

2018 IL App (1st) 1152041-U

No. 1-15-2041

Order filed September 26, 2018

Modified upon denial of rehearing January 23, 2019

Third Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	No. 13 CR 9116
v.)	
)	Honorable
JAVIER GARZA,)	James B. Linn,
)	Judge, presiding.
Defendant-Appellant.)	

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's sentence did not violate the eighth amendment of the United States Constitution or the proportionate penalties clause of the Illinois Constitution and the new juvenile sentencing provision allowing for firearm enhancements to be discretionary is inapplicable to defendant's sentence.

¶ 2 Following a bench trial, defendant, Javier Garza, was convicted of first-degree murder (720 ILCS 5/9-1(A)(1) (West 2012)), aggravated battery (720 ILCS 5/12-3.05 (e)(1) (West 2012)), and three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2)

(West 2012)), and sentenced to 51 years' imprisonment. On appeal, he argues that his sentence violates the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. He further contends that his case should be remanded for resentencing under new sentencing provisions contained in Public Act 99-69, section 10 (eff. Jan 1. 2016) (adding 730 ILCS 5/5-4.5-105), which became effective during the pendency of his appeal. He maintains that the new provisions apply retroactively and he is entitled to a new sentencing hearing because the provisions allow the sentencing court to use its discretion in meting out firearm enhancements when sentencing defendants who were minors at the time of their offense. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4

The facts adduced at trial are as follows. On April 7, 2013, the victims Emily Guerrero, Pablo Juarez, Alec Esparza, Alyna Esparza, and Michael Orozco, all between the ages of 13 and 15, met at Varraga Park and decided to get ice cream. The ice cream shop was located on Cermak Road and Leavitt Street. The group of teenagers walked north on Leavitt towards Cermak, and as the group approached 22nd Place, a green minivan pulled up across the street from them and stopped at the stop sign. The three individuals inside the minivan were Jamie Almarez, co-defendant, the driver, Damien Garza age 19, and defendant age 17. Defendant and Damien Garza¹, both members of the Latin Saints gang, presented gang signs at the group to show disrespect to a rival gang, the Satan Disciples. In response, Michael Orozco, an associate of the Satan Disciples, stepped towards the minivan while shouting and presented gang signs at the vehicle.

¹Damien Garza is not a party to this appeal and has a separate pending appeal docketed as No.1-15-2324.

¶ 5 Defendant opened the minivan sliding door, stepped out of the minivan and shouted out "D.K."² He then pulled out a black handgun and fired three to four shots at the group of teenagers. Emily, Pablo, Alec, Alyna and Michael all ran away from the gun fire. Defendant stopped shooting, got into the minivan, and Damien drove north. Three bullets struck Michael in the back. The group of teenagers looked back and observed that Michael was on the ground. Emily and Alyna called 911 and stayed with Michael. Pablo and Alec ran to Michael's house to tell Michael's family about the shooting. Michael's father and brother arrived at the scene to find Michael lying on the ground with gunshot wounds to his back. The paramedics arrived and placed Michael in an ambulance and transported him to the hospital. When Michael's father arrived at the hospital he learned that Michael had died from his wounds.

¶ 6 After the paramedics left the scene of the incident, Emily noticed she had a "piece of metal" in her leg. She pulled out the metal fragment from her leg and dropped it on the ground. Emily's parents took her to the hospital worried that she might still have metal in her leg.

¶ 7 Officers Manuel Hernandez and Waqar Mian were driving south on Loomis Street, approaching Cermak in an unmarked squad car when they received a call on the police radio about a shooting, as well as a description of a green minivan traveling east on Cermak. The officers passed a green minivan at the corner of Cermak and Wood Street, made a U-turn, activated their emergency lights and sirens, and began driving toward the minivan. The minivan accelerated and sped through traffic passing cars on the right and "squeezing in between the normal traffic and parked vehicles." Subsequently, the minivan crashed into a

² D.K. is understood to mean Disciple Killer.

group of parked cars at high impact. The officers positioned the squad car against the minivan to prevent escape.

