2019 IL App (1st) 171499-U

SIXTH DIVISION
October 11, 2019

No. 1-17-1499

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JIMMIE SMITH, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 80 C 7222 Honorable Arthur F. Hill, Jr., Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Mikva and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not establish cause and prejudice for his claim that his natural life sentence violated the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution; denial of leave to file successive postconviction petition affirmed.

¶ 2 Defendant, Jimmie Smith, appeals the circuit court's denial of leave to file a successive postconviction petition. In 1983, defendant was sentenced to a discretionary natural life prison sentence for offenses committed when he was 20 years old. On appeal, defendant contends that,

as applied to him, his sentence violated the eighth amendment to the United States and proportionate penalties clause of the Illinois Constitution. We affirm.

¶ 3 The evidence presented at defendant's jury trial established that on September 16, 1980, defendant robbed and fatally shot Irvin Cherry. Per defendant's account to law enforcement after his arrest, he had been in a vacant lot and decided to stick up a man who was approaching from a nearby store. Defendant realized that he knew the man, who was Cherry, but it was too late to back out. Cherry fell down on some grass as he tried to escape and defendant took money from Cherry's pockets. As defendant was leaving, Cherry fired a gun and defendant fired back. Defendant went on to rob another man in the area of 36th and Indiana. In the meantime, police offers arrived and defendant threw the gun into a garbage can. Police recovered the gun and it was found that the bullet taken from Cherry's body matched a bullet test-fired from the gun that defendant had discarded. Defendant was found guilty of first degree murder, armed robbery, and armed violence. The State sought the death penalty and defendant waived a jury for sentencing.

¶ 4 Defendant's presentence investigation report (PSI) indicated that defendant was born on January 14, 1960, and graduated high school in 1979. Defendant was 1 of 12 children and his parents divorced when he was six years old. Defendant was mostly raised by his mother and maternal grandparents in the Robert Taylor Homes. His upbringing was strict and he recalled being beaten with a belt and locked in a closet as punishment for misbehavior. However, he "felt he had a good childhood" and did not report other trauma. At the time of his arrest, defendant was attending YMCA Central City College and working for the Kenwood Oakland Community Organization. Defendant was also ready to enter the Marine Corps, having registered and completed testing. At the time the PSI was conducted, defendant was drinking heavily and felt he

may have an alcohol problem. As for his criminal history, defendant had prior convictions for theft and robbery. He was on probation for the robbery when he committed the crimes at issue.

¶ 5 In urging the death penalty at the sentencing hearing, the State asserted that defendant committed felony murder and that Cherry "was shot down in cold blood for just a few dollars." Asked if he wanted to address the court, defendant noted that he had a motion for a new trial and asserted that he did not have a fair trial. The court stated that defendant did not seem bothered by the prospect of the death penalty and was "primarily concerned with the matter that transpired." The court added that defendant did not seem remorseful and did not appear to understand the gravity of the situation. The court further stated that it had observed defendant's conduct and demeanor "for quite a long time." Yet, in spite of a snicker on defendant's face, and "because of [defendant's] youth and because of [defendant's] background and so forth," the death penalty was not warranted. The court repeated that due to defendant's youth and lack of extensive criminal background, the State's request for the death penalty was denied. The State requested a life sentence instead, noting defendant's lack of remorse and describing the offense as "exceptionally brutal." The State added that defendant was currently 23 years old and "not a young person."

¶ 6 The court ultimately sentenced defendant to natural life without parole. In explaining the sentence, the court noted that it had considered whether defendant could be rehabilitated and further stated:

> "I've considered your youth and the nature of the charge, the heinous, willful and wanton misconduct on your behavior as a result of the death inflicted upon an individual that had absolutely no reason to be afraid. *** And the thing is it's

> tantamount to a jungle, and have individuals like you praying upon them has created a problem for our society and also for this Court.
>
> I've also considered that the public should be protected from individuals of your nature, and I seriously question myself whether or not I should impose the death sentence, but after I've seen your conduct before this Court, your demeanor, I can see there's absolutely *** no remorse about you, and I feel rehabilitation is absolutely impossible, because for a person to be rehabilitated he must in fact admit that he's done something wrong and he's seeking a desire of remorse for what he's done, and you have not displayed that at all, and accordingly, on the basis of that, after considering the nature of the charges, the necessity of protecting the public and heinous nature of the charges before this Court, it's the opinion of this Court that you be required to serve the rest of your nature [*sic*] life in the State Penitentiary without any parole."

