2018 IL App (1st) 153207-U

THIRD DIVISION
April 18, 2018

No. 1-15-3207

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 8237
	)	
ORLANDO AVILA,	)	The Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

¶ 1 *Held*: The trial court's summary dismissal of defendant's postconviction petition was proper where the petition failed to allege a cognizable claim that his petition was unconstitutional under either the eighth amendment or the proportionate penalties clause.

¶ 2 Defendant Orlando Avila appeals from the trial court's summary dismissal of his *pro se* petition filed under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2014). Relying on the United States Supreme Court's decision in *Miller v. Alabama*, 576 U.S. 460 (2012), defendant asserts that his sentence was unconstitutional because he was only 18

years old at the time of the offense and his cumulative 65-year sentence for first-degree murder constitutes a *de facto* life sentence. We affirm the trial court's dismissal.

¶ 3 I. BACKGROUND

¶ 4 Briefly stated, the evidence at trial generally showed that just before 6 p.m. on October 31, 2007, Laticia Barrera was standing in her front yard after trick-or-treating with her children and their neighbors. At that time, defendant and Russel Rubio, a fellow member of the Latin Saints, fired shots at two members of the Two-Six gang: Nemroy Murray and Juan Hernandez. One bullet fatally struck Barrera in the head.

¶ 5 Felipe Santiago, Raynal Watson, Guadalupe Martinez and Christian Barrera, who was not related to the victim, all witnessed the shooting and ultimately identified defendant as one of the shooters. Additionally, Gregorio Reyes, whom Officer Eric Wier identified as a Latin Saint, initially testified that defendant had not admitted any involvement in the victim's murder. Reyes was impeached, however, with his grand jury testimony that two days after the shooting, defendant seemed nervous and said, "I don't know if I shot somebody." Detective Joaquin Mendoza further testified that Reyes reported defendant had said he was one of the shooters. Moreover, while Reyes denied that the Latin Saints had threatened him not to testify, Officer Wier testified that Reyes said the Latin Saints were going to kill him and asked to be relocated. According to Officer Wier, Reyes stated just before trial that he would rather spend 15 years in prison for perjury than be killed.

¶ 6 Defendant's mother testified that on the day in question, she went to the laundromat when it was light outside and returned when it was dark outside. When she got home, defendant was there. Defendant's sister, who had also been at the laundromat, testified that she returned home at

5:30 p.m. and went back to the laundromat after 15 or 20 minutes. She saw defendant at home during that period.

¶ 7 The jury found defendant guilty of first-degree murder and found that he personally discharged a firearm. The trial court sentenced him to 45 years in prison for murder and imposed an additional 20-year firearm enhancement. We affirmed the trial court's judgment on direct appeal. *People v. Avila*, 2013 IL App (1st) 111732-U.

¶ 8 In June 2015, defendant filed a *pro se* petition under the Act, asserting, in pertinent part, that his "sentence is unconstitutional as it is contrary to federal law as determined by the Supreme Court of the United States' Decision in *Miller v. Alabama*." Defendant did not assert that his sentence violated the proportionate penalties clause of Illinois' constitution. Subsequently, the trial court summarily dismissed the petition as frivolous and patently without merit. Defendant now appeals.

¶ 9 II. ANALYSIS

¶ 10 The Act allows criminal defendants to assert that their convictions resulted from the substantial denial of constitutional rights. *People v. House*, 2015 IL App (1st) 110580, ¶ 36 (citing 725 ILCS 5/122-1(a) (West 2008)). At the first stage of postconviction proceedings, the trial court must determine whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a) (2) (West 2008). To be summarily dismissed as frivolous or patently without merit, the defendant's petition must have no arguable basis in law or fact and, instead, must contain an indisputably meritless legal theory or a factual allegation that is fanciful. *People v. Boykins*, 2017 IL 121365 ¶ 9. A legal theory is meritless where contradicted by the record. *Id.*

¶ 11 A petition need only allege the gist of a meritorious claim. *People v. Hoare*, 2017 IL App (2d) 160727, ¶ 17. In addition, courts must take factual allegations as true, unless positively

rebutted by the record, and must liberally construe such allegations in favor of the defendant. *Id*. That being said, section 122-2 requires that the petition "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014). To determine whether a claim is meritorious, courts must consider the merit and relevance of the defendant's supporting documents. *People v. Jones*, 399 Ill. App. 3d 341, 357 (2010). Moreover, we review the trial court's summary dismissal of a postconviction petition *de novo* (*Hoare*, 2017 IL App (2d) 160727, ¶ 17), independently reviewing the petition without regard to the trial court's reasoning (*People v. Henry*, 2016 IL App (1st) 150640, ¶ 39).

