

No. 1-12-2562

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 18885
)	
STEVEN COHN,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court did not err by sentencing the 17-year-old defendant to the mandatory minimum sentence of 20 years' imprisonment for first degree murder, imposing an additional mandatory sentence of 20 years for personally discharging a firearm during the offense, and applying the truth-in-sentencing provision, which requires defendant to serve the entire sentence imposed by the court.

¶ 2 A jury found that 17-year-old defendant Steven Cohn was guilty of first degree murder and that he personally discharged a firearm during the commission of the offense. The trial court sentenced defendant to 40 years in prison. The court imposed a mandatory minimum term of 20 years for the murder conviction (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)) and an additional mandatory 20-year firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008)).

Defendant does not contest his conviction on appeal, but instead argues the imposition of both mandatory sentences and the application of the truth-in-sentencing statute (730 ILCS 5/3-6-3(a)(2)(i) (West 2008)), which deprives him of good conduct credit, violates the Eighth Amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. For the following reasons, we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 Defendant was charged by indictment with 27 counts of first degree murder, 11 counts of attempted murder, 5 counts of aggravated discharge of a firearm, 2 counts of aggravated battery, and 1 count of armed habitual criminal. The indictment generally alleged that defendant and codefendant James Hobson shot and killed Michael Tyner while armed with a firearm. The cases against them were jointly tried before different juries beginning on March 6, 2012.

¶ 5 Monica Tyner, Michael's wife, testified that defendant and Hobson were former friends of her husband. She had known defendant for three years prior to her husband's death. Michael Tyner's friendship with defendant and Hobson ended in June 2008 when Hobson's girlfriend, LaToya Smith, and Monica had a fistfight after Smith picked on Monica's children. Monica's testimony implied that the fistfight between her and Smith occurred before the incident leading to the death of her husband.

¶ 6 On June 20, 2008, after midnight, Monica sat in her vehicle with her friend, LaKeisha Wright, parked on the 6400 block of South Justine Street in Chicago. Monica was "hanging out" with LaKeisha, listening to the radio, drinking, and smoking marijuana. Monica was familiar with the 6400 block of South Justine because all her friends lived there. As Monica sat in her vehicle, her husband sat on the porch of an abandoned house on the opposite side of the street

with Parrish Wright, Michael Wright, Eugene Rooney, and David Daniels. The abandoned house was surrounded by a yard and a fence without a gate.

¶ 7 Defendant, Hobson, Smith, Shontaeya Simmons, “Double D,” and “Bobbie” began walking down Justine Street, towards Monica’s vehicle. According to Monica, this group of people normally do not come to that part of the block at that time of night. Defendant and Hobson walked past the fence toward the porch.

¶ 8 Shortly thereafter, Monica heard “hollering” over her radio system. She turned the radio down so she could hear the commotion. After exiting her car, she observed and heard Hobson yelling at the group of men on the porch, “No one has no gun bigger than mines. Psycho is back around, nobody move. If anybody move they going to get shot.” Monica observed that everyone that had been sitting on the porch tried to vacate the area and spread out into the street. Monica asked her husband if everything was alright. Her husband told her to get back in the car and go home.

¶ 9 Monica remained, standing in the street. Simmons tapped her on the shoulder. When Monica turned around, she was hit in the back of the head. Michael Tyner asked Monica if she had been stabbed. Monica felt blood running down her neck and realized she had been stabbed. She observed Smith running away and was going to chase her, but stayed in place when she saw defendant pull out a gun and start shooting.

¶ 10 At that time, Michael Tyner had started running toward Monica. Defendant shot first, but Monica also saw Hobson firing a gun. Both defendant and Hobson had white t-shirts wrapped around their guns. Monica ran to hide behind her car and observed defendant and Hobson running toward Hobson’s house, shooting backwards. When Michael reached Monica, he

collapsed. Monica saw Michael bleeding from his chest area. An ambulance took Michael to the hospital, where he died from his injuries.

¶ 11 On cross-examination, Monica testified that she did not know whether defendant or Hobson shot her husband. Monica further explained on redirect examination that she saw defendant fire first and did not see Hobson fire until both defendant and Hobson started shooting backwards.

