

No. 1-13-3515

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 96 CR 10552
)	
DOIAKAH GRAY,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the circuit's court's denial of leave to file a successive *pro se* petition for postconviction relief because defendant has failed to meet the requirements of the cause and prejudice test because the new rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), does not apply to a juvenile who was not sentenced to death or mandatory life in prison without parole.

¶ 2 Defendant Doiakah Gray appeals from the circuit court's order denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et*

seq. (West 2012). Defendant contends the circuit court erred by denying him leave to file the petition because he has shown the requisite cause and prejudice, and may therefore raise his claim that his 80-year extended-term prison sentence is a *de facto* life sentence imposed upon a juvenile in violation of *Miller v. Alabama*, 132 S. Ct. 2455 (2012). We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder and sentenced to an extended-term sentence of 80 years in prison for the December 1994 shooting death of the victim Donald Rietveld.

¶ 4 The evidence at defendant's trial established that after the victim gave defendant his cellular phone to make a call, defendant ran off with it and the victim chased him. Codefendant Tommy Smith subsequently fired a gun at the victim's head and the victim fell to the ground. In his inculpatory statement, defendant stated that he planned to steal the victim's cellular phone, that he ran off with it, and that he "figured" that because the victim knew him he "had to finish things" by shooting the victim three times in the head. Although defendant testified that he was home for most of the day of the victim's death and only learned of the shooting four or five days after it took place, the jury ultimately found defendant guilty of first degree murder.

¶ 5 At sentencing, the State argued in aggravation that defendant could have taken the victim's phone through a beating rather than by shooting him in the head when he was already wounded on the ground. The defense argued in mitigation that defendant was only 17 years old at the time of the offense and a life sentence would "throw away" any chance of rehabilitation. In sentencing defendant, the trial court stated that defendant planned to carry out the theft of the victim's phone, made a conscious decision to execute the victim, and that the offense was "accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty." In sentencing defendant to an extended-term sentence of 80 years in prison, the court stated that

"defendant at the age of seventeen" chose the "low road," but that "some day defendant will have the opportunity to get out and see society again."

¶ 6 On appeal defendant contended, *inter alia*, that the trial court abused its discretion in sentencing him to 80 years in prison because the court failed to consider his potential for rehabilitation. On appeal, the reviewing court determined that defendant waived consideration of this issue on appeal by failing to file a postsentencing motion in the trial court; therefore, the court affirmed the judgment of the trial court. See *People v. Gray*, 326 Ill. App. 3d 906, 913 (2001).

¶ 7 In 2002, defendant filed, through counsel, a postconviction petition alleging, *inter alia*, that he was denied the effective assistance of trial and appellate counsel because counsel failed to file a postsentencing motion or preserve for appeal the trial court's consideration of various aggravating factors at sentencing. Defendant subsequently filed an amended petition. The State filed a motion to dismiss which the circuit court granted. This judgment was affirmed on appeal. See *People v. Gray*, No. 1-04-1771 (2006) (unpublished order under Supreme Court Rule 23). In 2008, defendant filed a *pro se* motion for leave to file a successive postconviction petition. The circuit court denied defendant leave to file the petition, and that judgment was affirmed on appeal. See *People v. Gray*, 2011 IL App (1st) 091689, ¶¶ 13-16.

¶ 8 In September 2013, defendant filed a *pro se* petition for leave to file a successive postconviction petition relying, in pertinent part, on *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to challenge the imposition of an 80-year extended-term prison sentence upon a juvenile. The circuit court denied defendant leave to file the petition. Defendant now appeals.

