NO. 33794-4-III

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

FILED
April 8, 2016
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH JAMES GILBERT

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 92-1-00108-1

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The Court did not sentence the Defendant in violation of the "*Miller Fix*" or sentence the Defendant unconstitutionally by imposing consecutive sentences.

B. STATEMENT OF THE CASE

The procedural history and substantive facts are derived from the Defendant's first Appeal of his convictions, *State v. Gilbert*, No. 13366-4-III, and from Sentencing Memorandums filed by both the Defense and Prosecution for the re-sentencing (CP 26-37), unless otherwise indicated.

1. PROCEDURAL FACTS

The Defendant was arrested on September 20, 1992, and Probable Cause was found on September 21, 1992 in Juvenile Court. On September 23, 1992, the Defendant was charged in Juvenile Court with six charges. These charges came from the acts that occurred on September 20, 1992. On October 28, 1992, a decline hearing was held. An order permanently declining juvenile court jurisdiction and transferring the juvenile for adult criminal prosecution was entered, with the court finding that decline was necessary due to the seriousness of the crimes, including the fact that there was premeditation, for the protection of the community, and that the Defendant manifested a sophistication and maturity. The charges were transferred to Superior Court.

On March 16, 1993, the Defendant was charged in Superior Court by way of a Second Amended Information 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).

On April 16, 1993, a jury found the Defendant guilty of all counts. The jury found the Defendant guilty of Aggravated Murder in the First Degree for the execution of one victim, Murder in the First Degree for the death of the second victim, and found the deadly weapon enhancements sought by the Prosecution.

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. 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. 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.

The Defendant filed a Notice of Appeal with the Court of Appeals on June 22, 1993, challenging 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. _____, 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. *In Re the 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. VRP. Finally, a court appointed expert witness, a psychologist, appointed in accordance with the *Miller* decision, evaluated and submitted his assessment; which was reviewed prior to the hearing. CP 73-85.

The 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.

2. SUBSTANTIVE FACTS

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, broke out the window and was attempting 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 had 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 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.

C. ARGUMENT

1. The sentencing court properly applied the "*Miller Fix*" when sentencing the Defendant to consecutive sentences.

Miller v. Alabama holds "that *mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S.Ct. at 2460 (2012)(emphasis added). In order to comply with the Eighth Amendment, the sentencing court must engage in "individualized consideration" of juvenile offenders facing life in prison without the possibility of parole, and specifically to "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469-2470.

Thus, the *Miller* decision does not categorically bar a penalty for a class of offenders or type of crime, like was done in *Roper* v. *Simmons*, 543 U.S. 551,

125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), or *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Instead, it mandates only that the sentencing court follow a certain process which takes into account offender youth and other factors before imposing a particular penalty.

Miller did not prohibit an individualized sentence of lifetime without parole for a juvenile found guilty of aggravated murder, but only the mandatory imposition of such a sentence. In response to the ruling in *Miller,* the Washington state legislature enacted RCW 10.95.035, and amended RCW 10.95.030; commonly known as the "*Miller Fix.*"

The "*Miller Fix*" sets new sentencing guidelines for aggravated first degree murder committed by juvenile offenders. Under RCW 10.95.035, a person who was sentenced prior to June 1, 2014 to a term of life without the possibility of parole for an offense committed prior to their eighteenth birthday, shall be returned to the sentencing court for sentencing consistent with RCW 10.95.030. The sentencing court is to take into account new factors, including age at the time of offense, and sentence the defendant individually.

The Defendant had a hearing on this re-sentence. In accordance with the "*Miller Fix*", the Defendant was evaluated for the sole purpose of this re-sentencing. At the re-sentencing hearing, it was clear that the Court took this into account. "I've read the risk assessment of the Defendant . . ." VRP 19. The Court did not take this matter lightly. The Court listened to the Defendant, who spoke on his own behalf. He read the assessment. He listened to the witness that

spoke on the behalf of the Defendant. But he also listened to the State, and to the surviving spouse of one of the men executed.

The Defendant conveniently leaves out the actions he took in 1992. 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 categorizing it as "putting him out of his misery." Mr. Gresham's surviving spouse spoke at the re-sentencing. The Defendant then mercilessly murdered Mr. Evans' both to avoid detection and to use Mr. Evans' vehicle to flee the scene. Had the Defendant been able to find Mr. Harris, the bow hunter who witnessed these insensible acts, he too would likely been ruthlessly murdered, as evidenced by the Defendant repeatedly firing shots at Mr. Harris as he fled for his life.

The Defendant argues 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." The inmate that 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 – the fact that Dr. Roesch's evaluation reveals that the Defendant was not a model inmate. In fact, from 1994-2006, the Defendant had twenty-seven (27) serious infractions, including assaulting a Corrections

Officer. He 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, into account. The record does not agree.

The 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." *Id.*

Ultimately, the Court determined that justice for the Defendant's multiple horrific crimes demanded consecutive sentences. The Court was aware of its responsibilities and discretion, and exercised both.

2. <u>The sentencing court imposed a proper, standard range sentence that should not be subject to appeal.</u>

"If the court imposes a standard range sentence, the general rule is that it cannot be appealed." *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). 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.*

Here, the Defendant was given a standard range sentence. While the Defendant argues that the Court relied on the sole fact that he may be eligible for parole after he has served the minimum twenty-five years; that argument is flawed. There is no evidence to support the Defendant's assertion that the Court solely relied on this fact. The Court asked "[Defense Counsel], you said earlier that he is eligible for parole at some point now, is that correct?" VRP 18.

