

FILED
Court of Appeals
Division II
State of Washington
12/20/2019 4:46 PM

No. 53188-7-II
(Consolidated Case No. 53198-4-II)

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Brandon English,

Appellant, and

Calvin Quichocho,

Appellant.

Reply Brief of Appellant Brandon English

Kevin Hochhalter
WSBA # 43124
Attorney for Brandon English

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

Table of Contents

1. Introduction.....	1
2. Reply Argument	2
2.1 The trial court abused its discretion by misinterpreting the scope of its discretion to reduce the four, consecutive firearm enhancements on account of English’s youthfulness.....	2
2.1.1 This Court should review this constitutional issue de novo.....	3
2.1.2 Evolving standards of decency illustrated in recent case law point inexorably to trial courts having discretion to reduce sentence enhancements for youthful adult defendants.	5
3. Conclusion	8

Table of Authorities

Cases

<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)	2
<i>In re Meippen</i> , 193 Wn.2d 310, 440 P.3d 978 (2019).....	6, 7
<i>In Re Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007)	7
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)	2
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)	2
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017)	2, 5
<i>State v. Knight</i> , 176 Wn. App. 936, 309 P.3d 776 (2013).....	6
<i>State v. MacDonald</i> , 183 Wn.2d 1, 346 P.3d 748 (2015).....	3
<i>State v. McGill</i> , 112 Wn. App. 95, 47 P.3d 173 (2002)	7, 8
<i>State v. O'Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015)	2, 3, 4, 5
<i>State v. Scott</i> , 190 Wn.2d 586, 416 P.3d 1182 (2018)	3

1. Introduction

This case sits squarely at the intersection of *State v. O'Dell* and *State v. Houston-Sconiers*. Both cases require trial courts to engage in case-by-case analysis of the mitigating factors of youth. Both cases provide trial courts with discretion to reduce a sentence based on those mitigating factors. There is no principled reason to make a bright-line distinction between juveniles and youthful adult defendants who demonstrate the exact same mitigating factors. The sentence reductions available to juveniles under *Houston-Sconiers* should be equally available to youthful adults under *O'Dell*.

The State's response asks the Court to draw a bright-line distinction between juveniles and youthful adults, but fails to provide a principled reason for doing so.

O'Dell and *Houston-Sconiers* point inexorably toward a common conclusion: as a constitutional matter, trial courts must have the discretion to reduce sentencing enhancements for youthful adults just as they can for juveniles, by running the enhancements concurrently. This Court should reverse the sentences and remand for the trial court to exercise its discretion to consider reducing the firearm enhancements.

2. Reply Argument

2.1 The trial court abused its discretion by misinterpreting the scope of its discretion to reduce the four, consecutive firearm enhancements on account of English's youthfulness.

English's opening brief argued that the trial court abused its discretion by misinterpreting the scope of its discretion under the Eighth Amendment to the U.S. Constitution and Washington Constitution art. 1, § 14. Br. of App. at 6-16. The standards applicable to sentencing of youthful defendants, both juveniles and adults, have been evolving over recent years. Br. of App. at 10-14 (citing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015); and *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017)).

The arc of these cases points inexorably toward a constitutional requirement that trial courts must have discretion to reduce sentence enhancements on a case-by-case basis for youthful adult defendants who demonstrate mitigating factors of youth. Br. of App. at 14-16.

There is no principled reason to allow trial courts to reduce sentence enhancements for juveniles based on mitigating factors but not for youthful adults who demonstrate those same

mitigating factors. There is no reason to categorically exclude youthful adults over 18 who exhibit the exact same mitigating factors as a juvenile under 18. This Court should reverse the sentences of English and Quichocho and remand for the trial court to exercise its discretion to reduce the sentence enhancements.

2.1.1 This Court should review this constitutional issue de novo.

Both English and Quichocho argued in their opening briefs that the overarching standard of review in this case is abuse of discretion, as is applicable to an appeal of a sentencing decision generally. Br. of App. English at 9. Specifically, a trial court abuses its discretion in sentencing when it fails to consider a mitigating factor on the mistaken belief it is barred from such consideration. Br. of App. English at 9; Br. of App. Quichocho at 8 (citing *O'Dell*, 183 Wn.2d at 696).

Layered on top of this standard are the principles that interpretation of the proper constitutional standard is a question of law reviewed de novo, *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015), and that statutory interpretation is also reviewed de novo. *State v. Scott*, 190 Wn.2d 586, 591, 416 P.3d 1182 (2018). Br. of App. English at 9. The result is that this Court must review the constitutional issues raised by both

appellants and the statutory issues raised by Quichocho under a de novo standard.

If, under a de novo standard, this Court agrees that the trial court did, in fact, have the discretion to reduce the firearm enhancements on account of the mitigating factors of youth, then the trial court necessarily abused its discretion because it mistakenly believed that it had no discretion. *See O'Dell*, 183 Wn.2d at 696.

The State's argument misses the point. The typical standards of review for challenging an exceptional sentence do not apply here because English and Quichocho are not challenging the exceptional sentence as a whole. What English and Quichocho are challenging is the trial court's failure to recognize and exercise its discretion to reduce the firearm enhancements as a part of the exceptional sentence. Br. of App. English at 2; Br. of App. Quichocho at 1.

The specificity of the assigned error requires application of the standard of review described here and in English and Quichocho's opening briefs.

2.1.2 Evolving standards of decency illustrated in recent case law point inexorably to trial courts having discretion to reduce sentence enhancements for youthful adult defendants.

