2020 IL App (1st) 163370-U

SIXTH DIVISION
April 3, 2020

No. 1-16-3370

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. 95 CR 20771
	)	
EDWARD WILLINGHAM,	)	Honorable
	)	Allen F. Murphy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant failed to establish cause and prejudice for the filing of a successive postconviction petition; caselaw has yet to recognize the right of a defendant 21 years of age or older to make an as-applied challenge to a sentence imposed absent consideration of the factors set out in *Miller v. Alabama*, 567 U.S. 460 (2012).

¶ 2 Following a jury trial, defendant Edward Willingham was convicted of first degree murder and attempted murder, charges stemming from his participation in a gang shooting when he was 22 years old. Mr. Willingham was sentenced to consecutive terms of 60 years and 30 years in prison, and his convictions were affirmed on direct appeal (*People v. Willingham*, 298 Ill. App. 3d

1164 (1998) (table) (unpublished order under Supreme Court Rule 23)). In 1999, Mr. Willingham filed a postconviction petition, asserting claims of actual innocence and the ineffective assistance of his trial and appellate counsel. We recently affirmed the circuit court's dismissal of that petition at the second stage. *People v. Willingham*, 2019 IL App (1st) 162250-U.

¶ 3 In 2016, Mr. Willingham sought leave to file the successive postconviction petition that is the subject of this appeal, in which he contended that before sentencing him the circuit court was required to specifically consider the juvenile sentencing factors set forth by the United States Supreme Court in *Miller v. Alabama*, 567 U.S. 460 (2012). Mr. Willingham argued that he had established cause and prejudice to file a successive postconviction petition because *Miller* and its progeny had not yet been decided when he filed his initial petition for postconviction relief, and because, under caselaw as it has evolved since *Miller*, he can now demonstrate that the *de facto* life sentence he received as a 22-year-old offender violates the eighth amendment to the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11).

¶ 4 The circuit court denied Mr. Willingham leave to file his successive petition, and Mr. Willingham now appeals.

¶ 5 I. BACKGROUND

¶ 6 The events leading to Mr. Willingham's convictions and the evidence presented at his trial are discussed at length in our decisions resolving his prior appeals. We summarize them here only to provide context for Mr. Willingham's present appeal.

¶ 7 One victim was killed and another injured during a shooting in Chicago Heights on June 20, 1995. Mr. Willingham testified on his own behalf, telling the jury that he had intended to sell some guns that day to an acquaintance. He received a ride to a house where he believed this person

would be. When he arrived, however, he saw members of his gang—the Gangster Disciples—and a rival gang—the Four Corner Hustlers, or Solid Fours—engaged in fist fights. Mr. Willingham and his two co-defendants fired shots at the rival gang members. Mr. Willingham insisted that he did so only in self-defense. The State's witnesses, however, testified that Mr. Willingham and his co-defendants were the only shooters and that Mr. Willingham shot at unarmed individuals. The jury found Mr. Willingham guilty of first degree murder, attempted murder, and aggravated battery with a firearm.

¶ 8 At sentencing, Mr. Willingham offered evidence in mitigation, including that he had no prior felony convictions, that he did not have a violent background, that he was involved with his church, and that he was close with his family and had a four-year-old daughter. In allocution, Mr. Willingham said that he acted impulsively as a "reactor" on the day of the shooting, and that he was "terribly sorry" for what had happened.

¶ 9 The trial judge considered the pre-sentence investigation report, noted that Mr. Willingham was a high school graduate, and noted that he was raised by a single mother. The judge stated that he had considered the statutory factors in mitigation and found that "[v]ery few, if any appl[ied]." In aggravation, the judge noted that Mr. Willingham was the one who "brought the instruments of death to the scene," had a prior misdemeanor weapons charge, and shot into the crowd, which the court found showed "a callous disregard for human life" and "an abandon [*sic*], malignant heart." The judge believed Mr. Willingham when he said he was remorseful, but noted that "a lot of young people get involved in such conduct" and "are remorseful after the gun [*sic*] has left the chamber," but "these are things people need to think about before they pick up a gun." The judge merged the aggravated battery charge and sentenced Mr. Willingham to 60 years of imprisonment for first

degree murder and 30 years for attempted first degree murder, to be served consecutively, stating that the sentences were meant to deter "this gangsterism in our society."