In his appellant brief, Defendant argues the Court relied on the fact that the Defendant may be eligible for parole after he has served the minimum twenty-five (25) years; however, what is evident from the sentencing is that Court relied on the fact that he would be able to seek parole. During sentencing, the Court did not mention when the Defendant could seek parole, rather the Court recognizes that he has the opportunity to seek parole – something that was not possible when he was sentenced in 1993.

It should be noted that the Defendant has been incarcerated for nearly twenty-three (23) years at this time. He has nearly completed the entire 280 month sentence for Count I, Murder in the First Degree. If he did not have

consecutive sentences, he would be eligible for parole very soon, and due to the positive work he has done in the last ten years, he could be a likely candidate for parole, as the sentencing court touched on while imposing the sentence. As the surviving spouse of Mr. Gresham stated "[t]wenty-five years is not long enough for murder" VRP 8. The sentencing court ultimately agreed.

3. The sentence imposed was not unconstitutional.

The Defendant argues that he received a "*de facto*" life sentence when he received consecutive sentences.

RCW 9.94A.589(l)(b) provides:

> Whenever a person is convicted of two or more serious violent offenses arising from separate distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for the other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. **All sentences imposed under (b) of this subsection shall be served consecutively to each other** and concurrently with sentences imposed under (a) of this subsection (emphasis added).

Here, the Defendant was convicted of two or more serious violent offenses arising from separate and distinct criminal conduct; the cold-blooded murders of Mr. Gresham and Mr. Evans. The Defendant's conviction on Count I, Murder in the First Degree has a Crime Seriousness Level of XIV. The Defendant's conviction on Count II, Aggravated Murder in the First Degree has

a Crime Seriousness Level of XV. The trial court, at the time of the original sentencing, correctly sentenced the Defendant to 280 months on Count I and sentenced the Defendant mandatorily to Life Without Parole on Count II and correctly applied RCW 9.94A.589(l)(b) in imposing a consecutive sentences. In the re-sentencing, it was correct to sentence 280 months on Count I and apply RCW 9.94A.589(l)(b) in imposing a consecutive sentence of 25 years to life on Count II.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments," and Article I, Section 14 of the Washington State Constitution prohibits the infliction of "cruel punishment." A sentence violates Article I, Section 14 of the Washington State Constitution when it is grossly disproportionate to the crime for which it is imposed. *State v. Morin*, 100 Wn. App. 25, 29, 995 P.2d 113 (2000).

A punishment is grossly disproportionate "if the punishment is clearly arbitrary and shocking to the sense of justice." *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869 (1980). To determine whether a sentence is grossly disproportionate, courts consider the following factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the Defendant would have received in other jurisdictions, and (4) the punishment imposed for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

The Defendant argues that he received a "*de facto*" life sentence, but

fails to apply any *Fain* factors or otherwise demonstrate that his sentence is so grossly disproportionate to the gravity of his offense as to be arbitrary and shocking to the sense of justice. He also ignores the fact that a sentence within the guidelines provided by law is not arbitrary and shocking to the sense of justice. See *State v. Farmer*, 116 Wn.2d 414, 434, 805 P.2d 200, 812 P.2d 858 (1991).

Instead, the Defendant argues that juveniles are less blameworthy because they are less capable of making reasoned decisions, and that because of his age, sentencing him to consecutive sentences is cruel and unusual punishment. Our Supreme Court has rejected this proposition. *State v. Cornejo*, 130 Wn.2d 553, 569-70, 925 P.2d 964 (1996) (Eighth Amendment is not violated simply because a juvenile offender is tried as an adult and receives an adult sentence).

The Defendant has failed to demonstrate that even though he received a standard range sentence, and consecutive sentences are appropriate, that his punishment is unconstitutional.

The Defendant supports his "*de facto*" life sentence argument by relying on two Division I cases, *State v. Ronquillo* (*Slip opinion* 71723-5-I October 26, 2015) and *State v. Keodara* (*Slip opinion* 70518-1-I December 7, 2015). *State v. Ronquillo* stands for the premise that *Miller fix* would apply to *Ronquillo*, even though the defendant in that case was never sentenced to a life sentence, only consecutive sentences. *Ronquillo* only remands to the trial court for re-

sentencing to sentence in accordance with *Miller*. *Ronquillo* does not say that consecutive sentences are unconstitutional, only that the sentencing court needs to apply the "*Miller Fix*". *Keodora* stands for the same premise, that the sentencing court did not take into account the "*Miller Fix*" when applying the sentence, specifically the youth of the Defendant.

In *State v Ramos*, (*Slip Opinion* 32027-8-III, August 13, 2015), a case involving multiple murder victims and the imposition of consecutive sentences, the court affirmed consecutive sentences that were imposed after a re-sentencing hearing that took into account the *"Miller Fix"*. In *Ramos*, the court imposed a standard range of 85 years based on three consecutive sentences of 20 years each for three counts of first degree felony murder and one term of 25 years for one count of premeditated intentional murder. This Court upheld those consecutive sentences, dismissing the nearly identical arguments concerning youth that are made here.

State v. Ramos has a similar fact pattern and the same issue of consecutive sentences. It involves the merciless execution of multiple victims. The authority is controlling. Here, as in *Ramos*, the Defendant was convicted of multiple murders and because the Defendant committed multiple murders he deserves a sentencing scheme that reflects his crimes.

D. CONCLUSION

Upon re-sentencing, the trial Court took into account the "*Miller Fix*". The court weighed all the factors, including age, and weighed those factors

against the facts of the Defendant's heinous crimes, and imposed a standard range sentence and the proper application of consecutive sentences.

The Defendant has failed to show that the Court did not properly impose a standard range sentence. The Defendant has failed to show the standard range sentence was unconstitutional.

The sentence should be affirmed.

Respectfully submitted this 8th day of April, 2016.

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