¶ 8 Officer Hernandez drew his weapon and ordered Damien to get out of the minivan with his hands up. Officer Mian approached the passenger side of the minivan, observed Damien in the driver's seat, defendant in the rear behind the driver's seat, and Jamie Almarez in the front passenger seat. Officer Hernandez also observed defendant in the back of the minivan. Officer Mian removed defendant and Jamie Almarez from the minivan and found a "semiautomatic blue steel weapon underneath the driver's seat." Officer Hernandez and Officer Mian detained Damien, defendant, and Jamie Almarez. Other police officers brought Emily and Alyna to the minivan crash site. Both teenagers identified defendant and Damien as the individuals involved in the shooting.

¶ 9 Pablo went to the police station where he viewed a physical lineup and identified defendant as the shooter. Alec spoke to the police about the event; however, he was unable to identify an offender from a physical line up. Two other witnesses, Edward Dominguez, and Jessica Contreras, viewed a physical line up. Dominguez identified Damien as the shooter based on his clothes, but he indicated he had not seen defendant's face at the time of the shooting. Contreras spoke with detectives and an Assistant State's Attorney at the police station, and she identified Damien as the driver of the green minivan.

¶ 10 Four discharged cartridges, two fired bullets, and several metal bullet fragments were recovered from the scene of the shooting. The gun was recovered from the minivan. A fired bullet was recovered during Michael's autopsy. A firearms examiner concluded that all the discharged materials were fired from the gun recovered from the minivan. A gunshot residue test performed on defendant's right hand tested positive for gunshot residue.

¶ 11 Detective Roger Murphy, an expert on street gangs, was assigned to investigate the shooting of Michael Orozco. At trial, Detective Murphy testified about gangs in Chicago and then identified defendant and Damien's tattoos as signifying membership in the Latin Saints street gang. Murphy identified a number of videos showing interviews and statements of Damien while he was held in an interrogation room. In one segment, Damien admitted he was driving the van to look for Satan Disciples in rival territory, as they had been ordered to do so by a gang leader earlier in the day. The gang leader had urged defendant to avenge the death of his father on his birthday.

¶ 12 The trial judge found defendant guilty of all charges and found that he personally discharged the firearm. The presentence investigation report reflected that defendant had two prior juvenile adjudications: one for battery and one for possession of cannabis. The report also reflected that defendant's father was shot and killed in 2001 by a member of a different street gang and this event destabilized his family and left him without a male role model. In addition, the investigation report noted that defendant has one daughter who was nine months old at the time of his arrest.

¶ 13 At the sentencing hearing, the State presented victim impact statements from Alyna Esparza and Marisol Martinez, Michael Orozco's mother. The State further emphasized the "absolute senseless, mindless violence" reflected in this crime. The defense presented mitigation testimony from defendant's mother. After considering the factors in aggravation and mitigation, the judge imposed the minimum sentences of 45 years for murder, 5 years for the aggravated discharge of a weapon to run concurrently and 6 years for the aggravated battery with a firearm to run consecutively. This appeal followed.

¶ 14

II. ANALYSIS

¶ 15 A. Constitutionality of Sentence

¶ 16 Defendant who was 17 years old at the time of his offense, first contends that the trial court's imposition of an aggregate 51-year sentence amounts to a *de facto* life sentence in violation of the eighth amendment of the United States Constitution. Defendant further asserts that his sentence was imposed without considering *Miller v. Alabama*, 567 U.S. 460 (2012).³ The State responds that defendant's as applied challenge is improper because he failed to first raise his constitutional challenge at the trial court and therefore has forfeited review of his claim. The State cites *People v. Thompson*, 2015 IL 118151 as support. Defendant replies that the State misconstrues *Thompson* and contends that review here is proper.

