Honorable Kitty-Ann van Doorninck for resentencing pursuant to the Court of Appeals opinion. Defense counsel asked to continue the sentencing until October to address a change in the law that would be relevant to Taylor's sentencing. As defense counsel explained,

[I] thought maybe I could brief that as it relates to the sentencing and whether deadly weapon and firearm enhancements are consecutive or potentially concurrent as an exceptional downward sentence, based on age mitigation. I know that we addressed that at sentencing, but I understand -- well, that there has been a change in the

law that I would like to address, and I thought that would be more efficient than the PRP purposes -- process.

1RP 5.

In response, the trial court questioned whether it could just enter a corrected judgment and sentence. 1RP 5. As the trial court explained, "I mean, the Court of Appeals is pretty clear, they found that portion as an error and resentenced, taking away that one firearm enhancement." 1RP 5. Defense counsel agreed the trial court could simply enter an amended judgment and sentence. 1RP 5-6.

Judge van Doorninck asked the State for its input. 1RP 6. The prosecutor responded, "My appellate unit, I will just say, there is somebody in my appellate unit that believes that this may be a resentencing, in general, which would mean that the parties could litigate sentencing again. I don't know. He is telling me that's what it is." 1RP 6. The prosecutor noted that it did not agree with the exceptional downward sentence originally imposed, so if a full resentencing hearing was conducted, the State would be recommending a standard range sentence. 1RP 6-7.

After reading the Court of Appeals opinion conclusion, the trial court explained that it intended to reduce Taylor's sentence by five years. 1RP 7. The trial court continued, "I don't think it's a resentencing. I think

it's a, correct the Judgement and sentence." 1RP 8. Defense counsel noted he did not disagree with the trial court. 1RP 8.

Judge van Doorninck concluded the sentencing by noting, "I will say, for the record, I've had other cases with *[sic]* the Court of Appeals says, 'and do a resentencing hearing,' meaning hearing from everybody again. That's not what it said this time; it's pretty direct." 1RP 8.

The judgment and sentence was amended to remove the firearm enhancement on count I, and reflect a deadly weapon enhancement instead of a firearm enhancement on count XI. Taylor was resentenced to a total prison term of 606 months. CP 97-113.

Taylor timely appeals. CP 116-34.

C. ARGUMENT

1. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO RECOGNIZE AND EXERCISE ITS DISCRETION TO CONDUCT A FULL RESENTENCE HEARING AND CONSIDER TAYLOR'S YOUTH WHEN IMPOSING THE FIREARM AND DEADLY WEAPON ENHANCEMENTS

The sentencing court had the discretion to resentence Taylor on all counts. The resentencing court failed to recognize or exercise its discretion for resentencing however, instead concluding that the Court of Appeals mandate had authorized only a correction to the judgment and

sentence. RP 8. Accordingly, the resentencing court abused its discretion and remand for resentencing is required.

- a. A sentencing court commits reversible error by failing to recognize or exercise its discretion to conduct a full resentencing hearing.

The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all subsequent stages of the same litigation. State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). RAP 2.5(c)(1) restricts the law of the case doctrine, providing that, on remand, a trial court has the discretion to revisit an issue that was not the subject of the earlier appeal and exercise its independent judgment. State v. Kilgore, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009). Where a sentencing court fails to recognize or exercise discretion, it commits reversible error. State v. McFarland, 189 Wn.2d at 47, 58, 399 P.3d 1106 (2017); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-34, 166 P.3d 677 (2007); State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

A trial court's discretion on remand is limited by the scope of the appellate court's mandate. Kilgore, 167 Wn.2d at 42. When the appellate court's opinion states that the court orders remand for resentencing, the resentencing court has broad discretion to resentence on all counts. State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009), rev. denied, 168

Wn.2d 1027, 230 P.3d 1061 (2010). When the appellate court remands for the trial court to enter only a ministerial correction, the resentencing court does not have discretion to resentence on all counts. Toney, 149 Wn. App. at 792. As the Supreme Court has recognized, when remand is necessary to correct a sentencing error, and the trial court has any discretion in light of the needed correction, then the matter is not "merely ministerial" and the defendant is entitled to full resentencing with all associated rights. State v. Ramos, 171 Wn.2d 46, 49, 246 P.3d 811 (2011).

Taylor did not challenge the imposition of "mandatory" consecutive firearm and deadly weapon enhancements in his first appeal. See 2RP 21-66; CP 52-93. At the time of his original sentencing, defense counsel did not dispute that Taylor was facing a mandatory minimum of 47 years imprisonment based on the firearm and deadly weapon enhancements. 2RP 21, 56-57.

