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NO. 35460-1-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

WILLIE JOE RICHARDSON,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

1. The State erroneously advised the trial court, at Willie Joe Richardson's resentencing hearing, that it could not consider factors which had resulted in a turnaround in Mr. Richardson's life while in prison.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Can a trial court consider factors, which accrue after an original sentencing, beneficial to the defendant at a resentencing hearing?

2. Did the resentencing court abuse its discretion when it relied upon the State's argument that post-sentence factors could not be considered at a resentencing hearing?

STATEMENT OF THE CASE

Mr. Richardson was charged with first degree felony murder as either a principal or an accomplice by an Information filed on September 8, 1995. He was eighteen (18) years old at the time. (CP 1; RP 10, ll. 13-14)

An Amended Information was filed on June 24, 1996. (CP 4)

Mr. Richardson was found guilty after a jury trial. Judgment and Sentence was entered on August 9, 1996. He was sentenced to three hundred and sixty-one (361) months in prison. (CP 4; CP 6)

The Judgment and Sentence was based upon a birthdate of December 31, 1974. Mr. Richardson's offender score was calculated as a three (3).

On May 11, 2017 a reference hearing was conducted to determine Mr. Richardson's correct date of birth. Testimony was presented concerning the names of his parents and place of birth. A certified copy of a California birth certificate was presented to the court. (RP 10, ll. 15-16; ll. 19-20; ll. 23-24; RP 14, l. 25 to RP 15, l. 15; RP 16, ll. 21-25)

After it was determined that Mr. Richardson's true birthdate was December 31, 1976 his offender score was reduced to a two (2). The standard range sentence for first degree felony murder with an offender score of two (2) is two hundred and sixty-one (261) to three hundred and forty-seven (347) months. (RP 36, ll. 5-6; Appendix "A")

The resentencing court entered Findings of Fact and Conclusions of Law concerning Mr. Richardson's birthdate. (CP 129)

The State opposed Mr. Richardson's request for a sentence at the low end of the range (two hundred and sixty-one (261) months). The State filed memoranda of authority addressing its reasons for opposition. The

initial sentencing memorandum dealt with cases involving mitigated sentences. The second brief was in opposition to the *Miller*¹ fix. (CP 62; CP 121)

Defense counsel presented letters of support for Mr. Richardson. They outlined, in detail, the steps which Mr. Richardson has taken since he was sentenced to prison. (CP 46)

Mr. Richardson, in his colloquy at the resentencing hearing, also outlined how he has changed since he was sentenced. While in prison he paid the restitution ordered in the original Judgment and Sentence in full. A Satisfaction of Judgment was entered on December 19, 2012. (CP 42; RP 42, l. 13 to RP 43, l. 20; Appendix “B”)

The prosecuting attorney argued as follows at restencing:

With respect to Mr. Richardson’s conduct since conviction, I provided the Court with a slew of cases that the Court can’t consider post-conviction activity or behavior, family support, parental circumstance, remorse, anything of the like for purposes of determining the sentence.

¹ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012)

It has to be crime based. The Court has to look at the facts of the case and make an appropriate sentence or order an appropriate sentence.

(RP 40, l. 25 to RP 41, l. 8)

An Amended Judgment and Sentence was entered on June 29, 2017. Mr. Richardson was resentenced to three hundred and forty-seven (347) months in prison. (CP 137)

Mr. Richardson filed his Notice of Appeal on July 19, 2017. (CP 154)

SUMMARY OF ARGUMENT

The State misinformed the resentencing court concerning what it could consider as factors to determine an appropriate sentence for Mr. Richardson. The misinformation adversely impacted the trial court's resentencing decision. The decision amounted to an abuse of discretion based upon the fact that the Court was not properly advised of what it could and could not consider.

ARGUMENT

“A sentence within the standard sentence range ... for an offense shall not be appealed. ...” RCW 9.94A.585(1)

Mr. Richardson recognizes that he was resentenced within the standard range for the offense. Nevertheless, this does not preclude him from proceeding with his appeal.

