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Court of Appeals
Division II
State of Washington
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NO. 52538-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMAL SMITH,
Appellant.

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

The Honorable Carol A. Murphy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Smith was denied his Sixth Amendment and Wash. Const. art. I, § 22 right to effective assistance counsel when his attorney recommended a mandatory firearm enhancement rather than requesting the court waive the mandatory enhancement.

2. The trial court abused its discretion by failing to exercise its discretion not to impose the 60-month firearm enhancement.

B. ISSUES PRESENTED ON APPEAL

1. Was Smith denied his Sixth Amendment and art. I, § 22 right to effective assistance of counsel when his attorney recommended a mandatory firearm enhancement rather than requesting the court to waive the mandatory enhancement?

2. Did the trial court abuse its discretion by failing to exercise its discretion not to impose the 60-month firearm enhancement when both the Eighth Amendment and Wash. Const. art. I, § 14 authorize the trial court to exercise discretion to consider youth as a mitigating factor even when

a sentencing enhancement is mandatory?

C. STATEMENT OF THE CASE

1. Procedural history

The Court of Appeals reversed Jamal Smith's 2004 sentence and remanded for resentencing with direction to consider Smith's youth as a mitigating factor. *Matter of Smith*, 200 Wn. App. 1033, 2017 WL 3723086 *4 (2017)¹, unpublished. At the resentencing hearing, the trial court found Smith's youth was a mitigating factor. CP 690. As a result, the trial court imposed an exceptional sentence downward for the substantive crime of attempted first degree murder but added 60-months as a mandatory firearm enhancement. CP 680, 691; RP 118. This timely appeal follows. CP 692.

2. Substantive facts

In 2004 19-year-old Jamal Smith was sentenced to 700 months (58 years 4 months) in prison for attempted first degree murder (count I), first degree robbery (count II), possession of marijuana (count III), unlawful possession of a firearm (count IV), a

¹ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

second charge of attempted first degree murder (count V), residential burglary (count VI), and three firearm enhancements for counts I, II, and III. CP 12-13. Smith committed counts I through IV when he was 17 years old and counts V and VI when he was 19 years old. CP 676.

In 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012) which unequivocally held that a mandatory life sentence without parole for those under 18 at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishments. The Court of Appeals granted Smith's personal restraint petition and remanded for a resentencing hearing in which the court could consider Smith's youth as a mitigating factor. *Smith*, 2017 WL 3723086 *1, unpublished.

a. Testimony at the resentencing hearing

At Smith's resentencing hearing Psychologist Harry Dudley testified as follows:

i. Immaturity or capacity to consider future consequences of his actions

Dr. Dudley testified that as a teenager Smith was present-centered, focused on survival, and engaged in risk-taking behavior.

RP 32. Smith suffered from multiple traumas as a child and was involved with antisocial peers which increased Smith's risk of "behaving in an emotionally unregulated way." RP 33. Smith's childhood trauma put Smith at a greater risk of committing a crime than other teenagers. RP 32-33.

ii. Family and Home Environment

Smith was raised in a chaotic environment rampant with substance abuse. RP 33. He was also the victim of both physical and sexual abuse. RP 33.

iii. Ability to assist defense counsel

Dr. Dudley testified that although it was difficult to evaluate legal competence retrospectively, Smith was angry and emotionally reactive which may have hindered his relationship with his attorney. RP 35.

iv. Potential for Rehabilitation

Dr. Dudley testified Smith had potential for rehabilitation. RP 35. During an extended stay in a JRA facility Smith positively responded to structure and counseling. RP 30, 52. In addition, Dr. Dudley testified that although Smith was diagnosed with antisocial disorder as a youth, many young people grow out of that disorder. RP 20-21. After examining Smith, Dudley did not diagnose Smith

with antisocial disorder as an adult. RP 23.

b. Defense Counsel's recommendation

The defense's final recommendation was to impose "180 months with a 60-month firearm enhancement." RP 99. Defense counsel then requested that all the sentences be imposed concurrently, but did not request the court waive the firearm enhancement. RP 99.

c. The state's recommendation

In discussing the firearm enhancements, the prosecutor stated that "[i]n all fairness to Mr. Smith, he brought one gun, shot one time, and that was the attempted murder charge. That 60 months, your Honor, I would argue to this Court is mandatory for the initial 60 months. The additional stacking is discretionary with the Court." RP 89. The prosecutor's final recommendation included "the mandatory 60-month firearm enhancement". RP 95.

d. The sentence imposed

The trial court concluded that "Smith's youth and traumatic childhood provided mitigating circumstances which warranted a downward departure from the standard range sentence, particularly as applied to the convictions associated with the shooting on

February 17, 2003.” CP 690 (CL 3). Although the standard sentencing range was 308.25 to 411 months on count I, the trial court imposed 280 months as an exceptional downward departure. CP 679-80. However, the court added 60 months to count I for the firearm enhancement, which it stated was “mandatory time”. RP 118; CP 680. From the court’s colloquy, there was no indication the court knew it had discretion not to impose the enhancement. RP 118.

