2017 IL App (1st) 142729-U

No. 1-14-2729

Order filed June 23, 2017

Fifth Division

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. 96 CR 1275
	)	
LEVAIL GIVENS,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in denying leave to file successive postconviction petition, where adult defendant's sentence of 60 years' imprisonment for first degree murder was not unconstitutional as applied to him.

¶ 2 Following a jury trial, defendant Levail Givens was convicted of first degree murder and sentenced to 60 years' imprisonment. We affirmed on direct appeal. *People v. Givens*, No. 1-97-3033 (1998) (unpublished order under Supreme Court Rule 23). We also affirmed orders from 1999, 2001, 2003, 2006, and 2008 summarily dismissing his *pro se* postconviction petitions, and

a 2011 order denying his *pro se* petition for a writ of prohibition. *People v. Givens*, Nos. 1-11-3754 (2013); 1-08-1288 (2009); 1-06-1650 (2007); 1-03-2712 (2005); 1-01-2569 (2002); 1-99-3111 (2001) (unpublished orders under Supreme Court Rule 23). Defendant now appeals from a 2014 order denying him leave to file a successive postconviction petition. On appeal, he contends that his *pro se* petition stated the gist of a meritorious claim that his sentence is unconstitutional as applied to him because he was 18 years old at the time of the offense and it was his first conviction for a violent offense. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with first degree murder for allegedly killing Mary Ann Givens (the victim) by beating her with a mallet and stabbing her with a knife between December 13 and 14, 1995.

¶ 4 The trial evidence showed that defendant lived with the victim, his grandmother, when he was about five years old until she was killed in their home on the night in question. She was repeatedly stabbed and slashed, including wounds to her hands as if she had grabbed the knife blade, and her head was fractured with a mallet. The medical examiner who autopsied the victim opined from the number and type of wounds that the knife wounds preceded the blow to the skull and she struggled for a few minutes to defend herself. A man who lived with defendant and the victim for many years testified that defendant took money from him and was apparently smoking cocaine at the time. When the man found the victim dead on the night in question, the doors of the home were locked. Neighbors placed defendant in and near the home that night. Two neighbors observed blood on defendant's hands and shirt, and one observed cuts on his hands; defendant gave the neighbors two different explanations. Defendant gave a postarrest statement admitting to using drugs in the home and stealing from the victim, and stated that she was angry with him for using drugs on the night in question, but claiming that she attacked him with a

knife. He claimed that he did not remember killing her. DNA analysis found his blood on the mallet handle, and a mixture of defendant's and the victim's blood on a curtain covering the doorway of defendant's bedroom. With this evidence, the jury found defendant guilty of first degree murder.

¶ 5 The presentencing investigation report (PSI) reflects that defendant, born in April 1977, received a juvenile disposition in 1992 for possession of a controlled substance and criminal damage to property, and a criminal conviction in 1995 for possession of a controlled substance. Defendant told the PSI preparer that he never knew his father and lived with his mother until he was five years old, after which he lived with his maternal grandparents. He was not abused during his childhood and had a good relationship with his mother and grandparents. He has a young child, born after this arrest, who he visits occasionally. He attended but did not complete high school, and he did not report any plans to seek further education. He worked as a laborer in 1995 until his arrest. He reported no physical health issues until his diagnosis, after this arrest, with an enlarged heart for which he is receiving medication. He denied any mental health issues or treatment. He admitted to social use of alcohol and marijuana, admitted that he used cocaine daily, and reported that he was seeking counseling for his cocaine problem before his arrest. He admitted to membership in the Maniac Latin Disciples gang from 1986 to 1996.

¶ 6 At sentencing, defense counsel first argued that defendant's gang involvement should not be considered in sentencing him for the instant offense, while the State argued that it was relevant to his character. The court noted that "just about anything touching on [defendant's] life and history is relevant for purposes of these proceedings."

