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SIXTH DIVISION
June 20, 2014

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. 94 CR 8932
)	
DENNIS THOMPSON,)	The Honorable
)	James L. Rhodes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶1 *HELD:* This court lacked the jurisdiction to consider the merits of defendant's constitutional challenge of his mandatory life sentence pursuant to *Miller v. Alabama*, 567 U.S. __ (2012), where it was raised for the first time on appeal from the dismissal of his section 2-1401 petition for relief from judgment.

¶2 Defendant, Dennis Thompson, appeals the dismissal of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). For the first time on appeal, defendant contends the trial court erred in dismissing

his section 2-1401 petition where his mandatory life sentence violates the eighth amendment's prohibition against cruel and unusual punishment and is void as a result. Based on the following, we affirm.

¶3 FACTS

¶4 This case appears before us for the fourth time. For disposition of this appeal, we need only provide a brief summation of the evidence and the procedural posture of the case.

¶5 On March 26, 1994, defendant, who was nearly 20 years old at the time, shot and killed his father and his father's girlfriend. Defendant confessed to the murders and directed the police to the murder weapon. Defendant's theory at trial was that his actions constituted second degree murder because he shot his father in response to a long history of physical and mental abuse. Following a bench trial, defendant was convicted of two counts of first degree murder and sentenced to natural life in prison pursuant to section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994)). We affirmed defendant's convictions and sentence on direct appeal. *People v. Thompson*, No. 1-95-2040 (unpublished order pursuant to Supreme Court Rule 23) (July 21, 1997).

¶6 On May 21, 1998, defendant filed his initial petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)), alleging, *inter alia*, ineffective assistance of trial counsel. The petition proceeded to second-stage review, but ultimately was dismissed. We affirmed the dismissal of the initial postconviction petition on appeal. *People v. Thompson*, No. 1-99-2686 (unpublished order pursuant to Supreme Court Rule 23) (Apr. 26, 2001). Defendant's subsequent petition for leave to appeal to the supreme court was denied. *People v. Thompson*, 198 Ill. 2d 606 (2002). Defendant then unsuccessfully sought *habeas corpus* relief in the United States District Court for the Northern District of Illinois. *United*

States ex rel. Thompson v. Briley, No. 04-3110 (N.D. Ill. Feb. 10, 2005)). The Seventh Circuit Court of Appeals also denied defendant's appeal. *Thompson v. Battaglia*, 458 F.3d 614 (7th Cir. 2006).

¶7 On February 6, 2007, defendant requested leave to file a successive postconviction petition, again alleging, *inter alia*, ineffective assistance of counsel. The trial court denied defendant's request. This court affirmed on appeal. *People v. Thompson*, No. 1-07-0763 (unpublished order pursuant to Supreme Court Rule 23) (June 24, 2008).

¶8 On July 24, 2009, defendant filed a motion entitled "Article I Free Standing Motion to Vacate," alleging he was "denied the Constitutional right to qualified death-penalty attorneys." After the motion was recharacterized as a successive postconviction petition, the trial court struck the petition "since it was filed without leave of court." Defendant then sought leave to file another successive postconviction petition, which was denied. Defendant appealed, but withdrew his appeal.

¶9 On December 28, 2011, defendant filed a section 2-1401 petition, the subject of which underlies this appeal. In the 2-1401 petition, defendant claimed his convictions were void because the trial court failed to appoint two qualified capital attorneys to his case, all of his prior attorneys were ineffective, and perjured testimony was presented at his trial. The State filed a motion to dismiss, arguing the section 2-1401 petition was untimely and the substantive claims were not properly brought in a section 2-1401 petition and had no merit. Defendant responded. The trial court entertained lengthy arguments, but ultimately dismissed defendant's section 2-1401 petition.

¶10 This appeal followed.