This timely appeal follows. CP 692.

D. ARGUMENT

1. SMITH WAS DENIED HIS SIXTH AMENDMENT AND ART. I, § 22 RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY RECOMMENDED A MANDATORY FIREARM ENHANCEMENT RATHER THAN REQUESTING THE COURT WAIVE THE MANDATORY ENHANCEMENT

The Sixth Amendment to the United States Constitution and art. I, § 22 guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; art. I, § 22; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The Court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009)

To prevail on an ineffective assistance of counsel claim, the

defendant must show that defense counsel's representation was deficient, and that the deficient representation was prejudicial. *Grier*, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d at 33 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Counsel's performance is not deficient if it can be characterized as legitimate trial strategy. *Grier*, 171 Wn.2d at 33.

To establish actual prejudice, Smith must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Grier*, 171 Wn.2d at 34 (citing *Kylo*, 166 Wn.2d at 862). The remedy for ineffective assistance of counsel is reversal. *State v. Estes*, 193 Wn. App. 479, 495, 372 P.3d 163 (2016), *aff'd*, 188 Wn.2d 450, 395 P.3d 1045 (2017).

The Eighth Amendment and art. I, § 14 prohibit cruel punishment. Art. I, § 14. However, the Washington Constitution affords greater protection than the Eighth Amendment. *State v.*

Ames, 89 Wn. App. 702, 710 n.8, 950 P.2d 514 (1998) (citing *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996)). Thus, any violation of the Eighth Amendment necessarily violates art. I, § 14. A punishment is cruel and unusual if it is disproportionate to the crime. *Graham v. Fla.*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), as modified (July 6, 2010).

In determining proportionate sentences for children, the United States Supreme Court has explicitly held that the Eighth Amendment compels sentencing courts to recognize that children are different from adults. *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, 391 P.3d 409 (2017) (citing *Miller*, 567 U.S. at 481 (“children are different”); *Graham*, 560 U.S. at 68-70 (differences between children and adults are constitutional in nature and implicate Eighth Amendment and sentencing practices); *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (differences between juveniles and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders)).

The trial court “must have absolute discretion to depart as far as they want below otherwise applicable... sentencing enhancements when sentencing juveniles in adult court.” *Houston-Sconiers*, 188 Wn.2d at 9. In *Houston-Sconiers*, the trial court

indicated it would have departed downward from the firearm enhancements if it had authority to exercise any discretion. However, the court believed it did not have authority to exercise such discretion and imposed all of the enhancements. *Houston-Sconiers*, 188 Wn.2d at 13. *Houston-Sconiers*, 188 Wn.2d at 12-13.

The Washington Supreme Court reversed the two juveniles' firearm enhancements and remanded for the trial court to exercise its discretion to consider youth as a mitigating factor before applying the enhancements. *Houston-Sconiers*, 188 Wn.2d at 9, 13, 23.

Despite this established law, here, defense counsel did not request a departure from the firearm enhancement. Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690–91. Counsel's failure to ask for a waiver of the firearm enhancements was deficient performance, because counsel is deemed to know the law, and no reasonable attorney would only argue for a partial mitigating sentence under *Houston-Sconiers*, without asking the court to waive the firearm enhancements sentence. *Strickland*, 466 U.S. at 690–91; *Houston-Sconiers*, 188 Wn.2d at 12-13.

The record also establishes that counsel's deficient performance prejudiced Smith. The trial court imposed a downward

exception but mistakenly believed it had no ability to waive the firearm enhancements. RP 118. The trial judge understood that Smith's youth was a valid mitigating factor, but she mistakenly imposed the only exceptional downward sentence she believed possible, but without exercising her discretion. Had defense counsel requested a departure, or even confirmed the trial court knew it had discretion to do so, there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.

