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SUMMARY  
May 9, 2024

**2024COA49**

**No. 23CA0282, *People v. Crawley* — Crimes — Murder in the Second Degree; Constitutional Law — Eighth Amendment — Cruel and Unusual Punishments — Proportionality Review — Per Se Grave or Serious Offenses**

In *Wells-Yates v. People*, 2019 CO 90M, the supreme court held that “the designation of per se grave or serious for purposes of a proportionality review must be reserved for those rare crimes which, based on their statutory elements, necessarily involve grave or serious conduct,” meaning a crime should not be given the designation unless it is grave or serious in every potential factual scenario. *Wells-Yates*, ¶ 63.

In this case, a division of the court of appeals performs an abbreviated proportionality review and, in doing so, considers whether second degree murder — “knowingly caus[ing] the death of a person” — in violation of section 18-3-103(1)(a), C.R.S. 2023, is

per se grave or serious under *Wells-Yates*. The division concludes that second degree murder is indeed per se grave or serious and that the defendant's sentence does not give rise to an inference of gross disproportionality. Accordingly, the division affirms the postconviction court's order.

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Court of Appeals No. 23CA0282  
City and County of Denver District Court No. 18CR20003  
Honorable Kandace C. Gerdes, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ernie Crawley,

Defendant-Appellant.

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ORDER AFFIRMED

Division VI  
Opinion by JUDGE YUN  
Welling and Graham\*, JJ., concur

Announced May 9, 2024

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Philip J. Weiser, Attorney General, Trina K. Kissel, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Mulligan Breit, LLC, Patrick J. Mulligan, Denver, Colorado, for Defendant-Appellant

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Ernie Crawley appeals the postconviction court’s order denying, without a hearing, his Crim. P. 35(c) motion requesting an extended proportionality review of his sentence. In performing our own abbreviated proportionality review, we run into a threshold question that has not been addressed in a published appellate opinion: Is second degree murder<sup>1</sup> in violation of section 18-3-103(1)(a), C.R.S. 2023, per se grave or serious under *Wells-Yates v. People*, 2019 CO 90M? We conclude that it is per se grave or serious and that Crawley’s sentence is not disproportionately harsh. We therefore affirm the postconviction court’s order, albeit on grounds different from those relied on by the postconviction court.

## I. Background

¶ 2 In February 2018, Crawley and a friend went out to celebrate their birthdays. Over the course of the evening, Crawley consumed

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<sup>1</sup> In 2021, the crime of felony murder was moved from the first degree murder statute, section 18-3-102, C.R.S. 2023, to the second degree murder statute, section 18-3-103, C.R.S. 2023. Ch. 58, sec. 2, § 18-3-103, 2021 Colo. Sess. Laws 236. When we discuss “second degree murder” in this opinion, however, we are referring to section 18-3-103(1)(a), “knowingly caus[ing] the death of a person,” and not to felony murder under section 18-3-103(1)(b).

four beers and four shots. Later that night, Crawley decided to drive himself and his friend home on eastbound I-70. While driving 163 miles per hour, Crawley attempted to change lanes and struck another vehicle. Crawley's car hit the median and flipped, while the vehicle he struck lost control and rolled off the side of the road. Crawley, his friend, and the driver of the other vehicle survived the crash with severe injuries, but the two passengers in the vehicle that Crawley struck were pronounced dead at the scene. A blood alcohol test later that night revealed that Crawley's blood alcohol content was 0.177 — over two times the legal limit of 0.08.

¶ 3      Crawley was initially charged with, among other things, extreme indifference first degree murder, vehicular homicide, and vehicular assault. In exchange for dismissal of these charges, Crawley pleaded guilty to second degree murder and misdemeanor driving under the influence (DUI). The plea agreement specified that the sentences would be open to the court but would run concurrently. It also specified that the sentencing range for misdemeanor DUI was five days to one year and the sentencing range for second degree murder was sixteen to forty-eight years. The district court sentenced Crawley to the maximum allowable

sentence of forty-eight years in the custody of the Department of Corrections, finding that nothing less was appropriate “considering the devastating loss to the families by losing these two people” and the serious injuries to the surviving victims.