¶ 17 In *Thompson*, the court determined that an as-applied constitutional challenge is dependent on the facts and particular circumstances of the challenging party. 2015 IL 118151 ¶ 36. Such a challenge requires that the record be sufficiently developed in terms of those facts and circumstances for the purposes of appellate review. *Id.* ¶ 37. However, "[w]hen considered as a whole, *Thompson* implies that courts must overlook forfeiture and review juveniles' as-applied eighth amendment challenges under *Miller*, notwithstanding the general rule prohibiting as-applied challenges raised for the first time on appeal." *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 35. We agree with *Nieto* and will not depart from its interpretation of as-applied eighth amendment challenges with respect to juveniles under *Miller*. We also find the same rationale applies under a proportionate penalties challenge. Therefore, we find that defendant's as-applied challenges have not been forfeited.

¶ 18 1. Eighth Amendment

³ In *Miller v. Alabama*, 567 U.S. 460 (2012) the Supreme Court held that the sentencing schemes that mandate natural life in prison without the possibility of parole for juveniles violate the eighth amendment.

¶ 19 The eighth amendment to the United States Constitution prohibits "cruel and unusual punishment" and is applicable to the states through the fourteenth amendment. U.S. Const., amends. VIII, XIV; *People v. Davis*, 2014 IL 115595, ¶ 18. The heart of the eighth amendment's protection is the basic principle that "criminal punishment should be graduated and proportioned to both the offender and the offense." *Davis*, 2014 IL 115595, ¶ 18 (citing *Miller v. Alabama*, 567 U.S. 460, 469 (2012); *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). In recent years the United States Supreme Court addressed a series of cases that involved the risk of disproportionate punishment to juvenile offenders. See generally *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

¶ 20 In *Miller*, the Court held that mandatory life imprisonment without the possibility of parole for individuals under the age of 18, at the time the crime was committed, violates the eighth amendment. 567 U.S. 489-90. Subsequently, in *Montgomery*, the Supreme Court held that the basic precept of the *Miller* holding applies retroactively to juvenile offenders serving mandatory life sentences. *Montgomery*, 577 U.S. ___, 136 S. Ct. at 733-34.

¶ 21 Our supreme court in *People v. Holman*, set forth guidelines for applying *Miller* to juvenile offenders. 2017 IL 120655, ¶ 40. The court recognized that "[t]he greater weight of authority has concluded that *Miller* and *Montgomery* send an unequivocal message: Life sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial courts consider youth and its attendant characteristics." *Id.* The court fashioned a criteria for trial courts to follow with respect to considering a defendant's youth and its attendant characteristics. *Id.* ¶ 46. The attendant characteristics which a sentencing court should consider, include, but are not limited to, the

following: "(1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation. [Citation.]" *Id.*

¶ 22 Defendant argues that his 51-year sentence amounts to a *de facto* life sentence because there is a possibility that he may not outlive his sentence. This court has rejected the claim that a juvenile offender who is eligible to be released in the offender's sixties is subject to a *de facto* life sentence. See *People v. Rodriguez*, 2018 IL App (1st) 141379-B (50 years' imprisonment not *de facto* life, allowing for release at 65); *People v. Hoy*, 2017 IL App (1st) 142596, ¶ 46 (52 years' imprisonment not *de facto* life, allowing for release by 68); *People v. Evans*, 2017 IL App (1st) 143562, ¶¶ 15-16 (45 years' imprisonment not *de facto* life, allowing for release at 62); *People v. Jackson*, 2016 IL App (1st) 143025, ¶10, n.6 (50 years' imprisonment not *de facto* life, allowing for release at 66); *People v. Applewhite*, 2016 IL App (1st) 1420330, ¶ 16 (45 years' imprisonment not *de facto* life, allowing for release at 62); but see *People v. Buffer*, 2017 IL App (1st) 142931 (50 years' imprisonment is *de facto* life).