¶ 12 Michael Wright testified that on June 20, 2008, he sat on the porch of an abandoned building with Michael Tyner, Parrish Wright, Eugene Rooney, and David Daniels. They were getting ready to drink and smoke marijuana when defendant and Hobson approached. Michael Wright observed both defendant and Hobson had shirts wrapped around one of their hands. Hobson bragged that his gun was bigger than everyone else's gun. As Hobson spoke, Michael Wright's cousin, Richard, approached from a vacant lot. Richard Wright wore a hooded sweatshirt with the hood over his head. Hobson said, "mother fucker going to take their hood off when they walk past me." Parrish Wright responded that Richard was his nephew and did not have to take off his hood. Hobson repeated his demand that Richard Wright remove his hood. Michael Tyner told Hobson that Richard need not remove the hood.

¶ 13 According to Michael Wright, at that point, everyone who had sitting on the porch or standing in the yard of the abandoned house walked into the street. Michael Wright had observed that Monica Tyner and LaKeisha Wright exited Monica's vehicle. Simmons ran up and grabbed Monica's shoulder. Smith then stabbed Monica. After the stabbing, Michael Wright heard Hobson state, "if the mother fucker move, we going to kill him." Michael Tyner took a step forward and the shooting began. Michael Wright ducked in between parked cars. He could not see who was shooting. He saw Michael Tyner collapse.

¶ 14 Richard Wright recalled that Michael Tyner told Hobson that Richard did not need to remove his hood. Richard Wright observed that Hobson pulled out a dark revolver with a t-shirt wrapped around it. Michael Wright told Hobson to put the gun away. Defendant also had a t-shirt wrapped around his hand. After Smith stabbed Monica, Richard Wright heard Hobson say, “grab the gun, bust,” which means shoot. Richard Wright observed defendant fire the first shot. Richard Wright then jumped a fence and ducked for cover. When he looked up again, he saw Hobson running away while shooting behind his back.

¶ 15 Various police officers involved in the apprehension and forensic investigation also testified. In particular, Chicago police detective James Dowling testified that defendant was placed in a room at the police station equipped with video and audio recording equipment. Detective Dowling identified a video recording of defendant talking to Hobson, who was in a nearby cell. The video interview was published to the jury. The video shows that defendant told Hobson he washed his hands with bleach and that if Hobson “goes down,” defendant would go down with him.

¶ 16 After the State rested, defendant called Chicago police officer Tiffany Santiago to testify on his behalf. She responded to a call of shots fired at 6414 South Justine on June 20, 2008. Officer Santiago spoke to Monica Tyner, who identified Smith and Hobson as suspects. Chicago police officer Angela Palmero similarly testified that Monica Tyner identified Smith and Hobson, but never mentioned defendant as a possible suspect.

¶ 17 Following closing arguments, the jury found defendant guilty of first degree murder and that defendant personally discharged a firearm during the commission of the offense.¹

¹ The court instructed the jury on accountability pursuant to Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000), over defendant’s objection, as follows: “A person is legally responsible for the conduct of another person when either before or during the commission of an

¶ 18 Defendant filed a posttrial motion for judgment of acquittal notwithstanding the jury verdict, alleging that James Hobson's brother, Matthew Hobson, filed a report with the Chicago Police Department during the trial proceedings alleging that he was intimidated and threatened by Michael Wright in relation to Matthew's possible role as a witness. After the trial concluded, Matthew Hobson filed five additional police reports regarding other persons' involvement in the incident and its aftermath. Defendant argued that all of these incidents called into question the truthfulness of trial testimony provided by Michael Wright and his brother, Richard.

