

No. 1-12-0318

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 DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 18612
)	
DEVAUNTE JOHNSON,)	
)	Honorable Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

Held: The trial court did not err by merging defendant's aggravated battery with a firearm conviction into his attempted murder conviction because, under the circumstances, attempted murder is the more serious offense. The automatic transfer statute is not facially unconstitutional nor is it unconstitutional as applied to defendant. The mandatory term of imprisonment and the truth in sentencing statute are not facially unconstitutional nor are they unconstitutional as applied to defendant.

¶ 1 Defendant Devaunte Johnson was convicted of attempted first degree murder and aggravated battery with a firearm. The trial judge sentenced defendant to 37 years imprisonment. Defendant appeals that sentence. For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 The testimony adduced at trial was that on July 20, 2009, Hector Del Rio was sitting outside of his residence when he heard gunfire. Del Rio testified that when he looked up, he saw defendant coming towards him while firing a weapon at him. Del Rio allegedly knew defendant from the neighborhood and had given defendant a tattoo. Defendant is alleged to have been a member of the Black P Stones gang while the area in which the victim lived was apparently affiliated with the Latin Kings. Del Rio testified that he attempted to run away, but that he injured himself while attempting to jump a railing and fell. He felt a gunshot wound to his back and could not stand upright. Del Rio then began to crawl while defendant continued to approach him until they were four to six feet apart. Del Rio testified that while he was on his knees, defendant shot him in the stomach. Dr. Marie Crandall, a trauma surgeon, testified that when Del Rio arrived at the hospital, he had six holes in his torso from the various bullets. Del Rio testified that after being shot, he heard someone scream and defendant ran away, but continued shooting elsewhere.

¶ 4 Celeste Camarena, Del Rio's niece, testified that from the window of her home across the street she observed defendant shooting her uncle. Camarena further testified that, after defendant shot Del Rio, he shot at a vehicle occupied by her neighbor, Micaela Garcia, and that defendant then ran off. Micaela Garcia also testified and identified defendant as the shooter and stated that she witnessed defendant with a gun in his hand, and subsequently witnessed defendant shoot Del Rio. Garcia further testified that she yelled out the car window at which time defendant shot in the direction of the vehicle. Jordan Garcia, another nearby resident, also testified that he observed the occurrence, and that defendant was the perpetrator.

No. 1-12-0318

¶ 5 Del Rio's injuries were life threatening. Initially, observing the six holes in Del Rio's torso, Doctor Crandall opened Del Rio's skin from his breast bone to his pubic bone. His spleen was removed. A portion of his colon was removed. He had lost four liters of blood and the human body only contains five liters. He had a blast wound to his large intestine resulting in the majority of his small and large intestines eventually being removed. The testimony revealed that Del Rio has been forced to undergo at least 30 surgeries and that multiple complications arose during the procedures including spillage from the intestines into the abdomen, the development of a fistula, infection and various bouts of inflammation. In his victim impact statement, Del Rio described himself as "the unfortunate individual sentenced to live a life of misery" and described his life as a "nightmare." Del Rio further stated that he could "never be a functional human being," that "chronic pain is a part of [his] life," and that he "feel[s] helpless."

¶ 6 Defendant, sixteen years old at the time, was arrested in connection with the shooting and charged with attempted first degree murder and aggravated battery with a firearm. He was tried as an adult under the Juvenile Court Act's automatic transfer provision (705 ILCS 405/5-130) which mandates that anyone fifteen years old or older be tried as an adult for certain offenses, one of which is aggravated battery with a firearm. After a jury trial, defendant was found guilty of aggravated battery with a firearm and attempted first degree murder while personally discharging a firearm that caused great bodily harm to a person. At the sentencing hearing, the trial judge indicated various factors taken into account when determining what length sentence to impose: defendant's age, the victim's injuries, and the fact that defendant had not shown remorse and was more defiant than remorseful. The trial judge merged the conviction for aggravated battery with a firearm into the conviction for attempted first degree murder. The trial judge then imposed a

No. 1-12-0318

sentence of 37 years imprisonment: 12 years for attempted first degree murder plus the 25 year mandatory enhancement for personally discharging a weapon during a felony that caused great bodily harm. The trial judge denied defendant's motion to reconsider the sentence and this appeal followed.

