NO. 1009054

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.K.U.,

Petitioner.

STATE'S RESPONSE TO APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

Treated as an Answer to Petition for Review

DANIEL T. SATTERBERG
King County Prosecuting Attorney

GAVRIEL JACOBS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Rules and Regulations

Washington State:

A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. D.K.U., No. 82663-8-I.

C. STATEMENT OF THE CASE

On March 5, 2020, Lyubomirl Gural arranged to sell his phone over the Internet. CP 3-5. The buyer, who identified himself as "Chris Montay," agreed to meet at Gural's home to complete the sale. Id. When Gural walked outside to meet the buyer, however, he was ambushed by four Black males. Id. One, later identified as D.K.U., was armed with a pistol. Id. D.K.U. demanded Gural surrender "everything you got." Id.

When D.K.U. was momentarily distracted, Gural tried to grab the gun. Id. After a brief struggle, D.K.U. pistol-whipped Gural, causing a three-inch laceration on his forehead. Id. All four assailants then ran away. Id. As they fled, D.K.U. accidentally dropped his own cell phone. Id. The phone

connected D.K.U. to the robbery, and Gural later identified D.K.U. as the gunman in a photographic montage. Id.

The State charged D.K.U. with one count of first-degree robbery. CP 1. At arraignment, the prosecutor asked the court to place D.K.U. on electronic home detention. RP 8. The court instead released D.K.U. on personal recognizance, but imposed several conditions of release: (1) that D.K.U. maintain contact with his attorney and probation counselor; (2) that he appear for all court dates; (3) that he have no contact with the alleged victim; (4) that he commit no new criminal law violations; (5) that he regularly attend school; (6) that he not use alcohol or non-prescribed drugs; (7) that he not possess any weapons; and (8) that he reside in a location approved of by a parent or guardian. RP 15-18.

D.K.U. eventually pled guilty to an amended charge of second-degree robbery. CP 6, 15. As part of the plea colloquy, D.K.U. acknowledged that the State would recommend a

standard range term of 15-36 weeks, but that his attorney could request an "Option B" alternative sentence. CP 11; RP 38.[1]

After D.K.U. pled guilty, the court granted defense counsel's motion to continue the disposition hearing over the prosecutor's objection. RP 49-53, 65. D.K.U. then failed to appear at the next scheduled hearing, but the court declined the prosecutor's request for a bench warrant. Supp. CP __ (sub. no. 23).

At sentencing, the prosecutor recounted the serious facts of the offense, which included an assault at gunpoint, and noted that D.K.U.'s prior robbery conviction had also targeted a stranger. RP 65-66. The prosecutor further observed that

[1] "Option B" is a "suspended disposition alternative." RCW 13.40.0357. It allows the court to suspend the standard range term pending completion of "local sanctions and…educational or treatment requirements." Id. The "Option B" can be revoked, and the suspended sentence imposed, if the defendant "fails to comply with the suspended disposition." Id.

D.K.U. had "fail[ed] to engage in…treatment" despite extensive efforts:

> …our hope was that the respondent would really work to put together a treatment plan and engage in a treatment plan so that we could be confident that he would get the services he needed in the community.
>
> Unfortunately, that just has not really happened. He is not in school. [D.U.'s probation counselor] has written a very extensive report on all of the attempts that she has made to set up mental health, to get respondent engaged in school, and that hasn't happened.

RP 65-67. The State reiterated its recommendation for a standard-range sentence. RP 67.

D.K.U.'s juvenile probation counselor was "[u]nable to support option B" because D.K.U. was "taking…very little responsibility for the incident," had largely failed to cooperate with service providers, and continued to engage in "high-risk behavior." RP 67-70. D.K.U. had never enrolled in school, and the probation department did not even know where he was living. RP 69-70. Despite months of effort, D.K.U. "ha[d] not

started…any kind of…program[s] that Community Passageways has to offer."[2] RP 70.

