IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SEAN ALLEN STEVENSON, Appellant.	No. 50126-1-II UNPUBLISHED OPINION

GLASGOW, J. — In 1987, a jury found Sean Allen Stevenson guilty of one count of aggravated first degree murder and two counts of first degree murder for the rape and murder of his sister and the murders of his mother and stepfather. He was 16 years old when he committed the crimes. The superior court imposed a then-mandatory life sentence without the possibility of release or parole for the aggravated murder conviction. It also sentenced Stevenson to two 320-month terms for his two first degree murder convictions. These sentences were to run concurrently with each other but consecutive to his sentence of life without the possibility of release or parole.

In 2017, as a result of *Miller v. Alabama*[1] and amendments to RCW 10.95.030, the superior court held a resentencing hearing. The court again resentenced Stevenson to life without the possibility of early release or parole for his conviction of aggravated murder. Stevenson appealed.

Since his resentencing, the Washington Supreme Court has held in *State v. Bassett*, 192 Wn.2d 67, 73, 428 P.3d 343 (2018), that sentencing a person who committed their crime as a juvenile to a life sentence without the possibility of early release or parole violates Washington's constitutional prohibition against cruel punishment.

[1] 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

We reverse and remand, accepting the State's concession that resentencing under *Bassett* is required. We further hold that upon resentencing, under *State v. Gilbert*, 193 Wn.2d 169, 176-77, 438 P.3d 133 (2019), the trial court can consider concurrent sentences. We decline Stevenson's request to reassign this case to a different trial judge on remand.

FACTS

In the early hours of New Year's Day 1987, Stevenson raped and murdered his sister and murdered his mother and stepfather. Stevenson was 16 years old. The State tried Stevenson as an adult.

The jury found Stevenson guilty of one count of aggravated first degree murder for the rape and murder of his sister. It also found him guilty of two counts of first degree murder for the murders of his mother and stepfather. Based on the jury's verdict in the penalty phase of the trial, the sentencing court imposed a mandatory life sentence without the possibility of release or parole for Stevenson's conviction of aggravated first degree murder, rather than the death penalty. At the time, aside from the death penalty, life without the possibility of release or parole was the only available sentence for aggravated first degree murder. Former RCW 10.95.030 (1981).

When sentencing for the two counts of first degree murder, the court concluded that all three murders encompassed the same criminal conduct and counted as one crime for the purpose of applying former RCW 9.94A.400(1) (1986),[2] which addressed the offender score as well as concurrent and consecutive sentences.[3] Former RCW 9.94A.400(1) required the sentencing court

[2] RCW 9.94A.400 was recodified as RCW 9.94A.589. LAWS OF 2001, ch. 10, § 6.

[3] The trial court imposed the sentence a few months before the Washington Supreme Court decided *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), where the court overruled prior case law and held that offenses involving multiple victims do not constitute the same criminal conduct.

to impose consecutive sentences for his three murder convictions if they were separate and distinct criminal conduct and concurrent sentences if they were the same criminal conduct. The court imposed 320 months for each count of first degree murder to run concurrently with each other but consecutive to his sentence of life without the possibility of release or parole.

Almost 30 years later, following the United States Supreme Court's decision in *Miller v. Alabama*, the legislature, in 2014, amended RCW 10.95.030 and eliminated mandatory sentences of life without the possibility of early release or parole for juveniles who were sentenced as adults for aggravated first degree murder. RCW 10.95.030(1), (3)(a). The legislature also enacted a statute that required resentencing for all people who were convicted for aggravated first degree murder committed before their 18th birthday and who were sentenced to a term of life without the possibility of parole before June 1, 2014. RCW 10.95.035(1).

Stevenson moved for resentencing. After considering all of the mitigating factors required by RCW 10.95.030(3)(b), the superior court resentenced Stevenson to a minimum sentence of life for his conviction of aggravated first degree murder. It also concluded that former RCW 10.95.035(4) did not permit the court to consider Stevenson's challenge to his first degree murder sentences running consecutive to his life sentence.

Upon resentencing, the trial court said:

> Mr. Stevenson your actions back on New Year's Eve—New Year's Day—1987 rocked the community. The brutal and heinous, cold-blooded and calculated execution of your three family members shattered the innocence of a whole community.
>
> When you made the conscious decision to shoot and kill your mother and stepfather and when you made the conscious decision to shoot and kill and then rape your sister, you showed this community what the face of pure evil looks like.
>
> The savage murder and rape of your sister are not the acts of an unfortunate offender exhibiting transient immaturity. Those are the acts of an irreparably corrupt young man.

