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Supreme Court No. 96709-1
Court of Appeals No. 49792-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

CRISTIAN DELBOSQUE,

Respondent.

AMENDED SUPPLEMENTAL BRIEF OF
PETITIONER – STATE OF WASHINGTON

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

Page

I. STATEMENT OF THE ISSUE1

II. STATEMENT OF FACTS RELEVANT TO ISSUES1

III. ARGUMENT.....2

1) The Court of Appeals erred by substituting its own judgment for that of the trial court on contested matters of fact.....2

2) The Court of Appeals erred by misallocating the burden of proof and persuasion, by treating age as a per se mitigating factor, and by finding that the trial court did not properly follow the requirements of RCW 10.95.030 and *Miller v. Alabama*?.....6

3) Review should be by personal restraint petition rather than by appeal.....9

IV. CONCLUSION.....10

Amended Supplemental Brief of
Petitioner –State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

State Cases

State v. Bassett, 198 Wn. App. 714, 394 P.3d 430 (2017),
affirmed 192 Wn.2d 67.....9

State v. Delbosque, 6 Wn. App. 2d 407, 430 P.3d 1153 (2018).....*passim*

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015).....*passim*

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

Stringfellow v. Stringfellow, 56 Wn.2d 957, 350 P.2d 1003 (1960).....10

Federal Cases

Miller v. Alabama,
567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012).....1, 5, 6

Statutes

RCW 10.95.030.....1, 6, 9

RCW 10.95.035.....9

Amended Supplemental Brief of
Petitioner –State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

I. STATEMENT OF THE ISSUE

1) Did the Court of Appeals err by substituting its own judgment for that of the trial court on contested matters of fact?

2) Did the Court of Appeals err by misallocating the burden of proof and persuasion, by treating age as a per se mitigating factor, and by finding that the trial court did not properly follow the requirements of RCW 10.95.030 and *Miller v. Alabama*?

II. STATEMENT OF FACTS RELEVANT TO ISSUE

The State's factual summary in its brief filed in the Court of Appeals fairly and accurately portrays the facts of the case. Br. of Respondent at 1-12 (No. 49792-1-II). When rendering its decision in this case, the Court of Appeals limited its summary of the facts to one basic sentence, as follows: "In 1994, Delbosque was convicted of aggravated first degree murder for the murder of a young woman." *State v. Delbosque*, 6 Wn. App. 2d 407, 430 P.3d 1153 (2018). The State contends that the circumstances of the crime are much more important to

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the issue before the Court than what this single sentence implies.

Therefore, the State urges the Court to consider the entire record.

The Court of Appeals limited its discussion of the record to the summary of background information that was presented at the 2016 hearing to set the minimum term and to the few witnesses who testified at that hearing. *Id.* at 410-12. However, it is important to understand that, as set forth in the State's brief to the Court of Appeals at pages 1-2, the trial court considered the entire trial court record, which included "two sets of exhibits and two sets of verbatim reports... because the trial occurred in 1994 but the resentencing now at issue occurred in 2016." *Id.* at 1.

Therefore, "[t]here are ten volumes of verbatim reports from the trial, and there are four volumes of verbatim reports from the 2016 resentencing[.]"

Id.

III. ARGUMENT

- 1) The Court of Appeals erred by substituting its own judgment for that of the trial court on contested matters of fact.

In the context of reviewing a request for an exceptional sentence under the Sentencing Reform Act, this Court has recently reaffirmed that "[i]t remains true that age is not a per se mitigating factor automatically

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

entitling every youthful defendant to an exceptional sentence.” *State v. O’Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). The State contends that the same principle should apply in the instant case, where the trial court considered the circumstances of Delbosque’s youthfulness and life history when setting a minimum term pursuant to RCW 10.95.030.

In *O’Dell*, the Court noted that United States Supreme Court precedent establishes that “neurological differences make young offenders, *in general*, less culpable for their crimes.” *O’Dell* at 692 (emphasis in original). The Court recognized that “[i]t is precisely these differences that *might* justify a trial court’s finding that youth diminished a defendant’s culpability[.]. *Id.* at 693 (emphasis added). The Court – considering advancements in juvenile brain science – “conclude[d] that youth *may*, in fact, relate to a defendant’s crime... and that youth *can*, therefore, amount to a substantial and compelling factor, *in particular cases...*” *Id.* at 696 (internal quotations and citations omitted) (emphasis added).

In the instant case, the Court of Appeals ruled that there was insufficient evidence to sustain the trial court’s finding that “Delbosque continues to exhibit an ongoing attitude to others that is reflective of Mr.

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Delbosque's underlying murder." *State v. Delbosque*, 6 Wn. App. 2d 407, 417, 430 P.3d 1153 (2018). But the quotation above is an incomplete quotation and is an incomplete statement of the trial court's ruling.

The court's partial quotation, void of the context of the full paragraph in which it was given, consequently misstates the trial court's finding. The court opined that "the [trial] court's only example of this attitude was Delbosque's 2010 infraction for attempting to arrange an assault, which occurred six years prior to the evidentiary hearing." *Id.* at 418. But the trial court gave no examples of specific conduct in conjunction with this statement. However, the trial court had the benefit of 14 volumes of transcripts, which included four volumes that were specific to the 2016 hearing, and it had all the exhibits in the case. The trial court's oral ruling explains the court's conclusion. SRP-IV 641-670.

Additionally, the trial court found that:

The brutal murder that Mr. Delbosque committed in October of 1993 was not symptomatic of transient immaturity, but has proven over time to be a reflection of irreparable corruption, permanent incorrigibility, and irretrievable depravity.

CP 12. The Court of Appeals held that this finding was unsupported by substantial evidence. *Delbosque* at 409-10.

