

No. 49534-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JERMOHNN E. GORE,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Jermohnn Gore was only 16 years old when he allegedly participated in a drive-by shooting. Unbeknownst to any of the young men in the car, a group of five people was standing between the shooters and their purported target. One man in that group was unintentionally shot in the head and died. Gore was convicted of one count of first degree murder and four counts of first degree assault.

Without a warrant, the police impounded a car that Gore and an accomplice were riding in four days after the shooting. The police did not have probable cause to believe the car was involved in the shooting or contained evidence of the crime. The seizure of the car was therefore unconstitutional and the firearm evidence found in a search of the car should have been suppressed.

Gore's constitutional right to a unanimous jury verdict as to the unlawful possession of a firearm conviction was violated.

Gore received a *de facto* life sentence of 82 years in prison. The sentence is unconstitutional in violation of the Eighth Amendment because the court did not conduct a Miller¹ hearing or consider mitigating factors related to Gore's youthfulness.

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

Finally, the conviction for second degree felony murder must be vacated because it violates Gore's constitutional right to be free from double jeopardy.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress evidence found in the Cadillac DeVille, in violation of the Fourth Amendment and article I, section 7.

2. The court violated CrR 3.6 by failing to hold a hearing or explain in writing its reasons for denying the motion to suppress.

3. Gore's constitutional right to a unanimous jury verdict under the Sixth Amendment and article I, section 22, was violated as to the unlawful possession of a firearm charge.

4. The *de facto* life sentence Gore received for crimes he allegedly committed when he was only 16 years old, violates the Eighth Amendment.

5. The court erred in failing to vacate the conviction for second degree murder, in violation of the Double Jeopardy Clause.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Fourth Amendment and article I, section 7, the police may not impound a car without a warrant unless they have

probable cause to believe it was stolen, was used in the commission of a felony, or contains evidence of a crime. They may also impound a car without a warrant if it poses a danger to the public and no reasonable alternative to impoundment exists. Did the police violate Gore's constitutional right to be free from unreasonable searches and seizures by impounding, without a warrant, a car he was riding in, where they did not have probable cause to believe the car was used in the shooting or contained evidence of the shooting, and where the car posed no danger to the public and Gore's father was available to drive the car away? Must the evidence found in a search of the car be suppressed, where the State did not prove the police would have sought a search warrant absent the unlawful seizure of the car?

2. When the State presents evidence of multiple criminal acts, any one of which could form the basis of the charge, either the jury must be instructed it must unanimously agree on a single act, or the State must elect a single act. Failure to follow one of these alternatives violates the accused's constitutional right to a unanimous jury verdict. Here, the State charged Gore with one count of unlawful possession of a firearm and presented evidence that he possessed two firearms. The jury was not instructed it must unanimously agree on a firearm and the

State did not elect a firearm. Was Gore's constitutional right to a unanimous jury verdict violated?

3. When a juvenile offender faces a *de facto* life sentence, the Eighth Amendment requires that he receive a Miller hearing, at which the court must consider mitigating factors related to the offender's youth, his background, the circumstances of the crime, and the chances of rehabilitation. The court may not impose a life sentence unless it finds the offender is irreparably corrupt and not capable of rehabilitation. Gore was only 16 years old at the time of the offense. The court imposed a *de facto* life sentence but did not conduct a Miller hearing. Does the sentence violate the Eighth Amendment?

4. When an offender is convicted twice for the same offense, double jeopardy requires that the lesser conviction be vacated. Here, Gore was convicted of two counts of murder for a single homicide. Did the trial court's failure to vacate the lesser conviction violate his constitutional right to be free from double jeopardy?

D. STATEMENT OF THE CASE

Jermohnn Gore is a young African-American man from south Tacoma. At the time of the incident, he was only 16 years old. RP

3187-88.² His father is a gang member with a criminal record. RP 3316-17. He lives in a neighborhood where it is so common and routine to hear gunshots that some residents do not give it a second thought. RP 756, 1025, 2401.

The charges arose from a shooting incident on May 1, 2015. Early in the afternoon, a white Cadillac Escalade drove by a small grocery store at the intersection of South 45th and South Union Avenue in Tacoma. RP 852-57, 982-83. The grocery store, commonly called the “red store,” is a known hangout for the Knoccoutz Crips gang. RP 1004, 1340, 1500. As the Escalade drove down an alley near the store, one or two people inside fired several gunshots toward the store. RP 1175-81, 1198, 1247-49, 1766-67, 1983-85.

