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NO. 53822-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP VICTOR HICKS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson, Judge

No. 01-1-02238-7

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

ANNE E. EGELER
Deputy Prosecuting Attorney
WSBA No. 20258/OID 91121
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

As a 20-year-old offender, Phillips Hicks had no constitutional right to a lesser sentence, based on his alleged youthful characteristics. The United States and Washington Supreme Courts have made clear that age must be taken into account only is the offender is under the age of 18. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Moretti*, 193 Wn.2d 809, 825, 446 P.3d 609 (2019).

While the trial court was not required to mitigate Hicks' sentence based on his age, it allowed Hicks to present his contention that he was youthful and immature and took his argument into consideration. The trial court appropriately exercised its discretion in rejecting Hicks' argument, given Hicks' extensive criminal record, and full knowledge of the consequences of his actions.

Because the procedure employed by the trial court complies with the state and federal constitutions, Hicks' standard range sentence is not subject to appeal. RCW 9.94A.585(1).

II. RESTATEMENT OF THE ISSUES

A. Is a 20-year-old entitled to have age applied as a per se mitigating factor, when both the United States and Washington Supreme Court

have held that age must be taken into consideration only if the offender is under the age of 18?

B. Did the trial court properly exercise its discretion when it held that youthfulness was not a mitigating factor, after it had considered testimony regarding youthfulness and immaturity, as well as evidence indicating that Hicks had an extensive criminal record, had not corrected his behavior after prior convictions, and fully understood the consequences of his actions?

III. STATEMENT OF THE CASE

A. Phillip Hicks Murdered Chica Webber and Attempted to Murder Her Husband

In the spring of 2001, Chica Webber and her husband Jonathan were walking from a friend's house. *State v. Hicks*, 134 Wn. App. 1026, 2006 WL 2223807, at *1 (2005) (unpublished), *aff'd*, 163 Wn.2d 477, 181 P.3d 831 (2008). Phillip Hicks and Rashad Babbs approached the Webbers and asked whether they had any drugs. *Id.* The Webbers said no and kept walking, but Hicks and Babbs repeatedly demanded that Jonathon and Chica empty their pockets. *Id.* Jonathan stopped and told the men that he had no money. *Id.* Hicks responded by ordering Jonathan "to empty his pockets or he was going to die." *Id.*

Jonathan saw that Hicks had a gun, grabbed his wife's hand, and started to cross the street. Hicks and Babbs started shooting and the Webbers fell to the ground. Chica died with three bullet wounds to her head: two from a .22 revolver and one from a 9 mm handgun. *Id.* at 481-82. Jonathan was wounded in his leg, wrist, and the left side of his back. *Id.* at 482.

The State charged Hicks with (1) aggravated first degree murder in the alternative, first degree murder and first degree felony murder with first or second degree robbery as the predicate offense, (2) attempted murder of Jonathan Webber, and (3) unlawful possession of a firearm. *Hicks*, 2006 WL 2223807, at *4. The jury convicted Hicks of first degree felony murder of Chica Webber and unlawful possession of the firearm, but was unable to reach a verdict on the attempted murder charge. A second trial resulted in a conviction on the attempted murder charge. *Id.*

B. In His First Sentencing, Hicks Presented Mitigating Factors But Did Not Ask for Consideration of Age or Youthfulness

During a consolidated sentencing hearing, Hicks was given sentences at the high end of the standard range for each count, with a total sentence of 776 months. CP 20. Hicks was twenty years old when he shot Chica Webber in the head and attempted to murder her husband Jonathan. RP 40. By that time, he had amassed nine felony convictions and four misdemeanors in twelve criminal cases. *Id.* Hicks asked the court to

consider his mental health issues and difficult childhood as mitigating factors.

The court acknowledged that Hicks' upbringing and mental health issues were "legitimate sentencing considerations," but determined that they were outweighed by the "shocking...totally random" murder of a pregnant woman "over change." CP 117. The court concluded that Hicks posed an "extreme danger" to the community. CP 118.

Hicks raised numerous issues on appeal, but did not argue that the court should have considered his age or youthfulness during sentencing. The conviction and sentences were upheld. *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008)

C. Hicks' Newly Raised Age and Youthfulness Arguments Were Rejected In His Second Sentencing Hearing

In 2018, the Court of Appeals granted Hicks' personal restraint petition and remanded for resentencing in conformance with *State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017). *In re Pers. Restraint Petition of Hicks*, 6 Wn. App. 2d 1040 (2018) (unpublished) (noting that the State conceded that resentencing was appropriate). *Weatherwax* requires that "when the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences." 188 Wn.2d at 1062. Therefore, Hicks' offender score was required to be based

on the attempted murder conviction rather than the first degree murder conviction.

