

No. 97517-5

No. 77913-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN GREGG,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Article I, section 14 and the Eighth Amendment require a presumption of a mitigated sentence for juveniles sentenced in adult court. Placing the burden on Sebastian to prove his status as a juvenile warranted mitigation was unconstitutional. A new sentencing hearing is required.

a. For children sentenced in adult court, article I, section 14 and the Eighth Amendment require mitigation unless the State proves otherwise with proof beyond a reasonable doubt.

Both “[t]he “United States Supreme Court and [the Washington Supreme] [C]ourt have concluded that children are less criminally culpable than adults.” State v. Bassett, 192 Wn.2d 67, 87, 428 P.3d 343 (2018). Consistent with this determination, article I, section 14 of the Washington Constitution and the Eighth Amendment to the United States Constitution do not permit placing the burden on children to prove that they are less culpable than adult offenders.

In this case, the sentencing court placed the burden of proof on Sebastian Gregg to prove that his status as child at the time of the offense made him less culpable. After concluding that Sebastian had not met his burden, the court imposed an adult sentence of 37 years, 10 years of which are “flat time” for firearm enhancements. Br. of App. at 19, 21. Because this procedure violated article I, section 14 and the Eighth Amendment, a new sentencing hearing is required.

The State asserts that “[a]ge is not per se mitigating.” Br. of Resp’t at 6 (citing In re Pers. Restraint of Light-Roth, 191 Wn.2d 328, 335, 422 P.3d 444 (2018)). This is misleading because Light-Roth involved an *adult* offender, not a juvenile. Id. For *adults*, age or youth is not necessarily a mitigating factor under the Sentencing Reform Act. State v. O’Dell, 183 Wn.2d 680, 696, 358 P.3d 359 (2015).

In contrast, unless the State proves otherwise, age is necessarily mitigating for children because they are categorically different and less culpable than adults. Miller v. Alabama, 567 U.S. 460, 471, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); Bassett, 192 Wn.2d at 87. Therefore, for children sentenced in adult court, mitigation due to age is a constitutional presumption, not the exception. Requiring a juvenile to prove that he or she is different than an adult turns this constitutional rule on its head.

Although RCW 9.94A.535(1) is silent as to the burden of proof, the State asserts that the Sentencing Reform Act “explicitly places the burden of establishing grounds for a mitigated sentence on the defendant.” Br. of Resp’t at 6. Based on a purported conflict between Sebastian’s constitutional argument and RCW 9.94A.535(1), the State claims that Sebastian has the burden of proving this procedure unconstitutional as applied to juveniles like Sebastian beyond a reasonable doubt. Br. of Resp’t at 7.

The State forgets that this Court has a duty to uphold the constitutionality of statutes and, if possible, will interpret them to uphold their constitutionality. State v. Houston-Sconiers, 188 Wn.2d 1, 24-25, 391 P.3d 409 (2017). Our Supreme Court did exactly that in Houston-Sconiers, which unlike Light-Roth, actually involved juvenile defendants. There, notwithstanding the mandatory and uncompromising language of the firearm enhancement statutes, our Supreme Court read the statutes to not be mandatory as to juveniles, concluding the legislature could not have intended this result. Id. at 24-25. The court interpreted the Eighth Amendment to require discretion and read our state statutes in light of its Eighth Amendment holding. Id. at 23-24. Contrary precedent was overruled. Id. at 21.

A similar approach applies here. The Sentencing Reform Act contemplates adult offenders, not children. See Houston-Sconiers, 188 Wn.2d at 8-9. That children charged with certain offenses must be prosecuted in the adult system is constitutionally tenable only because “adult courts have discretion to consider the mitigating qualities of youth and sentence below the standard range in accordance with a defendant’s culpability.” State v. Watkins, 191 Wn.2d 530, 542-43, 423 P.3d 830 (2018). Following Houston-Sconiers, it cannot be concluded that the legislature intended to limit this discretion only to cases where the juvenile

is able to prove that his or her youth is mitigating. See Houston-Sconiers, 188 Wn.2d 25-26.

