2018 IL App (2d) 150779
No. 2-15-0779
Order filed March 30, 2018



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Lake County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 08-CF-3797 |
| RICKIE T. NICHOLS, | ) | Honorable George Bridges, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's aggregate 32-year sentence on two counts of aggravated criminal sexual assault violated neither the eighth amendment to the United States Constitution (U.S. Const., amend. VIII) nor the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11).

¶ 2 Defendant, Rickie Nichols, appeals the denial of his postconviction petition. He argues that his 32-year sentence of imprisonment is unconstitutional because certain sentencing mandates precluded the trial court from giving consideration to his youth and related characteristics in sentencing him. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 We affirmed defendant's convictions on direct appeal in *People v. Nichols*, 2012 IL App (2d) 10028. We provide here only the background necessary to resolve this current appeal.

¶ 5 A jury convicted defendant of two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2014)), based on evidence that he and Stephen Knighten, displaying an air pistol, forced the victim, K.H., to perform oral sex on each of them. Defendant was 16 years old when he committed the offenses. The trial court sentenced defendant to two consecutive 16-year terms of imprisonment. Due to several statutory mandates, the trial court had no discretion to impose a lesser sentence on either count or run the sentences concurrently. First, based on the nature of the offenses, the automatic transfer statute (705 ILCS 405/5-130 (West 2008)) required that defendant be tried as an adult. Second, the accountability statute (720 ILCS 5/5-2 (West 2008)) rendered defendant responsible for Knighten's assault of K.H. Third, the sentencing range for each offense, a Class X felony, was 6 to 30 years in prison (730 ILCS 5/5-8-1(a)(3) (West 2008)), but defendant was subject to a mandatory sentencing enhancement. Specifically, since defendant displayed to K.H. an object that appeared to be a dangerous weapon, section 12-14(d)(1) of the Code of Criminal Procedure of 1963 (Criminal Code) (720 ILCS 5/12-14(d)(1) (West 2008)) required a 10-year enhancement for each count. Fourth, due to the nature of the offenses, section 5-8-4(a)(ii) of the Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5-8-4(a)(ii) (West 2008)) required that defendant serve the sentences on each count consecutively. After considering factors in mitigation and aggravation, the trial court imposed the minimum sentence—16 years—allowed under each count, resulting in an aggregate sentence of 32 years consecutive. Defendant would serve the sentence at 85%.

¶ 6 On direct appeal, defendant argued, *inter alia*, that section 5-8-4(a)(ii) of the Code of Corrections (mandatory consecutive sentencing) violated, as applied to him, the proportionate penalties and due process clauses of the Illinois Constitution (Ill. Const. 1970, art. I, §§ 2, 11). Specifically, defendant contended that section 5-8-4(a)(ii) resulted in a sentence that was "disproportionate when considered in light of his age, his criminal history, and the seriousness of the offenses." *Nichols*, 2012 IL App (2d) 10028, ¶ 75. We rejected that contention and affirmed the sentence. *Id.* ¶¶ 70-84.

¶ 7 In August 2014, defendant filed by appointed counsel an amended postconviction petition. He raised several claims but did not challenge his sentence. Following a third-stage evidentiary hearing, the trial court denied the petition. Defendant filed this timely appeal.

¶ 8 II. ANALYSIS

¶ 9 Defendant reasserts none of the claims in his postconviction conviction, but, for the first time on appeal, challenges his sentence. He argues that section 12-14(d)(1) of the Criminal Code (mandatory dangerous-weapon enhancement) and section 5-8-4(a)(ii) of the Code of Corrections (mandatory consecutive sentencing) are unconstitutional as applied to him because they prevented the trial court from considering mitigating circumstances associated with his youth. Defendant cites two constitutional restrictions: the eighth amendment to the United States Constitution (U.S. Const., amend. VIII), made applicable to the States through the due process clause (U.S. Const., amend. XIV), and the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). The eighth amendment bars cruel and unusual punishments (U.S. Const., amend. VIII), while the proportionate-penalties clause 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." Defendant asks that we vacate his sentence and remand for re-sentencing.

¶ 10 We address first the eighth-amendment aspect of defendant's argument, which is based on *Miller v. Alabama*, 567 U.S. 460 (2012), and its interpretation by our supreme court. In *Miller*, the Supreme Court addressed the constitutionality of two state sentencing schemes that mandated, in homicide cases, a sentence of life without parole even for offenders who were juveniles when they committed the offense. The Court invalidated those schemes as applied to juveniles, holding that the eighth amendment "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 479. "[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489. The state sentencing schemes under question violated the "principle of proportionality" underlying in the eighth amendment "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes." *Id.*

¶ 11 The State claims that there are two procedural bars to our considering defendant's *Miller*-based claim. First, the State asserts that our holding on direct appeal—that defendant's sentence did not violate the proportionate-penalties clause—precludes his eighth-amendment claim in this appeal. We disagree. Under the doctrine of collateral estoppel, a criminal defendant is barred from raising, in a postconviction proceeding, an issue that he raised or could have raised on direct appeal from his conviction. *People v. Burrows*, 172 Ill. 2d 169, 187 (1996). However, an intervening change in the law is an exception to collateral estoppel (*Consiglio v. Department of Financial & Professional Regulation*, 2013 IL App (1st) 121142, ¶ 44), and our supreme court has held that *Miller* applies retroactively to sentences challenged on collateral review (see *People*

*v. Davis*, 2014 IL 115595, ¶ 39). Consequently, defendant is not barred from raising his *Miller*-based claim.