The Court of Appeals did determine that there was insufficient evidence to support the firearm enhancement imposed on count I. This court's mandate therefore remanded Taylor's case to "dismiss the firearm sentencing enhancements on the manslaughter convictions with prejudice." CP 52-53, 69-72, 92. The fact that a court remands for resentencing with instructions does not limit the resentencing to the mere

correction of a ministerial error. Toney, 149 Wn. App. at 179 (stating the Court "unequivocally" remanded for resentencing when the court included instructions with the order to resentence). To be sure, remand of Taylor's case necessarily required resentencing because dismissal of the firearm enhancement on count I reduced his overall sentence by a minimum of 5 years. See e.g. In re Habbitt, 96 Wn.2d 500, 502, 636 P.2d 1098 (1981) (where the trial court improperly applied firearm findings to enhance first degree robbery convictions, remand for resentencing, rather than simply striking firearm enhancements, is the appropriate remedy because "merely striking the findings without resentencing would be an illusory remedy because the cases would not be returned to the posture where the trial court's discretion can be exercised unfettered."). In contrast, had the Court of Appeals merely remanded Taylor's case for correction of the scrivener's error involving the imposition of a firearm enhancement instead of a deadly weapon enhancement, it would have involved a "merely ministerial" correction for which the trial court had no discretion.

Thus, the mandate gave the resentencing court broad authority to conduct a new sentencing hearing. As a result, the resentencing court had the discretion to resentence Taylor on all counts. The resentencing court failed to recognize its discretion when it determined that the Court of

Appeals opinion did not authorize resentencing on Taylor's remaining convictions. Accordingly, the resentencing court abused its discretion.

- b. Under *Houston-Sconiers* and *O'Dell*, the trial court had authority to reduce the firearm and deadly weapon portion of Taylor's sentence.

“Children are different than adults.” State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (citing Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 2457, 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.” Graham v. Florida, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); U.S. Const. Amend. VIII; Houston-Sconiers, 188 Wn.2d at 8. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable sentencing reform act range. Houston-Sconiers, 188 Wn.2d at 21; State v. O'Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

In O'Dell, the Court found persuasive the scientific and technical advances in understanding the adolescent brain which served as the foundation for the U.S. Supreme Court decisions in Graham, Miller, and Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (which held the constitution precludes the death penalty for

juveniles), O'Dell, 183 Wn.2d at 694-98.²

More recently, in Houston-Sconiers, the Court found “[a]n 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.” 188 Wn.2d at 20. Relying on Miller, the Court held that in exercising its discretion, the court must consider circumstances related to the defendant's youth—such as age and its “hallmark features,” of “immaturity, impetuosity, and failure to appreciate risks and consequences.” Id. at 23. “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. And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. Id. at 23.

In Houston-Sconiers, two defendants who committed crimes while under 18 years of age, appealed their sentences of 31 and 26 years on grounds that, in part, the difference between children and adults rendered their mandatory firearm enhancements unlawful. 188 Wn.2d at 13. There, the trial court had imposed no time on the underlying crimes but

² At the time of his charged crime, O'Dell was over eighteen years old. Nevertheless, the Court held the trial court could consider whether youth diminished his culpability. Id. at 683.

imposed all of the mandatory “flat time” triggered by the firearm enhancements: 312 months for Roberts and 372 months for Houston-Sconiers. Id. The trial court believed it was precluded from exercising its discretion about the appropriateness of the mandatory sentence increase outlined in RCW 9.94. Id.

On appeal, the Supreme reversed the sentences and remanded for resentencing. The Supreme Court concluded that “[t]he mandatory nature of these enhancements violates the Eighth Amendment protections.” Houston-Sconiers, 188 Wn.2d at 25-26. The Court also held that “sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable ranges and/or sentencing enhancements when sentencing juveniles in adult court.” Id. at 9.

Like the teens in Houston-Sconiers, here Taylor was 17-years-old at the time of the alleged offense, and 18-years-old at the time of sentencing. CP 1-6, 11-32. The trial court entered exceptional downward sentences, imposing zero months for each count except the manslaughter count (count I), for which Taylor was sentenced to 102 months in prison. CP 17-32; 2RP 63-66.

In originally imposing 564 months of consecutive firearm and deadly weapon enhancement flat time, however, the trial court believed it was precluded from exercising any discretion, explaining, “I, too, am

frustrated with the Sentencing Reform Act. It's very frustrating when the prosecutor has all the discretion, in terms of dealing with time, these things that bind the court, in terms of flat time, the firearm enhancements." 2RP 62. The trial court continued, stating, "everybody agrees it's 47 years flat time. There's no opportunity for good time. That's just the penalty enhancements. They are all stacked all because of the 11 charges. That's a long time for young men." 2RP 63.

