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Court of Appeals
Division III
State of Washington
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No. 36213-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH A. SMITH also know as GLENN A. AKERS,

Appellant.

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

The Honorable Judge John O. Cooney

APPELLANT'S SUPPLEMENTAL BRIEF

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A. PROCEDURAL HISTORY

Jeremiah A. Smith, also known as Glenn A. Akers, was found guilty of first degree felony murder, first degree burglary, first degree assault, and first degree unlawful possession of a firearm, following a bench trial. (CP 411-418; RP¹ 20-991). Mr. Smith was 25 years old on the date of the charged offenses. (CP 104-105).

At sentencing, the State argued “the only possible sentence that the Court is authorized to give is life in prison without the possibility of parole.” (RP 1053). Defense counsel stated “it is our intention to reserve any constitutional issues that could be brought up for purposes of challenging the sentencing in the appeal process.” (RP 1055). Defense counsel stated “[t]he statute would appear to require that he be sentenced to life[,]” but asserted there are mitigating factors, including his upbringing and his age at the time of sentencing. (RP 1055-1057). The trial court sentenced Mr. Smith to life in prison without the possibility of parole for the first degree felony murder, first degree burglary, and first degree assault counts. (CP 507; RP 1060-1061).

Mr. Smith appealed. (CP 484-485). On February 27, 2019, the Mr. Smith’s opening brief was filed. Mr. Smith raised two issues: insufficient evidence to support his conviction for first degree felony murder, and that his mandatory sentence of life without the possibility of parole, with no consideration

¹ References to “RP” herein are to the six volumes reported by Korina Kerbs.

of his youthfulness at the time he committed the current offenses or the predicate offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14.

In his opening brief, Mr. Smith noted our Supreme Court had granted review in three cases, considering the issue of whether sentencing an adult offender to life in prison without the possibility of parole, pursuant to the Persistent Offender Accountability Act (POAA), based on prior strike offenses the defendant committed when he was a youthful adult (i.e., ages 19, 20, and 21), constitutes cruel and unusual punishment under the United States Constitution or cruel punishment under the Washington Constitution. *See State v. Moretti*, No. 47868-4-II, 2017 WL 4899567, at *9-10 (Wash. Ct. App. Oct. 31, 2017), *review granted in part*, 433 P.3d 805 (Wash. 2019); *State v. Nguyen*, No. 74962-5-I, 2018 WL 417969, at *3-4 (Wash. Ct. App. Jan. 16, 2018), *review granted in part*, 433 P.3d 820 (Wash. 2019); *State v. Orr*, 34729-0-III, 2018 WL 1960197, at *4 (Wash. Ct. App. Apr. 26, 2018), *review granted in part*, 433 P.3d 815 (Wash. 2019).²

Also on February 27, 2019, Mr. Smith filed a motion to stay this appeal until these three cases were decided. On March 7, 2019, this Court granted the stay.

² GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

On August 15, 2019, our Supreme Court issued its decision in *State v. Moretti*, *State v. Nguyen*, and *State v. Orr*, which it consolidated for review. See *State v. Moretti*, 193 Wn.2d 809, 443 P.3d 609 (2019). On October 30, 2019, Mr. Smith filed a motion to lift the stay in this appeal. On November 7, 2019, this Court granted the motion to lift the stay, and set a due date for Mr. Smith's supplemental brief regarding the applicability of *State v. Moretti*, *State v. Nguyen*, and *State v. Orr* on his case. Mr. Smith now submits his supplemental brief.

B. SUPPLEMENTAL ARGUMENT: Whether a mandatory sentence of life without the possibility of parole, with no consideration of Mr. Smith's youthfulness at the time he committed the current offenses, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14.

Mr. Smith maintains his argument, raised in Issue 2 in his opening brief, that his mandatory sentence of life without the possibility of parole, with no consideration of his youthfulness at the time he committed *the current offenses*, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14. This case should be reversed and remanded for resentencing for the trial court to exercise its discretion on whether to impose a life sentence.

In *State v. Moretti*, our Supreme Court held "it is not categorically cruel under article I, section 14 of the Washington Constitution to impose mandatory sentences of life without the possibility of parole under the POAA on adult

offenders who committed one of their prior most serious offenses as young adults.” *State v. Moretti*, 193 Wn.2d 809, 818, 446 P.3d 609 (2019).

In *Moretti*, the three defendants committed their current convictions at the ages of 32, 41, and 41, and were each sentenced under the POAA to a mandatory sentence of life without the possibility of parole. *Id.* at 814-18. Each defendant committed their first strike offense at age 19 or 20. *Id.* The defendants challenged their sentences on the basis “that imposing a mandatory sentence of life without the possibility of parole on a person who committed at least one, but not all, of their strike offenses as a young adult categorically violates article I, section 14 of the Washington Constitution and the Eighth Amendment to the United States constitution.” *Id.* at 820.

The Court rejected the defendants’ argument, holding that “article I, section 14 does not categorically prohibit imposing a life without parole sentence on a *fully developed adult offender* who committed one of their prior strike offenses as a young adult.” *Id.* at 830 (emphasis added). The Court reasoned “[w]e see no evidence of a national consensus against applying recidivist statutes to adults who committed prior strike offenses as young adults.” *Id.* at 823. The Court reasoned “[n]othing in this record suggests that [the defendants] are any less culpable than any other adult offender[,]” and “[t]hese petitioners are *fully developed adults* who were repeatedly given opportunities to prove they could change.” *Id.* at 824-25 (emphasis added). The Court explained the mandatory life

without parole sentences did not punish the defendants for crimes they committed as young adults: “these sentences are for the most serious offenses they committed at either age 32 . . . or age 41 . . . , well into adulthood.” *Id.* at 826. The Court explained the sentences “are not punishment for the crimes the petitioner committed as young adults because recidivist statutes do not impose “cumulative punishment for prior crimes.” *Id.*

The Court concluded that the goals of punishment justified the sentences, because “these petitioners were each well into adulthood when they committed the instant offenses.” *Id.* at 827. The Court stated “the petitioners are neither juveniles nor young adults.” *Id.* at 829.