¶ 23 Defendant relies on *People v. Buffer*, 2017 IL App (1st) 142931, to support his contention that his sentence was a *de facto* life sentence. In *Buffer*, the 16-year-old defendant was convicted of murder for shooting the victim and personally discharging the firearm that caused the victim's death. *Buffer*, 2017 IL App (1st) 142931, ¶ 3. The defendant was

sentenced to 25 years for murder plus a mandatory 25 year firearm enhancement for a total of 50 years' imprisonment. *Id.* ¶¶ 26, 42. While the defendant's case was pending, the United States Supreme Court decided *Miller*. *Id.* ¶¶ 29, 31. The defendant filed a post conviction appeal arguing that his 50 year sentence was a *de facto* life sentence that violated the eighth amendment of the United States Constitution and the Illinois Proportionate Penalties Clause. We determined that the defendant's 50-year sentence was a mandatory *de facto* life sentence and the sentence did not comport with the sentencing factors under *Miller* and thus, violated the eighth amendment. *Id.* ¶ 62. In so holding, we relied on judicial notice of the IDOC website, statistics, and other state supreme court decisions to reach our conclusion. *Id.* Furthermore, in coming to our decision that the sentence violated the eighth amendment, we assessed the record and found that the trial court did not take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* ¶ 63 (quoting *Montgomery*, 577 U.S. at ____, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 477-79)).

¶ 24 Our decision here does run afoul of our holding in *Buffer*. The court in *Buffer* determined that the trial court erred in its examination of the defendant's mitigating evidence. *Id.* We held that the trial court's reasoning did not comport with the juvenile sentencing factors recited in *Roper*, *Graham*, *Miller* and *Montgomery*. *Id.* We specifically noted that "those cases require that the sentencing court take into account (1) a child's diminished culpability and heightened capacity for change; (2) the fact that children are immature, irresponsible, reckless, impulsive, and vulnerable to negative influences; and (3) that they lacked control over their environment and the ability to extricate themselves from crime-producing circumstances." *Id.* However, in *Buffer* we did not have the guidance of *Holman*, a case that

our supreme court decided after *Buffer* which, *inter alia*, instructed the courts on how to apply *Miller* to discretionary life sentences with respect to juvenile offenders. *Holman*, 2017 IL 120655, ¶ 40.

¶ 25 We find, consistent with *Holman*, that the trial court properly considered defendant's youth and its attendant characteristics in fashioning his sentence. Here, the trial court considered defendant's age and home environment. The trial court noted that defendant did not suffer from abuse or neglect and there is no indication that there was drug or alcohol abuse in the home. The trial court also considered defendant's participation in the offense, namely that defendant was the gunman and engaged in "neighborhood terrorism and it [was] extreme." The trial court further found that defendant was not in any way incompetent, nor did defendant have a history of mental health issues. Finally, the trial court considered defendant's rehabilitative potential, and determined that defendant's shooting of the victims justified the sentence. The record is clear that defendant received a sentencing hearing that complied with *Miller* and therefore defendant's sentence did not violate the eighth amendment.

¶ 26 Accordingly, in light of *Holman*, we conclude that the trial court properly considered defendant's youth and its attendant characteristics in fashioning his sentence. Thus, defendant's sentence does not violate the eighth amendment.

¶ 27 Next, defendant asserts that the mandatory minimum sentence of 45 years imposed on juveniles 15 years or older convicted of first degree murder is unconstitutional as applied to juveniles. We presume that defendant is actually asserting a facial challenge by arguing that no application of this statute is constitutional for juvenile offenders. However, because we

found that his as-applied challenge is constitutional we need not address defendant's facial challenge. *Horvath v. White*, 358 Ill. App. 3d 844, 854 (2005).

¶ 28

2. Proportionate Penalties

¶ 29

Defendant argues that his aggregate sentence of 51 years' imprisonment violates the proportionate penalties clause of the Illinois Constitution. Furthermore, defendant argues that the proportionate penalties clause provides more protections than the eighth amendment. The state contends that the proportionate penalties clause and the eighth amendment are co-extensive. We agree with defendant that the proportionate penalties clause grants broader protections to offenders. See *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 69, 70 (holding that the proportionate penalties clause of the Illinois Constitution is not in lockstep with the eighth amendment). Thus, we review the claim for state constitutional error.

