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Court of Appeals
Division II
State of Washington
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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,

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE TRIAL COURT FAILED TO RECOGNIZE AND EXERCISE ITS DISCRETION TO CONDUCT A FULL RESENTENCE HEARING.	1
B. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Columbia Steel Co. v. State</u> 34 Wn.2d 700, 209 P.2d 482 (1949) cert. denied, 339 U.S. 903 (1950).....	6
<u>Greene v. Rothschild</u> 68 Wn.2d 1, 414 P.2d 1013 (1966),.....	6
<u>In re Habbitt</u> 96 Wn.2d 500, 636 P.2d 1098 (1981).....	3
<u>In re Pers. Restraint of Mulholland</u> 161 Wn.2d 322, 166 P.3d 677 (2007).....	9
<u>State v. Barbee</u> ___ Wn.2d ___, 444 P.3d 10 (2019).....	5
<u>State v. Houston-Sconiers</u> 188 Wn.2d 1, 391 P.3d 409 (2018).....	3, 6, 7, 9
<u>State v. McFarland</u> 189 Wn.2d 47, 399 P.3d 1106 (2017).....	7, 8, 9
<u>State v. McGill</u> 112 Wn. App. 95, 47 P.3d 173 (2002).....	9
<u>State v. O'Dell</u> 183 Wn.2d 680, 358 P.3d 359 (2015).....	9
<u>State v. Traicoff</u> 93 Wn. App. 248, 967 P.2d 1277 (1998) rev. denied, 138 Wn.2d 1003, 984 P.2d 1034 (1999).....	3, 4, 5

RULES, STATUTES AND OTHER AUTHORITIES

Sentencing Reform Act.....	8
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A. ARGUMENT IN REPLY

THE TRIAL COURT FAILED TO RECOGNIZE AND EXERCISE ITS DISCRETION TO CONDUCT A FULL RESENTENCE HEARING.

The State properly recognizes that the trial court could have considered an exceptional sentence under State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2018), if the Court of Appeals mandate permitted it. Brief of Respondent (BOR) at 8. Instead however, the State asserts that the Court of Appeals “directed” the trial court to only correct the judgment and sentence and not to conduct a resentencing hearing. BOR at 7.

As discussed fully in the opening brief however, the Court of Appeals did not remand Taylor’s case for a “merely ministerial” correction, but rather, to dismiss a firearm enhancement for insufficient evidence thereby reducing Taylor’s overall sentence by a minimum of five years. Brief of Appellant (BOA) at 5-9; accord In re Habbitt, 96 Wn.2d 500, 502, 636 P.2d 1098 (1981). As such, the resentencing court failed to recognize its discretion to properly conduct a new sentencing hearing under the Court of Appeals mandate. Id.

The State’s reliance on State v. Traicoff¹ to suggest the Court of Appeals merely remanded for the trial court to correct the judgment and

¹ State v. Traicoff 93 Wn. App. 248, 967 P.2d 1277 (1998), rev. denied, 138 Wn.2d 1003, 984 P.2d 1034 (1999).

sentence is unpersuasive.

Traicoff successfully argued in his first appeal that the trial court improperly submitted a deadly weapon enhancement question to the jury. The Court of Appeals accordingly “reversed the sentence on the deadly weapon enhancement only, *and remanded for resentencing.*” 93 Wn. App. at 251 (emphasis added). At the resentencing hearing, the trial court stated that it would either enter a completely new judgment and sentence containing the correction, or an order amending the original second degree assault sentence by striking the deadly weapon enhancement. Traicoff elected the first option. Id. The trial court entered a completely new judgment and sentence which also corrected the term of community placement. Id. at 252. Significantly, Traicoff did not challenge any of the community placement conditions during the resentencing hearing.

Traicoff challenged several community placement conditions for the first time in his second appeal. 93 Wn. App. at 257. Division One declined to address any challenges to the community placement conditions for the first time on appeal. As the Court explained, “the deciding factor” was whether the trial court revisited the conditions of placement during the resentencing. Id. Because the record clearly indicated the trial court did not revisit the conditions, but only corrected the community placement term, Division One declined to address Traicoff’s “new challenge.” Id. at

258.

Unlike Traicoff, here Taylor does not raise a challenge to the term imposed regarding the firearm enhancement sentences for the first time in his second appeal. Rather, as the opening brief makes abundantly apparent, Taylor challenges the trial court's failure to properly recognize and exercise its discretion to resentence Taylor on all counts during the resentencing hearing. See BOA at 5-13.

