

FILED
Court of Appeals
Division II
State of Washington
3/5/2019 9:58 AM

No. 51409-5-II No. 97766-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TIMOTHY HAAG, Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Michael Evans
No. 94-1-00411-2

**REPLY BRIEF OF APPELLANT
TIMOTHY HAAG**

MARY K. HIGH, WSBA# 20123
Attorney for Timothy Haag

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996

TABLE OF CONTENTS

I. REPLYASSIGNMENTS OF ERROR.....1

1. The Court’s focus on retribution for the victim in setting a minimum sentence of 46 years re-imposed the functional equivalent of a life sentence and failed to provide a meaningful opportunity to obtain release based on demonstrated maturity and Rehabilitation1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

1. While the superior court clearly understood what it was required to consider, its findings demonstrate that it failed to meaningfully consider the evidence within the proper context of the diminished culpability of youth as required by the *Miller*-fix statute. Accordingly, the superior court failed to comply with the requirements of the *Miller*-fix statute in setting Haag’s minimum term. (Assignment of Error No. 1).....1

III. STATEMENT OF FACTS.....1

IV. ARGUMENT.....1

Issue No 1 – The Court’s focus on retribution for the victim in setting a minimum sentence of 46 years re-imposed the functional equivalent of a life sentence and failed to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.....1

V. CONCLUSION.....14

TABLE OF AUTHORITIES

Washington State Cases

State v. Bassett, 198 Wn. App.714, 725, 394 P.3d 430. (2017)1,13

State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018)3, 13

State v. Delbosque, ___ Wn. App. ___, 430 P.3d 1153, (Wash. Ct. App. 2018)3, 4, 5

In re Pers. Restraint of Dyer, 157 Wn.2d 358, 363, 139 P.3d 320 (2006)...2

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

State v. Ronquillo, 190 Wn. App. 765,771-775, 361 P.3d 779 (2015).....12

Federal Cases

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L. Ed 2d 825 (2010).....6

Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct.2455, 183 L. Ed 2d 407 (2012).....1, 2, 3, 6, 7, 13

Constitutions

8th Amendment of the United States Constitution12, 14

Const. art. I § 14.....12, 14

Statutes and Court Rules

RCW 10.95.0304, 6, 12

RCW 10.95.0354

Other

Cummings, Adele & Nelson Colling, Stacie, There is No Meaningful Opportunity in meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences. Vol.18:2 UC Davis Journal of Juvenile Law & Policy 268.....11

I. ASSIGNMENTS OF ERROR ON REPLY

1. The Court’s focus on retribution for the victim in setting a minimum sentence of 46 years re-imposed the functional equivalent of a life sentence and failed to provide a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.....

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. While the superior court clearly understood what it was required to consider, its findings demonstrate that it failed to meaningfully consider the evidence within the proper context of the diminished culpability of youth as required by the *Miller-fix* statute. Accordingly, the superior court failed to comply with the requirements of the *Miller-fix* statute in setting Haag’s minimum term.. (Assignment of Error No. 1).....

III. STATEMENT OF THE CASE

Appellants Assignments of Error are listed in detail at pages i to ii of Appellant’s Opening brief and are incorporated by reference. This reply focuses on recently decided cases that will assist the Court in determining whether Mr. Haag received a constitutionally permissible sentence.

Appellants Statement of Facts from his opening Brief at pages 2 to 15 is incorporated by reference.

IV. REPLY ARGUMENT

Issue No 1 – While the superior court clearly understood what it was required to consider, its findings demonstrate that it failed to meaningfully consider the evidence within the proper context of the diminished culpability of youth as required by the *Miller-fix* statute.

Accordingly, the superior court failed to comply with the requirements of the *Miller*-fix statute in setting Haag’s minimum term.

