

FILED
Court of Appeals
Division III
State of Washington
12/24/2019 8:15 AM

No. 36880-7-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

CALLEN C. WESSELS, Appellant.

BRIEF OF RESPONDENT

CURT L. LIEDKIE
Asotin County Chief Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. SUMMARY OF ISSUES	1
II. SUMMARY OF ARGUMENT	1
III. STATEMENT OF THE CASE	3
IV. DISCUSSION	8
1. <u>THE COURT DID NOT ABUSE IT'S DISCRETION IN FAILING TO GRANT AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE NO ARGUMENT OR EVIDENTIARY SUPPORT WAS OFFERED.</u>	8
2. <u>COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE THERE WAS INSUFFICIENT EVIDENTIARY SUPPORT AND WHERE SUCH ARGUMENTS WOULD HAVE CUT AGAINST OTHER ARGUMENTS TO SUPPORT DOWNWARD DEPARTURE.</u>	12
V. CONCLUSION	16

TABLE OF AUTHORITIES

U. S. Supreme Court Cases

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) 12, 13, 14

State Supreme Court Cases

In re Pers. Restraint of Crace, 174 Wn.2d 835,
280 P.3d 1102 (2012) 12

State v. Garrett, 124 Wn.2d 504,
881 P.2d 185 (1994) 13

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011) 12

State v. Kyllo, 166 Wn.2d 856,
215 P.3d 177 (2009) 13, 14

In re Personal Restraint of LightRoth, 191 Wn.2d 328,
422 P.3d 444 (2018) 10

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995). 13

In re Pers. Restraint of Meippen, 193 Wn.2d. 310,
440 P.3d 978 (2019) 15

State v. O'Dell, 183 Wn.2d 680,
358 P.3d 359 (2015) 10, 11, 13

State v. Renfro, 96 Wn.2d 902,
639 P.2d 737 (1982) 13

State Court of Appeals Cases

State v. Cunningham, 27 Wn. App. 228,
616 P.2d 702 (Div. I, 1980) 9

State v. Garcia-Martinez, 88 Wn. App. 322,
944 P.2d 1104 (Div. I, 1997) 8-9, 12

State v. Hernandez-Hernandez, 104 Wn. App. 263,
15 P.3d 719 (Div. III, 2001) 14-15

State v. McGill, 112 Wn. App. 95,
47 P.3d 173 (Div. I, 2002) 15

Statutes

RCW 9.94A.585 8

Court Rules

RAP 2.5. 12

I. SUMMARY OF ISSUES

1. DID THE COURT ABUSE IT'S DISCRETION IN FAILING TO GRANT AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE NO ARGUMENT WAS OFFERED NOR WAS ANY EVIDENTIARY SUPPORT OFFERED?

2. WAS COUNSEL INEFFECTIVE FOR FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE THERE WAS INSUFFICIENT EVIDENTIARY SUPPORT AND WHERE SUCH ARGUMENTS WOULD HAVE CUT AGAINST OTHER ARGUMENTS TO SUPPORT DOWNWARD DEPARTURE?

II. SUMMARY OF ARGUMENT

1. THE COURT DID NOT ABUSE IT'S DISCRETION IN FAILING TO GRANT AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE NO ARGUMENT OR EVIDENTIARY SUPPORT WAS OFFERED.

2. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE THERE WAS INSUFFICIENT EVIDENTIARY SUPPORT AND WHERE SUCH ARGUMENTS WOULD HAVE CUT AGAINST OTHER ARGUMENTS TO SUPPORT DOWNWARD DEPARTURE.

III. STATEMENT OF THE CASE

On July 22, 2018, at approximately 1:00 a.m., the Appellant, 21 year-old Callen C. Wessels, was heavily intoxicated and crashed his Dodge pickup, killing his passenger, 19 year-old Jared Brandt Lee. Clerk's Papers (*hereinafter* CP) 1. The Appellant was attempting to pass another vehicle at a high rate of speed, well in excess of the posted limit, when he left the roadway, over corrected and rolled the pickup, killing Mr. Lee. The Appellant then fled the scene on foot. CP 1-2. Officers arrived on scene very shortly after the crash and found Mr. Lee deceased in the passenger seat of the upside down pickup. The officers observed a debris field two to three hundred feet long, littered with, *inter alia*, alcoholic beverage containers. CP 1-2 The cab of the truck was crushed. CP 1.