Thus, defense counsel's failure to request a departure from the firearm enhancement prejudiced Smith. *Grier*, 171 Wn.2d at 32-33. This Court must reverse Smith's firearm enhancement and remand for a new sentencing where the trial court exercises its discretion regarding the firearm enhancements. *Estes*, 193 Wn. App. at 495; *Houston-Sconiers*, 188 Wn.2d at 23.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EXERCISE ITS DISCRETION TO CONSIDER SMITH'S YOUTH AS A MITIGATING FACTOR FOR THE FIREARM ENHANCEMENT

The trial court abused its discretion by failing to exercise its discretion to consider Smith's youth as a mitigating factor for the

firearm enhancement.

The failure to exercise discretion is an abuse of discretion. *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015); See also *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (the trial court's failure to consider an exceptional sentence authorized by statute is reversible error). Further, 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.'" *State v. McFarland*, 189 Wn. 2d 47, 56, 399 P.3d 1106 (2017) (citing *State v. Garcia-Martinez*, 88 Wn. App. at 330, 944 P.2d 1104 (1997)); *In re Pers. Restraint of Mulholland*, 161 Wn.2d at 333, 166 P.3d 677 (2007).

In *McFarland*, the Washington Supreme Court vacated McFarland's sentence and remanded for resentencing because the trial court mistakenly believed it did not have discretion to impose several firearm-related sentences concurrently, but the record suggested the trial court may have done so had it properly understood its discretion. *McFarland*, 189 Wn.2d at 59.

The trial court indicated its discomfort with McFarland's total sentence by noting that it was one typically given for second degree murder, that the court did not have much discretion, and that the high

end of the range was not called for, but it nonetheless imposed the sentences consecutively to each other as mandated by RCW 9.41.040(6) and 9.94A.589(1)(c). *McFarland*, 189 Wn.2d at 50-51.

However, the Washington Supreme Court held that if mandatory consecutive sentencing results in an excessive sentence the trial court may exercise its discretion to impose an exceptional, mitigated sentence by imposing concurrent sentences. *McFarland*, 189 Wn.2d at 55. Even though *McFarland* did not request a mitigated sentence in the trial court, resentencing was appropriate because the trial court's discomfort suggested "at least the possibility" it would have considered imposing concurrent sentences "had it properly understood its discretion to do so." *McFarland*, 189 Wn.2d at 59.

Similarly, here, the trial court had absolute discretion to depart from the firearm sentencing enhancement. *Houston-Sconiers*, 188 Wn.2d at 9; *Matter of Meippen*, ___ Wn.2d ___, 2019 WL 2050270, at *3 (May 9, 2019) (citing *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018) ("[The SRA] has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion.")) Yet, it appears from the record the trial court did not properly understand its discretion.

In *McFarland*, the “possibility” the court may have exercised its discretion was sufficient to remand for resentencing. Here, there is more than a possibility. The trial court found valid mitigating factors and imposed a mitigated sentence where it knew it could. Thus, here there are even stronger reasons to remand for resentencing than in *McFarland*. This court should remand for resentencing where the court can consider whether to impose any portion of the firearm enhancement. *McFarland*, 189 Wn.2d at 59.

The trial court also violated *Houston-Sconier’s* mandate to treat children differently than adults by failing to exercise its discretion to consider whether the mitigating qualities of youth warranted a downward departure from the sentencing enhancement. *Houston-Sconiers*, 188 Wn.2d at 18; *Miller*, 567 U.S. at 481; *Graham*, 560 U.S. at 68-70; *Roper*, 543 U.S. at 569-70. Further, by imposing the full 60 months despite finding Smith’s youth made him less culpable the trial court imposed a sentence that was disproportionate to the crime and was, thus, cruel and unusual. Therefore, the trial court violated the Eighth Amendment and art. I, § 14 when it imposed the 60-month enhancement. *Graham*, 560 U.S. at 59.

This court must reverse Smith’s 60-month sentencing

enhancement and remand for a new sentencing hearing where the trial court may consider Smith's youth as a mitigating factor to determine whether to impose any portion of the enhancement. *Houston-Sconiers*, 188 Wn.2d at 23.

E. CONCLUSION

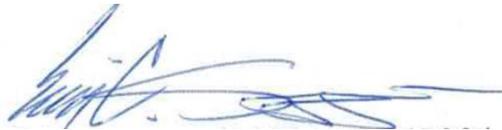
Jamal Smith respectfully requests that this Court find that he was denied effective representation and remand for a new sentencing for the trial court to consider his youth as a mitigating factor in determining whether to impose any portion of the firearm enhancement.

DATED this 10th day of June 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and Jamal Smith/DOC#870926, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on June 10, 2019. Service was made by electronically to the prosecutor and Jamal Smith by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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