¶11 DECISION

¶12 Defendant contends, for the first time on appeal, that his mandatory life sentence violated the eighth amendment and the proportionate penalties clause of the Illinois Constitution. In particular, defendant argues that section 5-8-1(a)(1)(c)(ii) is unconstitutional on its face because it mandates a term of natural life imprisonment for all offenders who murder more than one individual without consideration of any mitigating factors. Defendant additionally argues that the statute is unconstitutional as applied to him because he was 19 years old at the time of the shooting, had no criminal history, and impulsively committed the crime after years of abuse by his father. The State responds that defendant's sentence is not void and, therefore, is not properly before this court where he failed to include the allegation in his section 2-1401 petition. The State further responds that *Miller v. Alabama*, 567 U.S. ____ (2012), upon which defendant relies, created a new law that has no retroactive application to defendant's case. Finally, the State argues that *Miller* does not apply to defendant because he was nearly 20 years old when he committed the double murder and the *Miller* holding is limited to juveniles.

¶13 In *Miller*, the United States Supreme Court held that a mandatory life sentence without parole for a defendant under the age of 18 at the time of the crime is a cruel and unusual punishment in violation of the eighth amendment. *Miller*, 567 U.S. at _____. Importantly, the Supreme Court did *not* ban the imposition of life sentences for juveniles; rather, it required sentencing courts to consider the differences between children and adults before imposing a lifetime of incarceration. *Id.*

¶14 Similarly, prior to the United States Supreme Court's *Miller* decision, in *People v. Miller*, 202 Ill. 2d 328 (2002), our supreme court held that imposing a mandatory sentence of life without parole on a juvenile convicted of murdering more than one victim under a theory of

accountability and without considering mitigating evidence, including the defendant's age and culpability, violated the Illinois Constitution's proportionate penalties clause and was unconstitutional as applied. *Id.* at 341. Our supreme court emphasized that the holding was limited to the facts of the case and "does not imply that a sentence of life imprisonment for a juvenile offender convicted under a theory of accountability is never appropriate." *Id.*

¶15 We first address whether defendant's contention is properly before us.

"Section 2-1401 establishes a comprehensive statutory procedure for allowing the vacatur of a final judgment older than 30 days. [Citations]. To obtain relief, the defendant must show proof of a defense or claim that would have precluded entry of the judgment in the original action and diligence in discovering that defense or claim and presenting the petition. [Citation.] The statute ordinarily is used to correct errors of fact [citation] and with certain exceptions not applicable here, the statute provides that petitions must be filed no later than two years after entry of the order or judgment. [Citation.] The two-year limitation, however, does not apply to petitions brought on voidness grounds. [Citation.] Our review of the dismissal of this case is *de novo*. [Citation]."

People v. Gray, 2013 IL App (1st) 112572, ¶ 7.

¶16 Defendant was sentenced in 1994 and filed his section 2-1401 petition in 2011, clearly outside the 2-year requisite time period. There is no dispute that defendant raised his eighth amendment challenge for the first time on appeal from the dismissal of his section 2-1401 petition. Defendant, however, argues that he has not waived review of his claim because a challenge to the constitutionality of a statute may be raised at any time.

¶17 This issue was recently decided by this court in *Gray*. In *Gray*, the defendant also filed a section 2-1401 petition outside of the requisite time period and, for the first time on appeal from the dismissal of his 2-1401 petition, argued that his sentence was void under *Miller* and could be challenged at any time. This court disagreed. We cite the well-reasoned *Gray* opinion at length due to its procedural similarity to the facts before us.

"A judgment is void, as opposed to voidable, only if the court that entered it lacked jurisdiction. [Citation.] Jurisdictional failure can result from a court's lack of personal or subject matter jurisdiction or, relevant to this case, the court's lack of power to render the particular judgment. [Citation.] Jurisdiction or the power to render a particular judgment does not necessarily mean that the judgment rendered must be one that should have been rendered; indeed, the power to decide carries with it the power to decide wrong, as well as right, and a court will not lose jurisdiction merely because it makes a mistake in the law, the facts, or both. [Citation.] The principle follows: that which is unconstitutional is not necessarily void. [Citation.] A statute that is unconstitutional on its face—that is, where no set of circumstances exists under which it would be valid—is void *ab initio*, while a statute that is merely unconstitutional as applied is not. [Citation.]

