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Court of Appeals  
Division III  
State of Washington  
12/11/2019 1:14 PM

No. 35792-9-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DAHNDRE KAVAUGN WESTWOOD,

Appellant.

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

The Honorable Judge John Knodell

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APPELLANT'S SUPPLEMENTAL BRIEF

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Jill S. Reuter, WSBA #38374  
Eastern Washington Appellate Law  
PO Box 8302  
Spokane, WA 99203  
Phone: (509) 242-3910  
admin@ewalaw.com

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## **A. PROCEDURAL HISTORY**

Dahndre Westwood was convicted in adult court, following a jury trial, of three crimes that occurred when he was 14 years old: attempted first degree rape, first degree burglary, and first degree assault. (CP 423, 426, 428-429; RP<sup>1</sup> 661-663, 668-670, 672-676).

At sentencing, among other requests, Mr. Westwood requested the trial court impose a mitigated exceptional sentence below the standard range, based on his youthfulness at the time of the crimes. (CP 445, 460-461; RP (Jan. 8, 2018) 48, 71-83, 84-86, 93-99). The trial court declined this request. (RP (Jan. 8, 2018) 100-102).

Mr. Westwood appealed. (CP 623-624). He raised the following six issues in his opening brief:

Issue 1: Whether the trial court abused its discretion and violated constitutional separation of powers in rejecting the proposed amendment to the information reducing the charges and the corresponding plea agreement.

Issue 2: Whether Mr. Westwood was denied his article I, section 22 and Sixth Amendment right to a fair and impartial jury, where the trial court denied his motion for a mistrial based upon jurors discussing extrinsic DNA evidence.

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<sup>1</sup> The report of proceedings now consists of eight separate volumes. Five volumes, reported by Tom R. Bartunek, contain the jury trial, and are referred to herein as “RP.” Two volumes, transcribed by Amy Brittingham, contain various hearings, including sentencing, and are referred to herein as “RP” followed by the specific date of hearing. One volume, also transcribed by Amy Brittingham, containing four hearings that occurred in September and October 2019 following remand by this Court, referred to herein as “Supp. RP.”

Issue 3: Whether the trial erred by convicting Mr. Westwood of both attempted first degree rape and first degree assault, where the assault conviction merged with the attempted rape conviction, and entry of both convictions violated Mr. Westwood's double jeopardy rights.

Issue 4: Whether the trial court erred by finding Mr. Westwood's three convictions were not same criminal conduct and in sentencing Mr. Westwood to consecutive sentences for attempted first degree rape and first degree assault.

Issue 5: Whether the trial court abused its discretion in sentencing Mr. Westwood without considering mitigating circumstances related to his age at the time of the crimes.

Issue 6: Whether this Court should deny costs against Mr. Westwood on appeal in the event the State is the substantially prevailing party.

On September 12, 2019, this Court issued a published opinion, addressing the first issue raised on appeal by Mr. Westwood. *State v. Westwood*, 448 P.3d 771 (Wash. Ct. App. 2018). This Court held the trial court committed legal error in rejecting Mr. Westwood's attempt to enter a guilty plea pursuant to a plea agreement. *Id.* at 775-78. This Court held the trial court committed legal error for the following two reasons:

First, the court failed to recognize the difference between a plea and a plea agreement. Regardless of whether the trial court had a basis for rejecting Mr. Westwood's plea agreement, it did not have reason to reject Mr. Westwood's unopposed proffer to plea to an original charge. Second, the court did not properly consider the prosecutorial standards governing plea agreements and give deference to the State's assessment of those standards.

*Id.* at 775-76.

This Court remanded the case to allow for entry of a plea. *Id.* at 778-79.

This Court also retained jurisdiction to resolve the remaining issues raised by Mr. Westwood on appeal, in the event that no valid plea occurs. *Id.* at 779. This Court set forth the following procedure:

We retain jurisdiction over this appeal and remand to the trial court to allow for possible entry of a plea. On remand, within 60 days of the date of this opinion, the trial court shall hold a hearing to allow for entry of a plea. Within 30 days of the hearing, orders related to the change of plea hearing shall be transmitted to this court. Also within 30 days of the hearing, the parties may (but need not) file supplemental briefing advising this court of any additional action appropriate to this appeal.

*Id.* at 779.

