NO. 99619-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP VICTOR HICKS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

(Corrected Title Page)

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I. INTRODUCTION

Applying recent decisions of this Court, the Court of Appeals correctly upheld the trial court's thorough consideration of Phillip Hicks's request that he receive an exceptionally low sentence based on the fact that he was 20 years old when he committed murder. While all defendants have a right to request mitigation based on youth, there is no entitlement to a mitigated sentence. *E.g.*, *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

The trial court complied with the procedural requirements of the Sentencing Reform Act and consistent case law by allowing Hicks to present argument in support of his claim of youthfulness. After full consideration of all of the information presented, the trial court exercised its discretion to impose a standard range sentence. When the trial court has exercised its discretion, considered the mitigation argument, and imposed a standard range sentence, the sentence cannot be appealed. RCW 9.94A.585(1). As this Court reaffirmed less than a year ago, the statutory bar on appeal of a standard range sentence is constitutional. *State v. Gregg*, 196 Wn.2d 473, 474 P.3d 539 (2020). Because there is no intervening state or federal case law that creates a need for the Court to return to this well-plowed ground, the petition should be denied.

II. RESTATEMENT OF THE ISSUES

1. Did the trial court meaningfully consider Hicks's request for an exceptional sentence when it heard and considered evidence regarding youthfulness, including his brain maturation, difficult childhood, capacity to appreciate the wrongfulness of his actions and conform to the law, and capacity for reform?

2. RCW 9.94A.585(1) provides that a standard range sentence cannot be appealed. Because the trial court considered the facts and concluded that there was no basis for an exceptional sentence, is Hicks precluded from appealing his standard range sentence?

III. STATEMENT OF THE CASE

A. Hicks Murdered Chica Webber and Attempted to Murder Her Husband

In the spring of 2001, Chica Webber and her husband Jonathan were walking from a friend's house. *State v. Hicks*, 163 Wn.2d 477, 481-82, 181 P.3d 831 (2008). Phillip Hicks and Rashad Babbs approached the Webbers and asked whether they had any drugs. *Id.* The Webbers said no and kept walking, but Hicks and Babbs repeatedly demanded that Jonathon and Chica empty their pockets. *Id.* Jonathan stopped and told the men that he had no money. *Id.* Hicks responded by again telling the Webbers to empty their pockets. *Id.* When the Webbers continued to walk away, Hicks and Babbs started shooting. Jonathan survived shots in his leg, wrist, and back. *Id.* at 482. But Chica was killed. She was shot three times in her head: twice by a .22 revolver and once by a 9 mm handgun. *Id.* at 481-82.

The State charged Hicks with (1) aggravated first-degree murder in the alternative, first-degree murder and first-degree felony murder with first or second-degree robbery as the predicate offense, (2) attempted murder of Jonathan Webber, and (3) unlawful possession of a firearm. *Id.* at 482. The jury convicted Hicks of first-degree felony murder and unlawful possession of the firearm, but was unable to reach a verdict on the attempted murder charge. A second trial resulted in a conviction on the attempted murder charge. *Id.* at 484.

B. In His First Sentencing Hearing, Hicks Received a Sentence at the High End of the Standard Range on Each Count

In a consolidated sentencing hearing, Hicks was given sentences at the high end of the standard range for each count, with a total sentence of 776 months. CP 20. Hicks was twenty years old when he shot Chica Webber in the head and attempted to murder her husband Jonathan. RP 40. By that time, he had amassed nine felony convictions and four misdemeanors in twelve criminal cases. *Id.* Hicks asked the court to consider his mental health issues and difficult childhood as mitigating factors.

The court acknowledged that Hicks's upbringing and mental health issues were "legitimate sentencing considerations," but determined that they were outweighed by the "shocking…totally random" murder of a pregnant woman "over change." CP 117. The court concluded that Hicks posed an "extreme danger" to the community. CP 118.

Hicks raised numerous issues on appeal, but did not argue that the court should have considered his age or youthfulness during sentencing. The conviction and sentences were upheld. *Hicks*, 163 Wn.2d 477.

C. On Resentencing, the Trial Court Fully Considered Hicks's Request for a Mitigated Sentence Based on Youthfulness

In 2018, the Court of Appeals granted Hicks's personal restraint petition and remanded for resentencing in conformance with *State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017). *In re Pers. Restraint of Hicks*, 6 Wn. App. 2d 1040 (2018) (unpublished) (noting that the State conceded that resentencing was appropriate). *Weatherwax* requires that "when the seriousness levels of two or more serious violent offenses are identical, the trial court must choose the offense whose standard range is lower as the starting point for calculating the consecutive sentences." *Weatherwax*, 188 Wn.2d at 1062. Thus, Hicks's offender score was required to be based on the attempted murder conviction rather than the first-degree murder conviction.

