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Court of Appeals No. 74415-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN O'DELL,

Petitioner.

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

PETITION FOR REVIEW

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Court Rules

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Sean O'Dell asks this Court to grant review of the opinion of the Court of Appeals in *State v. O'Dell*, 74415-1-I.

B. OPINION BELOW

In Sean's prior appeal this Court concluded the trial court could rely on youthfulness alone as a mitigating factor to impose a mitigated exceptional sentence. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). The Court reached this conclusion upon finding the attributes of youth, such as risk-taking, impulsivity, immaturity, and increased likelihood for rehabilitation as compared to older offender, could significantly mitigate a young offender's culpability. On remand the trial court nominally considered Sean's youthfulness but did not engage in the analysis directed by this Court's mandate. Indeed, the trial court rested its analysis in large measure on the analysis and conclusions of the dissenting opinion in *O'Dell*.

C. ISSUE PRESENTED

This Court held that each of 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 Sean and other adult

offenders, did the court meaningfully consider youth and its attributes as directed to by this Court in Sean's prior appeal?

D. SUMMARY OF CASE

Ten days after his 18th birthday, Sean committed the offense of second degree rape of a child. 183 Wn.2d at 683. In light of the scientific evidence regarding adolescent brain development, and its significance to criminal sentencing, Sean asked the trial court to impose a mitigated exceptional sentence. *Id.* at 685. The trial court concluded it could not consider Sean's youth as a mitigating factor. *Id.*

On appeal, this Court reversed, disavowing its prior precedent to the extent it precluded consideration of the attributes of youth as mitigating factors. *Id.* at 696. The Court held that the differences between youthful offenders and other adult offenders may justify a mitigated sentence. *Id.* at 693. The Court remanded the matter for resentencing "in accordance with this opinion." *Id.* at 699.

At resentencing, Sean again asked for a mitigated exceptional sentence. Rather than address the differences between a young person like Sean and other adult offenders, the court compared Sean to other young people, concluding he was "not immature for his age." RP 42. Rather than address the increased likelihood for rehabilitation, the trial

court focused on its conclusion that Sean knew right from wrong. RP
43.

The court imposed the same sentence it originally imposed. RP
44-45.

E. ARGUMENT

**The sentencing court did not comply with this
Court's mandate and did not properly consider the
attributes of 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
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.

Recognizing "youthfulness" is more than merely chronological age; *O'Dell* extended these principles to circumstances where youthful offenders commit offenses as adults. 183 Wn.2d at 695-96. Examining decisions like *Miller* and the science underlying them, 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 an mitigated sentence. *Id.* at 693.

O'Dell concluded youth by itself is a mitigating factor. The Court remanded the matter directing the court to resentence Sean after giving meaningful consideration to the differences between young and

adult offenders. As set forth below, the trial court did not do as the Supreme Court directed.

2. The mitigating value of youthfulness is about more than just knowing right from wrong.

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 Sean’s youth differentiate him and his offense

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

The Court of Appeal's dismissed this argument as "unpersuasive." Opinion at 5. But it is the distinction between youthful and adult offenders which lies at the core of *O'Dell*. It is that distinction which the Court held could differentiate crimes committed by youthful offenders and crimes committed by other offenders.

The trial court stated "I don't see him as immature for his age." RP 42. Again, the relevant cohort is not just other youthful offenders, people "his age," but all other offenders convicted of the same offense, the vast majority of which are by virtue of Sean's age at the time of offense necessarily older. Within that group, the relevant question is whether Sean's youthfulness differentiates him and his offense for the offense of these older individuals. The trial court instead just compared his maturity to other young people. At no point, did the court consider how Sean's maturity, culpability, and decision making measured against adult offenders, the vast majority of which are older than him. In doing so, the trial court did not give effect to *O'Dell's* mandate.

Beyond that, 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 Sean’s likelihood for rehabilitation brought about simply by maturation as compared to older adult offenders.

Instead, the trial court focused on whether Sean’s youthfulness diminished his capacity to appreciate right from wrong. Saying “looking at his immaturity . . . this is a young man that was taught right and didn’t do it.” RP 43. The court said “He was brought up right. He knew right from wrong. And he didn’t follow that right and wrong on that particular night . . .” RP 44.

The ability to understand right and wrong is not the sum of 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’s focus on knowing right from wrong is

not a proper consideration of youth as a mitigating factor as required by *O'Dell*.

In addition, in making its ruling, the trial court read at length from the dissenting opinion in *O'Dell* relying on it as setting forth the “facts” of the case. RP 36-37. The trial court highlighted the dissent’s evaluation of Sean’s maturity and susceptibility to peer pressure, endorsing that as its own analysis. *Id.* It goes without saying that a dissenting opinion is not the view of the majority of the court as to the facts or analysis. The dissent is in no way a proper base for the trial court to rest its analysis upon, or to use as a guide to its analysis. The dissent does not represent the mandate of this Court which now governs this case. The fact the trial court acknowledged it was relying on the dissent does not excuse its analysis. The trial court’s reliance on the dissent is in itself an abuse of discretion.