¶ 19 On July 13, 2012, the trial court heard evidence on defendant's motion. Matthew Hobson testified that Michael and Richard Wright threatened him on multiple occasions. Matthew Hobson stated that Michael Wright drove up next to him and said that he was going to kill him and that "he knows Psycho [James Hobson] and Dontae [Simmons] didn't do it." Dontae Simmons is Matthew Hobson's nephew, who also allegedly fired a weapon into the crowd on June 20, 2008. Matthew Hobson had two orders of protection served against Michael and Richard Wright. Matthew Hobson stated that during all these alleged assaults and threats made by Michael and Richard Wright, they did not mention defendant. Lakesha Harris, Sharon Whitaker, and Tyler McDaniel, friends of Matthew Hobson, also testified that Michael and Richard Wright threatened Matthew Hobson.

¶ 20 Michael and Richard Wright each testified on behalf of the State and denied that they made any threats against Matthew Hobson or gave false trial testimony. The trial court denied defendant's motion, finding that the posttrial testimony of Matthew Hobson, Harris, McDaniel, and Whitaker was "not entitled to any credibility whatsoever."

offense, and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense."

¶ 21 The trial court then held a sentencing hearing. Monica Tyner testified for the State in aggravation. Investigator James Plybon of the Cook County Sheriff's Police Department testified that he investigated a case involving possession of contraband in a penal institution. A search of defendant's cell on October 1, 2008, revealed a sharpened metal object found under his mattress.

¶ 22 The State acknowledged in its argument on aggravation that defendant "is younger" and did not have the same criminal background as codefendant Hobson. The State argued defendant had misdemeanor convictions and had been given opportunities to rehabilitate. The State requested a 40-year sentence for first degree murder and the personal discharge of a firearm.

¶ 23 Defendant's mother testified in mitigation. She stated that defendant is not a bad person and she begged the trial court to spare his life.

¶ 24 In mitigation, defense counsel requested that the trial court sentence defendant to the minimum "because at least there is a possibility that he can get out and have a life at some point in the future." Defense counsel argued that the revolver recovered by the police was allegedly fired by, controlled by, and hidden by codefendant Hobson. Defense counsel contended the evidence showed defendant "fired a gun, a gun that was never recovered." Defense counsel also reminded the court that defendant "is a little boy" and that the evidence demonstrated "he was simply following [an] older, more accomplished person."

¶ 25 Defendant stated he was sorry that he was found guilty of something he did not do. He refused to apologize for his actions.

¶ 26 In sentencing defendant to a total of 40 years' imprisonment, the trial court stated:

"[M]r. Cohn was led by the nose in connection with this offense.

Although, he made the decision to fire the shots in connection with

the offenses committed by both him and Mr. Hobson that took Mr. Tyner from this earth and from his family.

When the Court indicates that it may give a sentence in the minimum range, the court does nothing to denigrate Mr. Tyner's life and his memory or his family, but appreciates that a sentence towards the minimum still exacts a demanding penalty for one of the persons to be adjudged responsible for Mr. Tyner's death."

¶ 27 The trial court sentenced defendant to a total of 40 years in prison. The court imposed the mandatory minimum term of 20 years for first degree murder (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)) and an additional 20-year firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008)). The sentence imposed by the court also required the application of the "truth-in-sentencing" provision, which mandates that defendant serve the entirety of his sentence. 730 ILCS 5/3-6-3(a)(2)(i) (West 2008). Defendant timely appeals his sentence.

¶ 28 ANALYSIS

¶ 29 Defendant argues the automatic application of a mandatory minimum sentence of 20 years for first degree murder, a mandatory 20-year firearm enhancement, and the truth-in-sentencing provision to 17-year-old minors violates the Eighth Amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. Defendant asserts a categorical framework and individualized sentencing is required when a statutory scheme automatically imposes harsh adult sentences on minors with no opportunity for judicial discretion. According to defendant, Illinois courts' application of mandatory sentencing ranges to children should be analyzed using rules set forth by the United State Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v.*

Alabama, 567 U.S. ---, 132 S. Ct. 2455 (2012). Defendant points out that the *Miller* Court concluded the fundamental flaw of automatically applying a sentence of life without parole to minors was that they prevented trial courts from taking into account the constitutionally relevant fact that youthful offenders are fundamentally different than adults. Defendant contends that his sentence is unconstitutional and he seeks a remand for new sentencing at which the trial court would have discretion for imposing the mandatory penalties applicable to adults who are convicted of first degree murder while personally discharging a firearm.

