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Court of Appeals
Division II
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No. 51348-0-II

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

STATE OF WASHINGTON, Respondent

v.

YANCY RAY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE TIMOTHY ASHCRAFT

SUPPLEMENTAL BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Imposition Of A Mandatory Life Sentence Without The Possibility Of Parole Based On A Predicate Strike Crime Committed As A Young Adult, Without Allowing A Trial Judge The Discretion To Consider The Mitigating Factors Of Youth And Culpability Is Cruel Punishment In Violation Of Article I, § 14 Of The Washington Constitution.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Does the Persistent Offender Accountability Act violate Article I, § 14 because it does not allow a sentencing court to consider the characteristics of the offender and his relative youth and culpability at the time of a predicate crime?
- B. Is a mandatory life without the possibility of parole a cruel punishment in violation of Article I §14 of the Washington State Constitution?
- C. Is the *Fain* analysis of proportionality no longer adequate because it does not consider the proportionality of punishment in terms of the characteristics of the individual defendant?

II. STATEMENT OF FACTS

Mr. Ray rests on the facts in his opening brief and adds facts as necessary and incorporates the arguments in his opening brief.

III. ARGUMENT

The Mandatory Life Sentence Without The Possibility of Parole Amounts To Cruel Punishment Because It Provides No Consideration Of Mr. Ray's Youthfulness At The Time He Committed A Predicate Offense And Violates Article I § 14 Of The Washington Constitution.

1. Relevant Facts

Mr. Ray was born on February 22, 1966. CP 1. He completed the 11th grade. CP 637. His first predicate strike offense occurred when he was 19 years old. CP 569. He entered a plea of no contest to manslaughter in the first degree and served 36 months. CP 637, 575. His plea read:

I plead no contest on the basis of the fact that in Multnomah County, Oregon, the State's evidence would show I unlawfully aided the co-defendant- Eddie Horton- to commit a robbery of the decedent- Leslie Walker- during the course of which *he killed her with a firearm* which I had reason to know he possessed. These facts would be established by the State's evidence.

CP 636-37.

The second predicate offense occurred when Mr. Ray was 27 years old. CP 643. Mr. Ray entered a no contest plea, but there was not a recitation of facts on the plea document for an Oregon robbery in the third-degree conviction. See App. Brief at 24; CP 646. He was sentenced to imprisonment for 11 months.

CP 649. At age 51 he was sentenced to life in prison without the possibility of parole for a third strike offense. CP 753,758.

2. Statutory Persistent Offender Requirements

A person is a “persistent offender” if he has been convicted in Washington of a “most serious offense” and has on at least two separate prior occasions been convicted of a most serious offense. RCW 9.94A.030(38)(a)(i)(ii). An offense is “most serious” if it is a class A felony, or one of the enumerated offenses including manslaughter in the first degree, and robbery in the second degree. RCW 9.94A.030(33)(k)(o). A life sentence without the possibility of parole is a mandatory sentence for a persistent offender. RCW 9.94A.570.

3. Article I, § 14 Is More Protective Than The Eighth Amendment And Requires That Punishment Be Proportionate To The Crime And The Defendant.

Article I, § 14 of the Washington Constitution is more protective than the Eighth Amendment. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); *State v. Fain*, 94 Wn.2d 387, 387, 617 P.2d 720 (1980). It explicitly bars cruel punishment, even if that cruelty is not unusual. *Fain*, 94 Wn.2d at 392-93.

In *Fain*, our Supreme Court reasoned that Article I, §14 required proportionate punishment commensurate with the crime. *Fain*, 94 Wn.2d at 396. The Court set out an analysis for determining whether a particular sentence is proportionate to the crime: 1) the nature of the offense, 2) the legislative purpose behind the sentencing statute, 3) the punishment which would be imposed for the same crime in other jurisdictions, and 4) the sentences imposed for the same crime in the state. *Fain*, 94 Wn.2d at 397. The Court overturned *Fain*'s life sentence imposed under the habitual offender statute, because the predicate crimes were relatively minor. *Fain*, 94 Wn.2d 402. The Court's focus was on the characteristics of the crimes, not the characteristics of the offender.