The trial court’s resentencing, and the opinion of the Court of Appeals affirming it, is contrary to this Court’s decision and mandate in Sean’s prior appeal. Thus, review is appropriate under RAP 13.4.

3. *The Court should remand this case for resentencing before a new judge.*

When a judge makes a sentencing decision without factoring in all necessary information, the judge’s continued involvement creates an appearance of unfairness and the remedy is remand before a different

judge. *City of Seattle v. Clewis*, 159 Wn. App. 842, 851, 247 P.3d 449 (2011). When a judge pronounces a sentence before it has heard and considered all available information, the remedy is remand for further proceedings before a different judge. *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996) (“the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court announced the sentence it intends to impose the remedy is to send the defendant before a different judge for a new sentencing hearing.”).

As held in *State v. Crider*, 78 Wn. App. 849, 899 P.2d 24 (1995), and affirmed in *Aguilar-Rivera*, 83 Wn. App. at 203,

Even when the court stands ready and willing to alter the sentence when presented with new information (and we assume this to be the case here), from the defendant’s perspective, the opportunity comes too late. The decision has been announced, and the defendant is arguing from a disadvantaged position.

Crider, 78 Wn. App. at 861. It is appropriate to reassign this case to a different judge who has not already twice announced a sentence, so that Sean is not disadvantaged in his request for a sentence that fully weighs the attributes of youth and his potential for rehabilitation.

F. CONCLUSION

This Court should grant review and remand this matter for a new sentencing hearing before a different judge, to permit the court to meaningfully consider Sean's youthfulness as a mitigating factor.

Respectfully submitted this 15th day of May, 2017.

s/ Gregory C. Link
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
SEAN THOMPSON O'DELL,
Appellant.

No. 74415-1-I
DIVISION ONE
UNPUBLISHED
FILED: April 17, 2017

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Cox, J. – Sean O'Dell appeals his sentence. He previously appealed an earlier sentence in this same matter and the supreme court remanded for resentencing. The trial court did not abuse its discretion in following the supreme court's guidance in O'Dell's earlier appeal. We affirm.

Ten days after his 18th birthday, Sean O'Dell raped a child in the second degree. Following trial, he requested that the court impose an exceptional sentence, below the standard range, because of the mitigating effect of his youth.¹ The trial court concluded it could not consider his youth in mitigation, based on the supreme court's opinion in State v. Ha'mim.²

O'Dell appealed and the supreme court granted review.³ That court clarified Ha'mim and held that youth could be considered to the extent it

¹ State v. O'Dell, 183 Wn.2d 680, 685, 358 P.3d 359 (2015).

² Id.; State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997).

³ Id. at 686.

mitigated the defendant's culpability.⁴ The court remanded for resentencing.⁵

Returning to the trial court, O'Dell asked again for a mitigated exceptional sentence. The trial court analyzed and applied the supreme court's guidance in this matter. But it denied his request and sentenced him within the standard range.

O'Dell appeals.

MITIGATED EXCEPTIONAL SENTENCE

O'Dell argues that the trial court abused its discretion in failing to adequately consider the mitigating effect of youthfulness in sentencing. We disagree.

RCW 9.94A.535(1) grants a trial court discretion to impose an exceptional sentence below the standard range if it finds, by a preponderance of the evidence, mitigating circumstances to do so. The factors it may consider include, at RCW 9.94A.535(1)(e), "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law."

The supreme court decided, in O'Dell's earlier appeal, that these factors permit the trial court to consider the defendant's youthfulness. That decision guides our review.

⁴ Id. at 689.

⁵ Id. at 699.

At initial sentencing, O'Dell had asked the trial court to impose a mitigated exceptional standard based on the RCW 9.94A.535(1)(e) factors.⁶ Several members of his family and community testified to his youthfulness and its effect on his character.⁷ But the trial court concluded that it could not consider age as a mitigating factor, based on the supreme court's decision in Ha'mim.⁸ This court agreed and affirmed.⁹

The supreme court reversed, concluding that the trial court had misinterpreted Ha'mim.¹⁰ That decision had barred courts from "impos[ing] an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's culpability."¹¹ But when the defendant's youth did in fact mitigate his culpability, it became relevant to the trial court's consideration of RCW 9.94A.535(1)(e).¹²

The supreme court analyzed that relevance based on social science studies relied upon by the United States Supreme Court in recent juvenile sentencing cases.¹³ These studies "reveal[ed] fundamental differences between

⁶ Id. at 685.

⁷ Id. at 697-98.

⁸ Id. at 685.

⁹ Id. at 686-87.

¹⁰ Id. at 689.

¹¹ Id.

¹² Id.

¹³ Id. at 695.

adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure."¹⁴ And these differences could persist past the defendant's 18th birthday.¹⁵

But the court clarified that such factors did not mandate mitigation per se.¹⁶ Rather, the trial court had to consider the defendant's youth in exercising its sentencing discretion.¹⁷ And the defendant had to offer facts showing that youth impaired his own capability, "since youth does not per se automatically reduce an adult offender's culpability."¹⁸

Thus, we review for abuse of discretion the trial court's consideration of youth in determining whether to grant a mitigated exceptional sentence.¹⁹

Here, the trial court followed the supreme court's instruction in considering the effect of O'Dell's youth. It first identified the framework within which it would consider the specific facets of youth noted by the supreme court: risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. And it explained that it considered

¹⁴ Id. at 692 (footnotes omitted).