¶ 10 On November 9, 2016, Mr. Willingham filed the *pro se* motion for leave to file a successive postconviction petition that is the subject of this appeal. In it he argued, *inter alia*, that his discretionary 90-year aggregate prison sentence was a *de facto* life sentence, unconstitutional under the United States Constitution and the proportionate penalties clause of the Illinois Constitution because the trial judge had failed to consider his youth at the time of the offense. Mr. Willingham also argued that his sentence was unconstitutionally disparate from the significantly shorter sentences that his co-defendants received. Citing *People v. House*, 2015 IL App (1st) 110580, *Miller v. Alabama*, 567 U.S. 460 (2012), *Graham v. Florida*, 560 U.S. 48 (2011), and *Roper v. Simmons*, 543 U.S. 551 (2005), Mr. Willingham maintained that he had cause for filing the successive petition because the law concerning the sentencing of juvenile offenders had changed since the filing of his original *pro se* postconviction petition. Mr. Willingham argued that in light of emerging scientific research on the neurological development of young adults' brains, he was prejudiced by the court's failure to consider the unique characteristics of his childhood and his young age at the time of his offense.

¶ 11 II. JURISDICTION

¶ 12 The circuit court denied Mr. Willingham's motion for leave to file a successive postconviction petition on November 21, 2016, and Mr. Willingham timely filed his notice of appeal from that decision on December 14, 2016. We have jurisdiction over this appeal pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Dec. 11, 2014); R. 651(a) (eff. Feb. 6, 2013)).

¶ 13 III. ANALYSIS

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a method for a criminal defendant to challenge his or her conviction by establishing that "in the proceedings which resulted in [the] conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). "A proceeding under the Act is a collateral attack on the judgment of conviction." *People v. Wrice*, 2012 IL 111860, ¶ 47. Postconviction proceedings in non-death penalty cases occur in three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the circuit court determines, without input from the State, whether a petition is frivolous or patently without merit. *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2016). At the second stage, the court appoints counsel to represent the defendant and, if necessary, to file an amended petition; at this stage, the State must either move to dismiss or answer the petition. *Gaultney*, 174 Ill. 2d at 418; 725 ILCS 5/122-4, 122-5 (West 2014). Only if the petition and accompanying documentation make a substantial showing of a constitutional violation does the defendant then proceed to the third stage, an evidentiary hearing on the merits. *People v. Silagy*, 116 Ill. 2d 357, 365 (1987); 725 ILCS 5/122-6 (West 2014).

¶ 15 The Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-1(f) (West 2014); *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Any claims that were decided on direct appeal or in an earlier postconviction proceeding are generally barred by the doctrine of *res judicata*, and claims that could have been, but were not, raised in an earlier proceeding are forfeited. *People v. Blair*, 215 Ill.2d 427, 443-44 (2005). Indeed, "successive postconviction petitions are highly disfavored" (*People v. Bailey*, 2017 IL 121450, ¶ 39); a defendant bringing such a petition "faces immense procedural default hurdles" (*People v. Davis*, 2014 IL

115595, ¶ 14). To file a successive postconviction petition, a defendant must first obtain leave of court (725 ILCS 5/122-1(f) (West 2014)) by establishing either "cause and prejudice" for failing to raise a claim earlier or actual innocence (*People v. Edwards*, 2012 IL 111711, ¶ 22-23). We review a circuit court's denial of leave to file a successive petition *de novo*. *People v. Jackson*, 2016 IL App (1st) 143025, ¶¶ 32-34.

¶ 16 Here, Mr. Willingham sought leave under the cause and prejudice exception to the general rule against the filing of successive postconviction petitions. Following our supreme court's opinion in *Pitsonbarger*, section 122-1(f) was added to the Act, which codifies what is required to establish cause and prejudice. *Davis*, 2014 IL 115595, ¶ 14. That section provides that a prisoner can show cause by "identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings[.]" 725 ILCS 5/122-1(f) (West 2014). A prisoner shows prejudice by "demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id*.

¶ 17 The cause-and-prejudice test establishes a higher standard than the frivolous-or-patently-without-merit standard used for first-stage proceedings. *People v. Smith*, 2014 IL 115946 ¶ 35. A defendant seeking leave to file a successive petition must "submit enough in the way of documentation to allow a circuit court to make that determination." (Internal quotation marks omitted.) *Id*. Our supreme court has held that "leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Id.* "In other words, the court must determine whether [the] defendant has

made a *prima facie* showing of cause and prejudice." *Bailey*, 2017 IL 121450, ¶ 24. If such a showing has been made, leave should be granted and the petition "advances to the three-stage process for evaluating postconviction petitions," at which point "the State [has] an opportunity to seek dismissal of the petition on any grounds, including the defendant's failure to prove cause and prejudice for not having raised the claims in the initial postconviction petition." *Id.* ¶ 26.

