

FILED
SUPREME COURT
STATE OF WASHINGTON
8/22/2018 2:16 PM
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SUPREME COURT NO. 95814-9
COURT OF APPEALS NO. 33794-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JAMES GILBERT,

Appellant.

ANSWER TO PETITION FOR REVIEW

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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. Gilbert*, No. 33794-4-III, filed April 3, 2018.

C. STATEMENT OF THE CASE

The defendant, Jeremiah James Gilbert, was convicted of numerous charges including the aggravated first degree murder of Loren Evans, the first degree murder of Robert Gresham, and the second degree assault of Farrell Harris, all committed when he was 15 years old. Gilbert now relies upon a 72 page dissent by Judge Fearing that begins with the rank speculation that the 40-year-old Gilbert will never commit another crime if he is released.

The facts of the underlying crimes as follows are taken from the unpublished appellate decision, *State v. Gilbert*, 13366-4-III, 1996 WL 576774 (Wash. Ct. App. Oct. 8, 1996). On Saturday, September 19, 1992, the Defendant and his friend Mr. Rau, decided to travel to Dufur, Oregon after they had a fight with their parents. They gathered backpacks and rifles from Mr. Rau's home and hitchhiked from Buckley, Washington,

towards Oregon. They spent the night in a hay loft near Goldendale, Washington, and on Sunday morning, September 20, 1992, started walking west toward an area known as Oak Gulch. Mr. Rau had testified that the Defendant had joked about killing the next person who drove by because he was tired of walking. At about noon that day they came across a tractor parked in a field with the keys in the ignition and took it for a ride.

Farrell Harris had planned to go bow hunting in Oak Gulch that day. He drove his Ford Bronco to the area and parked it beside a dirt road before hiking down across the bottom of a canyon and up the other side. Around 2 p.m. Mr. Harris saw two young men driving a tractor. He continued hunting. Later in the afternoon, Mr. Harris noticed that the two men had returned and he heard a shot. Mr. Harris returned to the area where he had parked his Bronco, and saw the tractor had come to a stop near his Bronco. Mr. Harris saw the Defendant walk over to his Bronco, break out the window, and attempt to "hot-wire" the vehicle. As Mr. Harris began running towards the two men to protest this action, the Defendant grabbed a rifle from the tractor and began shooting at him. Mr. Harris ran for cover and hid in a wooded area. He saw Defendant walk down the road shooting towards him and heard him say "I know you're

down there.” The Defendant continued to shoot at Mr. Harris four or five times more. Mr. Harris continued to watch the two men from a safe distance as the Defendant returned to the area of the Bronco.

A few minutes later, a man on a motorcycle, later identified as Robert Gresham, approached the area of the Bronco, the tractor and the two young men. When Mr. Gresham got close to the tractor Mr. Harris heard a shot. He then heard Mr. Gresham shout “what... did you do that for?” The Defendant had shot Mr. Gresham through the shoulder. Mr. Harris then heard a sound like crying and a man’s voice asking “What did I do?” and then another shot. The Defendant approached Mr. Gresham while he was laying helplessly on the ground begging for his life and executed him by firing a third shot into Mr. Gresham’s head. The Defendant testified at trial and told Sheriff’s Deputies that he shot Mr. Gresham at point blank range so that “he would quit yelling and screaming” and to “put him out of his misery” even though the first two shots were to the shoulder, an injury that Mr. Gresham may likely have survived.

At approximately 5:00 p.m., Loren Evans, who was in the Oak Gulch area at the time, heard the shots and drove his pick-up truck towards the area where the Bronco was parked. Mr. Harris, still in hiding, saw Mr.

Evans' pick-up truck approach the area where the Bronco was parked. Mr. Harris saw the Defendant lean a rifle across the top of the open door of the Bronco and fire a shot. The windshield on Mr. Evans' truck shattered and the truck slammed into the tractor. Mr. Evans, the driver of the truck, was killed by a single shot to the head. Mr. Harris saw the Defendant and Mr. Rau drag Mr. Evans' body from the truck and throw him on the ground. They then removed some items from the tractor and loaded them in the truck. After shooting out the tires of the Bronco the two drove away in Mr. Evans' truck.

