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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 12064
)	
EFREN AGUILAR,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge, presiding.
)	

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Lavin and Justice Coghlan concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dismissal of defendant's postconviction petition is reversed, where defendant a juvenile at the time of the offense, received a *de facto* life sentence, and the trial court did not consider his youth and the factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012). Because the record does not show that the judge who presided at trial and denied defendant postconviction relief held prejudice or bias against defendant, we remand to the same judge for resentencing.

¶ 2 Efren Aguilar argues that the circuit court erred in dismissing his *pro se* postconviction petition because his 50-year sentence for first degree murder violates the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution.

At the time of the offense, Aguilar was a juvenile. In imposing the *de facto* life sentence, the trial

court did not consider his youth and the factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012). The State concedes that Aguilar received an unconstitutional sentence and requires a new sentencing hearing.

¶ 3 Aguilar also asks that resentencing be conducted by a different judge due to prejudice or bias against him. The State disagrees. We agree with the State, and find the sentencing was largely premised on the judge's interpretation of precedent that existed at the time of the hearing, and not on prejudice or bias against Aguilar.

¶ 4 So we reverse, vacate Aguilar's sentence, and remand for a new sentencing hearing. In all other respects, we affirm the judgment

¶ 5 Background

¶ 6 When he was 16 years old, Aguilar was charged in a 12-count indictment with multiple offenses. The State proceeded on two counts of first degree murder (720 ILCS 5/9-1(a) (1), (2) (West 2004)). Aguilar elected a jury trial. While Aguilar argues on appeal that he was 17 years old at the time of the offense, the presentencing investigation report (PSI) suggests he was 16 years old. For purposes of determining the issue, we will consider his age as listed in the PSI, as it contained the information that was available to the trial court at sentencing.

¶ 7 Because Aguilar's challenge on appeal concerns his sentence, we need not discuss the evidence at trial, and proceed to the sentencing hearing.

¶ 8 According to the presentencing investigation report, Aguilar was 16 years old at the time of the offense and almost 20 years old at sentencing. He received probation for aggravated criminal sexual assault in 2001, and for unlawful use of a weapon and unlawful possession of a firearm or ammunition in 2002. Aguilar had a good relationship with his mother and siblings, but

“never developed a relationship with his father and has no knowledge of his whereabouts.” Aguilar did not graduate from high school, but his goal was to obtain a GED and work in carpentry. Additionally, the PSI listed one job in Aguilar’s employment history, which Aguilar quit because it did not pay enough. The PSI also stated that Aguilar only drank alcohol on “special occasions,” and that he “has never tried any illicit substances.” Aguilar joined the Latin Kings gang when he was 14 years old but quit about three years later.

¶ 9 The State presented the victim impact statement of the victim’s mother, and argued Aguilar had “no excuses” and “no reasons” to commit the offense. Further, the State asserted that the court’s sentence should deter other offenders and make the park where the murder occurred “a safer place.” The State indicated that Aguilar was subject to a sentencing range of 45 years to natural life, and requested a “reasonable” sentence “based upon the facts of this case.” Defense counsel only responded that Aguilar “maintains his innocence.”

¶ 10 The trial court noted it was required to impose a sentence of 45 years to natural life, as Aguilar was convicted of murder by personally discharging a firearm. The court stated that the victim was 18 years old when he died and “had a whole lot ahead of him.” The court further noted that Aguilar was age 16 at the time of the offense and “had a lot going on for him as well, or could have had a lot going on for him as well.” Then, the court explained, “I take no great pleasure in imposing a sentence which for all practical purposes means that a young man, 16 at the time and 20 now, will probably not see the outside of prison walls for the balance of his entire life.” The court sentenced Aguilar to 50 years’ imprisonment, comprising 25 years for first degree murder and 25 “additional” years for the use of a firearm.

¶ 11 Aguilar filed a motion to reconsider his sentence, arguing that the trial court failed to properly weigh his youth and rehabilitative potential, and improperly imposed a sentence enhancement based on the discharge of a firearm. The trial court denied the motion, stating Aguilar received a sentence “only five over the minimum, and theoretically he could have gotten sentenced to life imprisonment.” The court added that it had no discretion to impose a sentence below the 45-year minimum of Aguilar’s sentencing range.