¶ 18 In a progression of cases involving the sentencing of juvenile offenders, the United States Supreme Court has held that the eighth amendment to the United States Constitution prohibits capital sentences for juveniles who commit murder (*Roper*, 543 U.S. at 578-79), mandatory life sentences without the possibility of parole for juveniles who commit nonhomicide offenses (*Graham*, 560 U.S. at 82), and mandatory life sentences without the possibility of parole for juveniles who commit murder (*Miller*, 567 U.S. at 489). In *Roper*, *Graham*, and *Miller*, the Court made clear that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. Specifically, the Court noted three significant differences between juveniles and adults. First, a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking." (Internal quotation marks omitted.) *Id.* "Second, children are more vulnerable to negative influences and outside pressures" because of their limited control over their own environment and their lack of the ability to remove themselves from crime-producing settings. (Internal quotations omitted.) *Id.* Third, their characters are not as "well-formed" as an adult's, their traits are "less fixed," and their "actions are less likely to be evidence of irretrievable depravity." (Internal quotations omitted.) *Id.* Following *Miller*, courts sentencing juveniles must take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

¶ 19 In *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S. Ct. 718, 736 (2016), the Supreme Court held that *Miller* applies retroactively. The Supreme Court made clear that *Miller* did not merely create a procedural requirement but created a new substantive rule of constitutional law that applies to a specific set of individuals. *Id.* at 734, 736. The Court explained that *Miller* determined that a life sentence without parole for a juvenile is "excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.' " *Id.* at 734 (quoting *Roper*, 543 U.S. at 573). The Court indicated that *Miller* rendered life without parole an unconstitutional penalty for the class of juvenile offenders "whose crimes reflect the transient immaturity of youth." *Id.* at 734. Therefore, the Court held that *Miller* created a substantive rule of constitutional law that applies retroactively because there was a significant risk that the vast majority of juvenile offenders faced a punishment that the law could not impose on them. (Internal quotation marks omitted.) *Id.* at 734, 736.

¶ 20 Noting that the language the Court used in *Miller* "is significantly broader than its core holding," and that "[n]one of what the court said is specific to only mandatory life sentences," (*People v. Holman*, 2017 IL 120655, ¶ 38), our supreme court has taken this line of cases even further, holding that *Miller* applies both to discretionary sentences of life without parole for juvenile defendants (*id.* ¶ 40) and *de facto* life sentences of forty years or more for such defendants (*People v. Buffer*, 2019 IL 122327, ¶ 40).

¶ 21 Our supreme court has also raised the possibility that the principles established in these cases might apply—on a case-by-case basis—to young adult offenders who were between the ages of 18 and 20 at the time of their offenses. In *People v. Harris*, 2018 IL 121932, ¶¶ 37, 53, an 18-year-old defendant argued on direct appeal that eighth amendment *Miller* protections for juveniles should be applied to all "young adults under the age of 21," and that his mandatory aggregate

sentence of 76 years of imprisonment thus violated both the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution. The court rejected the defendant's facial challenge, noting that the United States Supreme Court in *Roper* limited direct application of *Miller* to those under the age of 18, on the basis that "a line must be drawn" somewhere. (Internal quotation marks omitted.) *Id.* ¶¶ 45, 60. The court agreed that a young adult offender could make an as-applied challenge to a life sentence, but because the defendant in *Harris* had not raised such a challenge in the circuit court, no evidentiary hearing was held and the record included no findings regarding characteristics of the defendant specifically pertaining to his youth. *Id.* ¶ 46. The defendant's challenge was premature because the record did not "contain evidence about how the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision *applie[d] to defendant's specific facts and circumstances*." (Emphasis added.) *Id.* ¶ 46. The court concluded that the defendant's challenge would be more appropriately considered on a postconviction petition. *Id.* ¶ 48.