¶ 9 The Act permits the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2012)), and such leave is granted only when a defendant shows cause for his failure to

bring the claim in his initial postconviction petition and prejudice resulting from that failure (*People v. Evans*, 2013 IL 113471, ¶ 10). A defendant must establish both elements of the cause-and-prejudice test in order to prevail. *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). To show cause, a defendant must identify an objective factor that impeded his ability to raise a specific claim during the initial postconviction proceedings. *Evans*, 2013 IL 113471, ¶ 10. To show prejudice, a defendant must demonstrate that the claim not raised in the initial petition so infected the trial that the resulting conviction or sentence violated due process. *Id.*

¶ 10 In *People v. Smith*, 2014 IL 115946, ¶ 35, our supreme court reiterated that "the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard." See also *People v. Edwards*, 2012 IL 111711, ¶ 29 (successive postconviction proceedings are disfavored). A circuit court should deny a defendant leave to file a successive postconviction petition "when it is clear, from a review of the successive petition and the documentation submitted ***, that the claims alleged *** 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* whether a defendant has fulfilled his burden to justify further proceedings on a successive postconviction petition. *Id.* ¶ 21.

¶ 11 In the instant *pro se* successive postconviction petition, defendant contends that his 80-year extended-term sentence for murder was a *de facto* life sentence imposed upon a juvenile in violation of the Supreme Court's holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012). He contends that he has established cause because he filed a initial postconviction petition in 2002, and *Miller*, which declared a new substantive rule that applies retroactively to cases on collateral review (see *People v. Davis*, 2014 IL 115595, ¶¶ 38-40), was decided in 2012. Defendant further

contends that he has shown prejudice because his *de facto* life sentence was imposed without consideration of the "special characteristics" of juveniles.

¶ 12 The State responds that defendant does not fall under the new rule announced in *Miller* because he was not sentenced to life in prison without the possibility of parole; rather, he was sentenced to 80 years in prison. The State also argues that because defendant was sentenced prior to the enactment of the truth-in-sentencing law he will receive day-for-day credit on his sentence and will "likely" serve only 40 years in prison. Defendant acknowledges that unlike the *Miller* defendants he was not sentenced to a single prison term of natural life without the possibility of parole but argues that his sentence is effectively the same, which makes it cruel and unusual punishment.

¶ 13 In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court held that mandatory life sentences without parole for defendants under the age of 18 at the time of their crimes is a cruel and unusual punishment and, therefore, violates the eighth amendment. *Id.* at 2460. However, the *Miller* court did not ban the sentencing of juveniles to life in prison without parole; rather, it concluded that sentencing courts must retain the discretion "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime of prison." *Id.* at 2468-69

¶ 14 In *People v. Patterson*, 2014 IL 115102, a juvenile sentenced to a prison term totaling 36 years, that is, three consecutive prison terms of 12 years, relied on *Miller* to argue youthfulness must be considered whenever a harsh adult sentence was imposed on a minor because juveniles' distinctive traits are not crime-specific. Our supreme court determined that although the defendant's sentence was "lengthy," it was not comparable to either the death penalty or a sentence of life in prison without parole. *Id.* ¶ 108. The court noted that the Supreme Court "has

clearly distinguished the latter sentences from any others, noting both the uniqueness of the "severity and irrevocability" of the death penalty and the "characteristics with death sentences that are shared by no other sentences" besides life without parole." *Id.*, quoting *Graham v. Florida*, 560 U.S. 48, 69 (2010), quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

¶ 15 Our supreme court then noted that the Supreme Court has held that a state is not required to guarantee eventual freedom to a juvenile but is only required to give such a defendant a meaningful opportunity to be released based upon his demonstrated rehabilitation. *Id.* ¶ 108, citing *Graham*, 560 U.S. at 75. The court then reiterated that it had declined to expand this narrow rule to all juveniles sentenced to life in prison without parole for homicides. *Id.* ¶ 109, citing *Davis*, 2014 IL 115595, ¶¶ 48-49. Therefore, the court rejected the defendant's argument that a 36-year term of imprisonment for a juvenile who had committed three counts of aggravated criminal sexual assault fell under *Miller* because the holdings of *Graham* and *Miller* are "closely limited" and invoked only in the context of the "most severe of all criminal penalties." *Id.* ¶ 110. See also *People v. Cavazos*, 2015 IL App (2d) 120171, ¶ 99 (rejecting the defendant's argument that his 75-year aggregate sentence was a *de facto* life sentence which fell under *Miller* as there are "distinct differences between a sentence of natural life without parole and a sentence of a determinate, albeit lengthy, number of years"); *People v. Reyes*, 2015 IL App (2d) 120471, ¶ 23 (declining to extend the rationale of *Miller* to a defendant who was sentenced to an aggregate term of 97 years' imprisonment because he did not receive the most severe of all possible penalties, *i.e.*, death or life without the possibility of parole); but see *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 58 (remanding for a new trial while noting that "the convergence of mandatory minimum and mandatory consecutive sentences, as applied to juveniles, resulting in a sentence that exceeds the juvenile's life expectancy, raises serious constitutional issues").