¶ 7 The court later denied defendant's posttrial motion, stating that it had "considered every possible ramification" and "every door available for the defendant if he sought to seek the mercy of this Court, which he did not seek to do so for some reason." The court also recalled that it had reviewed the PSI and "considered that with reference to all the statements I made."

¶ 8 On direct appeal, defendant contended that the trial court abused its sentencing discretion when it failed to consider his rehabilitative potential, improperly based the sentence on a lack of remorse, and erroneously found that the murder was accompanied by brutal and heinous behavior. Defendant also asserted that his natural life sentence for armed robbery was improper and his conviction for armed violence must be vacated under the one-act, one-crime principles. See *People v. Smith*, No. 1-83-1305 (1984) (unpublished order under Illinois Supreme Court

Rule 23). In affirming defendant's sentence, the court noted that a natural life sentence may be imposed for a murder committed during the commission of a felony. *Id*. Further, the sentence was not an abuse of discretion. *Id*. The sentencing court's remarks about defendant's demeanor did not indicate that the life sentence was a penalty for maintaining his innocence. *Id.* Rather, the court properly considered defendant's demeanor as a factor in assessing his rehabilitative potential. *Id*. The court also reduced defendant's armed robbery sentence to six years' imprisonment and vacated his armed violence conviction. *Id*.

¶ 9 Beginning in 2000, defendant filed approximately 14 unsuccessful collateral attacks on his conviction and sentence. On February 14, 2017, defendant sought leave to file the instant successive postconviction petition. Defendant contended that two recently-decided cases applied to him: *People v. Harris*, 2016 IL App (1st) 141744, and *People v. House*, 2015 IL App (1st) 110580. According to defendant, the analyses in *Harris* and *House* reflected a changing belief that young adults can be rehabilitated. Defendant also stated that the Illinois Supreme Court has recognized that research on juvenile maturity and brain development might apply to young adults. Further, defendant averred that his trial counsel was ineffective because he advised defendant to stay silent during the sentencing hearing. Defendant asserted that if his counsel had told defendant to say he was sorry, perhaps he would have been eligible for parole. In support of this assertion, defendant pointed to the sentencing judge's statement that "for a person to be rehabilitated, he must in fact admit that he's done something wrong and he's seeking a desire of remorse for what he's done." Defendant's petition included information about his activities and progress in prison, including that he had written letters to Cherry's family members apologizing for the pain he caused. Further, defendant had renounced his gang affiliation and was

cooperating with an internal investigation about gangs in his prison. Defendant requested that the court vacate his natural life sentence and order resentencing in the 20- to 60-year range.

¶ 10 On March 24, 2017, the circuit court denied defendant leave to file his petition. The court found that defendant established cause for his claim that his sentence violates *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny because the cases he cited were not decided until after he filed his initial petition. However, defendant did not establish prejudice. Although *Harris* and *House* found that life sentences for two young adults violated the Illinois Constitution, the facts of those cases were distinguishable from defendant's circumstances. Addressing defendant's claim that his counsel was ineffective for advising him to remain silent during the sentencing hearing, the court found that defendant failed to allege cause for his failure to raise the claim in his initial petition. The court also stated that defendant failed to demonstrate prejudice because the judge's statement about seeking remorse was insufficient to establish that defendant would be eligible for parole if he had apologized. As an aside, defendant does not challenge on appeal the circuit court's rejection of his claim of ineffective assistance of counsel.

¶ 11 Defendant filed a motion to reconsider, asserting that the one to one-and-a-half year age difference between him and the defendants in *Harris* and *House* was an inadequate reason to deny his claim. Defendant also contended that his natural life sentence was unfairly disparate based on *Miller*, *Harris*, and *House*. The court denied the motion on May 10, 2017, and this appeal followed.

