

NO. 74415-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Sean Thompson O'Dell,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 12-1-00111-2

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

Whether the trial court abused its discretion in denying O'Dell's recommendation for a mitigated exceptional sentence based on his youth, after the trial court considered the evidence before it pertaining to O'Dell's youth and his developmental personality attributes.

ANSWER: No. The trial court properly exercised its discretion, as directed by the Supreme Court.

II. STATEMENT OF THE CASE

Mr. O'Dell was convicted by a jury of rape of a child in the second degree after having sexual intercourse with A.J.N., a twelve-year-old girl. At the time of the offense, Mr. O'Dell was eighteen years old. At sentencing, Mr. O'Dell sought an exceptional sentence below the standard range, based on his youth. The trial court denied his request, based on the court's understanding that youth may not be used as a justification for an exceptional sentence. CP 78.

On appeal, this court upheld the sentence in an unpublished opinion. *State v. O'Dell*, No. 69942-3-I, 2014 WL 1711548 (Apr. 28, 2014, Div. 1). The Supreme Court reversed the decision of this court regarding the sentencing, and remanded to the trial court. *State v. O'Dell*,

183 Wn.2d 680, 358 P.3d 359, 368 (2015). The essential facts of the case are set forth in the Supreme Court’s opinion.

On remand, the trial court conducted a second sentencing hearing. Mr. O’Dell again asked for a mitigated sentence based upon his youth, and recent studies indicating that there are “fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.” *See, State v. O’Dell*, 183 Wn.2d 680, 692, 358 P.3d 359, 364 (2015). CP 34-41. The re-sentencing hearing was held on November 25, 2015. CP 18. At that time, the defendant was twenty-one years old. CP 18.

At the sentencing hearing, the trial court considered the testimony at trial, as well as the numerous written and oral statements made by Mr. O’Dell’s family and friends in support of an exceptional sentence downward. RP 21-45. The court recognized that the Supreme Court’s *O’Dell* opinion directed her to consider youthfulness, in light of recent brain development studies. RP 34-35. The trial court discussed and explained her analysis of nine letters submitted on behalf of Mr. O’Dell. RP 37-44. After doing so, the trial court concluded that psychological attributes which may be a function of youth and immaturity, were not

present, or not significant enough, to justify an exceptional sentence. RP 45.

III. ARGUMENT

A. **When A Mitigated Exceptional Sentence is Sought Based Upon Youthfulness, A Trial Court Must Exercise Its Discretion Based On The Facts To Determine Whether Such A Sentence Is Justified.**

The Supreme Court held that the trial court abused its discretion at the original sentencing hearing by not considering whether the defendant's youth was a mitigating circumstance. The abuse was caused by the trial court's understanding that *State v. Ha'mim*, 132 Wn.2d 834, 836, 940 P.2d 633 (1997) created a bar to considering youth as a basis for an exceptional sentence. *State v. O'Dell*, 183 Wn.2d 680, 685, 358 P.3d 359, 361 (2015).¹

A Trial Court must not categorically refuse to consider a request for an exceptional sentence. *O'Dell* at 696-97; *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). By assuming it could not consider youth at all, the trial court abused its discretion at the original sentencing hearing.

¹ The trial court apparently cited to the Court of Appeals decision in *Ha'mim*, which was later affirmed by the Supreme Court.

B. The Trial Court Properly Exercised Its Discretion By Considering Areas of Behavior Control That May Not Be Fully Developed Due To A Defendant's Youth.

In light of new brain development science, as recognized in several United State Supreme Court opinions, the Supreme Court in *O'Dell* clarified that, while youth alone is not a mitigating factor, it is inextricably linked to underdeveloped mental capabilities that may reduce culpability for some offenders. To the extent that those capabilities are underdeveloped in a young adult offender, they may, in the trial court's discretion, form the basis for an exceptional sentence. *State v. O'Dell*, 183 Wn.2d 680, 693, 358 P.3d 359, 365 (2015).

The Supreme Court noted that the parts of the brain involved in behavior control continue to develop well into a person's 20s. *O'Dell*, 183 Wn.2d at 692-93. The specific areas relevant to culpability are "risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." *State v. O'Dell*, 183 Wn.2d at 692 (footnotes omitted).

