No. 48877-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

JOHN PHET,
Appellant.

APPELLANT'S REPLY BRIEF

Jeffrey E. Ellis
Attorney for Mr. Phet
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Phet's Sentence Violates the State and Federal Constitutions 2

B. The Doctrine of Constitutional Avoidance Requires the Construction of the Parole Provision for Sentences Other than Aggravated Murder to Require a Release Hearing After Serving Twenty Years 4

C. The Sentencing Court Has the Complete Discretion to Run the Terms Concurrently 6

D. The State Fails to Respond to Phet's Argument that the Firearm Enhancement Provisions Do Not Raise the 25 Year Minimum Available Term Although It Concedes that the SRA Does Not Apply to Aggravated Murder. 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

United States Supreme Court Cases

Miller v. Alabama, 567 U.S. 460 (2012) *passim*

State Cases

Matter of Bourgeois, No. 74850-5-I, 2017 WL 1315503 (2017)(unpub) 7

State v. Bassett, __ Wn.App. __, __ P.3d __, 2017 WL 1469240 (2017) 2

State v. Houston-Sconiers, 188 Wash.2d __ , 391 P.3d 409 (2017) *passim*

State v. Ramos, 187 Wash.2d 420, 387 P.3d 650 (2017) 3

Statutes

RCW 9.94A.730 4

I. INTRODUCTION

It is overwhelmingly clear that John Phet's sentence—a total minimum sentence that far exceeds any human's life expectancy—is unconstitutional. The Eighth Amendment prohibits a life sentence for all juveniles, except those who are found to be irretrievably corrupt. John Phet is not irretrievably corrupt, a finding made by the court at Phet's resentencing that the State has never disputed. RP 164 ("It is well-established in the record that Mr. Phet has made extraordinary strides himself to improve his educational attainments, his work skills, and he has affected positive behavioral changes while in prison. He has never been involved in a major infraction that involved violence in prison."). But, the state constitution goes further and prohibits life without parole sentences for all juveniles. That rule, which applies to multiple counts of aggravated murder, applies with equal force to multiple assault convictions, the inclusion of firearm enhancements notwithstanding. This Court should hold that Phet is parole eligible on those counts after serving 20 years. In sum, Mr. Phet's greater-than-life sentence violates both the state and federal constitutional guarantees against cruel punishment. This Court should reverse and remand with directions that Mr. Phet is entitled to be resentenced to a

term that provides him with a meaningful opportunity to gain early release based on his demonstrated rehabilitation.

But, this Court should further rule on additional aspects of Phet's sentence that will either arise again or which may impact the sentencing judge's discretion regarding the minimum term to impose.

First, the sentencing court is absolutely empowered to run the terms (including the firearm enhancements) concurrently.

Second, the firearm enhancements do not apply to the aggravated murder counts.

II. ARGUMENT

A. Phet's Sentence Violates the State and Federal Constitutions

Mr. Phet, who was a 16-year-old child at the time of his crimes, was sentenced to a total minimum term of more than life without the possibility of release. That sentence categorically violates the state constitution. *State v. Bassett,* __ Wn.App. __, __ P.3d __, 2017 WL 1469240 (2017).

In *Bassett,* this Court held:

> Under a categorical analysis, we hold that to the extent that a life without parole or early release sentence may be imposed against a juvenile offender under the *Miller*-fix statute, RCW 10.95.030(3)(a)(ii), it fails the constitutional categorical bar analysis. Therefore, a life without parole or early release

> sentence is unconstitutional under article I, section 14 of our state constitution.

Slip Opinion, at ¶ 62.

It is also clear that Phet's sentence violates the federal constitution. Phet is not irretrievably corrupt, a finding that is beyond dispute.

Likewise, it makes no difference—constitutionally speaking—that Phet was sentenced to multiple terms which aggregate to a "more than life" minimum sentence. The Washington Supreme Court held in *State v. Ramos,* 187 Wash.2d 420, 438, 387 P.3d 650 (2017), that "nothing about *Miller* suggests its individualized sentencing requirement is limited to single homicides." *Ramos* continued:

> … we also reject the notion that *Miller* applies only to literal, not de facto, life-without-parole sentences. Holding otherwise would effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to *Miller*. Whether that sentence is for a single crime or an aggregated sentence for multiple crimes, we cannot ignore that the practical result is the same.

Id.

It is beyond peradventure that Phet's sentence is unlawful. He is entitled to be resentenced.

B. The Doctrine of Constitutional Avoidance Requires the Construction of the Parole Provision for Sentences Other than Aggravated Murder to Require a Release Hearing After Serving Twenty Years.

The ISRB's application of the law to Phet's assault convictions with firearm enhancements likewise results in a minimum term that is equivalent to life without the possibility of release. According to the ISRB, Phet must first serve 50 year of "flat" firearm enhancement time (25 years for the assault convictions alone) and then an additional 20 years on the assaults before he is parole eligible. That 70-year minimum term is the virtual equivalent of a life sentence. In a later section, Phet argues why the firearm terms should not apply to the aggravated murder counts.

The ISRB's position on Phet's parole eligibility for his non-aggravated murder convictions is contrary to the plain language of the statute. RCW 9.94A.730(1) provides in pertinent part:

> Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement…

The language of the statute is plain. All juvenile defendants sentenced for "one or more crimes" are eligible for release after serving 20 years, the inclusion of firearm enhancements "notwithstanding."

The ISRB offers no purported justification for its decision to treat all Phet's firearm enhancements as determinate terms that must be served in their entirety before Phet can start serving his indeterminate terms. In any event, the doctrine of constitutional avoidance as applied in *Houston-Sconiers, supra,* requires a different outcome. If the ISRB is correctly construing the *Miller*-fix statutes, then this Court is obliged to strike the provisions relating to convictions other than aggravated murder and direct that Phet be resentenced on all counts.