¶ 12 On appeal, defendant contends that the circuit court should have granted him leave to file his petition because his sentence violates the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. Defendant argues that he could not have filed his eighth amendment claim until *Miller* was found to apply retroactively. Further,

as a 20-year-old at the time of the offense, defendant also could not file his claim until *Harris* and *House* were decided, where those cases expanded *Miller*'s reasoning to defendants over 18 years old and relied on the Illinois proportionate penalties clause. Defendant acknowledges that the versions of *Harris* and *House* that he cited in his petition are no longer in effect, but states that they established cause at the time his petition was filed. Defendant further argues that the petition and record demonstrate that the evolving science on young adult brain development—a critical part of *Miller*—applies to his particular facts and circumstances. Defendant asserts that the sentencing court failed to adequately consider his youth, its attendant characteristics, and his unique potential for rehabilitation when it sentenced him to natural life in prison.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) provides a method by which people under criminal sentence can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings under the Act begin by filing a petition in the circuit court where the original proceeding took place. *Id*. "The Act contemplates the filing of a single petition" (*People v. Coleman*, 2013 IL 113307, ¶ 81), and "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived" (725 ILCS 5/122-3 (West 2016)). There are two instances where the bar against successive proceedings is relaxed: 1) when a petitioner shows actual innocence and 2) when a petitioner can establish "cause and prejudice" for not raising the claim earlier. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23. A defendant must obtain leave of court to file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2016).

¶ 14 Defendant asserts that he satisfied the "cause and prejudice" test. To establish "cause," the defendant must identify an objective factor that impeded his ability to raise the claim during his initial postconviction proceeding. *Id*. To establish prejudice, the defendant must show that the

claimed error "so infected the trial that the resulting conviction or sentence violated due process." *Id*. The cause-and-prejudice test involves a higher standard than the frivolously or patently without merit standard for the first stage of an initial postconviction petition. *People v. Smith*, 2014 IL 115946, ¶ 35. All well-pleaded facts in a successive petition are taken as true. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 77. Leave of court to file a successive petition should be denied when it is clear, from a review of the successive petition and accompanying documentation, "that the claims *** fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35. We review *de novo* the circuit court's denial of leave to file a successive petition. *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 32.

¶ 15 We first address defendant's eighth amendment claim. The eighth amendment prohibits "cruel and unusual punishments" and applies to the states through the fourteenth amendment. U.S. Const. amend. VIII; *People v. Davis*, 2014 IL 115595, ¶ 18. The United States Supreme Court has held that the eighth amendment prohibits capital sentences for juveniles who commit murder (*Roper v. Simmons*, 543 U.S. 551, 578-79 (2005)), mandatory life sentences for juveniles who commit nonhomicide offenses (*Graham v. Florida*, 560 U.S. 48, 82 (2010)), and mandatory life sentences for juveniles who commit murder (*Miller v. Alabama*, 567 U.S. 460, 489 (2012)). *People v. Buffer*, 2019 IL 122327, ¶ 16. In *Miller*, 567 U.S. at 471, the Supreme Court stated that children "are constitutionally different from adults for purposes of sentencing." Children have a "lack of maturity and an underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking." (Internal quotation marks omitted.) *Id*. Children are also more vulnerable to negative influences and outside pressures, have limited control over their own environment, and "lack the ability to extricate themselves from horrific, crime-producing

settings." *Id*. And, a child's character is not as well-formed as an adult's. *Id*. A child's traits are "less fixed" and his actions are "less likely to be evidence of irretrievable depravity." (Internal quotation marks omitted.) *Id*. *Miller* requires sentencing courts in homicide cases to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480. In *Montgomery v. Louisiana*, 577 U.S. —, 136 S.Ct. 736 (2016), the Supreme Court found that *Miller* applies retroactively.

¶ 16 The Illinois Supreme Court interpreted *Miller* to apply to discretionary life sentences, finding that "[l]ife 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." *People v. Holman*, 2017 IL 120655, ¶ 40. The court explained what a trial court must consider before sentencing a juvenile defendant to life without parole, including his age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences, his family and home environment, his degree of participation in the homicide, and his prospects for rehabilitation, among other factors. *Id*. ¶ 46.

¶ 17 Here, defendant acknowledges that, at 20 years old, he was not technically a juvenile at the time of his offense and so would not explicitly fall under *Miller*'s protection. Defendant contends that *Miller* should still directly apply to him, citing two cases from other jurisdictions where a court found that a natural life sentence for an 18-year-old violated the eighth amendment: *Cruz v. United States*, 2018 WL 1541898 (D. Conn. 2018), and *State v. O'Dell*, 358 P.3d 359 (Wash. 2015). We decline to follow those cases. We need not, and should not, consider foreign courts' determinations when there is substantial case law in our own state to answer the question presented. *People v. Qurash*, 2017 IL App (1st) 143412, ¶ 34. In Illinois, *Miller*'s eighth amendment protection only applies to juveniles and natural life sentences for young adults