A group of five young people, who were not associated with the Knoccoutz gang, were walking from the store through the alley. RP 1140-42, 1244, 1763, 1980. When they heard the gunshots, they ducked down behind a Jeep parked in a carport between the alley and the store. RP 1146, 1245-46, 1284, 1765, 1770, 1985-86. One of the

² The verbatim reports for all of the hearings cited, except the sentencing hearing, are consecutively paginated. Most of the hearings will be cited as “RP” followed by the page number. The sentencing hearing will be cited by its date, 10/12/16RP, followed by the page number.

young men in the group, Brandon Morris, was accidentally shot in the head. RP 1175, 1252-53, 1961. He died a few days later. RP 732.

The shooters were aiming at the red store, not at the group of people in the carport. RP 1281, 1293-95, 2600. No one inside the Escalade was aware that the people in the carport were there. They did not intend to shoot them. RP 1503, 1601, 2468, 2713. They did not learn until later that someone had been shot. RP 2478, 2600.

Two of the young men in the Escalade, Trevion Tucker and Lance Milton-Ausley, testified at trial in exchange for favorable plea agreements with the State. They each anticipated that, by pleading guilty and testifying against their associates, they would receive only 10 years in prison. RP 1363-65, 2520.

Tucker and Milton-Ausley said the shooting was in retaliation for an earlier shooting that morning. RP 738-39, 752-60, 1318-19, 2440. All of the men inside the Escalade were members of the Hilltop Crips, a rival gang of the Knoccoutz. RP 1327-28, 2388. Tucker said that morning a member of the Knoccoutz named LeShaun Alexander had fired several gunshots at Alexander Kitt, a member of the Hilltop Crips, in front of Tucker's house. RP 1331, 2400-09. In response, Milton-Ausley, Tucker, and four other young men drove the Escalade

toward the red store looking for Alexander. When they saw Alexander's black Monte Carlo there, and Alexander standing nearby, they opened fire. RP 1344, 2440, 2459-60, 2465.

Tucker and Milton-Ausley said Kitt and Gore were the shooters. They said Kitt and Gore were both sitting in the back seat of the Escalade on the right side, closest to the store. RP 1347, 2455, 2462-63. Kitt had brought a blue backpack containing two handguns, one a 9mm and the other a .40 caliber. RP 1322-24, 2434. He gave the 9mm to Gore and used the .40 caliber himself. RP 1357, 2435, 2462-63. Milton-Ausley said Gore had also brought a nylon guitar case containing an assault rifle. RP 1312-13. Another man sitting in the back seat, Clifford Krentkowski, held the assault rifle on his lap but did not use it. RP 2437-39, 2455, 2462-63. Bullet fragments and shell casings found at the scene were fired from a 9mm and a .40 handgun. RP 1086-1109.

At first, the police had no suspects but witnesses had described the white Escalade. Two days later, the police found the Escalade parked on a street. RP 1829-32. They impounded it. RP 1832. Behind the right rear passenger seat they found a spent .40 caliber casing. RP 1851-52.

By May 5, the police had identified Kitt as a suspect. RP 3119, 3128. They knew he had an appointment downtown to provide a urine sample for drug court. RP 269, 2018. Officers waited by the building and saw Kitt arrive in a Cadillac Deville. CP 140; RP 650. That car was not involved in the shooting. RP 651. When Kitt entered the building, he was arrested. CP 140; RP 270-71.

Officers contacted the other individuals in the DeVille, who were waiting for Kitt. Jermaine Gore³, Jermohnn Gore's father, was sitting in the driver's seat. RP 2024. The car was registered to his wife. RP 2068. In the back seat were Jermohnn Gore and a man named Ladell Moton, who was not involved in the shooting. CP 140; RP 269-70, 2020-24.

The officers arrested Gore because he was wanted on an unrelated incident. RP 2025. They also arrested Moton because he provided a false name. RP 2026. They released Gore, Sr. CP 62.

Moton was searched incident to arrest and a handgun was found in his waistband.⁴ The officers saw no other firearms in the car. RP 2027-29.

³ Gore's father Jermaine will be referred to as "Gore, Sr."

⁴ None of the bullet fragments or casings found at the scene were matched to the firearm found on Moton. RP 2188-89.

Although Gore, Sr. was available to drive the DeVille, and the police had no reason to believe it had been used in the shooting, they impounded it. RP 2027-29.

The police later obtained a search warrant and searched the DeVille on May 8. RP 2043. Inside they found a blue backpack containing two handguns, a .40 caliber and a .38 special. RP 2086-88, 2095. The .40 caliber handgun was matched to a bullet fragment and several shell casings found at the scene. RP 2171-74, 2186-87, 2211. The 9mm firearm used to fire other bullet fragments and casings found at the scene was never found. RP 2188-2206.

