

FILED
Court of Appeals
Division II
State of Washington
1/31/2020 4:37 PM
NO. 33122-4-11

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOLT, JR.,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
A. ARGUMENT IN REPLY	1
1. <i>MONTGOMERY V. LOUISIANA</i> HOLDS THAT <i>MILLER</i> ANNOUNCED A SUBSTANTIVE CHANGE TO SENTENCING THAT APPLIES RETROACTIVELY	1
2. <i>SLEDGE</i> IS NOT CONTROLLING AUTHORITY IN THIS CASE, OR ALTERNATIVELY THIS COURT SHOULD REMAND THE MATTER FOR THE TRIAL COURT TO CONDUCT AN EVIDENTIARY HEARING REGARDING THE ALLEGED BREACH OF THE PLEA AGREEMENT	8
B. CONCLUSION	12

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>In re Pers. Restraint of Colbert</i> , 186 Wn.2d 614, 380 P.3d 504 (2016).....	3
<i>State v. Gilbert</i> , 193 Wn.2d 169, 438 P.3d 133 (2019)	
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017).....	5,6,7,8,9,12
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	10
<i>In re Pers. Restraint of James</i> , 96 Wn.2d 847, 640 P.2d 18 (1982).....	10
<i>State v. Knight</i> , 176 Wn. App. 936, 309 P.3d 776 (2013).....	2
<i>In re Personal Restraint of Light-Roth</i> , 191 Wn.2d 310, 440 P.3d 444 (2018).....	5
<i>In re Pers. Restraint of Meippen</i> , 193 Wn.2d 310, 440 P.3d 978 (2019).....	6,7,8
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	5
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997).....	7,9,10,11
<i>State v. Ramos</i> , 187 Wn.2d 420, 387 P.3d 650 (2017).....	2
<i>State v. Roberson</i> , 118 Wn.App. 151, 74 P.3d 1208 (2003).....	10
<i>State v. Townsend</i> , 2 Wn.App. 2d 434, 409 P.3d 1094 (2018).....	10,11

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012).....	1,4
<i>Montgomery v. Louisiana</i> , — U.S. —, 136 S. Ct. 718, 193 L. Ed.2d 599 (2016)	1,4
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005).....	4
<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 10.73.090	1,2
RCW 10.73.100(6).....	3
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. amend. VIII.....	1,4
Wash. Const. art. 1, § 14.....	1

A. ARGUMENT IN REPLY

1. MONTGOMERY V. LOUISIANA HOLDS THAT MILLER ANNOUNCED A SUBSTANTIVE CHANGE TO SENTENCING THAT APPLIES RETROACTIVELY

In section A.1. of the Brief of Respondent, the State argues that the CrR 7.8 motion is time barred by RCW 10.73.090. Brief of Respondent (BR) at 10-17. As an initial matter, it should be noted that this issue was not raised by the State in the proceedings below.

In 2018, Mr. Holt filed a motion for relief from judgment pursuant to Criminal Rule 7.8. He asked for resentencing that considered his youthfulness at the time of the crime and attendant mitigating circumstances in light of the line of cases leading to and including *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

The sentence imposed by the trial court on January 30, 2019 violates the Eighth Amendment of the U.S. Constitution and article I, section 14 of the Washington Constitution because the sentencing court did not take Mr. Holt's age and youthful characteristics into consideration at sentencing.

At sentencing on January 30, 2019, the court did not change the

original sentence of 216 months imposed in 2009. Mr. Holt challenges the court's failure to consider the factors set forth in *Houston-Sconiers*. A defendant may appeal the process by which a trial court imposes a sentence. *State v. Knight*, 176 Wn. App. 936, 957, 309 P.3d 776 (2013). Therefore, a party may challenge “the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” *State v. Ramos*, 187 Wn.2d 420, 433, 387 P.3d 650 (2017).

