Order

Michigan Supreme Court
Lansing, Michigan

November 22, 2023

163290 & (79)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163290
COA: 351700
Saginaw CC: 80-000118-FY

RICHARD GERALD MUSSELMAN,
Defendant-Appellant.

_____/

On December 21, 2022, the Court ordered oral argument on the application for leave to appeal the May 20, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered. The parties' stipulated motion to dismiss appeal and remand for a term-of-years sentence is DENIED. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE our order of December 21, 2022, VACATE the judgment of the Court of Appeals, VACATE the sentence of the Saginaw Circuit Court, and REMAND this case to the trial court for resentencing. A court may not impose a sentence of life without parole on a defendant who was under 18 years of age at the time of his crime unless the prosecution has overcome its burden to rebut the presumption, by clear and convincing evidence, that life without parole is a disproportionate sentence. *People v Taylor*, 510 Mich 112 (2022). Because the sentencing court in this case was not operating within this framework, the defendant is entitled to resentencing. *Id*.

VIVIANO, J. (*dissenting*).

For the reasons stated in my dissent in *People v Taylor*, 510 Mich 112 (2022), I do not believe there is a presumption that life without parole is a disproportionate sentence or that the prosecution is required to rebut this presumption in order for a court to impose a sentence of life without parole on a defendant who was under the age of 18 at the time of his crime. Therefore, I do not believe defendant is entitled to resentencing. I respectfully dissent.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 22, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD GERALD MUSSELMAN,

Defendant-Appellant.

UNPUBLISHED
May 20, 2021

No. 351700
Saginaw Circuit Court
LC No. 80-000118-FY

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

On June 25, 1980, a jury found defendant, a 15-year-old juvenile, guilty of two counts of first-degree murder, MCL 750.316, two counts of assault with intent to commit murder (AWIM), MCL 750.83, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On August 26, 1980, the trial court sentenced defendant to serve life in prison without parole for the first-degree murder convictions, life in prison for the AWIM convictions, and two years in prison for the felony-firearm conviction. Following the decisions of the United States Supreme Court in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718, 726, 732; 193 L Ed 2d 599 (2016), which require resentencing of juvenile defendants who were sentenced to life imprisonment without the possibility of parole, the prosecution moved to resentence defendant to life imprisonment without parole. After holding a *Miller* hearing, the resentencing court again imposed sentences of life without parole for defendant's first-degree murder convictions. We affirm.

I. FACTUAL BACKGROUND

For purposes of this appeal, the underling facts are not in dispute. On January 3, 1980, defendant and two others, Vance Duby and Harry Varney, perpetrated a "shooting rampage" in which two people were killed. A third shooting victim survived. Duby drove the vehicle and defendant used a "12-gauge shotgun" to shoot the victims. At the time of the shooting, defendant was 15 years old, Duby was 23, and Varney was 19. The group used a spotlight and defendant wielded the shotgun to "terrorize and kill other motorists at various locations in Saginaw." The

group chased, rammed into, and shot at numerous motorists. Most of the victims were African-American. Evidence revealed that defendant made numerous disparaging comments toward African-Americans; therefore, the prosecution's theory had been that the crimes were racially motivated.

At the *Miller* hearing, defendant called Dr. Jeffrey Wendt, a forensic psychologist, to testify concerning his evaluation of defendant. Overall, Dr. Wendt testified favorably about defendant and believed that he showed good potential for rehabilitation. Similarly, Larry Gudith, a Certified Recovery Coach, chaplain, and founder and director of Lifeline Prison Ministry, opined that defendant could successfully integrate back into society. The prosecution did not present any witnesses at the hearing. The resentencing court provided a detailed analysis of the attributes of youth discussed in *Miller* and considered and applied the factors articulated therein, and it ultimately concluded that defendant's case was the "rare case" in which life without parole continued to be the appropriate sentence. It found no *Miller* mitigating factors, and it explained its analysis of numerous factors in support of its sentence, including defendant's disturbing behavior before commission of the offenses, his need for psychiatric help, his failure to seek such help in prison, and the heinous nature of the murders. Accordingly, the court resentenced defendant to life in prison without parole.