Phet certainly does not contend that his sentence must be structured so that he is parole eligible on the assault convictions (and the firearm enhancements) first. It would be reasonable for the ISRB not to hold a parole hearing until the resentenced juvenile has served the minimum term of the aggravated murder, since that term will be longer than and will subsume the 20-year minimum for non-aggravated murder convictions. But, it is unreasonable and hardly theoretical for the ISRB to structure the terms as they have done here.

This Court should reach the remaining issues raised by Phet because they will either arise again at resentencing; may influence the discretionary minimum term imposed on the aggravated murder counts; and/or will reoccur when Phet is resentenced if not corrected now.

C. The Sentencing Court Has the Complete Discretion to Run the Terms Concurrently

In *State v. Houston-Sconiers,* 188 Wash.2d __ , 391 P.3d 409 (2017), the Washington Supreme Court held sentencing courts must have "absolute discretion" to depart as far as they want below otherwise applicable ranges, sentencing enhancements, and consecutive sentence requirements when sentencing juveniles in adult court. The Washington Supreme Court added: "Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." 391 P.3d at 420. As a result, in *Houston-Sconiers,* "the exceptional sentences of zero incarceration on the base substantive offenses that the State proposed and the court accepted in this case were lawful, based on petitioners' youth at the time of the crimes. 391 P.3d at 421.

In Phet's case, the sentencing court failed to recognize that it not only had the discretion to run the terms concurrently, but that it could do so based on Phet's youth at the time of the crime. RP 166.

There is a second reason the sentencing court erred, the SRA's consecutive sentencing requirements simply do not apply to resentencing under RCW 10.95. In addition to the cases cited in Phet's

opening brief, this court in an unpublished opinion recently rejected an *ex post facto* claim regarding the denial of good time for a minimum term imposed for a juvenile resentenced on an aggravated murder conviction. This court held: "Former RCW 9.94A.150 only applies to individuals sentenced under the Sentencing Reform Act of 1981, ch. 9.94A RCW. But Bourgeois was sentenced under chapter 10.95 RCW, not the Sentencing Reform Act. *Matter of Bourgeois*, No. 74850-5-I, 2017 WL 1315503, at *4 (Wash. Ct. App. Apr. 3, 2017). "Bourgeois was not deprived of a liberty interest that he "possessed as of the time of the *Miller* decision" because former RCW 9.94A.150 never applied to him." *Id.* If the SRA's good time provisions do not apply to an JLWOP resentencing, then neither do the consecutive sentencing provisions.

After successfully arguing the opposite provision in the sentencing court, the State appears to concede that the SRA does not apply to sentencing aggravated murder counts. The State now acknowledges that the "two sentencing statutes are separate and apply to different offenses." *Response,* p. 11. Phet accepts the State's belated concession that he was not required to establish an exceptional circumstance for the sentencing court to run the aggravated murder counts concurrently.

But, after making this switch-in-time concession, the State embarks on another new argument not advanced in the court below. The State argues for the first time on appeal that the *Miller*-fix requires consecutive minimum indeterminate terms. The State's statutory argument finds cursory support in the language of the statute. The State argues because the statute uses the singular term "the crime" that each crime "was intended to receive its own punishment," which the State then asserts—without any grounding in the language of the statute—must be consecutive. The legislature clearly knows how to mandate consecutive terms. They did not do so.

Moreover, the doctrine of constitutional avoidance prevents the State's attempt to engraft words into the statute not placed there by the Legislature. Under the State's interpretation, every juvenile defendant convicted of more than one count of aggravated murder must be sentenced to a non-discretionary term of at least 50 years. Because that reading results in unconstitutional minimum-term sentences, the statute must be construed to give a sentencing judge the absolute discretion to impose concurrent terms.

D. The State Fails to Respond to Phet's Argument that the Firearm Enhancement Provisions Do Not Raise the 25 Year Minimum Available Term Although It Concedes that the SRA Does Not Apply to Aggravated Murder.

The State's concession that the provisions of the SRA do not apply to aggravated murder can only mean that the deadly weapon and firearm enhancement provisions of the SRA do not apply or, if they do, do not result in an increased 5-year minimum term (and are not required to run consecutively). The State simply cannot have it both ways.

When the Legislature set 25 years as the minimum term that could be imposed for a juvenile convicted of aggravated murder it is presumed to know that some of those convictions included a firearm special verdict. But, the statute makes no mention of any determinate term increase to the minimum indeterminate term now required.

Deadly weapon and firearm increases only apply to "standard range" determinate sentences, which the State concedes do not include aggravated murder indeterminate terms.

This Court should conclude that the firearm verdicts do not raise the minimum indeterminate term. If they do, the sentencing court has the complete discretion to run those terms concurrently.

III. CONCLUSION

Based on the above, this Court should reverse and remand for resentencing.

DATED this 23rd day of May, 2017.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis #17139
Jeffrey Erwin Ellis
Attorney for Mr. Phet
Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
503.222.9830 (o)
JeffreyErwinEllis@gmail.com

CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I served opposing counsel by electronically filing this reply brief causing a copy to be sent to opposing counsel at:

pcpatcecf@co.pierce.wa.us
CORreader@atg.wa.gov

May 23. 2017//Portland, OR /s/Jeffrey Erwin Ellis

ALSEPT & ELLIS LAW OFFICE
May 23, 2017 - 4:26 PM
Transmittal Letter

Document Uploaded: 6-488779-Reply Brief.pdf

Case Name: State v John Phet

Court of Appeals Case Number: 48877-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

■ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jeffrey Ellis - Email: jeffreyerwinellis@gmail.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us
CORreader@atg.wa.gov