2018 IL App (1st) 160032-U

SIXTH DIVISION
June 29, 2018

No. 1-16-0032

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRANDON WYATT, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 00 CR 19161 (01) Honorable Domenica A. Stephenson, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justice Connors concurred in the judgment.
Justice Cunningham specially concurred.

ORDER

¶ 1 ***Held:*** The circuit court properly denied defendant's motion for leave to file a successive postconviction petition, as his petition raised the meritless claim that his aggregate 42-year sentence was a *de facto* life sentence. Affirmed.

¶ 2 Following a bench trial, 16-year-old defendant Brandon Wyatt was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) and attempted armed robbery (720 ILCS 5/8-4(a) (West 2004), 720 ILCS 5/18-2(a) (West 2004)) in connection with the July 17, 1999, fatal shooting of a Metra train ticket agent. The circuit court sentenced defendant to consecutive sentences of 36 years' and six years' imprisonment for the first degree murder and attempted

armed robbery convictions, respectively. We affirmed both defendant's direct appeal and the summary dismissal of his postconviction petition. See *People v. Wyatt*, 1-05-0819 (2008) (unpublished order under Supreme Court Rule 23) (direct appeal) (*Wyatt I*); *People v. Wyatt*, 2011 IL App (1st) 093244-U (postconviction petition) (*Wyatt II*). Defendant then filed a motion for leave to file a successive postconviction petition, claiming that his aggregate 42-year sentence constituted an unconstitutional *de facto* life sentence, but the circuit court denied defendant's motion. Defendant now appeals, contending that, since he was 16 years old at the time of his sentencing and his aggregate 42-year sentence constitutes a *de facto* life sentence, he is entitled to a new sentencing hearing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012). We affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 This court has detailed the underlying facts of this case in *Wyatt I*. See *Wyatt*, 1-05-0819 (2008) (unpublished order under Supreme Court Rule 23). Therefore, we will summarize only those facts pertinent to the particular issues now before us.

¶ 5 The State charged Brandon Wyatt and a codefendant (Jason Dace) with multiple counts of first degree murder and attempted armed robbery. The first degree murder counts alleged various theories, including intentional, knowing, and felony murder predicated upon attempted armed robbery. The evidence adduced at trial established that on July 17, 1999, defendant planned to rob a Metra train with a codefendant. Defendant and codefendant waited for several trains at the West Pullman station before boarding a train in separate cars. After they boarded, the victim asked defendant for his fare, at which point defendant pointed his gun at the victim and demanded his money. The victim refused, and when defendant warned the victim that he was not joking, the victim stepped toward defendant. Defendant then shot the victim and tried to

flee from the train with codefendant, but the vestibule doors would not open. Defendant shot at the windows to try and open the doors, but the doors did not open until the train stopped. Defendant was later apprehended. The circuit court found defendant guilty and denied defendant's motion for a new trial.

¶ 6 The case proceeded to a sentencing hearing. At the hearing, the State's evidence in aggravation consisted of victim impact statements from the victim's son, granddaughter, coworkers, and fellow union members. In addition, the State presented testimony from a police officer that, less than three months before the shooting, defendant had hidden a bag containing a flare gun loaded with a live shotgun shell. The State further argued that defendant was educated and had good family support, but that he "chose a life of crime, not out of need, not out of necessity[,] but out of want." In addition, defendant's presentence investigation report (PSI), which was prepared in February 2005, indicated that he was born in October 1982, his "gang involvement" listed "Former Four Corner Hustler," a street gang that defendant had joined when he was 11 years old and then left "two years ago." The PSI further stated that defendant left school after the 11th grade. The State asked the court to sentence defendant "at the minimum of 50 years" based upon the seriousness of the offense, the need for deterrence, and the age of the victim (64 years). The State further argued that defendant's sentences should run consecutively due to the infliction of severe bodily injury.

¶ 7 In mitigation, defense counsel argued that a 50-year sentence was "tantamount to a life sentence" and urged the circuit court to impose a 20-year sentence, which was the same sentence that codefendant received. Defense counsel presented the testimony of numerous witnesses, including his godmother (who explained to the court that defendant was an honor student) and his aunt, who stated that defendant was raised in a "very loving and supportive family." Another

witness, Mary Powell, testified that defendant's family noticed a "sudden change in his behavior" in his sophomore year. Defendant's half-sister also testified that defendant had been a member of the Boy Scouts, had no "priors," and that, due to his age, defendant's "first attempt to fit in and belong to a group of peers turned disastrous."

¶ 8 At the close of the sentencing hearing, the circuit court noted that it had considered the trial evidence, defendant's PSI, evidence in mitigation and aggravation, the financial impact of incarceration, and the arguments of the parties. The court further observed that defendant elected not to make a statement before sentencing. The court then sentenced defendant to consecutive terms of 36 years' and six years' imprisonment for the first degree murder and attempted armed robbery convictions, respectively.