The Court found the sentences are not grossly disproportionate to the offenses. *Id.* at 830-34; *see also State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980) (setting forth the four factors to analyze for a claim of cruel punishment).

Here, Mr. Smith acknowledges that *Moretti* forecloses his argument that his mandatory sentence of life without the possibility of parole, with no consideration of his youthfulness at the time he committed *the predicate offenses*, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14. *See Moretti*, 193 Wn.2d at 819-34.

However: *Moretti* does not foreclose Mr. Smith’s argument that his mandatory sentence of life without the possibility of parole, with no consideration

of his youthfulness at the time he committed *the current offenses*, amounts to cruel and unusual punishment in violation of the Eighth Amendment and cruel punishment under Article I, section 14. Mr. Smith asks this Court to consider his arguments set forth on pages 32-39 of his Opening Brief, as they apply to his current offenses.

Mr. Smith was 25 years old on the date of the charged offenses. (CP 104-105). Unlike the defendants in *Moretti*, Mr. Smith was not a “fully developed adult offender” at the time he committed the current offenses. *See Moretti*, 193 Wn.2d at 824-25. His current offenses were not committed “well into adulthood.” *See id.* at 826-27. To the contrary, Mr. Smith’s current offenses were committed when he was a youthful offender. His offenses were committed at an age at which our Supreme Court has recognized the characteristics of youth persist. *See State v. O’Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015) (acknowledging that “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.”); *see also State v. Hatfield*, No. 77512-0-I, 2019 WL 6492483, at *17 (Wash. Ct. App. Dec. 2, 2019) (in rejecting a constitutional challenge to a life sentence under the POAA for current offenses committed when the defendant was in his 50s, acknowledging that the defendant’s first strike offense, committed when he was 24 years old, was when he was “a youthful adult.”)³; *cf. State v.*

³ GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Hart, 188 Wn. App. 453, 460-63, 353 P.3d 253 (2015) (upholding a life sentence under the POAA for a 27 year old offender).

In determining that a current offense committed at 32 years old “is well past the age when courts have recognized that youth may mitigate culpability[,]” the *Moretti* Court recognized that in *State v. O’Dell*, it cited to reports that the brain may not fully mature until age 25. *See Moretti*, 193 Wn.2d at 829 (citing *State v. O’Dell*, 183 Wn.2d 680, 692 n.5, 358 P.3d 359 (2015)). Mr. Smith committed the current offenses at the age where Court has recognized that youth may mitigate his culpability. *See O’Dell*, 183 Wn.2d at 692. “[P]sychological and neurological studies showing that the parts of the brain involved in behavior control continue to develop *well into a person's 20s.*” *O’Dell*, 183 Wn.2d at 691-92 (emphasis added) (internal quotation marks omitted) (quotations omitted).

The same characteristics that led to the Eighth Amendment analyses and holdings of *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, and to the constitutional and statutory analyses of *State v. Houston-Sconiers* and *O’Dell*, also apply to crimes committed at age 25, when Mr. Smith committed the current offenses. *See Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 68-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 34, 391 P.3d 409 (2017); *O’Dell*, 183 Wn.2d at 695. In addition, our Supreme Court’s decision in

O'Dell and the United States Supreme Court's decisions in *Roper* and its progeny suggest that a defendant's young age must be considered in evaluating whether his sentence violates article I, section 14 of the Washington Constitution. See *Roper*, 543 U.S. at 574; *Graham*, 560 U.S. at 68-70; *Miller*, 567 U.S. at 479; *O'Dell*, 183 Wn.2d at 699.

Mr. Smith's life sentence violates article I, section 14. He was just 25 years old when he committed the current offenses. At this age, his mental and emotional development was far from complete. See *O'Dell*, 183 Wn.2d at 691-92. The case must be remanded for resentencing to enable the trial court to exercise its discretion on whether to impose a life sentence, considering Mr. Smith's youthfulness at the time he committed the current offenses.

C. CONCLUSION

Based on the foregoing, and the arguments set forth in Mr. Smith's opening brief, this case should be reversed and remanded for resentencing for the trial court to exercise its discretion on whether to impose a life sentence.

In addition, the evidence presented at trial was insufficient to find Mr. Smith guilty of first degree felony murder. There was insufficient evidence that Mr. Smith, or Ms. Muongkoth, caused the death of Mr. Medina. This conviction should be reversed and the charge dismissed with prejudice.

Respectfully submitted this 6th day of December, 2019.


Jill S. Reuter, WSBA #38374

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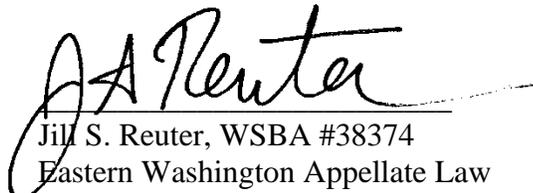
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 36213-2-III
vs.) Spokane Co. No. 15-1-02459-1
)
JEREMIAH A. SMITH) PROOF OF SERVICE
also known as GLENN A. AKERS)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 6, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served a copy on the Respondent at scpaappeals@spokanecounty.org using the Washington State Appellate Courts' Portal.

Dated this 6th day of December, 2019.


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