However, within the past 15 years, using an Eighth Amendment analysis, the United States Supreme Court has shifted its focus away from considering only the crime to an analysis that separately considers the characteristics of the offender, in particular, youthfulness. *Graham v. Florida*, 560 U.S. 48, 60, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). In 2005, the Court struck down the death penalty for juvenile offenders. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In 2010 the Court prohibited life without the possibility of parole for juvenile

non-homicide crimes. *Graham* 560 U.S. at 74. Two years later, the Court held the Eighth Amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, *even for a crime of homicide*. *Miller v. Alabama*, 567 U.S. 460, 479, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Acknowledging the advances in brain development research, psychology, and neuroscience, showing “fundamental differences between juvenile and adult minds’ – for example in parts of the brain involved in behavior control” the Supreme Court held that a *mandatory* sentence of life without the possibility of parole denied a sentencing court the opportunity to consider the impetuosity, lack of maturity, and underdeveloped sense of responsibility attendant to those under 18 years of age. *Miller*, 567 U.S. at 465, 471-72.

In *Roper*, the Court’s awareness of the lack of maturity, susceptibility to negative influences and outside pressures, and a juvenile’s unformed character, led it to conclude that even a “heinous crime committed by a juvenile” is not evidence of irretrievably bad character.” *Roper*, 543 U.S. at 569.

In *Graham*, the Court held that sentencing for defendants facing the most serious penalties must be individualized. *Id.* at 465.

The Court reasoned: “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Miller*, 567 U.S. at 479.

Our Supreme Court has followed the reasoning of *Roper*, *Graham*, and *Miller*, holding that sentencing courts must consider the mitigating quality of youth at sentencing, even in the adult court. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *State v. O’Dell*, 183 Wn.2d 680 689, 358 P.3d 359 (2015).

The *O’Dell* Court extended the requirement of considering a lessened culpability beyond age 18: “The brain isn’t fully mature at...18 when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.” *O’Dell*, 183 Wn.2d at 692 n.5¹ Simply put, “the qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574; *O’Dell*, 183 Wn.2d at 692.

In *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), our Supreme Court resolved whether it was constitutional to sentence a

¹ (quoting *MIT Young Adult Development Project: Brain Changes*, Mass. Inst. Of Tech., <http://hrweb.mit.edu/worklife/youngadult/brain.html>(last visited 3/22/19).

juvenile offender to life in prison without the possibility of parole or early release, even after the statutory *Miller*-fix. *Id.* at 72. Bassett was 16 years when he committed three aggravated murders and was sentenced to three life without parole sentences. *State v. Bassett*, 198 Wn. App. 714, 716, 394 P.3d 430 (2017). Based on the *Miller* -fix statute, he applied to be relieved of his life without the possibility of parole when he was 35 years old. The resentencing court again imposed three life without parole sentences and Mr. Bassett appealed his new sentence. *Id.* at 716.

The Court of Appeals reversed his sentence, holding the *Miller*-fix statute that allowed 16-to-18-year-old offenders convicted of aggravated first degree murder and sentenced to life without parole or early release violated the state constitutional guarantee barring cruel punishment. *Id.* The Supreme Court followed the reasoning of the Court of Appeals and adopted a “categorical approach” rather than the traditional *Fain* proportionality test. *Id.*

The *Fain* analysis, which considers only the nature of the offense, and not the characteristics of a youthful offender no longer follows the holdings and trend by the United States Supreme Court. Nor does it recognize the changes in Washington State case law

and the more protective Article I §14 guarantee punishment shall not be cruel. *Bassett*, 192 Wn.2d at 84-86.

The *Bassett* Court reasoned it was better to use the “categorical bar analysis [which] considers (1) whether there is objective indicia of a national consensus against the sentencing practice at issue and (2) the court’s own independent judgment based on ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the [cruel punishment provisions]’s test, history , ... and purpose.” *Bassett*, 192 Wn.2d at 83. The Court found the *Fain* analysis should give way to categorical bar analysis which allowed the Court to consider the characteristics of youth. *Id.* at 85.

It is clear the national trend is to find children are less criminally culpable than adults. *Id.* at 87. Children have a lessened culpability and are less deserving of the most severe punishments.