have not been found to violate the eighth amendment. For purposes of challenging life sentences without parole, "the [Supreme] Court drew a line at the age of 18 years old," however arbitrary that line may be. *People v. Herring*, 2018 IL App (1st) 152067, ¶ 103 (citing *Roper*, 543 U.S. at 574). See also *People v. LaPointe*, 2018 IL App (2d) 160903, ¶ 47 (*Miller* does not apply to a life sentence imposed on someone who was at least 18 at the time of the offense and so the defendant did not show prejudice from omitting his eighth amendment claim from his initial postconviction petition); *People v. Pittman*, 2018 IL App (1st) 152030, ¶ 31 ("*Miller* protections under the eighth amendment are not implicated in cases of adult offenders"); *People v. Thomas*, 2017 IL App (1st) 142557, ¶ 28 (sentence for an adult defendant "that approaches the span of the defendant's lifetime" does not implicate the eighth amendment). Defendant's eighth amendment challenge to his natural life sentence fails.

¶ 18 Next, defendant asserts that his sentence violates the proportionate penalties clause of the Illinois Constitution. That 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." Ill. Const. 1970, art. 1, § 11. We assume that the proportionate penalties claim is not automatically defeated by the failure of defendant's eighth amendment claim. See *LaPointe*, 2018 IL App (2d) 160903, ¶¶ 51-53 (noting inconsistency about whether the eighth amendment and proportionate penalties clause are co-extensive and should be interpreted in "lockstep"). Defendant seeks to extend the reasoning in *Miller* to young adults under the proportionate penalties clause.

¶ 19 In his petition, defendant relied on two cases, both of which were subsequently affected by Illinois Supreme Court rulings: *People v. Harris*, 2016 IL App (1st) 141744 (*Harris I*), and *People v. House*, 2015 IL App (1st) 110580 (*House I*). In *Harris I*, 2016 IL App (1st) 141744,

¶¶ 58, 64, the appellate court found on direct appeal that an 18-year-old defendant's 76-year sentence violated the proportionate penalties clause, noting that the defendant had no prior criminal history and several other attributes that reflected his rehabilitative potential. The court stated that *Miller*'s analysis "applies with equal force under the Illinois Constitution" to someone like the defendant. *Id*. ¶ 62. The State appealed, contending that the defendant forfeited his as-applied challenge to his sentence by failing to raise it in the trial court. *People v. Harris*, 2018 IL 121932, ¶ 35 (*Harris II*). Our supreme court found that *Miller* did not directly apply to the defendant because he was an adult. *Id*. ¶ 45. Further, defendant's challenge was premature because the record did not "contain evidence about how the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision" applied to the defendant's specific facts and circumstances. *Id*. ¶ 46. The supreme court stated that the record needed to be developed and defendant's claim was more appropriate for another proceeding, such as a proceeding under the Act. *Id*. ¶ 48. Here, *Harris II* does not fully resolve the matter at hand. Though *Harris II* indicates that here, defendant raised his claim in the correct proceeding, the court did not consider the merits of the *Harris II* defendant's challenge.

¶ 20 Turning to the other case relied on by defendant, in *House I*, 2015 IL App (1st) 110580, ¶¶ 80, 83, the 19-year-old defendant appealed the second-stage dismissal of his postconviction petition, contending in part that his mandatory natural life sentence violated the proportionate penalties clause. The defendant had been found guilty of first degree murder and aggravated kidnapping. *Id*. ¶ 3. The court found that based on the defendant's age, family background, his actions as a lookout, and the lack of any prior violent convictions, his mandatory natural life sentence violated the proportionate penalties clause. *Id*. ¶ 101.