¶ 12 On direct appeal, Aguilar argued “that the trial court erred in excluding testimony from an eyewitness identification expert and in admitting evidence of Aguilar’s other crimes.” *People v. Aguilar*, 396 Ill. App. 3d 43, 44 (2009). Aguilar also argued that the State failed to prove his guilt beyond a reasonable doubt, and that his sentence was excessive given his age. *Id.* This court affirmed. *Id.*

¶ 13 In December 2010, Aguilar filed a petition for postconviction relief, arguing that trial counsel was ineffective for not presenting an alibi defense. Aguilar also argued that counsel on direct appeal was ineffective for not raising an ineffective assistance claim against trial counsel, who failed to challenge Aguilar’s identification in a motion to suppress. The same judge who presided over Aguilar’s trial summarily dismissed his petition for postconviction relief.

¶ 14 Aguilar appealed, arguing the circuit court summarily dismissed his petition under the wrong standard, and that his ineffective assistance claims were not frivolous. *People v. Aguilar*, 2012 IL App (1st) 110878-U, ¶¶ 15, 18. He also requested that we remand the case to a different circuit court judge, claiming that the judge who presided over his trial and summarily dismissed his petition had prejudged the issues that would be heard on remand. *Id.* ¶ 26. We reversed and remanded the case for further postconviction proceedings before the same judge. *Id.* ¶¶ 28-29.

¶ 15 On June 3, 2015, during the pendency of proceedings in the circuit court, Aguilar filed a supplemental postconviction petition arguing an unconstitutional *de facto* life sentence under *Miller v. Alabama*, 567 U.S. 460 (2012). He asserted that his counsel on direct appeal was ineffective for not raising an ineffective assistance claim against his trial counsel, who failed to raise Aguilar’s youth as a factor that should be considered in sentencing.

¶ 16 The State filed a combined answer and motion to dismiss. In its answer, the State conceded that a third-stage evidentiary hearing was necessary to resolve the issue regarding Aguilar’s alibi defense. In its motion to dismiss, the State contended that Aguilar’s argument regarding sentencing was barred by *res judicata*, and that *Miller* only concerns “mandatory” life sentences and does not affect Aguilar’s sentence. According to the State, Aguilar’s assertion that a 50-year sentence constituted a *de facto* life sentence lacked precedential support.

¶ 17 During a court proceeding, defense counsel observed that Aguilar was a juvenile at the time of the offense, and he received a 50-year sentence. Then, this colloquy occurred:

“[ASSISTANT PUBLIC DEFENDER]: Judge, I would argue it’s a *de facto* life sentence. I believe you even said in the [sentencing] hearing he would pretty much spend the rest of his adult life in prison.

THE COURT: Well, he murdered a guy, so that wouldn’t be so unfair, would it?

[ASSISTANT PUBLIC DEFENDER]: Well, you know, the *Miller* decision is basically saying that juveniles are less culpable and there are certain factors that should be considered.

THE COURT: Well, it was murder with a firearm?

[ASSISTANT PUBLIC DEFENDER]: Yes, Judge.

THE COURT: And he is looking at life sentence, wasn't he?

[ASSISTANT PUBLIC DEFENDER]: Yes, Judge.

THE COURT: Well, we resolved that. What is left to do?"

¶ 18 On December 9, 2015, the court held an evidentiary hearing on Aguilar's claim of ineffective assistance as to an alibi defense, along with a simultaneous hearing on the State's motion to dismiss on the sentencing issue. At the hearing, defense counsel additionally supported the sentencing claim with *People v. Sanders*, 2014 IL App (1st) 121732-U, and a concurring opinion in *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 67 (Pucinski, J., concurring), which posited that a sentencing scheme that "mandates the imposition of a *de facto* life sentence on a juvenile offender absent any consideration of the unique hallmark features of youth, cannot withstand constitutional scrutiny in light of *Miller*."

¶ 19 Following the hearing, the court denied that part of Aguilar's petition raising the claim of ineffective assistance, and dismissed that part of his petition challenging his sentence. As to the sentencing issue, the court stated it would not consider *Sanders* and the concurring opinion in *Dupree*, as neither held binding precedential value. The court also found that *Miller* "doesn't apply to [Aguilar] in the slightest," as it concerned a "mandatory life sentence" and not a "de facto" life sentence. And, the court questioned the means of determining when a sentence constitutes a *de facto* life sentence, suggesting the determination would turn on the individual defendant's life expectancy. The court stated that the victim is "just as dead" regardless of Aguilar's age, and that "[t]he harm suffered by the victim of the crime is not dependent upon the age of the perpetrator." Further, Aguilar's 50-year sentence was five years above the minimum,

which was neither “excessive” nor “unreasonable” for a juvenile offender. The court concluded, “[d]o bad things, there are bad consequences and you’ve got to deal with them.”

