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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

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to consider the appellant's youth as a mitigating factor in evaluating his request for an exceptional sentence downward.

2. The appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion by failing to consider the appellant's youth as a mitigating factor in evaluating his request for an exceptional sentence downward?

2. Did counsel provide ineffective assistance by failing to cite to relevant state and federal authority that supported the appellant's request for exceptional sentence downward?

B. STATEMENT OF THE CASE

The State charged 21-year-old appellant Callen Wessels with vehicular homicide, hit and run, reckless driving, and second degree perjury. CP 12-15.¹ The charges stemmed from a single-vehicle accident

¹ RCW 46.61.520(1)(a); RCW 46.52.020(4)(a); RCW 46.61.500(1); RCW 9A.72.030(1). As for the perjury charge, the State alleged that in the aftermath of the collision—when Wessels was injured and still under the effects of alcohol—he lied to law enforcement about the vehicle being stolen and driven by someone else. CP 3-4.

occurring in July of 2018. Wessels managed to walk away from the collision, but the passenger, Wessels's friend, was killed. CP 8; RP 95.

Wessels agreed to plead guilty to the first two charges, which would result in an offender score of one on each charge. The other charges would be dismissed. CP 26. The State agreed to recommend a 100-month prison sentence, reflecting the midpoint of the 86- to-114-month standard range for vehicular homicide. CP 26, 30. According to the plea agreement, Wessels could argue for any lawful sentence. CP 26.

At the May 2019 sentencing hearing, the State argued the midpoint of the standard range should be imposed. RP 12-14.

The decedent's friends and family members urged the court to impose the maximum sentence. RP 16-39.

After the State's presentation, several friends, family, and community members addressed the court on Wessels's behalf. Many highlighted Wessels's remorse. RP 39-79. Those speaking on Wessels behalf included a retired physician who urged the court to consider that young people are terrible drivers and poor decisionmakers. He highlighted the reason for this is biological—their brains are not fully developed. RP 52-53.

Defense counsel argued that, rather than the midpoint of the standard range, an exceptional sentence downward was appropriate. RP

80-83. Counsel pointed to a vehicular homicide prosecution in another county in which the defendant, also 21, had received an exceptional sentence downward. In that case, the prosecutor had agreed. RP 83-86. Wessels was even more deserving of leniency. RP 86-87. But the prosecutor only wished to make an example of Wessels. RP 87.

In response, the prosecutor argued that Wessels had benefitted from dismissal of the perjury charge. RP 90-91. In addition, nothing about Wessels differentiated him from other defendants such that departure from the standard range was appropriate. RP 91. Despite Wessels's family and community support, he had made a series of bad decisions (driving drunk, driving recklessly, failing to check on his passenger, fleeing the scene, and lying to police). RP 92. Under the circumstances, the middle of the standard range was appropriate. RP 92.

In a contentious exchange, defense counsel accused the prosecutor of relying on unproven facts. And she claimed the prosecutor had stoked the victims' family's anger toward Wessels. RP 94. The prosecutor, on the other hand, pointed out that Wessels had agreed the court could consider the facts as he had argued. RP 93; see CP 33 (statement on plea form indicating that court could consider police reports and statement of probable cause).

The court sentenced Wessels to 114 months, the high end of the standard range, which was 14 months higher than the State's recommended sentence. The court made no statement regarding Wessels's request for an exceptional sentence downward. RP 97-100.

The court recognized that Wessels was young and had several positive attributes. RP 97. The court also recognized that "vengeance" was not the justice system's goal. RP 98. But deterrence of drunk driving was important. RP 98. The court noted that the period between Memorial Day and Labor Day is a dangerous time for young people on the roads. RP 98. Young people needed to understand that if they drove drunk and hurt someone, punishment would follow. RP 99.

The court continued

I know Mr. Wessels has pled guilty and is intending to be accountable. What's the accountability here. And I think that . . . when people hear, "Well, he got off light," or, "the judge gave him a sentence that doesn't sound too bad," . . . that message just sounds like, "Hm, that's not really that serious of an offense. We can go ahead and go out and party and drive drunk, and if somebody gets killed, it was an accident, and we're from a good family, and we're not going to be responsible."

But I don't see it that way. . . . I see it that this is a manifest problem in society. . . .

[M]y theory in justice is that the community needs a deterrent effect on crime, and the only way to put a deterrent effect on crime . . . and to make society safe is to impose the maximum 114 months. . . . I see that as a . . .

fair sentence. [I]t needs to be a deterrent on other people from having their family have to appear in this court and go through the same thing that these two families have gone through.

