

2018 IL App (1st) 160128-U

No. 1-16-0128

THIRD DIVISION
March 28, 2018

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.
Respondent-Appellee,)	
)	No. 90 CR 2710101
v.)	
)	Honorable
DAVID BIRO,)	Mary Brosnahan,
)	Judge, Presiding.
Petitioner-Appellant.)	

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶1 *Held:* The circuit court's dismissal of the allegation in petitioner's successive postconviction petition based on the eighth amendment is affirmed for lack of a substantial showing of a constitutional violation, where the circuit court considered petitioner's age at the time of the offense and other mitigating factors as required by the United States Supreme Court decision in *Miller v. Alabama*.

¶ 2 Petitioner, David Biro, appeals from the second-stage dismissal of his successive petition for relief under the Post–Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2012)). On appeal, petitioner contends that the circuit court of Cook County erred in dismissing his petition where his discretionary sentence of natural life without parole was imposed without consideration of the factors articulated by the United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012). For the reasons set forth below, we affirm the dismissal of petitioner’s successive postconviction petition.

¶ 3 BACKGROUND

¶ 4 Petitioner was charged with multiple crimes in connection with the April 1990 shooting deaths of Nancy and Stephen Langert in their home in Winnetka, Illinois. Petitioner, who was 16 years old at the time of the shootings, was prosecuted as an adult (see Ill. Rev. Stat. 1989, ch. 37, ¶ 805-4(6)(a)). Following a jury trial, petitioner was convicted of the first degree murders of Nancy and Stephen Langert, the intentional homicide of Nancy’s unborn child, home invasion, and residential burglary. The evidence presented at trial is summarized as follows.¹

¶ 5 In late March 1990 petitioner broke into the office of an attorney who had been consulted by petitioner’s parents regarding a counterfeit firearm owner’s identification (FOID) card bearing petitioner’s photograph and the name of another person. While searching for the FOID card, petitioner discovered and stole the gun that he later used as the murder weapon.

¶ 6 On April 7, 1990, Nancy and Richard Langert went out to dinner with Nancy’s parents. While the Langerts were out, petitioner used a glass cutter to gain entry to their townhouse and

¹ Although petitioner’s successive postconviction petition does not challenge the validity of his convictions, the evidence presented at trial is summarized to provide context for the comments and conclusions of the sentencing judge.

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waited for them to return. Petitioner handcuffed Richard and shot him once in the back of the head. He then shot Nancy twice, once in the chest and once in the abdominal region. The following day, Nancy's father found the Langerts' bodies in the basement of their townhouse. A large amount of cash was in plain view in the living room.

¶ 7 Phu Hoang, one of petitioner's high school classmates informed police that petitioner had confessed to killing the Langerts. According to Hoang, petitioner described certain details about the murders, including the fact that Nancy told him that she was pregnant. In addition, petitioner told Hoang that "in the next few weeks he was going to be in one of three places. He said, A, he could be in the morgue; B, he could be in jail and on the 10:00 news; or C, he could be leaving town." Petitioner explained that he did not take any money or other property from the Langerts' home "because that was not why he was there" and that he did not regret the killings because the Langerts "were annoying" and "deserved to die anyhow." Petitioner also told Hoang that he intended to murder bank employees "just to spite the police."

¶ 8 The murder weapon, a glass cutter, and documents relating to the Langerts' murders were recovered during a police search of petitioner's bedroom. In addition, the police recovered a piece of paper on which petitioner had written "remember that I am the viper of the pit, the next cunning animal, whose person is the deadliest known," and "remember it all but if you should forget some of it, just remember this, my name is Cain and I kill people."

¶ 9 At the conclusion of the evidence, the jury found petitioner guilty of two counts of first degree murder, one count of intentional homicide of an unborn child, multiple counts of home invasion, and several counts of residential burglary.