Defense counsel explained that D.K.U. was "very difficult to get ahold of" because he had not had a phone "for a while." RP 72-73. She stated that D.K.U. had not been attending school because he was "bouncing around" between homes in Tacoma and Federal Way. RP 72-73. Counsel claimed D.K.U. was planning to enroll in school the following week. RP 73-74.

Defense counsel further asserted that D.K.U.'s mentor was "trying to build rapport with him…to kind of spur engagement in everything that Community Passageways has to offer." RP 72. As further evidence of D.K.U.'s "growth [and] momentum," counsel noted he had recently undergone a mental

[2] Community Passageways is a non-profit organization that mentors at-risk youth and connects them with support services. https://www.communitypassageways.org/mission.

health assessment, despite having declined to do so earlier, and that he had appeared for that day's court hearing. RP 74-76.

Finally, defense counsel stated that D.K.U. had connected with "Young Businessmen of Washington," a mentoring organization run by Thrett Brown. RP 77. But D.K.U. had done nothing more than have "some phone conversations" with Brown. Brown had never met with D.K.U. in-person, was not present at the disposition hearing, and provided no written materials. RP 77-79, 90.

Defense counsel also conceded that:

> …[w]e hope always that kids will be like, Yes, I want all these services. Let me get involved. Let me…go forward. But it's just not always the case. And this is a kid where that just hasn't been the case…there's been bumps. It's taken us a while to get here.
>
> …
>
> …his engagement has not been nearly what we would hope for, but he has engaged, at least on some things at some points.

RP 75, 83.

The court expressed its concerns in a dialogue with defense counsel. RP 80. It noted that D.K.U. "has had chances before"; in fact, D.K.U. was already under supervision for a previous robbery conviction when he committed the instant offense. RP 7-8, 80. Counsel responded that "kids need…as many chances as we can offer them." RP 84.

The court was skeptical since D.K.U. had only become amenable to services "in the last week," and that despite various organizations having spent months "trying to build community bridges…a lot of this is just starting." RP 80-83. The court noted it had "no real proof of amenability other than the statements made here today. I don't even have a treatment plan…they say they haven't spoken much." RP 90.

The court determined that "the best, safest route" for D.K.U. was a term at the Juvenile Rehabilitation Administration (JRA), where he would "get a few months just to focus on [himself]." RP 91. The court imposed a standard-

range term of 15-36 weeks.[3] CP 19. The Court of Appeals affirmed D.K.U.'s sentence in an unpublished opinion. D.K.U., No. 82663-8.

D. THIS COURT SHOULD DENY D.K.U.'S PETITION FOR REVIEW

RAP 13.4 governs review by the Washington Supreme Court "of a Court of Appeals decision terminating review…" It states in relevant part that "[a] petition for review will be accepted by the Supreme Court only":

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

[3] D.K.U. repeatedly refers to this as a "prison sentence." Pet. for Rev. at 24-25, 29. However, respondents sentenced in juvenile court are housed in secure residential facilities, not prisons run by the Department of Corrections. This difference is not merely rhetorical. Juveniles sent to the maximum-security juvenile facility at Green Hill are each assigned a counselor who works with that individual "to assess their needs and provide appropriate treatment." https://www.dcyf.wa.gov/services/juvenile-rehabilitation/residential-facilities/green-hill. The facility provides opportunities for "educational and vocational training," mentoring, and cultural programming. Id. While juvenile detainees are in custody, their experience is fundamentally different than adult prison inmates, and this was an explicit part of the trial court's reasoning.

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b); RAP 13.5A.

D.K.U. does not specify which subsection of RAP 13.4(b) he is relying on. Pet. for Rev. at 1, 35. The State assumes that review is sought under RAP 13.4(b)(3) and RAP 13.4(b)(4).

1. THIS CASE PRESENTS A POOR VEHICLE TO ADDRESS THESE ISSUES BECAUSE D.K.U. RELIES ON EVIDENCE AND ARGUMENT PRESENTED FOR THE FIRST TIME ON APPEAL.

