2014 IL App (1st) 102155-U

FIRST DIVISION
July 21, 2014

No. 1-10-2155



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 08 CR 2826 |
| | ) | |
| LAURENCE LUDLOW, | ) | Honorable |
| | ) | Luciano Panici, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

**ORDER**

¶ 1 ***Held:*** Defendant's conviction for first degree murder affirmed where defendant failed to show provocation by a preponderance of the evidence; constitutional challenges to the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2008)) are rejected.

¶ 2 Following a bench trial, defendant Laurence Ludlow was found guilty of first degree murder and sentenced to the minimum term of 20 years' imprisonment. On appeal from that judgment, defendant contends that his conviction should be reduced to second degree murder and his cause remanded for resentencing because he killed the victim in the midst of provoked

mutual combat, a mitigating factor. He further contends that the automatic transfer provision of the Illinois Juvenile Court Act (Act) (705 ILCS 405/5-130 (West 2008)) is unconstitutional. We affirm.

¶ 3 Defendant was charged with first degree murder in relation to an incident that occurred on January 17, 2008, in Markham, Illinois and resulted in the death of Lincoln Dembry. During this incident, defendant and Dembry, aged 16 and 21, respectively, engaged in a physical altercation, during which defendant used a knife against Dembry.

¶ 4 At trial, the State called Angela Massey, who testified that about 8:30 a.m. on January 17, 2008, she allowed defendant, a friend of her three sons, to use the washroom at her home at 16449 Honore Avenue in Markham, Illinois. Defendant, who appeared to be intoxicated, then left, but returned around 10 a.m. in a more intoxicated condition. He went to the basement with her sons Brian and Brandon and another friend, and she only let him stay long enough to make three phone calls. Defendant vomited in her basement and became belligerent, so she asked him to leave, after which she saw him wandering up and down the block for about an hour.

¶ 5 Massey further testified that she expected Dembry, who was a close friend of her sons and like a son to her, to visit her home that day, but he never arrived. Instead, sometime after defendant last left her home that day, one of her sons alerted her to a fight occurring outside their home. When she looked out the window, Massey saw defendant swinging a knife at Dembry. Massey reported the incident to police, then informed defendant, who was lingering outside her home, that she had done so. Defendant yelled, "fuck you bitch. I'll kill you too."

¶ 6 Wanda Butler testified that around 12:45 p.m. on the day of the incident, she was visiting Cedric McClinton, who lived next door to Massey. They were sitting in McClinton's truck, which had been backed into the driveway. Because they were facing the sidewalk, she noticed defendant and Dembry, both of whom she recognized from the neighborhood, walking up and

down the street. They walked out of sight for 5 or 10 minutes, then returned and suddenly began to swing at each other with their fists, and she told McClinton "they are serious." Butler heard Dembry say, "you stabbed me," and saw him run toward Massey's house, then change course and run down the street when defendant followed him there.

¶ 7 Butler further testified that she never saw a weapon in Dembry's hand, and did not initially see anything in defendant's hand because his sleeve was covering it, but then saw defendant holding a knife and licking blood off his hand. She also saw defendant throw the knife in a neighbor's yard. When police arrived on the scene, defendant kicked the squad car and said, "let me in, I want to go to the ice box." After the police drove defendant away, she saw someone named Reese pick up the knife from where defendant had thrown it. Reese then entered McClinton's truck, along with one of Massey's sons, and, as they drove down 159th Street, Reese threw the knife out of the window.

¶ 8 Cedric McClinton corroborated Butler's testimony regarding the sequence of events leading up to the stabbing and the aftermath. He added that he and Butler were smoking marijuana in his truck when defendant and Dembry stood in front of it and began to fight, exchanging four or five punches. Dembry was holding eggs at the time, and defendant was the first one to throw a punch. McClinton initially thought the two were just playing, as they were hitting each other in the chest and not the face, so he looked down, but looked up when Butler said "they for real."

¶ 9 McClinton further testified that after the fight ended, and before police arrived, he exited his truck and asked defendant what was wrong with him. Defendant told him that he had nowhere to live and had called the police on himself. McClinton did not see a knife in defendant's hand because his sleeve was covering it, but defendant appeared to be cutting his own hand with something. He did not see Reese, who is related to defendant, holding a knife,

but knew that Reese threw something out of the window of the truck as McClinton drove, and Butler told him it was a knife. He later led police to the area where Reese threw the knife.