Approximately twenty minutes after the crash, the Appellant's father called dispatch, reporting that the Appellant had arrived home and was reporting that he had been "car jacked." CP 2. Law enforcement responded and contacted the Appellant who lied to the police and claimed that he had been driving his pickup when a subject with a gun took his vehicle. CP 2. He was not able to provide a description of the assailant. CP 2. He explained that he was driving from one friend's residence to another friend's residence when two men walked up and put a gun to his head. CP 2. He further falsely

claimed he got out of the pickup and then woke up in the ditch and walked home. CP 2-3. The Appellant then asked the investigating officer if his "buddy" was alright, since the car jackers took off in the pickup with his passenger still inside. CP 3. Officers observed the Appellant to be covered in dirt and weed seeds consistent with those observed at the crash site. CP 3. He also had cuts consistent with broken safety glass used in vehicles. CP 3. The injuries and dirt was on his left side, consistent with being the driver of a vehicle involved a crash such as had just occurred. CP 3.

Despite being confronted with inconsistencies, the Appellant maintained his story about being the victim of a car jacking. CP 3-4. The Appellant was provided with a statement form which he completed, repeating largely the events he previously described to the police. CP 4. The Appellant was reminded that the statement contained verification that it was being made under penalty of perjury and he signed it. CP 4. Law enforcement had interviewed the occupants of the second vehicle and determined that the Appellant was the driver of the vehicle at the time of the crash. CP 2. The Appellant was arrested. CP 4.

Subsequently, the Appellant was interviewed by a detective and, after initially denying he was driving, ultimately admitted he was driving at the time of the accident. CP 8. Far from taking responsibility, the Appellant then claimed that Mr. Lee had grabbed

the steering wheel. CP 08. He denied he was trying to pass¹ the other vehicle, and claimed that he accidentally pressed the accelerator when Mr. Lee grabbed the steering wheel. CP 8.

The Appellant was charged by Information with Vehicular Homicide, Hit and Run - Death, Reckless Driving, and Perjury in the Second Degree. CP 12-15. The Appellant subsequently agreed to plead guilty to Vehicular Homicide and Hit and Run - Death, in exchange for the State's agreement to recommend a mid range² sentence of one hundred months incarceration. CP 26. The Appellant entered his guilty pleas on April 24, 2019. CP 29-37.

The Court held a sentencing hearing on May 28, 2019. Report of Proceedings (*hereinafter* RP) 12-104. At the hearing, the State made its agreed upon midrange recommendation. RP 12. The sentencing court heard from members of Mr. Lee's family and friends, both in person and in writing. RP 16 - 38. The sentencing court then heard from a large number of supporters of the Appellant. RP 40 - 78. Most, if not all of these supporters spoke of how the Appellant was a good man, responsible, and a person of good character. RP 44-78. They complained that prison would not benefit the Appellant.

¹ The other evidence and testimony made clear that the Appellant had been trying to pass the other vehicle, which had left the same party and was going to the other party. CP 2, 9.

²The Appellant's standard range on the most serious charge was 86 to 114 months. CP 36

RP 43, 76. They spoke of how he had a clean criminal record until he was 21 years old.

One particular supporter, Dr. Richard Eggleston,³ a retired eye surgeon, spoke primarily about the character of the Appellant. RP 51 - 54. In passing, he mentioned how car companies generally won't rent vehicles to males under 25 years of age "because most of us males at that age are not known for repeatable good judgements." RP 52. He further stated that "our brain neurons usually don't get wired properly until that age." RP 52. Dr. Eggleston did not speak specifically regarding the Appellant, instead opining that the Appellant was of good and character, not a risk to the community. RP 53.