¶ 4       Crawley timely filed a Crim. P. 35(c) motion for postconviction relief challenging the forty-eight-year sentence. He argued that the sentence was grossly disproportionate to his conduct because his actions were more akin to vehicular homicide than second degree murder. The postconviction court, after conducting an abbreviated proportionality review, denied the motion without a hearing. It ruled that, even “assuming *arguendo* that [Crawley’s] conduct was more similar to vehicular homicide DUI, that offense is *per se* grave and serious.” Therefore, the postconviction court concluded that Crawley’s sentence did not give rise to an inference of gross disproportionality and an extended proportionality review was not required.

¶ 5       Crawley appeals that order.

## II. Analysis

¶ 6       Crawley contends that the postconviction court erred by ruling that his forty-eight-year sentence does not give rise to an inference

of gross disproportionality and thereby declining to conduct an extended proportionality review. After performing our own abbreviated proportionality review, we affirm the postconviction court's order, but for reasons different from those relied on by the postconviction court.

A. Standard of Review and Governing Law

¶ 7 A proportionality challenge implicates the constitutionality of a sentence and is thus cognizable under Crim. P. 35(c). *People v. Moore-El*, 160 P.3d 393, 395-96 (Colo. App. 2007); see *Wells-Yates*, ¶ 4. We review de novo whether a sentence raises an inference of gross disproportionality, *Wells-Yates*, ¶ 35, as well as a court's denial of a Crim. P. 35(c) motion without a hearing, *People v. Cali*, 2020 CO 20, ¶ 14. If the analysis does not require an inquiry into facts that are outside of the appellate record, as is the case here, we are as well positioned as the postconviction court to conduct an abbreviated proportionality review. *People v. Loris*, 2018 COA 101, ¶ 10. And we may affirm the postconviction court's order on any ground supported by the record, whether or not the postconviction court relied on or considered that ground. *People v. Cooper*, 2023 COA 113, ¶ 7.

¶ 8 The constitutional protections against cruel and unusual punishment include a proportionality principle requiring the sentence to fit the crime. See U.S. Const. amend. VIII; Colo. Const. art. II, § 20; *People v. Walker*, 2022 COA 15, ¶ 61. This principle is limited, however, as it “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Wells-Yates*, ¶ 5 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). “It is ‘exceedingly rare’ for a sentence to be deemed so extreme that it is grossly disproportionate to the crime.” *Id.* (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)).

¶ 9 Colorado courts conduct a two-step analysis when considering a proportionality challenge. *Id.* at ¶ 10. In step one — an abbreviated proportionality review — the court compares the gravity and seriousness of the offense with the harshness of the penalty. *Id.* at ¶¶ 7-14. In step two — an extended proportionality review — the court compares the challenged sentence to sentences for other crimes in the same jurisdiction and the same crime in other jurisdictions. *Id.* at ¶¶ 15-17. The court should only proceed to step two when the comparison between the gravity and seriousness



of the offense and the harshness of the penalty gives rise to an inference of gross disproportionality. *Id.* at ¶ 15.

¶ 10 Ordinarily, “the determination of whether the crime is grave or serious depends on the facts and circumstances underlying the offense.” *People v. Hargrove*, 2013 COA 165, ¶ 12, *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. The gravity or seriousness of an offense can be determined by considering “the harm caused or threatened to the victim or society,” as well as “the culpability of the offender.” *Wells-Yates*, ¶ 12 (quoting *Solem v. Helm*, 463 U.S. 277, 292 (1983)); *People v. Session*, 2020 COA 158, ¶ 33.

¶ 11 But some crimes are designated per se grave or serious for purposes of a proportionality review. *See Wells-Yates*, ¶ 13. For these crimes, the court may skip the fact-focused gravity or seriousness analysis and proceed directly to considering the harshness of the penalty. *Id.*; *Session*, ¶ 34.