II. STANDARDS OF REVIEW

We review sentencing decisions for an abuse of discretion. *People v Skinner*, 502 Mich 89, 131; 917 NW2d 292 (2018). A court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*. at 133. The trial court's fact-finding is reviewed for clear error and questions of law are reviewed de novo. *Id*. at 137 n 27.

III. ANALYSIS

A. THE *MILLER* FACTORS

In a recent decision, this Court summarized the procedure for use in resentencing in a "juvenile-lifer" case:

> Anticipating that the United States Supreme Court would give *Miller* retroactive effect, Michigan's Legislature designed a system for resentencing all prisoners serving life without parole who were under the age of 18 when they committed the offense. MCL 769.25a. In such cases, the resentencing court must select either life without parole or a term-of-years sentence. MCL 769.25a(2). Prosecutors seeking imposition of a life-without-parole sentence are obligated to file a motion specifying the grounds for imposing that punishment. MCL 769.25a(4)(b). The resentencing court then must hold a hearing to consider the juvenile sentencing factors set forth in *Miller* and other relevant information, including the defendant's "record while incarcerated." MCL 769.25(6). The court is additionally obligated to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). If the court elects a term-of-years sentence rather than life without parole, "the court shall sentence the individual to a term of

> imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25(9). [*People v Bennett*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350649); slip op at 2.]

This Court observed that the "*Miller* factors" and *Miller*'s holding are

> grounded in the propositions that "children are constitutionally different from adults for purposes of sentencing," "have diminished culpability and greater prospects for reform," and "are less deserving of the most severe punishments." The "distinctive attributes of youth" render the customary penological justifications for harsh sentencing—retribution, deterrence, and incapacitation—far less relevant in the context of minors. Rather than focusing on that traditional trio of sentencing factors, *Miller* requires judges to bear in mind that youth "is a time of immaturity, irresponsibility, impetuousness[,] and recklessness." These qualities, the Court stressed, are almost always "transient." [*Id.* at ___; slip op at 2-3 (citations omitted; alteration in original).]

This Court instructed that the *Miller* factors require that a trial court consider:

> "[T]he family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," that a youthful offender "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys" and "the possibility of rehabilitation[.]" [*Id.* at ___; slip op at 4 (citation omitted; third alteration in original).]

The trial court must also consider the defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at ___; slip op at 6.

A trial court may also "consider the traditional objectives of sentencing or other factors," including "(a) the reformation of the offender, (b) protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses." *Id.* at ___; slip op at 4 (quotation marks and citations omitted). Resentencing a juvenile lifer

> requires restructuring the evidentiary review; the older the adult, the larger the predictive canvas becomes. While the *Miller* factors remain highly relevant, a judge resentencing an offender who has served many years in prison has the benefit of actual data regarding whether the offender's life in prison is truly consistent with "irreparable corruption," the only ground *Miller* specifically identified for imposing a life-without-parole sentence. [*Id.* at ___; slip op at 5 (citation omitted).]

Although it will be a "rare" juvenile who is "irreparably corrupt" such that a life-without-parole sentence is warranted, *Miller* and *Montgomery* do not "require trial courts to make a finding of fact regarding a child's incorrigibility." *Skinner*, 502 Mich at 106, 122-123.

The United States Supreme Court recently revisited its *Miller* and *Montgomery* holdings in *Jones v Mississippi*, ___ US ___; ___S Ct ___; ___ L Ed 2d ___ (2021) and clarified that, although a sentencing court should follow the process specified in *Miller* before sentencing a juvenile defendant convicted of murder, as explained in *Montgomery*, a sentencing court does not have to make a finding of incorrigibility, because sentencing courts are not constitutionally required to make a separate factual finding that the defendant is permanently incorrigible before sentencing a juvenile offender to life without parole. *Id*. at ___; slip op at 7, 9, 11-14 (favorably quoting *Skinner*, 502 Mich at 122). Further, a sentencing court is not constitutionally required to provide an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility. *Id*. at ___; slip op at 14-19.

