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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SEAN ALLEN THOMPSON, Appellant.	No. 47229-5-II UNPUBLISHED OPINION

LEE, J. — A jury found Sean Allen Thompson guilty of second degree assault. Thompson appeals, arguing his sentence under Washington's Persistent Offender Accountability Act (POAA)[1] (1) violates his right to a jury because the court, rather than a jury, found he committed two prior most serious offenses by a preponderance of the evidence; (2) violates his right to equal protection because the classification of a persistent offender finding as a sentencing factor, rather than an element, unconstitutionally lowers the burden to less than beyond a reasonable doubt; and (3) constitutes cruel and unusual punishment under both the state and federal constitutions. We disagree and affirm.

FACTS

Following an altercation between Thompson and his long-time friend, the State charged Thompson with second degree assault. The charging document notified Thompson the maximum sentence was ten years unless he had two prior "most serious offense" convictions, in which case,

[1] RCW 9.94A.570.

the penalty would be life in prison without the possibility of release. Clerk's Papers at 25-26. A jury found Thompson guilty as charged.

At sentencing, the State presented evidence of Thompson's two prior convictions of felony harassment and second degree assault. The trial court found by a preponderance of the evidence that Thompson had committed two prior most serious offenses and ruled that the current offense was a most serious offense that counted as a strike. Accordingly, under the POAA, the trial court sentenced Thompson to life in prison without the possibility of release. Thompson appeals.

ANALYSIS

I. STANDARD OF REVIEW

The POAA states that a persistent offender shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. A defendant is a persistent offender if he or she has been convicted in Washington of a most serious offense, and has on at least two other prior occasions been convicted of a most serious offense in this or any other state. RCW 9.94A.030(38)(a)(i). We review de novo whether an offense may be classified as a most serious offense. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). We also review alleged constitutional violations de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

II. RIGHT TO A JURY

Thompson first argues that prior most serious offenses must be proved to a jury beyond a reasonable doubt because they elevate the seriousness of the current offense. We disagree.

A defendant has a constitutional right to a trial by jury. U.S. CONST. amend VI; WASH. CONST. art. I, § 21. The United States Supreme Court in *Apprendi v. New Jersey*, relying on

Almendarez-Torres v. United States,[2] held "[o]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000) (emphasis added); *see United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) (noting that *Apprendi* "unmistakably carved out an exception for 'prior convictions' that specifically preserved the holding of *Almendarez-Torres*"*), cert. denied*, 532 U.S. 966 (2001). The Supreme Court in *Blakely v. Washington* reiterated the same exception for prior convictions. 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The reason for the exception is "the trial court is relying on verifiable evidence in the form of prior conviction records and . . . is not weighing aggravating and mitigating circumstances." *State v. Lewis*, 141 Wn. App. 367, 393, 166 P.3d 786, *review denied*, 163 Wn.2d 1030 (2007).

Citing *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), Thompson argues the United States Supreme Court eliminated the *Apprendi* exception for prior convictions. But, *Alleyne* explicitly noted that the *Apprendi* exception for prior convictions was not raised and the court was not addressing it. 133 S. Ct. at 2160, n.1. Moreover, our Supreme Court recently considered and rejected this issue in *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014). In *Witherspoon*, the Supreme Court said, "Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi's* exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise." *Witherspoon*, 180 Wn.2d at 892. The court went on to say that the "United States

[2] *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Supreme Court precedent, as well as [Washington]'s own precedent, dictate that under the POAA, the State must prove previous convictions by a preponderance of the evidence and the defendant is not entitled to a jury determination on this issue." *Witherspoon*, 180 Wn.2d at 894.

Thompson asks this court to reject *Witherspoon* as an inconsistent opinion with the United States Supreme Court's opinion in *Apprendi.* We decline to recognize an inconsistency for the reasons discussed above.