¶ 9 On direct appeal, defendant argued that the circuit court erred in denying his motions to suppress statements and in sentencing him, but we affirmed his convictions and sentence. *People v. Wyatt*, 1-05-0819 (2008) (unpublished order under Supreme Court Rule 23). On September 23, 2009, defendant filed a postconviction petition alleging that he was denied the effective assistance of appellate and trial counsel relating to trial counsel's refusal to let defendant testify at the hearing on the motion to suppress, but the circuit court summarily dismissed defendant's petition, and we affirmed. *People v. Wyatt*, 2011 IL App (1st) 093244-U.[1]

¶ 10 On April 24, 2015, defendant filed a motion for leave to file a successive postconviction petition. In his motion, defendant asserted that, because he was 16 years old at the time of his sentencing, his 42-year aggregate sentence was a *de facto* life sentence and unconstitutional

[1] Defendant further filed a petition for a writ of habeas corpus in federal court, claiming (1) the circuit court violated his rights under the Fourteenth Amendment when it denied his motion to suppress his confession and (2) his trial counsel violated his right to effective assistance when he refused to call defendant to testify at the suppression hearing, but the court denied his petition. See *U.S. ex rel. Wyatt v. Atchison*, 920 F. Supp. 2d 894, 901 (N.D. Ill. 2013).

pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012). Although the circuit court found that defendant established cause for his failure to raise this claim in his prior postconviction petition, it "vehemently" disagreed with defendant's argument that his 42-year combined sentence was an improper *de facto* life sentence. It therefore denied defendant's motion because it found that defendant could not show prejudice. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Defendant contends that the circuit court erred in denying his motion for leave to file a successive postconviction petition. Specifically, defendant argues that his aggregate 42-year prison sentence, imposed when he was 16 years old, constitutes an unconstitutional *de facto* life sentence. Defendant further argues that he established both cause and prejudice for his failure to raise this claim either on direct appeal or in his initial postconviction petition. Defendant asks that this court either (1) vacate his sentence and remand for a new sentencing hearing or (2) reverse the trial court's denial of his motion for leave to file the successive petition and remand for further proceedings and the appointment of postconviction counsel.

¶ 13 The Post–Conviction Hearing Act (Act) creates a three-stage procedure for addressing a defendant's initial postconviction petition. 725 ILCS 5/122-1 *et seq.* (West 2016); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). A postconviction proceeding is a collateral proceeding and not an appeal of the underlying judgment, and it allows review of constitutional issues that were not, and could not have been, considered on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). Thus, issues that were raised and decided on direct appeal are barred from consideration by *res judicata*, and issues that could have been raised but are barred by waiver. *Id.* at 328.

¶ 14 Although the Act generally contemplates the filing of only one postconviction petition, the bar against successive petitions may be relaxed where a defendant can establish either

(1) cause and prejudice for his failure to raise the claim earlier or (2) actual innocence. *Id.* at 329; see also 725 ILCS 5/122-1(f) (West 2016). Defendant is not raising a claim of actual innocence, so he must comply with the cause-and-prejudice test. Under that test, cause is defined as "an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings," and prejudice is defined as a showing that "the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.* The cause-and-prejudice test is composed of two elements, "*both* of which must be met in order for the petitioner to prevail." (Emphasis added.) *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). In addition, because successive postconviction petitions "plague the finality of criminal litigation," a defendant's successive petition faces "immense procedural default hurdles" that are "lowered in very limited circumstances, 'where fundamental fairness so requires.' " *People v. Tenner*, 206 Ill. 2d 381, 392 (2002) (quoting *People v. Flores*, 153 Ill. 2d 264, 274 (1992)). The circuit court should deny leave of court to file the successive petition if the claims alleged in the petition fail as a matter of law. *People v. Smith*, 2014 IL 115946, ¶ 35. Our supreme court has not resolved whether the appropriate standard of review is abuse of discretion or *de novo*. *People v. Edwards*, 2012 IL 111711, ¶ 30. In this case, however, defendant's claim fails under either standard.

¶ 15 Here, defendant first argues that he has shown "cause" for his failure to raise this claim in his initial postconviction petition because his claim relies upon the holding in *Miller v. Alabama*, 567 U.S. 460 (2012), which was decided nearly three years after defendant's initial postconviction petition. Although *Miller* was held to apply retroactively on collateral review (see *People v. Davis*, 2014 IL 115595, ¶¶ 34-43), *Miller* only held that mandatory life sentences for juveniles violated the Eighth Amendment. *Miller v. Alabama*, 567 U.S. at 479. In *People v.*

Reyes, 2016 IL 119271, our supreme court interpreted *Miller* as further prohibiting mandatory term-of-years sentences imposed on juveniles that cannot be served in one lifetime, *i.e.*, "*de facto*" life sentences. *Id.* ¶¶ 9-10. The unconstitutionality of *de facto* life sentences for juveniles was thus not established until our supreme court's holding in *Reyes*, which was issued seven years after his first petition. We therefore agree with the parties (and the circuit court) that defendant has established cause for his failure to raise this claim in his initial petition. See *Davis*, 2014 IL 115595, ¶ 42 (holding that "*Miller*'s new substantive rule constitutes 'cause' because it was not available earlier to counsel").

