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Division II
State of Washington
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No. 52651-4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON TOLEAFOA,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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A. INTRODUCTION

When Aaron was tried and sentenced as an adult for an offense he committed as a 15-year-old, the court entered an order of restitution, requiring Aaron to pay over \$294,000, including about \$200,000 in reimbursement to an insurance company. Aaron was subsequently resentenced under *State v. Houston-Sconiers*,¹ but the resentencing court failed to consider the mitigating factor of youth when it reentered the previous restitution order, wrongly believing it lacked discretion to consider Aaron's reduced culpability when determining restitution.

This Court should reverse the restitution order and remand with instructions for the sentencing court to exercise its discretion in determining the amount of restitution owed in light of Aaron's offense being mitigated by youth—specifically considering RCW 13.40.190(1)(g), which allows a court to consider a child's indigence when ordering restitution to an insurance company.

Alternatively, should this court reverse and remand Aaron's sentence based on the federal and state constitutional claims argued in his opening brief, the court should apply RCW 13.40.190(1)(g) in determining restitution at Aaron's resentencing.

¹*State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d (2017).

B. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court failed to consider the mitigating factor of Aaron's youth when determining restitution at Aaron's *Houston-Sconiers* resentencing.

2. The sentencing court failed to presumptively sentence Aaron as a child when it reentered the restitution order of over \$294,000—\$200,000 of which is owed to a for-profit insurance company.

C. SUPPLEMENTAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Sentencing judges have full discretion to consider mitigating circumstances associated with youth when imposing sentence on a juvenile tried in adult court. RCW 13.40.190(1)(g) permits juvenile courts to reduce or decline to order restitution to insurance companies when indigent defendants are sentenced in juvenile court.

Does the resentencing court's mistaken belief it lacked discretion to consider the mitigating factors of youth when it reentered the original restitution order at Aaron's *Houston-Sconiers* resentencing hearing require reversal and remand for consideration of Aaron's indigence and reduced culpability in determining the amount of restitution he owes to an insurance company?

2. Under the Eighth and Fourteenth Amendments, was the court required to presumptively sentence Aaron as a child once the court found his offenses were mitigated by youth, which includes presumptive application of RCW 13.40.190(1)(g) when determining the amount of restitution he owes to an insurance company?

D. SUPPLEMENTAL STATEMENT OF THE CASE

When Aaron pleaded guilty and was sentenced in 2016 as an adult for a crime he committed as a 15-year-old, the trial court entered a restitution order for \$294,379.22. CP 10, 13-38; Supp. CP _____. Over \$200,000 of this amount is owed to Blue Cross, Blue Shield for reimbursement of his victim's medical expenses. CP 37-38; Supp. CP _____.

On remand, the trial court failed to consider the order of restitution, as all parties wrongly believed the trial court lacked the ability to fulfill its duty to consider the mitigating factor of youth as to the previously entered restitution order. RP 13, 22, 46-47.

E. ARGUMENT

1. The restitution order should be reversed and remanded because the resentencing court wrongly believed it lacked discretion to consider the mitigating factor of Aaron’s youth when ordering restitution.

- a. Houston-Sconiers makes clear the court has discretion to reduce restitution based on youth, but the court failed to consider this when resentencing Aaron.

The trial court failed to consider that Aaron’s offense was mitigated by youth when it reentered the original restitution order at Aaron’s *Houston-Sconiers* resentencing.

The Sentencing Reform Act (SRA) provides, “Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property ... unless extraordinary circumstances exist which make restitution inappropriate in the court’s judgment and the court sets forth such circumstances in the record.” RCW 9.94A.753(5).

The fact that the defendant was a child at the time of the crime constitutes an “extraordinary circumstance” making it inappropriate to order full restitution to an insurance company. But even disregarding that clause, the Supreme Court has made clear that courts have the discretion to reduce sentences for people who were under 18 at the time of their offenses, even if the relevant statutory language is ostensibly mandatory.