Witherspoon is controlling. Thus, the trial court did not err in finding by a preponderance of the evidence that Thompson had two prior most serious offenses that counted as strikes under the POAA.

III. EQUAL PROTECTION CLAUSE

Thompson next argues that his sentence violates the equal protection clauses of the Fourteenth Amendment of the United States Constitution and article I, section 12 of the Washington Constitution because it allows the State to prove by a lower standard of proof the existence of prior convictions to a judge rather than to a jury.

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. CONST. amend. XIV; WASH. CONST. art. I, § 12. We review the legislative classification for a rational basis when the classification does not involve a suspect class or threaten a fundamental right, as is the case here. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997).

All three divisions of this court have held that under the POAA there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense. *See State v. Witherspoon*, 171

Wn. App. 271, 305, 286 P.3d 996 (2012) (this court held "there is a rational basis for distinguishing between 'persistent offenders' and 'nonpersistent offenders' under the POAA."), *aff'd on other grounds by State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014); *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010) (Division Three of this court held that there is a distinction between proof of a prior conviction as an element of a crime requiring the State to prove its existence to a jury beyond a reasonable doubt and proof of prior serious offenses for the POAA; the distinction is rationally related to the purpose of the POAA and does not violate equal protection principles); *State v. Reyes-Brooks*, 165 Wn. App. 193, 207, 267 P.3d 465 (2011) (Division One of this court agreed with the *Williams* court and concluded that the distinction is rationally related to the purpose of the POAA). Based on the above, we reject Thompson's equal protection argument.

IV. CRUEL AND UNUSUAL PUNISHMENT

Thompson lastly argues that his mandatory sentence under the POAA of life without the possibility of release constitutes cruel and unusual punishment. He contends the POAA's failure to provide for individualized sentencing determinations in cases where (1) the offenders are youthful, (2) they lack prior Class A felonies, and (3) there is a large gap between a standard range sentence and a life sentence, violates the cruel and unusual punishment clauses of the United States Constitution and the Washington State Constitution.

The Eighth Amendment to the United States Constitution bars cruel and unusual punishment, and article I, section 14 of the Washington Constitution bars cruel punishment. *Witherspoon*, 180 Wn.2d at 887. Washington's constitutional provision is more protective than the Eighth Amendment. *Id.* Thus, if Thompson's life sentence does not violate the more protective

state constitutional provision, no need exists to further analyze the sentence under the Eighth Amendment. *Id.*

To determine whether punishment is cruel under article I, section 14, we consider the four factors delineated in *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980). Thus, we consider: "(1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction." *Id.* at 397.

State v. Ames considered the *Fain* factors in addressing whether a life sentence imposed under the POAA was cruel and unusual punishment where the current offense was second degree assault. 89 Wn. App. 702, 709, 950 P.2d 514, *review denied*, 136 Wn.2d 1009 (1998). The court first observed that second degree assault is a most serious offense. *Id.* The purposes of the POAA include deterring those who would otherwise commit three most serious offenses and segregating those who do from the rest of society. *Id.* The court then observed that Washington's persistent offender statute is similar to state and federal legislation throughout most of the United States and that the defendant likely would have received a similarly harsh sentence in most jurisdictions. *Id.* at 710. Finally, the court observed that all defendants who are convicted of a third strike receive sentences of life imprisonment without the possibility of parole. *Id.* Thus, the court concluded that the life sentence without the possibility of parole under the POAA was not grossly disproportionate to Ames's second degree assault conviction and did not constitute cruel and

unusual punishment.[3] *Id.* We reject Thompson's contention that his POAA sentence constitutes cruel and unusual punishment.

Accordingly, we hold that the trial court did not err in finding by a preponderance of the evidence that Thompson committed two prior most serious offenses that counted as strikes under the POAA. Also, Thompson's constitutional challenges to his sentence fail. Therefore, we affirm.

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.

Lee, J.

I concur:

Worswick, J.