A trial court's decision whether to impose an alternative sentence is generally reviewed for an abuse of discretion. See State v. Sims, 171 Wn.2d 436, 445, 256 P.3d 285 (2011) (granting SSOSA "entirely at a trial court's discretion").

D.K.U. relies heavily on academic authorities presented for the first time on appeal to assert "that Washington disproportionately sentences youth of color to harsher sentences." Pet. for Rev. at 9-22, 29. But when a trial court exercises discretion, its actions must be reviewed based on the information it possessed at the time it ruled. See State v. Bluford, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017) (in context of joinder: "we review only the facts known to the trial judge at the time…[a]fter all, a judge cannot abuse his or her discretion based on facts that do not yet exist").

This case is a poor vehicle for D.K.U.'s constitutional argument since none of the information he wishes this Court to consider was presented at sentencing. As the Court of Appeals observed:

> No one discussed D.K.U.'s race beyond defense counsel's passing reference to "people of the Black community hav[ing] a hard time trust the court, [and] trusting services that are connected to the court," which defense counsel mentioned to explain D.K.U.'s lack of engagement with service providers. Defense counsel did not argue D.K.U.'s experiences as a Black youth caused

> him to mistrust court services, nor did she argue D.K.U.'s race impacted the court's sentencing decision.

D.K.U., No. 82663-8 at 3-4.

Because of this failure, both the trial court and the prosecutor were deprived of any opportunity to address this issue and develop a proper factual record.

D.K.U. relies heavily on State v. Quijas, 12 Wn. App. 2d 363, 457 P.3d 1241 (2020), to support his argument. The issue in Quijas was "whether the juvenile court was required to rule on [his] claim that the declination process was tainted by racial prejudice." Id. at 373. The error in Quijas was not that the trial court failed to consider its own potential biases *sua sponte*, but that it refused to address an argument that Quijas had properly raised and supported with meaningful evidence. Id.

Although Quijas may require an investigation on the record in some cases, this duty arises only **"once a claim of racial bias is raised**." Id. at 374 (emphasis added). Unlike Quijas, D.K.U. made no allegations of racial bias at sentencing,

nor did he provide the court with any evidence that minority respondents are disproportionately denied Option B sentences. RP 84. Because the sentencing court in this case did not "ignore the evidence or the claim" of racial basis, Quijas is inapplicable. Quijas, 12 Wn. App. 2d at 375.

The trial court could not have abused its discretion by failing to credit information that D.K.U. never presented. Additionally, this Court typically does not address arguments "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (discussing RAP 2.5). D.K.U.'s petition should be denied.

2. D.K.U.'S ARGUMENT MISCHARACTERIZES THE FACTS OF THIS CASE.

A trial court abuses its discretion *per se* if a sentencing decision is based on an "impermissible factor" such as race. State v. Williams, 199 Wn. App. 99, 112, 398 P.3d 1150 (2017). Presumably recognizing this as his only avenue for

relief, D.K.U.'s petition has attempted to unfairly characterize the trial court's thoughtful ruling.

D.K.U. has omitted several material facts that were considered by the trial court and are detrimental to his argument:

> - D.K.U.'s petition omits the facts of the crime, which involved the robbery of a stranger at gunpoint during which D.K.U. pistol-whipped the victim. RP 65-66; CP 3-5.
>
> - D.K.U. neglects to mention that he was on probation for a similar robbery when he committed the instant offense. RP 7-8, 65-66.
>
> - D.K.U. cites his engagement with "Young Businessmen of Washington," but in actuality he had done nothing more than have "some phone conversations" with the owner. Pet. for Rev. at 3-4; RP 77-79, 90.
>
> - D.K.U. highlights his belated connection with community services. Pet. for Rev. at 4. However, despite being given months to engage with these programs and prepare for sentencing, D.K.U. had not completed a treatment plan "of any kind," "ha[d] not started…any kind of…program[s]," and the provider stated that "they haven't spoken much." RP 70, 90.
>
> - D.K.U. never enrolled in school despite it being a longstanding condition of release. RP 17. While his petition identifies some of the structural barriers he faced,

> D.K.U. omits that his probation counselor submitted "a very extensive report on all of the attempts that she has made…to get respondent engaged in school…" RP 65-67.