The police also found a nylon guitar case containing an assault rifle inside the DeVille. RP 2047-48. Milton-Ausley said it looked like the guitar case he had seen Gore carrying on the day of the shooting. RP 1315-17.

Gore was charged with one count of first degree murder by extreme indifference; one count of second degree felony murder; four counts of first degree assault; one count of unlawful possession of a firearm in the first degree; and one count of intimidating a witness. CP 515-18. Counts one through six all carried firearm enhancements. Id.

Gore was tried jointly with Kitt and Krentkowski.

Prior to trial, the defense moved to suppress the evidence found in the DeVille, arguing the police had no probable cause to arrest Kitt or to seize the car. CP 11-22, 61-135, 150-91; RP 651, 655. An evidentiary hearing was requested but denied. CP 69. After hearing argument, the court denied the motion, ruling the seizure and search of the car were lawful because the officers had probable cause to arrest Kitt. RP 657. Alternatively, the court ruled that even if the officers did not have probable cause to arrest Kitt, the search was lawful because the police later obtained a search warrant, which was not challenged. RP 287-89, 649, 657.

At trial, the jury heard evidence that Gore possessed both a 9mm handgun and a semiautomatic rifle on the day of the incident. RP 1312-13, 1357, 2435, 2462-63. Yet the jury was not instructed it must unanimously agree on which firearm he possessed for purposes of the unlawful possession of a firearm charge, and the State did not elect which firearm it was relying upon.

The jury found Gore guilty of all counts as charged, and found he was armed with a firearm during commission of the crime. CP 555-73; RP 3682.

At sentencing, the court imposed a sentence of 984 months—82 years—in prison. CP 579-91. The court imposed a low-end standard-range sentence of 312 months for the first degree murder conviction, the most serious charge.⁵ For each of the four first degree assault convictions, the court imposed a low-end standard-range sentence of 93 months. Because first degree murder and first degree assault are “serious violent offenses,” each of those sentences are to be served consecutively to each other.⁶ The sentence also includes five 60-month firearm enhancements, all to be served consecutively to each other and to the base sentence.⁷ CP 579-91.

By contrast, the court imposed an exceptional sentence downward of 300 months for Krentkowski. 10/12/16RP 133-35, 140. Krentkowski’s exceptional sentence consists of a base sentence of 0 months plus five consecutive 60-month firearm enhancements. *Id.* The court found Krentkowski was less culpable than Gore and Kitt because, although he held an assault rifle on his lap and was ready and willing to

⁵ The offender score for the first degree murder conviction is six. That includes two points for a prior adjudication for second degree assault and two points for a prior second degree robbery. CP 579-91. The two prior adjudications arose from a single incident involving a BB gun. Sentencing Exhibit 1.

⁶ See RCW 9.94A.589(1)(b).

⁷ The court dismissed the conviction for second degree felony murder “without prejudice” on double jeopardy grounds. CP 582.

assist in the shooting, he never fired his weapon. Id. The prosecutor surmised Krentkowski did not fire the weapon only because he was sitting on the left side of the Escalade, further away from the red store, whereas Kitt and Gore were sitting on the right side of the SUV.

10/12/16RP 133-35.

For Kitt, the court imposed essentially the same sentence as for Gore, the low end of the standard range. 10/12/16RP 153. That was despite the fact that Kitt was a 23-year-old adult at the time of the shooting and Gore was only a 16-year-old juvenile. RP 3187-88.

Gore's attorney requested an exceptional sentence downward. 10/12/16RP 161-62. Counsel argued Gore was less culpable than Kitt because he was not involved in the earlier shootings which had given rise to the current incident and the group's motive for revenge. Id. More important, Gore was less culpable than Kitt because he was only 16 years old at the time of the shooting. Id.

The prosecutor objected to an exceptional sentence downward. 10/12/16RP 164-67. The prosecutor argued Gore's youthfulness was not a factor to consider because he had two prior violent felony adjudications. Id. The prosecutor also argued an exceptional sentence

was not appropriate because, pursuant to the “Miller fix” statute,⁸ Gore’s sentence will be eligible for review by the indeterminate sentence review board in 20 years as long as he has no intervening disqualifying offenses. Id.

