

2014 IL App (2d) 130035-U
No. 2-13-0035
Order filed March 5, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 95-CF-573
)	
JOSEPH ARRIETA,)	Honorable
)	George J. Bakalis,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

RULE 23 ORDER

¶ 1 *Held: Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2469 (2012), applied retroactively to defendant's mandatory life sentence for multiple homicides, which was imposed when defendant was a minor. Under *Miller*, the trial court was required to have some discretion in imposing such a sentence, and the lack of discretion here rendered defendant's sentence void. Therefore, we affirmed the trial court's decision to grant defendant's section 2-1401 petition and allow him to obtain a new sentencing hearing.

¶ 2 Following a jury trial, defendant, Joseph Arrieta, was found guilty of two counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 1994)) and aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 1994)). Defendant was 17 years old at the time the crimes were committed.

He was sentenced to life imprisonment pursuant to section 5-8-1(a)(1)(c)(ii), which provides for mandatory life imprisonment for the murder of more than one victim. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994). At the time of sentencing, the trial court stated, “There is no discretion built into the statutory scheme that applies to the sentencing of this defendant.” Defendant appealed, and this court affirmed. *People v. Arrieta*, No. 2-96-0293 (1997) (unpublished order under Illinois Supreme Court Rule 23)).

¶ 3 Defendant subsequently filed numerous collateral attacks on his conviction and sentence. The trial court dismissed or denied these petitions, and the trial court’s rulings were all affirmed on appeal. See *People v. Arrieta*, No. 2-10-0382 (2011) (unpublished order under Illinois Supreme Court Rule 23)); *People v. Arrieta*, No. 2-06-0639 (2008) (unpublished order under Illinois Supreme Court Rule 23)); *People v. Arrieta*, No. 2-01-0492 (2002) (unpublished order under Illinois Supreme Court Rule 23)); *People v. Arrieta*, No. 2-97-1313 (1998) (unpublished order under Illinois Supreme Court Rule 23)).

¶ 4 On August 28, 2012, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). He argued that his sentence was unconstitutional and void under *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2469 (2012). In *Miller*, the United States Supreme Court held that the eighth amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, including those convicted of homicide. *Id.* at ___, 132 S. Ct. at 2469. The Supreme Court stated that a judge must have the opportunity to look at all of the circumstances involved before determining that life without the possibility of parole is the appropriate penalty. *Id.* In his section 2-1401 petition, defendant argued that because he was under the age of 18 when the crimes occurred and was given a mandatory life sentence, *Miller* requires that the case

be remanded for resentencing.

¶ 5 The State filed a motion to dismiss, arguing that: (1) defendant's petition was untimely; (2) defendant's sentence was not void and therefore not subject to collateral attack; and (3) *Miller's* holding does not apply retroactively. The trial court denied the motion to dismiss on November 15, 2012. It found that: *Miller* applied retroactively; under *Miller*, the statute under which defendant was sentenced was unconstitutional; and defendant was entitled to a new sentencing hearing. The case was continued, and on December 12, 2012, the trial court granted defendant's section 2-1401 petition. The State timely appealed.

¶ 6 I. Arguments on Appeal

¶ 7 In its initial brief, the State noted that this court and other courts have concluded that *Miller's* holding is retroactive, meaning that juvenile defendants who were given mandatory life sentences are entitled to new sentencing hearings. See *People v. Luciano*, 2013 IL App (2d) 110792; see also *People v. Gray*, 2013 IL App (1st) 112572; *People v. Williams*, 2012 IL App (1st) 111145; *People v. Morfin*, 2012 IL App (1st) 103568; *People v. Johnson*, 2013 IL App (5th) 110112, ¶ 22-24. However, the State argued that, pursuant to *Gray*, 2013 IL App (1st) 112572, a sentence imposed in violation of *Miller* is not void and therefore cannot be attacked in an untimely section 2-1401 petition. According to the State, the trial court lacked authority to grant defendant relief on his petition.

¶ 8 In his brief, defendant argued that his sentence is unconstitutional and void under *Miller* and therefore could be challenged in a section 2-1401 petition. Defendant also stated that the State had "abandoned" its primary argument before the trial court that *Miller* does not apply retroactively to a collateral challenge to a sentence.

¶ 9 The State subsequently filed a motion for leave to file a supplemental brief, alleging that

it had inadvertently neglected to include the retroactivity argument in its opening brief. This court granted the State's motion and allowed defendant to file a supplemental response. In that brief, defendant argued that the lower court correctly found that the rule announced in *Miller* applies retroactively to cases on collateral review.