As argued, the Eighth Amendment requires the State bear the burden of proving that a child should be treated just like an adult. The State argues that the entire line of Eight Amendment cases cited by Sebastian involving juveniles is inapplicable because Sebastian did not receive a life sentence. Br. of Resp't at 7-12. Houston-Sconiers, however, did not concern a life sentence. Rather, it concerned two non-life sentences of 26 and 31 years. Houston-Sconiers, 188 Wn.2d at 20. As for Ramos,¹ that case predates Houston-Sconiers and its holding on the burden of proof is confined to the specific facts of that case. Br. of App. at 24-25. Following Houston-Sconiers, this Court should reject the State's contention that the Eighth Amendment places no constraints on juvenile sentencing outside of the context of life sentences.

Regardless of the Eighth Amendment, this Court has a "duty to resolve constitutional questions under our own constitution." State v. Gregory, 192 Wn.2d 1, 16-17, 427 P.3d 621 (2018). Our Supreme Court recently held that "in the context of juvenile sentencing, article I, section 14 provides greater protection than the Eighth Amendment." State v.

¹ State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017).

Bassett, 192 Wn.2d 67, 82, 428 P.3d 343 (2018). Applying article I, section 14, this Court should hold that a mitigated sentence is appropriate for a juvenile offender in adult court unless the prosecution proves otherwise beyond a reasonable doubt. Br. of App. at 26-29.

In Bassett, our Supreme Court concluded “that sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution.” Bassett, 192 Wn.2d at 73. In reaching this conclusion, the Court emphasized the difficulty of achieving accurate determinations about whether a juvenile should or should not receive a life sentence. Id. at 89-90. Given this difficulty, permitting sentencing courts “discretion [to impose life sentences] produces the unacceptable risk that children undeserving of a life without parole sentence will receive one.” Id. at 90.

Likewise, placing the burden of proof on a child being prosecuted in adult court to prove that he or she is deserving of mitigation due to the attributes of youth creates an unacceptable risk that children undeserving of an adult sentence will receive one. Under article I, section 14, treating children just like adults results in cruel punishment. Thus, the State must bear the burden of proving that the defendant’s status as a child does not

warrant mitigation. To further guard against the risk of error, the beyond a reasonable doubt standard is appropriate.

The State recasts Sebastian's claim as being one of due process rather than an issue of unconstitutional cruel punishment under our state constitution. Br. of Resp't at 12. The State cites no authority in support of its contention that it can rewrite Sebastian's claim.

The State's approach is contrary to the approach used by the United Supreme Court in Miller, which dictated *a procedure* that must be followed for a court to impose a life sentence upon a juvenile.

Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718, 726, 193 L. Ed. 2d 599 (2016). The basis for the decision was the Eighth Amendment's prohibition on cruel and unusual punishment, not procedural due process. Id.

It is also contrary to the jurisprudence of the Washington Supreme Court. In Gregory, our Supreme Court held Washington's death penalty scheme unconstitutional under article I, section 14. Gregory, 192 Wn.2d at 5. The court did so not because the death penalty is necessarily "cruel," but because the procedure in which it was imposed in Washington was arbitrary. Id. at 18-19, 25-26. Again, that this involved a procedure did make the issue one of procedural due process.

Moreover, in Bassett, our Supreme Court adopted a flexible approach to article I, section 14. Washington courts “are free to evolve our state constitutional framework as novel issues arise to ensure the most appropriate factors are considered.” Bassett, 192 Wn.2d at 85. Thus, that Sebastian is not making a claim that his sentence is categorically barred by article I, section 14 does not matter.

Applying the reasoning of Houston-Sconiers and Bassett, this Court should hold that article I, § 14 requires a presumption that a mitigated sentence is appropriate for a juvenile offender in adult court and that the prosecution bears the burden of proving beyond a reasonable doubt that an adult sentence is appropriate.

b. Placing the burden of proof upon the State is consistent with the demands of due process under article I, section 3.