The court perfunctorily acknowledged Gore’s youthfulness but found it did not distinguish his culpability from Kitt’s. 10/12/16RP 168-69. The court believed it had “very limited discretion . . . to decide to go above or below the standard sentencing range.” Id. The court did not identify or consider any factors—other than the mere fact of Gore’s age—that might bear on *how* his youthfulness affected his culpability. The court did not find—and the State did not attempt to show—that Gore’s crimes reflected irreparable corruption or that, unlike most juveniles, he could not be rehabilitated.

E. ARGUMENT

1. The decision to impound the Cadillac DeVille was unreasonable in violation of the Fourth Amendment and article I, section 7.

The decision to seize the Cadillac DeVille was unreasonable and unconstitutional. The police did not have a warrant to seize the car. They did not have probable cause to believe the car was used in the shooting or contained evidence of the shooting. The car did not pose

⁸ RCW 9.94A.730.

any danger to the public. The driver of the car, Gore, Sr., was not under arrest and there is no reason to believe he could not safely drive the car away. The arrest of Kitt and Gore did not justify the decision to impound the car in which they were riding as passengers. Because the impoundment was unconstitutional, all evidence seized as a result of the impoundment must be suppressed.

a. Standard of review.

Ordinarily, when a trial court's findings of fact following a suppression hearing are challenged on appeal, the Court reviews them for substantial evidence. State v. Maxfield, 125 Wn.2d 378, 385, 886 P.2d 123 (1994). But here, the court made no findings of fact because it did not hold an evidentiary hearing. This Court may not independently review the evidence or substitute its own findings of fact. Id.

This Court reviews the trial court's conclusions of law *de novo*. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

b. The court violated CrR 3.6 by failing to hold an evidentiary hearing or explain its reasons in writing.

Defense counsel filed a motion to suppress and requested an evidentiary hearing. CP 11-22, 61-135, 150-91; RP 651, 655. The trial

court denied the motion without a hearing. RP 287-89, 649, 657. The court did not explain its reasons in writing.

The court's failure to hold a hearing or explain its reasons in writing violates the court rule. CrR 3.6(a) provides that when a motion to suppress is made, "[t]he court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons."

The court's failure to hold an evidentiary hearing, enter findings of fact, or explain its reasons in writing, not only violates the court rule, it significantly hampers appellate review.

c. The warrantless impoundment of a car violates the federal and state constitutions if the police do not have probable cause to believe it was stolen, was used in the commission of a felony, or contains evidence of a crime, and if it is not necessary to move the car in order to protect the public.

Police impoundment of a car is a "seizure" for purposes of the Fourth Amendment and article I, section 7, because it involves the governmental taking of a vehicle into its exclusive custody. State v. Coss, 87 Wn. App. 891, 898, 943 P.2d 1126 (1997).

As a general rule, the warrantless impoundment of a car is per se unreasonable. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L.Ed. 2d 564 (1971); U.S. Const. amend IV; Const. art. I, § 7. There are a few “‘jealously and carefully drawn’ exceptions” to the warrant requirement which “provide for those cases where the societal costs of obtaining a warrant, such as danger to the law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.” Houser, 95 Wn.2d at 149 (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

The State bears the burden to prove the warrantless impoundment of a car falls within a narrow exception to the warrant requirement. Houser, 95 Wn.2d at 149. The reasonableness of an impoundment must be assessed in light of the facts at the time of the impoundment. State v. Tyler, 177 Wn.2d 690, 699, 302 P.3d 165 (2013). Any facts the police become aware of *after* the impoundment do not bear on whether the impoundment was reasonable. Id.

The police may lawfully impound a vehicle without a warrant if they have probable cause to believe it was stolen or used in the

commission of a felony. Id. at 698. They may also impound a vehicle without a warrant if they have probable cause to believe it contains contraband or evidence of a crime. State v. Huff, 64 Wn. App. 641, 653, 826 P.2d 698 (1992). In such a case, the car may be held for the reasonable time needed to obtain a search warrant. Id.

Probable cause to justify impoundment is a quantum of evidence “less than . . . would justify . . . conviction,” yet “more than bare suspicion.” Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). Before an officer may impound a car, the facts and circumstances must amount to more than mere suspicion that evidence of criminal activity will be found. State v. Ozuna, 80 Wn. App. 684, 688-89, 911 P.2d 395 (1996). Relevant to that inquiry is whether the officer is actually aware that the car contains contraband. Id. The mere possibility that a car may contain contraband is not sufficient to justify a seizure. State v. Cuzick, 21 Wn. App. 501, 502-03, 585 P.2d 485 (1978).

