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September 23, 2016
Court of Appeals
Division I
State of Washington

NO. 74959-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

D'MARCO MOBEY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

D'Marco Mobley asked the court to consider the circumstances of his youth as distinguishing his blameworthiness from the adults for whom the standard sentencing range was created. The court refused because he did not present records documenting his deficient neurological development. Because the court misconstrued the requirements of *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015), and the United States Supreme Court decisions on which it is based, a new sentencing hearing is required.

B. ASSIGNMENT OF ERROR.

The trial court abused its discretion when it failed to meaningfully consider youthfulness as a mitigating factor as directed by the Supreme Court.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

The Supreme Court held that the differences between young offenders and other adult offenders can constitute a mitigating factor justifying the imposition of an exceptional sentence. Where the trial court did not address the differences between Mr. Mobley and other adult offenders, did the court meaningfully consider youth and its attributes as directed to by the Supreme Court?

D. STATEMENT OF THE CASE.

This Court remanded Mr. Mobley's case for resentencing after a double jeopardy violation. CP 38, 60 (unpublished opinion in COA No. 68766-2-I). Mr. Mobley asked for an exceptional sentence below the standard range based on the mitigating effects of his youth that distinguish his blameworthiness and amenability to rehabilitation, based on the recent Supreme Court decision in *O'Dell*. CP 127-36 (defense presentence report); Supp. CP __, sub. no. 253 (presentence report with psychological evaluation attached). He was 19 and 20 years old at the time of the offense, and initially received a sentence of 444 months to life in prison. CP 21.

Mr. Mobley "was born addicted to cocaine" and five weeks premature. Supp. CP __, sub. no. 253 (O'Neal evaluation at 2); Supp. CP __, sub. no. 230, p. 2. "His mother spent most of his first two years of life in jail" due to cocaine addiction. *Id.* He lived with his father from six to 10 years old; his father was a drug dealer who Mr. Mobley witnessed being shot. Supp. CP __, sub. no. 230, p. 2. As a child, he was beaten by his aunt. *Id.* Following these traumatic experiences, he was diagnosed as a teenager with post-traumatic stress disorder (PTSD),

attention deficit hyperactivity disorder (ADHD), and major depressive disorder. *Id.*

The State did not contest Mr. Mobley's traumatic and difficult childhood circumstances. It countered that he could only receive an exceptional sentence if he showed he did not understand the wrongfulness of his conduct. RP 57. It argued that the circumstances of the offense, involving efforts to convince two young women to prostitute themselves, was not a childish enterprise and he should be treated as a mature adult. RP 55-56.

The defense asked for an exceptional sentence of 210 months to life, which would accord with the plea bargain he was initially offered by the State but which he rejected based on inaccurate advice from his attorney, which is presently the subject of a pending CrR 7.8 motion. RP 23-25, 52, 106-17.

The court refused to impose an exceptional sentence. RP 62-64. It complained that Mr. Mobley had not offered evidence of deficient neurological development. RP 62. It also noted that when testifying at trial, Mr. Mobley did not display the attributes of youth. RP 63. It concluded that because Mr. Mobley was now older and more mature,

he was unable to demonstrate how his youthfulness undercut his culpability. RP 63.

Before this Court's remand for resentencing, Mr. Mobley was serving a standard range indeterminate sentence of 444 months to life.¹ CP 21. The court had imposed a low end sentence at Mr. Mobley's initial sentencing hearing. 4/27/12RP 45. On resentencing, the court imposed a sentence at the low end of the reduced standard range, ordering Mr. Mobley to serve an indeterminate term of 333 months to life. RP 76, 81.

E. ARGUMENT.

The sentencing court abused its discretion when it failed to properly consider the attributes of Mr. Mobley's youth as a mitigating factor.