[3] *Witherspoon* came to a similar conclusion when analyzing whether a POAA sentence is cruel and unusual punishment for a current offense of second degree robbery. 180 Wn.2d at 895-96.

BJORGEN, C.J. (dissenting) — Sean Thompson was sentenced to life imprisonment without possibility of release under the Persistent Offender Accountability Act (POAA), chapter 9.94A RCW. Washington statutes mandated this harsh punishment because Thompson had been convicted on two prior occasions of felonies that under the laws of this state are considered most serious offenses. *See* former RCW 9.94A.030(37) (2012). He committed the first of these offenses, second degree robbery, when he was 20 years old. Without this first conviction, the POAA would not have commanded a sentence of life imprisonment without possibility of release for his current offense. In these circumstances, the conjunction of the United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and the Washington Supreme Court's decision in *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), counsels that Thompson's life sentence under the POAA cannot rest on a conviction for a crime committed at age 20, absent some consideration of Thompson's youth when he committed that crime. For that reason, I dissent.

In *Miller*, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." The Court rested this holding on its recognition that

> [b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.

Miller, 132 S. Ct. at 2469.

The characteristics of youth on which *Miller* relied were those first summarized in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *Miller*, 132 S. Ct. at 2464-65. In *Roper* the Court identified three general differences between adults and juveniles central

to an Eighth Amendment analysis. First, juveniles more often display "'[a] lack of maturity and an underdeveloped sense of responsibility,'" often resulting in "'impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569 (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). This susceptibility means that their "'irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988)). Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569. This "vulnerability and comparative lack of control over their immediate surroundings" give juveniles "a greater claim than adults to be forgiven for failing to escape negative influences." *Id.* at 570. Finally, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles . . . less fixed." *Id.* at 570. Thus, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570.

In finding these differences, the Court in *Roper*, *Miller*, and the intervening *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), drew on developments in psychology and neuroscience showing "'fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 560 U.S. at 89-90). These differences, the Court recognized, both lessened a juvenile's moral culpability, *Roper*,543 U.S. at 571, and enhanced the prospect of reformation, *Miller*, 132 S. Ct. at 2465. With these differences, each decision recognized that the penological justifications for imposing the harshest sentences were diminished for juveniles. *See Miller*, 132 S. Ct. at 2465.

Roper, *Graham*, and *Miller* all dealt with crimes committed while the defendant was a juvenile. Thompson's POAA offenses were committed while an adult, the first at age 20. Thus, the specific holdings of these three decisions do not aid Thompson. However, the Washington Supreme Court held in *O'Dell*, 183 Wn.2d at 698-99, that

> a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is.

O'Dell did not rest its holding on the Eighth Amendment. Rather, the court reasoned that the same characteristics of youth based on the same scientific findings relied on by *Miller*, *Roper*, and *Graham* mean that a defendant's youth can justify an exceptional sentence below the standard range under the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), when the defendant was over 18 when he or she committed the offense. *O'Dell*, 183 Wn.2d at 689, 691-92, 695. Because O'Dell's youth was not considered, the court remanded for a new sentencing hearing to consider whether youth diminished his culpability. *O'Dell*, 183 Wn.2d at 697.

O'Dell, admittedly, was only 10 days past his 18th birthday when he committed his crime. *O'Dell*, 183 Wn.2d at 683. The court, though, did not focus on the defendant's precise age at the time of the offense, but rather on the *Roper* Court's recognition that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." 543 U.S. at 574. More specifically, *O'Dell* cited A. Rae Simpson, *MIT Young Adult Development Project: Brain Changes,* Mass. Inst. of Tech. Young Adult Development Project (2008), http://hrweb.mit.edu/worklife/youngadult/brain.html, for the proposition that "'[t]he brain isn't fully mature at . . . 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car.'" *O'Dell*, 183 Wn.2d at 692 n.5. The court also

cited the finding in Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Ann. N.Y. Acad. Sci. 77 (2004), that "[t]he dorsal lateral prefrontal cortex, important for controlling impulses, is among the latest brain regions to mature without reaching adult dimensions until the early 20s." *Id.*. Our state Supreme Court, relying on the same type of psychological and neurological findings as is the United States Supreme Court, is instructing us that the very characteristics that underlie *Miller* may persist well into one's 20s.