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

In *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017), this Court stated – in the context of the Sentencing Reform Act – that the burden of proof is on the defendant who seeks an exceptional sentence below the standard range. *Id.* at 434. In the instant case, the Court of Appeals took exception to the trial court’s findings because, it observed, “incurrigibility is inconsistent with youth.” *Delbosque* at 420, citing *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012). But the judge in the instant case did not sentence Delbosque to death, or to life without the possibility of parole. Instead, he imposed a minimum term of 48 years *with the possibility of parole*, and when doing so, he acknowledged that the ISRB would be empowered to make a finding about whether Delbosque continued to impose a danger to society. CP 12 (Conclusion No. 2).

When making this finding, the trial court judge had the benefit of the *entire* record, to include live testimony in the live courtroom. In *Ramos*, this Court explained that “Miller does not require that the State assume the burden of proving that a standard range sentence should be imposed, rather than placing the burden on the juvenile offender to prove an exceptional sentence is justified.” *Ramos* at 436-37. “It also does not

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

require the sentencing court... to make an explicit finding that the offense reflects irreparable corruption on the part of the juvenile.” *Id.* at 437. Still more, *Ramos* makes it clear that when imposing a sentence, the facts of the crime matter. *Id.* at 438-39.

- 2) The Court of Appeals erred by misallocating the burden of proof and persuasion, by treating age as a per se mitigating factor, and by finding that the trial court did not properly follow the requirements of RCW 10.95.030 and *Miller v. Alabama*?

The Court of Appeals acknowledged that the trial court received evidence and addressed each of the *Miller* factors in conjunction with the statutory requirements of RCW 10.95.030(3)(b), but, because the trial court did not give complete deference and full weight to Delbosque’s contentions, the court opines that the trial court did not give adequate consideration to the evidence. *Delbosque* at 418-420. But, the State contends that the fact that the trial court was unpersuaded by Delbosque’s evidence and arguments does not mean that the trial court did not give adequate consideration to them.

Miller announced a substantive rule of law that a juvenile offender cannot be sentenced to a period of life in prison unless the trial court judge

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

has the discretion to instead allow for the possibility of parole. *Ramos* at 441. In *Ramos*, the Court wrote that “when a juvenile facing a standard range life-without parole sentence shows that his or her crimes reflect transient immaturity, the juvenile has necessarily proved that substantial and compelling reasons justify an exceptional sentence below the standard range.” *Id.* at 442-43. The Court noted that “most juvenile homicide offenders facing the possibility of life without parole will be able to meet their burden of proving an exceptional sentence below the standard range is justified.” *Id.* at 443.

Here, the trial court judge had the benefit of the entire record and had Delbosque’s witnesses at the 2016 minimum term hearing before him in open court. The mere fact that the sentencing judge set the minimum term at 48 years rather than something lower does not mean that the trial court judge ignored evidence. In *Ramos*, this Court compared transient immaturity with irreparable corruption and affirmed that the trial court is not required to find that the defendant is irreparably corrupt before imposing a sentence of life without parole. *Ramos* at 444-45. As stated previously, however, Delbosque did not receive a life without parole

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

sentence – instead, he is eligible for parole after 48 years. He simply failed to persuade the trial court that he deserved any less of a sentence.

Delbosque presented generic testimony about how he may have been affected by the conditions and circumstances of his youth, but all of what he presented does little to mitigate against his act of hacking Kristina Berg in the face, arms, hands, torso and neck 68 times with a meat cleaver, nearly severing her head. RP-V 520-21; RP-VI 686-700, 710; Ex.s 21, 24, 55, 66, 68, 70, 71, 72, 152, 153, 155. Each blow reflected cruelty and depravity rather than mere impulse control and a lack of appreciation for risks and consequences. In *Ramos* this Court noted that Washington law *allows* consideration of mitigating factors that might seem personal to a juvenile offender, if they bear on culpability. *Ramos* at 448. And the Court also noted that the sentencing court *may* consider subsequent rehabilitation as a mitigating factor, but that the trial court is not required to weigh subsequent rehabilitation or good conduct as factors that require a lesser sentence. *Id.* at 448-49. Delbosque's personal story reduced his life without parole sentence to a minimum term of 48 years, and the mere fact that it was not less than 48 years does not mean that the trial court did not follow the requirements of the law.

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

In *Ramos*, this Court stated as follows: “Although we cannot say that every reasonable judge would necessarily make the same decisions as the court did here, we cannot reweigh the evidence on review.” *Ramos* at 453. The State contends that the same principle should apply in the instant case.

- 3) Review should be by personal restraint petition rather than by appeal.

RCW 10.95.035(3) provides that review of a trial “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.” This procedure sets forth the equivalent of a personal restraint petition. *State v. Bassett*, 198 Wn. App. 714, 721, 394 P.3d 430 (2017), *affirmed* 192 Wn.2d 67.

The State contends that because the conviction and sentence in this case was long final before the enactment of the *Miller*-fix statute at RCW 10.95.030, and because the single purpose of the *Miller*-fix hearing was to set a minimum term, the personal restraint petition is the proper avenue for review.

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

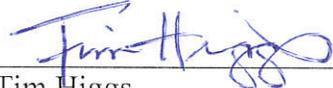
Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

IV. CONCLUSION

Although not all courts would necessarily agree with the trial court's view of this case, the trial court was within its discretion to rule as it did, and the Court of Appeals should not have substituted its judgment for that of the trial court. *See, e.g., Stringfellow v. Stringfellow*, 56 Wn.2d 957, 958-59, 350 P.2d 1003 (1960).

DATED: July 2, 2019.

MICHAEL DORCY
Mason County Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

Amended Supplemental Brief of
Petitioner -- State of Washington
Case No. 96709-1

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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