In *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003), the Court, in analyzing RCW 9.94A.585(1) stated:

This precept arises from the notion that, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length. *See State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986). However, this prohibition does not bar a party’s right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. *See State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies. [Citations omitted.]

Mr. Richardson contends that the resentencing court, relying upon the State’s briefing and argument concerning mitigated sentences and the

factors which do not apply to those sentences, used misinformation that deprived the Court of its discretion.

Mr. Richardson was not asking for a mitigated sentence. He was requesting a sentence at the low end of the range. Cases involving mitigating factors were not applicable.

RCW 9.94A.010 sets out the purposes behind the Sentencing Reform Act (SRA) as determined by the Legislature. It provides:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

In *State v. Ronquillo*, 190 Wn. App. 765, 784-85, 361 P.3d 779 (2015) the Court discussed the application of RCW 9.94A.010 in connection with mitigated and exceptional sentences. The Court noted at 785:

Here, these purposes should be examined in light of *Miller* in the same manner that the exceptional sentencing framework in *O'Dell* [*State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)] was examined in light of *Miller*. In that light, many if not all of the seven statutory purposes will point toward a mitigated sentence.

It is Mr. Richardson's contention that the purposes of the SRA are equally applicable to standard range sentences.

Moreover, when factors clearly reflect that an individual has matured and improved himself during the course of incarceration, the failure to consider those factors constitutes an abuse of discretion. In fact, additional evidence is used on a regular basis by the State when a convicted defendant is found to have additional criminal history. *See: State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009).

As the old saying goes: "What is good for the goose is good for the gander."

Further support for Mr. Richardson's position can be found in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed.2d 656 (1969) where the Court ruled at 723:

A trial judge is not constitutionally precluded ... from imposing a new sentence, whether greater or less than the original sentence, **in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities."** *Williams v. New York*, 337 U.S. 241, 337 U.S. 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources.

It is Mr. Richardson's position that the State's briefing and argument acted to contravene his right to due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3. This deprivation occurred due to the fact that the resentencing court was constrained in the exercise of its discretion.

The following language from the sentencing court's ruling is *apropos* to Mr. Richardson's argument:

You got to live a life. You have a son now if I remember from the reference hearing. You have a wife. You've made some good things of yourself, but I look back and look and Ms. Dixon has nothing and never had children, never got to be grown up. So the Court looks at and do I think that you deserve the low end

because you've done things since then? I'm glad you had a life to live. I'm sad that Ms. Dixon didn't.

The Court is going to sentence you to the high end of the three hundred and forty-seven months. I think that's what Judge Austin did because that's what he believed at the time.

....

(RP 45, l. 25 to RP 46, l. 10)

The foregoing excerpt appears to be an emotional ruling as opposed to a ruling based upon all of the necessary factors that have to be considered at a resentencing hearing.

In addition to the *Pearce* and *Ronquillo* cases Mr. Richardson also points to *State v. Worl*, 91 Wn. App. 88, 93-4, 955 P.2d 814 (1998):

The additional evidence is, nonetheless, consistent with *State v. Stewart*, 72 Wn. App. 885, 891, 866 P.2d 677 (1994), *aff'd* 125 Wn.2d 893, 890 P.2d 457 (1995), because **additional evidence may be taken at a resentencing hearing following the reversal and remand of a case.**

(Emphasis supplied.)

Even though the remand of Mr. Richardson's case was not due to a reversal of his conviction, the introduction of additional evidence in support

of a low end standard sentence should have been taken into consideration in light of the purposes of the SRA and the cited cases.

CONCLUSION

The trial court abused its discretion when it did not give due consideration to the change in status of Mr. Richardson's history while in prison. The State's argument directed the resentencing court away from that consideration by comparing it to a request for a mitigated sentence.

An abuse of discretion occurs when there is

a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Richardson respectfully requests that he be remanded for another resentencing hearing directing the trial court to appropriately consider his change-of-life factors.