The thread joining *Roper*, *Graham*, and *Miller* is a willingness to abandon or extend prior holdings when needed to serve their underlying rationale: a willingness informed by advancing neurological and psychological knowledge, as well as ascending standards of decency. In this state, after *O'Dell*, the rationale of *Miller* demands that the characteristics of youth be considered before imposing a mandatory sentence of life imprisonment without possibility of release based on a crime committed while in the first years of adulthood. Of necessity, the temporal reach of this requirement is a fog-bound matter, but the studies noted above cited by *O'Dell* suggest that some inquiry should be made up to age 25. At the least, the rationale of these cases directs that youth be considered before life imprisonment without possibility of release may be imposed based on a crime committed at age 20.

Thompson was denied this consideration. He was sentenced to a mandatory term of life imprisonment without possibility of release, precisely the sentence condemned by *Miller* when imposed for juvenile crime. Under the POAA, Miller's two prior "strike" offenses were just as necessary to this sentence as was his current offense. His sentence, then, was based on his first "strike" offense as much as it was on any other. He committed that offense one week after his 20th birthday.

Our Supreme Court has established that article I, section 14 of the Washington State Constitution is more protective than the Eighth Amendment of the United States Constitution in this context. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). As noted, based on the same characteristics of youth and the same scientific findings relied on by *Miller*, *Roper*, and *Graham*, *O'Dell* held that a young adult offender's youth must be considered in sentencing under the SRA. 183 Wn.2d at 689, 691-92, 695-97. Those characteristics in juvenile offenders compelled *Miller*'s holding that mandatory life imprisonment without possibility of release for crimes committed while under the age of 18 violated the Eighth Amendment. With the state Supreme Court's recognition in *O'Dell* that those characteristics may persist past age 18, the rationale of *Miller* would also condemn mandatory sentences of this nature for crimes committed during the early years of adulthood. If, consistently with *Witherspoon*, article I, section 14 is more protective than the Eighth Amendment, then it should be interpreted parallel to *O'Dell* to require consideration of an offender's youth during the years in which the scientific studies tell us the characteristics of youth may persist. Without this, article I, section 14 is diminished to the reach of *Miller*.

This analysis, admittedly, has its practical complications. Thompson was 30 years of age when sentenced to mandatory life imprisonment without possibility of release. Only then was Thompson given this sentence, but it necessarily rested on his "strike" offense committed while age 20. When, as here, no thought was given to his youth at sentencing for his first "strike" offense, those characteristics must be considered at the time of his POAA sentencing. With 10 years' run since that first offense, that examination would be difficult at best. If the POAA sentence were imposed at age 40, it would likely be impossible. Nonetheless, if state statutes

will mandate life imprisonment without release on the basis of a crime committed by one this young, our state constitution demands consideration of the characteristics of youth that may have driven that offense. When that does not occur at sentencing for the first offense, it can only occur at sentencing for the last.

Whatever obscurities may vex these determinations, the studies noted above, relied on by *O'Dell*, show that age 20 generally lies within the term of the characteristics of youth on which *Miller* and *O'Dell* rested. Thompson was sentenced to mandatory life imprisonment without possibility of release on the basis of an offense committed at age 20, among two others. The record discloses no consideration of Thompson's youth in that initial offense. For the reasons discussed above, article I, section 14 should be interpreted to require consideration of Thompson's youth at that age. Because that did not occur, Thompson's conviction of a crime committed at age 20 should not be used as a basis for a POAA sentence. For that reason, I would vacate Thompson's sentence under the POAA.

BJORGEN, C.J.