Mr. Harris came out of the woods, got on the dead man's motorcycle and rode to a nearby farmhouse where he contacted law enforcement. The Defendant was arrested later that evening.

The State charged the Defendant with two counts of Aggravated Murder in the First Degree (or alternatively Murder in the First Degree), Assault in the First Degree, Burglary in the First Degree (seeking a deadly weapon enhancement), Theft in the First Degree, and Robbery in the First Degree (seeking a deadly weapons enhancement). A jury found the Defendant guilty on all counts.

On June 7, 1993, the trial court imposed a sentence of life in prison without the possibility of parole, which was mandatory at that time for

Aggravated Murder in the First Degree. CP 0-8. A sentence of 280 months was imposed for Murder in the First Degree, to run consecutively to the sentence for Aggravated Murder in the First Degree. CP 0-8. The sentences for the four remaining crimes were to run concurrent to each other and the sentence for the Aggravated Murder in the First Degree. CP 0-8.

On appeal, the Defendant challenged the sufficiency of the evidence to support either the premeditation element of the First Degree Murder convictions or the three aggravating factors found by the jury. CP 9. The Court of Appeals rejected these arguments and affirmed the Defendant's convictions by a decision that was entered on October 8, 1996. The mandate was issued confirming the convictions on March 5, 1997. CP 22.

In 2012, the United States Supreme Court decided *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), holding that mandatory life without parole sentences for juveniles violated the Eighth Amendment.

On June 16, 2013, the Defendant filed his Personal Restraint Petition. On February 23, 2015, a joint motion to dismiss the Personal Restraint Petition and remand for re-sentencing in light of the Miller

decision was filed. On March 5, 2015, the Court of Appeals granted the motion and remanded the case to the Klickitat County Superior Court for re-sentencing. *Personal Restraint of Jeremiah Gilbert*, 89080-3.

On September 21, 2015, the Defendant was re-sentenced. Sentencing Memorandums were submitted by both the defense and prosecution. CP 26-37. A surviving spouse gave a victim impact statement, the defense presented a character witness, and oral arguments were made by each side. Finally, a court appointed expert witness, a psychologist, appointed in accordance with the *Miller* decision, evaluated the Defendant and submitted his assessment, which was reviewed prior to the hearing. CP 73-85.

The resentencing court imposed the new statutorily-prescribed sentence of 25 years to life for the Aggravated Murder in the First Degree and otherwise adhered to the original sentence. Thus, Defendant was sentenced to 280 months for Murder in the First Degree, to run consecutively to the sentence of 25 years to life for the Aggravated Murder in the First Degree. The remaining sentences were to run concurrently with the sentence for the Aggravated Murder in the First Degree. CP 86-92.

D. ARGUMENT

Gilbert seeks review of four issues: (1) whether the majority opinion comports with the “spirit” of recent jurisprudence on juvenile sentencing, (2) whether the Court of Appeals’ reliance on facets of the “*Miller*¹ fix” legislation and implementing regulations violate the Eighth Amendment and his right to equal protection under the federal and state constitutions, (3) whether the Court of Appeals improperly failed to consider an opinion identified by Gilbert in a Statement of Additional Authorities, and (4) whether imposition of consecutive sentences amounts to a de facto life sentence in violation of *Miller* and *Montgomery v. Alabama*, 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

This Court should deny review of each of these claims because Gilbert’s petition fails to conform to the requirements of RAP 13.4. Further, Gilbert raises certain issues for the first time in this petition, making them unsuitable for review under RAP 13.3. Additionally, no evidence before the Court demonstrates that the resentencing court abused its discretion in imposing a sentence for Aggravated Murder consistent with statute.

¹ *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L. Ed. 2d 407 (2012).

1. THIS COURT SHOULD DENY REVIEW BECAUSE
GILBERT FAILS TO COMPLY WITH RULES OF
APPELLATE PROCEDURE.

This Court has set forth the requirements for obtaining review of a Court of Appeals decision in RAP 13.4. Subsection (b) of the rule identifies the considerations governing acceptance of review, specifying that review will be granted “only” if one or more of the following circumstances exist: (1) the decision conflicts with a decision of the Supreme Court, (2) the decision conflicts with a published decision of the Court of Appeals, (3) the decision involves a significant question of constitutional law, or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). In order for this Court to evaluate whether any of these conditions exist, the petition must include “A direct and concise statement of the reasons why review should be accepted under one or more of the tests established in subsection (b), with argument.” RAP 13.4(c)(7).