RP 99-100.

Wessels timely appeals. CP 47.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO CONSIDER WESSELS'S YOUTH AS A MITIGATING FACTOR IN EVALUATING HIS REQUEST FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

The trial court failed to consider Wessels's youth as a mitigating factor in evaluating his request for an exceptional sentence downward. This constituted an abuse of discretion. This Court should remand for resentencing.

In general, a party cannot appeal a sentence within the standard range. State v. Brown, 145 Wn. App. 62, 77, 184 P.3d 1284 (2008); see also RCW 9.94A.585(1). The rationale is that a trial court that imposes a sentence within the range set by the legislature cannot, as a matter of law, abuse its discretion as to sentence length. Brown, 145 Wn. App. at 78.

But a defendant may appeal a sentence when a trial court has refused to exercise its discretion or relies on an impermissible basis for its refusal to impose an exceptional sentence downward. State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). It is an abuse of discretion for a

trial court to categorically refuse to impose an exceptional sentence downward or to mistakenly believe that it does not have such discretion. Id. Therefore, remand is the appropriate remedy when a trial court imposes a sentence without properly considering an authorized mitigated sentence. Id. at 58-59.

The trial court may impose an exceptional sentence below the standard range if it finds mitigating circumstances by a preponderance of the evidence. RCW 9.94A.535(1). As the case law has developed in recent years, it is now well-established that youth and its attendant characteristics tend to mitigate culpability. See In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 336, 338 n.3, 422 P.3d 444 (2018) (youth as basis for requesting an exceptional sentence downward is consistent with Sentencing Reform Act; moreover, United States Supreme Court cases have supported youth as a mitigator since the publication of Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

Thus, where the sentencing court finds that a defendant's youth and immaturity contributed to his offense, the court may reduce the sentence on that basis. State v. Ronquillo, 190 Wn. App. 765, 780-83, 361 P.3d 779 (2015).

In State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), the Supreme Court noted that certain attributes common to youthful

offenders—including, of relevance here, poor consequence assessment and judgment, impulsivity, and susceptibility to peer pressure—can support exceptional sentences below the standard range. Id. at 691-92.

Citing studies that show adolescent brain development continues “well into a person’s 20s,” the O’Dell court explained that the “penological justifications” for harsh sentences are weaker before the defendant attains cognitive maturity. Id. (quoting Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 2465, 183 L. Ed. 2d 407 (2012)).

This reasoning reflects two principles from the case law on youthful offender sentencing. First, punishment and deterrence are less effective when a person lacks self-control. Miller, 567 U.S. at 472. Second, behaviors that stem from immaturity are, by definition, likely to lessen with age. Id. at 472-73.

The O’Dell court concluded that “youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.” O’Dell, 183 Wn.2d at 696. Moreover, as the court noted, a defendant can demonstrate that youth is a factor even through the testimony of lay witnesses. Id. at 697-98.

Of note in this case, the O’Dell court also held that a trial court errs when it fails to exercise its discretion to consider a defendant’s age, which failure “is itself an abuse of discretion.” Id. at 696-97. A court “must

conduct a meaningful, individualized inquiry” into whether the defendant’s youth should mitigate the sentence. State v. Solis-Diaz, 194 Wn. App. 129, 132, 141, 376 P.3d 458 (2016), rev’d on other grounds, 187 Wn.2d 535, 387 P.3d 703 (2017).

Here, there was evidence before the sentencing court—particularly through the statements made by the retired physician—suggesting that Wessels was less culpable due to his youth. RP 52-53. Although defense counsel was not so focused in her presentation, she did argue Wessels’s youth warranted leniency. E.g. RP 84. However, the prosecutor argued that nothing about Wessels differentiated him from other defendants. RP 91-92. And the court’s remarks indicate it never meaningfully considered Wessels’s youth and its attendant characteristics as a basis for an exceptional sentence downward. Solis-Diaz, 194 Wn. App. at 141. The court instead seemed to treat youth as an aggravating factor. RP 97-100.

The court erred—indeed, abused its discretion—by failing even to exercise its discretion. O’Dell, 183 Wn.2d at 696-97; see also State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (“While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the [sentencing] court to consider such a sentence and to have the alternative actually considered.”).

Under the circumstances, remand is required. Id. at 342-43.

2. IN THE ALTERNATIVE, DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO CITE TO RELEVANT CASE LAW THAT SUPPORTED THE REQUESTED EXCEPTIONAL SENTENCE DOWNWARD.