1. Youthfulness is a substantial and compelling basis for a mitigated sentence.

Children are "constitutionally different from adults for purposes of sentencing." *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012). They are categorically less blameworthy and

¹ He was initially convicted in 2012, for offenses that occurred during January through June, 2011. CP 17-18. These convictions include promoting commercial sexual abuse of a minor, promoting prostitution in the second degree, robbery in the first degree, and two counts of rape in the first degree, and are described in the Court of Appeals opinion, at CP 38-40 (COA 68766-2-I).

more likely to be rehabilitated. *Id.*; *Roper v. Simmons*, 543 U.S. 551, 572, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). The principles underlying adult sentences -- retribution, incapacitation, and deterrence -- do not to extend juveniles in the same way. *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Children are less blameworthy because they are less capable of making reasoned decisions. *Miller*, 132 S. Ct at 2464. Scientists have documented their lack of brain development in areas of judgment. *Id.* Also, children cannot control their environments. *Id.* at 2464, 2468. They are more vulnerable to and less able to escape from poverty or abuse and have not yet received a basic education. *Id.* Most significantly, juveniles' immaturity and failure to appreciate risk or consequence are temporary deficits. *Id.* at 2464. As children mature and "neurological development occurs," they demonstrate a substantial capacity for change. *Id.* at 2465.

Because "youthfulness" is more than merely chronological age; *O'Dell* extends these principles to youthful offenders who commit offenses as adults. 183 Wn.2d at 695-96. Based on the analysis in *Miller*, *Graham*, and *Roper*, and the science underlying these cases, the Court held youthfulness, by itself, is a valid mitigating factor upon which a court may impose an exceptional sentence. *Id.* at 696.

Culpability is not defined by the defendant's participation in the offense. Instead, among the relevant factors the judge should consider as mitigation are: (1) immaturity, impetuosity, and failure to appreciate risks and consequences; (2) lessened blameworthiness and resulting diminishment in justification for retribution; and (3) the increased possibility of rehabilitation. *O'Dell*, 183 Wn.2d at 692-93. The court concluded each of these "differences" between adults and young offenders could justify a mitigated sentence. *Id.* at 693.

2. The trial court must comply with the Supreme Court's mandate to meaningfully consider youthfulness as a mitigating factor.

When a defendant has requested a mitigated exceptional sentence, review is available where the court refused to exercise discretion or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998).

While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative considered.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis in original).

O'Dell concluded a court's failure to "meaningfully consider youth as a possible mitigating circumstance" constituted "an abuse of discretion subject to reversal." 183 Wn.2d at 696-97. The Supreme Court remanded *O'Dell's* case for the trial court to consider whether his young adult age and the transient nature of his immaturity substantially distinguished him from the adults for whom the standard range was crafted.

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). But this statute only precludes challenges to the amount of time imposed when the time is within the standard range. *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A defendant may challenge the procedure by which a sentence within the standard range is imposed, including the improper consideration of the availability of an exceptional sentence. *State v. Mail*, 121 Wn.2d 707, 712-13, 854 P.2d 1042 (1993); *see O'Dell*, 183 Wn.2d at 698-99.

3. *Mr. Mobley's youthfulness, coupled with the traumatic childhood circumstances that delays brain development, constitute mitigating circumstances, contrary to the court's focus on his present-day maturity.*

Miller addressed at length the “hallmark features” of youth, “immaturity, impetuosity, and failure to appreciate risks and consequences.” 132 S. Ct. at 2468. Critically, the Court noted that beyond a youth’s lessened “moral culpability,” the transitional nature of adolescence means it is much more likely a young person’s “deficiencies will be reformed” as his “neurological development occurs.” *Id.* at 2464-65.

In assessing whether any fact is a valid mitigating factor the trial court’s task is to determine whether that fact differentiates the current offense and offender from those in the same category. *O’Dell*, 183 Wn.2d at 690. What makes youthfulness a mitigating factor is the degree to which it distinguishes youthful offenders from older offenders. *Roper* observed it is “misguided” to equate adolescent failings with those of older offenders. 543 U.S. at 570. It is precisely the “differences” between youthful and other offenders which are the valid mitigating factors. 183 Wn.2d. at 693. Thus, the relevant question is to what degree did Mr. Mobley’s youth differentiate him and his

offense from other adult offenders. The trial court did not engage in that analysis.

The trial court instead focused on Mr. Mobley's demeanor at trial and the lack of specific evidence proving neurodevelopmental problems. RP 62-63. The judge summarily stated that he did not appear immature and did not display distinctive "attributes of youth" during the trial. RP 63. The judge acknowledged that the difficulty of recreating his youthfulness as he aged: "he simply couldn't do so because of the passage of time." *Id.* Similarly, a psychological evaluation described Mr. Mobley's current condition, including the effects of spending several years in prison since his conviction, and the evaluator was unable to get records from his childhood. RP 50-51, 63.