¶ 10 Immediately before the sentencing hearing, the trial court heard argument as to the constitutionality of the applicable sentencing statute, which required that petitioner be sentenced to life imprisonment. During that argument, defense counsel repeatedly stressed the fact that petitioner was 16 years old when the crimes were committed. At the sentencing hearing, defense counsel objected to the introduction of evidence in aggravation and further argued that, because a sentence of natural life was mandatory, it was inappropriate for the court to consider factors in aggravation and mitigation. The trial judge disagreed and, over defense counsel's objection, considered the information contained in the presentence investigation report as well as any factors in aggravation and mitigation. The prosecutor requested that the court consider the victim-impact statements that had been provided by the families of Nancy and Richard Langert.

¶ 11 Upon consideration of those matters, the trial judge observed that petitioner
“had every advantage conceivable – a cohesive family, from all appearances, a loving family, a neighborhood that is not crime ridden, certain degree of affluence rather than poverty. You have *** two murders for no reason other than the fact that the defendant wished to kill. It really wasn't a killing because of some real or perceived offense of the decedents. It wasn't a killing because of any threatened action by the decedents to the defendant. It was simply a coldblooded killing for a reason that still remains a mystery to me, at least other than the fact that the defendant wanted to kill, apparently to achieve some sort of infamy from that killing, some sort of notoriety from that killing.”

Based on these observations and findings, petitioner was sentenced to concurrent mandatory sentences of life in prison without parole for the first degree murders of Nancy and Richard

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Langert. The court determined that the conviction for intentional homicide of an unborn child merged with the murder convictions and declined to impose a separate sentence for that crime.

¶ 12 On direct appeal, petitioner contended that he had been deprived of a fair trial based on several evidentiary rulings by the circuit court. He also argued that his mandatory life sentences were unconstitutional because he was 16 years old at the time of the murders and did not receive a hearing to determine whether his case should be transferred to juvenile court. The appellate court rejected petitioner's arguments and affirmed his convictions and the sentences for first degree murder. *People v. Biro*, 260 Ill. App. 3d 1012 (1994). However, the appellate court held that the trial court had erred in merging the conviction for intentional homicide of an unborn child into the convictions for first degree murder. Accordingly, the appellate court remanded the case to the trial court for a new sentencing hearing on that conviction.

¶ 13 Pursuant to the mandate of this court, a second sentencing hearing was held on February 24, 1995. That hearing was conducted by the same judge who presided over petitioner's trial and imposed sentence on the murder convictions. During that hearing, the judge considered petitioner's presentence investigation report and heard the arguments of counsel as to factors in aggravation and mitigation. In addition, the sentencing judge made the following remarks:

"I do remember with crystal clarity the facts and circumstances *** brought out in the trial. I also do recall the impact statement as well as the testimony elicited. The father's testimony as well as the presentence hearing. *** I do have present a pre-sentence investigation. In my opinion the evidence was that the killing was intentional, totally unprovoked ***.

“There was nothing provocative in the victims or what happened, what the victims did. It was planned, coolly [*sic*] planned and it was executed, the plan was executed in a cold-blooded manner. And then the circumstances of extraordinary cruelty. The evidence would indicate that the life of the decedent, the wife was still alive when the husband was killed. Accordingly, I do believe the killing was exceptionally brutal, indeed 2 people were killed as well aside from the fetus. There is something to be gained, in my opinion, from punishment. The acts that took place deserve extraordinary punishment. I do appreciate that the defendant was youthful, young, but he cold bloodedly in a planned killing as evidence of a greater maturity than the 16 years of age of the defendant at the time of the killings.”

“My intent was to illustrate the horror of this crime. The heinous nature of the crime, revulsion, revulsion that all of us should feel arising out of this crime.” “I understand you were young in years, but by golly, the evidence of the killing, how the killing was executed *** illustrates a maturity beyond far beyond your 16 years.” “The maturity unfortunately is far beyond 16 years to do evil. To do evil.”

At the conclusion of that hearing, the judge exercised its discretion to impose a natural life sentence for the intentional homicide of an unborn child.