¶ 20 Analysis

¶ 21 *De Facto* Life Sentence

¶ 22 Aguilar argues that the trial court dismissal of his postconviction petition alleging he received a *de facto* life sentence without consideration of his youth and its attendant circumstances violated the eighth amendment to the United States Constitution (U.S. Const., amends. VIII, XIV) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11). The State concedes that Aguilar received an unconstitutional sentence and requires a new sentencing hearing.

¶ 23 At the second stage of a postconviction proceeding, “the defendant bears the burden of making a substantial showing of a constitutional violation.” *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). “Unless the petitioner’s allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or show a constitutional violation.” (Internal quotation marks omitted.) *People v. Lee*, 2016 IL App (1st) 152425, ¶ 46. The “substantial showing” to be made at the second stage “is a measure of the legal sufficiency of the petition’s well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle petitioner to relief.” (Emphasis and internal quotation marks omitted.) *Id.* We review *de novo* a circuit court’s decision to dismiss a postconviction petition without conducting an evidentiary hearing. *People v. Childress*, 191 Ill. 2d 168, 174 (2000).

¶ 24 In *Miller*, the United States Supreme Court held that the eighth amendment to the United States Constitution “forbids a sentencing scheme that mandates life in prison without possibility

of parole for juvenile offenders.” *Miller*, 567 U.S. at 479; see also U.S. Const., amends. VIII, XIV. The Court emphasized that “[m]andatory life without parole for a juvenile precludes consideration” of numerous mitigating factors, including the juvenile’s age and its “hallmark features,” the juvenile’s family and surrounding home environment, the extent of the juvenile’s participation in the offense, the effects of familial or peer pressure, the “inability to deal with police officers or prosecutors,” the incapacity to assist the juvenile’s own attorneys, and the possibility of rehabilitation. *Miller*, 567 U.S. at 477-78. Additionally, the Court held that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.* at 489. In *Montgomery v. Louisiana*, 577 U.S. ___, ___, ___, ___, 136 S. Ct. 718, 725, 732, 734 (2016), the Court clarified that *Miller* applies retroactively “to juvenile offenders whose convictions and sentences were final when *Miller* was decided,” including cases on collateral review.

¶ 25 The Illinois Supreme Court has ruled that *Miller* applies to *de facto* life sentences, or sentences “that cannot be served in one lifetime” and have “the same practical effect on a juvenile defendant’s life as would an actual mandatory sentence of life without parole.” *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10 (finding defendant’s legislatively mandated sentence of 97 years, with no opportunity for release until after 89 years, was unconstitutional *de facto* life sentence). Recently, our supreme court in *People v. Buffer*, 2019 IL 122327, ¶¶ 41-42, concluded that a sentence exceeding 40 years was a *de facto* life sentence, and because the trial court failed to consider “defendant’s youth and its attendant circumstances,” the sentence was unconstitutional.

¶ 26 Since *Miller*, the Illinois legislature has enacted section 5-4.5-105 of the Code (730 ILCS 5/5-4.5-105 (West 2018)), which requires a circuit court to consider a number of factors when imposing a sentence on an individual under the age of 18. Section 5-4.5-105(b) also provides that the circuit court has discretion to “decline to impose any otherwise applicable sentencing enhancement based upon *** [firearm] possession with personal discharge that proximately causes *** death to another person.” 730 ILCS 5/5-4.5-105(b) (West 2018).

¶ 27 This case concerns a sentence and procedural posture similar to *Buffer*. Like the defendant in *Buffer*, Aguilar was 16 years old when the offense occurred, and he received a 50-year sentence. *Buffer*, 2019 IL 122327, ¶ 42. Also as in *Buffer*, Aguilar was sentenced before *Miller*, and “the record does not indicate that the court considered Aguilar’s youth and its attendant circumstances.” *Id.* ¶¶ 5, 46. Rather, at the sentencing hearing, the court acknowledged that Aguilar “will probably not see the outside of prison walls for the balance of his entire life,” and did not discuss the many factors listed by the United States Supreme Court in *Miller*. Because there is no indication in the record that the court properly considered these factors, we must vacate Aguilar’s sentence and remand for resentencing under section 5-4.5-105 of the Code (730 ILCS 5/5-4.5-105 (West 2018)). *Buffer*, 2019 IL 122327, ¶ 47. Given that the record does not require further factual development for us to decide this issue, and in the interests of judicial economy, further postconviction proceedings are unnecessary. *Id.* ¶¶ 46-47.

