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No. 96709-1

NO. 49792-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTIAN DELBOSQUE,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 17, 2018, this court entered the following order:

After review of the file and record herein, the court is of the opinion that supplemental briefing is needed in order to review the issues raised on appeal. The proper method for Delbosque to seek review of his resentencing under RCW 10.95.030 is a personal restraint petition. *State v. Bassett*, 198 Wn.App. 714, 721, 394 P.3d 430, review granted, 189 Wn.2d 1008 (2017). However, Delbosque has filed a direct appeal rather than a personal restraint petition (PRP). In order to facilitate review of a minimum term decision on the merits, we may disregard this filing defect and treat Delbosque's direct appeal as a PRP. *Bassett*, 198 Wn.App. at 721. However, Delbosque must meet the PRP standards of RAP 16.4 to obtain relief. *Bassett*, 198 Wn.App. at 721-722.

'To obtain relief under PRP where no prior opportunity for judicial review was available, a petitioner must show that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c)' *Bassett*, 198 Wn.App. at 722. Delbosque has raised the following assignments of error:

1. The trial court erred when it entered findings of fact unsupported by substantial evidence when resentencing a juvenile convicted of homicide who was originally sentenced to life without the possibility of parole.

2. The trial court erred when it resentenced the defendant without adequately weighing and applying the criteria required under RCW 10.95.035, RCW 10.95.030 and the decision in *Miller v. Alabama*.

Br. of Appellant at 1. The court requires supplemental briefing regarding whether the assignments of error Delbosque has raised in his opening brief satisfy the requirements for relief from unlawful restraint under RAP 16.4(c).

Order Requesting Supplemental Briefing (in part).

Appellant's supplemental brief follows.

ARGUMENT

I. MR. DELBOSQUE IS ENTITLED TO REVIEW UNDER RCW 16.4 BECAUSE HE IS UNDER RESTRAINT, THAT RESTRAINT IS UNLAWFUL, AND HE HAS HAD NO PRIOR OPPORTUNITY FOR REVIEW OF THE CLAIMS HE MAKES IN THIS APPEAL.

Under RAP 16.4(a), a petitioner who has no other adequate method of redress and who acts in a timely manner may obtain relief by petition to an appellate court upon two conditions: (1) the petitioner is under “restraint” as that word is defined under RAP 16.4(b), and (2) that “restraint” is unlawful “for one or more of the reasons set out in RAP 16.4(c).” As the following explains, Mr. Delbosque meets both of these requirements and is entitled to relief in this case.

RAP 16.4(b) defines “restraint” as follows:

A petitioner is under a “restraint” if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

RAP 16.4(b).

In the case at bar Mr. Delbosque is in the custody of the Washington State Department of Corrections serving a 48 year minimum mandatory sentence. Thus, as a petitioner who is “confined” he is currently under restraint as defined in RAP 16.4(b). Under RAP 16.4(c), the Washington Supreme Court has set out seven non-exclusive types of “unlawful”

restraint under which relief is available under RAP 16.4(a). Numbers two, five and seven are:

(2) The . . . sentence . . . was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

. . . .

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding . . . ; or

. . . .

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

RAP 16.4(c)(2), (5) & (7).

In the case at bar Mr. Delbosque’s restraint is illegal under each of these three alternatives. First, as was set out in the Opening Brief of Appellant, the trial court’s failure to adequately weigh and apply the criteria required under the United States Supreme Court’s decision in *Miller v. Alabama*, 576 U.S. —, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), violates Mr. Delbosque’s right to be free from cruel and unusual punishment under the Eighth Amendment. This is a constitutional violation for which relief is available under RAP 16.4(c)(2). Similarly, as was set out in the Opening Brief of Appellant, the sentencing court’s failure to consider and apply the criteria the legislature has set for resentencing under RCW 10.95.035 and RCW 10.95.030 constitutes “other grounds” for which relief is available

under RAP 16.4(5)&(7). Thus, in the case at bar Mr. Delbosque is entitled to seek relief under RAP 16.4(a).

In addition, to the extent review is not available under any other method, this Court should grant review as a personal restraint petition (PRP) for two further reasons: (1) to facilitate review on the merits, *See State v. Bassett*, 198 Wn.App. 714, 721-722, 394 P.3d 430, *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017) (citing *In re Pers. Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987)); and (2) since Mr. Delbosque has had no prior opportunity for judicial review of these claims, he only needs to show he is subject to unlawful restraint under RAP 16.4. *Bassett*, 198 Wn.App. at 722. In addition, since Mr. Delbosque has not had a prior opportunity for judicial review of the sentence in this case, this court should not apply the heightened threshold requirements for a PRP. *See In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004).