On remand, Hicks asked the trial court to make a downward departure from the standard sentencing range based on his immaturity and youthfulness at the time of the crime. *State v. Hicks*, __ Wn. App. __, 2021 WL 982592, *2 (March 16, 2021) (unpublished). Hicks argued that even though he was a 20-year-old offender, the court could consider these mitigating factors under *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183,

161 L. Ed. 2d 1 (2005), *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019), and *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). *Id.* He presented the sentencing court with a declaration from Robert Halon, Ph.D., explaining the emergencing science regarding brain development and maturation, and the impact of external stimulous. Dr. Halon provided extensive analysis regarding potential biological impacts on Hicks's neurological maturation and impulse control, including issues with his birth, a family history of mental illness and addiction, and the possibility of fetal alcohol syndrome. *Hicks*, 2021 WL 982592 at *3. Dr. Halon also detailed a variety of sociological factors that may have influenced Hicks's brain development and maturation, including neglect, severe abuse, and traumatic experiences that Hicks suffered as a child. *Id.*

Dr. Halon examined the escalation of Hicks's criminal behavior, starting from the time Hicks was in sixth grade. He then explained that Hicks was diagnosed with posttramautic stress disorder and explosive intermittent disorder in 2003, when the possibility of an insanity plea was investigated. *Id.* Finally, Dr. Halon discussed the mental health treatment Hicks received during his incarceration, and opined that it had "'improved his coping methods and maturity.'" *Id.* (quoting CP at 52).

In addition to Dr. Halon's analysis, Hicks also presented statements from his family and friends regarding his childhood and subsequent

maturation. Based on this information, Hicks requested that the trial court make a downward departure and impose a total term of confinement of 300 months (25 years). *Id.* at *2, n.3.

The State responded to the mitigation request by arguing that there was nothing before the trial court that conclusively established impairment of Hicks's capacity to appreciate the wrongfulness of his actions or comply with the law. The State requested that Hicks be sentenced to a total term of confinement of 752 months (62.67 years), two years less than the original sentence. *Id.*

In ruling on the sentence, Judge Leanderson stated "I reviewed everything that was presented to this Court….I read it all." RP 39. In orally walking through the information presented regarding Hicks's youth, she stated: "Yes, you were in the dependence and foster care system. Yes, your parents let you down. Every child should have a good childhood. No, it was not easy for you. So *I am considering your circumstances, sir. I am considering.*" CP 39-42. Judge Leanderson also recognized that Hicks "gained a significant amount of maturity" during his incarceration and participation in counseling and therapy. *Id.* But she concluded that he knew right from wrong at the time he committed the crimes. *Id*. The court pointed to Hicks's lengthy criminal history, including nine felonies and four misdemeanors, as an indication that "he knew fully the consequences of

committing criminal acts." *Id.* at 41. The court noted that Hicks had made some efforts toward rehabilitation in prison, and therefore took 24 months off the high end, standard range sentence. This, in conjunction with the *Weatherwax* correction, resulted in a reduced total sentence of 728 months. CP 184.

On direct appeal, the Court of Appeals upheld the trial court's exercise of discretion. *Hicks*, 2021 WL 982592. In an unpublished decision, the Court of Appeals adhered to Washington Supreme Court decisions by holding that a standard range sentence may be appealed "'only if the sentencing court failed to comply with procedural requirements of the Sentencing Reform Act or constitutional requirements.'" *Id.* at 5 (quoting *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006)). The Court of Appeals carefully evaluated the record and determined that "the [trial] court was aware that it had the ability to consider Hicks's youth, brain development, and personal circumstances" and that "the record shows that the court considered those factors." *Id.* at 6. It held that the trial court exercised its discretion by reviewing all of the mitigating evidence presented by Hicks and concluding that there was not a basis for an exceptional sentence. *Id.*

IV. ARGUMENT

It is well settled that a standard range sentence may be appealed only "if the sentencing court failed to comply with procedural requirements of the [Sentencing Reform Act] or constitutional requirements." *Osman*, 157 Wn.2d at 481-82 (citing, *e.g.*, *State v. Mail*, 121 Wn.2d 707, 711-13, 854 P.2d 1042 (1993)); RCW 9.94A.585(1). As the Court of Appeals properly concluded, Hicks cannot meet either of these two requirements. First, the trial court complied with the Sentencing Reform Act by allowing Hicks to present extensive information regarding his maturity and neurological development at the time of Chica Webber's murder, and his maturation during incarceration. The trial court fully considered all of this information before imposing a sentence below the level requested by the State. Second, there is no state or federal constitutional requirement that a claim of youthfulness entitles the offender to a mitigated sentence below the standard range. As this Court has repeatedly held, the trial court retains its discretion to impose a standard range sentence and appeal of a standard sentence is barred by RCW 9.94A.585(1).