¶ 14 In June 1995, petitioner filed a postconviction petition claiming that he had been deprived of his constitutional right to a fair trial. That petition was dismissed in January 1996, and this court affirmed the dismissal on appeal. *People v. Biro*, No. 1-96-0471 (December 26, 1997) (unpublished order under Supreme Court Rule 23).

¶ 15 In October 2013, petitioner was granted leave to file a successive postconviction petition asserting only that his sentences of life imprisonment without parole were unconstitutional. In support, petitioner relied on the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), which held that imposition of a mandatory sentence of natural life on a juvenile offender is unconstitutional in violation of the eighth amendment's prohibition against cruel and unusual punishment *Id.* at 479. Petitioner claimed that, based on the reasoning in *Miller*, he was entitled to a new sentencing hearing with regard to all three of his life sentences. The petition was docketed for second-stage proceedings, and the State moved to dismiss on two grounds: (1) *Miller* does not apply retroactively to cases on collateral review and (2) *Miller* does not apply to discretionary life sentences. While the petition was pending, the Supreme Court of Illinois decided *People v. Davis*, 2014 IL 115595, which held that *Miller* does apply retroactively to cases on collateral review. *Id.* ¶ 39-40. In light of *Davis*, the State conceded that petitioner is entitled to a new sentencing hearing on his first degree murder convictions, and the circuit court specifically acknowledged that issue was no longer before it. The State maintained, however, that the reasoning in *Miller* did not apply to discretionary sentences and requested dismissal of petitioner's claim that he was entitled to a new sentencing hearing on his conviction for intentional homicide of an unborn child.

¶ 16 The circuit court reasoned that *Miller* did not apply to discretionary life sentences and granted the State's motion. In doing so, the court referred to and quoted at length from the transcript of the second sentencing hearing. Based on those proceedings, the circuit court determined that the sentencing judge had considered petitioner's youth in imposing the

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discretionary life sentence for intentional homicide of an unborn child. Noting that petitioner had received a full and fair sentencing hearing, at which the relevant statutory sentencing factors were considered, the circuit court concluded that the discretionary life sentence does not violate *Miller*. Consequently, the court found that petitioner failed to make a substantial showing of a constitutional violation involving his discretionary life sentence and granted the State's motion to dismiss the allegation pertaining to that sentence. Petitioner appealed the circuit court's grant of the State's motion to dismiss.

¶ 17 While the appeal was in the briefing stage, the Supreme Court of Illinois issued its decision in *People v. Holman*, 2017 IL 120655, which held that *Miller* is applicable to discretionary life sentences imposed on juvenile offenders. *Id.* ¶ 40. The *Holman* court further held that postconviction relief is not available for an eighth amendment claim based on *Miller* where the record demonstrates that the sentencing judge considered evidence of the juvenile offenders age and the attendant characteristics of youth before imposing a natural life sentence. *Id.* ¶¶ 47-50. We consider petitioner's arguments in light of the reasoning articulated by the supreme court in *Holman*.

¶ 18 ANALYSIS

¶ 19 Initially we observe that, although neither party has raised the question, this court has an obligation to consider its jurisdiction to address an appeal. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). Pursuant to the Illinois Constitution, the appellate court has jurisdiction to review only final judgments entered by the circuit court. Ill. Const. 1970, art. VI, § 6. A final judgment "determines the litigation on the merits such that the

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only thing remaining is to proceed with execution of judgment.” *People v. Shinaul*, 2017 IL 120162, ¶ 10.

¶ 20 Here, the judgment challenged on appeal is the dismissal of a single allegation in the successive postconviction petition. We conclude, however, that the circuit court’s grant of the “partial” dismissal requested by the State was a final judgment that is subject to review. After the supreme court issued its decision in *Davis*, the question of *Miller*’s retroactivity was conclusively settled, rendering petitioner’s mandatory life sentences for first degree murder unconstitutional. The State conceded that petitioner was entitled to a new sentencing hearing on those convictions, and the circuit court specifically stated that issue was no longer in dispute. Thus, the only remaining contested question was whether *Miller* provided an avenue of relief from the discretionary sentence imposed for intentional homicide of an unborn child. The circuit court’s second-stage dismissal of that allegation constituted a final judgment because it disposed of the only pending claim in the successive postconviction petition and terminated the litigation before the court. Accordingly, this court has jurisdiction to address petitioner’s appeal.