¶ 12 A. 8th Amendment

¶ 13 The eighth amendment prohibits cruel and unusual punishment. U.S. Const., amend. VIII. In a series of cases involving juveniles, the United States Supreme Court issued *Miller*, which held that the eight amendment does not permit sentencing schemes that require juveniles to receive life sentences without parole. *Miller*, 576 U.S. at 479; see also *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding the eighth amendment prohibits the death penalty for an offender under 18 years of age); *Graham v. Florida*, 560 U.S. 48, 74 (2010) (finding the eight amendment prohibits a life sentence without parole for juveniles who did not commit murder). The Court arrived at this determination after considering factors unique to juveniles, including their transient immaturity, impetuosity, failure to appreciate consequences, home life, peer pressure and prospects for rehabilitation. *People v. Holman*, 2017 IL 120655, ¶¶ 20, 27, 29-32 (citing *Miller*, 576 U.S. at 477-78). Subsequently, the Illinois Supreme Court determined that *Miller* requires sentencing courts to consider these factors even before imposing discretionary life sentences. *Holman*, 2017 IL 120655, ¶¶ 38, 43-44; see also *Montgomery v. Louisiana*, 577 U.S. _, _, 136 S.Ct. 718, 733 (2016) (stating that *Miller* requires sentencing courts to consider how

children's differences counsel against imposing life sentences). Moreover, our supreme court has found that *Miller* applies to *de facto* life sentences. *People v. Reyes*, 2016 IL 119271, ¶ 9.

¶ 14 Here, defendant was not a juvenile at the time of the offense. He was 18 years old. While we acknowledge that the characteristics of youth may remain at 18 years of age, the Court has nonetheless drawn a bright line for purposes of the eighth amendment:

> "Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. *** The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574; see also *People v. Horta*, 2016 IL App (2d) 140714, ¶ 84 (finding that the United States Supreme Court has drawn a bright line at 18 years of age).

Moreover, the appellate court has adhered to that line. *People v. Pittman*, 2018 IL App (1st) 152030, ¶¶ 29, 34 (finding the eighth amendment was not implicated with respect to the 18-year-old offender); *People v. Thomas*, 2017 IL App (1st) 142557, ¶¶ 1, 28 (same); *People v. Barnes*, 2017 IL App (1st) 143902, ¶ 97; *People v. Harris*, 2016 IL App (1st) 141744, ¶ 2 (appeal allowed No. 121932) (finding on direct appeal that the 18-year-old offender's cumulative 76-year prison term did not violate the eighth amendment).

¶ 15 Defendant now concedes in his reply brief that "the Eighth Amendment does not protect [him] from what is effectively a life sentence" because he was 18 years old at the time of the offense. Accordingly, we consider his contention that the Illinois constitution's proportionate penalties clause warrants further proceedings.

¶ 16 B. Proportionate Penalties

¶ 17 "All 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. In addition, a statute is unconstitutionally disproportionate where (1) the punishment is cruel, degrading or wholly disproportionate to the offense so as to shock the moral sense of the community; (2) the comparison of similar offenses shows that the conduct creating a less serious threat to the public's health and safety is subject to harsher punishment; or (3) identical offenses have different sentences. *House*, 2015 IL App (1st) 110580, ¶ 85. In this instance, the first category is at issue. Before considering that issue, however, the State contends that defendant waived his proportionate penalties claim by failing to raise it in his petition.