A. The Trial Court's Exercise of Discretion Comported with Case Law Regarding the Procedural Requirements of the Sentencing Reform Act

The trial court complied with the procedural requirements of the Sentencing Reform Act by allowing Hicks to request an exceptional

sentence based on youthfulness and considering the mitigating information he provided. Sentencing courts have discretion to consider youthfulness as a mitigating factor if the defendant establishes by a preponderance of the evidence that there are "substantial and compelling reasons" for doing so, including mitigation based on youth. RCW 9.94A.535; *In re Pers. Restraint of Light-Roth*, 422 P.3d 444, 448, 191 Wn.2d 328 (2018); *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

Every defendant has a right to *request* an exceptional sentence. But as Hicks correctly concedes, no defendant is entitled to *receive* an exceptional sentence. Pet. at 8 (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). Where, as in this case, the sentencing court has exercised its discretion and considered the mitigation argument, review is not permitted. As Hicks acknowledges, the case law consistently holds that review is appropriate only if the sentencing court relies on an impermissible basis to deny mitigation (i.e., race, religion) or refuses to exercise its discretion at all. Pet. at 8 (citing *Grayson*, 154 Wn.2d at 697; *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)); *see also State v. Khanteechit*, 101 Wn. App. 137, 140, 5 P.3d 727 (2000). A court refuses to exercise discretion if it categorically refuses to impose an exceptional sentence "under any circumstances," or categorically refuses to impose an exceptional sentence. *Garcia-Martinez*, 88 Wn. App. at 330. For

example, this Court has held that a sentencing court cannot categorically refuse to impose a drug offender sentencing alternative because the State no longer has funds to support the program. *Grayson*, 154 Wn.2d at 335-36.

Given the record in this case, Hicks cannot credibly argue that the trial court refused to exercise its discretion in response to his request. At the resentencing hearing, he was permitted to submit information regarding his youthfulness, including extensive information regarding neurological science and emerging information on brain development. *Hicks*, 2021 WL 982592 at *3. Dr. Halon addressed how Hicks's maturity, impulse control, and ability to appreciate consequences may have been impacted by biological and medical factors, as well as sociological factors, including neglect and abuse during his childhood. *Id.* The information considered by the trial court also addressed Hicks's mental health and the diagnosis received soon after the crimes were committed. *Id.* Finally, Dr. Halon addressed the services Hicks received while incarcerated and the evidence of his capacity for maturation.

Hicks contends the court failed to consider how his "youth and traumatic upbringing may have impacted his ability to make good choices." Pet. at 10. But the record tells a different story. At the resentencing hearing, the court stated: "'No doubt you had a difficult childhood. *I reviewed everything that was presented to this Court*. And you did spend much of

your childhood and your youth in the dependency system. I read it all.'" *Hicks*, 2021 WL 982592 at *3-4 (quoting RP 39-42). The court expressly considered that Hicks's parents "let him down," causing him to spend time "in the dependency and fostercare system." *Id.* She weighed the fact that he experienced "a significant amount of trauma." *Id.*

As required by RCW 9.94A.535(1)(e), the court also evaluated how Hicks's past impacted his "capacity to appreciate the wrongfulness" of his actions on the night he shot Chica Webber in the head, and his ability to conform his actions to the requirements of the law. *O'Dell*, 183 Wn.2d at 696. The court determined that although Hicks was 20 years old, he "'knew right from wrong'" when he committed his crimes. *Hicks*, 2021 WL 982592 at *4 (quoting RP 39-42). The court relayed that by the age of 20, Hicks had amassed a lengthy criminal history, including nine felonies. *Id.* As a result, he was "very familiar with the justice system and knew fully the consequences of committing criminal acts." *Id.* There also can be no doubt that the sentencing court also considered information regarding Hicks's maturation and capacity for reform post-conviction. The court expressly indicated that Hicks had "gained a significant amount of maturity" during his years in prison, "had counseling and therapy," and had a wife and a young child. *Id.* In recognition of Hicks's "commendable" rehabilitative efforts in prison, the trial court took 24 months off the high end, and

