2017 IL App (1st) 150334-U

SIXTH DIVISION
JUNE 30, 2017

No. 1-15-0334

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 02 CR 3181
	)	
ADAM TITUS,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's order denying the petitioner leave to file a successive postconviction petition where he failed to satisfy the cause-and-prejudice test as to his challenges to the constitutionality of his prison sentence and the exclusive jurisdiction provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2002)).

¶ 2 The petitioner, Adam Titus, appeals from the circuit court's order denying him leave to file a successive postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, he contends that the circuit court erred in

denying him leave to file where he demonstrated cause and prejudice as to his challenges to the constitutionality of his prison sentence and the exclusive jurisdiction provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2002)). For the reasons that follow, we affirm.

¶ 3 The petitioner, a 17-year old juvenile at the time of the offenses, was tried and convicted as an adult for the 2002 first-degree murder and armed robbery of Charles Gordon. The evidence adduced at the petitioner's jury trial established that on the day of the offenses, the petitioner and codefendant, Demetrius Phipps, made plans to rob a pizza deliveryman at a building in Chicago. The petitioner gave a gun to Phipps and, when the deliveryman, Gordon, arrived, joined with Phipps to beat him. According to the defendant's videotaped confession, Phipps pointed the gun at Gordon while the petitioner took money from his pockets. Then, according to the defendant, " 'a gunshot went off' while Phipps was holding the gun and standing over Gordon." The trial court sentenced the petitioner to consecutive sentences of 38 years' imprisonment for first-degree murder and 18 years' imprisonment for armed robbery.

¶ 4 On direct appeal, this court modified the petitioner's sentence for armed robbery to run concurrently with his sentence for first-degree murder. *People v. Titus*, No. 1-05-1523 (2007) (unpublished order under Supreme Court Rule 23). Upon further appeal, our supreme court vacated the petitioner's sentence for armed robbery and otherwise affirmed. *People v. Smith*, 233 Ill. 2d 1, 29 (2009).[1] The petitioner filed a postconviction petition in 2009 and, subsequently, sought leave to file a successive postconviction petition in 2012. Each filing was summarily dismissed by the circuit court, and each summary dismissal was affirmed on appeal. *People v. Titus*, 2011 IL App (1st) 100900-U; *People v. Titus*, 2014 IL App (1st) 121463-U.

[1] The Illinois Supreme Court consolidated the defendant's case with another unrelated murder case involving Leratio Smith.

¶ 5 On October 8 and November 25, 2014, the petitioner filed copies of the instant successive postconviction petition, which are identical in all respects relevant to this appeal. Therein, he argued, in relevant part, that: (1) because he was 17 years old when his offenses occurred, his 38-year prison term for first-degree murder constituted a *de facto* life sentence in violation of the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and *Miller v. Alabama*, 567 U.S. 460 (2012); and (2) the exclusive jurisdiction provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2002)) is unconstitutional for violating due process. On March 19, 2015, the circuit court denied the petitioner leave to file his successive postconviction petition, finding, *inter alia*, that his claims did not meet the requirements of cause and prejudice. On March 7, 2016, our supreme court entered a supervisory order allowing the petitioner to file a late notice of appeal from the order of the circuit court. This appeal followed.

¶ 6 On appeal, the petitioner contends that the circuit court erred in denying him leave to file the instant successive postconviction petition where he demonstrated cause and prejudice as to the constitutional challenges that he raised against both his prison sentence and the exclusive jurisdiction provision of the Juvenile Court Act of 1987.

¶ 7 The Act permits a petitioner to raise a collateral challenge to his conviction or sentence for violations of his constitutional rights that have not been, and could not have been, adjudicated previously on direct appeal. 725 ILCS 5/122-1(a) (West 2014); *People v. Davis*, 2014 IL 115595, ¶ 13. "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*," and "issues that could have been raised, but were not, are considered forfeited." *Davis*, 2014 IL 115595, ¶ 13. The Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-1(f) (West 2014); *Davis*, 2014 IL 115595, ¶ 14. A successive postconviction petition may be considered only when the petitioner (1)

