

2017 IL App (1st) 151725-U
No. 1-15-1725
Order filed December 15, 2017

Fifth Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 00 CR 4887
)	
MICHAEL MCCASKILL,)	Honorable
)	Gregory Robert Ginex,
Petitioner-Appellant.)	Judge, presiding.
)	
)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in denying petitioner leave to file a successive post-conviction petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), where he failed to satisfy the cause and prejudice test as to the challenges to the constitutionality of his prison sentence under *Miller v. Alabama*, 567 U.S. 460 (2012).

¶ 2 Petitioner, Michael McCaskill, appeals the trial court order denying him leave to file a successive post-conviction petition for relief under the Post-Conviction Hearing Act (Act) (725

ILCS 5/122-1 *et seq.* (West 2012)). Petitioner contends on appeal that the trial court erred in denying him such leave where he demonstrated "cause" and "prejudice" as to his challenges to the constitutionality of his aggregate prison sentence of 50 years.

¶ 3 Petitioner argues that because he was a 17-year-old juvenile at the time of the offenses, his aggregate 50-year prison sentence amounts to a *de facto* life sentence in violation of the requirements of *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. In *Miller*, the United States Supreme Court held that sentencing a juvenile offender to mandatory life imprisonment without the possibility of parole violates the eighth amendment's prohibition against cruel and unusual punishment. *Miller*, 567 U.S. at 489. We do not believe that the rule of constitutional law announced in *Miller* and its progeny apply to the factual circumstances in this case and thus we affirm.

¶ 4 BACKGROUND

¶ 5 The parties are familiar with the underlying facts of the case which were set forth in this court's previous order and therefore we recite only those facts necessary to address the issues on appeal. Following a jury trial, petitioner was convicted of aggravated battery with a firearm and second degree murder. He was sentenced as an adult to consecutive prison terms of 30 years' imprisonment for aggravated battery with a firearm and 20 years' imprisonment for second degree murder. On May 14, 2003, petitioner's convictions and sentences were affirmed on direct appeal. *People v. McCaskill*, No. 1-01-0836 (2003) (unpublished order under Supreme Court Rule 23).

¶ 6 On November 12, 2003, petitioner filed a *pro se* petition for post-conviction relief. On October 29, 2004, the circuit court docketed the petition and appointed post-conviction counsel.

After several years of continuances, post-conviction counsel filed a Rule 651(c) certificate on August 15, 2008, and stood on petitioner's *pro se* petition. The State moved to dismiss the petition.

¶ 7 On June 5, 2009, the circuit court dismissed the petition. The State Appellate Defender subsequently filed a motion for leave to withdraw as appellate counsel and filed a memorandum in support of the motion pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Petitioner did not file a response. On November 8, 2010, our court granted appellate counsel's motion to withdraw and we affirmed the judgment of the circuit court. *People v. McCaskill*, No. 1-09-1501 (2010) (unpublished order under Supreme Court Rule 23).

¶ 8 On March 16, 2015, petitioner filed the instant motion seeking leave to file a successive *pro se* post-conviction petition. In the petition, petitioner alleged that his aggregate sentence of 50 years' imprisonment was unconstitutional under *Miller* because he was a 17-year old juvenile at the time of the offenses and his aggregate prison sentence amounted to a *de facto* life sentence.

¶ 9 In a separate motion seeking leave to file his successive *pro se* post-conviction petition, petitioner argued that the substantive change in the law occasioned by *Miller* established "cause" under the cause-and-prejudice test codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)), and because he was a 17-year-old juvenile at the time of the offenses, his aggregate prison sentence amounted to a *de facto* life sentence establishing the requisite "prejudice."

¶ 10 Following a hearing on May 8, 2015, the circuit court denied petitioner leave to file a successive post-conviction petition, finding that he failed to satisfy the cause-and-prejudice test. The court found that *Miller* was not dispositive because petitioner was not sentenced to a

mandatory life sentence without the possibility of parole. The court noted that petitioner's projected release from prison when he was approximately 53 years old did not amount to a *de facto* life sentence.

¶ 11 We allowed petitioner's late notice of appeal. Petitioner now appeals the trial court's order denying him leave to file a successive post-conviction petition.

¶ 12 ANALYSIS

¶ 13 Initially, we will establish the framework for our analysis. We recognize that the trial court is generally in the best position to determine the appropriate prison sentence and punishment and its decision is entitled to great weight and deference. *People v. Abraham*, 275 Ill. App. 3d 587, 596 (1993).