If the police do not have probable cause, they may also impound a car under the “community caretaking function” if it must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety, or if there is a threat to the vehicle itself and its contents

due to vandalism or theft. Tyler, 177 Wn.2d at 698. But before a car may be impounded for that reason, officers must first consider reasonable alternatives. Id. If the defendant or a friend or family member is available to move the car, it may not be impounded. Id.

“[I]f there is no probable cause to seize the vehicle and a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen’s vehicle.” Tyler, 177 Wn.2d at 698.

d. The impoundment of the DeVille did not fall under any narrow exception to the warrant requirement.

The impoundment of the DeVille violated the Fourth Amendment and article I, section 7, because the officers did not have probable cause to believe the car was used in the commission of a felony or contained evidence of a crime, and they did not need to move the car to protect the public.

The officers had no basis to believe the DeVille was used in the shooting. Witnesses identified the suspect car as a white Cadillac Escalade or white SUV. RP 852-57, 982-83. The police had already seized the Escalade two days earlier. RP 1829-32.

Moreover, the officers did not have probable cause to believe the car contained evidence of the crime. The car was seized four days

after the shooting. It was driven by Gore, Sr. and was registered to his wife. RP 2024, 2068. There was no information to suggest that either of those individuals was involved in the shooting.

Although a firearm was seized from Moton in a search incident to arrest, the police did not have probable cause to believe he was involved in the shooting. CP 140; RP 269-70, 2020-24. The officers saw no other firearms in the car. RP 2027-29. There was no other information available to the officers at the time to suggest that any other evidence of the shooting was contained in the car.

Finally, there was no need to impound the car in order to protect the public. It was parked in the middle of the day on a city street in Tacoma. CP 140; RP 650. It was not abandoned. Gore, Sr., the driver, was available to drive it away. CP 62.

In sum, the officers did not have probable cause to seize the DeVille and a reasonable alternative to impoundment existed. Therefore, the impoundment was unreasonable and unconstitutional. Tyler, 177 Wn.2d at 698.

e. *All of the evidence found in the search of the unlawfully seized DeVille must be suppressed.*

The court erroneously concluded that the evidence found in the search of the DeVille need not be suppressed because the police obtained a search warrant after the car was impounded and the defense did not dispute that the search warrant was valid. RP 287-89, 649, 657. This conclusion is erroneous because the court did not find that the police would have obtained the warrant absent the illegal seizure. Absent such a finding, the search was the “fruit of the poisonous tree.” The evidence obtained in the search must be suppressed.

Generally, evidence derived from an illegal search or seizure is subject to suppression under the fruit of the poisonous tree doctrine. State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Under the independent source exception to the exclusionary rule, evidence tainted by unlawful governmental action is not subject to suppression if it is ultimately obtained pursuant to a valid warrant that is independent of the unlawful action. Gaines, 154 Wn.2d at 718. But for the exception to apply, the State must prove the police would have

sought the warrant absent the illegal search or seizure. Id. at 721-22; Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

Here, the independent source exception does not apply because the court did not find—and the evidence does not show—that the police would have sought a warrant to search the DeVille absent the illegal seizure of the car. The police impounded the DeVille because Kitt had been riding in it just before he was arrested. There is no reason to believe the police would otherwise have impounded the car, or sought a search warrant, as part of the ongoing investigation of the case. The DeVille was not involved in the shooting. It was not registered to anyone who was involved in the shooting. RP 2024, 2068. Before the decision to impound the car was made, the police had no information to suggest it contained evidence of the crime.

Because the State did not prove the police would have sought the warrant absent the illegal seizure of the car, the independent source exception does not apply and the evidence found in the search must be suppressed. Gaines, 154 Wn.2d at 721-22; Murray, 487 U.S. 533; Wong Sun, 371 U.S. 471.

f. The convictions for murder, first degree assault, and unlawful possession of a firearm must be reversed.

An error in failing to suppress illegally seized evidence is presumed prejudicial and the State bears the burden to prove the error was harmless beyond a reasonable doubt. State v. Keodara, 191 Wn. App. 305, 317-18, 364 P.3d 777 (2015); Chapman v. California, 386 U.S. 18, 22-24, 87 S. CT. 824, 17 L. Ed. 2d 705 (1967). The State must prove the illegally seized evidence did not contribute to the verdict obtained. Keodara, 191 Wn. App. at 317-18.