establishes "cause and prejudice" for the failure to raise the claim earlier, or (2) makes a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 329-30 (2009). Here, as to his challenges to both his prison sentence and the exclusive jurisdiction provision, the petitioner only raises claims of cause and prejudice. "Cause" denotes an objective factor external to the defense which impaired the petitioner's ability to raise a claim in an earlier proceeding. *Id.* at 329. "Prejudice" refers to a constitutional error which " 'so infected the entire trial that the resulting conviction or sentence violates due process.' " *Id.* (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002)). Both elements of the test must be satisfied in order to allow for the filing of a successive postconviction petition. *Davis*, 2014 IL 115595, ¶ 14. Our review from the denial of a motion for leave to file is *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 8 Turning first to the petitioner's contention that his challenge to the constitutionality of his prison sentence satisfied the cause-and-prejudice test, we briefly set forth the legal principles necessary to understand his substantive claims. In Illinois, all sentences must comport with the requirements of the eighth amendment of the United States Constitution (U.S. Const., amend. VIII), and article I, section 11, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, § 11). The eighth amendment, applicable to the states through the fourteenth amendment (*Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The proportionate penalties clause of the Illinois Constitution, in turn, provides that penalties must be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. While the defendant cites the proportionate penalties clause of the Illinois Constitution in his brief on appeal, he raises no argument as to its application in his case. Accordingly, this point is waived

and our analysis will address only his argument pertaining to the eighth amerndment. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 9 As to juvenile offenders, the United States Supreme Court has held that the eighth amendment prohibits imposing sentences of death (*Roper v. Simmons*, 543 U.S. 551, 575 (2005)) and also sentences of life without parole for nonhomicide offenses (*Graham v. Florida*, 560 U.S. 48, 79 (2011)). In so holding, the Court identified several differences between juveniles and adults, including juveniles' lack of maturity, less-developed characters, and vulnerability to negative influences, which negate the "penological justifications" for both the death penalty (*Roper*, 543 U.S. at 569-71) and life imprisonment without parole (*Graham*, 560 U.S. at 71-75). Subsequently, in *Miller*, the Court held that the eighth amendment prohibits mandatory sentencing of a juvenile to life in prison without parole, even if the juvenile, like the petitioner in this case, was convicted of murder. *Miller*, 567 U.S. at 489. The Court reasoned that mandatory life without parole penalties "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," and concluded 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." *Id.* at 466, 479. In Illinois, *Miller* has been interpreted to also prohibit mandatory terms of imprisonment that, due to their length, amount to *de facto* life sentences. *People v. Reyes*, 2016 IL 119271, ¶¶ 9.

¶ 10 *Miller* declared a new substantive rule that applies retroactively to cases on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 735-36 (2016); *Davis*, 2014 IL 115595, ¶ 42. When, as in the present case, the cause-and-prejudice test must be satisfied before a petitioner

can file a successive postconviction petition, the new rule in *Miller* constitutes "cause" if the petitioner filed his previous postconviction petitions before *Miller* was decided. *Davis*, 2014 IL 115595, ¶ 42. As this is the situation in the case at bar, we, therefore, proceed to the issue of prejudice.

¶ 11 The petitioner contends that his 38-year prison term satisfies the "prejudice" prong of the cause-and-prejudice test because it constitutes a *de facto life* sentence without the possibility of parole in violation of *Miller*. We disagree. At the outset, we recognize that our supreme court, thus far, has limited its extension of *Miller* to *de facto* life sentences without parole that are mandatory. In *Reyes*, the court found that *Miller* "was not a categorical prohibition of life-without-parole sentences for juvenile murderers," but, rather, "required that life-without parole sentences be based on judicial discretion rather than statutory mandates." *Reyes*, 2016 IL 119271, ¶ 4. Similarly, in *Davis*, the court noted that a trial court may impose a *de facto* term of life imprisonment without parole upon a juvenile offender "so long as the sentence is at the trial court's discretion rather than mandatory." *Davis*, 2014 IL 115595, ¶ 43. Based upon the foregoing, the trial court's discretionary sentence in this case did not violate *Miller*. The petitioner was subject to a sentencing range of 20 to 60 years for his conviction for first-degree murder. 720 ILCS 5/9-1 (West 2000); 730 ILCS 5/5-8-1(a)(1)(a) (West 2002). The record of his sentencing hearing demonstrates that, in imposing sentence, the trial court considered the characteristics and circumstances of his youth, including his age at the time of the offense, the presentence investigation report, and the fact that, while "perhaps [the] defendant was not mature in his thoughts, *** he had been a part of the [juvenile justice] system enough to know what was good and what was not." In view of these considerations, the trial court exercised its discretion to sentence the petitioner to 38 years' imprisonment. To the extent that other panels of this court

have held that discretionary life sentences imposed upon juvenile offenders violate *Miller*, or that courts from other jurisdictions have extended *Miller* to question all lengthy sentences imposed upon juvenile offenders, we decline to follow those holdings. See, *e.g.*, *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25-27. Instead, adhering to the directive of our supreme court in *Reyes* and *Davis*, we find that the discretionary sentence imposed upon the petitioner was not constitutionally prohibited.