¶ 7 On appeal, defendant argues that: (1) the trial judge erred by merging the aggravated battery with a firearm conviction into the attempted murder conviction; (2) the automatic transfer statute is unconstitutional; and (3) the mandatory firearm enhancement and the truth in sentencing statute are unconstitutional when applied to minors. For the purpose of clarity, we will address defendant's arguments in the foregoing numerical order.

¶ 8 ANALYSIS

¶ 9 I. Merger Under The One Act, One Crime Doctrine

¶ 10 It is well-settled that multiple convictions arising from the same physical act cannot stand. *People v. Garcia*, 179 Ill.2d 55, 71 (1997). When multiple convictions of greater and lesser offenses are rendered for offenses arising from a single act, a sentence should be imposed on the most serious offense and the convictions on the less serious offenses should be vacated. *Id.*

¶ 11 Defendant argues that the trial court erred by merging the aggravated battery with a firearm conviction into the attempted murder conviction. Defendant contends that, in consideration of the fact that the aggravated battery with a firearm requires an automatic transfer to criminal court while attempted murder does not, aggravated battery with a firearm is the more serious offense for a juvenile. Thus, according to defendant, the trial judge should have merged the attempted murder conviction into the aggravated battery with a firearm conviction and sentenced defendant on that count.

No. 1-12-0318

¶ 12 The automatic transfer statute provides that if a minor is at least fifteen years old when he or she is alleged to have committed certain serious offenses, the defendant is to be prosecuted and sentenced as an adult. 705 ILCS 405/5-130(1)(a); 1(c)(i). The statute further provides that the enumerated charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws. 705 ILCS 405/5-130(1)(b)(ii).

¶ 13 In determining which offense based upon the same physical act is more serious, and the one on which a sentence should be imposed under the one act, one crime doctrine, a reviewing court compares the relative punishments prescribed by the legislature for each offense and relies on the plain language of the statutes. *People v. Artis*, 232 Ill.2d 156, 170 (2009). But this court has held that the automatic transfer statute is not part of the punishment, it is merely a procedural device for determining where a defendant's case will be tried. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66. It is not a penalty provision in even the broadest sense. *People v. Jackson*, 2012 IL App (1st) 100398, ¶ 24. Because the automatic transfer has nothing to do with punishment, it does not enter into the calculus for purposes of the one act, one crime doctrine.

¶ 14 Moreover, because the automatic transfer results from how a defendant is charged, it has no application to how a defendant should be sentenced. At the time the automatic transfer provision takes effect, guilt has not been determined, let alone what punishment, if any, should be imposed. *Id.* By its very nature, because it requires more than one conviction, the one act, one crime doctrine concerns how a defendant should be sentenced, not how a defendant should be charged. Accordingly, there is no reason that the trial judge should consider the automatic transfer when deciding which crime was more serious during a sentencing hearing. Under the Juvenile Court Act, once a minor is tried and convicted, the court has available to it any or all dispositions

No. 1-12-0318

prescribed for that offense under Chapter V of the Unified Code of Corrections. 705 ILCS 405/5-130(1)(c)(i). The purpose of the one act, one crime doctrine is to prevent unfair prejudice to a defendant by way of multiple punishments for one wrongful act, and to avoid any future misconception that the defendant committed multiple, separate criminal acts. *People v. King*, 66 Ill.2d 551, 566 (1977). Defendant's arguments, if accepted, would not further the purposes of the doctrine, and the automatic transfer is not an appropriate consideration for determining the seriousness of a crime for purposes of the one act, one crime doctrine.