¶ 22 In *Harris*, the court largely relied upon its earlier analysis of these issues in *People v. Thompson*, 2015 IL 118151. *Id.* ¶¶ 43-48. In *Thompson*, a 19-year-old defendant attempted to raise an as-applied constitutional challenge to his mandatory natural life sentence for the first time on appeal from the dismissal of a petition for relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). *Thompson*, 2015 IL 118151, ¶¶ 1, 4. He argued that eighth amendment *Miller* considerations should apply with " 'equal force' to individuals between the ages of 18 and 21." *Id.* ¶ 21. The defendant exclusively relied on the evolving science regarding juvenile maturity and brain development in support of this position. *Id.* ¶ 38. The court held that the defendant's as-applied challenge under *Miller* was forfeited because it was not a type of challenge that is recognized as being exempt from the typical rules of forfeiture. *Id.* ¶ 39. The court

noted in *dicta*, however, that the defendant's as-applied challenge was really a facial challenge because he relied exclusively on the evolving science of brain development, and the record contained "nothing about how that science applie[d] to the circumstances of [the] defendant's case, the key showing for an as-applied constitutional challenge." *Id.* ¶ 38.

¶ 23 After the *Harris* and *Thompson* decisions, Illinois courts have had to address the question of when a young adult may make an as-applied *Miller* challenge in a postconviction proceeding. In *People v. House*, 2019 IL App (1st) 110580-B, ¶¶ 17, 23, this court considered the second-stage dismissal of a 19-year-old defendant's postconviction petition, in which he asserted in part that his mandatory natural life sentence violated the proportionate penalties clause. After discussing the evolving science regarding brain development and considering our supreme court's decision in *Harris*, the *House* court concluded that the line drawn at 18 years of age that demarcates adulthood for legal purposes was "somewhat arbitrary." *Id.* ¶¶ 55-56. It held that the defendant's mandatory life sentence violated the proportionate penalties clause and shocked the moral sense of the community because of the "defendant's age, his family background, his actions as a lookout as opposed to being the actual shooter, and [his] lack of any prior violent convictions[.]" *Id.* ¶ 64. The court noted that the defendant's age, coupled with his relevant culpability, created questions regarding the "propriety of a mandatory natural life sentence for a 19-year-old defendant convicted under a theory of accountability." *Id.* ¶ 46.

¶ 24 Courts faced with cases in which a defendant played a more active role in the crime or received a discretionary, rather than a mandatory, sentence, have distinguished *House* on one or both of these bases. See, *e.g.*, *People v. Ramsey*, 2019 IL App (3d) 160759 ¶¶ 22-23 (rejecting an 18-year-old defendant's proportionality claim and noting that he was the sole actor who committed the offenses), and *People v. Handy*, 2019 IL App (1st) 170213 ¶¶ 1, 41 (finding that an 18-year-

old defendant was not entitled to a new sentencing hearing because he was an active participant in the crimes and received a discretionary sentence). Here, Mr. Willingham did indeed receive a discretionary sentence. And he played an active role in the crimes for which he was convicted. We need not consider whether these two facts are sufficient to distinguish his claims from those advanced in *House*, however, because we find no support in the caselaw for application of the *Miller* principles to defendants who, like Mr. Willingham, were over the age of 21 at the time of their offenses.

¶ 25 The only reported decisions we are aware of in which courts have even considered application of the *Miller* factors to defendants 21 years of age or older do not support Mr. Willingham's position. In *People v. Hoover*, 2019 IL App (2d) 170070, for example, the court considered a 22-year-old's as-applied sentencing challenge under the proportionate penalties clause and rejected the defendant's claim, finding the defendant did not satisfy the cause prong of the cause-and-prejudice test because the proportionate penalties clause was always in existence, such that the defendant could have raised a proportionate penalties challenge at the time of his direct appeal. *Id.* ¶¶ 19, 37.Without necessarily agreeing with the court in that case that evolving caselaw extending *Miller*'s application could never satisfy the cause prong, it is clear that *Hoover* provides no support for the argument that the law as it currently stands establishes that individuals like Mr. Willingham—who were 21 years of age or older at the time of their offenses—may bring as-applied challenges like those the *Harris* court was asked to consider for offenders between the ages of 18 and 20.