Finally, as regards to Mr. Delbosque's first assignment of error, there is no bar in PRPs precluding an argument that a lower court's findings of fact are not supported by substantial evidence. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250, 1268 (1999), as amended (June 30, 1999) ("Because a PRP is a civil proceeding, as a matter of consistency, we adopt the "substantial evidence" standard as the standard of review for appeals from factual findings in PRP reference hearings. RAP 16.14(b)).

Although *Gentry* deals with the review of facts following a fact finding hearing ordered as part of a PRP, there is no logical difference between the scope of review of a trial court's findings of fact following a reference hearing as part of a PRP and the scope of review of a trial court's findings of fact as part of a new sentencing hearing reviewed as a PRP. Indeed, under the rules this court applies on appeal, any other interpretation would completely deny review of factual findings a trial court made upon resentencing pursuant to either RCW 10.95.030 or *Miller*.

II. TO THE EXTENT RCW 10.95.030 AND THE DECISION IN *STATE v. BASSETT* PRECLUDE DIRECT REVIEW OF THE SENTENCE IMPOSED IN THIS CASE THEY VIOLATE MR. DELBOSQUE'S RIGHT TO DIRECT APPEAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.

Under Washington Constitution, Article 1, § 22, a defendant sentenced in a criminal case has a fundamental right to appeal. This provision states:

In criminal prosecutions the accused shall have . . . the right to appeal in all cases.

Washington Constitution, Article 1, § 22 (in part).

While an "accused" in a "criminal prosecution" has "the right to appeal in all cases," under this constitutional provision, that guarantee does not include the right to appeal solely from a "conviction." *State v. King*, 18 Wn.2d 747, 140 P.2d 283 (1943). Rather, what this provision guarantees is the right to appeal from the "judgment and sentence" the trial court

imposes. *Id.* The reason is that until the trial court imposes a sentence there is nothing from which to appeal. *Id.* Thus, any statutory provision that impinges upon the right to appeal the “sentence” a trial court imposes in a criminal case is unconstitutional. By contrast, with a few exceptions there is no constitutional right to appeal the verdict in a civil case. *In re Groves*, 127 Wn.2d 221, 897 P.2d 1252 (1995). Rather, the right to a civil appeal generally only arises as provided by the legislature. *Id.*

In the context of our criminal law and in the context of the constitutional right to appeal, a “sentence” is a “formal declaration that an individual has been found guilty of a criminal offense and a declaration of the punishment being imposed.” *State v. Munds*, 83 Wn.App. 489, 922 P.2d 215, 217 (1996). In *State v. King*, *supra*, the Washington Supreme Court addressed at length what a “sentence” was in the context of a criminal case. In *King*, a defendant convicted as a habitual offender and sentenced to life in prison later sought relief from restraint, arguing that while he had been convicted of his third substantive offense prior to the state convicting him on a new information charging him with being an habitual offender, he had never been sentenced in that third substantive conviction. Thus, the defendant argued that his conviction for being an habitual offender was invalid because the preceding third substantive offense was not final and could not be considered as his third offense. In addressing this argument,

the Washington Supreme Court considered at length the difference between a “conviction” and a “sentence.” The court noted:

The judgment of conviction, without sentence . . . was simply a judicial establishment of appellant’s guilt as ascertained by the verdict of the jury. However, the judgment contained no formal declaration of the legal consequences of his guilt as thus established, but at most constituted simply an order or decree from which it might be inferred that sentence would be imposed later.

In its technical legal signification ‘sentence’ is ordinarily synonymous with ‘judgment’ and denotes the action of a court of criminal jurisdiction formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted. 24 C.J.S. 15, Criminal Law, § 1556. The essential part of the judgment is the punishment and the amount thereof, and until sentence is pronounced there is no final judgment.

State v. King, 18 Wn.2d 747, 753-54, 140 P.2d 283 (1943)

In the context of this case and under Washington Constitution, Article 1, § 22, there is a fundamental difference between a trial court’s imposition of an original sentence within the bounds set by the legislature and a parole board or other administrative agency’s decision on how and where a defendant will serve that sentence. In the former the trial court exercises the judicial function to declare what the sentence will be within the limits the legislature sets. In the latter, an executive or administrative body exercises the authority the legislature sees fit to give it in determining how and where the sentence will be executed. See *In re Aqui*, 84 Wn.App. 88,

95, 929 P.2d 436, 441 (1996), *abrogated by Det. of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000).

It is true that the legislature has the authority to take all discretion from the trial court when imposing a sentence. As the Washington Supreme Court stated in a 1909 case,

The spirit of the law is in keeping with the acknowledged power of the legislature to provide a minimum and maximum term within which the trial court may exercise its discretion in fixing sentence, taking into consideration, as it should always, the character of the person as well as the probability of reformation; or the legislature may take away all discretion and fix a penalty absolute, as it does in many instances.

State v. Le Pitre, 54 Wn. 166, 169, 103 P. 27 (1909).