“Children are different”¹ has been the theme of the recent string of Supreme Court decisions on juvenile² sentencing cases. Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct.2455, 183 L. Ed 2d 407 (2012). A court conducting a Miller resentencing abuses its discretion when it “acts without consideration of and in disregard of the facts” or relies on speculation and conjecture in disregard of the evidence. See Dyer, 164 Wn.2d at 286 (quoting In re Pers. Restraint of Dyer, 157 Wn.2d 358, 363, 139 P.3d 320 (2006)) (explaining when the Indeterminate Sentence Review Board abuses its discretion in setting minimum terms). During a Miller resentencing hearing, the court must “fully explore the impact of the defendant's juvenility on the sentence rendered.” Ramos, 187 Wn.2d at 443 (quoting Aiken v. Byars, 410 S.C. 534, 543, 765 S.E.2d 572 (2014)).

The Miller Court required that sentencing courts consider the “mitigating qualities of youth,” including an offender’s youth and attendant characteristics, before imposing a particular penalty. 567 U.S. at 476, 132 S.Ct. 2455. These attendant circumstances include: chronological age, immaturity, failure to appreciate risks and consequences, the

¹ 132 S. Ct. 2455, 2470 (2012).

² Note: By “juveniles,” I refer to persons under 18 years old.

circumstances of the homicide offense, and the possibility of rehabilitation. Delbosque, 430 P. d at 1156. Bassett, 198 Wn. App.714, 725, 394 P.3d 430. (2017).

Before Miller, Washington law imposed a mandatory sentence of life without the possibility of release or parole for an offender convicted of aggravated first degree murder, regardless of the offender's age. Bassett, 198 Wn. App. at 726, 394 P.3d 430. In response to *Miller*, our legislature enacted the *Miller*-fix statute, which provides:

(3)(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.³

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in [*Miller*] including, but not limited to, the age of the individual, the youth's

³ Our Supreme Court recently held that this subsection of RCW 10.95.030 is unconstitutional under the Washington Constitution because sentencing juvenile offenders to life without parole or early release constitutes cruel punishment. *State v. Bassett*, 192 Wash.2d 67, 428 P.3d 343 (2018).

childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

RCW 10.95.030. See State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018) (held RCW 10.95.030(3)(a)(ii) imposition of a life sentence is unconstitutional.)

Our legislature also enacted RCW 10.95.035(1), which states: 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 or the sentencing court's successor for sentencing consistent with [the *Miller*-fix statute]. State v. Delbosque, 430 P.3d 1153, 1158–59 (Wash. Ct. App. 2018),

In a recent decision from Division Two of this court, in 1994, a jury found Cristian Delbosque guilty of aggravated first degree murder committed when he was 17 years old. The superior court imposed a life sentence without the possibility of parole. In 2016, under RCW 10.95.030 (the *Miller*-fix statute) and RCW 10.95.035, the superior court held an evidentiary hearing and entered an order imposing a minimum term of 48 years with a maximum term of life imprisonment. State v. Delbosque, 430 P.3d 1153, 1155–56 (Wash. Ct. App. 2018), as corrected (Dec. 11, 2018). Delbosque challenged his judgment and sentence, arguing that the superior

court's findings of fact were unsupported by substantial evidence and that the superior court failed to adequately consider the diminished culpability of youth as required by the *Miller*-fix statute when setting the minimum term. This division of the Court of Appeals agreed and held that the superior court's findings regarding Delbosque having an attitude towards others reflective of the underlying crime, and of Delbosque's permanent incorrigibility and irretrievable depravity were not supported by substantial evidence. The reviewing court further held that the superior court failed to comply with the *Miller*-fix statute when setting Delbosque's minimum term of 48 years. Consequently, the reviewing court granted Delbosque's Personal Restraint Petition (PRP), reversed the judgment and sentence, and remanded for resentencing. State v. Delbosque, 430 P.3d 1153, 1155–56 (Wash. Ct. App. 2018), as corrected (Dec. 11, 2018).

While the superior court clearly understood what it was required to consider, its findings demonstrate that it failed to meaningfully consider the evidence within the proper context of the diminished culpability of youth as required by the *Miller*-fix statute. Accordingly, the superior court failed to comply with the requirements of the *Miller*-fix statute in setting Delbosque's minimum term.