Verbatim Report of Proceedings (VRP) (Mar. 16, 2017) at 34-35.

Stevenson appealed.

ANALYSIS

I. RESENTENCING

A. Proper Review of Stevenson's Claims

As an initial matter, we note that under RCW 10.95.030(3), the proper method to seek review of a *Miller* resentencing decision is through a personal restraint petition. RCW 10.95.035(3) provides: "The court's order setting a [new] minimum term is subject to review to the same extent as a minimum term decision by the parole board before July 1, 1986." Before July 1, 1986, defendants could seek review of a parole board's minimum term decision only through a personal restraint petition. *See, e.g., In re Pers. Restraint of Rolston*, 46 Wn. App. 622, 623, 732 P.2d 166 (1987). Therefore, the proper method to seek review of a resentencing decision under RCW 10.95.035 is through a personal restraint petition. To facilitate review of Stevenson's arguments on the merits, we convert his appeal challenging his resentencing to a personal restraint petition. *See State v. Bassett*, 198 Wn. App. 714, 721-22, 394 P.3d 430 (2017), *aff'd*, 192 Wn.2d 67, 428 P.2d 343 (2018).

When a petitioner has not had a prior opportunity for judicial review, the heightened standard for relief normally applicable to a personal restraint petition does not apply. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299-300, 88 P.3d 390 (2004). Instead, the petitioner need only show that they are under restraint under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). *Id.* Under RAP 16.4(c)(2), restraint is unlawful if an offender's sentence was imposed in violation of the state or federal constitution or Washington law.

There can be no dispute that Stevenson is under restraint because he is currently incarcerated. Thus, the issue here is whether his sentence is unlawful.

B. Stevenson's Aggravated First Degree Murder Sentence

Stevenson argues that his life sentence, which is a minimum term, constitutes cruel punishment and therefore is unconstitutional under article I, section 14 of the Washington Constitution. The State concedes that Stevenson is correct. We agree with Stevenson, accept the State's concession, and conclude that his sentence for aggravated first degree murder is unlawful. *Bassett*, 192 Wn.2d at 73.

In *Miller*, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479 (emphasis added). *Miller* also required sentencing courts to consider the "'mitigating qualities of youth'" before imposing a particular penalty. *Id*. at 476 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). In response, the legislature amended RCW 10.95.030, to eliminate mandatory life sentences for people who committed aggravated first degree murder when they were under 18 years old. LAWS OF 2014, ch. 130, § 9. RCW 10.95.030 now provides that when a person is convicted of aggravated first degree murder for an offense committed when the person was between 16 and 18 years old, the court must sentence that person to a minimum of at least 25 years and a maximum term of life. "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 v. Alabama* . . . including, but not limited to, the age of the individual, the youth's 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(3)(b).

The legislature also required resentencing for any juvenile offender sentenced to life without the possibility of parole or early release before the statute's amendment. RCW 10.95.035. It did not prohibit the imposition of a minimum sentence of life for a person who committed the crime when they were a juvenile, so long as the resentencing court considered the required factors.

After the superior court resentenced Stevenson under the new statute, our Supreme Court held "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.

Stevenson was 16 years old when he committed his crimes, and at his resentencing hearing, the superior court re-imposed a minimum sentence of life. The State appropriately concedes that *Bassett* compels resentencing for Stevenson's aggravated first degree murder conviction because this sentence violates article I, section 14 of the Washington Constitution. *See id.* We accept the State's concession that resentencing is required in light of *Bassett*.

C. Stevenson's First Degree Murder Sentences

Stevenson also argues that this court should require on remand that the trial court impose his sentence for aggravated first degree murder to run concurrently with his sentences for first degree murder. He contends that the trial court must do so because the superior court found the crimes to be the same criminal conduct in 1987. Specifically, he argues that it would now defeat the legislature's intent to allow him to be sentenced to consecutive sentences. We hold that *Gilbert* does not require the trial court to run Stevenson's sentences concurrently upon resentencing. *See Gilbert*, 193 Wn.2d at 176-77. But it does require the trial court on remand to *consider* the mitigating factors of Stevenson's youth in determining whether to impose his sentence for

aggravated first degree murder concurrently with his sentences for first degree murder as an exceptional sentence. *Id.* at 177.