¶ 12 When considering the harshness of the penalty, “a great deal of deference is due to legislative determinations regarding sentencing.” *People v. Deroulet*, 48 P.3d 520, 523 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. “[I]n almost every case, the abbreviated proportionality review will result in a

finding that the sentence is constitutionally proportionate, thereby preserving the primacy of the General Assembly in crafting sentencing schemes.” *Id.* at 526; *see also Wells-Yates*, ¶ 21. The assessment of the harshness of the penalty includes consideration of the length of the sentence and the defendant’s parole eligibility. *Wells-Yates*, ¶ 14. Whether a defendant is parole eligible is relevant to an abbreviated proportionality review because parole can reduce the actual period of confinement and render the penalty less harsh. *Id.*

¶ 13 If the abbreviated review gives rise to an inference of gross disproportionality, the court must then conduct an extended proportionality review. *Id.* at ¶ 8. But if no inference of gross disproportionality arises at the first step, “the proportionality challenge fails and the sentence must be upheld.” *Id.*

#### B. Proportionality Review

¶ 14 Crawley contends that his forty-eight-year sentence is disproportionately harsh when compared to his conduct. Specifically, he argues that (1) his conduct was more akin to vehicular homicide than second degree murder, and we should therefore consider vehicular homicide the applicable offense for our

proportionality review; (2) vehicular homicide is not per se grave or serious, nor was his underlying conduct; and (3) his forty-eight-year sentence is unduly harsh, particularly given that he has no prior felony convictions. We address and reject each contention in turn.

### 1. Second Degree Murder Is the Applicable Offense

¶ 15 Even though he pleaded guilty to second degree murder, Crawley argues that we should consider his “underlying conduct” as more consistent with vehicular homicide and, therefore, we should use that offense for our proportionality analysis. We do not agree.

¶ 16 A “plea of guilty has the same effect as if defendant had been tried before a jury and had been found guilty on evidence covering all the material facts.” *People v. Flagg*, 18 P.3d 792, 794 (Colo. App. 2000); see *Neuhaus v. People*, 2012 CO 65, ¶ 8 (“A guilty plea is an admission of all the elements of a criminal charge.”); *People v. Gardner*, 250 P.3d 1262, 1271 (Colo. App. 2010) (“When a defendant enters a guilty plea to a charge he or she admits all material facts alleged in that charge . . . .”). Crawley’s guilty plea is an admission of all material facts — including that he committed each of the elements of second degree murder. And in the plea agreement, Crawley waived the right to challenge his admission that

he “knowingly caus[ed] the death of a person.” § 18-3-103(1)(a).

Thus, second degree murder is the applicable offense for our analysis.<sup>2</sup>

## 2. Second Degree Murder Is Per Se Grave or Serious

¶ 17 We first assess the gravity or seriousness of the offense, starting with the threshold question of whether it is per se grave or serious. Second degree murder has not yet been defined by our supreme court or a division of this court as a per se grave or serious offense. We now consider the question and conclude that it is.

¶ 18 *Wells-Yates* refined the framework for designating crimes per se grave or serious for the purposes of conducting a proportionality review. *See Wells-Yates*, ¶ 63; *People v. Kennedy*, 2023 COA 83M, ¶ 21 (“[T]he definition of a grave or serious offense has evolved based on our supreme court’s 2019 directive . . . .”). Before

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<sup>2</sup> The postconviction court relied on *People v. Strock*, 252 P.3d 1148, 1158 (Colo. App. 2010), in ruling that vehicular homicide is per se grave or serious. But since the postconviction court’s ruling, a division of this court has held that “vehicular homicide . . . is not a per se grave or serious offense for the purposes of proportionality review.” *People v. Kennedy*, 2023 COA 83M, ¶ 25. Regardless, we conclude that the applicable offense for our proportionality review is second degree murder, not vehicular homicide. Therefore, we take no position on this split of authority.

*Wells-Yates*, attempted second degree murder was considered per se grave or serious. *See People v. Penrod*, 892 P.2d 383, 387 (Colo. App. 1994). But *Wells-Yates* called into question all pre-existing per se designations apart from those it identified as satisfying the new definition of per se grave or serious. *Wells-Yates*, ¶¶ 64-65, ¶ 65 n.18 (holding that robbery, “[a]ggravated robbery, burglary, accessory to first degree murder, and the sale or distribution of narcotics” satisfy the new per se grave or serious standard, but declining to decide whether “[a]tttempted burglary, conspiracy to commit burglary, and felony menacing” remained per se grave or serious) (footnote omitted); *see People v. Sellers*, 2022 COA 102, ¶ 44 (*cert. granted* May 15, 2023). While no published court of appeals or supreme court case has addressed whether second degree murder is per se grave or serious since *Wells-Yates*, a division of this court has held that felony murder is per se grave or serious. *Sellers*, ¶ 65.