“No person shall be deprived of life, liberty, or property, without due process of law.” Const. art. I, § 3. Although not necessary to resolve this case, a due process analysis under article I, section 3 supports Sebastian’s argument that the burden of proof must be allocated to the State.

As a threshold matter, the State misunderstands how state constitutional analysis works. “The purpose of [the Gunwall]² factors is not to presumptively adhere to federal constitutional analysis.” State v. Silva, 107 Wn. App. 605, 614, 27 P.3d 663 (2001). Rather, the purpose is to provide a “process that is at once articulable, reasonable and reasoned.” State v. Gunwall, 106 Wn.2d 63, 720 P.2d 808 (1986).³

The State is correct that Washington courts have turned to precedent interpreting the Fourteenth Amendment’s guarantee of due process in interpreting the guarantee of due process under article I, section 3. But “regardless of whether [the Washington Supreme Court] turn[s] to federal guidance to interpret the state protection, the true ‘question is what the state’s guarantee means and how it applies to the case at hand.’” Matter of Dependency of E.H., 191 Wn.2d 872, 891, 427 P.3d 587 (2018) (quoting Malyon v. Pierce County, 131 Wn.2d 779, 798 n.30, 935 P.2d 1272 (1997)). Sensibly, “the Supreme Court’s interpretation of the

² State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

³ Courts should use “the *Gunwall* criteria as interpretive tools rather than as a magic key to the walled kingdom of the state constitution.” Hugh D. Spitzer, New Life for the “Criteria Tests” in State Constitutional Jurisprudence: “Gunwall Is Dead-Long Live Gunwall!”, 37 Rutgers L.J. 1169, 1180 (2006); accord City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641, 211 P.3d 406 (2009) (“*Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue.”).

Fourteenth Amendment does not control [the] interpretation of the state constitution’s due process clause.” State v. Bartholomew, 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984) (applying due process provision under article I, section 3 differently than how United States Supreme Court would apply due process under the Fourteenth Amendment). Thus, the State is incorrect in asserting that the decisions from the United States Supreme Court interpreting the Fourteenth Amendment’s due process clause precludes this Court from adopting Sebastian’s rule under article I, section 3.⁴ Br. of Resp’t at 14. The State’s attempt to shackle article I, section 3 to the Fourteenth Amendment should be rejected. See Penick v. State, 440 So.2d 547, 552 (Miss. 1983) (“The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail.”).

A “procedural due process challenge under our state provision turns on whether the increased decisional accuracy afforded by additional

⁴ For a scholarly argument by one federal circuit judge on why state constitutions should be interpreted independently of the United States Constitution, see Jeffrey S. Sutton, What Does—and Does Not—Ail State Constitutional Law, 59 U. Kan. L. Rev. 687 (2011). See also Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018) (book making same argument); <https://reason.com/volokh/2018/05/21/interview-with-judge-jeffrey-sutton-about-interview-with-author-about-book> (interview with author about book).

procedure to safeguard against an erroneous deprivation of a private interest is outweighed by the State's legitimate reasons for denying more protections." E.H., 191 Wn.2d at 891.

Here, it is undeniable that juveniles have a great interest in their liberty. The costs to the State in being required to shoulder the burden of proof is minimal. The State has not argued otherwise. And, unless the State bears the burden to prove that mitigation is not warranted for children, there is a grave risk children will improperly receive adult sentences. See Bassett, 192 Wn.2d at 90. In placing the burden on the State at Miller hearings as being required by due process, other state courts have recognized this grave risk. Davis v. State, 415 P.3d 666, 681-82 (Wyo. 2018); Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410, 451-55 (2017). Thus, due process under article I, section 3 requires that the State bear the burden to prove beyond a reasonable doubt that a juvenile's age is not mitigating.

In sum, Sebastian's rule is supported by due process under article I, section 3. The State's contrary argument should be rejected.

c. Because the State has not proved the error harmless beyond a reasonable doubt, reversal is required.

