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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PHILLIP VICTOR HICKS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 01-1-02238-7
The Honorable Gretchen Leanderson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied Phillip Hicks' request for an exceptional sentence below the standard range.
2. The trial court abused its discretion when it failed to meaningfully consider youthfulness as a mitigating factor justifying an exceptional sentence.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where youthfulness can diminish a young offender's culpability and can constitute a mitigating factor justifying the imposition of an exceptional sentence, did the trial court meaningfully consider youth and its attributes when it failed to consider whether 20-year old Phillip Hicks' behavior and decision making were a product of his youthful immaturity?
(Assignments of Error 1 & 2)
2. Where the differences between young offenders and adult offenders can constitute a mitigating factor justifying the imposition of an exceptional sentence, did the trial court meaningfully consider youth and its attributes when it failed to address the differences between 20-year old Phillip Hicks and older adult offenders? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

In 2001, the State charged a then-20 year old Phillip Victor Hicks and Rashad Babbs for the murders of Chica and Jonathan Webber. (CP 1-3, 6-9) The facts are contained in the Supreme Court's written opinion from Hicks' direct appeal:

On the night of March 21, 2001, two men approached Jonathan Webber and his wife Chica as they were walking from a friend's house and asked the couple if they had drugs. The Webbers told the men that they did not and kept walking. The two men followed the Webbers, demanding several times that they empty their pockets. The Webbers continued walking, and the two men started shooting at them. Jonathan sustained wounds to his leg, wrist, and the left side of his back, but survived. Chica died. The autopsy of Chica's body revealed that she had been shot three times in the head—twice by a .22 revolver and once by a 9 mm handgun. Jonathan and another witness, Wayne Washington, also testified that the shots came from two firearms. Jonathan identified Hicks in a photomontage as one of his assailants but was unable to identify Babbs as the second assailant.

After the attack, the shooters ran off through an alley. A search of the area recovered a .22 revolver, a brown glove, a black leather jacket, a knit stocking cap, and a sweatshirt. The sweatshirt had DNA (deoxyribonucleic acid) that later testing found to be consistent with Babbs's DNA. The jacket also contained items linked to Babbs's sister and cousin.

...

On April 24, 2001, the police arrested Hicks for unrelated drug dealing charges. Hicks made statements implicating himself in the Webber shootings[.]

See *State v. Hicks*, 163 Wn.2d 477, 481-82, 181 P.3d 831 (2008).

Hicks was found guilty of first degree felony murder of Chica, of attempted murder of Jonathan, and of unlawful possession of a firearm. (CP 6-9, 16) At sentencing, the court imposed a term of confinement totaling 776 months. (CP 20)

Hicks' convictions were affirmed on direct appeal. See *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008). Hicks later filed a Personal Restraint Petition, arguing that the trial court miscalculated his offender score. (CP 27-28) The Court of Appeals agreed, and remanded his judgment and sentence to the Superior Court for resentencing.¹ (CP 29)

On remand, Hicks asked the court to “consider his youth, immaturity and mental illness at the time of the offense and impose a downward departure in sentencing[.]” (CP 30, 33; RP 15) Hicks relied on *State v. O'Dell*, which was decided after Hicks' original sentencing hearing, and which held that a defendant's youthfulness can support an exceptional sentence below the standard range.² (CP 32-33, 35-43; RP 15)

In his sentencing memorandum, Hicks asserted that his “upbringing and child development was plagued by abrupt

¹ See *Matter of Hicks*, 51831-7-II, 2018 WL 6705522, at *2 (2018).

² See *State v. O'Dell*, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015).

separations and abuse.” (CP 37) Hicks presented evidence detailing the difficulties he faced in childhood and adolescence, and asserting that he has matured significantly since his original sentencing in 2004. (CP 37-78) To summarize, Hicks’ mother was 16 years old and drug-addicted when she gave birth to Hicks. The delivery was difficult because the umbilical cord was wrapped around Hicks’ neck. Medical personnel also believed Hicks suffered from fetal alcohol syndrome. (CP 37, 48)

Hicks did not have a stable or secure living environment, as he was shuffled between his mother, her relatives or friends, and foster care. When living with his mother, Hicks was neglected and abused, both physically and sexually. (CP 37-38, 48-50) At one point, Hicks was removed from a positive foster care placement and made to live with his mother in her drug rehabilitation facility. A few days later, he witnessed a drug-related shooting near the rehab center. A few weeks after that, his mother abandoned Hicks and never returned. (CP 38-39, 50)

Now, for the first time, Hicks began acting out at school and engaging in reckless behaviors. At the age of 13, Hicks started using marijuana and engaging in criminal behavior. (CP 29, 51) And at the age of 20, he committed the crimes that are the subject

of this case. (CP 35)

According to psychologist Dr. Robert Halon, who reviewed and evaluated Hicks' case:

Hicks' background reveals fundamental early life experiences that deterred, prevented and delayed development of maturity in the areas of understanding, anticipating and assessing risks and consequences, impulse control, pro-social behavior and resistance to peer pressure. Mr. Hicks is a classic example of a man who, because of destructive family and environmental conditions in his developmental and later adolescent years, lacked normally developing neurological maturity, conscience-morality, the ability to control his emotions and to identify, anticipate and negotiate consequences and make reasoned decisions[.]

(CP 53)

Hicks also presented declarations and described how, in the years since he committed these offenses, he has matured and taken responsibility both for his own past actions and for his future.