The Haag court did not enter findings of fact or conclusions of law after the resentencing hearing, however, similar to what occurred in

Delbosque, the Haag superior court made oral statements regarding Haag's age, childhood and life experience, degree of responsibility, and chances of becoming rehabilitated. Similar to the Delbosque court's findings, the court's statements regarding Mr. Haag's childhood, age and life experience were not supported by substantial evidence. The Haag superior court, likewise did not, consider the designated factors "that account for the diminished culpability of youth," as required by the *Miller*-fix statute. RCW 10.95.030(3)(b).

Miller held that children are constitutionally different from adults for purposes of sentencing, explaining that because juveniles have diminished culpability and greater prospects for reform, "they are less deserving of the most severe punishments." 567 U.S. at 471, 132 S.Ct. 2455 (quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)). In making this determination, the Court relied on three gaps between children and adults: children display a lack of maturity and an underdeveloped sense of responsibility, they are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Miller*, 567 U.S. at 471, 132 S.Ct. 2455.

Miller also determined that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences

on juvenile offenders, even when they commit terrible crimes. 567 U.S. at 472, 132 S.Ct. 2455. Because the heart of the retribution rationale relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult. *Miller*, 567 U.S. at 472, 132 S.Ct. 2455. Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Miller*, 567 U.S. at 472, 132 S.Ct. 2455. Similarly, deciding that a juvenile offender forever will be a danger to society would require making a judgment that the juvenile is incorrigible, but incorrigibility is inconsistent with youth. *Miller*, 567 U.S. at 472-73, 132 S.Ct. 2455. For the same reason, rehabilitation cannot justify a sentence of life without parole because it forswears altogether the rehabilitative ideal and reflects an irrevocable judgment about a juvenile offender's value and place in society, at odds with a child's capacity for change. *Miller*, 567 U.S. at 473, 132 S.Ct. 2455.

At Timothy Haag's *Miller* hearing, two experts spoke at length about the trauma and deep emotional issues that preceded the murder and were unequivocal about his readiness to return to the outside world. RPII 6-91; CP 61-95. Testimony from people who knew him in prison expanded on this and showed the court the efforts he went to be a better

person and help others. RPII 96. Even the judge agreed that Haag “has reached a significant level of rehabilitation” and “has exhibited a stellar track record in prison and has been assessed as a low risk for violently re-offending.” RPI 27. The court, even while discounting the uncontroverted expert testimony, found that Mr. Haag was “not irretrievably depraved nor irreparably corrupt.” RPI 25. In contrast, the prosecutor focused exclusively on the original crime instead of the actual reasons for the re-sentencing: the possibility of rehabilitation and the diminished culpability because of youth and the application of the *Miller* factors to a resentencing decision. The State did not introduce any contravening witnesses or evidence. In their closing argument, the prosecutor focused on the horrific nature of the crime and at no point addressed the claim of whether Haag was rehabilitated or not. RP1 at 113-22. He asked the court to “hold him accountable for the murder” despite Haag having served the entirety of his adult life in prison. *Id.* at 113. He incorrectly stated that the “the sentencing is about justice for an innocent little girl.” *Id.* at 114. Finally, he questioned the ability of the two psychologists to give opinions on Haag without interviewing more people and to make statements about Haag at 17 despite presenting no evidence to support this argument. *Id.* at 116-17.

Near the end of the hearing, Judge Evans remarked that the sentencing decision was “more than mere mortals can handle.” RP2 175. The Judge opened his remarks at the sentencing hearing by expressing his “deepest sympathies” to the Dillard family “who have suffered indescribable pain and utter heartbreak.” RPI, p.16. In his decision, he expressed concern that “I’ve seen no report that tells me Mr. Haag has engaged in any mental health counseling or any type of counseling that has allowed him to address the underlying issues that led to the strangling of Miss Rachel. A prisoner can be a model prisoner for twenty-plus years but still have untreated, underlying issues.” RPI p.22. He went on to state that “One aspect of the HCR-20 that caused me some concern is that the relationship stability prong of the assessment, which forms nearly one-third of the assessment questions, was not administered because Mr. Haag did not have a measurable relationship as a youth or adult.” Id. at 23. According to Dr. Roesch, who administered the HCR-20, the relationship stability factor is only one of ten factors of the Historical prong of the assessment which is itself only one-third of the entire assessment. CP at 92. Its omission did not affect Dr. Roesch’s confidence in the assessment. Id. at 93-94. Dr. Roesch had also earlier stated that Haag “does not have any mental health issues or anger problems that would place him at risk for future offending.” Id. at 94. This conclusion was mirrored by Dr.