This case sits directly at the intersection of *O'Dell* and *Houston-Sconiers*. *O'Dell* involved a defendant who was just over 18 at the time of the crime, but did not address sentence enhancements. *Houston-Sconiers* dealt with sentence enhancements, but only involved juvenile defendants. As a matter of first impression, this Court has the opportunity to determine whether the same constitutional principles require that trial courts have discretion to reduce sentence enhancements for youthful adult defendants.

The State's arguments rely on a strict reading of *Houston-Sconiers* to say that the reduction of sentence enhancements is only available to juveniles. The State would have this Court believe that the Washington Supreme Court intentionally refused to extend this discretion to cases with youthful adult defendants. But *Houston-Sconiers* itself contains no such holding. *Houston-Sconiers* was a juvenile defendant, so of course the opinion speaks in terms of juveniles. The question of whether the same principles apply to youthful adults was not before the court at that time, so there was no reason for the court to address it. *Houston-Sconiers* does not preclude the

outcome that English and Quichocho seek here. Rather, *Houston-Sconiers* is an essential link in the evolving chain of cases leading to the inevitable conclusion that trial courts must have discretion to reduce sentence enhancements not only for juveniles but any youthful adult defendant who, like English and Quichocho, can demonstrate the mitigating factors of youth.

The State is also wrong when it argues that there is no remedy because, it claims, there is no evidence that the trial court might have exercised its discretion had it known. In attempting to support this erroneous proposition, the State relies on *State v. Knight*, 176 Wn. App. 936, 957-58, 309 P.3d 776 (2013). In *Knight*, the defendant claimed ineffective assistance of counsel for failing to inform the trial court that it had discretion to impose an exceptional sentence downward. *Knight*, 176 Wn. App. at 957. The appellate court held, **as part of the prejudice analysis** of the ineffective assistance claim, that Knight failed to prove prejudice because there was no indication that the trial court would have even considered a low-end standard range sentence, let alone an exceptional sentence downward. *Id.* at 958. “Instead, the trial court’s imposition of a *high-end* standard-range sentence expressed quite the opposite.” *Id.* (emphasis in original).

The State also attempts to rely on *In re Meippen*, 193 Wn.2d 310, 440 P.3d 978 (2019). *Meippen* was an untimely

personal restraint petition based on *Houston-Sconiers*. *Id.* at 312. As a threshold matter, Meippen was required to prove actual and substantial prejudice—*i.e.*, “that his sentence would have been shorter.” *Id.* The court held that he could not make that showing because he had been sentenced at the high end of the standard range. *Id.*

Thus, *Knight* and *Meippen* are distinguishable on at least two grounds. First, this is neither an ineffective assistance claim nor a personal restraint petition, so the prejudice analyses of *Knight* and *Meippen* do not apply. Second, the trial court here did not express the opposite of a willingness to impose an exceptional sentence downward. Rather, the trial court **did impose an exceptional sentence downward**, but stopped short of reducing the firearm enhancements on the belief that it did not have the discretion to do so. RP 214-15. Had the trial court concluded that it **did have discretion** to reduce the sentence enhancements, it might have done so.

Because this Court cannot determine whether the trial court would have made the same decision had it known the scope of its discretion, remand is the proper remedy. *In Re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007); *State v. McGill*, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002). The trial court in *McGill* did the same things as the trial court here: It erroneously determined that it did not have discretion to impose

a lower sentence, and then imposed a sentence within the range of discretion it mistakenly believed it had. *McGill*, 112 Wn. App. at 98-99. The appellate court held that when the reviewing court cannot say with certainty that the trial court would impose the same sentence, remand for a proper exercise of discretion was the appropriate remedy. *Id.* at 100-01.

Here, this Court cannot say with certainty that the trial court would not reduce the sentence enhancements if it had known that it had discretion to do so. In this situation, remand is the proper remedy.

3. Conclusion

Under the constitutional requirements set forth in *O'Dell* and *Houston-Sconiers*, the trial court misunderstood its discretion to reduce the firearm enhancements or run them concurrently as part of its exceptional sentence downward. This Court should reverse and remand for resentencing, in which the trial court can properly exercise its discretion to reduce the firearm enhancements.

Respectfully submitted this 20th day of December, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Brandon English
kevin@olympicappeals.com

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 20, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

Aaron Bartlett
Clark County Prosecuting Attorney's Office
PO Box 5000
Vancouver, WA 98666-5000
Aaron.bartlett@clark.wa.gov
CntyPA.GeneralDelivery@clark.wa.gov

Peter B. Tiller
The Tiller Law Firm
PO Box 58
Centralia, WA 98531-0058
ptiller@tillerlaw.com
kelder@tillerlaw.com

SIGNED at Lacey, Washington, this 20th day of December, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

December 20, 2019 - 4:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53188-7
Appellate Court Case Title: State of Washington, Respondent v. Brandon English and Calvin Quichocho, Appellants
Superior Court Case Number: 13-1-02318-1

The following documents have been uploaded:

- 531887_Briefs_20191220164306D2871040_6721.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Brief - Appellant Reply 2019-12-20.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- Kelder@tillerlaw.com
- aaron.bartlett@clark.wa.gov
- ptiller@tillerlaw.com

Comments:

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
4570 AVERY LN SE STE C-217
LACEY, WA, 98503-5608
Phone: 360-763-8008

Note: The Filing Id is 20191220164306D2871040