¶ 10 Markham police officer Tyrone O'Neal testified that around 12:45 p.m. on the day of the incident, he was dispatched to the area of 165th Street and Honore due to a disturbance. Upon arriving, he saw defendant, who had blood on his hands and appeared to be under the influence of drugs or alcohol. Defendant was belligerent and combative, and remained so after being handcuffed and placed in the police car. Defendant told Officer O'Neal that he wanted to go to jail, that he had stabbed or hurt somebody, and that "it" was over alcohol.

¶ 11 Sergeant Knapp testified that he saw defendant upon arriving at the scene on the day of the incident, and that defendant was upset and screaming "take me to jail!" He searched the area for the knife that was used in the stabbing, but did not find it. The following day, he and McClinton went to the area of 159th Street and Interstate 294 to search for the knife.

¶ 12 Detective Jones testified that on January 18, 2008, he went to the area of 159th Street and Interstate 294, where police were told the knife was thrown, and found a black folded knife off the side of the roadway.

¶ 13 The People introduced a certified copy of Dembry's postmortem examination, which listed his cause of death as multiple stab wounds. The parties stipulated that Dembry's blood was found on defendant's socks, that defendant's own blood was found on his own pants and jacket, and that no blood was found on the knife. The parties also stipulated that People's Exhibit 3, an audio tape of seven 9-1-1 calls relating to this case, was a true and accurate recording of those calls. The audio tape was played for the court, but the substance of those calls was not transcribed by the court reporter. In their briefs, the parties agree regarding the substance of those calls, which, in relevant part, include the following:

> First Call: Defendant's mother reported that she had kicked defendant out of the house for quarreling with his stepfather, and that defendant threatened to return and smash the windows.
>
> Second Call: Defendant stated that he had been kicked out of his house and asked that a squad car pick him up because it was cold outside and he had no place to go. The operator responded that they could not do so because "we have no charge on you," but upon finding out that he was 16 years old and had a juvenile probation officer, transferred the call to a juvenile detective.
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> Third Call: Defendant verified his address and the operator told him "we are going to send someone to you right now."

¶ 14 Defendant testified that on the day of the incident, he was 16 years old and lived at 16504 South Honore. That morning, his mother kicked him out of the house, so he went to Massey's home around 8 a.m. and drank alcohol and smoked with her sons in the basement for about three hours. Massey kicked him out of her house around 11 a.m., so he called the police because it was cold and he had nowhere to go, and was told that a squad car would pick him up.

¶ 15 Defendant further testified that upon leaving Massey's house, he saw Dembry, to whom he owed $5, and Dembry approached him and asked if he had his money. Defendant said that he did not and began walking toward 165th Street, and Dembry followed him and continued to ask for his money. Dembry then began to poke him, so defendant walked toward Massey's home and Dembry followed him and began to push him. Dembry then punched him in the face and the two began to fight, exchanging three or four punches. At that point, defendant retrieved a knife from his pocket and stabbed Dembry, who was not armed, in the chest with it. Dembry then ran down the block and defendant dropped the knife in a yard across the street from Massey's house.

When police arrived on the scene, he told them he wanted to be arrested. Defendant denied that the knife recovered by police was his knife, and that he stabbed Dembry because he wanted to get arrested. On cross-examination, defendant testified that he was not afraid that Dembry was going to kill him, but rather, he was trying to get Dembry off of him.

¶ 16 The trial court found defendant guilty of first degree murder. In doing so, the court found, *inter alia*, that defendant's testimony that Dembry threw the first punch was not believable, and that because defendant used a knife against an unarmed person, the fight was not on equal terms. The court found that defendant failed to prove by a preponderance of the evidence the mitigating factor of intense passion arising from serious provocation.

¶ 17 On appeal from that judgment, defendant contends that his conviction should be reduced to second degree murder because he provided sufficient evidence to show that the murder was triggered by a sudden and intense passion resulting from mutual quarrel or combat.

¶ 18 A defendant commits second degree murder when he commits the offense of first degree murder, but in doing so is acting under a sudden and intense passion resulting from serious provocation by the victim. *People v. Lopez*, 371 Ill. App. 3d 920, 934 (2007); 720 ILCS 5/9-2(a)(1) (West 2008). Once the State has proved the elements of first degree murder, the burden then shifts to defendant to show provocation by a preponderance of the evidence. *People v. Thompson*, 354 Ill. App. 3d 579, 586 (2004). The question of whether a defendant was acting under mitigating circumstances is a question of fact. *People v. Romero*, 387 Ill. App. 3d 954, 967-68 (2009). Where, as here, a defendant argues that he provided sufficient evidence to prove a mitigating factor to reduce his conviction to second degree murder, we consider whether, after viewing the evidence presented in the light most favorable to the prosecution, any rational trier of fact could have found the mitigating factors were not present. *Thompson*, 354 Ill. App. 3d at 587.