Gilbert’s petition does not identify which if any of the considerations in RAP 13.4(b) warrants review in his case. Indeed, he fails to cite the governing rule at all. And while Gilbert’s petition includes argument on the merits of the claims he submits for review, he fails to address the only issue relevant to his petition: whether review is

appropriate under RAP 13.4. Because Gilbert has not shown why review should be granted, this Court should deny review of the petition in its entirety. *See State v. Korum*, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006) (declining to review issue because of petitioner's failure to comply with RAP 13.4).

2. GILBERT MAY NOT RAISE NEW ISSUES IN A PETITION FOR REVIEW.

Among other issues, Gilbert seeks review of whether “RCW 9.94A.740(1) and WAC 381-40-150 contravene[s] Mr. Gilbert’s right to equal protection under the Fourteenth Amendment to the United States Constitution, [Wash.] Const. art. I, § 3, as well as the Eighth Amendment[.]” Petition at 1. But Gilbert has presented that issue to neither the trial court nor the Court of Appeals. Consequently, the Court of Appeals has issued no decision on the matter. This Court will not ordinarily consider an issue not raised or briefed in the Court of Appeals. *State v. Halstein*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); RAP 13.3(a) (allowing a party to seek review of a “decision” of the Court of Appeals). Further, besides identifying the issue on page 1 of his petition, Gilbert fails to explain the nature of the claim, let alone why review is appropriate under RAP 13.4(b). Accordingly, this Court should not accept review of the alleged Equal Protection violation.

Gilbert's attempt to obtain review of whether the Court of Appeals "side-step[ed] its duty to consider" an opinion he submitted in a statement of additional authorities suffers similar deficiencies. As presented, the issue is not whether the Court of Appeals properly construed or applied *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), but whether it has discretion to avoid considering cases presented in statements of additional authority.² If Gilbert believed the Court of Appeals failed to consider his authority at all, he should have moved for reconsideration on that basis. He did not. There is no decision on the issue as presented, and therefore, nothing to review. *Halstein*, 122 Wn.2d at 130; RAP 13.3(a). Moreover, aside from his statement of issues presented for review, Gilbert's petition includes no argument about whether the Court of Appeals considered or properly applied *Houston-Sconiers*, or why review of the issue is warranted under RAP 13.4(b). This Court should not accept review of the question concerning the Court of Appeals' duty to consider supplemental authority.

3. GILBERT DOES NOT ADDRESS THE TRUE
SUBSTANTIVE CLAIM AT ISSUE: DID THE TRIAL
COURT ABUSE ITS DISCRETION?

² The Court of Appeals clearly did consider *Houston-Sconiers*. It is cited and discussed in the majority opinion. Slip. Op. at 8.

In his Petition for Review Gilbert ignores the true substantive issue presented by this case: Did the trial court abuse its discretion in denying an exceptional sentence of a concurrent sentence for two murders when statute dictates consecutive sentences? The Defendant had a hearing accordance with the “*Miller Fix*” and at that hearing it was clear that the court took into account all materials provided by the defendant. “I’ve read the risk assessment of the Defendant . . .” VRP 19. The court did not take this matter lightly. Rather, the court read the risk assessment, listened to the witness who spoke on the behalf of the Defendant, and listened to the Defendant, who spoke on his own behalf. But he also listened to the State, and to the surviving spouse of one of the men executed.

The fact is, the Defendant executed two innocent individuals in cold blood. He showed no mercy. Even as one man begged for his life, he fired a shot into his head. He executed Mr. Gresham, treating him like an animal by characterizing the murder as “putting him out of his misery.” The Defendant then mercilessly murdered Mr. Evans both to avoid detection and to obtain a vehicle to flee the scene. Had the Defendant been able to find Mr. Harris, the bow hunter who witnessed these insensible acts, he undoubtedly would have ruthlessly murdered Mr. Harris as well, as evidenced by the Defendant repeatedly firing shots at Mr. Harris as he

fled for his life. These gratuitously violent and cruel acts cannot be explained by youthful impulsivity or transient immaturity.

