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NO. 36880-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

CALLEN WESSELS,

Appellant.

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

The Honorable Gary Libey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE STATE'S BRIEF INCORRECTLY CLAIMS THE RECITED FACTS WERE PROVEN AT TRIAL.

Rather than going to trial, Mr. Wessels pleaded guilty. He did so to promote closure and to avoid further traumatizing the decedent's family. RP 93. The State's brief lists facts included in the probable cause statement, yet incorrectly claims the facts were proven at trial. E.g. Brief of Respondent (BOR) at 5 n. 1. This Court should reject this erroneous characterization of the proceedings below.

2. AN O'DELL ARGUMENT COEXISTS EASILY WITH THE DEFENSE PRESENTATION AT SENTENCING; BUT COUNSEL DOES NOT APPEAR TO HAVE BEEN AWARE OF THAT IMPORTANT LINE OF CASE LAW.

The State also suggests that defense counsel's failure to cite State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) was strategic because reliance on O'Dell and related cases would have been inconsistent with the defense strategy that Wessels appear mature and responsible. BOR at 13-14.

But, as argued in the opening brief, Wessels—despite possessing several positive traits—clearly demonstrated poor consequence assessment and judgment, impulsivity, and susceptibility to peer pressure by drinking and driving on the night in question. See O'Dell, 183 Wn.2d at 692. His behavior on the night, manifesting the youthful characteristics identified above, is consistent with his efforts at improvement since the incident. The

possibility, indeed, likelihood, that young people will improve as they progress into their 20s is one of the reasons that courts treat children and young people differently than adults for purposes of sentencing. Id. at 692 and 692 n.5 (citing Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 NOTRE DAME L. REV. 89, 152 & n. 252 (2009) (collecting studies); MIT Young Adult Development Project: Brain Changes, MASS. INST. OF TECH., <http://hrweb.mit.edu/worklife/youngadult/brain.html> (last visited Aug. 4, 2015) (“The brain isn’t fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.”); Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANN. N.Y. ACAD. SCI. 77 (2004) (“The dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s” (formatting omitted)); see also State v. Solis-Diaz, 194 Wn. App. 129, 139, 376 P.3d 458 (2016) (characteristics of adolescent brain make it more likely offender will reform), rev’d on other grounds, 187 Wn.2d 535, 387 P.3d 703 (2017).

The trial court appeared not to recognize the significance of these characteristics. While age is not a “per se” mitigating factor, a court must take into account the observations underlying relevant United States

Supreme Court cases that generally show, among youthful offenders, a reduced sense of responsibility, increased impetuosity, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life. O'Dell, 183 Wn.2d at 695-96 (discussing sentencing of very young adult); see also Solis-Diaz, 194 Wn. App. at 132, 140-41. But, as argued, the court instead appeared to treat Wessels's youthful characteristics as an aggravating factor rather than a mitigating factor. RP 98. This is inconsistent with science and now well-established case law. Considering this, as well as the underlying facts of this case, it is reasonably probable that Wessels would have benefited from appropriate argument under O'Dell.

Relatedly, the State also argues that Wessels cannot show prejudice. But counsel's deficient performance left the trial court uninformed as to recent developments in case law. The long road reaching O'Dell reflects that perceived common sense is not always consistent with science. And "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." State v. McGill, 112 Wn. App. 95, 102, 47 P.3d 173 (2002) (criticizing State v. Hernandez-Hernandez, 104 Wn. App. 263, 15 P.3d 719 (2001)). Specific to this context, a court "must conduct a meaningful, individualized inquiry" into

whether the defendant's youth should mitigate the sentence. Solis-Diaz, 194 Wn. App. at 140-41 (citing O'Dell, 183 Wn.2d at 696).

Although the State would have this Court rely on Hernandez-Hernandez to reject Wessels's argument, that case does not involve mitigation based on the characteristics of youth. And the logical underpinnings of that case are opaque, to say the least.¹

The State also mistakenly relies on In re Pers. Restraint of Meippen, 193 Wn.2d 310, 317, 440 P.3d 978 (2019) to argue that Wessels cannot show prejudice. However, the State fails to indicate that Meippen involves a standard of prejudice (more likely than not) applicable to personal restraint petitions, not direct appeals. Id. at 315-16 (citing, inter alia, In re Pers. Restraint of Hagler, 97 Wn.2d 818, 825, 650 P.2d 1103 (1982) (petitioner "must shoulder the burden of showing" not merely that outcome would more likely than not have been different had the alleged error not occurred (internal quotations omitted))). Meippen is patently inapplicable.

¹ In Hernandez-Hernandez, the trial court sentenced Mr. Hernandez to a standard range sentence. On appeal, he argued trial counsel was ineffective for failing to alert the court to the applicable case law which permitted the court to impose an exceptional sentence downward in a factually similar case. Hernandez-Hernandez, 104 Wn. App. at 265-66. This Court rejected Hernandez's argument and concluded that Hernandez could not prove prejudice. Id. at 266. This Court stated that, even without an argument alerting the trial court to the applicable case law, the trial court had the discretion to impose an exceptional sentence downward. Id. But this Court does not explain how the trial court could exercise discretion it did not know that it had.

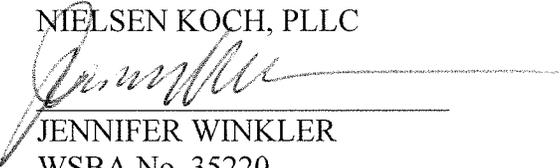
B. CONCLUSION

For the reasons stated above and in Mr. Wessels's amended brief of appellant, this Court should remand for a resentencing hearing at which Mr. Wessels is represented by competent counsel with knowledge of the applicable case law.

DATED this 9th day of January, 2020.

Respectfully submitted,

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