¶ 30 The State responds that the mandatory penalties and truth-in-sentencing provision are constitutional under the Eighth Amendment and proportional penalties clause. The State also argues that defendant forfeited his claim by failing to include it in a written posttrial motion (*People v. Reed*, 177 Ill. 2d 389, 394 (1997)), but acknowledges that a party may challenge the constitutionality of a statute at any time (*People v. Wagener*, 196 Ill. 2d 269, 279 (2001)).

¶ 31 Standard of Review

¶ 32 We recognize the well-established rule that “[a]ll 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 clearly a constitutional violation.” *People v. Greco*, 204 Ill. 2d 400, 406 (2003) (citing *People v. Sypien*, 198 Ill. 2d 334, 338 (2001)). This presumption means that, if possible, we must construe the statute “so as to affirm its constitutionality and validity.” *Greco*, 204 Ill. 2d at 406 (citing *People v. Fuller*, 187 Ill. 2d 1, 10 (1999)).

¶ 33 The cardinal rule of statutory construction is to ascertain and give effect to the true intent of the legislature. *People v. Comage*, 241 Ill. 2d 139, 144 (2011). The best indication of the legislature’s intent is the language of the statute, which should be given its plain or ordinary and

popularly understood meaning. *Id.* The constitutionality of a statute is a question of law reviewed *de novo*. *Id.*; *People v. Malchow*, 193 Ill. 2d 413, 418 (2000).

¶ 34

Constitutionality of Defendant's Sentence

¶ 35 Defendant challenges the constitutionality of the mandatory sentences imposed upon him by the trial court. Under section 5-8-1(a)(1)(a) of the Unified Code of Corrections (Code), a sentence for first degree murder “shall be not less than 20 years and not more than 60 years.” 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). The trial court imposed upon defendant the minimum sentence of 20 years. Section 5-8-1(a)(1)(d)(ii) of the Code provides a 20-year firearm enhancement “if, during the commission of the offense, the person personally discharged a firearm ***.” 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2008). The trial court imposed this 20-year firearm enhancement upon defendant. Finally, the truth-in-sentencing provision states, “a prisoner who is serving a term of imprisonment for first degree murder *** shall receive no good conduct credit and shall serve the entire sentence imposed by the court.” 730 ILCS 5/3-6-3(a)(2)(i) (West 2008).

¶ 36 Defendant relies on *Roper*, *Graham*, and *Miller* to support his argument. In *Roper*, the 17-year-old defendant committed murder and did not fall within the jurisdiction of Missouri's juvenile court system. He was tried and convicted as an adult and sentenced to death. The issue before the Court was whether the minor defendant's death penalty sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment. The *Roper* Court held that the Eighth and Fourteenth Amendments prohibit a sentence of death on defendants who were under the age of 18 at the time of the commission of their crime. *Roper*, 543 U.S. at 578.

¶ 37 The 16-year-old defendant in *Graham* was charged as an adult with attempted robbery. He pled guilty to armed burglary with assault and battery and attempted armed robbery. He was

initially sentenced to concurrent three-year terms of probation, but when he violated his probation by committing a home invasion robbery, possessing a firearm, associating with others engaged in criminal activity, and attempting to avoid arrest, the trial court revoked his probation and sentenced the defendant to what, in effect, was life in prison without parole. The *Graham* Court held that the Eighth Amendment does not permit a sentence of life without parole for a juvenile criminal who does not commit a homicide. *Graham*, 560 U.S. at 79.

¶ 38 *Graham* established that children are considered to be constitutionally different from adults for purposes of sentencing because they have diminished culpability and greater prospects for reform. *Id.* at 68. The Court explained, “because juveniles have lessened culpability they are less deserving of the most severe punishments.” *Id.* “An offender’s age is relevant to the Eighth Amendment,” and, therefore, “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” *Id.* at 76.