Our Supreme Court has accepted review of an unpublished opinion, *State v. Moretti*, 1 Wn.App.2d 1007 (2017)², *review granted*

² Under GR 14.1, Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

in part, 192 Wn.2d 1016, 433 P.3d 805 (Feb. 2019)³. *Moretti* is concerned with whether an individual who committed a first strike offense at age 20, and a third strike offense at age 32, should be imprisoned without hope of release, or benefit of discretion, and without consideration of his youthfulness at the time of the predicate strike offense. *Id.* at *17.

In a dissent opinion, Chief Judge Bjorgen noted, “This appeal presents the next step in the evolution of our law governing punishment of those with psychological traits of juveniles at the time of the offense.” *Moretti*, 1 Wn.App.2d at * 16. Relying on Supreme Court rulings and Washington Supreme Court opinions which focus on youthfulness and culpability for crime, he reasoned the specific holdings of those cases did not disclose a flaw in the POAA sentence, but “their rationales and empirical bases do.” *Id.* at *17. Chief Justice Bjorgen wrote:

Moretti was not sentenced to life without possibility of release for his last “strike” conviction or for any single “strike” conviction. Rather, his sentence rested equally on all three convictions, his first as indispensable as the rest to the POAA sentence. Without that first conviction, he could not have been sentenced under the POAA. His POAA sentence,

³ *Moretti* is consolidated with *State v. Frederick Del Orr*, and *State v. Hung Van Nguyen* Supreme Court No. 95263-9.

therefore, was as much a punishment for his first “strike” offense at age 20 as it was for any of the others.

In some ways, life imprisonment without possibility of release forfeits one’s humanity more deeply than does execution. It condemns the prisoner to a captivity from which the only release is death. It disinherits the prisoner once and for all from the hope of freedom, the common inheritance that lies near the heart of what it is to be human.

Public safety may show the need for even that forfeit. *Miller* holds, though, that the mandatory imposition of that punishment for crimes committed while a juvenile is not tolerated by the Eighth Amendment. *Houston–Sconiers* holds that the Eighth Amendment requires that the characteristics of youth be considered in sentencing for crimes committed while a juvenile, whether or not mandatory. *O’Dell* requires that the same characteristics of youth that underlie *Miller* and *Houston–Sconiers* be considered in sentencing for crimes committed at an age these characteristics generally persist. The studies on which *O’Dell* relied show that range extends at least to age 20. *O’Dell*, 183 Wn.2d at 689, 691–92, 695.

Moretti was mandatorily sentenced to life imprisonment without possibility of release, **a sentence that punished his offense at age 20 as much as it did any other “strike” offense. His mandatory sentencing involved not a shred of human discretion or consideration of the individual. Nor did it require that any heed be paid to the characteristics of youth at the time of his offense at age 20.** *O’Dell* recognized that the same characteristics of youth that led to *Miller*’ s condemnation of mandatory life without parole and *Houston–Sconiers*’ requirement that youth be considered in sentencing generally are also present in young adulthood, certainly including age 20. *O’Dell* thus demands

the same conclusions as in *Miller* and *Houston–Sconiers* for crimes committed at age 20. Under the confluence of *Miller*, *Houston–Sconiers*, and *O'Dell*, Moretti's POAA sentence violated the Eighth Amendment.

Moretti, 1Wn.App.2d at * 18-19.

Mr. Ray was under the age of 20 when he was charged and convicted as a co-defendant in a robbery that resulted in a death. Mr. Ray was not the individual with the firearm. Under the rulings and rationale of *Miller*, *O'Dell*, *Houston-Sconiers*, and *Bassett*, his youth at the time of the first strike offense must be considered to avoid violations of Article I §14 and the Eight Amendment, which bar cruel and unusual punishment.

IV. CONCLUSION

Mr. Ray respectfully asks this Court to strike the Persistent Offender life without the possibility of parole sentence and remand to the trial court to consider his youthfulness at the time of the first predicate offense.

Respectfully submitted this 25th day of March 2019.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on March 26, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Pierce County Prosecuting Attorney at pcpatcecf@co.pierce.wa.us and to Yancy Ray/DOC#762825, .



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