¶ 7 Susan Schaefer testified for the State that she knew defendant from their neighborhood. In 1990, when defendant was 13 years old, he expressed an interest in having a relationship with

Schaefer's sister though she "wanted nothing to do with him," and Schaefer supported her sister's decision. In September 1990, defendant yelled gang slogans and threw a bottle at Schaefer as she rode past him on a bicycle. The bottle struck her in the back of her head, so that her "head was split open" and she required four stitches. Schaefer testified that, in her experience, defendant would "use force to get what he wanted."

¶ 8 Donald Fumo testified that he was an assistant principal, and in charge of discipline, at defendant's elementary school. Defendant was a "struggling" student who became engaged in fights. Fumo spoke with the victim frequently, as she "was our primary source of parental guardianship" for defendant. She cooperated with Fumo, and defendant's "attitude would sometimes change" after Fumo met with the victim. In February 1990, defendant threatened a school teacher, to the effect that he would shoot her if he had a gun. Defendant admitted to Fumo that he uttered the threat but denied having a gun. On cross-examination, Fumo testified that he met defendant's mother only once and never met his father. He opined that defendant needed help in school primarily due to "his lack of a family life."

¶ 9 Victoria Riner testified that she knew defendant from their neighborhood in 1991. In August 1991, defendant attacked Riner's then-15-year-old daughter in the street as she was holding an infant in her arms. Accusing her of being in a rival gang, he punched her in the face. On cross-examination, Riner denied that she initially accused someone other than defendant of striking her daughter. However, the parties stipulated to the testimony of a police officer that Riner reported on the day in question that a named person, not defendant, punched Riner's daughter.

¶ 10 In aggravation, the State argued that this offense was brutal, noting that the victim received multiple slashes before her skull was crushed, and that the medical evidence showed her

death was not immediate but that she struggled to defend herself. The State argued that defendant's violent nature was shown by his gang membership and Schaefer's testimony. The State argued that the victim loved defendant and tried to help him but "he reciprocated that love by killing her" because she would not allow him to use cocaine in her home. The State asked the court to find that the murder was brutal and heinous so defendant could receive natural life imprisonment.

¶ 11 In mitigation, defense counsel noted that defendant grew up with no father and a virtually absent mother, and argued that his grandmother "may have loved him but obviously paid no attention to him." Counsel asked the court to not find the murder brutal and heinous, noting the court's discretion.

¶ 12 Defendant addressed the court, stating that he was raised without a father and a "no good mother," and that his grandfather rejected him. He argued that he "never had an opportunity in life." He acknowledged that the victim, his grandmother, "was there for me" and "a mother to me." He asserted that he loved her "with all my heart" and denied that he killed her.

¶ 13 The court noted that the jury heard all the evidence and found him guilty beyond a reasonable doubt, and stated that the court considered the PSI, trial evidence, and factors in aggravation and mitigation. The court noted that, in the PSI, defendant claimed he "had a good relationship with the person you have been found guilty of murdering" and denied any childhood abuse. The court found the murder to be brutal and heinous. Noting the State's request for a life sentence, the court found only one mitigating factor–mercy–and sentenced defendant to 60 years' imprisonment. The court denied defendant's motion to reconsider his sentence, in which he argued that the court did not give proper consideration to his rehabilitative potential.

¶ 14 On direct appeal, defendant raised no sentencing issue. He filed many *pro se* postconviction petitions, and all were summarily dismissed. His 1999 and 2006 petitions raised no sentencing issues. His 2001 petition raised an *Apprendi* challenge to his sentence. His 2003 petition raised a claim that he should receive a new sentencing hearing because the court did not give proper consideration to mitigating factors. His 2008 petition raised a claim that his term of mandatory supervised release (MSR) after his prison sentence extended his sentence beyond the statutory maximum.[1] Defendant also filed a *pro se* petition for a writ of prohibition in 2011, raising the same MSR challenge, which the trial court denied. As stated above, we affirmed these dispositions.