¶ 39 In *Miller*, the United States Supreme Court considered two cases in which 14-year-old defendants received sentences of life in prison without parole following murder convictions. *Miller*, 567 U.S. ---, 132 S. Ct. at 2460. The *Miller* court held that mandatory life imprisonment without parole for juvenile offenders violates the Eighth Amendment’s ban on cruel and unusual punishment. *Miller*, 567 U.S. ---, 132 S. Ct. at 2475. “*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.* In concluding that “youth matters for purposes of meting out the law’s most serious punishments,” the *Miller* court also recognized that “ ‘a sentence which is not otherwise cruel and unusual does not becom[e] so simply because it is mandatory.’ ” *Miller*, 567 U.S. ---, 132 S. Ct. at 2470-71 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991)).

¶ 40 Notably, *Miller* does not impose a categorical ban on mandatory non-life sentences or mandatory enhancements such as those meted out to this defendant. Indeed, the United States Supreme Court has had the opportunity to review cases that would allow it to expand the reasoning in *Roper*, *Graham*, and *Miller* to cases wherein *de facto* life sentences were imposed, but declined to do so. See, e.g., *Bunch v. Smith*, 685 F.3d 546, 552-53 (6th Cir. 2012) (89-year sentence imposed upon the juvenile defendant was not specifically “life without parole,” and, therefore, there is no violation under *Graham*, and if “the [United States] Supreme Court has more in mind, it will have to say what it is”), cert. denied 569 U.S. ---, 133 S. Ct. 1996 (2013).

¶ 41 With this in mind, we now turn to Illinois authority on this issue. Although defendant does not challenge the constitutionality of the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2008)), this issue will be addressed by our supreme court in *People v. Pacheco*, 2013 IL App (4th) 110409, *appeal allowed*, No. 116402 (Ill. Sept. 25, 2013) and, therefore, its relevance to our discussion deserves a brief mention. Section 5-130 of the Juvenile Court Act automatically transfers juvenile offenders ages 15 and above to adult courts for certain offenses, including first degree murder, among others. 705 ILCS 405/5-130 (West 2008). Illinois courts have repeatedly found the automatic transfer provision constitutional. See *People v. M.A.*, 124 Ill. 2d 135, 147 (1988) (due process); *People v. J.S.*, 103 Ill. 2d 395, 404-05 (1984) (due process); *People v. Jackson*, 2012 IL App (1st) 100398, ¶ 24 (Eighth Amendment); *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66 (Eighth Amendment). Both *Jackson* and *Salas* held that the automatic transfer statute does not impose a punishment, but instead specifies the forum in which the defendant’s guilt may be adjudicated, so it is not subject to the Eighth Amendment. *Jackson*, 2012 IL App (1st) 100398, ¶ 24; *Salas*, 2011 IL App (1st) 091880, ¶ 66; see also *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 56 (finding that, similar to the automatic

transfer provision, application of the Illinois exclusive jurisdiction statute (705 ILCS 405/5-120 (West 2006)) did not violate the Eighth Amendment).

¶ 42 In contrast to the automatic transfer provision, the mandatory sentencing schemes in this case did impose a punishment upon defendant. Accordingly, the issue before us is whether sections 5-8-1(a)(1)(a) (first degree murder), 5-8-1(a)(1)(d)(ii) (firearm enhancement), and 3-6-3(a)(2)(i) (truth-in-sentencing) of the Code violate the Eighth Amendment of the United States Constitution and the proportional penalties clause of the Illinois Constitution.

¶ 43 In *Pacheco*, noting “[t]he minimum 20-year term defendant faced in this case does not compare with the death penalty or a mandatory term of life in prison without the possibility of parole,” the Fourth District held the defendant’s sentence did not violate the Eighth Amendment or proportional penalties clause. *Pacheco*, 2013 IL App (4th) 110409, ¶ 58. The 16-year-old defendant was convicted by jury of unlawful possession of a stolen vehicle, robbery (accountability), and first degree murder (accountability). The trial court sentenced her to 30 years in prison with 3 years of mandatory supervised release. The court took into account defendant’s age and stated the evidence would suggest her potential for rehabilitation is greater than that of most juveniles who might find themselves in similar circumstances.