¶ 10 A. Retroactivity of *Miller*

¶ 11 We first address the State's argument that the holding in *Miller* does not apply retroactively to collateral proceedings. Whether a new rule applies retroactively is a question of law that we review *de novo*. See *People v. Atkins*, 217 Ill. 2d 66, 68 (2005). As stated, the State recognizes that this court has held that *Miller* applies retroactively (*Luciano*, 2013 IL App (2d) 110792), as has the First District (*Gray*, 2013 IL App (1st) 112572; *Williams*, 2012 IL App (1st) 111145; *Morfin*, 2012 IL App (1st) 103568)). The Fifth District recently reached the same conclusion. *Johnson*, 2013 IL App (5th) 110112, ¶ 22-24.

¶ 12 As the State urges us to reconsider our decision in *Luciano*, we examine in depth our analysis on the issue of *Miller's* retroactive application. We stated as follows in *Luciano*. New constitutional rules generally will not be applied retroactively to a case on collateral review because the State has a legitimate interest in the finality of criminal convictions. *Luciano*, 2013 IL App (2d) 110792, ¶ 51. However, under *Teague v. Lane*, 489 U.S. 288, 301 (1989), a new constitutional rule will apply retroactively if either (1) the new rule placed certain kinds of primary, private individual conduct beyond the power of criminal-law-making authority to proscribe, or (2) the new rule required the observance of procedures implicit in the concept of ordered liberty. *Id.* The first exception pertains to substantive rather than procedural rules, but it includes substantive rules that limit the penalty that applies to a particular defendant. *Id.* ¶ 52. See also *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (first exception applies where the new rule

decriminalizes any class of conduct). The second exception applies to procedural rules only, specifically watershed rules that affect the likely accuracy of a conviction. *Luciano*, 2013 IL App (2d) 110792, ¶ 52.

¶ 13 The State argued in *Luciano*, as it does again here on appeal, that *Miller* does not fit into the first *Teague* exception because *Miller* set forth only the procedure for sentencing a juvenile defendant and did not altogether ban the imposition of life sentences on juveniles. *Id.* ¶ 53. This court disagreed, relying on *Morfin*. There, the court stated that because *Miller* required consideration of a wider sentencing range than previously provided by statute for minors convicted of first-degree murder, it categorically broadened the sentencing range and was therefore a substantive rule. *Id.* (citing *Morfin*, 2012 IL App (1st) 103568, ¶ 56). We continued:

“[W]hile *Miller* can be read to announce a procedural rule, namely, the requirement that youth-related mitigation be considered in any sentencing hearing in which a minor would otherwise be subject to a mandatory natural-life sentence, there is a valid and substantive distinction between the pre-*Miller* sentencing regime and the *Miller*-mandated broader range of sentencing options that courts are to consider. Accordingly, we accept and choose to follow the holding in *Morfin* and agree that *Miller*'s rule is better understood to be a substantive rule and not a solely procedural rule.” *Id.*

¶ 14 The State further argued in *Luciano*, as it does in this appeal, that *Miller* falls outside of the second *Teague* exception because it does not create a watershed rule of criminal procedure, such as in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* ¶ 60. We noted that another First District case had determined that *Miller* actually created such a watershed rule. *Id.* (citing *Williams*, 2012 IL App (1st) 111145, ¶ 52-53); see also *Johnson*, 2013 IL App (5th) 110112, ¶ 22 (agreeing with *Williams*). Still, we stated that, based on our determination that *Miller* fell within

the first exception, we did not need to address whether it also fell into the second exception. *Luciano*, 2013 IL App (2d) 110792, ¶ 52.

¶ 15 Having reviewed our decision in *Luciano*, we continue to find its reasoning sound that *Miller* falls within the first *Teague* exception and therefore applies retroactively. As the State recognizes, all Illinois cases that have reviewed this issue have reached the same result. The State's current argument on the first exception adds nothing new to the conversation, and we therefore do not discuss it further.

¶ 16 B. Whether Sentence is Void

¶ 17 We next address the argument that the State raised in its original brief, namely whether defendant may obtain the relief he seeks through a section 2-1401 petition.

¶ 18 Section 2-1401 allows for relief from final orders and judgments more than 30 days but less than two years after their entry. 735 ILCS 5/2-1401 (West 2012). Here, defendant filed his petition well beyond the two-year period. However, defendant brought his petition under section 2-1401(f) (735 ILCS 5/2-1401 (West 2012)), which provides that the two-year limitation period does not apply to void judgments. *People v. Lawton*, 212 Ill. 2d 285, 308 (2004). Therefore, in granting defendant's petition, the trial court implicitly found that defendant's sentence was void. Whether a judgment is void presents a question of law that we review *de novo*. *People v. Rodriguez*, 355 Ill. App. 3d 290 (2005). Likewise, where a trial court rules on a section 2-1401 petition based on the pleadings alone, without an evidentiary hearing, we review its decision *de novo*. See *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 19 The State argues that defendant's sentence is not void, but rather merely voidable, and therefore the petition is untimely. See *People v. Moran*, 2012 IL App (1st) 111165, ¶ 32 (where the defendant's section 2-1401 petition was filed outside of the two-year statutory period and the