¶ 15 In July 2014, defendant filed this *pro se* motion for leave to file a successive postconviction petition, claiming that his sentence is unconstitutional under *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455 (2012),[2] because he was a minor or youth and his sentence was effectively a life sentence. Regarding cause and prejudice for a successive petition, he argued that he could not have cited *Miller* in an earlier petition. On July 23, 2014, the court ordered that defendant's "*pro se* petition for successive postconviction relief is without merit and denied." Regarding his sentencing challenge based on youth, the court noted that *Miller* concerns "natural life sentences for a juvenile. He was neither a juvenile nor sentenced to natural life." This appeal followed.

¶ 16 On appeal, defendant contends that his *pro se* postconviction petition should not have been summarily dismissed because it stated the gist of a meritorious claim that his sentence is

[1] Defendant filed a *pro se* petition for relief from judgment in 2010, reiterating his challenge to MSR. The court dismissed the petition *sua sponte*, and we denied defendant leave to file a late notice of appeal. *People v. Givens*, No. 1-11-0206 (2011).

[2] We shall refer to *Miller v. Alabama* as either *Miller* or "U.S. *Miller*" as clarity requires.

unconstitutional as applied to him because he was 18 years old at the time of the offense and it was his first conviction for a violent offense. The State responds that the court properly denied defendant leave to file a successive postconviction petition.

¶ 17 As a threshold matter, we find that the court denied defendant leave to file a successive postconviction petition. Generally, a defendant may file only one postconviction petition without leave of court, which may be granted if the defendant shows an objective cause for not previously raising the instant claims and prejudice from not raising them. 725 ILCS 5/122-1(f) (West 2014). Defendant duly filed a motion for leave to file a successive petition, arguing cause and prejudice based on *Miller*, and it was wholly proper for the court to address the merits of his *Miller* claim in determining whether he showed prejudice. The cause-and-prejudice test is a higher standard for a defendant to overcome than the frivolous-and-patently-without-merit test for summarily dismissing a petition, and the circuit court should deny leave when it is clear upon reviewing the successive petition and attached documentation that the defendant's claims fail as a matter of law or the petition and documentation are insufficient to justify further proceedings. *People v. Terry*, 2016 IL App (1st) 140555, ¶ 28 (citing *People v. Smith*, 2014 IL 115946, ¶ 35). Our review of the denial of leave to file a successive petition is *de novo*. *Terry*, 2016 IL App (1st) 140555, ¶ 28.

¶ 18 Defendant received the maximum unextended sentence for first degree murder, which has an unextended sentencing range of 20 to 60 years' imprisonment. 730 ILCS 5/5-4.5-20(a) (West 2014). A defendant may receive natural life imprisonment for first degree murder found to be "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-4.5-20(a), 5-8-1(a)(1)(b) (West 2014).

¶ 19 The eighth amendment of the United States Constitution prohibits "cruel and unusual punishments." U.S. Const., amend. VIII. This provision prohibits not only "inherently barbaric punishments" but those "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59 (2010). The proportionate-penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11.

¶ 20 In *Miller*, 567 U.S. at __, 132 S. Ct. at 2460, the United States Supreme Court held that "mandatory life without parole for those *under the age of 18* at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " (Emphasis added.) The Supreme Court held that minors are constitutionally different from adults for sentencing purposes, being more impulsive and more vulnerable to negative influences and peer pressure than adults, and not having the fully-formed character of adults so that their actions do not necessarily indicate irreversible depravity. *Miller*, 567 U.S. at __, 132 S. Ct. at 2463-68. "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at __, 132 S. Ct. at 2469. While opining that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," the Court stated that "we do not foreclose a sentencer's ability to make that judgment in homicide cases" but "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, 567 U.S. at __, 132 S. Ct. at 2469, 2475.