¶ 44 The *Pacheco* court read the *Roper*, *Graham*, and *Miller* holdings as being narrowly applied to sentences involving the death penalty and life without the possibility of parole, “the two most severe punishments allowed under the United States Constitution.” *Pacheco*, 2013 IL App (4th) 110409, ¶ 51. The court explained, “when taken to its logical extreme, defendant’s argument would make any statute unconstitutional which imposes on a juvenile transferred to an adult court the same mandatory minimum sentence applicable to an adult for the same offense.” *Pacheco*, 2013 IL App (4th) 110409, ¶ 56. For the same reason, the court held the truth-in-

sentencing provision did not violate the Eighth Amendment or proportional penalties clause. *Pacheco*, 2013 IL App (4th) 110409, ¶ 60. As to policy, the court stated, “we cannot find a statute unconstitutional simply because we believe it creates bad policy. ‘In relation to the judicial branch, the General Assembly, which speaks through the passage of legislation, occupies a superior position in determining public policy.’ ” *Pacheco*, 2013 IL App (4th) 110409, ¶ 67 (quoting *Reed v. Farmers Insurance Group*, 188 Ill. 2d 168, 175 (1999)).

¶ 45 The *Pacheco* court also acknowledged, “[i]t may be time for our supreme court to consider this important issue. However, based on the arguments made by defendant and the prior precedent of both this court and, more importantly, our supreme court, defendant has failed to overcome the strong presumption the statutes at issue in this case are constitutional.” *Pacheco*, 2013 IL App (4th) 110409, ¶ 68. The dissenting opinion in *Pacheco* stated that it would find that, under the reasoning of *Miller* and *Graham*, the mandatory transfer of 15- and 16-year old juveniles to adult court is constitutionally prohibited. *Pacheco*, 2013 IL App (4th) 110409, ¶ 102 (Appleton, J., dissenting). According to the dissent, “[w]hile there are juvenile offenders who may, based on the totality of the circumstances, be eligible for adult prosecution, an automatic transfer provision based on age and offense alone, without consideration of the wide variance in the maturity, sophistication, intelligence, and social adjustment of any particular juvenile offender, cannot pass constitutional muster.” *Pacheco*, 2013 IL App (4th) 110409, ¶ 98 (Appleton, J., dissenting). *Pacheco* is currently being briefed in our supreme court.

¶ 46 Two other cases held similarly to *Pacheco*, *People v. Jenkins*, 2013 IL App (1st) 103006-U, *appeal allowed*, No. 115979 (Ill. Sept. 25, 2013) and *People v. Patterson*, 2012 IL App (1st) 101573, *appeal allowed*, No. 115102 (Ill. Jan. 30, 2013), which are currently before our supreme court. *Jenkins* is in the briefing stage and *Patterson* is under advisement. Both *Jenkins* and

Patterson held that application of the automatic transfer provision to the juvenile defendant did not violate the Eighth Amendment or proportional penalties clause. *Jenkins*, 2013 IL App (1st) 103006-U, ¶¶ 58-59; *Patterson*, 2012 IL App (1st) 101573, ¶ 27.

¶ 47 More recently, in *People v. Willis*, 2013 IL App (1st) 110233, this court expressed concern regarding constitutional protections for juvenile offenders, but followed *Pacheco* and held the automatic transfer provision was constitutional. The *Willis* court stated:

“The right for a child to be treated as one is a basic tenet of a just society. Yet, this tenet comes under particular stress when a society balances the needs of its children against its role of preventing and punishing crime and protecting citizens. How a society deals with this difficult balance reflects mightily on its values. It is a balance that our society must try to get right. And we must try in a culture in which violence has become far more commonplace, in a nation in which the federal, state, and local governments have neither the resources nor ability to adequately address the underlying social factors that precipitate violence, and in a society in which juveniles regularly witness adults solving problems in violent ways.” *Willis*, 2013 IL App (1st) 110233, ¶ 56.