No one spoke of the Appellant or described him as impulsive, irresponsible, or immature for his chronological age. RP 40-78 No evidence, testimony, or statement was offered that the Appellant otherwise suffered from "adolescent brain derangement syndrome." RP 40-78.

Counsel for the Appellant asked the sentencing court for a sentence well below the standard range. RP 79 - 90. Therein, counsel reminded the court of the Appellant's age, and cultural pressures on young men to drink, arguing to the effect, "boys will be boys." RP 79 - 80. Counsel argued that the State's recommendation

³Neither Dr. Eggleston, nor any of the family and friends that spoke at sentencing were sworn in or subject to cross examination.

was vengeance for vengeance sake. RP 82. Instead, counsel sought to sway the court by noting the Appellant's good character and responsible behavior, and argued that prison would have not beneficial impact on the Appellant, and rather would likely have a negative impact on him. RP 81, 88.

The court discussed the facts of the case, recognizing that the Appellant's Blood Alcohol Content (BAC) was 0.15, well in excess of the legal limit. RP 97. The court started to refer to the crash as an "accident" but expressed reservations at such a characterization considering the Appellant's high BAC and reckless actions that included a high speed attempt to pass another vehicle. RP 97. The court recognized the Appellant's young age, noting "he's a young man." RP 97. The Court further considered the policy concerns regarding punishment, and recognized that deterrence is a strong consideration in cases like these. RP 98. Ultimately, the court determined that a sentence at the high end of the range (114 months) was necessary to deter future similar conduct, especially for younger drivers and that a lesser sentence would undercut the goals of deterrence. RP 97 - 100.

The Appellant now appeals claiming that the court failed to consider his age as a mitigating factor and that the trial counsel was ineffective for failing to raise age as mitigation. RP 47.

IV. DISCUSSION

1. THE COURT DID NOT ABUSE IT'S DISCRETION IN FAILING TO GRANT AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE NO ARGUMENT OR EVIDENTIARY SUPPORT WAS OFFERED.

The Appellant argues that the sentencing court abused its discretion in failing to consider the Appellant's age as mitigation for an exceptional sentence downward. As a general rule, the trial court's refusal to grant an exceptional sentence and subsequent imposition of a sentence within the standard range is not reviewable. RCW 9.94A.585(1). Even where such sentence is reviewable, review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. See State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (Div. I, 1997). As discussed in Garcia-Martinez:

A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no

basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection.

Id. As a starting point, the sentencing court herein did not categorically reject the possibility of imposing an exceptional sentence. Instead, the court considered the facts of the case, including the age of the Appellant, and further considered the deterrent impact of a sentence in this case. Deterrence is a wholly appropriate consideration for the sentencing court. See State v. Cunningham, 27 Wn. App. 228, 234, 616 P.2d 702 (Div. I, 1980), *aff'd*, 96 Wn.2d 31, 633 P.2d 886 (1981) (“*Individualized sentencing does not require that the trial judge disregard other relevant circumstances, including the current prevalence of the offense and the deterrent effect of the sentence.*”) Considering the Appellant’s age (21), his actions after the fact, and erosion of the deterrent impact of a sentence below the standard range, the court was well within its discretion to reject the Appellant’s argument. The court did not categorically reject mitigation, nor did it ignore its discretion to deviate from the sentencing guidelines.

The Appellant’s argument herein presupposes that age is somehow a *per se* mitigating factor and that the court was somehow

obligated to consider it as such. This is not the law. In State v. O'Dell, 183 Wn.2d 680, 689, 358 P.3d 359 (2015), the Supreme Court specifically rejected such an approach. The O'Dell Court stated "age is not a per se mitigating factor" that automatically entitles young defendants to an exceptional sentence downward. 183 Wn.2d at 695. A defendant must demonstrate that his youthfulness relates to the commission of the crime." In re Personal Restraint of LightRoth, 191 Wn.2d 328, 336, 422 P.3d 444 (2018). Here, while discussing his age, the statements proffered by the defense painted the Appellant as anything but impulsive or immature. Rather he was shined up and put on display as a model citizen, perhaps more responsible than other young men his age. No evidence was submitted demonstrating that his age played any part in the crime. The Appellant points to Dr. Eggleston's statement. However, while averring generally to youth and impulsivity, there was no individualized claims that this is what caused the Appellant to commit the crimes. Even Dr. Eggleston spoke glowingly of a responsible young man who he would willing to hire on as an employee. It is clear that Dr. Eggleston spoke not as an expert in child psychology, but rather, as character witness with the clout of a retired eye surgeon.