Mr. O'Dell, in his brief before this court, misread the Supreme Court's opinion. He asserts that "the Supreme Court concluded the trial court could rely on youthfulness alone as a mitigating factor...." App. Br. at 1. That is untrue. The Supreme Court stated it agreed "with much of the State's interpretation of *Ha'mim*." *O'Dell* at 689. It was referring to

its characterization of the State's briefing made in the preceding passage of its opinion: "The State interprets *Ha'mim* differently [from Mr. O'Dell]; it argues that age 'may be relevant,' under *Ha'mim*, 'for the statutory mitigating factor that the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired.' But it contends that a defendant must provide some evidence that youth *in fact* impaired his capacities, since youth does not per se automatically reduce an adult offender's culpability." *O'Dell* at 689 (internal citations omitted).

The Court went on to explain: "It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence. In this respect, we adhere to our holding in *Ha'mim*." *O'Dell* at 695. It is logical that the Court intended trial courts to consider areas of behavior control that may not be fully developed as a result of a defendant's age, and not simply the age of the defendant in isolation. That is exactly what the trial court did on remand.

Mr. O'Dell portrays the trial court's resentencing as summarily rejecting the exceptional sentence because it did not "see him as immature for his age." App. Br. at 7. Mr. O'Dell ignores the fact that the trial court first identified the framework within which she was considering his youthfulness. She stated she was considering the factors in RCW

9.94A.536(e) – whether the defendant had the capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law. RP 34. She recognized that the defendant argued those capabilities were impaired due to Mr. O’Dell’s youth. RP 34.

These are precisely the capabilities that would be impaired by the neurological and psychosocial deficits that the Supreme Court was concerned with in *O’Dell* -- risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.

Notably, the trial court cited several passages from the dissenting justices in *O’Dell* with approval. RP 36-37. In this case, that is not inappropriate, because the passages concerned the dissent’s interpretation of the evidence that was before the trial court at the original sentencing. The majority noted that it was in substantial agreement with the dissent, but only viewed the evidence differently:

In light of our fundamental agreement with the dissent on this point, we think that the dissent simply views the evidence differently than we do—it concludes, for example, that testimony about O’Dell’s hobbies is not probative of his maturity level. Dissent at 370. But as the dissent acknowledges, “the trial court [is] in the best place to make such a determination.” *Id.* at 371. And in this case, the trial court did not believe it had any discretion to do so. *See supra* at 361.

State v. O’Dell, 183 Wn.2d 680, 693, 358 P.3d 359, 365 (2015).

Mr. O'Dell misread the transcript of the sentencing hearing and ignored the trial court's discussion of the evidence she considered. Mr. O'Dell also is requesting some sort of heightened consideration of the facts presented in favor of a mitigated sentence.² It appears that the standard proposed by Mr. O'Dell all but requires an exceptional sentence for any "young" offender by presuming his or her brain development is so incomplete that moral culpability cannot be ascribed to the offender. This is not what *O'Dell* requires, and such a rule could only be achieved through legislative action.

C. Even if the Court Remands the Case For Resentencing, A New Judge Need Not Be Assigned.

Mr. O'Dell cites *City of Seattle v. Clewis*, 159 Wn. App. 842, 851, 247 P.3d 449, 453 (2011) for the proposition that a new judge needs to be assigned to this case, should it be remanded. *Clewis* says no such thing. The case includes dicta about the appearance of fairness doctrine where a judge had taken on the role of prosecutor at a pre-trial hearing. The trial judge later recused himself, and the Court of Appeals declared the issue

² Notably, before this court Mr. O'Dell argues that the trial court must also consider his "potential for rehabilitation." App. Br. at 4, 8, and 10. Mr. O'Dell asserts that the Supreme Court included that factor in its opinion. In fact *O'Dell* is completely devoid of any discussion of rehabilitation. No form of the word "rehabilitate" appears anywhere in the Supreme Court's opinion.

moot, except to rule that, even if the judge had violated the appearance of fairness doctrine, dismissal was not warranted. *Id.*

The other cases cited by Mr. O'Dell create a "bright line rule" that is expressly limited to situations where the defendant was denied his right of allocution, and the court has announced all the elements of the sentence before the matter was brought to its attention. *State v. Aguilar-Rivera*, 83 Wn.App 199, 203 920 P.2d 623 (1996); *State v. Crider*, 78 Wn.App. 849, 899 P.2d 24 (1995). This case does not fall under the rubric of those cases.

IV. CONCLUSION

For the reasons argued above, the Court should deny the defendant's appeal.

Respectfully submitted this 20th day of September, 2016

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