A sea change has occurred in the intervening years since Mr. Holt was initially sentenced in this case on January 9, 2009; a series of cases announced the substantive rule that sentencing courts must consider youthfulness as a mitigating factor. Case law indicates that this change applies retroactively.

Generally speaking, a defendant may not collaterally attack a judgment more than one year after the judgment becomes final. RCW 10.73.090.¹

¹(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, “collateral attack” means any form of postconviction relief other than a direct appeal. “Collateral attack” includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

There are exceptions, however, to this time limit contained in RCW 10.73.100.² Under one of these exceptions, the time limit does not apply if a petitioner can show that there has been a significant change in the law, that the change is material to their conviction or sentence, and that the change applies retroactively. RCW 10.73.100(6).

An exception exists when (1) there has been a “significant change in the law,” (2) the change is “material to the ... sentence,” and (3) “sufficient reasons exist to require retroactive application.” RCW 10.73.100(6); see *In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 619,

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

²The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
- (2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
- (3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
- (4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
- (5) The sentence imposed was in excess of the court's jurisdiction; or
- (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

380 P.3d 504 (2016).

During the past decade and a half, decisions have taken into consideration the impact of age and mental development on juvenile defendants' culpability during sentencing. The United States Supreme Court held that the Eighth Amendment prohibited sentencing juveniles to death. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The Court banned mandatory sentences of life without parole for juvenile homicide offenders, concluding that a sentencing court must be allowed to take an offender's youth into account. 567 U.S. at 474. This decision did not impose a categorical bar on life sentences without the opportunity for parole for juveniles, but the Court noted that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" in light of this line of cases. *Id.* at 479.

The Court later clarified that *Miller* had created a new substantive rule that applied retroactively. *Montgomery v. Louisiana*, — U.S. —, —, 136 S. Ct. 718, 732, 193 L. Ed. 2d 599 (2016). The Court noted that "courts must give retroactive effect to new substantive rules of constitutional law." *Id.* at 728. Where a new rule prohibits states from imposing a certain category of punishment, the rule is substantive. *Id.* at

729. The “Constitution itself deprives the State of the power to impose [this] penalty.” *Id.* “It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.” *Id.* at 729-30. Therefore, “*Miller* announced a substantive rule that is retroactive in cases on collateral review.” *Id.* at 732.

Relying on this line of cases, the Washington Supreme Court addressed consideration of an offender’s youth in *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). In *In re Personal Restraint of Light-Roth*, 191 Wn.2d 328, 336-38, 422 P.3d 444 (2018), the Supreme Court held that *O’Dell* did not constitute a significant change in the law and therefore did not provide an exception to the time bar. The Court concluded that even before *O’Dell* was decided, a defendant could have argued youth as a mitigating factor. *Id.* at 337-38. In *State v. Houston-Sconiers*, however, the Supreme Court applied the same principles under the Eighth Amendment in holding that “sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant.” 188 Wn.2d 1, 21, 391 P.3d 409 (2017). The Court stated that to comply with the Eighth Amendment, courts must address the differences between children and adults by exercising “discretion to consider the mitigating qualities of youth.” *Id.* at

19. *Houston-Sconiers* stated that not only did trial courts have the discretion under the SRA to consider youth as *O'Dell* clarified, but trial courts were required under the Eighth Amendment to consider mitigating qualities of youth when sentencing a juvenile defendant. *Id.* at 21. The Court also identified certain factors relating to youth that trial courts must consider at sentencing. *Id.* at 23.

The Washington Supreme Court has not yet definitively stated whether *Houston-Sconiers* constitutes a significant change in the law that applies retroactively and provides an exception to the time bar.