¶ 26 In *People v. Suggs*, 2020 IL App (2d) 170632, ¶¶ 30-44, this court likewise affirmed the summary dismissal at the first stage of an initial postconviction petition where the defendant, who was 23 years old at the time of his offense, raised eighth amendment and proportionate penalties

challenges to his *de facto* life sentence. The *Suggs* court noted that although "society has drawn lines at ages 18 and 21 for various purposes," the defendant in that case—like Mr. Willingham here—failed to "point to any line, societal, legal, or penological, that is older than 21 years. *Id.* ¶ 35. The court concluded that, while it may seem "but a short step" to apply the *Miller* factors to an 18-year-old offender, "it is a much greater leap to extend [them] to a 21-year-old, and an even greater leap to apply [them] to a 23-year-old," such as the defendant in that case. *Id.*

¶ 27 And in *People v. Figueroa*, 2020 IL App (2d) 160650, ¶¶ 86-89, this court ultimately did not address the as-applied proportionate penalties challenge of a defendant who was 22 years old at the time of his offense, finding instead that his claim, made for the first time on direct appeal, was premature. None of these cases support the extension of the law Mr. Willingham proposes.

¶ 28 Even the secondary sources that Mr. Willingham references do not advocate for the extension of the *Miller* principles to young adults over the age of 21. See Andrew Michaels, *A Decent Proposal: Exempting Eighteen-To-Twenty-Year-Olds From The Death Penalty*, 40 N.Y.U. Rev. L & Soc. Change 139, 179 (2016) (arguing that exempting 18-to-20 year-olds from the death penalty is a logical extension of this nation's evolving standards of decency); Elizabeth S. Scott *et al.*, *Young Adulthood As a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 664 (considering the advantages of giving juvenile courts jurisdiction over young adults 21 years old or younger, but concluding that scientific evidence does not justify an institutional reform of that magnitude).

¶ 29 We also note the recent willingness of courts to be guided by the legislature regarding the extent to which the youth-based sentencing factors set out in *Miller* should be applied to defendants other than juveniles who received mandatory sentences of life without parole. See, *e.g.*, *Buffer*, 2019 IL 122327, ¶¶ 34-39 (finding guidance regarding what constitutes a *de facto* life sentence in

a statutory provision establishing 40 years as the maximum sentence a juvenile may receive for first degree murder (730 ILCS 5/5-4.5-105(c) (West 2018)); *House*, 2019 IL App (1st) 110580-B, ¶¶ 61-63 (discussing the significance of the legislature's codification of the *Miller* factors and the establishment of parole review for persons under 21).

¶ 30 In support of its argument that individuals over the age of 21 are not "youthful offenders" who can make the as-applied challenge suggested in *Harris*, the State likewise points to passage of Public Act 100-1182 (amending 730 ILCS 5/5-4.5-110), which creates a parole system only for persons under the age of 21. The legislature's use of the age of 21 as a bright line between youthfulness and full-fledged adulthood can be seen in several other contexts as well. *See, e.g.*, 720 ILCS 675/1 (West 2018) (prohibiting the sale of nicotine and tobacco products to persons under 21); 720 ILCS 5/24-1.6(a)(3)(I) (West 2018) (generally limiting the right to carry a firearm to those over the age of 21); 760 ILCS 20/2(1) (West 2018) (defining "adult" as "an individual who has attained the age of 21 years" for purposes of the Illinois Uniform Transfers to Minors Act (760 ILCS 20/1 *et seq.*) (West 2018)). These enactments indicate that the Illinois legislature at this point views individuals 21 years old and older as full adults.

¶ 31 Mr. Willingham is quite correct that the law governing the sentencing of juveniles and young adult offenders has rapidly progressed since his sentencing, since the filing of his initial postconviction petition, and indeed even since the filing of his opening brief in this appeal. However, having considered both the applicable cases and the parties' well-articulated arguments, we are unconvinced that the law has progressed far enough in this area for Mr. Willingham to meet the high burden of establishing cause and prejudice to file a successive petition. The cases he relies upon were certainly not available to him at the time of his first postconviction petition, but their holdings fall short of establishing that Mr. Willingham is entitled to the relief he seeks. Our

supreme court has simply not recognized as-applied sentencing challenges seeking application of the *Miller* sentencing factors for defendants over the age of 20 at the time of their offenses. Should the relevant authorities make clear in the future that such challenges may be brought, Mr. Willingham may again seek leave to initiate successive postconviction proceedings.

¶ 32 IV. CONCLUSION

¶ 33 For the above reasons, we affirm the circuit court's denial of Mr. Willingham's motion for leave to file a successive postconviction petition.

¶ 34 Affirmed.