On remand, Hicks asked that in addition to complying with the remand order, the trial court entertain a newly raised argument that he is entitled to have the court treat his youthfulness as a mitigating factor during the resentencing. RP 15. Hicks contended that this argument could not be made earlier, because the Washington Supreme Court did not permit such a request until 2015. *Id.*

Although the trial court recognized that "the sole reason" for the hearing was "the need for resentencing based on the *Weatherwax* decision concerning a scoring error," it allowed Hicks to make the new argument regarding youthfulness. RP 38. In exercising its discretion, the trial court noted that Hicks was 20 years and five-months old at the time of the trial, and that the court has "unfettered discretion with sentencing" only until the age of eighteen. *Id.* at 40. The court considered Hicks' age and difficult childhood, but concluded that he knew right from wrong at the time he committed the crimes. *Id.* The court pointed to Hicks' lengthy criminal history, including nine felonies and four misdemeanors, as an indication that "he knew fully the consequences of committing criminal acts." *Id.* at 41. The court noted that Hicks had made some efforts toward rehabilitation in prison, and therefore took 24 months off the high end, standard range

sentence for the attempted first degree murder. This, in conjunction with the *Weatherwax* correction, resulted in a reduced total sentence of 728 months. CP 184.

Hicks filed a timely appeal of the sentencing order.

IV. ARGUMENT

A. Age Is Not a Per Se Mitigating Factor After the Age of Eighteen

Only offenders who are under the age of eighteen must be treated differently for sentencing purposes. There is no legal support for Hicks' request that this Court depart from decisions of the United States Supreme Court and Washington Supreme Court, and impose a new rule that "youthfulness" be a mitigating factor regardless of the offender's age.

The United States Supreme Court has held that youth—not "youthfulness"—is a mitigating factor. *See Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). *Miller* involved two 14-year-old offenders who were convicted of murder and sentenced to life without parole. *Id.* at 465. The Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes" violates the Eighth Amendment to the federal constitution. *Id. Miller* is consistent with the Supreme Court's earlier determination that "[b]ecause age '18 is the point where society draws the line for many purposes between childhood and adulthood,' it is the age below which a defendant may not be

sentenced to life without parole for a nonhomicide crime." *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2016, 176 L. Ed. 2d 825 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d (2005) (upholding death penalty for 18-year-old offender)).

The United States Supreme Court's decisions are explicitly limited to offenders under the age of 18. There is nothing in these cases that would erase this bright line or require consideration of "youthfulness," regardless of the offender's age.

In applying the federal case law, the Washington Supreme Court has also recognized that mandatory federal and state constitutional requirements for sentencing offenders under the age of 18 do not extend to adult offenders. *See, e.g., State v. Moretti*, 193 Wn.2d 809, 822, 446 P.3d 609 (2019) (holding that there is not a state or federal "categorical bar" on sentences of life in prison without the possibility of parole for adult offenders, even if the sentence is based on a strike obtained before the age of 18); *State v. Witherspoon*, 180 Wn.2d 875, 890-91, 329 P.3d 888 (2014) (recognizing that "*Graham* and *Miller* unmistakably rest on the differences between children and adults[.]"); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) (applying *Miller* to 16 and 17-year-old offenders).

Although the Washington Supreme Court has recognized that "age may well mitigate a defendant's culpability, even if the defendant is over

the age of 18," it has never stated that adult offenders are categorically entitled to mitigation based on youthfulness or immaturity. *State v. O'Dell*, 183 Wn.2d at 695, 358 P.3d 359 (2015). To the contrary, the Court has repeatedly held that "age is *not* a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *O'Dell*, 183 Wn.2d at 695 (emphasis added); *Moretti*, 193 Wn.2d at 825.

In *O'Dell*, the Court reviewed a sentence given to a defendant who committed an offense just 10 days after his 18th birthday. The Court held that although the defendant was not entitled to mitigation, the "trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18." *O'Dell*, 183 Wn.2d at 696. Contrary to Hicks' assertion, *O'Dell* was not a change in the law. As the Washington Supreme Court has explained, "RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion." *Matter of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018).