¶ 21 In *People v. Reyes*, 2016 IL 119271, ¶¶ 1-2, a defendant who committed first degree murder and two counts of attempted first degree murder when he was 16 years old received prison sentences totaling 97 years when mandatory firearm enhancements were added to the

minimum sentence for each offense and mandatory consecutive sentencing applied. Noting that the *Miller* "Court's holding required that life-without-parole sentences be based on judicial discretion rather than statutory mandates" (*Reyes*, 2016 IL 119271, ¶ 4), our supreme court extended *Miller* to include *de facto* as well as *de jure* life sentences. "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole–in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *Reyes*, 2016 IL 119271, ¶ 9.

¶ 22 In *People v. Thompson*, 2015 IL 118151, our supreme court considered the contention of a defendant who was 19 years old at the time of his offenses, two counts of first degree murder, that *Miller* should be extended to defendants who were less than 21 years old as of their offense, so that his mandatory sentence of natural life imprisonment was unconstitutional as applied to him. *Thompson* held that the defendant could not raise his as-applied challenge for the first time on appeal from an untimely collateral petition. In doing so, the supreme court distinguished cases where *Miller* claims were allowed to be raised for the first time on appeal. Unlike those cases, the *Thompson* "defendant was 19 years old when he committed the murders. Indisputably, he was not a minor for purposes of sentencing. Therefore, defendant cannot obtain the same collateral relief afforded the defendants *** who all received mandatory natural life sentences for crimes committed when they were under the age of 18 in violation of *Miller*." *Thompson*, 2015 IL 118151, ¶ 43. However, the supreme court noted that a properly-filed postconviction petition could raise the *Thompson* defendant's claim, and it refused to opine on the merits of such a petition. *Thompson*, 2015 IL 118151, ¶ 44.

¶ 23 In *People v. Miller*, 202 Ill. 2d 328 (2002) (Illinois *Miller*), a 15-year-old offender convicted of two counts of first degree murder on an accountability basis, for standing as a lookout for the shooters, was sentenced to 50 years' imprisonment rather than the mandatory sentence of natural life imprisonment because the trial court found the latter unconstitutionally disproportionate as applied. Our supreme court affirmed. It acknowledged that mandatory natural life for double murder had previously and generally been upheld. However, it found that such a sentence was disproportionate–"cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community"–in that case because the defendant was both a juvenile and convicted strictly on an accountability basis. *Miller*, 202 Ill. 2d at 338. Noting the "long-standing distinction made in this state between adult and juvenile offenders," the supreme court found that "the convergence of the *** transfer statute, the accountability statute, and the multiple-murder sentencing statute eliminates the court's ability to consider any mitigating factors such as age or degree of participation." *Miller*, 202 Ill. 2d at 341-42.

¶ 24 Defendant cites this court's decisions in *People v. House*, 2015 IL App (1st) 110580, and *People v. Harris*, 2016 IL App (1st) 141744, in support of his contention of error.

¶ 25 In *House*, the defendant was 19 years old at the time he served as lookout during a double murder, for which he received a mandatory life sentence. *House*, 2015 IL App (1st) 110580, ¶ 83. This court noted that, "as in [Illinois] *Miller*, defendant's sentence involved the convergence of the accountability statute and the mandatory natural life sentence." *House*, 2015 IL App (1st) 110580, ¶ 83. "While defendant was not a juvenile at the time of the offense, his young age of 19 is relevant in consideration under the circumstances of this case." *House*, 2015 IL App (1st) 110580, ¶ 83.