¶ 21 After the State appealed, our supreme court issued a supervisory order directing the appellate court to consider the effect of *Harris II* on the issue of whether the defendant's sentence violated the proportionate penalties clause. *People v. House*, 2019 IL App (1st) 110580-B, ¶ 1 (*House II*). After considering *Harris II*, the court still concluded that the defendant was entitled to a new sentencing hearing. *Id*. ¶ 32. The court stated that the defendant's "young age of 19 [was] relevant under the circumstances" and noted that his sentence "involved the convergence of the accountability statute and the mandatory natural life sentence." *Id*. ¶ 46. The court found it somewhat arbitrary that the age of 18 designates that someone is a mature adult and discussed recent research and articles that explain the differences between young adults and a fully mature adult. *Id*. ¶ 55. Moreover, recent trends indicated that defendants under 21 years old "should receive consideration for their age and maturity level when receiving harsh sentences." *Id*. ¶ 62. The court noted the particular considerations at play in the defendant's case: he "was barely a legal adult and still a teenager" when he committed the offenses, he did not have a history of committing violent crimes, he attended high school through twelfth grade but did not graduate, and he never knew his father, his mother died when he was 18, and he was raised by his maternal grandmother. *Id*. ¶ 63. The court added that the defendant's youthfulness was relevant when considered with his participation in the crimes, in which the defendant acted as a lookout as opposed to being the actual shooter. *Id*. ¶¶ 63-64. The court was also troubled by the sentencing court's inability to consider the goal of rehabilitation due to the mandatory nature of the defendant's sentence. *Id*. ¶ 64.

¶ 22 *House II* extended *Miller* principles to young adults under the proportionate penalties clause based on special circumstances that are not present in defendant's case. A key factor in *House II* was that the defendant was convicted via accountability, where defendant "merely acted

as a lookout" and was not present at the scene of the murder. *Id*. ¶ 46. The defendant was serving the same sentence that applied to someone who actually participated in the shootings, while another codefendant with similar culpability as the defendant had been released following resentencing because that codefendant was 17 years old during the offense. *Id*. Whether a defendant physically committed the offense is a significant consideration for courts tasked with deciding whether to extend *Miller* principles to a young adult under the proportionate penalties clause. See *People v. Pittman*, 2018 IL App (1st) 152030, ¶ 38 (*House I* did not apply where the 18-year-old defendant was the perpetrator of the violent stabbing deaths of three victims); *Thomas*, 2017 IL App (1st) 142557, ¶ 34 (*House I* did not apply where the 18-year-old defendant was the shooter and his convictions were based on his own actions instead of accountability for the acts of another); *People v. Ybarra*, 2016 IL App (1st) 142407, ¶ 27 (*House I* did not apply where the 20-year-old defendant was the one who "pulled the trigger"). These cases cited *House I*, but *House II* reiterated *House I*'s emphasis that the defendant was not the actual shooter. We cannot overlook that defendant himself robbed and shot and killed the victim.

¶ 23 Another significant consideration in *House II* was that the sentencing court could not consider any mitigating factors because of the mandatory nature of the defendant's sentence. *House II*, 2019 IL App (1st) 110580-B, ¶ 64. Here, defendant's life sentence was discretionary, which allowed the sentencing court to consider many different factors in determining a sentence. Although the State contended at the sentencing hearing that defendant was "not a young person," the court mentioned defendant's youth three times. Further, although defendant asserts that the court held defendant's silence against him, this court previously found on direct appeal that defendant's life sentence was not a penalty for maintaining his innocence and defendant's demeanor was properly considered in assessing his rehabilitative potential. *Smith*, 1-83-1305

(1984) (unpublished order under Illinois Supreme Court Rule 23). The sentencing court also indicated that it had reviewed the PSI, which included details about defendant's family background, education, and postsecondary plans. The sentencing court considered the mitigating evidence that defendant claims it ignored. And, because defendant was an adult, the actual perpetrator of the crime, and received a discretionary sentence, he is not entitled to a more in-depth consideration of his youth under *House II*.

¶ 24 Until a higher court or legislature says otherwise, we are bound by existing precedent. See *In re Clifton R.*, 368 Ill. App. 3d 438, 440 (2006) (the appellate court is bound to follow decisions of the Illinois Supreme Court); *People v. Jones*, 357 Ill. App. 3d 684, 694 (2005) (the legislature's function and role is to declare and define criminal offenses and determine the nature and extent of punishment for their commission). Defendant urges this court to apply the analysis used for a juvenile offender in *Miller*, 567 U.S. 460, and *Holman*, 2017 IL 120655, to him, a 20-year-old adult at the time of his offenses. We recognize that defendant is serving the harshest possible sentence that now exists in Illinois for a crime he committed as a young adult. Defendant's successive petition documents progress he has made in prison. Yet, we cannot make the leap that defendant requests based on existing law. Defendant has not shown prejudice and the trial court properly denied him leave to file his successive postconviction petition.

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

¶ 26 Affirmed.