See Houston-Sconiers, 188 Wn.2d at 21; *see also State v. Kinneman*, 155 Wn.2d 272, 281, 119 P.3d 350 (2005) (“restitution is part of an offender’s sentence”).

In *Houston-Sconiers*, two teenagers were convicted of several serious offenses in adult court. *Id.* at 8, 12. The sentencing judge imposed no prison time on the substantive crimes, *id.* at 13, but did impose “lengthy adult firearm sentence enhancements, with their mandatory, consecutive, flat-time consequences[.]” *Id.* at 8.

The Supreme Court reversed the sentences, holding the court had the discretion to reduce or decline to impose the firearm enhancements. *Id.* at 9. It did so despite the mandatory language of the statute at issue: “Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions” RCW 9.94A.533(3)(e).

The Court construed the mandatory sentencing statute to be discretionary for people under 18 because “children are different[.]” *Houston-Sconiers*, 188 Wn.2d at 9. Children have diminished culpability because they lack maturity and are susceptible to peer pressure. *Id.* at 19 n.4. They are also more amenable to rehabilitation than their older counterparts. *Id.* Thus, “sentencing courts must have complete discretion

to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not.” *Id.* at 2. Critically, the Court held, “[t]o the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled.” *Id.*

Applying *Houston-Sconiers* here, the restitution statute cannot be construed as mandatory for juveniles. *Houston-Sconiers*, 188 Wn.2d at 21. And this should be especially true as to insurance company restitution, which is not mandatory for juveniles tried in juvenile court. RCW 13.40.190(1)(g).

For children convicted in juvenile court, “the court may determine that the respondent is not required to pay, or may relieve the respondent of the requirement to pay, full or partial restitution to any insurance provider authorized under Title 48 RCW if the respondent reasonably satisfies the court that he or she does not have the means to make full or partial restitution to the insurance provider.” RCW 13.40.190(1)(g).

Despite the SRA’s mandatory language on restitution, *Houston-Sconiers* requires the trial court to exercise its discretion, taking into account the mitigating aspects of youth when imposing restitution on a

child like Aaron who is tried and sentenced as an adult. *Houston-Sconiers*, 188 Wn.2d at 21.

- b. *Blazina* also suggests the SRA’s restitution statute should be construed as discretionary, because reducing the amounts indigent young people must pay insurance companies helps facilitate successful reentry.

A court’s exercise of its discretion to limit the restitution owed to insurance companies by juveniles sentenced in adult court also furthers the legislature’s goal of facilitating reentry.

The legislature declares that it is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons and to assist them in the assumption of the responsibilities of citizenship, and the opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to rehabilitation and the assumption of the responsibilities of citizenship.

RCW 9.96A.010. Burdening a defendant who was a child at the time of the crime with crushing debt does not further the above goal. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) (“problems associated with LFOs imposed against indigent defendants ... include increased difficulty in reentering society”). For this reason, too, this Court should construe RCW 9.94A.753(5) as discretionary in the context of ordering juveniles sentenced in adult court to pay restitution to insurance companies.

- c. The resentencing court should be required to exercise its discretion to determine whether Aaron should be straddled with hundreds of thousands of dollars in debt to a for-profit insurance company, even if the issue was not raised below.

Even though Aaron’s attorney and the court wrongly believed the court lacked discretion to consider Aaron’s restitution order at his resentencing, this Court should consider the matter because it is necessary to a just outcome.

A trial court errs when it refuses to consider an exceptional sentence based on a “mistaken belief that it did not have the discretion” to consider an exceptional mitigated sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). In *McFarland*, defense counsel did not request, and the sentencing court did not consider, imposing an exceptional sentence downward by running the firearm-related sentences concurrently. *McFarland*, 189 Wn.2d at 51. Division Three “concluded that the sentencing court committed no error given the arguments raised,” but the Supreme Court reversed. *Id.* at 57. The Court emphasized that an appellate court has the authority “to address arguments belatedly raised when necessary to produce a just resolution.” *Id.* Where the record suggests “at least the possibility” that the sentencing court would have considered imposing a mitigated sentence, reversal and remand is warranted. *Id.* at 59.

