2016 IL App (3d) 130661-U

Modified upon denial of rehearing filed June 6, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRED KOGER, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois, Appeal No. 3-13-0661 Circuit No. 95-CF-696 Honorable Clark Erickson, Judges, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's petition to vacate his sentencing order was barred by principles of *re judicata* and was not available as a means to raise an as-applied constitutional challenge to the propriety of his mandatory natural life sentence.

¶ 2 The defendant, Fred Koger, appeals from the dismissal of his petition seeking relief from a judgment imposing a mandatory natural life sentence without the possibility of parole following his conviction for two murders in 1995. The petition was filed pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). The

circuit court of Kankakee County dismissed the petition on timeliness and *res judicata* principles. On appeal, the defendant maintains that the trial court erred dismissing his petition on *res judicata* principles, maintaining that this sentence was imposed by an order void *ab initio*. The defendant raises the additional argument on appeal that his sentence was unconstitutional as applied in his case and constituted cruel and unusual punishment under the holding in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2344 (2012).[1]

¶ 3 BACKGROUND

¶ 4 The underlying details of the defendant's conviction and sentences have been previously detailed in the decision of this court on his direct appeal. *People v. Koger*, 287 Ill. App. 3d 764 (1997). The facts relevant to the instant appeal are that the defendant was 19 years of age at the time of the offenses and that he was sentenced to a statutorily imposed mandatory natural life sentence. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994) (natural life sentence for a defendant "found guilty of murdering more than one victim")). On direct appeal, the defendant maintained, *inter alia*, that his mandatory life sentence was unconstitutional because it precluded consideration of his rehabilitative potential. This court disagreed and affirmed the sentence. *Id.* at 767. Subsequently, the defendant filed petition in 1999 under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998), and two petitions under section 2-1401 of the Code, one in 2010 and another in 2012. None of these prior post-judgment proceedings raised the issue of his mandatory natural life sentence.

¶ 5 On August 27, 2012, the defendant filed the petition at issue in the instant appeal. He appeals the trial court's dismissal of the petition on *res judicata* principles arguing that his

[1] The State concedes that the trial court erred in *sua sponte* dismissing the petition for lack of timeliness. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001).

sentence was void *ab initio* and thus not subject to the *res judicata* bar. *People v. Kidd*, 398 Ill. 405, 410 (1947) (finding that a void judgment is not subject bar under *res judicata*). In addition, the defendant maintains that his *Miller* claim is not subject to *res judicata*. *People v. Davis*, 2014 IL 11559, ¶ ¶ 34-39; *People v. Morfin*, 2012 IL App (1st) 1035683 ¶ ¶ 24, 48-54 (holding that *Miller* claim raised by juvenile offenders are not barred by *res judicata*). He further argues that his sentence is unconstitutional as applied to him where he was not permitted to present individualized sentencing mitigation factors including his youthful age, the fact that he was found guilty for the two murders under an accountability theory, as well as other mitigating personal characteristics. He further maintains that *Miller* supports his as-applied constitutional challenge.

¶ 6 During the pendency of this appeal, the court was apprised that our supreme court was considering the question of applicability of *Miller* in a case nearly identical to the matter at bar. *People v. Thompson*, 2015 IL 118151. We held this matter in abeyance pending the *Thompson* decision, which we now find to be dispositive on all issues raised herein.

¶ 7 On April 28, 2016, the defendant filed a petition for rehearing, in which he maintained that his claim could not be *res judicata* since he had not raised the matter prior to the section 2-1401 petition giving rise to this appeal. After considering the matters raised in the petition for rehearing, we find no basis to modify our prior ruling.