As this court noted of late, *Miller v. Alabama* does not affect the validity of the natural life imprisonment statute as to nonminor defendants, so that the statute is not unconstitutional on its face. [Citations.] Moreover, *Miller* does not deprive or divest any state or court of the authority to sentence a defendant who was a minor at the time of his offense, like defendant, to a natural life imprisonment for committing homicide after already having obtained a murder

conviction. [Citation.] Thus, although the mandatory imposition of a life sentence might have violated defendant's constitutional rights, that violation did not divest the trial court of jurisdiction over him. [Citations.] As such, defendant's sentence is merely voidable if challenged in a timely manner.

[Citation.]" *Gray*, 2013 IL App (1st) 112572, ¶ 10-11.

¶18 As stated, defendant did not challenge the constitutionality of his sentence in a timely manner. In fact, defendant did not even include the challenge in his section 2-1401 petition. Because a *Miller* claim only challenges a sentence as voidable, the challenge may not be raised at any time irrespective of waiver. Defendant's contention, therefore, is not properly before this court.

¶19 We find further support in *People v. Chambers*, 2013 IL App (1st) 100575, where this court additionally concluded that it did not have jurisdiction to review the defendant's *Miller* challenge, which was raised for the first time during supplemental briefing on appeal from the dismissal of his motion for leave to file a successive postconviction petition. In so finding, this court noted that the defendant's sentence was not rendered void *ab initio* as a result of *Miller* and the defendant failed to allege his successive petition satisfied the elements of the requisite cause-and-prejudice test found in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)).

Chambers, 2013 IL App (1st) 100575, ¶ 39. The *Chambers* court added:

"we stress that we do not have the supervisory authority possessed by our supreme court to overlook the procedural posture of the matter before us and address defendant's sentencing challenge on the merits." *Chambers*, 2013 IL App (1st) 100575, ¶ 40 (citing *People v. Jones*, 213 Ill. 2d 498, 507-08 (2004)) (our supreme court stated 'our appellate court is not free, as this court is under its

supervisory authority, to excuse, in the context of postconviction proceedings,¹ an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition').

¶20 Defendant cites to *People v. Morfin*, 2012 IL App (1st) 103568, to support his contention that we can reach the merits of his constitutionality claim even though he raised it for the first time in his section 2-1401 petition. In *Morfin*, this court similarly concluded that *Miller* did not render the statute in question or the defendant's sentence void *ab initio*. *Morfin*, 2012 IL App (1st) 103568, ¶ 40. Notwithstanding, this court considered the merits of the defendant's contention, namely, the retroactive application of *Miller*. However, unlike defendant here, the *Morfin* defendant repeatedly raised the constitutionality of the statute at issue throughout his proceedings and only expressly cited *Miller* for the first time during briefing on appeal from the dismissal of his section 2-1401 petition because *Miller* had been released while the dismissal of the petition was under consideration. Therefore, unlike the case before us, the constitutionality of the statute at issue was properly before the *Morfin* court.

¶21 To the extent the Second District of this court has found contrary in *People v. Luciano*, 2013 IL App (2d) 110792, we respectfully decline to follow it. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008) (pursuant to the doctrine of *stare decisis*, "the opinion of one district, division, or panel of the appellate court is not binding on other

¹ Like a postconviction petition, a section 2-1401 petition is also a collateral proceeding. See generally *People v. Addison*, 371 Ill. App. 3d 941, 945 (2007) (pursuant to the doctrine of *res judicata*, a section 2-1401 petition may not be used to garner relief from points previously raised at trial or in other collateral proceedings).

districts, divisions, or panels"). This court in *Gray* and *Chambers* similarly declined to follow *Luciano*. *Gray*, 2013 IL App (1st) 112572, ¶ 12, *Chambers*, 2013 IL App (1st) 100575, ¶ 41

¶22 CONCLUSION

¶23 Based on the procedural posture of this case, we conclude that we may not consider the merits of defendant's constitutionality challenge pursuant to *Miller*. We affirm the dismissal of defendant's section 2-1401 petition for relief from judgment.

¶24 Affirmed.