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NO. 53234-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES MALLIS,

Appellant.

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

The Honorable Stephen M. Warning, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Mallis received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. Was defense counsel ineffective at sentencing, when he failed to cite relevant case law that supported the low-end sentence he requested?

B. STATEMENT OF THE CASE

Charles Mallis pleaded guilty to one count of assault in the first degree with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. CP 30-31. The charges arose from an incident in which Mr. Mallis shot another individual in the shoulder. CP 28. Mr. Mallis was 20 years old when he committed that offense, and 21 when he entered his pleas. CP 30, 43.

In his written “Statement of Defendant on Plea of Guilty,” and in his colloquy with the trial court before he entered his pleas, Mr. Mallis expressly waived his rights to a speedy, public trial; to remain silent; to confront and call witnesses; to be presumed innocent; and to appeal a finding of guilt after a trial. VRP 4; CP 19-29. He did not waive his right to argue for a low-end standard range sentence. CP 22. In fact, at Mr. Mallis’s sentencing hearing, the prosecutor argued for the high end of the standard range sentence (231

months) while defense counsel argued for the low end (189 months). VRP 11-12.<sup>1</sup>

In support of a high-end sentence, the prosecutor argued that Mr. Mallis's "brazen conduct . . . poses an extreme risk to the community." VRP 11. In support of a low-end sentence, defense counsel argued that the victim had provoked Mr. Mallis by forcing Mr. Mallis's "14-year-old sister to smoke methamphetamine and also potentially sexually assault[ing] her." VRP 12. Defense counsel did not raise Mr. Mallis's age or any of the case law supporting leniency in sentencing youthful offenders. VRP 11-12. In allocution, Mr. Mallis apologized for his "[c]hildish acts" and for mishandling his emotions. VRP 12-13.

The trial court clearly agreed that Mr. Mallis's crimes reflected childish characteristics. When it sentenced him, the court remarked on Mr. Mallis's "juvenile" tendencies, including his impulsiveness and failure to appreciate the consequences of his actions. VRP 13-14. The court attributed Mr. Mallis's crimes to these tendencies, rather than to "callousness":

What I recall from the probable cause statement, and this kind of confirms it, this reaction, that if it wasn't for how serious it is, it's just phenomenally juvenile. And, fortunately, phenomenally inept. It's not even a matter of callousness, just is a complete lack of recognition that this is a serious thing and

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<sup>1</sup> See RCW 9.94A.515; RCW 9.94A.525(a)(7), (9); RCW 9.94A.589(1)(a); RCW 9.94A.533(3)(a), (e); CP 36.

you probably shouldn't shoot people. It seems very clear that that kind of a decision making process was utterly absent.

VRP 13-14.

The trial court then cited these "juvenile" characteristics as a basis for imposing the highest possible standard range sentence, consistent with the State's request. VRP 14. It reasoned that, because Mr. Mallis suffered from poor decision making, he "is a very dangerous individual." VRP 14. Defense counsel made no objection. VRP 14.

Mr. Mallis's high-end sentence amounted to just over 19 years. CP 37. The low-end sentence requested by defense counsel would have been just over 15. VRP 12.

### C. ARGUMENT

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). While the Sentencing Reform Act generally prohibits the appeal of a standard range

sentence, this does not apply where the appellant alleges ineffective assistance.

State v. Goldberg, 123 Wn. App. 848, 852, 99 P.3d 924 (2004).

1. Trial Counsel’s Failure to Cite Relevant Case Law on Youthful Offender Sentencing Fell Below a Minimum Objective Standard of Reasonable Attorney Conduct

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Trial counsel failed in that duty to Mr. Mallis.

The relevant case law on sentencing holds that youth and its attendant characteristics tend to mitigate culpability. See Matter of Light-Roth, 191 Wn.2d 328, 336, 338 n.3, 422 P.3d 444 (2018) (“[the SRA] has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward”; noting that U.S. Supreme Court precedent has supported youth as a mitigator since the publication of Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)). Thus, where the sentencing court finds that a defendant’s youth and immaturity contributed to his offense, it may reduce the sentence on that basis. State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015). This rule has been well-established in Washington since at least 2015, when our supreme court decided State v. O’Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).

In O'Dell, the court held that certain attributes common to youthful offenders—including, of relevance here, “impulsivity” and “poor judgment”—can support exceptional sentences below the standard range. 183 Wn.2d at 691. Citing studies that show brain development continues “well into a person’s 20s,” the O'Dell court explained that the “penological justifications” for harsh sentences are weaker before the defendant attains cognitive maturity. Id. at 691 (quoting Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012)). That reasoning reflects two principles from the case law on youthful offender sentencing. First, punishment and deterrence are less effective when a person lacks self-control. Miller, 567 U.S. at 472. Second, behaviors that stem from immaturity are, by definition, likely to lessen with age. Id. at 472-73.

