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Supreme Court No. 95578-6

In The
Supreme Court of the State of Washington

In Re the Personal Restraint of:

SAID OMER ALI,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF RE: MEIPPEN

King County Superior Court No. 08-1-05113-3 SEA

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I. INTRODUCTION

Said Omer Ali (“Mr. Ali”) filed a personal restraint petition (“PRP”) in November, 2017, seeking resentencing due to the significant changes in the law marked by the Supreme Court’s decisions in State v. Houston-Sconiers, 188 Wn.2d 1, 18, 391 P.3d 409 (2017), (the “mandatory nature” of the SRA weapon enhancement penalties violates the Eighth Amendment when applied to youths), and State v. O’Dell, 183 Wn.2d 680, 693, 358 P.3d 359 (2015) (youth must be taken into consideration as a factor justifying exceptional sentences downward, even for adults). The State argued in response that Mr. Ali’s case should be remanded to amend the judgment and sentence to reflect his 1992 year of birth, after which RCW 9.94A.730 would allow him to seek parole upon completing 20 years of his sentence, in lieu of resentencing.

Mr. Ali argued in his Reply Brief that (1) Mr. Ali is entitled to resentencing pursuant to the change in law announced in Houston-Sconiers, and RCW 9.94A.730 is an inadequate remedy, and (2) the State is judicially estopped from arguing in this case that O’Dell did not constitute a significant change in the law, as this argument is diametrically opposed to the State’s position at sentencing.

The Court then entered an order staying ruling on Mr. Ali’s PRP pending its decision in In re Pers. Restraint Meippen, 193 Wn.2d 310,

440 P.3d 978 (2019). Upon that decision having become final, the Court entered a ruling instructing the parties to file supplemental briefs addressing the effect of Meippen, if any, on Mr. Ali's PRP. As set forth herein, although the decision in Meippen was adverse to the petitioner in that case, the decision provides further support for granting Mr. Ali's PRP, as it underscores the fact that Mr. Ali, unlike the petitioner in Meippen, met his evidentiary burden of establishing that his youth in fact mitigated his culpability. Therefore, Mr. Ali, unlike the petitioner in Meippen, is entitled to a new sentence imposed by a court that meaningfully considers the mitigating factor of youth.

II. ARGUMENT IN REPLY

A. Unlike the Petitioner in Meippen, Mr. Ali has Established Actual and Substantial Prejudice by a Preponderance of the Evidence.

In Meippen, 193 Wn.2d 310, this Court held that the petitioner was not entitled to resentencing for the purpose of having the mitigating factor of youth meaningfully considered because the petitioner presented an insufficient record showing that his youth warranted lenience. In Mr. Ali's case, on the other hand, he has clearly met his burden, presenting abundant evidence at sentencing and in conjunction with his PRP establishing that his youth played a role in the offense, that his youth constitutes a

mitigating factor, and that justice requires imposition of an exceptional sentence downward based on the mitigating factor of youth.

In Meippen, the Court held that the petitioner failed to meet his burden of showing actual and substantial prejudice because he presented no evidence whatsoever that he would have received a shorter sentence if he had the benefit of Houston-Sconiers at sentencing. In re Pers. Restraint Meippen, 193 Wn.2d at 312-13 (citing Houston-Sconiers, 188 Wn.2d at 18). In Meippen, defense counsel did not seek an exceptional sentence based on youth, but rather requested a low-end standard range sentence with consecutive imposition of a firearm enhancement. Id.

In support of this request, counsel relied solely on his bald assertions that “Meippen was too young to appreciate the nature and consequences of his actions and that he ‘lack[ed] an understanding ... of the seriousness of the situation he involved himself in.’” Id. at 313. Counsel also argued that the defendant was “‘very immature in his thought processes and beliefs’ and opined that due to Meippen’s age, a lengthy prison sentence would be especially difficult.” Id. The trial court rejected these arguments and imposed a high-end standard range sentence with consecutive imposition of the firearm enhancement. Id.

The Meippen opinion contains no facts or details that would support defense counsel’s conclusory assertions, other than the bare fact

of the defendant's age (16 years old). Id. Rather, this Court stated "Meippen does not present any evidence that the trial court would have imposed a lesser sentence if it had the discretion to depart from the SRA standard sentencing ranges and mandatory sentence enhancements." Id. at 317. Accordingly, the Court concluded "[n]othing in our record suggests that the trial court would have exercised its discretion to depart from the SRA sentence enhancement guidelines." Id.