Here, this Court remanded Aaron's case for the trial court to fulfill its mandatory obligation to consider the mitigating factors of youth. CP 40. At Aaron's *Houston-Sconiers* resentencing, Aaron's attorney wrongly believed the previously entered restitution was mandatory:

I would ask for a waiver of discretionary costs. Certainly, restitution is not discretionary, so I'm not going to touch on that; that's mandatory, absent some other showing of extreme exceptional circumstances that would have to be addressed at a later time once the principal is paid.

RP 22.

The resentencing court determined that Aaron's offenses were mitigated by youth, but did not consider this factor when reentering the restitution order, despite the fact that restitution is part of an offender's sentence. *Kinneman*, 155 Wn.2d at 281. Instead, the court simply reentered the restitution order from Aaron's first sentencing, when the court did not consider the mitigating factors of youth. RP 46-47.

Like in *McFarland*, Aaron's attorney's belief that the court lacked discretion to consider the restitution order at his resentencing does not preclude review by this Court where the court's imposition of an exceptional sentence downward at the resentencing establishes the "possibility" the court would have likewise mitigated Aaron's restitution obligation to the insurance company had it known it had the discretion to do so. *McFarland*, 189 Wn.2d at 59.

The restitution order requires Aaron to pay over \$200,000 to a private insurance company, Blue Cross, Blue Shield. CP 38; Supp. CP _____. Aaron is indigent. CP 318. When he is released from prison, the collateral consequences of Aaron's convictions will pose onerous impediments to his ability to obtain employment and economic advancement. *See e.g. Collateral Consequences: the Crossroads of Punishment, Redemption, and the Effects on Communities*, BRIEFING REPORT (U.S. Commission on Civil Rights) June 2019 at 1, *available at* <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> (addressing the collateral consequences individuals face following conviction in regards to employment, housing, and education).

By contrast, Blue Cross, Blue Shield had a 4.1 billion dollar profit margin the previous year. Lisa Schenker, *Think Health Insurance is too Costly? The Parent of Blue Cross Blue Shield of Illinois Made \$4.1 Billion Last Year*, CHICAGO TRIBUNE, March 12, 2019, *available at* <https://www.chicagotribune.com/business/ct-biz-blue-cross-triples-profit-20190312-story.html>; CP 37; Supp. CP _____.

Justice demands the court consider the factors of Aaron's indigency and reduced culpability of youth before ordering him to pay over \$200,000 in restitution to an insurance company despite Aaron's

attorney and the court wrongly believing the court lacked discretion to do so. *McFarland*, 189 Wn.2d at 57.

- 2. In the alternative, should this Court reverse and remand for the trial court to presumptively sentence Aaron commensurate with the culpability of a child, the resentencing court should determine whether Aaron's youth and indigence require reduction of restitution under RCW 13.40.190(1)(g).**

Should this Court reverse and remand Aaron's sentence for the court to presumptively sentence him commensurate with the culpability of a child rather than an adult, this would include resentencing on the order of restitution. *Kinneman*, 155 Wn.2d at 281 ("restitution is part of an offender's sentence"). The court's resentencing on the order of restitution would permit consideration of RCW 13.40.190(1)(g), which allows a court to consider a child's indigence before ordering him to pay restitution to an insurance company.

F. CONCLUSION

This Court should reverse the restitution order and remand for the resentencing court to take into account the mitigating qualities of Aaron's youth and his indigence when determining the amount of restitution owed to an insurance company that yields billions of dollars in annual profit.

In the alternative, should this Court reverse and remand based on the constitutional grounds asserted in Aaron's opening brief, it should

presumptively apply RCW 13.40.190(1)(g) in determining the amount of restitution owed at his resentencing.

Respectfully submitted this 11th day of July, 2019.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52651-4-II
v.)	
)	
AARON TOLEAFOA,)	
)	
Appellant.)	

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