The *Willis* court concluded:

“While we agree that *Roper*, *Graham*, and *Miller* have provided juvenile offenders with more constitutional protections than adult offenders, we cannot accept the expansive reading defendant asks

us to make, that is, to declare the automatic transfer provision unconstitutional. The Illinois supreme court's opinion in *J.S.* remains good law, and we may not depart from it." *Willis*, 2013 IL App (1st) 110233, ¶ 57.

¶ 48 Considering the above, only *Pacheco* addressed the constitutionality of a sentencing statute rather than only the automatic transfer provision. Defendant in this case seeks a resentencing with application of the guidelines set forth in *Miller*, including his character, record, background, mental and emotional development and the circumstances of the offense, among other things.

¶ 49 We reject defendant's argument for three reasons. First, until the United States Supreme Court or our supreme court hold otherwise, *Roper*, *Graham*, and *Miller* are limited to the specific factual settings of those cases. Defendant does not sufficiently explain why we should expand the *Roper*, *Graham*, and *Miller* line of cases to include mandatory sentencing schemes that do not impose upon juvenile offenders either the death penalty or a sentence of life without parole.

¶ 50 Second, we recognize that "the legislature has the power to determine the appropriate punishment for criminal conduct" and "the judiciary is bound to fashion sentences within the parameters set forth by the legislature." See *People v. Petrenko*, 237 Ill. 2d 490, 506 (2010).

¶ 51 Third, the sentencing judge in an adult court still has the ability to apply individual sentencing considerations within the statutory sentencing ranges. In this case, even though defendant declined to avail himself of the opportunity to present mitigating evidence related to his youth, the trial court was cognizant of that issue and recognized that defendant "was led by the nose" by the older codefendant. Thus, the trial judge, in his discretion, sentenced defendant

to the mandatory minimum sentence of 20 years for first degree murder even though he could have sentenced defendant to the maximum 60 years under section 5-8-1(a)(1)(a) of the Code.

¶ 52 We also address defendant's contention that his sentence violates the proportionate penalties clause of the Illinois Constitution. The proportionate penalties clause provides that "[a]ll penalties shall be determined * * * according to the seriousness of the offense." Ill. Const. 1970, art. I, §11. A sentence violates the proportionate penalties clause if: "(1) it is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community; or (2) it is greater than the sentence for an offense with identical elements." *People v. Herron*, 2012 IL App (1st) 090663, ¶24 (citing *People v. Hauschild*, 226 Ill. 2d 63, 74 (2007)). In *People v. Clemons*, 2012 IL 107821, ¶40, our supreme court reiterated that the Illinois proportionate penalties clause is not synonymous with the eighth amendment of the United States Constitution because the clause grants greater protections than its federal counterpart. Under the proportionate penalties clause, the court must assess whether the two crimes have identical elements. Only if that is so, does the proportionate penalties clause provide a possible remedy. However, that analysis is no longer made merely by comparing the penalties for first degree murder and sentencing enhancements. See *People v. Sharpe*, 216 Ill. 2d 481, 515-16 (2005) ("we have concluded that cross-comparison analysis has proved to be nothing but problematic and unworkable, and that it needs to be abandoned. Those cases that used such an analysis to invalidate a penalty are overruled, and this court will no longer use the proportionate penalties clause to judge a penalty in relation to the penalty for an offense with different elements"). The defendant makes no specific "identical elements" argument here. Additionally, we cannot find that a 40-year sentence for murder shocks the conscience to such a

degree that we must strike it down as unconstitutional. Accordingly, we reject defendant's proportionate penalties challenge.

¶ 53 In sum, we find that defendant did not meet his burden to demonstrate a clear constitutional violation. We must construe sections 5-8-1(a)(1)(a), 5-8-1(a)(1)(d)(ii), and 3-6-3(a)(2)(i) of the Code so as to affirm their constitutionality and validity. *Greco*, 204 Ill. 2d at 406 (citing *Fuller*, 187 Ill. 2d 1, 10 (1999)). We hold these statutes violate neither the Eighth Amendment nor the proportional penalties clause and affirm the trial court's 40-year sentence.

¶ 54 CONCLUSION

¶ 55 We affirm the sentence imposed upon defendant by the trial court as constitutionally sound.

¶ 56 Affirmed.