¹⁵ Id. at 695.

¹⁶ Id.

¹⁷ Id. at 696.

¹⁸ Id. at 689.

¹⁹ Id. at 699.

these factors as they went to O'Dell's capacity to appreciate the wrongfulness of his conduct or to conform his conduct in accordance with that appreciation.

Regarding risk and consequence assessment, the court found that O'Dell had demonstrated this capability when he hesitated to commit the rape based on concerns of its illegality. It determined his youthfulness did not deprive him of impulse control, based on letters and testimony that he was "quite a thinker" and "thought very carefully" about decisions and solutions. The court also found that O'Dell had no tendency toward antisocial behaviors, based on the same and similar letters that showed him to be a good and involved member of his family and community. And it found nothing in the record to suggest either a susceptibility to peer pressure or the presence of peer pressure in this matter.

Applying these findings, the court determined that O'Dell was not immature and, thus, his youth did not justify a mitigated exceptional sentence. Accordingly, the trial court properly considered the effect of O'Dell's age and soundly exercised its discretion in denying an exceptional mitigated sentence.

O'Dell makes several further arguments against the specific nature of the trial court's consideration. First, he argues that the trial court abused its discretion in comparing the effect of youth on O'Dell with similar effects amongst peers in his age group. He contends that the court should have compared that effect on O'Dell with the character of adult offenders. This argument is unpersuasive.

As discussed above, the supreme court identified certain facets of youth that differentiate young from adult offenders. It held that the trial court could

consider these factors to the extent they mitigated the defendant's culpability. But it also held that age could not dictate a mitigated exceptional sentence *per se*. Thus, the court's focus, and that of the cases upon which it relied, remained on individualizing the defendant's sentence.

Here, the trial court did find that O'Dell was not "immature *for his age*."²⁰ But its consideration went much further. It analyzed in depth the various facets of youth identified by the supreme court. And it considered their effects on O'Dell's individual decision making in the crime at issue. Its focus remained on O'Dell, not broad categories of comparison. This is in accord with the supreme court's instruction. Thus, there was no abuse of discretion here.

Second, O'Dell argues that the trial court improperly and only focused on O'Dell's capacity to appreciate wrongfulness to the exclusion of youth's other effects. This argument is also unpersuasive.

Here, as discussed above, the trial court considered numerous facets of youth as they manifest in O'Dell's character. Thus, the trial court did not abuse its discretion in this regard.

Third, O'Dell argues that the trial court abused its discretion by not considering that youth fades and, thus, immature juveniles are uniquely susceptible to rehabilitation. This argument is unpersuasive.

The supreme court did not discuss the importance of a youth's rehabilitative potential in considering age under these circumstances. But the United States Supreme Court cases upon which it relied did so. Those cases

²⁰ Report of Proceedings (Nov. 25, 2015) at 42 (emphasis added).

took place in dispositively different contexts. Roper v. Simmons²¹ concerned imposition of the death penalty on juveniles. Graham v. Florida²² and Miller v. Alabama²³ concerned imposition of life without parole on juveniles. The permanence of these sentences places special emphasis on the offender's susceptibility to reform and rehabilitation.

Here, the trial court sentenced O'Dell to 95 months in prison. Unlike the sentences in Roper, Graham, and Miller, such a term of imprisonment allows for future release and, thus, does not deny O'Dell the opportunity to rehabilitate. The trial court referred to that fact in advising O'Dell: "Your life is not over."

Lastly, O'Dell argues that the trial court abused its discretion by relying on the supreme court dissent in his earlier appeal. Not so.

"[T]he meaning of a majority opinion is not found in a dissenting opinion."²⁴
"[A] dissenting opinion is not law."²⁵

Here, at sentencing, the trial court read from the dissent, not for its legal analysis, but for its account of undisputed facts in the first sentencing proceeding. And the majority opinion had suggested that both it and the dissenting justices disagreed not on the substance of the factual evidence but on its interpretation.²⁶

²¹ 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

²² 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

²³ 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

²⁴ Cole v. Harveyland, LLC, 163 Wn. App. 199, 207, 258 P.3d 70 (2011).

²⁵ Gen. Constr. Co. v. Pub. Util. Dist. No. 2 of Grant County, 195 Wn. App. 698, 708, 380 P.3d 636 (2016).

²⁶ O'Dell, 183 Wn.2d at 693 n.10.

O'Dell does not explain why the trial court could not consider such facts, incidentally noted in the dissent, when it was not applying any legal analysis proposed by the dissent. And, more importantly, he does not explain why this discussion prejudiced the sentencing, given the trial court's extensive further consideration. Thus, there was no abuse of discretion here.

SENTENCING JUDGE

O'Dell argues that if we remand this case for resentencing, we should order that further proceedings be conducted by a different judge. We need not address this request because it is moot.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Speelman, J.

Daly, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74415-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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WASHINGTON APPELLATE PROJECT

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