¶ 16 Defendant, however, has failed to also establish prejudice. Defendant argues that his cumulative sentence is a *de facto* life sentence because he will leave prison at the age of 56, which he asserts is beyond the life expectancy for incarcerated individuals. We disagree.

¶ 17 Defendant received a combined 42-year sentence for the first degree murder and attempted armed robbery of the victim, which included a 6-year sentence for the attempted armed robbery conviction. See 720 ILCS 5/18-2(b) (West 2016) (armed robbery while armed with a firearm is a Class X felony); 720 ILCS 5/8-4(c)(2) (West 2016) (the sentence for an attempt to commit a Class X felony is the sentence for a Class 1 felony); 730 ILCS 5/5-4.5-30(a) (West 2016) (Class 1 sentencing range is not less than 4 years and not more than 15 years). In addition, defendant is eligible to receive day-for-day good conduct credit on his attempted armed robbery sentence. See 730 ILCS 5/3-6-3(a)(2.1) (West 2016). Therefore, defendant must serve a minimum of 39 years of his sentence, 3 years for attempted armed robbery and 36 years for first degree murder, which he will have served by age 56.

¶ 18 This court, however, has held that sentences of greater length are not reasonably characterized as *de facto* life sentences. *People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 73

(50-year sentence, eligible for release at 65); *People v. Evans*, 2017 IL App (1st) 143562, ¶ 16 (90-year sentence, but eligible for release as early as age 62); *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 57 (50-year sentence, eligible for release at age 65); *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 16 (45-year sentence, eligible for release at age 62); *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66 (52-year sentence, allowing for release at age 60); but see *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 64 (50-year sentence is a *de facto* life sentence), *appeal allowed*, No. 122327 (Nov. 22, 2017).

¶ 19 We recognize that the precise point at which a juvenile's term-of-years sentence transforms into an unconstitutional *de facto* life sentence is a recurring issue in this court. We further recognize Justice Mikva's dissent in *Rodriguez* that a "bright-line rule" would help courts apply the *Reyes* holding fairly and consistently. See *Rodriguez*, 2018 IL App (1st) 141379-B, ¶¶ 97-102 (suggesting that juvenile's sentence resulting in a release at age 64 or older is a *de facto* life sentence) (Mikva, J., dissenting in part). Nonetheless, we will follow the weight of authority and reject defendant's claim that his 42-year combined sentence—for which he would be eligible for release at age 56—is a *de facto* life sentence.

¶ 20 In addition, defendant erroneously relies upon two foreign decisions that have held that similar sentences were "functionally equivalent to life without parole": *State v. Pearson*, 836 N.W.2d 88, 89 (Iowa 2013), and *Bear Cloud v. State*, 2014 WY 113. Both cases are from out-of-state jurisdictions, and as this court has already held, "where there is Illinois law on point, we need not, and should not, consider cases from other jurisdictions." *People v. Rodriguez*, 2018 IL App (1st) 151938, ¶ 21. Moreover, both cases factually distinguishable. In *Pearson*, a jury convicted the 17-year-old defendant of robbery and burglary, and she was sentenced to a combined 50-year sentence for which she had to serve a minimum of 35 years. *Pearson*, 836

N.W.2d at 89. Here, defendant was convicted of two violent crimes: first degree murder and attempted armed robbery. In *Bear Cloud*, the 16-year-old defendant (who was sentenced to 45 years' imprisonment) stole a gun and broke into a home with two other individuals, and during the course of the burglary, one of the two individuals shot and killed the victim while the defendant "was in another room." *Bear Cloud*, 2014 WY 113, ¶¶ 3, 11. In this case, defendant actively planned the armed robbery and pulled the trigger, killing the victim. For this additional reason, defendant's reliance upon *Pearson* and *Bear Cloud* is unavailing.

¶ 21 Finally, we reject defendant's argument that he is unlikely to survive his 42-year sentence of imprisonment, based upon various third-party reports concerning the "average" life expectancy of unincarcerated African-American males, those incarcerated as adults, and those incarcerated as juveniles. As this court noted, prison life is "undoubtedly harsh," but it would nonetheless be inappropriate for this court to speculate as to which side of the "average" defendant's life expectancy will ultimately lie. *Evans*, 2017 IL App (1st) 143562, ¶ 15. Whether a *de facto* life sentence is based upon a certain age at release, ethnicity, race, gender, other societal factors, health concerns—or some combination thereof—are "policy considerations that are better handled in a different forum." *Jackson*, 2016 IL App (1st) 143025, ¶ 57. Defendant cannot establish both elements of the cause-and-prejudice test, and thus cannot prevail. *Pitsonbarger*, 205 Ill. 2d at 464. Therefore, the circuit court properly denied defendant's motion where his proposed successive petition failed as a matter of law. *Smith*, 2014 IL 115946, ¶ 35.