The error in admitting the evidence found in the illegal search of the DeVille is not harmless beyond a reasonable doubt. In the search, the police found an assault rifle in a guitar case that Milton-Ausley said Gore was carrying earlier on the day of the incident. RP 1312-17. Milton-Ausley and Tucker said Krentkowski was holding the rifle on his lap during the shooting. RP 2437-39, 2455, 2462-63. The police also found a .40 caliber handgun that was determined to have fired some of the bullets and casings found at the scene. RP 2171-74, 2186-87, 2211.

This evidence undoubtedly contributed to the verdicts. The jury heard that an assault rifle in a guitar case, and a .40 caliber handgun

linked to bullets and casings found at the scene, were found in a car in which Gore and Kitt were riding four days after the incident. This physical evidence significantly corroborated Milton-Ausley's and Tucker's accounts of who was responsible for the shooting. It significantly corroborated Milton-Ausley's testimony that Gore was in possession of an assault rifle earlier on the day of the incident.

The testimony of Milton-Ausley and Tucker was virtually the only evidence linking Gore to the crime. No other witness placed Gore in the Escalade or said he participated in the shooting. The jury was instructed to view the accomplices' testimony with skepticism. CP 303. It is likely the illegally obtained firearm evidence induced the jury to give the accomplices' testimony greater weight. The State cannot prove the error in admitting the evidence is harmless beyond a reasonable doubt and the convictions must be reversed.

2. Gore's constitutional right to a unanimous jury verdict was violated in relation to the unlawful possession of a firearm charge.

Gore's constitutional right to a unanimous jury verdict was violated because the record does not affirmatively demonstrate that the jury unanimously agreed that Gore possessed a particular firearm. The State presented evidence of two different firearms the jury could have

relied upon. The jury was not instructed it must unanimously agree on a particular firearm, and the State did not elect a firearm.

An accused may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the prosecution presents evidence of multiple acts that could form the basis of the charge, either the State must tell the jury which act to rely upon in its deliberations, or the court must instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). Failure to follow one of these options is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” Kitchen, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI. “The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411.

Failure to provide a unanimity instruction when required is a manifest constitutional error that may be raised for the first time on

appeal. State v. Moultrie, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3).

Here, the State charged Gore with a single count of unlawful possession of a firearm but presented evidence of multiple firearms that could form the basis of the charge. CP 515-18. Milton-Ausley testified he saw Gore in possession of an assault rifle on the day of the incident. RP 1312-13. Both Milton-Ausley and Tucker testified Gore was in possession of a 9mm handgun at the time of the shooting. RP 1357, 2435, 2462-63. Yet, the jury was not instructed it must unanimously agree on a particular firearm. The State did not elect which firearm it was relying upon. See RP 3529.

Because the jury did not receive a unanimity instruction and the State did not elect a particular firearm, Gore's constitutional right to a unanimous jury verdict was violated. Petrich, 101 Wn.2d at 570.

The error is presumed prejudicial and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether Gore possessed both of the firearms. See Kitchen, 110 Wn.2d at 411. If there was conflicting testimony as to whether Gore possessed either firearm, or if a rational juror could have entertained reasonable

doubt as to whether he possessed either of them, the conviction must be reversed. Id. at 412.

A rational juror could have easily entertained reasonable doubt as to whether Gore possessed either firearm. The only evidence linking Gore to either firearm was Milton-Ausley and Tucker's testimony, and the unlawful search of the DeVille in which Gore was riding four days after the incident. Milton-Ausley said that before the shooting on the day of the incident, he saw Gore carrying a guitar case that contained an assault rifle. RP 1312-13. Tucker said he had seen Gore carrying a similar rifle in a similar guitar case a couple weeks earlier. RP 2437-39. Both Milton-Ausley and Tucker said they saw Gore possess a 9mm handgun at the time of the shooting, which Kitt had given to him. RP 1357, 2435, 2462-63. No physical evidence such as fingerprints or DNA linked Gore to either firearm. Any one of the jurors could have discounted the accomplices' testimony, or concluded their testimony was reliable with respect to one firearm but not the other.

Because a rational juror could have concluded that the State did not prove beyond a reasonable doubt that Gore possessed either of the firearms on the day of the incident, the conviction must be reversed.

3. The *de facto* life sentence is excessive and disproportionate in violation of the Eighth Amendment.

Gore's *de facto* life sentence is excessive and disproportionate in violation of the Eighth Amendment because the court did not meaningfully consider his youthfulness or determine whether the crimes reflect his transient immaturity. The sentence must be remanded for a full "Miller" hearing at which the court must consider factors relevant to that determination. On remand, the court must impose an exceptional sentence downward unless it finds that Gore is the rare juvenile offender who is irreparably corrupt and not capable of rehabilitation.

a. When a juvenile offender faces a de facto life sentence under the Sentencing Reform Act, the court must conduct a Miller hearing and impose an exceptional sentence downward unless it finds the crime reflects irreparable corruption.