While the record showed that he was 21 years old when he killed his friend and left the scene, there was no evidence that youth

mitigated his conduct in any way. In O'Dell, the defendant therein was described as quite immature. The Court therein noted:

In this case, the defense offered just such lay testimony that a trial court should consider in evaluating whether youth diminished a defendant's culpability. *E.g.*, VRP (Mar. 6, 2013) at 62–63 (mother testifying that after O'Dell committed his offense, "[a]s I was cleaning a pack from his room so that we could move, I was struck by the contents of his room. In his room I found his Lego collection, a poster of Daffy Duck on Harley–Davidson, the stuffed kitty that had been on his bed since he was born.... [H]e's only a kid. He likes to play video games, and he likes to go *698 hiking, and he likes to play music and tease his sisters. He rolls his eyes when he's forced on a family outing ..."); see also *id.* at 42 (friend and former babysitter of the defendant testifying that he "has lots of growing up to do"), 44 (friend testifying that O'Dell "thinks and ... talks and ... acts like I did when I was 18–years old.... [H]e is still forming his own identity ... [and needs a chance to] become a corrected and productive member of society"), 48 (family's pastor testifying that "[w]hen I met with [O'Dell] ... just a couple weeks ago, I saw the same immature kid who wanted to be with good people and do good things"), 51 (family friend testifying that "[s]tudies show that boys do not mature as quickly as girls do. This remains true for Sean O'Dell.... Even though his birth date says he was 18, mentally, he was not"), 56 (cousin testifying that in "the time I've spent with [O'Dell] ... I think the most grown-up thing I've ever done with him was play a video game.... He's just a kid. He's a young, young kid. He's a boy."), 59 (sister testifying that "[e]motionally, [O'Dell]' s still just a kid who likes hanging out, video games and family nights at the movies").¹³

O'Dell, at 697–98. This description of the defendant in O'Dell stands in sharp contrast to the picture of the Appellant painted by the defense and his supporters. On this evidence, the court, quite frankly,

would have abused its discretion were it to have granted a downward exceptional sentence on the record before it.

Further, the court is not required to consider mitigating factors that are not properly raised nor can it be considered to have abused its discretion in not doing so. Garcia–Martinez, 88 Wn. App. at 329. Here, the Appellant did not argue his youth. He argued his good character. His failure to raise the issue below should preclude review in any event. See RAP 2.5.

2. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON AGE WHERE THERE WAS INSUFFICIENT EVIDENTIARY SUPPORT AND WHERE SUCH ARGUMENTS WOULD HAVE CUT AGAINST OTHER ARGUMENTS TO SUPPORT DOWNWARD DEPARTURE.

Presumably recognizing that the issue was not properly preserved for appellate review, the Appellant asserts that his privately retained defense counsel was ineffective for failing to argue youth as a mitigating circumstance. To establish ineffective assistance of counsel, the Appellant must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); In re Pers. Restraint of Crace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Further, the Appellant must overcome the "strong presumption that counsel's performance was reasonable." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "When counsel's

conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). See also State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics.’” (quoting State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982))).

Here, it was clear that the defense strategy was to polish the Appellant up as much as possible with the court and present him in the best light possible. The Appellant now complains that counsel should have cited the O’Dell decision to the sentencing court and argued his youthful impulsivity. This would have been wholly counter to and self defeating of his arguments concerning his good character and maturity. The Appellant brought in a number of persons who spoke positively of his character and maturity. This was not an unreasonable strategy, given the facts of the case. The fact that hindsight might suggest that a different strategy might have been preferable is of no moment. See Strickland, 466 U.S. at 689. Further, the record does not support the Appellant’s argument. There is nothing therein indicating that there was any evidentiary support for such a claim, especially considering the supporters’ statements. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Accepting the Appellant's argument would unfairly allow him to argue one strategy, and when that didn't work, reverse course and argue a wholly inapposite position. The Appellant has failed to establish deficient performance by his privately retained counsel.