B. APPLICATION OF THE *MILLER* FACTORS

1. DEFENDANT'S AGE

Regarding defendant's age and his immaturity, impetuosity, and ability to appreciate consequences of his actions, the resentencing court did not find this a mitigating factor. It examined defendant's extensive school record and his disruptive, disturbing, and violent behavior. The court considered the extensive record evidence including the testimonies of many of defendants' teachers and social workers regarding defendant's behavior in school. A substitute teacher for defendant's sixth-grade class testified that defendant told her that he was going to kill someone and spend the rest of his life in prison, and he drew a violent, graphic picture that shocked her. A social worker testified that she and others were increasingly concerned by defendant's disturbing behavior, and that she believed defendant had been a "severely disturbed young man who needed psychiatric help" and who could "be a danger to himself or to others." Another social worker testified that defendant discussed "blow[ing]" people "away if they kept messing with him."

One of defendant's teachers had testified that defendant began exhibiting increasingly aggressive behavior toward other students in the month immediately preceding the murders, including locking an autistic student in a bathroom while laughing and enjoying it. Defendant had a habit of purposely targeting other students' weaknesses. Defendant told a classmate that he was capable of shooting someone. Another teacher testified that defendant used racist and violent language against African-Americans, intentionally injured students in gym class, and was "destined to hurt someone badly, possibly kill him, probably kill him, and probably sooner than later." The court also considered the testimony of Dr. Margaret Cappone, an expert psychologist, who had evaluated defendant and found that he exhibited sadistic pleasure from inflicting pain on others, and he displayed narcissistic, hostile, and antisocial personality traits. She also testified that defendant had a predisposition to be violent toward others.

Defendant's actions and predispositions prior to the offense supported the resentencing court's conclusion that, although young, defendant appreciated the nature of his violent actions, and that the attributes of youth, i.e., impetuosity and immaturity, were not mitigating factors. The court did not clearly err in this regard.

2. THE FAMILY AND HOME ENVIRONMENT

Regarding defendant's family and home environment, the resentencing court did not find this a mitigating factor because defendant had not been neglected and had been loved by his grandparents. The record evidence supported this conclusion. Defendant grew up living with his grandmother because his own mother gave birth as a teenager and could not properly care for him. Defendant had been very close to his grandfather prior to his death. Defendant and his grandmother "spent quite a bit of time together" and did things like chores, gardening, and mowing together. The record does indicate that defendant had less supervision as he grew older and spent his time with older individuals who were not good influences and that he also lacked a stable male role model, but defendant also had a "Big Brother" mentor with whom he did various activities, such as hunting, and the two had a good relationship. The record contains no evidence of physical or sexual abuse, or that defendant's household had been filled with criminality. The resentencing court did not clearly err regarding this factor because record evidence amply supported its conclusion.

3. THE CIRCUMSTANCES OF THE MURDERS AND PEER PRESSURE

Regarding the murders themselves and effects of any peer pressure, the resentencing court concluded from the record evidence that peer pressure, if any, had been minimal. The court gave little weight to Dr. Wendt's testimony to the contrary. The court also found that the circumstances of the murders were particularly heinous.

The record reflects that Dr. Cappone testified that she found that defendant did not like people, especially African-Americans, whom he "hate[d]." Defendant exhibited hostile, violent, and antisocial behavior, as well as elements of sadism. Dr. Cappone concluded that defendant was a sociopath. As previously discussed, the record contained the testimonies of various teachers and school officials regarding defendant's disturbing and violent actions before his commission of the charged offenses. While awaiting his trial, defendant told a juvenile inmate that he, Duby, and Varney planned to shoot some African-Americans. Defendant used the n-word regarding his targeted victims. Defendant told a jail inmate that he would "get off the hook" by "play[ing] crazy." As for the murders, the record supports the resentencing court's conclusion. Defendant and his codefendants purposely drove around looking for victims to target and defendant repeatedly shot at and otherwise terrorized several unsuspecting African-American motorists with the shotgun.