More problematic for the State, however, is the fact that Traicoff supports the argument that Taylor makes here: that when a firearm enhancement is reversed on appeal, the case is necessarily remanded for resentencing, not a mere ministerial correction to the judgment and sentence. In Traicoff, the Court of Appeals explicitly remanded Traicoff's case for resentencing pursuant to dismissal of the deadly weapon enhancement. 93 Wn. App. at 251. On remand, the trial court also properly recognized that it had the discretion to enter a completely new judgment and sentence, and gave Traicoff the option of electing that remedy. Id. Thus, although Traicoff is factually distinguishable, the unintended consequence of the State's reliance on that case is that it offers further support for Taylor's argument here. See also State v. Barbee, ___ Wn.2d ___, 444 P.3d 10, 11-13 (2019) (recognizing that reversal of an exceptional sentence on one count in the first appeal, resulted in "a brand-

new Judgement and Sentence” on remand which properly allowed a new restitution order on a different count to be entered on remand as well).

The State also attempts to distinguish the law of the doctrine case established in Greene v. Rothschild, 68 Wn.2d 1, 414 P.2d 1013 (1966), on the basis that Taylor could have raised a challenge to imposition of the firearm and deadly weapon enhancements based on his youth in the first appeal. BOR at 11. This argument is likewise unpersuasive.

Generally, where an appellate court has considered and ruled on the merits of a claim, that determination will not be litigated again in a subsequent forum. Where, however, a claim has never been decided on its merits, the law of the doctrine does not prevent its consideration. See Columbia Steel Co. v. State, 34 Wn.2d 700, 705-706, 209 P.2d 482 (1949) (distinguishing between claims “considered and decided,” and therefore subject to law of the case doctrine, and those not previously decided and therefore properly addressed), cert. denied, 339 U.S. 903 (1950). Moreover, as the Court noted in Greene, the doctrine will not be applied where the prior ruling is clearly erroneous and to do so would result in a manifest injustice. 68 Wn.2d at 7, 10.

The State’s suggestion that Taylor could have raised a challenge based on Houston-Sconiers in the first appeal is misplaced and overlooks the procedural history of the case. Taylor filed the opening brief in his first

appeal on August 25, 2016. See State v. Taylor, 2 Wn. App. 2d 1015, 2018 WL 509086 (6/23/18). In contrast, Houston-Sconiers was not argued until October 18, 2016 and the Supreme Court did not issue an opinion until March 2, 2017. 188 Wn.2d at 1. The State filed its response brief in Taylor's first appeal just one week after the Houston-Sconiers opinion was issued.

It was therefore more than six months after Taylor's opening brief was filed, that Houston-Sconiers provided a catalyst by which Taylor could have raised an argument challenging the otherwise "mandatory" consecutive firearm and deadly weapon enhancements imposed against him. Contrary to the State's argument, the procedural history of Taylor's appeal clearly reveals resentencing, and by extension this appeal, was his first opportunity to challenge the consecutive firearm and deadly weapon enhancements under Houston-Sconiers.

The State next argues that "even if this case is sent back to the trial court for resentencing, the record does not show that the trial court would impose a different sentence." BOR at 12 (citing State v. McFarland, 189 Wn.2d 47, 59, 399 P.3d 1106 (2017)). Because this argument wholly ignores the record from Taylor's initial sentencing, another review of the trial court's statements regarding imposition of the firearm enhancements demonstrates why the State's argument necessarily fails.

Taylor was 17-years-old at the time of the alleged offense, and 18-years-old at the time of sentencing. 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. BOA at 11 (citing CP 1-6, 11-32, 17-32; 2RP 63-66).

In originally imposing 564 months of consecutive firearm and deadly weapon enhancement flat time, however, the trial court explained, "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." BOA at 11-12 (citing 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." *Id.* (citing 2RP 63).

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.]” 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"); McFarland, 189 Wn.2d at 56.

The trial judge’s sentencing comments clearly denote sympathy for Taylor and a mistaken belief that the court was precluded from exercising any discretion, in imposing the prison time related to the firearm and deadly weapon enhancements. There can be little dispute that these comments “suggests at least the possibility” that the court would have considered imposing reduced, or concurrent, sentencing enhancements had it properly understood its discretion to do so. That is all that is required for reversal and remand for a full resentencing hearing. BOA at 12-13 (citing Houston-Sconiers, 188 Wn.2d at 56-59; State v. O’Dell, 183 Wn.2d 680, 683, 358 P.3d 359 (2015); Mulholland, 161 Wn.2d at 333; State v. McGill, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002)).

Finally, the State also makes the same flawed argument regarding the trial court’s sentencing comments to suggest that Taylor cannot demonstrate ineffective assistance of counsel “because the record suggests the court would not have imposed a new exceptional sentence, even if counsel had asked for one.” BOR at 16-17. For the same reasons discussed above, the State's argument necessarily fails.

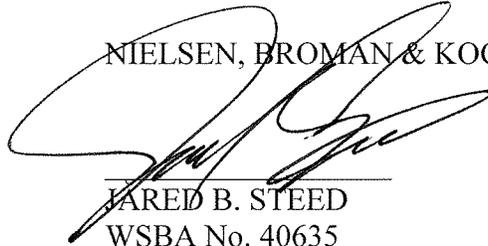
B. CONCLUSION

For the reasons discussed above, and in the opening brief, 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 14th day of August, 2019.

Respectfully submitted,

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