It is well-established that children are constitutionally different from adults for purposes of sentencing. State v. Houston-Sconiers, 188 Wn.2d 1, 18, 391 P.3d 409 (2017); State v. Ramos, 187 Wn.2d 420, 428, 387 P.3d 650 (2017); Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); Graham v. Florida, 560 U.S. 48,

68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); Roper v. Simmons, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

“The Eighth Amendment’s prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’” Miller, 567 U.S. at 469 (quoting Roper, 543 U.S. at 560). “The concept of proportionality is central to the Eighth Amendment.” Graham, 560 U.S. at 59. “Because juveniles have diminished culpability and greater prospects for reform, . . . ‘they are less deserving of the most severe punishments.’” Miller, 567 U.S. at 470 (quoting Graham, 560 U.S. at 68).

Three significant differences between juveniles and adults support this conclusion. First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Miller, 567 U.S. at 470. Second, children are more vulnerable to negative influences and outside pressures, including from family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. Id. Third, a child’s character is not as well formed as an adult’s, his traits are less fixed, and his

actions are less likely to be evidence of “irretrievable depravity.” Id. (quotation marks, alterations and citation omitted).

Given these differences between adult and juvenile offenders, a sentence of “life without parole is excessive for all but ‘the rare juvenile offender whose crime reflects irreparable corruption.’” Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 734, 193 L. Ed. 2d 599 (2016) (quoting Miller, 567 U.S. at 479-80). Put another way, life without parole is an unconstitutional penalty for most juvenile offenders, “whose crimes reflect the transient immaturity of youth.” Montgomery, 136 S. Ct. at 724.

Before imposing a sentence of life without parole on a juvenile—even in a homicide case—the trial court must conduct an individualized hearing and “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” Miller, 567 at 479-80. The court must consider the individual characteristics of the child and the crime. Id. at 477. The court must take account of the child’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” Id. The court must also consider the child’s family

and home environment. Id. And it must consider “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected him.” Id.

The Supreme Court’s Eighth Amendment jurisprudence discussed above applies equally in Washington when a juvenile offender receives a *de facto* life sentence under the Sentencing Reform Act.⁹ State v. Ramos, 187 Wn.2d 420, 434, 437, 387 P.3d 650 (2017). Thus, every juvenile offender facing a literal or *de facto* life sentence is automatically entitled to a full Miller hearing. Id. at 434-35, 443. At the hearing, the court must meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life sentence for a juvenile offender is constitutionally permissible. Id.

In most cases, the juvenile will be able to establish that his or her crimes reflect transient immaturity and that a life sentence is therefore unconstitutional. Id. at 436. A sentence of life without parole for a juvenile homicide offender should be “uncommon.” Id. at 443

⁹ A standard-range sentence is a *de facto* life sentence if it results in a total prison term exceeding the average human life-span. Ramos, 187 Wn.2d at 434.

(quoting Miller, 567 U.S. at 479). In most cases, the juvenile will necessarily be able to prove that there are substantial and compelling reasons for an exceptional sentence downward. Id. at 436, 442-43.

Moreover, the Eight Amendment requires the court to exercise this discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line. State v. Houston-Sconiers, 188 Wn.2d 1, 20, 391 P.3d 409 (2017). In other words, the court must conduct a full Miller hearing at the time of sentencing notwithstanding the “Miller fix” statute, RCW 9.94A.730.¹⁰ Id. at 20, 22-23.

A juvenile cannot forfeit his or her right to a full Miller hearing by failing to request it. Ramos, 187 Wn.2d at 443.

¹⁰ RCW 9.94A.730(1) provides:

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, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

- b. *Gore must be resentenced after a full “Miller” hearing and the court must impose an exceptional sentence downward unless it finds the crimes reflect irreparable corruption.*

Unquestionably, Gore received a *de facto* life sentence. He received a standard-range sentence totaling 984 months—82 years—in prison. CP 579-91. That includes 25 years of “mandatory” firearm enhancements. Id.

Gore was only 16 years old at the time of the offense. RP 3187-88. Yet the court did not conduct a Miller hearing. The court only perfunctorily acknowledged Gore’s young age. 10/12/16RP 168-69. The court erroneously concluded it had “very limited discretion . . . to decide to go above or below the standard sentencing range.” Id.