¶ 8 ANALYSIS

¶ 9 In *Thompson*, the defendant was convicted of two counts of first degree murder, committed when he was 19 years old, and was sentenced to a mandatory natural life sentence. *Id*. at ¶ ¶ 6-7. Following the dismissal of his section 2-1401 petition, Thompson argued on appeal that, under *Miller* the statutorily mandated natural life sentence was unconstitutional as

applied to him. *Id. at* ¶ 18. Thompson recognized that *Miller* expressly applied to minors under 18 years of age, and thus did not specifically applied to his case; however, he argued that the policy concerns articulated in *Miller* regarding mandatory life sentences for youthful offenders applied with equal force to a 19-year-old defendant. *Id.* at ¶ 21. As in the instant matter, Thompson pointed out the evolving science on juvenile maturity and brain development that formed the policy basis of the *Miller* decision to ban mandatory natural life sentences for minors. *Id.* at ¶ 37. Additionally, Thompson argued that because his as-applied constitutional challenge constituted a challenge to a void judgment, he could raise it at any time. *Id.* at ¶ 30.

¶ 10 Thus, the issue addressed by our supreme court in *Thompson* was whether a 19-year-old defendant sentenced to mandatory natural life can raise an as-applied constitutional challenge to his sentence based upon the holding in *Miller* in a section 2-1401 proceeding. *Id.* at ¶ ¶ 43-44. This is the very issue raised by the defendant herein. In *Thompson*, our supreme court held that: (1) *Miller* does not provide any basis to support a challenge to a sentence raised by a 19-year-old defendant; and (2) an as-applied constitutional challenge based upon the age of the defendant is not exempt from the typical procedural bars of section 2-1401, *i.e.*, forfeiture or *res judicata*. *Id.* at ¶ 43 and ¶ 34. Thus our decision in the instant matter is directly controlled by the holdings in *Thompson* and we must reject the defendant's arguments and affirm the trial court's ruling on his section 2-1401 petition.[2]

[2] The court in *Thompson* noted that, although a defendant could not raise an as-applied constitutional challenge to his sentence under *Miller* for the first time on appeal from a section 2-1401 petition, he was not necessarily foreclosed from renewing his as-applied challenge in a successive petition under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2012). The court, of course, expressed no opinion on the merits of any future claims that might

¶ 11 In his petition for rehearing, the defendant maintains that the *res judicata* analysis in our original order was erroneous. He maintains that his argument on appeal, *i.e.*, that his natural-life prison sentence was unconstitutional as applied in his case because he was only 19 years old at the time of the offense, was not *res judicata* because he had "never raised it before." His argument on petition for rehearing lacks merit. While it may be true that the defendant never raised the claim at issue in the instant matter, the doctrine of *res judicata* not only bars claims that were actually raised and decided, but also bars claims that could have been raised. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 955 (2008). Moreover, the defendant's claim that he could not have raised his as-applied constitutional challenge until after *Miller v. Alabama* was decided also lacks merit. As our supreme court held in *Thompson*, the *Miller* decision was not new law for a *19-year-old* defendant and could not be utilized to revive a claim otherwise barred by principles of forfeiture and *res judicata*. *Thompson*, 2015 IL 118151, ¶ ¶ 43-44. Simply put, since *Miller v. Alabama* had no relevance to his case, the defendant in the instant matter could have raised his argument regarding the constitutionality of a mandatory life sentence for a 19-year-old defendant in his original appeal, and his current claim is thereby barred by principles of *res judicata.*

¶ 12 We further note that the defendant's reference to the holding in *People v. Leon Miller*, 202 Ill. 2d 328 (2002), wherein the court held that a mandatory life sentence for a *15-year-old* defendant was unconstitutional, likewise provides no support for his argument in his petition for rehearing. The defendant in the instant matter, like the defendant in *Thompson* was 19-years-old, not 18-years-old (*Miller v. Alabama*) and not 15-years-old (*People v. Leon Miller*). While these

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be raised in a new proceeding. *Id*. at ¶ 44. See *People v. Anderson*, 375 Ill. App. 3d 990, 1002 (2007).

age differences may not seem significant, the *Thompson* court held that principles of forfeiture and *res judicata* prevent a 19-year-old defendant from raising this issue in a petition under section 2-1401 of the Code. (735 ILCS 5/2-1401 (West 2010)).

¶ 13 CONCLUSION

¶ 14 Following the controlling precedent in *Thompson*, the judgment of the circuit court of Kankakee County is affirmed.

¶ 15 Affirmed.