¶ 19 Under the *Wells-Yates* framework, “the designation of per se grave or serious for purposes of a proportionality review must be reserved for those rare crimes which, based on their statutory elements, necessarily involve grave or serious conduct,” meaning a

crime should not be given the designation unless it is grave or serious in every potential factual scenario. *Wells-Yates*, ¶ 63.

¶ 20 For example, robbery is per se grave or serious because, in every potential factual scenario, a person convicted of robbery “knowingly took something of value from the person or presence of another by the use of force, threats or intimidation,” which always involves “knowing conduct and grave harm (or the threat of grave harm) to the victim or society (or both).” *Id.* at ¶ 64. Put differently, robbery is per se grave or serious because the statutory elements ensure that there is no way to commit the crime in a manner that is not grave or serious. *See id.*

¶ 21 We now turn to second degree murder. A person commits second degree murder when “[t]he person knowingly causes the death of a person.” § 18-3-103(1)(a). Under this definition, second degree murder, like robbery, always involves knowing conduct and grave harm — the death of a person. *See Wells-Yates*, ¶ 64. And the General Assembly has designated second degree murder as a per se crime of violence and an extraordinary risk crime. § 18-3-103(4); § 18-1.3-406(2)(a)(II)(B), C.R.S. 2023; *see Sellers*, ¶ 65 (considering felony murder’s classification as a crime of violence

and extraordinary risk crime in concluding it is per se grave or serious).

¶ 22 In other words, the statutory elements of second degree murder ensure that, “regardless of the facts and circumstances involved, a defendant who stands convicted of [the] offense will have committed a crime that is necessarily grave or serious.”

*Wells-Yates*, ¶ 65. Accordingly, second degree murder satisfies the *Wells-Yates* standard and is per se grave or serious.

¶ 23 Because Crawley committed a per se grave or serious offense, we skip the fact-focused gravity or seriousness analysis and proceed directly to the harshness of the penalty.

### 3. The Penalty Is Not Disproportionately Harsh

¶ 24 Any review of the harshness of a penalty “is substantially circumscribed because the legislature’s establishment of the harshness of the penalty deserves great deference. Consequently, a per se grave or serious designation ‘renders a sentence nearly impervious to attack on proportionality grounds.’” *Wells-Yates*, ¶ 62 (citations omitted); see *Deroulet*, 48 P.3d at 523; *Rutter v. People*, 2015 CO 71, ¶ 16 (“[I]n non-capital cases, courts will rarely conclude that a defendant’s sentence is grossly disproportionate.”).

¶ 25      Crawley’s forty-eight-year sentence was within the range for second degree murder and within the stipulated range under the plea agreement. *See Deroulet*, 48 P.3d at 526. And Crawley will be eligible for parole after serving seventy-five percent of his sentence, *see* § 17-22.5-403(2.5)(a), C.R.S. 2023, potentially reducing the actual period of confinement to about thirty-six years. *See Wells-Yates*, ¶ 14.

¶ 26      Even so, Crawley contends the sentence is too harsh because he had no prior felony convictions. But while that is a factor we consider, it does not outweigh the other circumstances, especially given that Crawley’s per se grave or serious crime resulted in the deaths of two victims and significant injuries to two others. *See People v. Myers*, 45 P.3d 756, 757 (Colo. App. 2001) (“[A] lengthy sentence may be justified even in the absence of a prior criminal record when the offense is particularly egregious.”).

¶ 27      Giving deference to the General Assembly’s determination regarding sentencing, and noting that Crawley will be eligible for parole, we conclude that his sentence — though lengthy — is not unduly harsh when compared to the gravity and seriousness of second degree murder. Because we find no inference of gross



disproportionality, we agree with the postconviction court that an extended proportionality review is not warranted. *See Wells-Yates*, ¶ 8.

### III. Disposition

¶ 28 The order is affirmed.

JUDGE WELLING and JUDGE GRAHAM concur.