No. 99330-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON DALE BACKSTROM,

Appellant.

SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

On November 6, 1998, the defendant was found Guilty of two counts of aggravated first degree murder, both committed with a deadly weapon. 1 CP 207. On January 6, 1999 he was sentenced to two terms of life imprisonment without possibility of release, to be served consecutively. He was also sentenced to 24 months' confinement for each deadly weapon enhancement. 1 CP 211.

The charges arose from an incident on November 29, 1997 wherein the defendant and his cousin, Jason Whited, planned to rob and murder Marnie Wells and her 12-year-old daughter K.O. 1 CP 221-223. The defendant was 17 years old at the time of the murders. 1 CP 219-20.

On June 30, 2017 the defendant was resentenced pursuant to RCW 10.95.030. 1 CP 23-38. The defendant appealed this sentence, and the Court of Appeals affirmed. The defendant's petition for review was granted

and the case remanded to the Court of Appeals for reconsideration in light of State v. Delbosque, 195 Wn.2d 106, 456 P.3d 806 (2020). On reconsideration the Court of Appeals again affirmed the sentence. The defendant petitions for review of that decision.

II. ARGUMENT

A. THE COURT SHOULD NOT ACCEPT REVIEW OF AN ISSUE THAT WAS NEITHER PRESENTED NOR DECIDED BY THE COURT OF APPEALS.

The defendant raised a single issue on his direct appeal/personal restraint petition after resentencing. He argued that the trial court did not meaningfully consider and weigh the Miller factors as well as the relevant factors in RCW 10.95.030. The defendant petitioned for review of the decision of the Court of Appeals rejecting that argument. This Court granted review and remanded to the Court of Appeals to consider the issue in light of State v. Delbosque, 195 Wn.2d 106, 456 P.3d 806 (2020). The Court of Appeals then re-affirmed its decision.

The defendant's petition for review from this decision argued that the 42-year sentence constituted a de facto life sentence. He renews this argument in his supplemental brief in support of review, arguing that the sentence is an unconstitutional life sentence after State v. Haag, __ Wn.2d __, 495 P.3d 241 (2021).

Whether the court abused its discretion by imposing a de facto life sentence was never before the Court of Appeals. Appellate courts only review a claimed error which is included in the assignment of error or disclosed in the associated issue pertaining thereto. RAP 10.3(g). The Court of Appeals cannot possibly have committed error when an issue was not briefed or decided.

This Court has refused to consider an issue that was not raised in accordance with the rules of appellate procedure. This is true even for issued of constitutional magnitude. State v. Sassen Van Elsloo, 191 Wn.2d 798, 813, n. 3, 425 P.3d 807(2018), State v. Johnson, 119

Wn.2d 167, 170, 829 P.2d 1082 (1992), State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993). As this Court observed, if it were to allow a party to expand the issues beyond those briefed in the Court of Appeals, the Rules of Appellate Procedure would be rendered meaningless. State v. Kalakosky, 121 Wn.2d 525, 540, n. 18, 852 P.2d 1064 (1993).

This Court should adhere to its long line of precedent and refuse to consider whether a 42-year sentence is a de facto life sentence in this case. The defendant may raise this issue in a CrR 7.8 motion or a personal restraint petition. The defendant's sentence here was less than that imposed in Haag. The concerns expressed by the court that rendered a 46-year sentence a de facto life sentence in that case may not be as compelling as in the case here. But since there has never been an opportunity to argue that point as it relates to the

defendant, it would be improper to accept review of this issue raised only in the context of a petition for review.

B. THE TRIAL COURT FOCUSED ON THE DEFENDANT'S REHABILITATION WHEN IT DETERMINED AN APPROPRIATE SENTENCE.

The defendant also argued that the court abused its discretion because it did not adequately consider mitigating circumstances. Instead, he argues the court focused on the "horrific" nature of the crime. He claims that this was error in light of Haag. The record does not support his argument.

The court carefully went through the factors it was required to consider, citing evidence for its determination of those factors. It considered the defendant's age, recognizing that science and common sense informs that his brain and decision-making abilities were not fully formed. 6/28 RP 181. His lifestyle illustrated that he had poor judgment and ability to make decisions. Id. It also considered the lack of support or controls from the

defendant's family. It noted that he "clearly had far too much freedom to do as he pleased." 6/28 RP 181-82.

The evidence supported the conclusion that he had made strides toward rehabilitation. The court remarked that it was clear that the defendant was a far different person at re-sentencing than he had been at the time of the murders. "And so, on balance, I would say that the rehabilitation factor probably is in his favor." 6/28 R 184-85.

The court also considered how his youthful character may have impacted his legal defense. Although difficult to ascertain 20 years later, the court concluded that he received a vigorous defense. It therefore found no evidence that his youth affected his defense. 6/28 RP 183-84.

The court further found that there was no evidence that would have precluded the defendant from being responsible for the crime. It noted that the evidence

showed the defendant was an "intelligent and capable 17 year old." 6/28 RP 185.

The court was asked to impose the same sentence that the co-defendant received. 6/28 RP 174. In response to this request, the court stated that after reviewing the evidence, it found the defendant's participation significantly greater than that of the co-defendant. For that reason, it found the punishment should be greater than that imposed on the co-defendant. 6/28 RP 182-83, 186.

In sum, the court found that there were mitigating factors, including the defendant's youth, his family circumstances, and prospects for rehabilitation. It did weigh those factors against the circumstances of the murder. It agreed with defense counsel those circumstances were "horrible" involving a double homicide of a mother and daughter accomplished by many stab wounds. 6/28 RP 168, 171, 185-86.

The defendant argues that the court's references to the nature of the crime were an abuse of discretion. He accuses the court of failing to acknowledge that "the case for retribution was a weak or peripheral concern."

In Haag this Court held that in a Miller-fix resentencing hearing, retributive factors count for less than mitigating factors. Haag, 495 P.3d at 249, ¶ 37. It did not hold that those factors count for nothing. Nor did it hold that retribution was a weak or peripheral concern. To say so would conflict with Miller. While holding that mandatory life without parole was impermissible for juvenile offenders, the court also remarked "that Miller deserved severe punishment for killing Cole Cannon is beyond question." Miller v. Alabama, 567 U.S. 460, 479, 132 S.Ct 2455, 183 L.Ed.2d 407 (2012). The circumstances of the crime do count for something in setting a just sentence for a juvenile who committed murder.

Unlike the trial court in Haag, the court here did not emphasize the facts of the case or the vulnerability of the victims in its decision. The majority of its reasoning revolved around whether there were mitigating factors and the evidence supporting those factors. Although the court's decision predated Haag by more than four years, the decision is consistent with the requirements for a Miller-fix resentencing as articulated in that case.

III. CONCLUSION

For the foregoing reasons the petition for review should be denied.

This brief contains 1302 words (exclusive of appendices, title sheet, table of contents, table of authorities, certificate of service, signature blocks, and pictorial images).

Respectfully submitted on December 3, 2021.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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Appellate Court Case Title:	State of Washington v. Brandon Dale Backstrom
Superior Court Case Number:	97-1-01993-6

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