In short, D.K.U. committed violent offenses, had shown little interest in complying with court orders or services, and continued to engage in "high-risk behavior." RP 67

It has long been the law in Washington that "[a] judge is not presumed to be biased, and one alleging bias bears the burden of making an 'affirmative showing' to that effect." Ritter v. Board of Com'rs of Adams County Public Hospital Dist. No. 1, 96 Wn.2d 503, 513, 637 P.2d 940 (1981) (internal citation omitted); Rich v. Starczewski, 29 Wn. App. 244, 246, 628 P.2d 831 (1981) ("Bias or prejudice on the part of a judge is never presumed and must be affirmatively shown by the party asserting it."). While D.K.U. offers a conclusory assertion that "[t]he [sentencing] court's decision was based on race," he presented no evidence or argument of bias at sentencing. Pet. for Rev. at 26.

It appears that D.K.U. has implied racial bias primarily from the fact that the trial court did not find his eleventh-hour mitigation persuasive, evidence that even his attorney acknowledged "has not been nearly what we would hope for." RP 83.

D.K.U. asks this Court to address whether the constitution "require[s] a juvenile court to clearly explain its reasons in declining to order a sentencing alternative." Pet. for Rev. at 2. But while the court did not expressly consider racial disproportionality, it certainly did not impose a term at JRA lightly – "the court provided a detailed explanation for its decision that was grounded in the sentencing statute and did not rely on proxies for race." D.K.U., No. 82663-8 at 13.

D.K.U. accuses the trial court of carelessly imposing incarceration despite understanding "the effect prison would have on [him]." Pet. for Rev. at 25. But, as the trial court explained, it did not impose a custodial sentence to be maximally punitive, but because it thought JRA provided the

best chance for him to engage with services and achieve rehabilitation. RP 90-91.

The Court of Appeals saw "no indicia of implicit racial bias in the trial court's thoughtful explanation of its decision." D.K.U., No. 82663-8 at 14. D.K.U. speculates that he "might have been viewed differently had he been white," but offers no case-specific evidence to support this assertion. Pet. for Rev. at 25. While this country's history of racial bias is undeniable, Pet for. Rev. at 10-18, it is neither fair nor credible to draw a linear line between this shameful past and the trial judge's carefully reasoned decision in this case.

D.K.U.'s allegation of prejudice relies entirely on statistical evidence presented for the first time on appeal along with a distorted version of the facts. Review is therefore inappropriate.

E. CONCLUSION

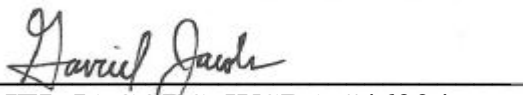
The State respectfully requests that D.K.U.'s petition for review be denied.

This document contains 2,661 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 20 day of May, 2022.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
GAVRIEL JACOBS, WSBA #46394
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

May 20, 2022 - 4:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,905-4
Appellate Court Case Title:	State of Washington v. D.K.U.

The following documents have been uploaded:

- 1009054_Answer_Reply_20220520162036SC678179_7390.pdf
  This File Contains:
  Answer/Reply - Answer to Motion for Discretionary Review
  The Original File Name was 100905-4 STATES RESPONSE TO APPELLANTS MOTION FOR DISCRETIONARY REVIEW.pdf

A copy of the uploaded files will be sent to:

- travis@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov
Filing on Behalf of: Gavriel Gershon Jacobs - Email: gavriel.jacobs@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20220520162036SC678179