

No. 1-11-0415

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 07 CR 12118
)	
MICHAEL PACE,)	
)	Honorable Nicholas Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

¶ 1 **Held:** We remand this case to the circuit court to resentence defendant according to the law in effect at the time of resentencing.

¶ 2 This case returns to us pursuant to a supervisory order from the Illinois Supreme Court. Defendant Michael Pace was charged with first degree murder, attempted murder, and aggravated battery with a firearm stemming from a 2007 shooting in Chicago. 720 ILCS 5/9-a(a)(1), (a)(2); 720 ILCS 5/8-4; 720 5/12-4.2 (West 2006). Defendant was 16 years old at the time of the offense but his case was transferred to adult court pursuant to the automatic transfer provision of the Juvenile Court Act. 705 ILCS 405/5-130 (West 2006).

¶ 3 Defendant entered a blind guilty plea to: (1) one count of first degree murder, (2) one count of first degree murder in which he personally discharged a firearm that proximately caused death, and (3) two counts of aggravated battery with a firearm. Before accepting the plea, the court provided defendant with the requisite admonishments. The court sentenced defendant to an aggregate term of 100 years' imprisonment, comprised of consecutive terms as follows: (1) 35 years for first degree murder, (2) 25 years pursuant to a mandatory firearm enhancement, and (3) two 20-year terms for aggravated battery with a firearm.

¶ 4 Defendant raised five arguments in his direct appeal. First, he argued that the trial court erred during the sentencing hearing by (1) considering private investigations and its personal beliefs about gang violence in Chicago, (2) cross-examining a witness he called in mitigation, (3) punishing him for declining to speak in allocution, and (4) failing to consider mitigating evidence. Second, he argued that the court violated his right to due process by cross-examining a witness he called during a hearing on a motion to withdraw his guilty plea. Third, he maintained that his guilty plea was not knowing and voluntary because the court (1) did not admonish him about the possibility of consecutive sentencing; (2) allowed him to plead guilty to two counts of first degree murder; and (3) led him to believe that the minimum sentence for first degree murder was 20 or 25 years' imprisonment, when it was actually 45 years. Fourth, he argued that the automatic transfer provision of the Juvenile Court Act is unconstitutional.

¶ 5 Finally, defendant argued that the mandatory firearm enhancement statute, in conjunction with the mandatory consecutive sentencing statute, as applied to him, violated his rights under the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. Specifically, defendant argued that under these statutes, the trial court was required to sentence him, at a minimum, to 57 years' imprisonment. Defendant suggested

that such a sentence constituted a *de facto* mandatory life sentence and thus violated *Miller v. Alabama*, 567 U.S. at ____, 132 S. Ct. 2455 (2012).

¶ 6 This court rejected most of defendant’s arguments. *Pace*, 2015 IL App (1st) 110415, ¶ 80 (finding that the circuit court did not abuse its discretion by denying defendant’s motion to vacate his guilty plea); ¶ 89 (finding that the circuit court did not err by questioning defense witness during sentencing); ¶ 95 (finding that circuit court did not fail to consider mitigating evidence during sentencing); ¶ 118 (rejecting argument that the circuit court erred by questioning a defense witness during a hearing on defendant’s motion to withdraw his guilty plea); ¶ 123 (rejecting constitutional challenge to the automatic transfer provision of the juvenile court act); ¶¶ 131-34, 150 (rejecting claim under eighth amendment and proportionate penalties clause that Illinois’s consecutive sentencing and firearm enhancement statutes were unconstitutional because they subjected defendant to a *de facto* mandatory life sentence in violation of *Miller*). With respect to defendant’s argument that he was subjected to *de facto* life sentence in violation of the eighth amendment as interpreted by the United States Supreme Court in *Miller*, we stated:

“While this argument has some facial appeal, the current state of the law in Illinois does not support it. In *People v. Gay*, 2011 IL App (4th) 100009, the defendant, a mentally ill man, was sentenced to a 97-year aggregate prison term. *Id.* ¶ 20. On appeal, the defendant argued that his 97-year aggregate sentence violated the eighth amendment because it was a *de facto* life sentence. The appellate court disagreed, explaining that the defendant’s aggregate prison term was different from a sentence of life without parole because a life sentence is “[n]ot an accumulation of sentences,” but

rather “is tied to a single conviction and is absolute in its duration for the offender’s natural life.” *Id.* ¶ 23; see also *People v. Reyes*, 2015 IL App (2d) 120471, ¶ 23; *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 99; but see *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 61 (declining to follow *Reyes* and *Cavazos*).” *Pace*, 2015 IL App (1st) 110415, ¶ 131.

¶ 7 We nonetheless found that the circuit court violated defendant’s rights during sentencing in two ways. First, we determined that the circuit court, when sentencing defendant, took into consideration the fact that defendant declined to speak in allocution. We held that this violated defendant’s fifth amendment privilege against self-incrimination. *Id.* ¶¶ 100-01. Second, we held that the record of defendant’s sentencing proceeding demonstrated that defendant was denied his right to a fair sentencing hearing before an impartial judge. *Id.* ¶¶ 103-08. We remanded for resentencing before a different judge. *Id.* ¶ 108.

¶ 8 Defendant filed a petition for leave to appeal to the Illinois Supreme Court. The Supreme Court denied defendant’s petition on November 23, 2016, but at the same time, entered a supervisory order directing this court to vacate its judgment in *Pace* and “reconsider its judgment in light of *People v. Reyes*, 2016 IL 119271, to determine if a different result is warranted.” This court vacated the judgment in *Pace* on January 17, 2017.

¶ 9 In *Reyes*, a juvenile defendant was convicted of first degree murder and two counts of attempted murder and sentenced to a mandatory minimum term of 97 years’ imprisonment *Reyes*, 2016 IL 119271, ¶ 2. On appeal, the defendant argued that his sentenced violated *Miller v. Alabama*’s prohibition against mandatory life sentences for juvenile murder defendants. The

appellate court rejected the defendant's argument and refused to extend *Miller's* application beyond *actual* life sentences to *de facto* life sentences. *Id.* ¶ 6.

¶ 10 The Illinois Supreme Court reversed. The court explained:

“A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation.” *Id.* ¶ 9.

Accordingly, the court held that “sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment.” *Id.*

¶ 11 We vacated defendant's sentence because the circuit court violated defendant's fifth and fourteenth amendment rights during the sentencing hearing. Nothing in the court's opinion in *Reyes* calls that judgment into question. On remand, defendant is entitled to be resentenced under the law in effect at the time of resentencing, including the recent amendment to the Code of Corrections making the circuit court's application of firearm enhancement discretionary for defendants who were under 18 years of age at the time of their offense. 730 ILCS 5/5-4.5-105(b), (c) (West Supp. 2015); see *Reyes*, 2016 IL 119271, ¶¶ 11-12. Thus, on remand, the defendant will be subjected to a mandatory minimum sentence of 32 years' imprisonment, “a term that is not a *de facto* life sentence.” *Reyes*, 2016 IL 119271, ¶ 12. Since we have already vacated defendant's sentence and the sentencing scheme which defendant will be subject to on

remand does not mandate that defendant serve a *de facto* life sentence, defendant is not entitled to further relief under *Reyes*.

¶ 12 Based on the foregoing, we vacate defendant's sentence and remand for resentencing before a different judge. On remand, the circuit court shall apply the sentencing laws in effect at the time of resentencing. Since nothing in *Reyes* affects the validity of our disposition of defendant's other claims, we otherwise affirm the circuit court's judgment.

¶ 13 Affirmed in part, vacated in part, and remanded with instructions.