Ample record evidence supported the resentencing court's conclusion that defendant had not been subjected to pressure to commit the murders. The evidence established that defendant had disturbing, violent tendencies, hated African-Americans, exhibited sociopathic behavior, and enjoyed inflicting pain on others. Based upon the witnesses' testimonies and defendant's own admissions, the court could rationally conclude that, far from being pressured into committing the offenses of which he had been convicted, defendant purposely shot his victims. Defendant relies on evidence of his passive behavior and various conclusions drawn by Dr. Wendt, and contends that his witnesses were more credible and that the court should have given them more weight in its decision. The record reflects that the resentencing court considered defendant's witnesses' testimonies but appropriately found that the record evidence weighed against defendant regarding this *Miller* factor.

4. THE EFFECTS OF YOUTH

Regarding the effects of youth on defendant's ability to assist in his own defense and the possibility of being charged with a lesser crime, the resentencing court concluded that this was not a mitigating factor. We discern no error in this finding. Defendant presented no persuasive evidence demonstrating that his youth negatively affected his ability to present his defense. Defendant points to his incriminating admissions made to others after the murders. However, the fact that defendant incriminated himself to fellow inmates and to a neighbor is not dispositive; defendant fails to adequately establish how these instances were due specifically to his youth. Finally, defendant presents no persuasive evidence showing that, but for his youth, he would have been charged with a lesser offense. Based upon the evidence in this case, we are unpersuaded that defendant might have been charged with a lesser offense but for his youth and inexperience.

5. POSSIBILITY OF REHABILITATION

Regarding the possibility of rehabilitation factor, the resentencing court found that, although defendant had significantly improved his behavior and character in prison, this factor, one among many, in light of the totality of the circumstances did not outweigh all other factors. The record in this case supported the court's conclusion. As previously discussed, testimony of several witnesses in the record established that defendant exhibited particularly troublesome behavior before he went on his murder spree. Further, Dr. Cappone performed a thorough psychological evaluation, which included speaking to friends and family, as well as conducted a complete battery of various tests, from which she came to several troubling conclusions regarding defendant, including that he derived pleasure from inflicting pain on others. The court found Dr. Cappone's evaluation more credible than Dr. Wendt's. As a general matter, appellate courts refrain from interfering with a fact-finder's role of assessing the weight and credibility of evidence. *People v Kosik*, 303 Mich App 146, 150; 841 NW2d 906 (2013). The resentencing court also found it particularly troublesome that defendant had sought no psychological treatment in his entirety of time in prison. Moreover, defendant's supportive network outside of prison was dubious. Defendant presented nothing showing concretely where he would live, what he would do for work, and what his support structure would be if released. We discern no clear error in the court's findings and we decline to substitute our judgment for that of the resentencing court which had extensive knowledge of the facts and direct familiarity with the circumstances of the offense and the offender. See *Skinner*, 502 Mich at 134.

6. CONCLUSION

The resentencing court concluded that, although a juvenile rarely may be sentenced to life without parole, this case presented the rare instance necessitating such resentencing because defendant "was the only shooter and directly responsible for the death of both victims. Prior to these offenses, the defendant was fascinated with violence and openly discussed a desire to kill, particularly African-Americans." The court believed "that the defendant's conduct during these offenses and his behavior before these crimes reflect irreparable corruption, not merely the transient immaturity associated with youth," and that there were no mitigating *Miller* factors. The court opined that "the protection of society, punishment, and deterrence" weighed against a sentence for a term of years. The court neither clearly erred nor abused its discretion in resentencing defendant to life without parole.