In cases involving defendants like Hicks, the courts have declined to apply youthfulness as a mitigating factor. For example, in the context of the three strikes law, the Washington Supreme Court considered whether

adult offenders had used their prior sentences and release into the community to prove that they possess one of the most compelling attributes of youth: the ability to change. *Moretti*, 193 Wn.2d at 825. Where the offenders failed to do so—choosing instead to commit more serious offenses—the Court held that they had not shown that they were any less culpable than other adult offenders. *Id.* at 826. That is precisely the situation here. Hicks' prior offenses educated him about the wrongfulness of his conduct and the repercussions of violating the law. But instead of changing his conduct, he devolved from theft to murder. *See also State v. Kitt*, 9 Wn. App. 2d 235, 442 P.3d 1280 (2019), *rev. denied*, 194 Wn.2d 1010, 452 P.3d 1239 (2019) (unpublished) (non-binding authority cited under GR 14.1) (holding that 23-year-old offender had not shown sufficient youthful immaturity to merit a *Miller* hearing); *In re Richey*, 11 Wn. App. 2d 1035, 2019 WL 6492484 (2019) (unpublished) (non-bnding authority cited under GR 14.1) (holding *Miller* was not material to a 65-year sentence imposed for an offense committed at the age of 18 and dismissing petition as time-barred).

In sum, there is a bright-line rule mandating consideration of youth for offenders under the age of 18. There is no corresponding constitutional entitlement for a 20-year-old, adult offender. A trial court may reject a claim of youthful immaturity when the defendant fails to show that his immaturity

effected his behavior control, and the evidence indicates that the defendant understood the legal consequences of his actions.

B. Because the Trial Court Properly Exercised Its Discretion, Hicks' Standard Range Sentence Is Not Subject to Appeal

Although the Court of Appeals only directed the trial court to recalculate Hicks' offender score, the trial court allowed Hicks to argue that he possessed youthful and immature characteristics that supported an exceptional sentence below the standard range. CP 37-78. The court considered his difficult childhood, time spent in the dependency and fostercare systems, and positive steps taken during his 17 years in prison. RP 39-40.

But as in the state Supreme Court's *Moretti* decision, the trial court also considered that Hicks was 20 years old when he murdered Chica Webber and attempted to murder her husband, and he "knew right from wrong when [he was] committing those crimes." RP 40. The trial court noted that Hicks had an extensive criminal history prior to being sentenced for his current offenses, including nine felonies and four misdemeanors. RP 40. His actions following prior sentences demonstrated his lack of a youthful capacity for rehabilitation. Rather than reforming, he graduated from theft-related offenses to murder. Hicks was "very familiar with the justice system and knew fully the consequences of committing criminal acts" when he "told Jonathan [Webber] to empty his pockets or he was

going to die" and shot his wife in the head. RP 41. The trial court's rejection of Hicks' claim of youthfulness was a proper exercise of its discretion.

The trial court followed the correct sentencing procedure. It allowed Hicks' arguments, properly considered them, and correctly exercised its discretionary authority. Hicks did not raise the issue at his original sentencing proceding, even though RCW 9.94A.535(1)(e) allowed him to request an exceptional sentence downward based on youth. *See Light-Roth*, 191 Wn.2d at 336 (explaining that *O'Dell* did not announce a change in the law). He was not entitled to raise the new issue on appeal, much less during the limited remand for resentencing based on *Weatherwax*. RAP 2.5(a)(3).

Because Hicks was not entitled to a procedure that considered the newly raised issue of his youth, the standard-range sentence he received is not appealable. RCW 9.94A.585(1); *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). Hicks contends that the challenge is allowed because it is procedural. Not so. In order to bypass the bar on appeal of a standard range sentence, the petitioner must show that the trial court refused to consider certain information. *Mail*, 121 Wn.2d at 713-14. Here, the trial court properly heard and considered the argument. The appeal is simply an improper request that this Court overturn a standard range sentence.

V. CONCLUSION

The State respectfully requests that Hicks' standard range sentence be upheld. There is no per se entitlement under the federal or state constitution to have youthfulness applied as a mitigating factor when the court sentences a 20-year-old offender. The trial court's exercise of discretion is well supported by the record of Hicks' knowledge of the judicial system and the consequences of his actions.

RESPECTFULLY SUBMITTED this 30th day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Anne Egeler
ANNE EGELER
Deputy Prosecuting Attorney
WSBA No. 20258/OID 91121
Prosecuting Attorneys Office
930 Tacoma Avenue So., Rm. 946
Tacoma, WA 98402
Telephone: (253) 798-7400
E-mail: Anne.egeler@piercecountywa.gov

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PIERCE COUNTY PROSECUTING ATTORNEY

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