¶ 12 Even if *Miller* precludes the imposition of discretionary sentences of life imprisonment without parole for juvenile offenders, the petitioner has not established that his 38-year prison term is, in fact, a *de facto* life sentence. While no bright-line rule has been established as to how long a sentence must be to qualify as a *de facto* life sentence, the petitioner's prison term is significantly less than terms that have been found to violate *Miller*. See *Reyes*, 2016 IL 119271, ¶ 10 (97 years); *People v. Buffer*, 2017 IL App (1st) 142931, ¶¶ 63-64 (50 years); *Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25-27 (100 years). Notably, the petitioner's prison term is less than the term imposed in *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 16, where this court found that a 45-year sentence imposed upon a juvenile offender as part of a negotiated plea agreement was not a *de facto* life sentence, and closer in length to the term imposed in *People v. Patterson*, 2014 IL 115102, ¶ 110, where our supreme court held that a 36-year aggregate sentence did not violate *Roper*, *Graham*, and *Miller*. See also *Reyes*, 2016 IL 119271, ¶ 12 (noting that a 32-year sentence would not constitute a *de facto* life sentence).

¶ 13 Notwithstanding, the petitioner's brief on appeal cites studies which suggest that the conditions of his imprisonment will reduce the likelihood he will live beyond his projected parole date. Other panels of this court have taken such materials into consideration in evaluating similar claims in *Buffer*, 2017 IL App (1st) 142931, ¶ 59, and *Sanders*, 2016 IL App (1st)

121732-B, ¶ 26, but we will not do so here because the petitioner did not introduce these sources in the trial court and, therefore, they do not qualify as relevant authority on appeal. See, *e.g.*, *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983); *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30 (2007); *People v. Heaton*, 266 Ill. App. 3d 469, 476-77 (1994); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993). In view of all the foregoing, we reject the petitioner's assertion that his 38-year prison term constituted a prohibited sentence of life imprisonment without parole and, as such, find that his sentence was not unconstitutional under *Miller*.

¶ 14 The petitioner next contends that he demonstrated cause and prejudice as to his constitutional challenge to the exclusive jurisdiction provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2002)). The version of the exclusive jurisdiction provision in effect at the time of the petitioner's offenses provided, in relevant part, that 17-year-old juveniles charged with first-degree murder, such as the petitioner, were ineligible for proceedings under the Act and, instead, were automatically subject to prosecution and sentencing as adults. *Id.* The petitioner submits that, under *Miller*, the exclusive jurisdiction provision violated the eighth amendment and his right to due process under both the United States and Illinois constitutions.

¶ 15 The petitioner's contentions lack merit, as each of the arguments that he raises here was considered and rejected by this court in *People v. Harmon*, 2013 IL App (2d) 120439. As we explained in *Harmon*, the exclusive jurisdiction provision is not irreconcilable with *Roper*, *Graham*, and *Miller*, which only "stand for the proposition that a sentencing body must have the chance to take into account mitigating circumstances" relevant to a juvenile defendant's youth before imposing the death penalty or life imprisonment without parole. *Id.* ¶ 54; *People v. Wilson*, 2016 IL App (1st) 141500, ¶ 27. Neither penalty is at issue in the present case, where

the petitioner was sentenced to a discretionary term of 38 years' imprisonment and, as discussed *infra*, the trial judge considered mitigating circumstances pertaining to the petitioner's youth prior to imposing sentence. As *Harmon* further explained, "the exclusive-jurisdiction provision does not violate [a juvenile] defendant's right to due process" because the statute merely specifies the forum in which a defendant will be tried and "does not impose any penalties." *Id.* ¶ 62; see also *Wilson*, 2016 IL App (1st) 141500, ¶ 28.

¶ 16 The petitioner contends that *Harmon* was wrongly decided because it relied upon decisions that analyzed the automatic transfer provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-130 (West 2006)), including *People v. Patterson*, 2014 IL 115102. In *Patterson*, our supreme court found, *inter alia*, that neither the eighth amendment of the United States Constitution, nor the proportionate penalties clause of the Illinois Constitution, nor due process concerns rendered the automatic transfer provision unconstitutional. *Id.* ¶¶ 98, 106. Consistent with *Harmon*, we find that *Patterson* and other decisions analyzing the automatic transfer provision are equally applicable to the exclusive jurisdiction provision at issue here. *Harmon*, 2013 IL App (2d) 120439, ¶¶ 56. 62. Consequently, we adhere to our reasoning in *Harmon* and reject the petitioner's constitutional challenge to the exclusive jurisdiction provision.

¶ 17 For the foregoing reasons, we find that the petitioner has not satisfied the cause and prejudice test as to his challenges to the constitutionality of his prison sentence and the exclusive jurisdiction provision of the Juvenile Court Act of 1987 and, therefore, we affirm the judgment of the circuit court dismissing the petitioner's postconviction petition.

¶ 18 Affirmed.