Based on the foregoing discussion, Meippen merely stands for the proposition that bare conclusory assertions of youthfulness without supporting evidence showing diminished culpability are insufficient to warrant reversal of a trial court's imposition of a standard range sentence and consecutive enhancements.

Whereas the record in Meippen lacked any evidence to support imposition of an exceptional sentence downward, the record in Mr. Ali's case lies on the opposite end of the spectrum. Mr. Ali did not simply ask for a reduced sentence on the basis of his youth alone. Rather, he provided extensive support for the mitigating role that his youth played in the commission of the offenses at issue, providing evidence and testimony that Mr. Ali "is seventeen years old without criminal history" and has "endured extreme turmoil in his young life," having been "born into a bloody civil war in his native Somalia," and then having to adapt to

American society and culture as an adolescent refugee without the guidance of his father, who had been killed prior to their flight from violence. 5.27.2009 RP at 1420:10-24; *Appendix “A”, Defense Sentencing Memorandum*. The record in Mr. Ali’s case contains abundant evidence establishing that the transitory qualities of youth in fact played a role in the offense, that Mr. Ali suffered extraordinary trauma in his youth that stunted his development and maturity, and that a trial court properly exercising its discretion would have departed downward from the SRA standard range. See Appendix A.

Mr. Ali also presented 36 letters and testimony from multiple community members attesting to the difficulties Mr. Ali faced as a refugee, Mr. Ali’s demonstrated potential to be rehabilitated and play a positive role in the community, and even specifically identifying peer pressure as a cause of his criminal conduct. 5.27.2009 RP at 1424-30; *PRP Appendix “A,” at 8-41*; see also *O’Dell*, 183 Wn.2d at 692 (identifying peer pressure as an indicator that youth played a role in the commission of an offense).

The evidence showing Mr. Ali’s potential for rehabilitation and underlying positive personality traits is particularly crucial in evaluating Mr. Ali’s PRP. This evidence indicates that Mr. Ali has an underlying personality that can conform to the rules of society, which were

temporarily overshadowed by poor judgment while the processes of reductions in gray matter, shifts in the proliferation and redistribution of dopamine receptors, increases of white matter in the prefrontal regions, and increases in connections between the cortical and subcortical regions remain ongoing. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 *Am. Psychologist* (Nov. 2009), at 742-43.

One of the three primary reasons the courts have begun to treat young offenders with greater leniency is the recognition that, due to the transitory nature of the characteristics of youth, young offenders have a greater potential for successful rehabilitation. See State v. Moretti, No. 95263-9, at *15 (Wash. Aug. 15, 2019) (“Many of the cases exempting juveniles from harsh sentencing practices have relied on the strong prospects of juveniles for change”)¹; Roper v. Simmons, 543 U.S. 551,

¹ The Moretti decision further emphasized the importance of assessing the transitory nature of characteristics leading to the commission of an offense, quoting a study that found:

Just as risk taking peaks during adolescence, studies that have been conducted in different historical epochs and in countries around the world have found that crime engagement peaks at about age seventeen (slightly younger for nonviolent crimes and slightly older for violent ones), and declines significantly thereafter. Longitudinal studies have shown that the majority of adolescents who commit crime desist as they mature into adulthood. Only a small percentage—generally between

570, 125 S. Ct. 1183, 1195-96 (2005) (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.”). Mr. Ali has established the existence of precisely the redeemable characteristics upon which the Roper Court relied in striking down the death penalty for juveniles.

In contrast to the dearth of supporting evidence in Meippen, it is difficult to conceive of weightier evidence in support of imposition of an exceptional sentence downward than that presented in Mr. Ali’s case.² The State has presented no evidence whatsoever to challenge Mr. Ali’s evidence on this point. If Mr. Ali’s presentation at sentencing and in conjunction with this PRP is insufficient to establish that youth played a mitigating role in the commission of his offenses, then this is a standard

five and ten percent—become chronic offenders or continue offending during adulthood.

Moretti, No. 95263-9, at *17 n.7 (quoting Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 UC IRVINE L. REV. 21, 26 (2018)).