¶ 12 The State also asserts that defendant's eighth-amendment claim based on *Miller* is forfeited because he failed to raise it below. We again disagree. In assessing whether a claim is procedurally forfeited, case law distinguishes between facial and as-applied constitutional challenges. See *People v. Thompson*, 2015 IL 118151, ¶ 36 A claim that a statute is unconstitutional on its face, *i.e.*, "unconstitutional under any set of facts," may be raised at any time. *Id.* ¶¶ 32, 36. By contrast, an as-applied challenge must be raised first in the trial court, but "a very narrow exception exists" for cases where the record is sufficiently developed in the trial court for the appellate court to decide the claim. *People v. Holman*, 2017 IL 120655, ¶ 32.

¶ 13 Defendant acknowledges that his challenge is an as-applied challenge. We agree. The provisions he challenges—the mandates for consecutive sentencing and for an enhancement for use of a dangerous weapon—are not specific to an offender's age. See 720 ILCS 5/12-14(d)(1) (West 2008); 730 ILCS 5/5-8-4(a)(ii) (West 2008). Defendant does not claim that there are no offenders to which the provisions may validly be applied. He challenges their validity as applied to juveniles like himself, but not as applied to adults.

¶ 14 We also agree with defendant that the record is sufficiently developed for us to address his as-applied challenge. As in *Holman*, "[a]ll of the facts and circumstances to decide the defendant's claim—that his sentencing hearing did not comply with *Miller*—are already in the record." *Holman*, 2017 IL 120655, ¶ 32.

¶ 15 On the merits, we agree with the State that *Miller* cannot be construed as applying here. The Supreme Court's holding in *Miller* concerned "the harshest possible penalty for juveniles." *Miller*, 567 U.S. at 479. The sentences under scrutiny in *Miller* were mandatory life sentences

without the possibility of parole. In recognition, however, that *Miller* "contains language that is significantly broader than its core holding" (*Holman*, 2017 IL 120655, ¶ 38), our supreme court has found *Miller*'s principles to apply beyond the context of mandatory life sentences without the possibility of parole. First, in *People v. Reyes*, 2016 IL 119271, ¶ 9, the court held that *Miller* applies to a mandatory sentence for a term of years that amounts to a *de facto* life sentence. The court said:

> "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *Id.*

¶ 16 Second, in *Holman*, the court held that *Miller* applies to *discretionary* life sentences as well: "Life sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." *Holman*, 2017 IL 120655, ¶ 40.

¶ 17 Notably, defendant does not claim that his 32-year sentence, imposed when he was 17 years old, amounts to a *de facto* life sentence. See *Reyes*, 2016 IL 119271, ¶ 12 (a sentence on remand of 32 years in prison for a 16-year-old offender would not be a *de facto* life sentence). He claims, rather, that the supreme court has suggested that *Miller* has application to less severe sentences than life sentences. Defendant relies on the court's comment in *Holman* that "[n]one of what the [Supreme] Court said [in *Miller*] is specific to only mandatory life sentences." *Holman*, 2017 IL 120655, ¶ 38. Defendant misconstrues this language. The court's point was

that discretionary life sentences, just as much as mandatory life sentences, fall within the concerns expressed in *Miller*. The court was not suggesting that *Miller* applies to sentences other than life sentences. Consequently, we reject defendant's claim that his sentence is invalid under the eighth amendment as construed in *Miller*.

¶ 18 Defendant asserts, however, that his claim under the proportionate-penalties clause succeeds even if his eighth amendment, *Miller-based* claim does not, because the clause provides greater protection than the amendment. According to defendant, the clause reaches beyond the amendment to mandate that trial courts have discretion, before imposing any kind of sentence on a juvenile, to consider the youth and related characteristics of the offender.

¶ 19 We need not decide whether, as the State claims, defendant is collaterally estopped from bringing his proportionate-penalties challenge, because we can readily dispose of it on the merits. As this court has noted, the supreme court "has not spoken consistently" on whether the proportionate-penalties clause is coterminous with the eighth amendment or instead provides greater protection. See *People v. Horta*, 2016 IL App (2d) 140714, ¶ 62 (comparing *People v. Patterson*, 2014 IL 115102, ¶ 106 (stating that the proportionate-penalties clause is "co-extensive with the eighth amendment's cruel and unusual punishment clause") with *People v. Clemons*, 2012 IL 107821, ¶ 40 (stating that the proportionate-penalties clause, "which focuses on the objective of rehabilitation, went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision")). Appellate districts are divided on how to view the relationship between the proportionate-penalties clause and the eighth amendment in light of the supreme court's apparently conflicting pronouncements in *Clemons* and *Patterson*. Compare *People v. Harris*, 2016 IL App (1st) 141744, ¶ 38 (the proportionate penalties clause is more expansive than the eighth amendment) with *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 51

(the proportionate penalties clause does not provide greater protection than the eighth amendment). In *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 93, this district remarked that the provisions "are read co-extensively." For authority we cited not *Patterson* but *In re Rodney H.*, 223 Ill. 2d 510 (2006), which predated both *Patterson* and *Clemons*. The court in *Rodney H.* stated: "Our proportionate penalties clause is coextensive with the cruel and unusual punishment clause." *Id.* at 518.

¶ 20 Here we follow *Patterson*—the court's most recent pronouncement on the relationship between the two provisions—and regard the provisions as co-extensive. Therefore, because defendant's eighth-amendment claim based on *Miller* fails, so does his claim under the proportionate-penalties clause.

¶ 21 Defendant relies heavily on *People v. Gipson*, 2015 IL App (1st) 122451, for support on the merits of his proportionate-penalties claim. The First District's analysis, however, rested on the premise that the proportionate-penalties clause provides greater protection than the eighth amendment. See *id.* ¶ 70. We reject that premise, following instead the supreme court's statement in *Patterson* that the provisions are co-extensive.

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 24 Affirmed.