¶ 21 The Act provides a statutory mechanism by which a defendant may collaterally attack his conviction or sentence based upon a denial of a constitutional right. *People v. Holman*, 2017 IL 120655, ¶ 25; *Davis*, 2014 IL 115595, ¶ 13. At the second stage of proceedings, a defendant is obligated to make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At this stage, a petition may be dismissed only where the allegations, construed liberally and in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). All well-pleaded facts that are not positively rebutted by the record

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are to be taken as true. *Pendleton*, 223 Ill. 2d at 473. We review a second-stage dismissal of a postconviction petition *de novo*. *Id.*

¶ 22 Petitioner contends that his discretionary life sentence for intentional homicide of an unborn child is unconstitutional under *Miller* because the sentencing judge failed to consider his age and the other “hallmark features” of youth prior to imposing that sentence. According to petitioner, the sentencing judge’s failure demonstrates a substantial showing of a violation of the eighth amendment. As a consequence, petitioner argues, the circuit court erred in dismissing that portion of his successive postconviction petition.

¶ 23 The State argues that petitioner is not entitled to a new sentencing hearing for his conviction of intentional homicide of an unborn child because the sentencing judge did consider petitioner’s youth and its attendant characteristics when he imposed sentence for that crime. According to the State, petitioner’s claim of a constitutional violation under *Miller* is refuted by the record. We agree.

¶ 24 The eighth amendment of the United States Constitution prohibits the imposition of “cruel and unusual punishments” and is applicable to the States through the fourteenth amendment. U.S. Const., amends. VIII, XIV; *Davis*, 2014 IL 115595, ¶ 18. Intrinsic to that prohibition is the concept of proportionality. *Holman*, *supra* ¶ 33 (citing *Graham v. Florida*, 560 U.S. 48, 59 (2010)); *Davis*, *supra* ¶ 18 (same). Underlying the eighth amendment’s protection is the fundamental principle that “criminal punishment should be graduated and proportioned to both the offender and the offense.” *Davis*, *supra* ¶ 18 (citing *Miller*, 567 U.S. at 469, and *Roper v. Simmons*, 543 U.S. 551, 560 (2005)).

¶ 25 The Supreme Court has addressed the risk of disproportionate punishment in a trilogy of cases and held in each that youth must be considered in sentencing juvenile offenders. In *Roper*, the Court ruled that the eighth amendment proscribes capital punishment for juvenile offenders. *Id.* at 578-79. In *Graham*, the Court explained that the eighth amendment prohibits a sentence of life without parole for juveniles who do not commit homicide. *Graham*, 560 U.S. at 82. In *Miller*, the Court concluded that the eighth amendment forbids mandatory life sentences for juvenile offenders who are convicted of homicide. *Miller*, 567 U.S. at 489-90.

¶ 26 This line of precedent is premised on the Court's recognition that juveniles differ from adults in three critical ways, including a lack of maturity and an underdeveloped sense of responsibility, a greater susceptibility to negative influences and outside pressures, and the fact that a juvenile's character is not as well formed as that of an adult. *Davis supra* ¶ 19 (citing *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70).

¶ 27 In *Miller*, the Court explained that a court must take into account how children are different from adults for purposes of sentencing (567 U.S. at 480) and that an offender's youth and attendant characteristics must be considered before imposition of life imprisonment without the possibility of parole (*id.* at 483). These principles were reiterated in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

¶ 28 In *People v. Holman*, the Supreme Court of Illinois recognized that a juvenile offender may be sentenced to life imprisonment without parole if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation. *Holman, supra* ¶ 46. Such a decision must be

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based on consideration of the offender's youth and its attendant characteristics, which "include, but are not limited to, the following factors: (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." *Id.* (citing *Miller*, 567 U.S. at 477-78). *Holman* further held that, in revisiting a discretionary sentence of life without parole, a court must look at the record to determine if the trial court considered such evidence at the defendant's original sentencing hearing. *Id.* ¶ 47.