¶ 18 The Act states that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014). Thus, a defendant generally cannot raise a claim for the first time on appeal from the dismissal of a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). Furthermore, our supreme court has stated that despite the appellate court repeatedly overlooking the Act's waiver language, the appellate court lacks the supervisory authority necessary to consider waived claims. *Id.*

¶ 19 Defendant argues that he “alleged in his petition that his sentence is unconstitutional, and no new claims are being raised on appeal.” Yet, asserting that a sentence is unconstitutional does not constitute a claim; rather, his petition specifically raised the claim that his sentence violated the federal constitution pursuant to *Miller* and acknowledged that *Miller* pertained to the eighth amendment. Contrary to defendant’s assertion, claims under the proportionate penalties clause and the eighth amendment are not subject to “identical analysis.” Furthermore, it is well settled that "[a] ruling on a specific flavor of constitutional claim may not justify a similar ruling

brought pursuant to another constitutional provision." *People v. Patterson*, 2014 IL 115102, ¶ 97. Even a liberal reading of defendant's petition does not reveal that he was asserting a proportionate penalties violation. Thus, his contention is waived.

¶ 20 Notwithstanding the Act's waiver provision, defendant's contention suffers from other procedural deficiencies. Because as-applied challenges depend on the specific circumstances of the individual defendant, "it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *People v. Thompson*, 2015 IL 118151, ¶ 37. That factual development must occur in the trial court. *Id.* ¶ 38. As stated, section 122-2 also requires that the petition "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014). The purpose of section 122-2 is to show that the defendant's allegations are capable of independent or objective corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Thus, section 122-2 is a vehicle for showing that relevant facts can be developed. We find *Thompson* to be instructive, notwithstanding that it did not involve the summary dismissal of a petition filed under the Act.

¶ 21 There, the defendant was convicted of committing two murders at 19 years of age and was sentenced to life in prison. *Thompson*, 2015 IL 118151, ¶ 4. On appeal from the denial of his petition filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), the defendant argued that the relevant sentencing statute was unconstitutional as-applied under the reasoning of *Miller*. *Thompson*, 2015 IL 118151, ¶¶ 14, 17, 21. Yet, the record contained no evidence as to how the evolving science on juvenile brain development and maturity applied him, a young adult. *Id.* ¶ 38. Accordingly, the supreme court held that the defendant had forfeited his contention. *Id.* ¶ 39; *cf. Holman*, 2017 IL 120655, ¶¶ 20, 27, 29-32

(suggesting that where a juvenile's record is sufficiently developed to review an as-applied sentencing challenge under the eighth amendment, this creates an exception to the requirement that as-applied challenges be raised in the trial court and the Act's requirement that all postconviction claims first be raised in the trial court).

¶ 22 Here, defendant essentially asserts that the sentencing statutes at hand (730 ILCS 5/5-8-1(a) (1) (a), (d) (2) (West 2006); 730 ILCS 5/3-6-3(a) (2) (i), (ii) (West 2006)) are unconstitutional as applied to this 18-year-old offender. Yet, he has attached nothing to his petition showing that the scientific evidence of juveniles' characteristics, adopted by *Miller*, also applies to young adults such as him. *People v. McKee*, 2017 IL App (3d) 140881, ¶ 24 (rejecting an 18-year-old's claim that her sentence violated the proportionate penalties clause where the record on direct appeal did not contain scientific evidence of juvenile development or show how such evidence would apply to her); see also *People v. Horta*, 2016 IL App (2d) 140714, ¶¶ 50, 85. Similar to *Thompson*, we have no basis to determine that defendant's as-applied constitutional claim could be meritorious and defendant has not shown that his allegations are capable of independent corroboration. *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 30 (stating that a party challenging the constitutionality of a statute as applied has the heavy burden of rebutting the strong judicial presumption that the statute is valid).

¶ 23 We recognize that the appellate court has on occasion found violations of young adult's proportionate penalty rights based on the reasoning in the *Miller* line of cases. See *People v. House*, 2015 IL App (1st) 110580, ¶¶ 20, 24, 101 (finding the 19-year-old defendant's life sentence shocked the moral sense of the community where he was a mere lookout, had committed no prior violent crimes, never knew his father, lost his mother at age 18, was raised by a grandmother, and attended school through the 12th grade but never graduated); *Harris*,

2016 IL App (1st) 141744, ¶ 62 (finding on direct appeal that while the reviewing court could not directly extend *Miller*'s holding, the court could find *Miller*'s analysis applied equal force to the 18-year-old defendant's proportionate penalties claim); but see *Harris*, 2016 IL App (1st) 141744, ¶¶ 79, 84 (Mason, J., dissenting) (disagreeing with the majority's extension of *Miller* to young adults where the defendant did not introduce evidence on the science of juvenile maturity as applied to him). Nonetheless, we decline to find defendant's petition warrants further proceedings under the Act where he has failed to show his allegations may be corroborated.