The Defendant argued that he deserves to be shown mercy, that a concurrent sentence would be just. At his re-sentencing, he asked the court to “read the letters of support and realize that reform is possible if I choose it and I have chosen such.” VRP 18. The Defendant’s opening brief states “Twenty-three (23) years of incarceration have changed him from a troubled juvenile into a responsible adult.” Petition at 1. The inmate who spoke on his behalf and his briefing would lead this Court to believe that he was a model prisoner. The Defendant again leaves out the whole story. In fact, from 1994-2006, the Defendant had twenty-seven (27) serious infractions, including assaulting a Corrections Officer. He also had a minor infraction in 2009. CP 73-85. He has spent twelve years being a problem inmate, and less than ten years being a “model” inmate.

The Defendant argues now that the court did not take his mitigating factors such as his youth and the positive things he has done in the last ten years in prison. The record does not support this position.

The resentencing court made it very clear that all the evidence was examined. Upon handing down the sentence, the court said “I’ve read the risk assessment . . . I’ve given thought to this and poured over what the

facts are. . . even Mr. Gilbert would agree that this was a heinous crime, that he gratuitously and senselessly executed at least one person . . .” VRP 19. The court recognized the issue of whether a consecutive sentence was just, or whether “in the context of everything I know, justice requires me to agree with [Defense Counsel] and reduce that [sentence] by sentencing concurrently.” VRP 19.

A standard range sentence can be challenged on the basis that the court refused to exercise discretion or relied on an improper basis for declining to consider the request. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). In such circumstance, it is the court's refusal to exercise discretion that is appealable rather than the sentence itself. *Id.* “Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the Defendant may not appeal that ruling.” *Id.*

In a *Miller* hearing, the offender has the burden of proving that an exceptional sentence below the standard range is justified. *State v. Ramos*, 187 Wn.2d 420, 445, 387 P.3d 650 (2017). “[N]ot every juvenile homicide offender is automatically entitled to an exceptional sentence below the standard range.” *Id.* at 434. In *Ramos*, the defendant argued that his *Miller* hearing was insufficient. Ramos was convicted of the

brutal murders of a family of four and was sentenced to a de facto life sentence. *Id.* at 429. At resentencing after *Miller*, the court again imposed a de facto life sentence. *Id.* at 432. Noting that *Miller* did not dictate a particular procedure but left the states to develop their own procedures for implementing its holding, this Court held that the hearing in *Ramos* was constitutionally sufficient. *Id.* at 453.

Significantly, the *Ramos* Court noted that not every judge would have imposed the same sentence, but “we cannot reweigh the evidence on review.” *Id.* at 453. “The court clearly received and considered *Ramos*’ extensive mitigation evidence, was fully aware of its authority to impose an exceptional sentence below the standard range, and reasonably considered the issues identified in *Miller* when making its decision.” *Id.* *Ramos* failed to show on appeal that the hearing violated “*Miller*’s minimal requirements.” *Id.* The Court concluded that the 85-year sentence did not violate the Eighth Amendment. *Id.* at 458.

Likewise, Gilbert’s resentencing met the substantive and procedural requirements of *Miller*. Substantively, the sentence imposed does not constitute a de facto life sentence and thus does not violate *Miller*’s ban on imposing a life sentence without the possibility of parole

on all the but the worst homicide offenders. Gilbert will be eligible for release from his sentence by age 60.

Ultimately, the resentencing court reasonably determined that justice for the Defendant's multiple horrific crimes demanded a consecutive sentence which would result in the possible release of Defendant at age 60. The court was aware of its responsibilities and discretion, and exercised both.

E. CONCLUSION

The State respectfully asks that the petition for review be denied.

DATED this 22nd day of August, 2018.

Respectfully submitted,

KLICKITAT COUNTY
PROSECUTING ATTORNEY

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August 22, 2018 - 2:16 PM

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Appellate Court Case Title: State of Washington v. Jeremiah James Gilbert
Superior Court Case Number: 92-1-00108-1

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