However, what the legislature cannot do is usurp a trial court's authority to impose a sentence within the bounds the legislature has set. In addition, once the court imposes a sentence in a criminal case, Washington Constitution, Article 1, § 22, guarantees the defendant's right to appeal from that sentence. Herein lies the error in RCW 10.95.030(3) in that it attempts to preclude the constitutional right to appeal the imposition of a sentence imposed pursuant to the authority the legislature has given the court and pursuant to the requirements of the Eighth Amendment as set out in *Miller*. The following sets out this argument.

In RCW 10.95.030, commonly called the "Miller fix Statute," the legislature has created a mechanism for resentencing juveniles who have

previously been sentenced to life without the possibility of release. Under this statute the trial court is required to hold a new sentencing hearing after which the court imposes a new sentence that includes a minimum mandatory term for the defendant to serve prior to becoming eligible for release by the parole board. The first section of this statute holds:

(1) A person, who was sentenced prior to June 1, 2014, under this chapter or any prior law, 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 RCW 10.95.030. Release and supervision of a person who receives a minimum term of less than life will be governed by RCW 10.95.030.

RCW 10.95.035(1)

The criteria the trial court is supposed to consider when resentencing a defendant and when setting the minimum mandatory term are set out in RCW 10.95.030, and they explicitly include the criteria the United States Supreme Court requires in *Miller v. Alabama, supra*, as an expression of the minimum requirements of the Eighth Amendment. There should be little question that at the end of the hearing required under RCW 10.05.035, the court has not merely “modified” an original sentence. Rather, as the statute itself notes, the court has imposed a new sentence. In fact, subsection (4) of the statute specifically refers to the process as a “resentencing.”

Since the statute specifically gives the trial court the authority to impose a new sentence, in fact mandates the imposition of a new sentence, and since the decision in *Miller* requires the sentencing court to consider certain factors as an expression of minimum Eighth Amendment requirements, Washington Constitution, Article 1, § 22, guarantees those defendants sentenced under the statute and *Miller* the right to appeal from the imposition of that new sentence. The question on appeal then becomes twofold: (1) did the sentence the trial court impose exceed the discretion the legislature granted, and (2) did the sentence the trial court imposed violate any constitutional guarantees. What the legislature cannot do is usurp the defendant's constitutional right to appeal, and usurp the defendant's right to argue that the sentence imposed violates a constitutional guarantee even if the legislature has specifically authorized the imposition of that sentence. This is precisely what the legislature has attempted to do in subsection (3) of the statute, which states:

(3) The court's order setting a minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986.

RCW 10.95.035(3).

As this court has itself noted, the mechanism for seeking review of a parole board decision setting a minimum term is via a PRP, not a direct appeal. Limiting the scope of review of a parole board decision setting a

minimum term does not generally violate Washington Constitution, Article 1, § 22, because the parole board is acting well within its authority to determine how and where a defendant will serve a sentence the trial court has already imposed. For example, prior to the implementation of the sentencing reform act, trial courts generally sentenced defendants to the maximum terms available for a particular class of crime. By statute, the decision on the minimum term to serve and the conditions of release were given to the parole board. In these cases the court was imposing the sentence and the parole board was determining how and where to give effect to the sentence the trial court imposed.

By contrast, in the context of resentencing juveniles previously given life without release, the decision in *Miller* requires that the trial court consider the criteria for resentencing set out in *Miller*. Consistent with the Eighth Amendment, that decision does not grant the legislature the authority to usurp the trial court's duty to impose the mandatory minimum sentence and then give it to an executive body such as a parole board. Since only the trial court has the authority to impose the sentence, precluding a direct appeal from that sentence exceeds the legislature's authority and violates a defendant's right to appeal under Washington Constitution, Article 1, § 22. Consequently, in this case the defendant is

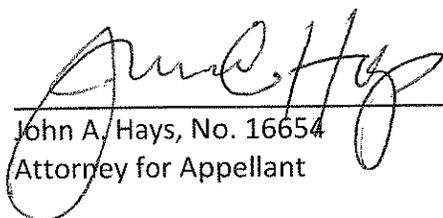
entitled to review as a matter of right on direct appeal, not simply by review under a PRP standard.

CONCLUSION

Under Washington Constitution, Article 1, § 22, Mr. Delbosque is entitled to direct review of the arguments made in his opening brief. In the alternative, he is entitled to a review of his arguments under RAP 16.4.

DATED this 7th day of May, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

RAP 16.4

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a “restraint” as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a “restraint” if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, or .100. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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CHRISTIAN DEL BOSQUE,
Appellant.

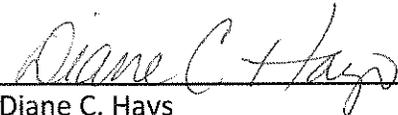
NO. 49792-1-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Supplemental Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this Dated this 7th day of May, 2018, at Longview, WA.



Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

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