Not only does the Appellant fail to establish deficient performance, he cannot demonstrate prejudice. To satisfy the prejudice prong of the Strickland test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." Kyllo, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

Here, the Appellant's argument is basically the same argument which was rejected by this Court in State v. Hernandez-Hernandez, 104 Wn. App. 263, 15 P.3d 719 (Div. III, 2001). There, the court sentenced the defendant to a standard range sentence, and on appeal, the defendant made a similar argument to the Appellant's argument here. Specifically, the defendant argued that his trial counsel was ineffective for failing to request an exceptional downward sentence based on applicable case law. *Id.* at 265-66. The Court rejected the argument and concluded that the defendant could not

prove the prejudice prong of his ineffective assistance of counsel claim. *Id.* at 266. The court reasoned that, even without his counsel's argument, the trial court had the discretion to impose an exceptional sentence downward. *Id.* Thus, it was "not convinced the outcome would have been different had defense counsel argued [the relevant case law] to support an exceptional sentence." *Id.*

Here, the sentencing court not only rejected claims for leniency, it sentenced the Appellant above the State's recommendation. There is nothing in the record here to suggest that the sentencing court would have done otherwise. The Appellant points to a mere, hypothetical possibility that such argument would have changed the outcome. This is insufficient. See In re Pers. Restraint of Meippen, 193 Wn.2d. 310, 317, 440 P.3d 978 (2019) ("*M]ere possibilities do not establish a prima facie showing of actual and substantial prejudice.*"). This is not a case, like State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (Div. I, 2002), where the court indicated a desire to impose an exceptional sentence downward, but incorrectly believed it lacked the ability to do so. *Id.* at 98-99. In this case, the sentencing court weighed the Appellant's circumstances and the facts of the case, considered appropriate factors, exercised its discretion, and determined that a standard range sentence at the high end was appropriate. The Appellant has failed to demonstrate

that, but for counsel's failure to cite to case law, the outcome would likely have been different. The sentence imposed below should be affirmed.

V. CONCLUSION

The Appellant was sentenced within the standard range. The Appellant fails to demonstrate that the sentencing court abused its discretion in so sentencing him to the statutory presumptive sentence. The Appellant's argument, aided by hindsight, that counsel was deficient should also be rejected. The State respectfully requests this Court enter an opinion affirming the sentence imposed by the trial court.

Dated this 23rd day of December, 2019.

Respectfully submitted,



CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061

COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

CALLEN C. WESSELS,

Appellant.

Court of Appeals No: 368807

DECLARATION OF SERVICE

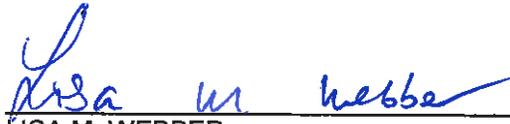
DECLARATION

On December 24, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

JENNIFER WINKLER
winklerj@nwattorney.net
sloanej@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on December 24, 2019.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

December 24, 2019 - 8:15 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36880-7
Appellate Court Case Title: State of Washington v. Callen Christopher Wessels
Superior Court Case Number: 18-1-00128-7

The following documents have been uploaded:

- 368807_Briefs_Plus_20191224081510D3958164_5359.pdf
This File Contains:
Affidavit/Declaration - Service
Briefs - Respondents
The Original File Name was Wessels Brief.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- bnichols@co.asotin.wa.us
- winklerj@nwattorney.net

Comments:

Sender Name: Lisa Webber - Email: lwebber@co.asotin.wa.us

Filing on Behalf of: Curtis Lane Liedkie - Email: cliedkie@co.asotin.wa.us (Alternate Email:)

Address:
135 2nd Street
P.O. Box 220
Asotin, WA, 99402
Phone: (509) 243-2061

Note: The Filing Id is 20191224081510D3958164