In *Gilbert*, the jury convicted the juvenile defendant of aggravated first degree murder, first degree murder, and multiple other crimes. *Id.* at 172. The court sentenced Gilbert to life without the possibility of early release or parole for his aggravated murder conviction, and it imposed a consecutive sentence for his first degree murder conviction. *Id*. The legislature's enactment of RCW 10.95.035 entitled Gilbert to a resentencing hearing, and he argued that the resentencing court should run his two murder sentences concurrently. *Id*. The resentencing court ruled that it lacked statutory authority to address anything other than Gilbert's sentence for aggravated murder, so it did not address his consecutive sentence for first degree murder. *Id*. Our Supreme Court held that RCW 10.95.035 cannot limit the sentencing court's discretion to consider a defendant's youth as a mitigating factor in determining whether to impose an exceptional upward or downward sentence. *Id*. at 176.

The *Gilbert* court reiterated that

> the [sentencing] court must consider the mitigating circumstances related to the defendant's youth, including, but not limited to, the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences—the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated.

Id. It added that "[t]he sentencing court should consider these circumstances, the convictions at issue, the standard sentencing ranges, and any other relevant factors—and should then determine whether to impose an exceptional sentence, taking care to thoroughly explain its reasoning." *Id*. And "[i]f, after considering such factors, the trial court does find an exceptional sentence is

warranted, it may adjust the standard sentence to provide for a reduced term of years, for concurrent rather than consecutive sentences, or for both." *Id*. at 176-77.

Without the benefit of *Gilbert*, the resentencing court in this case believed it did not have discretion to consider anything other than Stevenson's sentence for aggravated first degree murder. *Gilbert*, however, has now clarified that the trial court does have this discretion. *Id.* at 177.

Although Stevenson contends that the trial court *must* impose concurrent sentences on remand, *Gilbert* does not require as much. *Gilbert* only requires that the sentencing court *consider* whether the mitigating factors of his youth might warrant an exceptional sentence. *See id.* Moreover, the trial court has not yet considered Stevenson's other arguments as to why he believes concurrent sentences must be imposed. On remand, Stevenson may raise any arguments supporting why his two sentences for first degree murder should run concurrently with his sentence for aggravated murder.

D. Stevenson's Reassignment Request

Stevenson argues that this court should reassign his case to a different judge on remand to ensure fairness and impartiality. We disagree.

"[R]eassignment may be sought . . . where, for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue." *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (footnotes omitted). "The remedy of reassignment on appeal is available only in limited circumstances; even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if an appellate opinion offers sufficient guidance to effectively limit trial court discretion on remand." *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703

(2017). "But where review of facts in the record shows the judge's impartiality might reasonably be questioned, the appellate court should remand the matter to another judge." *Id*.

The record here does not show that the trial judge cannot be impartial, nor does it show that he prejudged the issues to be addressed on remand. The sentencing court did not have the benefit of *Bassett* and *Gilbert* at the prior resentencing. Moreover, some of the language the resentencing court used directly mirrored the language from *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

Thus, we decline Stevenson's request for reassignment to a different judge on remand.

CONCLUSION

We reverse Stevenson's conviction and remand for resentencing consistent with *Bassett* and *Gilbert*. We decline Stevenson's request for reassignment to a new judge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

I concur:

Melnick, P.J.

FEARING, J. (concurring) — This court accepts the State's concession, and we agree to remand for resentencing of Sean Stevenson in light of the Washington Supreme Court's recent decisions in *State v. Gilbert*, 193 Wn.2d 169, 438 P.3d 133 (2019) and *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018). I diverge from the majority of this court in that I wish to assign the resentencing court additional resentencing parameters beyond resentencing consistent with *Gilbert* and *Bassett*. First, I would direct the resentencing court not to impose a minimum sentence. *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014). Second, I would direct the resentencing court to impose a maximum sentence that affords Stevenson a meaningful opportunity for release during his likely lifetime. *State v. Bassett*, 192 Wn.2d 67 (2018). Third, I would instruct the resentencing court not to impose aggregate or consecutive sentences for Stevenson's three convictions that could incarcerate him during his likely lifetime. *State v. Ramos*, 187 Wn.2d 420, 387 P.3d 650 (2017); *State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015); *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017); *McKinley v. Butler*, 809 F.3d 908, 909-11 (7th Cir. 2016); *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013); *State v. Zuber*, 227 N.J. 422, 152 A.3d 197, 203, 215 (2017); *Willbanks v. Department of Corrections*, 522 S.W.3d 238, 244-45 (Mo. 2017); *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, 76 N.E.3d 1127 (2016); *State v. Boston*, 131 Nev. 981, 363 P.3d 453 (2015); *Bear Cloud v. State*, 2014 WY 113, 334 P.3d 132, 136, 141-42 (Wyo. 2014); *People v. Caballero*, 55 Cal. 4th 262, 145 Cal. Rptr. 3d 286, 282 P.3d 291 (2012).

Fearing, J.

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