Beyer. Id. at 62. Haag has also participated in anger/stress management courses in prison. Id. at 89.

While arguing against the conclusions of both expert psychologists that Haag had likely not planned out the crime in advance, Judge Evans explicitly pointed to the victim impact statement of the victim's brother, Alex Anderson. He wrote "Mr. Alex Anderson indicated that Mr. Haag was fascinated with death and all things macabre. Mr. Alex reported that Mr. Haag enjoyed watching a show entitled Faces of Death that shows video footage of people being killed or sufferings some type of trauma that ends their life." RP1 at 24. These allegations were never substantiated or presented in any other context.

Further, despite the uncontested and unquestioned reports of actual trauma when he was a child, Judge Evans generically described Haag's young life as a "mixed bag of positive and challenging circumstances, not unlike others" and made a point of rhetorically aging Haag. CP 62, RP1 20 He twice called Haag a "man" at the time of the murder and made repeated references to Haag's large weight at the time and the difference in ages between Haag and the victim. RP1 18, 27.

Judge Evans accepted that Haag "has reached a significant level of rehabilitation," "has likely aged out of what is called adolescent-limited delinquency," and "is not irretrievably depraved nor irreparably

corrupt.” RPI at 25. He also noted that “Haag has expressed what I judge to be sincere remorse and sorrow for his actions. RPI 25. Nevertheless, he went on to say that “rehabilitation is not the sole measure in sentencing. Retribution holds that punishment is a necessary and deserved consequence for one’s criminal act. Under the retributive theory, severity of the punishment is calculated by the gravity of the wrong committed.” RPI 25. In this case the wrong was the single murder of a young white girl.

Although he concluded by listing the factors he had to “weigh,” his earlier statements about the rehabilitation of Haag and the retributive nature of sentencing made it clear that the only consideration was how much more to punish a person who, by all accounts, has been rehabilitated.

So the Court is faced with the daunting task of properly weighing a multiplicity of factors, which include a vile, cowardly, and particularly heinous multi-step strangulation and drowning of a defenseless, sixty-five pound little girl committed by a three hundred pound seventeen-year-old young man that resulted in a convicted for aggravated murder in the first degree. I’m also to consider the then-youthful brain of Mr. Haag with diminished decision-making capacity, who simultaneously lived through some very difficult circumstances while still enjoying a supportive relationship and activities. And also, a man convicted of murder who has exhibited a stellar track record in prison and has been assessed as a low-risk for violently re-offending.” RPI 27.

The court sentenced Timothy Haag to a minimum sentence of 46 years to life. RP1 27, CP 756-766. With his current sentence, Haag will only be eligible for parole at the age of 63 at which point he'll have lived almost three-quarters of his life in prison. Life expectancy in the prison system makes this sentence another life sentence. *See: Cummings, Adele & Nelson Colling, Stacie, There is No Meaningful Opportunity in meaningless Data: Why it is Unconstitutional to Use Life Expectancy Tables in Post-Graham Sentences. Vol.18:2 UC Davis Journal of Juvenile Law & Policy 268 (Using Colorado State life expectancy tables that do not take into account, race, poverty trauma and incarceration do not accurately reflect life expectancy for incarcerated juveniles); State v. Ronquillo, 190 Wn. App. 765,771-775, 361 P.3d 779 (2015) (Ronquillo's 51 year sentence contemplates that he will remain in prison until the age of 68. This is a de facto life sentence. It assesses Ronquillo as virtually irredeemable. This is inconsistent with the teachings of *Miller* and its predecessors.)*