> "His youthfulness is relevant when considered alongside *his participation in the actual shootings*. Defendant's presentence investigation report showed that his only prior offenses were possession of a controlled substance with intent to deliver. Defendant did not have a criminal history of violent crimes. The sentencing hearing also disclosed that defendant never knew his father, he was raised by his maternal grandmother, and that his mother died when he was 18. Defendant attended high school through the twelfth grade, however, he never graduated. At the time defendant was sentenced, the death penalty was still in place in Illinois. Although the trial judge found defendant eligible for the death penalty, he concluded that there were 'sufficient mitigating factors to preclude the imposition of the death penalty.' While some of these mitigating factors were before the trial court when it declined to impose the death penalty, they were not available to be considered before imposing a mandatory natural life sentence. *The court's ability to take any factors into consideration was negated by the mandatory nature of defendant's sentence. The trial court was also precluded from considering the goal of rehabilitation in imposing the life sentence, which is especially relevant in defendant's case*. Given defendant's age, his family background, *his actions as a lookout as opposed to being the actual shooter*, and lack of any prior violent convictions, we find that defendant's mandatory sentence of natural life shocks the moral sense of the community." (Emphases added.) *House*, 2015 IL App (1st) 110580, ¶ 101.

The *House* court therefore remanded for a new sentencing hearing. "We do not make a recommendation to the trial court on remand as to the appropriate sentence. That determination is best left to the trial court who presided over defendant's trial proceedings." *House*, 2015 IL App (1st) 110580, ¶ 103.

¶ 26 In *Harris*, the defendant was convicted of first degree murder and attempted first degree murder, committed when he was 18 years old. He received prison sentences totaling 76 years when mandatory firearm enhancements were added to the minimum sentence for each offense and mandatory consecutive sentencing applied. *Harris*, 2016 IL App (1st) 141744, ¶ 15. The defendant contended that his sentencing was unconstitutional under the eighth amendment and the proportionate-penalties clause, and in particular that it constituted a mandatory *de facto* life sentence. *Harris*, 2016 IL App (1st) 141744, ¶¶ 31-32. Following *Reyes*, this court agreed with the defendant that his sentences were effectively a life sentence. *Harris*, 2016 IL App (1st) 141744, ¶¶ 50-54. This court noted that both the firearm enhancement and consecutive sentencing had been found constitutional, and this court found that defendant's sentences did not violate the eighth amendment because in U.S. *Miller* the Supreme "Court drew a line between juveniles and adults at the age of 18 years." *Harris*, 2016 IL App (1st) 141744, ¶¶ 43-47, 55-56.

¶ 27 Following *House*, the *Harris* court found that its defendant's sentence shocked the moral sense of the community and thus violated the proportionate-penalties clause. The "trial court could not tailor the sentence to fit Harris's particular circumstances; the statutes did not merely restrict the trial court's discretion, but rather eliminated it. The statutes hemmed the trial court in, particularly the firearm enhancements, which had an outsized effect on the length of the sentence." *Harris*, 2016 IL App (1st) 141744, ¶ 71.

> "All sentencing cases are fact-specific, but Harris is similar to *House* in some important ways. Like House, Harris was young (although neither qualifies as a juvenile) when he committed his crimes. Like House, Harris had no violent criminal history; in fact, Harris had no criminal history at all. Harris's responsibility for his crimes was much greater than House's, but Harris has additional attributes arguing for his rehabilitative potential.

> Harris had grown up in a stable family environment, and those family members continued to support him through his sentencing. Harris was finishing high school when he committed the murders and completed his GED while in pretrial custody. The dissent rightly argues that Harris's stable home life is not a mitigating factor; however, that evidence, along with his educational achievements, does support the notion that Harris might be able to rehabilitate himself if given the opportunity. Or, in the words of our constitution, might be able to restore himself to 'useful citizenship.' *The confluence of sentencing statutes, which the trial court was required to apply, is absolutely contrary to that constitutional objective of the rehabilitation clause*." (Emphasis added.) *Harris*, 2016 IL App (1st) 141744, ¶ 64.

The court noted that "all as-applied challenges are necessarily fact-specific; in upholding Harris's constitutional challenge, we are merely saying that his sentencing should have been similarly specific to his own circumstances, to effectuate the constitutional mandate of restoring Harris to useful citizenship." *Harris*, 2016 IL App (1st) 141744, ¶ 68. "We realize that if the firearm enhancements had not applied, the trial court might well have sentenced Harris above the minimum for both murder and attempted murder. But the application of these enhancements prevented the trial court from constructing a sentence that had any chance of returning Harris to society, even if the court thought that Harris was a good candidate to rehabilitate himself." *Harris*, 2016 IL App (1st) 141744, ¶ 72.