On remand, the trial court held four hearings. (Supp. RP 1-39). The State proposed a plea offer to Mr. Westwood, to plead guilty to one count of attempted second degree rape. (Supp. RP 7, 10, 14). Mr. Westwood declined to accept this proposed plea offer. (Supp. RP 28-29, 34-35). He offered no explanation for his decision to reject the offer. (Supp. RP 35). On October 30, 2019, the trial court entered an order remanding the case to Court of Appeals. (CP 625; Supp. RP. 24, 36, 38-39). The trial court attached a letter to its order, setting forth the court's findings. (CP 626-668; Supp. RP 36, 38). The trial court included two attachments with its letter: a State's memorandum in support of declination of juvenile court jurisdiction over Mr. Westwood, and a decline investigation report. (CP 637-668).

In its letter, the trial court “examine[d] whether the previous plea agreement was in the interest of justice under both CrR 8.3 and RCW 9.94A.431(1).” (CP 628). The trial court stated its reasons for doing so:

This Court should not have rejected the plea agreement initially proposed as inconsistent with prosecutorial standards under RCW 9.94A.450 because the State articulated a tenable basis justifying it. (Slip Opinion at 16) But this Court has not had the opportunity to apply the correct standard to the State's original proposal. Both the court rules and the Sentencing Reform Act (hereinafter SRA) contemplate judicial evaluation of plea agreements, particularly those which effectively dismiss counts. If by rejecting the State's offer Mr. Westwood waives this Court's error in applying the wrong standard to the plea offer, there is of course no issue. But if Mr. Westwood's counsel seeks some other remedy for the Court's error, further consideration of that proposed agreement under the standards identified by the COA itself not only promotes efficient disposition of this case, but also is mandated by both rule and statute. This Court's previous misapplication of the law does not justify abrogation of its duty to decide correctly now.

....

As noted above, this Court will now conduct the same original inquiry it should have when the first plea bargain was offered to the Court: Was the State's original offer, which not only reduced, one charge substantially but also effectively dismisses two other serious violent offenses, in the interest of justice?

(CP 627-628, 633).

The trial court concluded: “[t]he Court finds that the State's original plea offer to Mr. Westwood was contrary to the interest of justice.” (CP 635).

In reaching this conclusion, the trial court stated “[t]his Court failed to recognize that the Defendant's youth although not a statutorily enumerated basis justifying a plea bargain which does not adequately describe the Defendant's

criminal conduct should have been considered by this Court.” (CP 633). The trial court further stated:

Children are different. They are different from adults and from each other. The Defendant in particular was different from other children both at the time he stood trial and when he was fourteen years of age. *The State knew when it offered to dismiss three of the class A felonies it had levelled against the Defendant that his crimes were not the product of a passing weakness to resist wrongdoing. They were part of a series of ever more violent and dangerous criminal conduct. As the O'Dell case cited by the State at sentencing recognized, the degree to which the criminal conduct of any given youthful offender should be mitigated must be individually evaluated. A youth not otherwise inclined to crime who is unable because of immaturity to resist something he might otherwise have avoided and is likely to avoid when he acquires maturity does not require lengthy incarceration. See State v. Houston-Sconiers, supra. But the entire record before this Court demonstrates that the Defendant here is not that youthful offender.*

Where a defendant asserts that his youth significantly impaired his ability to appreciate the wrongfulness of his conduct or conform to the law but does not rise to the level of a defense, the court is to take that into consideration at sentencing. The prosecution argued at the Defendant's declination hearing that the charges of which the Defendant was convicted here had prosecutorial merit. Judge Estudillo agreed and found that they did. When the prosecution offered the plea bargain, it acknowledged that there were no evidentiary problems which made conviction doubtful. This means that the Defendant was unable to demonstrate that he was incapable of forming any required mental state. The defense did not challenge this assertion.

The prosecution did not make an individual assessment of the Defendant's youth as a mitigating factor to be considered in charging in the full context of the Defendant's entire criminal history when it extended a plea offer to the Defendant. Further, it ignored the full consideration given to the Defendant's youth as a mitigating factor in juvenile court. This Court concludes that if it had, no reasonable prosecutor could have concluded that the

Defendant's youth was a justification for dismissing two serious violent felonies the Defendant had committed.

....

The State has demonstrated over and over again that it does not believe Mr. Westwood's criminal conduct resulted from a youthful inability to resist transient violent urges.

....