The Washington Supreme Court recently declined to address the issue of retroactivity in *In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 317-18, 440 P.3d 978 (2019). In *Meippen*, the Court held that the defendant had not shown “by a preponderance of the evidence that his sentence would have been shorter if the trial court had absolute discretion to depart from the SRA at the time of sentencing.” *Id.* at 312. The Court held that *Meippen* had not met this “threshold, prima facie burden,” it did not need to determine whether the case fell within an exception to the time bar. *Id.* at 315. The majority in *Meippen* did not directly address the issue of retroactivity, leaving it “for another day,” *Id.* at 317. The four dissenting justices, however, indicated that they would find *Houston-Sconiers* to apply retroactively on collateral review. *Id.* at 328.

Meippen is not controlling authority in this case. Here, Mr. Holt can show actual and substantial prejudice because his youthfulness was not considered by the sentencing court at all; the court not only declined to consider youthfulness as a mitigating factor and impose a sentence at the bottom of the standard range or an exceptional sentence below the standard range, but the court granted the State's request for specific performance and declined to exercise its discretion regarding resentencing. CP 378.

Unlike *Meippen*, in which the appellant had not presented any evidence that the trial court would have imposed a lesser sentence if it had the discretion to depart from the standard range, counsel for Mr. Holt presented extensive Department of Corrections records pertaining Mr. Holt's record while in custody—at the request of the court—and told the court that she anticipated calling four witnesses at sentencing. 2RP at 10. The court, finding the motion for resentencing was controlled by *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997), refused to hear testimony regarding mitigation under *Houston-Sconiers*. The sentencing court, however, showed that it was initially receptive to a lower sentence or even departure from the standard range by requesting that defense counsel provide his DOC records and inquiring if the defense was going to provide expert testimony. 1RP at 26. Defense counsel filed an extensive

pre-sentence report on January 7, 2019, describing Mr. Holt's immaturity, the contribution that peer pressure played in the offense, his difficult childhood including parents who sold drugs and who did not provide a stable home for him. CP 85-95

This is in contrast to *Meippen*, where the sentencing court stated that it found the defendant's actions "cold, calculated, and showing extreme indifference toward another human being," which the Supreme Court interpreted to mean that the sentencing court "clearly intended to impose a sentence at the top of the standard range despite *Meippen's* youth." *Id.* at 313, 317.

Here, no such conclusion can be reached as the court was at least initially receptive to the argument that the factors should be considered at resentencing and heard a partial defense argument for mitigation, despite being precluded from calling witnesses. 2RP at 9-17.

Mr. Holt filed documents and presented evidence in support of a shorter sentence and the court indicated that it would hear the evidence and was receptive to the defense argument on sentencing.

This Court should address the question of retroactivity not resolved by *Houston-Sconiers* and decide whether *Houston-Sconiers* is a substantial change in the law that must be applied retroactively.

2. ***SLEDGE IS NOT CONTROLLING AUTHORITY IN THIS CASE, OR ALTERNATIVELY, THIS COURT SHOULD REMAND THE MATTER FOR THE TRIAL COURT TO CONDUCT AN EVIDENTIARY HEARING REGARDING THE ALLEGED BREACH OF THE PLEA AGREEMENT***

The trial court based its decision to not take testimony, finding that any reconsideration of the original sentence is prohibited by *Sledge, supra*. 2RP at 27-28.

Mr. Holt submits that *Sledge* is inapplicable to the present case. *Sledge* pertains to instances where the State has breached a plea agreement, not the defendant. Because a defendant gives up important constitutional rights by entering into a plea agreement, due process requires the State to adhere to the agreement by recommending the agreed-upon sentence. *Sledge*, 133 Wn.2d at 839.