The Court's statements make manifest its failure to comply with RCW 10.95.030, the Eight Amendment and Article 1 section 14 of the Washington State Constitution. The sentencing court must conduct and individualized sentencing that considers how the Miller factors, which include such transient but very real and significant differences in the

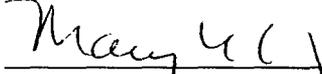
actual brains of youth, including “hallmark” features as immaturity, impetuosity, failure to appreciate risks and consequences, vulnerability and other “incompetencies of youth” militate against imprisoning them before they die, before imposing such a sentence. The Supreme Court noted that juvenile offenders have diminished culpability and are less deserving of the most severe punishments because they have a lack of maturity and an underdeveloped sense of responsibility, are more vulnerable to outside pressures and negative influences, and their traits are less likely to be evidence of irretrievable depravity. *Miller*, 567 U.S. at 471, 132 S.Ct. 2455. The *Miller* Court required that sentencing courts consider the “mitigating qualities of youth,” including an offender’s youth and attendant characteristics, before imposing a particular penalty. 567 U.S. at 476, 132 S.Ct. 2455. These attendant circumstances include: chronological age, immaturity, failure to appreciate risks and consequences, the circumstances of the homicide offense, and the possibility of rehabilitation. *Bassett*, 198 Wn. App. at 725, 394 P.3d 430 and *see also*; *State v. Bassett*, 192 Wn.2d 67, 426 P.3d 343 (2018)(in the context of juvenile sentencing, the State’s constitutional prohibition on cruel punishment provides greater protection than the Eighth Amendment.)

V. CONCLUSION

The Court's fixation on retribution for the crime overshadowed its obligations to conduct a sentencing that meets the requirements of Miller, the Eighth Amendment and Article 1 section 14.

Dated this 5 day of March, 2019.

Respectfully Submitted,



MARY K. HIGH, WSBA# 20123
Attorney for Appellant, Timothy Haag

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
 vs.)
 TIMOTHY HAAG,)
)
 Appellant.)

NO. 51409-5-II
CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this reply brief were delivered electronically to the following:

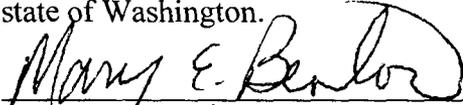
Derek Byrne, Clerk, Division II, Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

Ryan Jurvakainen
Cowlitz County Prosecutor
jurvakainen.ryan@co.cowlitz.wa.us; appeals@co.cowlitz.wa.us

The undersigned certifies that on this day correct copies of this reply brief were delivered by U.S. mail to the following:

Timothy Haag (Appellant)
DOC #731136
c/o Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

This statement is certified to be true and correct under penalty of perjury of the laws of the state of Washington.


Signed March 4th, 2019 at Tacoma, Washington

CERTIFICATE OF SERVICE

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996
(253)798-6715 (fax)

PIERCE COUNTY ASSIGNED COUNSEL

March 05, 2019 - 9:58 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51409-5
Appellate Court Case Title: State of Washington, Respondent v. Timothy E. Haag, Appellant
Superior Court Case Number: 94-1-00411-2

The following documents have been uploaded:

- 514095_Answer_Reply_to_Motion_20190305095733D2408234_3383.pdf
This File Contains:
Answer/Reply to Motion - Reply to Response
The Original File Name was Reply Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- appeals@co.cowlitz.wa.us
- jfreem2@co.pierce.wa.us
- lissa.flannigan@piercecountywa.gov
- mary.benton@piercecountywa.gov
- pheland@co.cowlitz.wa.us

Comments:

Sender Name: Mary Benton - Email: mbenton@co.pierce.wa.us

Filing on Behalf of: Mary Katherine Young High - Email: mhigh@co.pierce.wa.us (Alternate Email:)

Address:
949 Market Street Suite 334
Tacoma, WA, 98402
Phone: (253) 798-6062

Note: The Filing Id is 20190305095733D2408234