¶ 19 To demonstrate adequate provocation, a defendant must show that it fits within one of the recognized categories of serious provocation. *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996). Here, defendant relies upon the recognized category of mutual quarrel or combat, which has been defined as a struggle into which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat. *Thompson*, 354 Ill. App. 3d at 588. A defendant who instigates a fight cannot rely upon the victim's response as evidence of mutual combat. *Lopez*, 371 Ill. App. 3d at 935. Moreover, it is not mutual combat when defendant's response is disproportionate to the provocation, particularly where a deadly weapon is used. *Lopez*, 371 Ill. App. 3d at 935.

¶ 20 Here, McClinton testified that Dembry and defendant were standing in front of where he was seated in his truck when they began to fight and that he saw defendant throw the first punch. Thus, the evidence presented at trial was sufficient for the trial court to find that defendant was the initial aggressor. Defendant, however, maintains that is not the case, given that he testified that it was Dembry who threw the first punch, and that prior to the fistfight, Dembry was the one who instigated the dispute by poking and shoving him in an attempt to collect a debt.

¶ 21 Even if we were to accept that defendant was not the initial aggressor, the fact remains that it is uncontested that Dembry was unarmed during the fistfight. Moreover, when defendant retrieved a knife from his pocket and stabbed Dembry in the chest with it, pursuant to defendant's own testimony, Dembry had only punched him three to four times. We find that defendant's use of a deadly weapon under these circumstances was wholly disproportionate to the provocation. *People v. Jones*, 371 Ill. App. 3d 303, 309 (2007) (defendant's use of a hammer against victim who hit, poked and spit at him was grossly disproportionate to that slight provocation); *Thompson*, 354 Ill. App. 3d at 588-90 (and cases cited therein). Accordingly, we find that a rational trier of fact could have found that the mitigating factor of mutual combat was

not present. *Thompson*, 354 Ill. App. 3d at 587, 590.

¶ 22 In reaching this conclusion, we have considered *People v. Johnson*, 4 Ill. App. 3d 249 (1972), upon which defendant relies for his contention that the fact he used a knife against Dembry is not a bar to a second degree murder conviction, and find it distinguishable. In *Johnson*, defendant stabbed the victim in the leg with a knife, and, on appeal, this court found that defendant was guilty of voluntary manslaughter, and not murder. *Johnson*, 4 Ill. App. 3d at 250, 252-53. In doing so, this court noted, *inter alia*, that the victim was the initial aggressor, that defendant had been defending a friend, and that the victim was larger than defendant and was reputed to be a skillful and aggressive fighter. *Johnson*, 4 Ill. App. 3d at 250-51. Here, in contrast, evidence was presented that defendant was the initial aggressor, and no evidence was presented that Dembry was larger than defendant, or that he was a skillful fighter. Further, defendant stabbed Dembry in the chest, a more vulnerable area than the leg. Under these circumstances, we find that defendant's retaliation in this case was more disproportionate than that of the defendant in *Johnson*. Further, as this court noted in *Thompson*, *Johnson* does not address the issue of grossly disproportionate retaliation as negating the mutual combat aspect of provocation. *Thompson*, 354 Ill. App. 3d at 590. Accordingly, *Johnson* is inapplicable to the case at bar.

¶ 23 In a supplemental brief, defendant also challenges the automatic transfer provision of the Act, which excludes juveniles over the age of 15 years of age who are charged with particular enumerated crimes, including first degree murder, from juvenile court jurisdiction. 705 ILCS 405/5-130 (West 2008). Defendant contends that this provision, pursuant to which he was charged and tried as an adult in this case, is unconstitutional in various respects. He thus requests that this court vacate his adult conviction and remand his cause for a hearing to determine whether it should be transferred from juvenile court to criminal court, or, in the

alternative, remand for a new sentencing hearing where the trial court will have the discretion not to apply the 20-year mandatory minimum sentence.