Misplacement of the burden of proof is constitutional error. The State does not argue otherwise. The State does not argue harmless error.

Therefore, the State has failed to meet its burden to rebut the presumption of prejudice and prove the error harmless beyond a reasonable. State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014). This Court should reverse and remand for a new sentencing hearing.

2. If not remanded for a new sentencing hearing, the Court should remand with instruction that Sebastian be permitted to withdraw his plea, should he choose, because the plea was involuntary.

Sebastian was affirmatively told by the prosecutor and defense counsel that if he pleaded guilty, he would not be required to register as a felony firearm offender. CP 22; 8/18/17RP 15. At the hearing on Sebastian's plea, the court did not tell Sebastian otherwise. 8/18/17RP 16.

The State agrees with Sebastian that what he was told was false. Br. of Resp't at 15. As a consequence of his plea, Sebastian would be required to register as a felony firearm offender. Br. of App. at 35-36. As required by the law, the court imposed the registration requirement at sentencing. CP 137.

The State argues none of this matters and that the defendants can be affirmatively misled about sentencing consequences so long as the consequence is deemed "collateral." Br. of Resp't 17. The State is wrong.

Affirmative misrepresentation about a sentencing consequence, regardless of whether it is "direct" or "collateral," results in the plea being

involuntary. State v. A.N.J., 168 Wn.2d 91, 114, 225 P.3d 956 (2010). In A.N.J., our Supreme Court held that affirmative misinformation to a juvenile concerning a collateral consequence entitled the juvenile to withdrawal of his plea. Id. at 115-17. The juvenile was affirmatively told that he could remove the conviction he was pleading guilty to from his record in the future. Id. at 116-17. This affirmative misinformation entitled the juvenile to withdraw his plea. Id. at 117. Thus, contrary to the State's suggestions, it does not matter if the firearm offender registration requirement is direct or collateral.

The State appears to suggest that affirmative misrepresentation about a collateral sentencing consequence permits withdrawal of the plea only if the defendant proves ineffective assistance of counsel. Br. of Resp't at 20-21. The State does not cite authority in support of its suggestion. While A.N.J. also involved claims of ineffective assistance of counsel, it did not adopt the framework advanced by the State. A.N.J., 168 Wn.2d at 109-17. Regardless of whether Sebastian was provided effective assistance of counsel, due process entitles him to withdraw his plea because he was affirmatively misled about a consequence of his plea.

Although it does not make a difference due to the affirmative misinformation, imposition of the firearm offender registration requirement is a "direct" consequence. The State agrees that under

Sebastian's guilty plea, the court had no choice but to impose the registration requirement upon Sebastian. Br. of Resp't at 16. Therefore, the requirement for registration flowed directly from the guilty plea. It was "definite, immediate and automatic." State v. Ross, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). Further, like community custody, which is also a direct consequence, registration "furthers the punitive purposes of deterrence and protection." Id. at 286.

The State contends that Washington's sex offender registration scheme is not punitive and registration is a collateral consequence. Br. of Resp't at 18-19. Contrary to the State's contention, our Supreme Court has not resolved whether the requirement to register as a sex offender is a direct consequence of a plea. A.N.J., 168 Wn.2d at 114. However, because it is punitive, it should be. See Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016). Similarly, because the firearm offender registration scheme is punitive, it is also a "direct" consequence.

Whether a direct or collateral consequence, the affirmative misinformation about the firearm offender registration requirement makes Sebastian's plea involuntary. Accordingly, if the Court does not order a new sentencing hearing, the court should remand with instruction that Sebastian be permitted to withdraw his plea, should he choose.

B. CONCLUSION

The constitutional error in misallocating the burden of proof at the sentencing hearing requires a new hearing. Alternatively, due process requires this Court remand with instruction that Sebastian, should he choose, be permitted to withdraw his plea.

DATED this 6th day of February 2019.

Respectfully submitted,

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)	
Appellant.)	

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