² Mr. Ali’s argument is supported also by the fact that the trial court failed to enter written findings of fact to support its decision to impose a standard range sentence with consecutive imposition of the firearm enhancement. See State v. Gilbert, 193 Wash. 2d 169, 175-76, 438 P.3d 133, 136 (2019) (“While formal written findings of fact and conclusions of law are not strictly required, they are always preferable to ensure that the relevant considerations have been made and to facilitate appellate review.”)

that cannot be met. To deny Mr. Ali's PRP would be to deprive the landmark decisions of O'Dell and Houston-Sconiers of any force or effect. See Houston-Sconiers, 188 Wn.2d at 21; O'Dell, 183 Wn.2d at 689. Although the Court rejected the petitioner's unsupported request for relief in Meippen, the necessary implication of the decision is that when, as in Mr. Ali's case, a petitioner presents evidence establishing that he should have received an exceptional sentence based on the mitigating factor of youth under current law, the petitioner has established actual and substantial prejudice and is therefore entitled to relief. Accordingly, the Meippen decision provides further support for granting Mr. Ali's PRP.

B. The Meippen Dissent Supports Mr. Ali's Argument that His PRP is Timely.

The majority opinion in Meippen bypassed the analysis of the RCW 10.73.100(6) exception to the RCW 10.73.090 one-year time bar, instead reaching only the issue of whether the petitioner was actually and substantially prejudiced by the failure of the sentencing court to meaningfully consider his youth. However, the dissenting opinion in Meippen, joined by four justices, evaluated the RCW 10.73.100(6) elements at the outset. In re Pers. Restraint Meippen, 193 Wn.2d at 318-29 (Wiggins, J., dissenting with González, Gordon McCloud, and Yu, JJ concurring in the dissent). In conducting the RCW 10.73.100(6) analysis, the dissenters concluded "[b]y overturning Brown, Houston-Sconiers was

a significant change in the law.” Id. at 321-22 (citing State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999)).

As to materiality, the dissenters would hold the materiality requirement is met based on the petitioner’s showing that the court did not meaningfully consider his youth at sentencing. Id. at 322-23. They reasoned that the sentence was material on the grounds that “[w]e cannot presume that the sentencing court took Meippen’s youth into account when it gave absolutely no indication of having done so” and “[s]ilence does not constitute reasoning.” Id. Because Houston-Sconiers requires courts to meaningfully consider youth in imposing sentences on juveniles, and because the court did not do so in the petitioner’s case, the dissenters held Houston-Sconiers was material to the petition. In re Pers. Restraint Meippen, 193 Wn.2d at 322-23. Materiality was also deemed to have been met because the attorneys involved were likewise unaware that youth must be meaningfully considered. Id.

This same reasoning applies in Mr. Ali’s case, and with more force given that Mr. Ali has established not only that the sentencing court did not meaningful consider his youth, but also that, had it done so, it would have imposed a shorter sentence.

As to retroactivity, the dissenters reasoned that the rule in Houston-Sconiers constitutes a “substantive rule of constitutional law” and

must therefore be given retroactive application. In re Pers. Restraint Meippen, 193 Wn.2d at 323-26 (citing Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). In reaching this conclusion, the dissenters analogized Houston-Sconiers to Miller and concluded “[j]ust as Montgomery considered Miller a substantive change in the law, so too should we hold that Houston-Sconiers is a substantive change of constitutional law.” In re Pers. Restraint Meippen, 193 Wn.2d at 326 (citing Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016); Miller v. Alabama, 567 U.S. 460, 479-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

The majority opinion in Meippen did not address the foregoing analysis and thus did not reject it. Because the dissenting opinion, joined by four Justices, is analytically sound and was not rejected by the majority, it should be adopted and applied in this case. Based on the dissenters’ analysis in Meippen, Mr. Ali’s PRP meets all the requirements of the exception to the one-year limit codified at RCW 10.73.100(6), as to all issues raised therein, and the PRP is timely.

III. CONCLUSION

As set forth herein, the recent decision in Meippen, including the dissenting opinion, provides further support for granting Mr. Ali's PRP. Accordingly, Mr. Ali again respectfully requests that the Court grant his PRP and remand the matter for further proceedings.

Respectfully submitted this 27th day of August, 2019.

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CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on August 27, 2019 I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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