*The record before the Court demonstrates that Mr. Westwood is a dangerous and violent person.*

(CP 633-634) (emphasis added).

Following the trial court's remand of this case back to this Court, Mr. Westwood now submits his supplemental brief.

**B. SUPPLEMENTAL ARGUMENT: Should this Court reverse and remand this case for resentencing, Mr. Westwood requests this Court order reassignment of the case to a different trial court judge on remand.**

Mr. Westwood is requesting, in relevant part, that his case be reversed and remanded for resentencing, for the trial court to exercise its discretion to consider a sentence below the adult standard range based upon his age at the time of the crimes (Issue 5 in his Opening Brief). Because the assigned trial court judge will exercise discretion on this issue on remand, and has prejudged and already expressed an opinion as to the merits of this issue, reassignment of the case to a different trial court judge on remand is warranted.

“Under the state and federal constitutions, a criminal defendant has the right to be tried and sentenced by an impartial court.” *State v. Solis-Diaz*, 187 Wn.2d 535, 539, 387 P.3d 703 (2017) (citing U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22). “Pursuant to the appearance of fairness doctrine, a

judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.” *Id.* at 540 (citing *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010)). “The law requires more than an impartial judge; it requires that the judge also appear to be impartial.” *Id.* (citing *Gamble*, 168 Wn.2d at 187). “The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias.” *Id.* (citing *Gamble*, 168 Wn.2d at 187-88). “The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts.” *Id.* (citing *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

“Generally, a party seeking a new judge files a motion for recusal in the trial court, which allows the challenged judge to evaluate the grounds for recusal and permits the parties to develop a record adequate to determine whether the judge’s impartiality might reasonably be questioned.” *Id.* at 540 (citing *State v. McEnroe*, 181 Wn.2d 375, 386, 333 P.3d 402 (2014)). However, a party may seek a new judge for the first time on appeal. *Id.* This is typically done “where the trial judge ‘will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.’” *Id.* (quoting *McEnroe*, 181 Wn.2d at 387).

“The remedy of reassignment on appeal is available only in limited circumstances; even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if an appellate opinion offers sufficient guidance to effectively limit trial court discretion on remand.” *Id.* (citing *McEnroe*, 181 Wn.2d at 387). “But where review of facts in the record shows the judge’s impartiality might reasonably be questioned, the appellate court should remand the matter to another judge.” *Id.*

In *Solis-Diaz*, our Supreme Court ordered reassignment on remand, where it was requested for the first time on appeal. *Id.* at 541. The case was remanded for resentencing, for the trial court to conduct an individualized determination of the propriety of an exceptional sentence downward based on the defendant’s youth. *Id.* at 537. At resentencing, the trial court imposed the same sentence. *Id.* at 537-39. The defendant again appealed and another resentencing was ordered. *Id.* at 539. In ordering this resentencing be held before a different judge, our Supreme Court stated:

In sum, Judge Hunt will be asked to exercise discretion on remand regarding the propriety of a sentence he has twice imposed, and the record reflects that he not only has strong opinions on sentencing generally and juvenile sentencing in particular, but also suggests he has already reached a firm conclusion about the propriety of a mitigated sentence in this case and may not be amenable to considering mitigating evidence with an open mind. These are precisely circumstances that justify remand of the matter to another judge.

*Id.* at 541.

In *State v. Sledge*, the trial court imposed an exceptional disposition on a juvenile. *State v. Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). The Court of Appeals held the trial court erred in calculating the exceptional disposition based upon the possibility of the juvenile receiving early release time, because whether the juvenile would receive early release time was speculative. *Id.* at 843-46. The Court ordered that any new disposition hearing be held before a new judge. *Id.* at 846. The Court stated “[w]e do not cast aspersions on the trial court here by this remedy, but provide for a new judge at the disposition hearing in light of the trial court’s already-expressed views on the disposition.” *Id.* at 846 n.9.

In *State v. Talley*, this Court reversed the defendant’s exceptional sentence on the basis that the trial court considered disputed facts without holding an evidentiary hearing. *State v. Talley*, 83 Wn. App. 750, 753, 923 P.2d 721 (1996), *aff’d*, 134 Wn.2d 176, 949 P.2d 358 (1998). This Court remanded the case for resentencing, to consider whether the State can prove the facts necessary to support an exceptional sentence. *Id.* at 763. This Court also ordered reassignment of the trial court judge, stating “we direct that [the defendant] be sentenced by a different judge because the court’s statement at the August 11 hearing that she had already decided to give him an exceptional sentence even though there had been no evidentiary hearing suggests she may have prejudged the matter.” *Id.*

Here, in its letter issued following remand, the trial court evaluated Mr.