¶ 14 In a noncapital case such as this, the Act provides a statutory remedy to criminal defendants who claim that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The defendant must show that he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008).

¶ 15 A post-conviction proceeding under the Act is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Therefore, issues that were decided on direct appeal are barred by *res judicata* and issues that could have been raised, but were not, are considered forfeited. *Beaman*, 229 Ill. 2d at 71. Consistent with these principles, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) permits the filing of only one post-conviction petition without leave court and expressly provides that any claim not raised in the original or an amended petition is forfeited.

¶ 16 However, the statutory bar against a second or successive post-conviction petition may be relaxed under two circumstances: if the petitioner can demonstrate "cause" for failing to raise the claim in the initial petition and "prejudice" resulting from that failure (*People v. Smith*, 2014 IL 115946, ¶¶ 23-24); or if the petitioner can demonstrate a "fundamental miscarriage of justice." *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)). At issue here is whether petitioner satisfied the cause and prejudice requirements codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)).

¶ 17 To establish "cause," the defendant must show that some objective factor external to the defense impeded his ability to raise the claim in the initial post-conviction proceeding (*People v. Tenner*, 206 Ill. 2d 381, 393 (2002)), and "prejudice" is established when the defendant shows that the claimed constitutional error so infected his trial that the resulting conviction or sentence violated due process. *Id.* Both elements of the test must be satisfied in order to allow for the filing of a successive post-conviction petition. *People v. Davis*, 2014 IL 115595, ¶ 14. Our review of this issue is *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 18 Petitioner contends he demonstrated "cause" because the ruling in *Miller* was decided after he filed his initial post-conviction petition and that he established "prejudice" because the *Miller* ruling applies retroactively rendering his aggregate sentence of 50 years' imprisonment a *de facto* life sentence in violation of the cruel and unusual punishment clause found in the eighth amendment of the U.S. constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois constitution (Ill. Const. 1970, art. I, § 11).

¶ 19 In this case, petitioner acknowledges that he is eligible for day-for-day good-conduct credit against his sentence. This means he potentially could be released from prison at age 53

after serving 35 years of his sentence. This alone takes petitioner out of the *Miller* category since he is not serving a sentence without the possibility of parole. See *People v. Evans*, 2017 IL App (1st) 143562, ¶ 14 (finding the holding in *Miller* inapplicable in defendant's case since he was not serving a sentence without the possibility of parole).

¶ 20 Petitioner further acknowledges he might not have to serve all 50 years of his prison sentence, but still maintains that the sentence amounts to a *de facto* life sentence because life in the penitentiary is dangerous and he might not survive it. However, as this court recently observed and stated, "[p]rison life is undoubtedly harsh. But [defendant] invites us into the weeds of actuarial tables, asking us to make a legal determination of his likely lifespan. We are in a poor position to make this prediction and decline to do so." *Evans*, 2017 IL App (1st) 143562, ¶ 15.

¶ 21 For similar reasons, we decline to speculate or estimate petitioner's likely lifespan while incarcerated. We also note that petitioner committed the offenses at issue only eight months after he was found delinquent as a juvenile for unlawful use of a weapon, an offense for which he was on juvenile probation.

¶ 22 We find that petitioner's aggregate sentence of 50 years' imprisonment is not unconstitutional as applied to him under *Miller*. While no bright-line rule has been established as to how long a sentence must be in order to qualify as a *de facto* life sentence, the petitioner's potential 50-year sentence is less than prison terms found unconstitutional under *Miller*. See *People v. Reyes*, 2016 IL 11927, ¶ 10 (*per curiam*) (aggregate sentence of 97 years); *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 43 (78-year sentence). As in *Evans*, the length of petitioner's prison sentence compares favorably with cases not involving a *de facto* life sentence. See *People*

v. Applewhite, 2016 IL App (1st) 142330, ¶ 58 (45-year sentence, allowing release at age 62); *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 65-67 (52-year sentence, allowing release at age 62).

¶ 23

CONCLUSION

¶ 24 For the foregoing reasons, we find that petitioner has not satisfied the cause-and-prejudice test as to his challenges to the constitutionality of his prison sentence. Therefore, we affirm the trial court's order denying petitioner leave to file his successive post-conviction petition.

¶ 25 Affirmed.