¶ 22 CONCLUSION

¶ 23 The circuit court correctly denied defendant's motion for leave to file a successive postconviction petition because his underlying claim, *i.e.*, that his aggregate 42-year prison sentence constitutes an unconstitutional *de facto* life sentence, is without merit.

¶ 24 Affirmed.

¶ 25 JUSTICE CUNNINGHAM, specially concurring.

¶ 26 While I concur with the holding of the majority, I briefly write separately to highlight the ongoing problem encountered by this court in resolving this category of cases. While the facts of this specific case are such that it does not squarely fall under the principles of *People v. Reyes*, 2016 IL 119271, as outlined by our supreme court, defendant's argument underscores the continuing problem presented by such cases.

¶ 27 The eighth amendment to the United States Constitution forbids sentencing a juvenile to life imprisonment without the possibility of parole. *Miller v. Alabama*, 132 S. Ct. 2455, 2469, 567 U.S. 460 (2012). In *Reyes*, our supreme court held that a *de facto* life sentence imposed on a juvenile constitutes cruel and unusual punishment in violation of the eighth amendment if the sentence is imposed without considering the mitigating factors outlined in *Miller*. *Reyes*, 2016 IL 119271, ¶ 9. Thus, trial courts now have a responsibility to consider the *Miller* factors before imposing a *de facto* life sentence on a juvenile defendant. This court has used its judgment on a case-by-case basis when reviewing the issue of *de facto* life sentences as applied to juveniles. There is no doubt that the United States Supreme Court, and in turn our supreme court, have recognized that juveniles who commit serious and even the most heinous crimes may not be using the same well-developed psychological and experiential tools of adults who commit similar crimes. A growing body of jurisprudence and legislative action, buttressed by psychological research, firmly establishes that juvenile offenders differ in significant ways from adult offenders. Thus, the sentencing guidelines which may justify imposing a life sentence upon a 30-year-old who commits a murder may not apply to a 15-year-old under similar facts, even if the sentence is not specifically a life sentence, but rather, a *de facto* life sentence. The

Reyes ruling therefore requires the trial judge to consider certain other factors pertinent to a defendant's youthfulness which were not part of the sentencing equation prior to *Miller* and *Reyes*. While the trial court is not required to impose any *particular* sentence, it must take certain factors regarding the defendant's youth into consideration in deciding the appropriate sentence. However, *Reyes* has provided only a broad outline regarding *de facto* life sentences as applied to juveniles. This has led to varying conclusions throughout this court, as to what constitutes a *de facto* life sentence for a juvenile. Thus, a floodgate of litigation has followed as juvenile defendants challenge what they see as *de facto* life sentences which run afoul of *Miller* and *Reyes*. The case before us falls into that category of unsettled jurisprudence on this issue.

¶ 28 While I agree with the majority under the facts of this case, it is clear that this question will be raised in other similar cases as this court and others try to find a balance. The answer to what constitutes a *de facto* life sentence as applied to juveniles seems to turn on the facts of each case. That scenario, in turn, gives rise to a variety of subjective analyses by our court. In my view, this issue demands uniformity in applying the principles of *Miller* and *Reyes* in order to ensure fairness.

¶ 29 In the case before us, the defendant will be eligible for release at age 56. While he argues that it is a *de facto* life sentence, that argument is not persuasive, mainly because, as the majority found, there is no support for his suggestion that his life expectancy is less than 56 years. Under the United States Sentencing Commission's Preliminary Quarterly Data Reports, of which this court has in the past taken judicial notice, see, *e.g.*, *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶ 26, this defendant does not establish that his sentence is a *de facto* life sentence. Those guidelines establish that "a person held in a general prison population has a life expectancy of about 64 years." (Internal quotation marks omitted.) *People v. Joiner*, 2018 IL

App (1st) 150343, ¶ 87 (citing *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 59). Defendant's projected release at age 56 falls short. However, defendant's argument is not frivolous, and the body of cases seeking our review and resolution of this issue is likely to continue to grow until clear, uniform guidelines are established. In the case before us, just a slight change in the facts, circumstances and data could change the perspective on the question of whether his sentence is a *de facto* life sentence.

¶ 30 Accordingly, until there is more guidance and an effort at uniformity, we will continue to see a steady flow of cases in which this issue is raised, with widely varying results from our court.