¶ 24 Statutes are presumed to be constitutional, and, if reasonably possible, this court has a duty to construe a statute in a manner that upholds its validity. *People v. Graves*, 207 Ill. 2d 478, 482 (2003). The party challenging the statute bears the burden of clearly establishing that it violates the constitution. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). The constitutionality of a statute is a question of law which we review *de novo*. *Sharpe*, 216 Ill. 2d at 486-87.

¶ 25 Defendant first raises eighth amendment and proportionate penalties challenges against the automatic transfer provision, arguing that its primary consequence is to expose minors to greater punishment through adult sentencing procedures. Defendant acknowledges that this court has rejected similar challenges. For example, in *People v. Salas*, 2011 IL App (1st) 091880, ¶¶ 68-70, this court held that the automatic transfer provision did not violate the eighth amendment of the United States Constitution or the proportionate penalties clause of the Illinois constitution because it does not impose any punishment on defendant, but rather, merely provides the forum where his guilt will be adjudicated. See also *People v. Jackson*, 2012 IL App (1st) 100398, ¶ 19; *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 55.

¶ 26 Defendant maintains that the reasoning behind these holdings does not withstand scrutiny because the legislative intent behind the transfer provision reveals that enhanced punishment is the only conceivable reason for such laws. He further argues that the punitive nature of transfer laws is also demonstrated by the prohibition of their retroactive application on *ex post facto* grounds because the transfer exposes minors to a harsher sentence. We, however, decline to depart from the prior holdings, and adhere to the reasoning stated therein.

¶ 27 Defendant also argues that the automatic transfer provision violates his procedural and substantive due process rights because it provides no mechanism by which a trial court can make

an individualized determination as to whether a juvenile should automatically be tried in criminal court and subject to the same sentencing requirements as adults. He maintains that such individualized determination is required due to the fundamental differences between children and adults, which impact the evaluation of the constitutionality of harsh mandatory minimum sentences to minors automatically tried in adult court. However, Illinois courts have repeatedly held that the automatic transfer provision does not violate a juvenile offender's substantive and procedural due process rights. *People v. J.S.*, 103 Ill. 2d 395, 402-05 (1984); *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 63 (and cases cited therein).

¶ 28 Defendant submits that *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005), compel the opposite conclusion, as those cases reflect a growing understanding that juvenile offenders are less culpable than their adult counterparts regardless of the offense, and therefore should not automatically be transferred to the adult system. He also argues that although this case does not deal with the single harshest sentence for which a minor is eligible, pursuant to *Miller*, no principled reason exists for abandoning the concept that a state's most severe penalties must be meted out with due consideration to an offender's youthfulness. However, *Miller*, *Graham* and *Roper* have been held to not affect the constitutionality of the automatic transfer provisions in the face of similar due process challenges, as well as eighth amendment and proportionate penalties challenges. *Pacheco*, 2013 IL App (4th) 110409, ¶¶ 58, 63, 68; *Jackson*, 2012 IL App (1st) 100398, ¶¶ 14-16, 19; *People v. Salas*, 2011 IL App (1st) 091880, ¶¶ 66-70. Accordingly, defendant's reliance on *Miller*, *Graham* and *Roper* is misplaced.

¶ 29 To the extent defendant argues that the automatic transfer provision is unconstitutional as it is applied to him, we find that such an argument fails. We observe that the only case he cites which upheld an as-applied challenge is *People v. Miller*, 202 Ill. 2d 328, 339-41 (2002), in

which the court based its reasoning in finding a multiple murder sentencing statute unconstitutional as applied, in part, on the fact that the juvenile defendant was charged under a theory of accountability. Here, unlike *Miller*, defendant was not convicted under a theory of accountability, but rather, was the actual perpetrator of the stabbing at issue. Additionally, the trial court here was not prevented from weighing the facts of the case, as well as evidence in aggravation and mitigation. In fact, in doing so, the trial court imposed the minimum applicable sentence. As such, we find that the automatic transfer provision is not unconstitutional as applied to defendant.

¶ 30 Defendant's arguments attacking the constitutionality of the automatic transfer provision have been repeatedly raised and rejected by Illinois courts, and he offers no new arguments which compel us to depart from applicable precedent. We thus find that defendant has failed to satisfy his burden of clearly establishing that the automatic transfer provision violates the constitution. *Sharpe*, 216 Ill. 2d at 487; *J.S.*, 103 Ill. 2d 395, 402-05 (1984); *Jackson*, 2012 IL App (1st) 100398, ¶¶ 14-16, 19.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.