¶ 29 Here, when petitioner was sentenced for intentional homicide of an unborn child, the sentencing judge explicitly stated that he remembered the trial evidence with "crystal clarity" and considered that evidence along with the victim-impact statements, the presentence investigation report, and the arguments of counsel at the sentencing hearing. With regard to the mitigating factors identified in *Miller*, the judge was well aware of petitioner's chronological age and specifically noted that he was 16 years old at the time of the offense, a fact that was repeatedly emphasized by both the prosecutor and defense counsel. In addition, there was no indication that petitioner was immature, impetuous, or failed to appreciate the risks and consequences of his actions. Indeed, the record shows that petitioner exhibited behavior indicating the contrary. As the sentencing judge particularly noted, "the killing was intentional

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[and] totally unprovoked.” He further observed that petitioner had planned the killing and executed it “in a cold-blooded manner.” The judge also specifically found that, although petitioner was young, the planning and execution of the killing illustrated a “maturity far beyond [his] 16 years” of age. Moreover, petitioner’s ability to appreciate the risks and consequences of his actions was borne out by the evidence that he told Hoang that he could end up in the morgue, in jail and on television news, or leaving town.

¶ 30 The presentence investigation report included information regarding petitioner’s family and home life. That information indicated that he was raised in a stable home, was not abused either physically or emotionally as a child, and had a good relationship with his parents and siblings. Also, the sentencing judge observed that petitioner had “a family that always had an interest in [him].”

¶ 31 The evidence at trial established that petitioner was solely responsible for the killings, and there was no indication that he had been subjected to pressure by any other person in relation to the commission of the crimes. Nothing in the record indicates that petitioner was incompetent or was unable to deal with police officers or his defense counsel.

¶ 32 As to petitioner’s prospect for rehabilitation, the sentencing judge expressly stated that petitioner’s conduct demonstrated “extraordinary cruelty” and that the killing was “exceptionally brutal.” In light of that circumstance, the judge determined that his actions “deserve extraordinary punishment.” These comments reflect that the sentencing judge found that petitioner’s conduct demonstrated irretrievable depravity and incorrigibility, such that he had no prospects for rehabilitation.

¶ 33 Based on our examination of the record in this case, we conclude that the sentencing judge considered all of the mitigating factors identified in *Miller*, including petitioner’s age and its attendant characteristics before imposing sentence. The judge also clearly articulated his findings and reasons as to why a sentence of natural life was warranted. The record in this case refutes petitioner’s claim of an eighth amendment violation under the reasoning of *Miller v. Alabama*. Accordingly, the circuit court correctly dismissed that portion of petitioner’s successive postconviction petition alleging that his natural life sentence for intentional homicide of an unborn child is unconstitutional.

¶ 34 As a final matter, we note that petitioner has argued that his discretionary life sentence was not statutorily authorized and that it did not comply with the requirement that aggravating factors be found by a trier of fact beyond a reasonable doubt as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). However, that question is not before us because the issue was not asserted in the successive postconviction petition. The Act provides that claims not actually in the petition are waived. 725 ILCS 5/122-3 (West 2012) (stating that “[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived.”). This court is not free to excuse appellate waiver resulting from a petitioner’s failure to raise an issue in a postconviction petition. See *People v. Cathey*, 2012 IL 111746, ¶ 21 (holding that the appellate court erred in reaching an issue that was not raised in the postconviction petition); see also *People v. Jones*, 213 Ill. 2d 498, 507 (2005) (recognizing that the appellate court does not have supervisory authority enabling it to reach claims not raised in a postconviction petition). Therefore, we are precluded from addressing petitioner’s *Apprendi* argument.

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¶ 35 For all of the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 36 Affirmed.