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Division II
State of Washington
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NO. 53234-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES MALLIS,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

Defense counsel was not ineffective at sentencing in failing to request an exceptional sentence downward.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Has Mallis carried his burden of showing that his counsel's performance was deficient?
2. Has Mallis carried his burden of showing he was prejudiced by any arguable deficiency in his counsel's performance?

III. STATEMENT OF THE CASE

Defendant was charged by amended information with attempted murder in the first degree with a firearm enhancement, assault in the first degree with a firearm enhancement, two counts of unlawful possession of a firearm in the first degree, tampering with a witness, and felony harassment. CP 12. The events that led to the charges occurred in September of 2017, approximately three months before defendant's 21st birthday. His counsel negotiated a resolution by which he would plead guilty to assault in the first degree with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. Thereafter defendant entered a plea to those two charges. The sentencing range of this negotiated resolution, with the firearm enhancement, was 189 to 231 months.

At the sentencing hearing, the State provided the court with the following factual background in support of its sentence recommendation. The incident started with the defendant sending text messages to the victim, 17 year old Zachary Bopp. The text messages were along the lines of that defendant was angry with Mr. Bopp over alleged threats or an incident to a friend of the defendant, and these text messages included threats to shoot him, accompanied by photographs of him and a third codefendant posing with various firearms. The text messaging went back-and-forth and included that they were going to meet up and basically have this out. In the meantime, defendant was texting Harley Hansen, directing him to find Bopp, that he was on his way with another person and they were armed. Hansen was texting back and forth with the defendant that he was trying to locate Bopp, and that, at around 3 AM, he did locate Bopp and was with him, standing out in the open on Bopp's porch. Hansen was going to keep him occupied and out in the open until defendant and his friend, Mr. Christy, arrived. At some point, defendant texted Hansen, who was now standing on the porch with Bopp, that he is arriving and Hansen texts defendant he is still there with Bopp. Defendant and Christy walk up to the area and situate themselves across the street in some shadows. Hansen then leaves Bopp who was still standing on the porch and goes over to the defendant telling him that that's the guy. Defendant then fires one shot from a .22 caliber rifle

hitting Bopp in the shoulder. Bopp then retreats into his house realizing he's been shot and his father takes him to the hospital. Then, while at the hospital defendant contacts the defendant warning him against calling the police saying that if the police get involved then everybody is involved. Some days later defendant and Christy were located in a vehicle containing a .22 caliber rifle as well as another handgun. RP 6-9.

After the incident defendant bragged to his friends on Facebook about what he did. This text messaging included the following exchanges. "Who did you shoot? Defendant replied, Zach Bopp." "You blast him homey? Where'd you get him? Defendant's reply was, the shoulder at his crib. Ha ha." To another friend, defendant stated "I was letting everyone know I will bury (indiscernible) if my family gets hurt." To another friend defendant wrote, "I also made sure the cops didn't get involved. Let it known I'll fire on anyone who talks and their friends. Anyone who wants it can come get pumped full of lead." To another friend defendant wrote, "I already shot him." When this friend asked him where he aimed, defendant answered, "the chest." RP 10, 11.

Given this background the State recommended a high-end sentence of 231 months arguing that defendant's conduct was brazen and more aggravated than typically seen. The State noted that the sentencing range on

the original charges were a little over 33 years and a high-end sentence for the amended charges came to a little over 19 years. RP 9, 10. Defendant's attorney focused on defendant's motivation for committing the crimes, and asked for a sentence at the bottom end of the range, which would have been a little over 15 years. RP 12.

Addressing the court, defendant acknowledged committing the crimes as well as bragging about it, and characterized his conduct as being "childish." Defendant told the court that he had moved to California and started his own business but returned to the area because family members were ill. He said he didn't want to come back to this town because it was too tempting for him to commit crimes. Once back in the area he heard that something happened which caused him to be very angry and he then handled his emotions wrongly. RP 12, 13.

The court imposed a high-end sentence of 231 months on count 1 (assault in the first degree with a firearm enhancement), and 41 months on count 2 (unlawful possession of a firearm in the first degree). In pronouncing its sentence the court stated, "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 as a complete

lack of recognition that this is a serious thing and you probably shouldn't shoot people it seems very clear that this kind of a decision-making process was utterly absent. So, it seems to me that Mr. Mallis is a very dangerous individual, just because he completely lacks the notion of any sort of decision-making process." RP 13,14.

IV. ARGUMENT

DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE AT SENTENCING FOR FAILING TO REQUEST AN EXCEPTIONAL SENTENCE DOWNWARD.

Defendant's attorney was not ineffective. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v.*

Jury, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

Defendant asserts that his attorney was ineffective for failing to request an exceptional sentence downward based upon his youth, and to cite *State v. O'Dell*, 183 Wn.2d 680, 695-96, 358 P.3d 359 (2015) to support such a request. The State asserts defendant has not met his burden of showing both that his attorney was deficient and resulting prejudice.