Under Miller, O'Dell, and Houston-Sconiers, the trial court here had discretion to depart from the otherwise "mandatory" consecutive firearm and deadly weapon enhancements. As discussed above, the trial court's failure to recognize and exercise its discretion to conduct a full resentencing hearing on remand, before imposing a 504 consecutive month sentence on the enhancements, failed to take into consideration Taylor's youth and personal circumstances, thereby violating his Eighth Amendment rights.

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. Such an error is "particularly significant" and resentencing is particularly appropriate, where "the trial court made statements on the record which indicated some openness toward an exceptional sentence" or

“expressing sympathy toward [the defendant.]” Mulholland, 161 Wn.2d at 333 (remanding where statements on the record "indicated some openness toward an exceptional sentence"); McFarland, 189 Wn.2d at 56. 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 State v. McGill, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002) (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).

The trial court's imposition of an exceptional downward sentence at the original sentence hearing, coupled with its comments about being troubled by the "flat time" "penalty enhancements," which was "a long time for young men," suggests at least the possibility that the court would have considered imposing reduced sentencing enhancements had it properly understood its discretion to do so. 2RP 63. Reversal and remand for a full resentencing hearing is required. Houston-Sconiers, 188 Wn.2d at 21; O'Dell, 183 Wn.2d at 683.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO ALERT THE TRIAL COURT TO ITS DISCRETION FOR RESENTENCING ON REMAND

Alternatively, if necessary to raise this issue, this Court should find defense counsel ineffective for failing to ensure the trial court was aware of its discretion to resentence Taylor on the firearm and deadly weapon enhancements.

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). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

The performance of Taylor's attorney was deficient because he failed to properly advise the court of its resentencing discretion. When the trial court indicated it read the Court of Appeals opinion as only

authorizing a correction to Taylor's judgment and sentence, and not a resentencing, defense counsel noted, "I don't disagree with the Court at all." 1RP 8. This was deficient performance.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Competent counsel would know the trial court had authority to conduct a full resentencing hearing on remand. Counsel has a duty to know the relevant law. Id. at 862. The relevant law is Kilgore, Toney, and Ramos. 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 alerted the trial court that it had discretion to resentence Taylor. "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 resentence Taylor cannot be explained as a legitimate tactic. Counsel was aware of the applicability of Houston-Sconiers and O'Dell as evidenced by his remarks that there had been a change in the law "as it relates to the

sentencing and whether deadly weapon and firearm enhancements are consecutive or potentially concurrent as an exceptional downward sentence, based on age mitigation." 1RP 4-5. Thus, counsel's failure to ensure that the trial court recognized and exercised its discretion to apply those cases to Taylor's case was not strategic.

Even with the dismissal of the firearm enhancement on count I, Taylor was still facing a de facto life sentence of 606 months, given the consecutive sentencing enhancements. CP 97-113. Thus, despite the prosecutor's explanation that in the event of a full resentencing hearing, he would still be recommending a standard range, Taylor in effect, had nothing to lose by ensuring the trial court was fully aware of its discretion to resentence Taylor and impose an exceptional sentence based on Houston-Sconiers and O'Dell.

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. 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 discretionary authority. As a result, the trial court failed to recognize and exercise its discretion to resentence Taylor to an exceptional sentence based on Houston-Sconiers and O'Dell. As in McGill, given the trial court's willingness to impose an exceptional downward sentence on the underlying crimes, and mistaken belief about its lack of discretion to resentence Taylor, there is a reasonable probability the trial court would have exercised discretion when imposing the firearm and deadly weapon enhancements had it understood it had such discretion. Thus, ineffective assistance of counsel provides another basis on which to hear the claim and remand the matter to the trial court for resentencing.

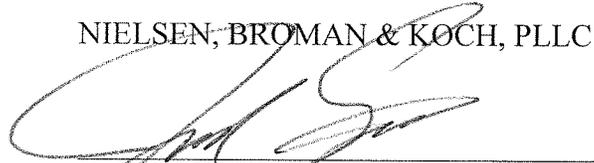
D. CONCLUSION

For the reasons discussed above, this Court should remand Taylor's case for resentencing so the trial court can fully exercise its discretion in determining whether to impose the firearm and deadly weapon enhancements.

DATED this 28th day of March, 2019.

Respectfully submitted,

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