(CP 41-43, 51-53, 70-78; RP 17-19)

The sentencing court found that an exceptional sentence downward was not warranted because Hicks "knew right from wrong when [he was] committing those crimes." (RP 40) The court imposed a new term of confinement totaling 728 months. (CP 184; RP 41-42) Hicks filed a timely Notice of Appeal. (CP 170-71)

IV. ARGUMENT & AUTHORITIES

Under the SRA, a sentencing court must generally sentence a defendant within the standard range. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014); RCW 9.94A.505(2)(a)(i). But “[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.” RCW 9.94A.535(1).

A. YOUTHFULNESS IS A SUBSTANTIAL AND COMPELLING BASIS FOR A MITIGATED SENTENCE.

Children are “constitutionally different from adults for purposes of sentencing.” *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012); see also *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, 391 P.3d 409 (2017). They are categorically less blameworthy and more likely to be rehabilitated. *Miller*, 132 S. Ct. at 2464; *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The principles underlying adult sentences—retribution, incapacitation, and deterrence—do not to apply to juveniles in the same way as they do adults. *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 132 S. Ct at 2464. Scientists have documented their lack of brain development in areas of judgment. *Miller*, 132 S. Ct at 2464. Also, children cannot control their environments. *Miller*, 132 S. Ct at 2464, 2468. They are more vulnerable to and less able to escape from poverty or abuse. *Miller*, 132 S. Ct. at 2464, 2468. Most significantly, juveniles' immaturity and failure to appreciate risk or consequence are temporary deficits. *Miller*, 132 S. Ct. at 2464. As children mature and "neurological development occurs," they demonstrate a substantial capacity for change. *Miller*, 132 S. Ct. at 2465.

Recognizing that "youthfulness" is more than merely chronological, *State v. O'Dell* extended these principles to circumstances where youthful offenders commit offenses as adults. 183 Wn.2d 680, 695-95, 358 P.3d 359 (2015). Examining decisions like *Miller* and the science underlying them, the Court held that youthfulness, by itself, is a valid mitigating factor upon which a court may impose an exceptional sentence. *O'Dell*, 183 Wn.2d at 696.

B. HICKS MAY APPEAL THE SENTENCING COURT'S FAILURE TO COMPLY WITH THE SUPREME COURT'S DIRECTION TO MEANINGFULLY CONSIDER YOUTHFULNESS AS A MITIGATING FACTOR.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute, however, does not place an absolute prohibition on the right of appeal. A defendant may challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993).

When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis in original).

C. THE TRIAL COURT DID NOT MEANINGFULLY CONSIDER THE MITIGATING VALUE OF YOUTHFULNESS.

A sentencing court must consider an offender's "youth and

attendant characteristics” before determining the penalty, and not simply examine his acts during the incident. *Miller*, 132 S. Ct. at 2471. Thus, a youthful defendant’s culpability is not defined by their participation in the offense.

Among the relevant factors the judge should consider as mitigation are: (1) immaturity, impetuosity, and failure to appreciate risks and consequences; (2) lessened blameworthiness and resulting diminishment in justification for retribution; and (3) the increased possibility of rehabilitation. *O’Dell*, 183 Wn.2d at 692-93. Each of these “differences” between adults and young offenders could justify a mitigated sentence. *O’Dell*, 183 Wn.2d at 693.

The judge must “meaningfully consider youth as a possible mitigating circumstance.” A court’s failure to fully consider youthfulness as a mitigating factor is an abuse of discretion. *O’Dell*, 183 Wn.2d at 697. The sentencing court here failed in its duty to fully consider Hicks’ youthful characteristics and potential for rehabilitation.

In its oral ruling denying Hicks’ request for a mitigated sentence, the trial court acknowledged that Hicks had a difficult childhood but focused primarily on the facts of what the judge called “heinous, callous, and selfless crimes.” (RP 38-41) The trial

court focused on Hicks' past behavior and the consequences of that behavior, and did not meaningfully consider Hicks' ability to appreciate those consequences or to make mature decisions about his life when he was just 20 years old.

The court failed to consider that immature judgment and impetuosity—classic traits of youth—may have contributed to Hicks' choices that fateful night. The court did not consider how Hicks' youth and traumatic upbringing may have impacted his ability to make good choices. And at no point did the court consider how Hicks' maturity, culpability, and decision making compared to adult offenders, the vast majority of which are older than him. In doing so, the trial court did not give effect to *O'Dell's* mandate.

The trial court also failed to give effect to the Supreme Court's caution that the hallmark attributes of youth are transient. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570. The trial court never assessed Hicks' likelihood for rehabilitation brought about simply by maturation, which does not apply to older adult offenders.

The trial court “did not meaningfully consider youth as a possible mitigating circumstance” and therefore failed to properly exercise its discretion at sentencing. *O’Dell*, 183 Wn.2d at 696-97. Hicks’ case should be remanded for a new sentencing hearing. *O’Dell*, 183 Wn.2d at 697.

V. CONCLUSION

For the reasons argued above, this Court should remand this matter for a new sentencing hearing.

DATED: January 29, 2020



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CERTIFICATE OF MAILING

I certify that on 01/29/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Phillip V. Hicks, DOC# 793210 A-104, Monroe Correctional Complex – TRU, Post Office Box 888, Monroe, WA 98272-0888.



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