State v. O'Dell is distinguishable and it is debatable whether it applies to this case at all. First, in *O'Dell*, the trial court clearly believed that

it was absolutely prohibited from considering whether youth diminished the defendant's capacity to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law. *O'Dell*, at 685. Our state Supreme Court made clear that while youth is not a per se mitigating factor, a defendant's youth *can* justify an exceptional sentence below the standard range. In so holding, it disavowed the reasoning of prior case law to the extent it was inconsistent. *Id.* at 696. The court remanded *O'Dell*'s case for resentencing. Unlike the trial court in *O'Dell*, the court here did not mistakenly believe that it could not consider youth as a possible mitigating factor.

Second, the defendant in *O'Dell* committed his offense just 10 days after his 18th birthday. Here, defendant was a 20-year-old adult when he committed his crimes. Defendant has not cited to any authorities that extend the rule in *O'Dell* to a 20-year-old.

Further, the premise of defendant's argument is that the court was unaware of *O'Dell*. Defendant writes "unfortunately, the court did not recognize the significance of these characteristics to its sentencing discretion, because defense counsel failed to cite *O'Dell* ..." Appellant's brief, page 5. *O'Dell* is a very significant case which has been cited numerous times in both published and unpublished decisions by the

appellate courts. Given the significance of *O'Dell* it is unrealistic that the veteran sentencing judge here was simply unaware of the case. Trial judges are presumed to know the law and apply it in making their decisions and their rulings come to the appellate court with a presumption of correctness. 29 Am. Jur. 2d Evidence § 280, citing *United States v. Lymon*, 905 F.3d 1149 (10th Cir. 2018); *State v. Louis D.*, 180 Conn. App. 527, 184 A.3d 321 (2018), certification denied, 328 Conn. 936, 183 A.3d 1175 (2018); *State v. Adams-Bey*, 449 Md. 690, 144 A.3d 1200 (2016), *Saidi v. U.S.*, 110 A.3d 606 (D.C. 2015).

Even assuming defendant's attorney was deficient in failing to request an exceptional sentence downward and citing *O'Dell*, he has not shown a reasonable probability that the court would have imposed an exceptional sentence downward, if requested. Here, the standard sentencing range was 189-231 months. The judge was aware of defendant's age as it is indicated on the first page of the statement of defendant on plea of guilty. CP 25. Defendant's attorney requested a sentence at the bottom end of the range yet the court sentenced him at the top end of the range. Even though the court was aware of defendant's age, he rejected the low-end recommendation. Since the court did not believe that a sentence lower than the very top end was appropriate, there is no reason to believe that the court would have imposed a sentence below the bottom end of the range. The

court has the discretion to impose an exceptional sentence downward with or without counsel's request, yet it did not. Nor did the court give any indication that it believed a low-end sentence, much less an exceptional downward was appropriate. The court obviously believed that the nature of the harm and the dangerousness of the defendant justified a high-end sentence.

In this case, defendant, three months prior to his 21st birthday formulated a plan to shoot 17-year-old Zachary Bopp for some perceived transgression. Defendant enlisted the aid of two other individuals who located the victim and lured him to remain out in the open where defendant shot him with a rifle. Afterwards defendant threatened the victim against telling the police, and bragged about the incident to numerous friends. Defendant was later apprehended with the rifle he used to shoot the victim as well as another handgun. He had been convicted of assault in the second degree and a felony drug crime in 2015. (Judgment and Sentence, CP 27, paragraph 2.2) Among other things he told the court that prior to this incident he had gone to California to start his own business and only returned because of ill family members. Defendant characterized his acts as "childish" and although the court stated that if it wasn't for how serious it

is, it's just phenomenally juvenile, and fortunately phenomenally inept, the court emphasized that the defendant is very dangerous.

From the court's use of the word "juvenile" and the defendant's own characterization of his conduct as "childish" defendant now divines that the court would have imposed a shorter sentence if only his counsel would have informed the court of this option vis-à-vis O'Dell. Defendant writes, "with the benefit of the O'Dell argument the trial court *might well have* viewed its sentence as excessive." Defendant's burden is to show a reasonable probability that the court would have imposed an exceptional sentence downward if only his attorney would have asked and cited O'Dell. On this record, defendant has failed to make that showing.

V. CONCLUSION

For the above stated reasons this court should deny defendant's request to remand for a new sentencing hearing.

Respectfully submitted this 9 day of December, 2019.



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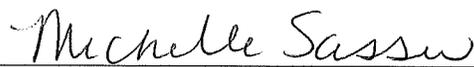
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Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 9th, 2019.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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