The court erred by demanding concrete proof of diminished neurological development. The trial court's quest for neurological records documenting diminished brain capacity sets an unreasonable bar. As *O'Dell* explained, generally accepted science documents that in a young person, the last part of the brain in develop are "areas of risk and consequence, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." 183 Wn.2d at 692.

Mr. Mobley offered pertinent information documenting the diminished culpability that stems from his youthfulness at the time of the offense. He had an extremely dysfunctional childhood, including being born addicted to drugs, with his mother in prison during his formative years, witnessing violence perpetrated against his father who was shot in his presence, and suffering as a victim of physical abuse himself. RP 51; Supp. CP __, sub. no. 230, p. 2.

As *Miller* explains, one reason the youthfulness of the offender is a significant sentencing consideration is that young people have had “limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” 132 S.Ct. at 2458. But because young peoples’ brains are still developing, their offending behavior is “less likely to be evidence of irretrievable depravity.” *Id.* (internal citation omitted). Consequently, there is less penological justification for imposing a harsh, adult-based sentence on a person whose behavior stems from immature brain development.

Experiencing childhood trauma alters neural pathways and impairs brain development.

Simply stated, children reflect the world in which they are raised. If that world is characterized by threat, chaos, unpredictability, fear and trauma, the brain will reflect

that by altering the development of the neural systems involved in the stress and fear response.

Bruce D. Perry, *Traumatized Children: How Childhood Trauma Influences Brain Development*, American Academy of Experts in Traumatic Stress (last viewed Sept. 21, 2016).²

Studies of brain development show “a lasting alteration in the basic architecture and connectivity of the brain” due to extreme adversity in early childhood, including cognitive function, memory, and emotion. Stacy S. Drury, Michael S. Scheeringa, Keith E. Schmidt, Charles A. Nelson, *From Biology to Behavior to the Law: Policy Implications of the Neurobiology of Early Adverse Experiences*, 10 Whittier J. Child & Fam. Advoc. 25, 38 (2010). The manifestations of impaired neural connections from childhood trauma, including aggression and hostility, are usually transitory because a young person’s brain is not fully developed and “deficiencies will be reformed with maturation . *Miller*, 132 S.Ct at 2464-65; *see also* H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, U.S. Dep’t of Health and Human Servs. 10 (2003) (discussing effect of childhood trauma on brain development).

² Available at: <http://www.aets.org/article196.htm>.

In order to consider youthfulness as a mitigating factor, the relevant comparison is not just other youthful offenders, but all other offenders convicted of the same offense, the vast majority of which are necessarily older. Within that group, the relevant question is whether Mr. Mobley's still developing brain function and transient immaturity due to his youthfulness differentiates him and his offense from the offenses of those older individuals for whom the standard range was crafted. The legislature set the standard range without necessarily considering the way that a young adult culpability is less than a mature adult's. *O'Dell*, 183 Wn.2d at 693.

Similarly, the trial court failed to give effect to the Supreme Court's caution that the hallmark attributes of youth are transient. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570. The trial court never assessed Mr. Mobley's likelihood for rehabilitation brought about by maturation as compared to older adult offenders.

The prosecution erroneously focused on whether Mr. Mobley proved he lacked the capacity to understand right and wrong. RP 57.

The ability to understand right and wrong is not the analysis required by *O'Dell* or *Miller*. Youthful offenders may well understand right and wrong and yet impetuously make the wrong choice. There could be little doubt that the juvenile defendants in *Miller* understood murder was wrong. That, however, does not account for the fact that immature judgment and impetuosity, classic traits of youth, contributed to their conduct. More importantly, merely knowing right from wrong does not account for the significant remaining deficits in young people.

The trial court abused its discretion by failing to consider whether the scientifically established effect of deficits in a young person's brain development, particularly one who has experienced an indisputably chaotic childhood, distinguish his blameworthiness from the adults for whom the standard range was created. A new sentencing hearing is required.

F. CONCLUSION.

Mr. Mobley's sentence should be reversed and his case remanded for a new sentencing hearing.

DATED this 23rd day of September 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Nancy Collins". The signature is written in a cursive, flowing style.

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74959-5-I
v.)	
)	
D'MARCO MOBLEY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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