The court’s failure to conduct a Miller hearing renders Gore’s sentence unconstitutional. Ramos, 187 Wn.2d at 434-35, 437, 443. Gore did not forfeit his right to a Miller hearing by failing to request it. Id. at 443. And, contrary to the prosecutor’s argument, 10/12/16RP 164-67, the availability of the “Miller fix” statute did not obviate the court’s duty to conduct a Miller hearing at the time of sentencing. Houston-Sconiers, 188 Wn.2d at 20, 22-23.

The case must be remanded for a full Miller hearing. Houston-Sconiers, 188 Wn.2d at 21. On remand, the court has discretion to impose any sentence below the standard sentence range. Id. Also, the firearm enhancements are not “mandatory” in the context of juvenile sentencing. Id. at 21, 25-26.

On remand, the court must consider mitigating circumstances related to Gore’s youth, including his age and its “hallmark features,” such as his “immaturity, impetuosity, and failure to appreciate risks and consequences.” Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller, 567 U.S. at 477). It must also consider factors like the nature of Gore’s surrounding environment and family circumstances, the extent of his participation in the crime, and the way familial and peer pressures may have affected him. Id. And it must consider any factors suggesting that Gore might be successfully rehabilitated. Id.

When making its decision, the court must be mindful that a *de facto* life sentence is constitutionally prohibited for most juvenile homicide offenders. That is because the crimes of most juvenile offenders reflect “unfortunate yet transient immaturity” rather than “irreparable corruption.” Ramos, 187 Wn.2d at 444 (quoting Miller, 576 U.S. at 479-80).

Finally, the court must thoroughly explain its reasoning, specifically considering the differences between juveniles and adults identified by Miller and how those differences apply to the case. Id. Although formal written findings of fact and conclusions or law are not strictly required, they are preferable, in order to ensure that the relevant considerations have been made and to facilitate appellate review. Id.

4. The court’s failure to vacate the second degree murder conviction violates Gore’s constitutional right to be free from double jeopardy.

The court did not vacate the conviction for count II, second degree felony murder. Instead, the court noted on the judgment and sentence that the charge was dismissed “without prejudice . . . on double jeopardy grounds.” CP 582.

The court’s failure to vacate the conviction violates Gore’s constitutional right to be free from double jeopardy.

Double jeopardy may be violated when a defendant receives multiple convictions for a single offense. State v. Womac, 160 Wn.2d 643, 656, 160 P.3d 40 (2007); U.S. Const. amend V. In order to avoid a double jeopardy violation, the court must vacate the lesser charge. Id.

It is not sufficient for the court to “conditionally” vacate the lesser conviction while directing, in some form or another, that the

conviction nonetheless remains valid. State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010). Therefore, in order “[t]o assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction.” Id.

Under these authorities, the judgment and sentence must be corrected to remove any reference to the conviction for count II.

F. CONCLUSION

The court’s failure to suppress the evidence found in the Cadillac DeVille violated Gore’s federal and state constitutional right to be free from unreasonable searches and seizures. The first degree murder, first degree assault, and unlawful possession of a firearm convictions must be reversed. Gore’s constitutional right to a unanimous jury verdict was violated as to the unlawful possession of a firearm charge. That conviction must be reversed. Gore’s sentence must be reversed and remanded for a full “Miller” hearing. The second degree murder conviction must be vacated.

Respectfully submitted this 28th day of July, 2017.

/s Maureen M. Cyr

State Bar Number 28724
Washington Appellate Project – 91052
1511 Third Avenue, Suite 701
Seattle, WA 98101

Phone: (206) 587-2711
Fax: (206) 587-2710
Email: maureen@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 49534-1-II
)	
JERMOHNN GORE,)	
)	
Appellant.)	

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| [X] MICHELLE HYER, DPA
[PCpatcecf@co.pierce.wa.us]
PIERCE COUNTY PROSECUTOR'S OFFICE
930 TACOMA AVENUE S, ROOM 946
TACOMA, WA 98402-2171 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| [X] JARED STEED
ATTORNEY AT LAW
NIELSEN BROMAN KOCH, PLLC
1908 E MADISON ST
SEATTLE, WA 98122
[SloaneJ@nwattorney.net] | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| [X] STEPHANIE CUNNINGHAM
ATTORNEY AT LAW
4616 25TH AVE NE #552
SEATTLE, WA 98105
[SCCAAttorney@yahoo.com] | ()
()
(X) | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| [X] JERMOHNN GORE
GREEN HILL SCHOOL
375 SW 11TH ST
CHEHALIS, WA 98532 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JULY, 2017.


X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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