¶ 28 Given our determination that Aguilar’s sentence violated the eighth amendment to the United States Constitution, we need not reach Aguilar’s further argument that the sentence also violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11).

¶ 29 Remand before Different Judge

¶ 30 Aguilar argues that the judge who presided at trial, imposed his sentence, and considered his postconviction claims had “prejudged” the sentencing issue now on appeal and was previously unwilling to consider it. Accordingly, Aguilar requests that we remand the case to a new judge. The State maintains that the record does not show the judge is unable to determine Aguilar’s sentence fairly, and the same judge should consider resentencing.

¶ 31 “Procedural due process requires a fair trial in a fair tribunal, with an absence of any actual bias.” *People v. Williams*, 124 Ill. 2d 300, 308 (1988). A “defendant has no absolute right to a substitution of judge in a postconviction proceeding,” however, and “the judge who presided over the criminal trial should hear the postconviction petition unless it is shown that the judge is substantially prejudiced.” *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). “A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice.” *People v. Burnett*, 2016 IL App (1st) 141033, ¶ 56.

¶ 32 “‘To conclude that a judge is disqualified because of prejudice is not, of course, a judgment to be lightly made.’ ” *Id.* (quoting *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002)). “A judge’s rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality.” *Eychaner*, 202 Ill. 2d at 280. A “party claiming prejudice must present evidence of prejudicial trial conduct and evidence of the judge’s personal bias, which can stem from an extrajudicial source.” *Burnett*, 2016 IL App (1st) 141033, ¶ 56. Moreover, “‘judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.’ ” *Eychaner*, 202 Ill. 2d at 281 (quoting *Liteky v. U.S.*, 510 U.S. 540, 555 (1994)). A judge’s remarks may support

a challenge “ ‘if they reveal an opinion that derives from an extrajudicial source,’ ” and they will support a challenge “ ‘if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.’ ” *Id.* (quoting *Liteky*, 510 U.S. at 555).

¶ 33 Aguilar asserts that the trial court has prejudged the issue of sentencing based on the judge’s comments before and during the hearing on Aguilar’s postconviction petition. Specifically, Aguilar cites the judge’s comments that he believed Aguilar’s sentence was not excessive, and that Aguilar did “bad things” and thus must face “bad consequences.” Aguilar also cites the colloquy before the postconviction hearing on the sentencing issue, in which the circuit court stated it had resolved the issue and asked, “What is left to do?”

¶ 34 The comments that Aguilar cites, however, do not reveal any extrajudicial source of bias or partiality, and they do not suggest that the judge has a high degree of favoritism or antagonism that would cause him to be unable to render a fair judgment. *Id.* Rather, the record shows that when issuing his ruling, the judge simply did not believe that then-existing case law supported Aguilar’s position.

¶ 35 When discussing the sentencing issue at the hearing on Aguilar’s postconviction petition, defense counsel raised *Miller*, *Sanders*, and the concurring opinion in *Dupree*. The judge noted that *Sanders*, which was entered under Illinois Supreme Court Rule 23 (eff. July 1, 2011), and the concurring opinion in *Dupree* were not precedential. The judge also found that *Miller* “doesn’t apply to [Aguilar] in the slightest,” as it only affects a “mandatory life sentence” and not a “de facto” life sentence. The judge additionally questioned when a sentence would constitute a *de facto* life sentence, suggesting that this determination would depend on the

defendant's life expectancy. Thus, the ruling was largely premised on the judge's interpretation of precedent that existed at the time of the hearing, and not any prejudice or bias against Aguilar.

¶ 36 Since then, as we have discussed, the Illinois Supreme Court has clarified that sentences exceeding 40 years, when imposed on a juvenile, are *de facto* life sentences subject to the requirements in *Miller. Buffer*, 2019 IL 122327, ¶¶ 41-42 and *Reyes*, 2016 IL 119271, ¶¶ 9-10 address the trial court's concerns regarding whether and when a sentence may constitute a *de facto* life sentence subject to *Miller. Id.* Nothing from the record indicates that the trial judge would not comply with this recently developed case law. Accordingly, we find that Aguilar is not entitled to have his sentencing hearing conducted before a different judge.

¶ 37 Affirmed in part; reversed in part; vacated in part; and remanded.