¶ 30

The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall 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. A defendant who challenges a sentence under the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005).

¶ 31

Illinois courts recognize three different forms of proportionality review. *People v. Miller*, 202 Ill. 2d 328, 338 (2002).

"A statute may be deemed unconstitutionally disproportionate if (1) the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; (2) similar offenses are compared and the conduct that

creates a less serious threat to the public health and safety is punished more harshly; or (3) identical offenses are given different sentences." *Id.*

¶ 32 To succeed on his claim, defendant must show that the sentence imposed is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community. *People v. Hoy*, 2017 IL App (1st) 142596, ¶ 48 (Internal quotation marks omitted.). "To determine whether a penalty shocks the moral sense of the community, we must consider objective evidence as well as the community's changing standard of moral decency." *People v. Hernandez*, 382 Ill. App. 3d 726, 727 (2008).

¶ 33 Defendant contends that his sentence violates the proportionate penalties clause because it was imposed without appropriate considerations of his youth and attendant circumstances. Defendant further argues that his culpability was diminished because he was negatively influenced by others. Citing *People v. Gipson*, 2015 IL App (1st) 122451 as support, defendant maintains that his violent actions were motivated by his desire to impress and appease the authority figures in his gang.

¶ 34 We find defendant's reliance to *Gipson* unavailing. In *Gipson*, the court determined that the juvenile's sentence violated the proportionate penalties clause and reversed and remanded for a retroactive fitness hearing. 2015 IL App (1st) 122451, ¶ 80. In doing so, this court strongly relied on the juvenile defendant's history of mental illness, his impulsive behavior, and that he may have been motivated by a desire to impress his older brother. *Id.* ¶ 73.

¶ 35 Here, unlike *Gipson*, there was no sign that defendant suffered from a mental illness or that he was in need of mental health treatment at the time of the offense or at the time of sentencing. Defendant's argument that he intended to impress authority figures in his gang may be true, however, it is not a relevant factor in our proportionality analysis. Further, the

record shows that defendant had positive influences in his life such as his mother and other family members that he ignored and chose to pursue a gang lifestyle. Defendant's culpability is not diminished because he chose to follow bad influences. Defendant armed himself with a gun and drove around neighborhoods with his companions seeking out rival gang members. He and Damien instigated a confrontation with unsuspecting teenagers. Defendant then escalated the confrontation by discharging his firearm into the crowd of teenagers.

¶ 36 As previously stated, the trial court appropriately considered defendant's youth and attendant circumstances when imposing the sentence. Given the seriousness of the offense and the manner in which defendant shot at the group of teenagers fatally striking Michael Orozco, we are hard pressed to conclude that his sentence is so wholly disproportionate to the offense as to shock the moral sense of the community.

¶ 37 As we have determined that defendant's sentencing does not violate the proportionate penalties clause of the Illinois Constitution as applied to him, we need not address the facial challenge. See *City of Chicago v. Alexander*, 2015 IL App (1st) 122858-B, ¶ 25.

¶ 38 B. 730 ILCS 5/5-4.5-105

¶ 39 Defendant argues that he is entitled to a new sentencing hearing under 730 ILCS 5/5-4.5-105(b) the discretionary firearm enhancement provision, because his case was pending on direct appeal when the law was enacted. Defendant acknowledges in his reply brief that pursuant to *People v. Hunter*, 2017 IL 121306, which was decided during the pendency of this appeal, that 730 ILCS 5/5-4.5-105 (b) does not apply retroactively to sentences issued before the law came into effect. 2017 IL 121306, ¶ 48. Therefore, we need not address this argument.

¶ 40 III. CONCLUSION

No. 1-15-2041

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.