imposed a period of total confinement below the total the State requested. *Id.*

In sum, the record firmly establishes that the trial court complied with the Sentencing Reform Act by meaningfully exercising its discretion to consider youthfulness as a mitigating factor. RCW 9.94A.535(1)(e). Contrary to Hicks's insinuation, neither state nor federal case law impose a check-list of factors the trial court is required to evaluate on the record before imposing life without possibility of parole—the most severe permissible sentence for a minor. *See, e.g.*, *Jones v. Mississippi*, __ U.S. __, 141 S. Ct. 1307 (2021). Nor is the trial court required to make a finding of permanent incorrigibility. Even if such a requirement existed, Hicks's procedural argument would fail for three reasons: (1) He was 20 years old when the murder occurred, not a minor; (2) he was not given a sentence of life without possibility of parole; and (3) despite the fact that it was not required to address a laundry list of factors, the trial court explained on the record that she reviewed all of the information submitted regarding Hicks's brain development, maturation, and capacity for reform.

Because the statutory procedural requirements were met, Hicks's standard-range sentence is not subject to review. As this Court has held, the Legislature structured the trial courts' discretion by establishing presumptive sentencing ranges. Thus, "[a] trial court's decision regarding

the length of a sentence within the standard range is not appealable because 'as a matter of law there can be no abuse of discretion.'" *Mail*, 121 Wn.2d at 710 (quoting *State v. Ammons*, 105 Wn.2d 175, 183, 718 P.2d 796 (1986)). Hicks has not offered any statutory or case law refuting this bedrock principle, and indeed, there is none. The crux of Hicks's argument is that he is *entitled* to a reduced sentence based on youthfulness. That underlying argument has already been soundly rejected by this Court. *Grayson*, 154 Wn.2d at 342.

B. It Is Well Settled That the Procedural Bar on Appeal of Hicks's Standard Range Sentence Is Constitutional

Hicks's reliance on cases addressing the constitutional concerns raised in sentencing offenders under the age of 18 is also unavailing. *See* Pet. at 6-7 (citing *e.g.*, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Nothing in these cases indicates that Hicks is constitutionally entitled to a mitigated sentence based on youthfulness, or calls into question the constitutionality of the statutory bar on appeal of a standard range sentence. To the contrary, this Court has soundly rejected the notion that it is unconstitutional for a standard range sentence to be presumptively valid for a juvenile, let alone a 20-year-old offender.

This issue was recently addressed in *State v. Gregg*, 196 Wn.2d 473, 474 P.3d 539 (2020). Gregg pled guilty to crimes he committed at the age

of 17, including first-degree murder. *Id.* at 477. After consideration of extensive evidence regarding Gregg's youthfulness, the trial court concluded that Gregg had not established a compelling reason for an exceptional sentence. He was sentenced within the standard range to a total of 37 years of confinement. *Id.* at 477-78. On appeal, the Washington Supreme Court rejected Gregg's argument that it is unconstitutional for a standard range sentence to be presumptively valid for a juvenile sentenced as an adult. *Id.* at 479-80 (citing *State v. Ramos*, 187 Wn.2d 420, 445-46, 387 P.3d 650 (2017)). The Court further indicated that *Houston-Sconiers* does not dictate a contrary result. *Id.* at 481. While sentences of life without possibility of parole are categorically barred for juveniles in adult court, "those principles do not support invalidating the statutory *procedure* required to be applied nor the burden to present evidence and testimony to support the relief sought." *Id.* at 482.

The same is true in Hicks's case. The trial court complied with the procedural requirements of the Sentencing Reform Act by allowing Hicks to request a mitigated sentence based on youthfulness, allowing him to submit information and arguments in support of that request, and fully considering all of it. Based on that information, the trial court properly exercised its discretion by opting to reduce the sentence two years below the high end of the standard range (in recognition of Hicks's remedial

efforts) and imposing a sentence within the standard range. *Hicks*, 2021 WL 982592 at *4. Therefore, even if Hicks had been a juvenile offender—and he was not—the standard range sentence imposed would not be subject to appeal. *Gregg*, 196 Wn.2d at 482.

The petition for review is devoid of support and should be denied.

V. CONCLUSION

The trial court properly afforded Hicks the opportunity to request and present argument in favor of mitigation based on youthfulness. Having fulfilled the statutory obligation to consider his mitigation argument, the court was not required to grant his request. Recent decisions of this Court firmly establish that the procedural, statutory bar on appeal of Hicks's standard range sentence is constitutional. Given the absolute absence of any conflicting legal argument or case law, the petition for review should be denied.

RESPECTFULLY SUBMITTED May 3, 2021.

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PIERCE COUNTY PROSECUTING ATTORNEY

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