¶ 28 Here, we need not reach the weighty constitutional issue of whether to extend U.S. *Miller* to defendant's case because we conclude that doing so would not avail him. U.S. *Miller* does not prohibit natural life imprisonment for minors, nor does *Reyes* prohibit *de facto* life sentences for minors. Instead, U.S. *Miller* and *Reyes* require–as Illinois *Miller* has long authorized–that the

trial court engage in a discretionary sentencing decision, where sentences shorter than the otherwise-mandatory sentence are considered, before imposing actual or *de facto* life imprisonment on a minor. The problem addressed in both *Miller* cases, *Reyes*, *House*, and *Harris* is mandatory sentencing that deprived the trial court of discretion–of the ability to weigh mitigation or rehabilitation–in sentencing a minor to a *de jure* or *de facto* life sentence.

¶ 29 Accepting *arguendo* that defendant's sentence is a *de facto* life sentence and that he falls under *Miller* and *Reyes* despite being an adult at the time of his offense, his case is still fundamentally distinguishable from those cases. Defendant was subject to a sentencing range of 20 to 60 years, or life imprisonment upon the court's finding that the murder was brutal and heinous. Unlike the *Miller* cases, *Reyes*, *House*, and *Harris*, no mandatory firearm enhancements or mandatory life sentence tied the trial court's hands in sentencing defendant. It had ample discretion to impose a prison sentence as low as 20 years or as high as natural life, and it exercised discretion in imposing a 60-year sentence. In defendant's sentencing hearing, the defense ably argued his troubled (but not abusive) childhood in mitigation, as the State properly argued in aggravation the brutality of his crime–stabbing, slashing, and bludgeoning his grandmother over several minutes in their home–and prior instances of violence and threats. In sum, defendant had the discretionary sentencing hearing that the *Miller* cases and *Reyes* envision, and we do not find the sentence resulting from that hearing to be so wholly disproportionate to the offense as to shock the moral sense of the community. We conclude that defendant's sentence does not violate the proportionate-penalties clause, and that the trial court did not err in denying him leave to file a successive petition raising such a claim.

¶ 30 Defendant has cited as additional authority *People v. Morris*, 2017 IL App (1st) 141117, and *People v. Buffer*, 2017 IL App (1st) 142931, where this court granted juvenile or minor

defendants relief under U.S. *Miller* and *Montgomery v. Louisiana*, 567 U.S. __, 136 S. Ct. 718 (2016), even though the trial court had discretion at sentencing. In doing so, *Morris* and *Buffer* relied on *Montgomery*'s holding that life imprisonment without parole is unconstitutional for " 'juvenile offenders whose crimes reflect the transient immaturity of youth.' " (*Buffer*, 2017 IL App (1st) 142931, ¶ 51 (quoting *Montgomery*, 567 U.S. at __, 136 S. Ct. at 734)), or " 'unfortunate yet transient immaturity.' " (*Morris*, 2017 IL App (1st) 141117, ¶ 22 (quoting *Montgomery*, 567 U.S. at __, 136 S. Ct. at 734)). However, *Morris* and *Buffer* granted relief to defendants who were at the time of their offenses juveniles or minors, rather than adults such as defendant. As the *Montgomery* court stated, *Miller* is based on the principle that children–juveniles or minors–are constitutionally different from adults for sentencing purposes. *Montgomery*, 567 U.S. at __, 136 S. Ct. at 732-33. Nothing in *Montgomery* applies *Miller* to adults or calls for *Miller* to be extended to adults. We conclude that *Morris* and *Buffer* are not applicable here and do not change our decision.

¶ 31 Accordingly, the judgment of the circuit court is affirmed.

¶ 32 Affirmed.