Westwood's youth in the plea bargain context. (CP 633-634). In doing so, the trial court concluded Mr. Westwood's crimes "were not the product of passing weakness to resist wrongdoing. They were a part of a series of every more violent and dangerous criminal conduct." (CP 633). The trial court concluded "the entire record before this Court demonstrates that the Defendant here is not that youthful offender[.]" that does not requiring lengthy incarceration, as in *State v. Houston-Sconiers*. (CP 633); *see also State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). The trial court also concluded "[t]he record before the Court demonstrates that Mr. Westwood is a dangerous and violent person." (CP 634).

These conclusions by the trial court demonstrate the trial court has prejudged and already expressed an opinion as to the merits of the very issue it will be asked to exercise its discretion upon on remand: whether Mr. Westwood should receive a sentence below the adult standard range based upon the mitigating qualities of youth. Therefore, reassignment of the trial court judge, requested here for the first time on appeal, is warranted. *See Solis-Diaz*, 187 Wn.2d at 540 (quoting *McEnroe*, 181 Wn.2d at 387); *see also Sledge*, 133 Wn.2d at 846 n.9; *Talley*, 83 Wn. App. at 763; *cf. McEnroe*, 181 Wn.2d at 387-88 (denying the State's request for reassignment of the trial court judge on remand, where there was no proof that the assigned judge had prejudged the merits of the case, or the propriety of any particular sentence). Based upon the trial court's statements and conclusions in its letter, the trial court's impartiality might

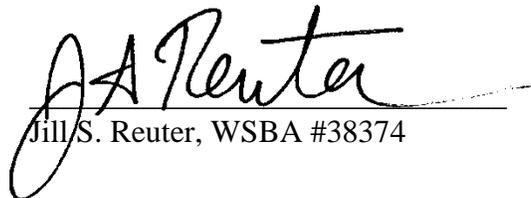
reasonably be questioned. *See Solis-Diaz*, 187 Wn.2d at 540. Therefore, this case should be remanded to a different judge. *See Solis-Diaz*, 187 Wn.2d at 540.

Because the assigned trial court judge has prejudged and already expressed an opinion as to the merits whether Mr. Westwood should receive a mitigated sentence based upon youth, reassignment of the case to a different trial court judge on remand is warranted.

**C. CONCLUSION**

Should this Court reverse and remand this case for resentencing, as requested by Mr. Westwood in his Opening Brief, Mr. Westwood requests this Court order reassignment of the case to a different trial court judge on remand.

Respectfully submitted this 11th day of December, 2019.

  
Jill S. Reuter, WSBA #38374

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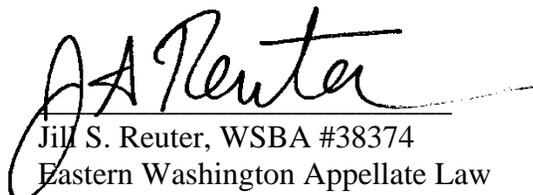
STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 35792-9-III
vs.	)	Grant Co. No. 16-1-00352-7
	)	
DAHNDRE KAVAUGN WESTWOOD	)	PROOF OF SERVICE
Defendant/Appellant	)	
	)	
	)	
	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 11, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's supplemental brief to:

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Having obtained prior permission, I also served a copy on the Respondent at [kburns@grantcountywa.gov](mailto:kburns@grantcountywa.gov) using the Washington State Appellate Courts' Portal.

Dated this 11th day of December, 2019.

  
Jill S. Reuter, WSBA #38374  
Eastern Washington Appellate Law  
PO Box 8302  
Spokane, WA 99203  
Phone: (509) 242-3910  
admin@ewalaw.com

**NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW**

**December 11, 2019 - 1:14 PM**

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**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35792-9  
**Appellate Court Case Title:** State of Washington v. Dahndre K. Westwood  
**Superior Court Case Number:** 16-1-00352-7

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Appellant's Supplemental Brief

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Sender Name: Jill Reuter - Email: jill@ewalaw.com  
Address:  
PO BOX 8302  
SPOKANE, WA, 99203-0302  
Phone: 509-242-3910

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