Even where a defendant does not seek an exceptional sentence, these principles can support the imposition of a low-end standard range term, and competent counsel would have cited them at Mr. Mallis’s sentencing. See, e.g., Matter of Meippen, 193 Wn.2d 310, 313, 440 P.3d 978 (2019). Mr. Mallis was a textbook example of a defendant whose crimes reflected juvenile thinking. See VRP 13-14. The trial court recognized this, calling Mr. Mallis “phenomenally juvenile” and incapable of reasoned decision making. VRP 13-14. Unfortunately, the court did not recognize the significance of these characteristics to its sentencing discretion, because defense counsel failed to

cite O'Dell, the U.S. Supreme Court cases from which it derives, or any of the science underlying the reasoning in those decisions. VRP 1-14.

While counsel's performance is presumed reasonable, a criminal defendant can rebut that presumption by showing that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). There was no strategic reason for trial counsel's failure to cite relevant and highly persuasive case law supporting the imposition of the low-end sentence Mr. Mallis requested. Thus, that failure was objectively unreasonable.

2. Had Trial Counsel Cited the Relevant Case Law on Youthful Offender Sentencing, the Trial Court Likely Would Have Imposed a Shorter Term of Incarceration

To prevail on an ineffective assistance claim, an appellant must also show that, had trial counsel performed reasonably, there is a probability the outcome would have been different. Benn, 120 Wn.2d at 663. That standard is met here.

As detailed above, the trial court recognized Mr. Mallis's juvenile characteristics and their contribution to his crimes, but it treated those characteristics as *aggravating* rather than mitigating factors. VRP 14. The court reasoned that Mr. Mallis's poor "decision making process" made him "a very dangerous individual," and it imposed a long term of incarceration

primarily to protect public safety. VRP 14. That reasoning suggests a lack of familiarity with O'Dell and related U.S. Supreme Court precedent.

Of most significance here, this precedent recognizes that the characteristics that make youthful offenders dangerous—characteristics like the impulsiveness and lack of insight the trial court noted in Mr. Mallis—are also likely to be “transitory,” and thus fade with age. E.g., O'Dell, 183 Wn.2d at 692 (“until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond”) (internal quotations and alterations omitted); Miller, 567 U.S. at 472 (“In Roper, we cited studies showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior.”) (Internal quotations and alterations omitted). As a result, even where a youthful offender commits a heinous crime, incapacitation does not necessarily justify the longest possible sentence. See Graham v. Florida, 560 U.S. 48, 72-73, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (Eighth Amendment prohibits life without parole for juvenile non-homicide offenders because of high probability that they will reform).

Had defense counsel cited this case law to the trial court, it is likely that Mr. Mallis would have received a shorter sentence. The trial court was primarily concerned with incapacitation: it called Mr. Mallis a “very

dangerous individual.” VRP 14. But it attributed his dangerousness to immaturity (a “phenomenally juvenile” mentality) rather than “callousness.” VRP 13-14. The studies informing the case law on youthful offender sentencing indicate that neurological development may continue into an individual’s mid- or late twenties. O’Dell, 183 Wn.2d at 692. Those studies support the sentence the defense recommended in this case, which would have incapacitated Mr. Mallis until his mid-30s. VRP 12 (“we’re asking the Court to impose the bottom end, in light of the fact it’s still just a little over 15 years”). The actual sentence imposed will keep Mr. Mallis incarcerated into his forties. CP 37. With the benefit of the O’Dell argument, the trial court might well have viewed that as excessive.

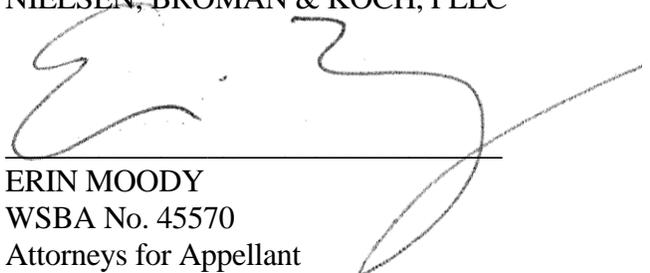
D. CONCLUSION

Mr. Mallis was denied effective assistance at sentencing when defense counsel failed to explain the science and reasoning underlying relevant case law on youthful adult offenders. There was no strategic reason for this failure, and it likely resulted in a longer sentence. This court should remand for a new sentencing hearing, at which, consistent with his plea agreement, Mr. Mallis can present a competent argument for a low-end standard range sentence.

DATED this 15th day of OCTOBER, 2019.

Respectfully submitted,

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