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DATED this 5th day of December, 2017.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX “A”

MURDER, FIRST DEGREE
 (RCW 9A.32.030)
CLASS A FELONY
SERIOUS VIOLENT
(If sexual motivation finding/verdict, use form on page III-33)

I. OFFENDER SCORING (RCW 9.94A.360 (10))

ADULT HISTORY: (If the prior offense was committed before 7/1/86, count prior adult offenses served concurrently as one offense; those served consecutively are counted separately. If both current and prior offenses were committed after 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of serious violent felony convictions x 3 = _____
 Enter number of violent felony convictions x 2 = _____
 Enter number of nonviolent felony convictions x 1 = _____

JUVENILE HISTORY: (Adjudications entered on the same date count as one offense except for violent offenses with separate victims)

Enter number of serious violent felony adjudications x 3 = _____
 Enter number of violent felony adjudications x 2 = _____
 Enter number of nonviolent felony adjudications x 1/2 = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of violent felony convictions x 2 = _____
 Enter number of nonviolent felony convictions x 1 = _____

STATUS: Was the offender on community placement on the date the current offense was committed? (If yes), + 1 = _____

Total the last column to get the Offender Score
 (Round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:
 STANDARD RANGE
 (LEVEL XIV)

0	1	2	3	4	5	6	7	8	9 or more
240 - 320	250 - 333	261 - 347	271 - 361	281 - 374	291 - 388	312 - 416	338 - 450	370 - 493	411 - 548
months									

- B. The range for attempt, solicitation, and conspiracy is 75% of the range for the completed crime (RCW 9.94A.410).
- C. Twenty-four months community placement must be served following release from state prison (RCW 9.94A.120).
- D. Statutory minimum sentence is 240 months (20 years) (RCW 9.94A.120 (4)).
- E. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-17 or III-18 to calculate the enhanced sentence.

APPENDIX “B”

1 consideration. He did choose to go to trial. He has
2 every right to go to trial, but he chose to do so and
3 following conviction he has to pay the consequences of his
4 crime.

5 So, again, I'm asking that the Court sentence
6 Mr. Richardson to the high end unless the Court has any
7 other questions?

8 THE COURT: I don't.

9 MR. STEINMETZ: Thank you.

10 THE COURT: Mr. Richardson, why don't you stand up? Is
11 there anything that you would like to say at this time
12 before the Court pronounces sentence?

13 THE DEFENDANT: I understand that my actions between
14 now and then don't have bearing on this incident.

15 However, I believe that it has bearing on my state of
16 mind, the maturity level the difference which is standard.
17 I haven't committed a single violent act since the crime.
18 I've took my own responsibility to pay off all my
19 financial legal obligations.

20 I made it a point to educate myself to a point not only
21 help myself, I became a peer facilitator in groups that
22 help other people. For the last seven years, my job has
23 been unit representative, and I help people with release
24 plans and help them to release back in the community, a
25 good way to help reduce recidivism. I've done everything

1 in my power to make sure that this wasn't in vain.

2 I mean, I can't do nothing to take it back. My actions
3 in the past were what they were, but since that time, I've
4 made a genuine effort to make sure that my life wasn't
5 only life that was saved by this that I could try to pay
6 forward to other people.

7 I did it as Mr. Steinmetz said intently go to do a
8 robbery. I was greedy. I was ignorant, but knowing the
9 difference between right and wrong, and I did, I never in
10 a million years thought that the final result would be
11 what it was, that somebody end up dying by I never had a
12 weapon. I never tried intentionally to hurt anybody.

13 I don't know if that means anything to the Court, but
14 with that, I'd like to apologize to the Court. I know
15 them people I can't talk to anymore. I want them to know
16 that it wasn't intentional, and that the final result
17 although it doesn't help them, it wasn't in vain.

18 It saved my life, and I'm sure it will save more as I
19 continue to serve people to try to be a better leader.
20 Thank you.

21 THE COURT: I do want to note what I reviewed because I
22 didn't try the case. I did go back and read the file. It
23 was a lengthy file, a lot of documents filed. I have the
24 briefing from both sides for the sentencing. I, also,
25 have the letters of support for Mr. Richardson that was

NO. 35460-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 95 1 01950 2
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
WILLIE JOE RICHARDSON,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 5th day of December, 2017, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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