C. DR. CAPPONE'S EVALUATION

Defendant also contends that Dr. Cappone's evaluation lacked reliability by modern standards and that this requires remand for a proper diagnosis and resentencing. This contention is unpersuasive because his own expert had limited knowledge of the evaluation and did not indicate that the 1980 evaluation was invalid.

Although Dr. Wendt expressed doubts about Dr. Cappone's evaluation and opined that it was "incomplete," he acknowledged that he did not "know every method and procedure that [Dr. Cappone] engaged in to come to these conclusions, so I can't speak to the thoroughness at the time." Dr. Wendt also testified that he had "no reason to say that it's inaccurate in terms of what she had to work with at that time." He further acknowledged he did not know on what Dr. Cappone had based her conclusions and opinions. On appeal, defendant compares the "Diagnostic and Statistical Manual of Mental Disorders" from 1980 with today's version. Defendant, however, did not proffer such a comparison at the *Miller* hearing. Further, at the *Miller* hearing, Dr. Wendt did not state that Dr. Cappone's evaluation lacked validity; he merely expressed his opinion that Dr. Cappone's evaluation was incorrect and perhaps incomplete, but admitted that he had no reason to believe it lacked accuracy by 1980's standards. Dr. Wendt simply came to a different conclusion than Dr. Cappone. We decline to interfere with the fact-finder's role of assessing the weight and credibility of evidence. *Kosik*, 303 Mich App at 150; *Skinner*, 502 Mich at 134. The resentencing court did not clearly err in this regard.

D. BURDEN OF PROOF

Finally, defendant argues that the prosecution should have borne the burden of proving beyond reasonable doubt that defendant was irreparably corrupt. We disagree.

As defendant acknowledges, there is nothing in *Miller*, Michigan statutory law, or Michigan caselaw that places a burden, or even suggests there is a burden, on the prosecution to prove beyond a reasonable doubt that a juvenile is irreparably corrupt. See *Miller*, 567 US at 489; MCL 769.25; MCL 769.25a; *Bennett*, ___ Mich App at ___; slip op at 2. The United States Supreme Court has recently clarified that a court sentencing a juvenile offender convicted of murder is not constitutionally required to find that the defendant is permanently incorrigible before sentencing such offender to life without parole. *Jones*, ___ US ___; slip op at 7-19. As previously discussed, although it will be a "rare" juvenile who is "irreparably corrupt" such that a life-without-parole sentence is warranted, neither *Miller* nor *Montgomery*, "require[s] trial courts to make a finding of fact regarding a child's incorrigibility" nor the juvenile's irreparable corruption. *Skinner*, 502 Mich at 106, 122-123, 126; *Jones*, ___ US ___; slip op at 14. Given that there is no requirement for a trial court to make a finding on whether a youth is irreparably corrupt, it follows that the prosecution does not bear the burden of proving beyond a reasonable doubt that a defendant is irreparably corrupt.

Further support against defendant's position lies in *Skinner*, in which our Supreme Court explicitly stated that there is no presumption against life without parole. *Skinner*, 502 Mich at 131. In fact, the Court stated that "there is language in *Montgomery* that suggests that the *juvenile*

offender bears the burden of showing that life without parole is not the appropriate sentence by introducing mitigating evidence." *Skinner*, 502 Mich at 131 (emphasis added).[1]

Therefore, in light of *Miller*, *Montgomery*, *Jones*, *Skinner*, and our Legislature's intent as evidenced in the plain language of MCL 769.25 and MCL 769.25a, which provide no suggestion of a burden of proof, we find defendant's position to be without merit. The resentencing court properly analyzed the record evidence and did not clearly err in its findings, and therefore, did not abuse its discretion by resentencing defendant to life without parole.

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford

[1] We note that our Supreme Court recently asked for briefing on the question of "which party, if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence." *People v Masalmani*, 503 Mich 1007 (2019). However, after considering the parties' briefs and arguments, the Court subsequently vacated its order and denied leave to appeal for failure to be "persuaded that the questions presented should be reviewed by this Court." *People v Masalmani*, 505 Mich 1090 (2020), cert pending.