Moreover, even assuming arguendo that *Sledge* may be expanded to apply to the breach of a plea agreement by the defense, that does not get around the fact that—the plea agreement notwithstanding—the court was required to consider Mr. Holt’s youth as a mitigating factor and had discretion to impose a downward sentence. The court was required to consider the mitigating circumstances related to the defendant’s youth, including, but not limited to his immaturity, failure to appreciate risks and consequences, the nature of his environment and family circumstances, the

extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him, how youth impacted any legal defense, and any factors suggesting that he might be successfully rehabilitated. *Houston-Sconiers*, 188 Wn.2d at 23, 391 P.3d 409 (quoting and citing *Miller*, 567 U.S. at 477, 132 S.Ct. 2455.) See also *State v. Gilbert*, 193 Wn.2d 169, 176-77, 438 P.3d 133 (2019). By erroneously giving *Sledge* unwarranted prominence, the court subverting the holding of *Miller*, *Houston-Sconiers*, and its progeny.

The Court's determination that *Sledge* is invoked by the defense's motion for resentencing following the change in the law created by *Houston-Sconiers* is also erroneous. If a defendant breaches a plea agreement, the State may rescind it. *State v. Thomas*, 79 Wn.App. 32, 36-37, 899 P.2d 1312 (1995). Before doing so, however, the State must prove breach by a preponderance of the evidence. *In re Pers. Restraint of James*, 96 Wn.2d 847, 850-51, 640 P.2d 18 (1982) (merely accusing the defendant of misconduct is insufficient and does not relieve the State of its bargained-for duty); *State v. Roberson*, 118 Wn.App. 151, 158-59, 74 P.3d 1208 (2003), overruled in part on other grounds by *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). Due process requires the State's proof be presented during an evidentiary hearing, at which the defendant must have the opportunity to call witnesses and contest the State's

allegations. *James*, 96 Wn.2d at 850-51. A defendant can waive his or her right to an evidentiary hearing, but waiver will not be presumed. *State v. Townsend*, 2 Wn.App. 2d 434, 440, 409 P.3d 1094 (2018) (citing *James*, 96 Wn.2d at 851).

In its response, the State argues that Mr. Holt “had the opportunity to contest the allegations from the State, and the matter was fully briefed and argued by the parties.” BR at 27. The circumstances of the January 30, 2019 hearing do not fulfill even the basic requirements of due process delineated by *Townsend*. In *Townsend*, the defendant pleaded guilty and was later arrested on new felony charges, and a warrant was issued based on his violation of his conditions of release. *Id.* at 437. At sentencing, the prosecutor stated that *Townsend* had breached the terms of the plea agreement as shown by the warrant. *Id.* Division Three reversed, holding that “the trial court improperly relieved the prosecution of its plea agreement obligations without either holding an evidentiary hearing or obtaining a valid waiver of [Townsend's] right to a hearing.” *Id.* at 439.

In this case, as in *Townsend*, the sentencing hearing “did not bear any of the hallmarks of an evidentiary hearing. No evidence was admitted. No testimony was taken.” *Id.* at 439. Defense counsel argued that the facts were “not like the *Sledge* case,” the sentencing court stated that it “is much like the *Sledge* case, only that it was the State that was the breaching

party in the *Sledge* case.” 2RP at 19. The court refused to hear testimony on the issue.

This case should be remanded for resentencing for consideration of mitigation factors involving the appellant’s youthfulness, or in the alternative, remand for evidentiary hearing in compliance with *Townsend*.

B. CONCLUSION

For the reasons stated herein, and in the opening brief Mr. Holt respectfully requests this Court to remand for resentencing in conformity with *Houston-Sconiers*.

DATED: January 31, 2020.

Respectfully submitted,
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CERTIFICATE OF SERVICE

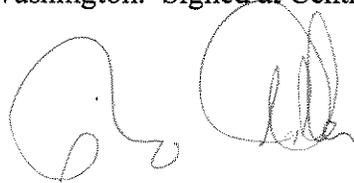
The undersigned certifies that on January 31, 2020 that this Appellant's Reply Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and to Prosecuting attorney, Kristie Barham and copies were sent by first class mail, postage prepaid to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 31, 2020.



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January 31, 2020 - 4:37 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v Christopher Daniel Holt, Jr. , Appellant
Superior Court Case Number: 08-1-01519-1

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