¶ 16 Here, defendant contends that the 80-year sentence imposed by the trial court was a *de facto* life sentence and therefore violated *Miller*.¹ However, courts have rejected such an argument, noting that there are distinct differences between a sentence of natural life without parole and a sentence of a set, albeit lengthy, number of years. See, e.g., *Patterson*, 2014 IL 115102, ¶¶ 107-111; *People v. Gay*, 2011 IL App (4th) 100009, ¶¶ 19-20, 22-25 (defendant's aggregate 97-year sentence was not a *de facto* life sentence without parole). Contrary to defendant's argument on appeal, *Miller* merely stands for the proposition that the state cannot impose adult mandatory maximum penalties on a juvenile without permitting the sentencing authority to take the defendant's youth and other characteristics into consideration. See *Cavazos*, 2015 IL App (2d) 120171, ¶ 98, quoting *Miller*, 132 S. Ct. at 2475 (emphasis omitted) (concluding that *Miller* only stands for proposition that " 'a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles' "); *Reyes*, 2015 IL App (2d) 120471, ¶ 11 ("*Miller* did not preclude a sentence of life without parole for homicide offenders; it required only that the trial court first consider the special characteristics of young offenders, such as immaturity, impetuosity, and the failure to appreciate risks and consequences, before imposing such a sentence on a juvenile defendant.").

¶ 17 Here, the trial court considered defendant's age and actions in the commission of the offense at sentencing. The court noted that defendant was 17 at the time of the offense and made the "conscious decision" to shoot the victim in the head multiple times. However, the court also stated that defendant would have the opportunity to rejoin society at the completion of his prison

¹ Defendant relies upon several studies regarding life expectancy for his conclusion that his sentence is a *de facto* life sentence. Although we question defendant's interpretation of these mortality tables, such sources do not qualify as relevant authority on appeal and will not be considered. See *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

term. In the case at bar, defendant was not sentenced pursuant to a sentencing scheme which mandated a sentence of life in prison without parole. More importantly, consistent with *Miller's* requirement that a sentencing court retain some discretion to consider a juvenile's youth before imposing a severe sentence (see *Miller*, 132 S. Ct. at 2474-75), the trial court in this case had the discretion to impose a sentence between 20 years and life in prison (see 730 ILCS 5/5-8-1(a)(1), (a)(1)(b) (West 1994)). While defendant was under 18 years of age when he committed the crime, he was not sentenced to death or natural life in prison without the possibility of parole.

¶ 18 Although defendant argues on appeal that it is likely that our supreme court or the United States Supreme Court will ultimately expand the scope of *Miller* to include lengthy, *de facto* life, sentences, neither court has done so yet. Accordingly, based upon current precedent including our supreme court's pronouncement in *Patterson*, we decline to extend the rule in *Miller* to the facts of this case. Ultimately, because the rule announced *Miller* does not apply to those juveniles who are sentenced to determinate, albeit lengthy, term of imprisonment (see *Patterson*, 2014 IL 115102, ¶¶ 107-111), defendant has failed to establish prejudice and the circuit court properly denied him leave to file the instant successive postconviction petition. See *Pitsonbarger*, 205 Ill. 2d at 464 (both elements of the cause-and-prejudice test must be met for a defendant to prevail).

¶ 19 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.