¶ 15 The trial court has broad discretionary powers to fashion an appropriate sentence within the statutory limits prescribed by the legislature. *People v. Lindsey*, 2013 IL App (3d) 100625, ¶ 56. The trial judge did not err in finding that, under the circumstances, attempted first degree murder was a more serious offense than aggravated battery with a firearm. When the statutory enhancement for the personal discharge of a firearm in connection with an attempted murder that proximately causes great bodily harm is present, as it is here, the sentencing range for that offense is 31 years to natural life, a more severe punishment than a conviction for aggravated battery with a firearm. Without the statutory enhancement, both crimes are Class X felonies with a sentencing range of 6 to 30 years. See 730 ILCS 5/5-4.5-25(a). In situations where the degree of the offenses and their sentencing classifications are identical, the Illinois Supreme Court has instructed that the sentencing judge consider which of the convictions has the more culpable mental state. *Artis*, 232 Ill.2d at 171. Attempted intentional first degree murder requires the State to prove that a defendant had the specific intent to kill, the most culpable mental state, while aggravated battery with a firearm only requires proof that a defendant intentionally committed a battery by discharging a firearm. See 720 ILCS 5/8-4; 720 ILCS 5/9-1; 720 ILCS 5/12-4.2; *People v. Miller*, 284 Ill.App.3d

No. 1-12-0318

16, 25-26 (1996). Thus, attempted first degree murder has a more culpable mental state and the sentence was properly entered on that conviction.

¶ 16 II. Constitutionality of Automatic Transfer

¶ 17 Defendant contends that the automatic transfer statute (705 ILCS 405/5-130) itself violates the Eighth Amendment and the right to due process. The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. Const. amend VII, XIV. This Court has previously held that the automatic transfer statute does not violate the Eighth Amendment. *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66. This is so because the automatic transfer is not punishment, as it only provides a mechanism for determining where defendant's case is to be tried. *Id.*; see also *Jackson*, 2012 IL App (1st) 100398 at ¶ 24; *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 55. Defendant argues that a finding that the automatic transfer is not punitive defies common sense because trying certain minors as adults clearly has the purpose and effect of imposing harsher penalties on them. However, minor defendants do not have a constitutional right to be treated as juveniles in the first instance and the legislature has the authority to define the limits of the juvenile system. *People v. Perea*, 347 Ill.App.3d 26, 36 (2004). While the legislative choice to try certain juvenile offenders as adults may impact the punishment ultimately imposed, it is not, in and of itself, punishment for purposes of the Eighth Amendment. Defendant does not argue that there is anything inherently cruel and unusual about a minor being tried as an adult. It follows then that the procedure that determines the court in which a defendant is tried is not, by itself, violative of the Eighth Amendment.

¶ 18 The Illinois Supreme Court and this Court have consistently held that the automatic transfer statute does not violate the right to either procedural or substantive due process. *People v.*

No. 1-12-0318

J.S., 103 Ill.2d 395, 402-05; *Salas*, 2011 IL App (1st) 091880, at ¶ 75-76, 78-79. Based on existing precedent, we reject defendant's arguments that the automatic transfer provision is unconstitutional.

¶ 19 III. Constitutionality of The Mandatory Firearm Enhancement And The Truth In Sentencing Statute When Imposed On Minors

¶ 20 Similar to and interrelated with the prior argument, defendant contends that the application of the 25 years to life mandatory firearm enhancement and the mandatory truth in sentencing statute violate the Eighth Amendment when applied to minors. Defendant challenges the constitutionality of these statutes based on a line of recent United States Supreme Court cases: *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, --- U.S. ---, 132 S. Ct. 2455 (2012). The cases essentially provide that minors cannot be sentenced to the death penalty and cannot be mandatorily sentenced to life imprisonment without the possibility of parole. Defendant relies heavily on one statement in *Miller* in particular to support his argument: "[a]n offender's age * * * is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take a defendant's youthfulness into account at all would be flawed.'" *Miller*, 132 S. Ct. at 2466. Based on this statement, Defendant urges us to categorically hold that the legislature is prohibited from imposing an automatic sentence on a minor that is the same as the sentence it would impose on an adult for the same crime. We decline to take the holdings in *Roper*, *Graham*, and *Miller* that far.