challenged order was voidable rather than void, the trial court should have granted the State's motion to dismiss the petition). Our supreme court discussed the distinction between the terms "void" and "voidable" in *People v. Davis*, 156 Ill. 2d 149 (1993). It stated as follows. The terms have been employed interchangeably in judicial decisions so often that it is necessary to look at the term's context to determine its intended meaning. *Id.* at 155. A void judgment is one where the court lacked jurisdiction to enter the judgment; a void judgment can be attacked directly or indirectly at any time. *Id.* Conversely, a voidable judgment is one that a court with jurisdiction entered erroneously; a voidable judgment is not subject to collateral attack. *Id.* at 155-56. In Illinois, jurisdiction is conferred by our constitution, which gives circuit courts jurisdiction over all justiciable matters. *Id.* at 156. There are three "element[s]" of jurisdiction: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) "the power to render the particular judgment or sentence." *Id.*; see also *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002) (referring to the same three categories). Regarding the third category, "jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right." *Id.* A court that has jurisdiction will not lose jurisdiction because of a mistake of law or fact, or both, though a judgment may be void where the court exceeded its jurisdiction. *Id.*

¶ 20 The State argues that the mandatory life sentencing statute is not void *ab initio*. *Void ab initio* means that the statute was constitutionally infirm from the moment it was first enacted and is, therefore, unenforceable. *People v. Blair*, 2013 IL 114122, ¶ 30. The State points out that our supreme court has stated that the void *ab initio* doctrine applies only to facially unconstitutional statutes, which occurs when there are no set of circumstances under which the statute would be

valid. *People v. Jackson*, 199 Ill. 2d 286, 300-01 (2002). The State notes, and we agree, that because section 5-8-1(a)(i)(c)(ii) can still be applied to offenders 18 years and older, the statute is not facially unconstitutional. Defendant responds that he is not arguing that the statute is void *ab initio*, but rather that the sentencing judgment against him is void.

¶ 21 The State relies primarily on *Gray* for its argument that a sentence imposed in violation of *Miller* is not void and cannot be attacked in an untimely section 2-1401 petition. In *Gray*, the defendant, a minor, was sentenced to mandatory life imprisonment under section 5-8-1(a)(i)(c)(ii). *Gray*, 2013 IL App (1st) 112572, ¶ 1. About ten years later, he filed a petition under section 2-1401, arguing that his conviction and sentence were void because the indictment cited the wrong statute. *Id.* ¶¶ 1-5. The State filed a motion to dismiss, and the trial court granted the motion. *Id.* ¶ 5. On appeal, the defendant argued for the first time that his sentence was void under *Miller*. *Id.* ¶ 8.

¶ 22 The *Gray* court concluded that defendant's sentence was voidable rather than void. The *Gray* court stated that "that which is unconstitutional is not necessarily void." *Id.* ¶ 10. It reasoned that: section 5-8-1(a)(i)(c)(ii) is not unconstitutional on its face following *Miller* because it still applies to adult defendants; *Miller* did not divest any state or court of the authority to sentence a minor defendant to life imprisonment after being convicted of multiple homicides; and while the mandatory imposition of a life sentence might have violated the defendant's constitutional rights, the violation did not divest the trial court of jurisdiction over him. *Id.* ¶ 11; see also *Chambers*, 2013 IL App (1st) 100575, ¶¶ 38-39 (following *Gray*). The *Gray* court therefore affirmed the trial court's dismissal of the defendant's section 2-1401 petition. *Id.* ¶ 15. In doing so, it stated that the defendant still had an avenue available for relief because he could

raise the issue in a postconviction petition, which allows a defendant to challenge his conviction based on a deprivation of constitutional rights. *Id.* ¶ 13.

¶ 23 In reaching its decision, the *Gray* court disagreed with *Luciano*, where this court stated that a defendant may challenge at any time a sentence that contravenes the constitution, and that the defendant's argument was a proper voidness challenge to his sentence. *Luciano*, 2013 IL App (2d) 110792, ¶ 48. The *Gray* court stated that although a defendant may generally raise a constitutional challenge to a criminal statute for the first time on appeal, such a principle had not been applied to a situation where a defendant filed an untimely section 2-1401 petition, failed to establish an exception to the untimeliness, and did not establish a claim of voidness. *Gray*, 2013 IL App (1st) 112572, ¶ 12.

¶ 24 The State argues that we should follow *Gray*. It suggests that *Luciano* is not really at odds with *Gray* because *Luciano*'s analysis was directed at a voidability argument rather than a voidness argument. The State further notes that the procedural posture in *Luciano* was different than *Gray* and the instant case because the *Luciano* defendant filed a postconviction petition, which *Gray* states is the more appropriate vehicle in which to bring a *Miller* claim. The State maintains that to the extent a conflict exists, we should reconsider the language we employed in *Luciano*.