In the alternative, defense counsel provided ineffective assistance at sentencing by inexplicably failing to cite to relevant state and federal authority that supported the requested exceptional sentence downward. Remand is required for this reason as well.

- a. Wessels had the right to effective representation of counsel at sentencing.

The federal and state constitutions each guarantee the right to effective representation. U.S. CONST. amend. VI; CONST. art. 1, § 22. A defendant in criminal proceedings is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993).

A claim of ineffective assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

- b. Defense counsel's failure to cite to relevant authority on youthful offender sentencing fell below a minimum objective standard of performance.

Defense counsel's failure to cite to relevant case law on youthful offender sentencing fell below a minimum standard for reasonable attorney conduct.

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Trial counsel failed in that duty to Wessels.

In Kyлло, for example, the court found that counsel's proposal of defective pattern instructions was both unreasonable and prejudicial, considering that by the time of Kyлло's trial occurred, case law indicated the pattern instruction was flawed. Kyлло, 166 Wn.2d at 866.

As stated above, the relevant case law holds that youth and its attendant characteristics—including poor consequence assessment and judgment, impulsivity, and susceptibility to peer pressure—tend to mitigate culpability. This has been the law since at least 2015, when the Washington state Supreme Court decided O'Dell, 183 Wn.2d 680.

Wessels, despite possessing several positive traits, demonstrated these youthful failings by drinking and driving and then engaging in the actions that spiraled out of control that night. The retired physician even

touched upon the biological basis for such deficiencies in his presentation to the court. RP 52.

Unfortunately, the sentencing court appeared not to recognize the significance of these characteristics. This is likely because, in the defense presentation, counsel failed to cite to O'Dell, the United States Supreme Court cases from which derives, or to any of the science underlying the reasoning in those decisions. RP 78-90, 92-94.

While counsel's performance is presumed reasonable, a defendant can rebut that presumption by showing that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

There was no strategic reason for counsel to fail to cite relevant, highly persuasive case law supporting an exceptional sentence downward. Counsel failed even to mention such authority when faced with the prosecutor's argument that nothing differentiated Wessels from the typical defendant. RP 91-92. Counsel's failure was objectively unreasonable.

- c. Had defense counsel cited relevant case law on youthful offender sentencing, the trial court was likely to have imposed a shorter term of incarceration.

To prevail on an ineffective assistance claim, an appellant must also show that, had defense counsel performed reasonably, the outcome would likely have been different. Benn, 120 Wn.2d at 663. In this case, that means Wessels must show a possibility he would have received a shorter sentence. That standard is satisfied here.

As explained above, the trial court recognized that Wessels's youth contributed to his crime. But, as stated, the court treated Wessels's youth as an aggravating rather than mitigating factor. RP 98.

The court's reasoning suggests a lack of familiarity with O'Dell and related United Supreme Court precedent. And, as stated, a trial court "must conduct a meaningful, individualized inquiry" into whether the defendant's youth should mitigate the sentence. Solis-Diaz, 194 Wn. App. at 132. Had defense counsel cited the appropriate authorities to the trial court, and the court engaged in the required individualized inquiry, it is likely that Wessels would have received a shorter sentence. Despite the retired physician's brief remarks, the court did not have the benefit of a well-reasoned O'Dell-based argument that Wessels was less culpable due to the characteristics of youth.

Moreover, the court may well have thought twice about making an example of Wessels and, more broadly, thought twice about the usefulness of the court's message to the intended youthful audience. RP 99-100. The usefulness of such a message must be called into question when the audience is likely to be hampered by the same deficits as the defendant.

Wessels will not see the light of day until he is in his 30s. With the benefit of the O'Dell argument—available to, but ignored by, defense counsel—and the resulting individualized inquiry, the trial court might well have viewed the standard range sentence as excessive.

For this reason, as well, remand for resentencing is required.

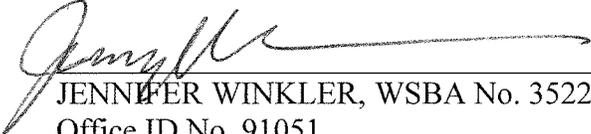
D. CONCLUSION

The trial court failed to consider Wessels's youth as a mitigating factor in evaluating his request for an exceptional sentence downward. Moreover, Wessels received ineffective assistance of counsel at sentencing. Based on either of these arguments, remand for resentencing is required.

DATED this 8th day of November, 2019.

Respectfully submitted,

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