¶ 21 The line of Supreme Court cases relied upon by defendant does not stand for as broad of a position as he suggests, nor does it compel the conclusion that mandatory prison sentences cannot in any instance be imposed on minors. Each of the cases before the United States Supreme Court dealt with capital punishment or life imprisonment without the possibility of parole. In its holdings

No. 1-12-0318

in any of those cases, the Court could have invalidated all mandatory minimum sentences for minors, but it did not. Instead, the Court limited those holdings to the "most severe" punishments allowed under the United States Constitution: the death penalty and life imprisonment without the possibility of parole (*Miller*, 132 S.Ct. at 2466). *Roper*, *Graham*, and *Miller* do not compel the broad reading that defendant requests us to ascribe to them: that juveniles charged with certain offenses may not be tried in criminal court and, if found guilty, sentenced to the attendant penalties.

¶ 22 A minor has no constitutional right to be prosecuted as a juvenile, and the legislature is entitled to define the scope of protections afforded to minors under the Juvenile Court Act. *Perea*, 347 Ill.App.3d at 36. The Illinois legislature has made a determination that a certain class of juvenile offenders that commit heinous crimes is not entitled to the protections it affords to other minor offenders. All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate a clear constitutional violation. *People v. Dinelli*, 217 Ill.2d 387, 397 (2005). A court must construe a statute so as to affirm its constitutionality if reasonably possible. *Id.* To deem a statute facially unconstitutional, we must find that there are no circumstances in which the statute could be validly applied. *People v. Davis*, 2014 IL 115595, ¶ 25. This Court has already found that the challenged statutory scheme can be constitutionally applied under some circumstances, *Salas*, 2011 IL App (1st) 091880, and we find no reason to depart from that holding.

¶ 23 Additionally, the statutory scheme is not unconstitutional as applied to this defendant. A defendant's age is still a factor that the trial judge can and should consider when sentencing a minor tried as an adult. In this case, the trial judge indicated that he "considered greatly" the defendant's

No. 1-12-0318

age, along with the severity of the victim's injuries and defendant's lack of remorse. The totality of the testimony reflects the fact that the crime was heinous. The victim's injuries were life threatening and resulted in severe permanent disfigurement. The trial judge stated that he "had to fashion a sentence that's necessary to protect the public, that won't deprecate the seriousness of the offense, and that will suggest to those other people who would think that firing weapons in the streets of Chicago at individuals who have done nothing to them is less than a good idea."

¶ 24 Defendant concedes that there is nothing inherently unconstitutional about the length of the sentence when he states that "[e]ven if a trial judge later determines that such a sentence is appropriate, forcing a judge to impose it at the outset, without due consideration of the juvenile's status is improper." citing *Miller*, 132 S. Ct. at 2469. But, after giving consideration to defendant's age and conduct, it is clear that the trial judge did not feel constrained by the mandatory minimums as evidenced by his sentencing defendant to six years more than the minimum allowable. In fact, the trial judge seemed inclined to sentence defendant to a longer term, but felt that defendant's age and lack of a felony background limited him.

¶ 25 In light of the current state of our precedent, and for the other reasons stated above, we reject defendant's constitutional challenges. Instead, we find that the statutory scheme is not facially unconstitutional because, as here, it may be validly applied in some circumstances. We likewise find that the statutory scheme is not unconstitutional as applied to defendant because the trial judge took defendant's age into consideration when sentencing defendant to a term of imprisonment exceeding the mandatory minimum.

¶ 26 IV. Mittimus Correction

¶ 27 Defendant also contends that the mittimus should be corrected to reflect that his conviction

No. 1-12-0318

on count 15 merged with his conviction on count 4 and requests that the sentence of the mittimus that states "C06 and C025 at 80%" be stricken. The People agree that the suggested correction is proper. Pursuant to our authority to correct a mittimus without remand (*People v. Rivera*, 378 Ill.App.3d 896, 900 (2008)), we direct the clerk of the circuit court to correct the mittimus by striking the language "C06 and C025 at 80%."

¶ 28

CONCLUSION

¶ 29 Accordingly, we affirm the judgment of the Circuit Court of Cook County.

¶ 30 Affirmed, mittimus corrected.