¶ 25 Defendant states that *Gray*'s statement of "that which is unconstitutional is not necessarily void" is true to an extent. Defendant cites the example that a conviction obtained in violation of a defendant's constitutional right to remain silent will be allowed to stand if the error did not cause prejudice. See *People v. Laliberte*, 246 Ill. App. 3d 159, 172 (1993). Defendant maintains that in such a case, however, it is the erroneous evidentiary ruling that is

unconstitutional, not the judgment itself. Defendant argues that here, in contrast, the sentence itself is unconstitutional under *Miller* and therefore void.

¶ 26 Defendant further argues that in *Luciano*, it is readily apparent that we found the defendant's sentence void rather than voidable. Defendant contends that while the State tries to distinguish *Luciano* from *Gray* on the basis that *Luciano* was an appeal from a postconviction petition, the *Gray* court cited no authority for its theory that a voidness challenge to an unconstitutional judgment brought under section 2-1401 differs from such a challenge raised for the first time on a postconviction appeal.

¶ 27 Defendant cites *Rodriguez*, 355 Ill. App. 3d 290, in support of his argument that retroactive application of *Miller* to his sentencing proceedings renders the sentencing court without jurisdiction to impose a mandatory life term, and so renders his sentence void. In *Rodriguez*, the trial court determined that the parking lot of a gas station, where the crime took place, was part of the public way, requiring transfer of the minor defendant from juvenile court to the adult court based on a provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-4(7)(a) (West 1992)). *Rodriguez*, 355 Ill. App. 3d at 291. Years later, this court found that the parking lot was not a public way, so the transfer was not authorized under the Juvenile Court Act. *Id.* at 295-96. Therefore, we concluded that the defendant should not have been tried as an adult, and that his conviction and sentence were void. *Id.* at 296. Defendant argues that as in *Rodriguez*, retroactive application of *Miller* to defendant's sentencing proceedings renders the sentencing court without jurisdiction to impose a mandatory life term.

¶ 28 We agree with defendant's arguments. First, *Luciano* found that the defendant's sentence was void rather than voidable, and this conclusion was not tied to defendant's appeal being from a postconviction petition as opposed to a section 2-1401 petition. See *Luciano*, 2013 IL App

(2d) 110792, ¶¶ 46, 48. Therefore, *Luciano's* holding on this subject cannot be reconciled with *Gray*. Second, every constitutional error does not render a conviction or sentence void. See, e.g., *People v. Hubbard*, 2012 IL App (2d) 101158, ¶¶ 23, 25 (involuntary guilty plea violated the defendant's due process rights but did not render his conviction void). Rather, as pertinent here, the voidness doctrine applies where the *sentence itself* is unconstitutional or was imposed in violation of a statute. See *People v. Brown*, 225 Ill. 2d 188, 203 (2007) ("A sentence which exceeds statutory maximums or violates the constitution is void from its inception and subject to challenge at any time"); see also *Luciano*, 2013 IL App (2d) 110792, ¶ 46 (citing *Brown* for this proposition). In this manner, it was beyond the trial court's jurisdictional authority, in that the trial court lacked, albeit retroactively, the power to impose the sentence. See *Davis*, 156 Ill. 2d at 156 (discussing three elements of jurisdiction).

¶ 29 Here, at the time of sentencing, the trial court was required to sentence defendant to life imprisonment under section 5-8-1(a)(1)(c)(ii). However, based on the retroactive application of *Miller*, that mandatory sentence is unconstitutional, making defendant's sentence void. The State repeatedly emphasizes that *Miller* does not prohibit the imposition of life sentences on juveniles, but reliance on this point is without merit, for as we concluded in *Luciano*, "the sentencing range for minors convicted of first-degree murder has been broadened categorically." *Id.* ¶ 57. Accordingly, we affirm the trial court's judgment vacating defendant's sentence and ordering a new sentencing hearing at which all permissible sentences may be considered. See *id.* ¶ 62.¹ The trial court is no longer limited to imposing the sentence of life without parole, though such a sentence is still permissible in the most serious cases. See *id.* ¶ 63.

¹ We note that although it did not address the issue of voidness in any detail, *Morfin* also allowed the defendant to obtain a new sentencing hearing under *Miller* by means of a section 2-

¶ 30 Based on our conclusion that defendant can obtain a new sentencing hearing under *Miller* by means of a section 2-1401 petition, we do not address his alternative argument that we may recharacterize his 2-1401 petition as a postconviction petition in order to grant the relief he seeks.

¶ 31

III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.

1401 petition. *Morfin*, 2012 IL App (1st) 103568, ¶ 1.