¶ 24 We further observe that based on the record before us, defendant's sentence does not shock the conscience. The PSI stated that by defendant's own account, he had a good relationship with his family and lacked any physical or psychological problems. Yet, he was kicked out of the ninth grade for not participating and joined the Latin Saints because it "looked fun." Defendant had several prior juvenile adjudications for weapons violations, aggravated assault, retail theft and possession of cannabis. As an adult, he was convicted of driving under the influence of alcohol and delivery of a controlled substance.

¶ 25 Carline Cordell, a teacher's assistant, testified to an incident at defendant's school, in which he was sent home early for misbehavior but returned. According to Cordell, defendant stared at her while repeatedly reaching into his jacket. Cordell saw the butt of a gun and called the police. Additionally, one officer testified that he arrested defendant at 13 years of age for driving a stolen van, and a second officer testified to finding him with a pistol. A third officer testified to an incident in which defendant pointed a gun at Rosalba Carillo and said, "I ought to shoot you, you Laraza bitch." A fourth officer testified to recovering over 100 grams of cannabis from defendant's bedroom, although his mother disputed the circumstances of that event. The court observed, "[t]here hasn't been a time much over the last nine, ten years or so that Avila has

gone more than a few months or so without doing something illegal or antisocial, resulting in a tragic murder of an innocent woman." The found that records from his time in jail showed defendant could not abide by the jail's rules either.

¶ 26 The trial court noted that defendant's placement in rehabilitative programs, such as a violence prevention program, a youth violence program and "retail theft school," had apparently been ineffective given the present offense. Defendant had also been referred to the Gateway Foundation and a gang intervention program. In addition, defendant refused an offer to attend Boys Town, an alternative school in Omaha, Nebraska. The prosecutor argued that many persons or entities had attempted to help defendant but he rejected their help. The court found defendant could not and would not abide by society's rules.

¶ 27 The record shows that defendant went out with a firearm on Halloween to engage in a gang-related shooting. Not only did he have reason to know that children would be outside in the early evening hours of Halloween, but surveillance footage admitted at trial shows that many children were in fact trick-or-treating around that time. Despite this, defendant fired multiple shots, choosing the Latin Saints over the safety of his community. Compare *Harris*, 2016 IL App (1st) 141744, ¶¶ 64-69 (finding the 18-year-old's cumulative 76-year prison term shocked the conscience where the record showed he had rehabilitative potential and no criminal record, and the trial court expressed dissatisfaction with the minimum available sentence), with *Harris*, 2016 IL App (1st) 141744, ¶¶ 79, 84 (Mason, J., dissenting) (finding the record was insufficient to consider to show a proportionate penalties violation where the defendant fired the murder weapon in a premeditated fashion despite lacking mental health issues, disclaiming drug or alcohol use and being raised in a two-parent household).

¶ 28 The trial court found that while defendant did not intend to kill this victim and did not know she was four months pregnant, "[defendant] didn't care about what happened October 31, 2007." The court found defendant had "total disregard for who else might get hit out there" and that his conduct on the night in question showed "a shocking and callous disregard for human life." As a result, defendant shot the victim, who had a husband and three children, and was expecting another child. It happened to be the victim's birthday. Furthermore, the court acknowledged that it had to consider returning defendant to useful citizenship but stated, "[i]t kind of makes me wonder what is useful about [defendant], returning to useful citizenship. I don't see anything about returning to useful citizenship at any time at all. At least not for quite awhile." See *People v. Huddleston*, 212 Ill. 2d 107, 129 (2004) (finding our constitution contains no indication that in determining an appropriate penalty, the possibility of rehabilitation must receive greater weight than the seriousness of the offense). Defendant had stated on his own behalf that he was sorry for what happened to the victim's family but that he was not responsible for the shooting. Given the foregoing, defendant's sentence does not shock the conscience.

¶ 29 For the foregoing reasons, we affirm the trial court's judgment.

¶ 30 Affirmed.