

FILED
Aug 31, 2016
Court of Appeals
Division I
State of Washington

NO. 75168-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

JAI'MAR SCOTT,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD F. MCDERMOTT

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. SCOTT'S COLLATERAL ATTACK ON HIS SENTENCE IS UNTIMELY.

In the Brief of Respondent, Scott does not cite or discuss the statutory time bar contained in RCW 10.73.090 and 10.73.100. Instead, he focuses on the merits of his argument, and contends that recent U.S. Supreme Court cases have fundamentally changed juvenile sentencing law.

In essence, Scott is arguing that recent cases mandate that every youthful offender that has received a long prison sentence must be given a new sentencing hearing, so that new standards can be applied. His argument is based on an overbroad reading of Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Scott's sentencing did not violate the rule set forth in Miller. The constitutional error identified in Miller was that a sentencing scheme that mandates a life sentence prohibits the sentencing court from considering an offender's youth. Miller, 132 S. Ct. at 2466. The Court stated explicitly that it did not foreclose the sentencing court's ability to impose a life sentence in its discretion

in homicide cases after considering the offender's youth. Id. at 2469. That is what happened in this case.

The sentence that Scott received was not mandated by statute. The sentencing court had the ability to sentence Scott to the low end of the standard range, 240 months, as recommended by the defense. The sentencing court was allowed to consider Scott's youth, which was argued by defense counsel as a reason to impose the low end of the standard range.

Scott's claim that youth was not considered is simply incorrect. The fact of Scott's age was clearly before the trial court, and was cited by the defense as a reason to impose a 240-month sentence. While, the sentencing court rejected that recommendation in light of the egregious facts, the court was not foreclosed from accounting for Scott's youth in choosing the appropriate sentence. Because a life sentence was not mandated and the court was not prohibited from factoring in Scott's youth, the holding of Miller is not material to Scott's sentence, and thus is not a significant change pursuant to RCW 10.73.100(6). Scott's collateral attack is time barred.

B. ANY CONSTITUTIONAL ERROR HAS BEEN
REMEDIED BY ENACTMENT OF RCW 9.94A.730.

Scott argues that he must be resentenced, and at the new sentencing a *de facto* life sentence cannot be imposed without a specific finding of “irreparable incorrigibility.” Brief of Respondent, at 10. His argument ignores the clear holding of Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

That precise phrase, “irreparable incorrigibility,” does not appear in the Miller decision. Rather than mandating such a finding, as Scott claims, the Court instead noted the difficulty of making such a determination when sentencing a juvenile. The Court noted “the great difficulty we noted in Roper and Graham of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’” Miller, at 2469 (quoting Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that imposition of the death penalty on juvenile offenders constitutes cruel and unusual punishment).

Subsequently, in Montgomery, the Court characterized its Miller decision as follows:

Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "irreparable corruption."

Montgomery, 136 S. Ct. at 726 (quoting Roper, 543 U.S. at 573).

Significantly, the Court agreed with Louisiana that "Miller did not impose a formal factfinding requirement of 'irreparable corruption.'"

Id. at 735. The Court explained, "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole." Id.

In Montgomery, the Court held that the *automatic* sentence of life in prison without parole for murder imposed on a 17-year-old offender violated Miller, and that Miller's holding should be applied retroactively. Id. at 736. The Court then explained that its holding did not require the relitigation of sentences:

A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change.

Id. at 736.

Washington has provided this remedy, not just to those juvenile offenders who received mandatory life sentences, but to all juvenile offenders who were sentenced to more than 20 years of confinement. RCW 9.94A.730 provides that “any person convicted of one or more crimes committed prior to the person’s eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement.” Scott now has an opportunity for release, and thus is no longer serving a *de facto* sentence of life without parole.

Thus, even if this Court found that Miller was material to Scott’s sentence and his collateral attack is not untimely, the statutory fix has resolved any constitutional error pursuant to Montgomery. As such, Scott cannot show he is entitled to relief. In a collateral attack alleging constitutional error, the petitioner must show that the constitutional error has resulted in actual and

substantial prejudice. In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 603, 316 P.3d 1007 (2014). Because Scott is no longer ineligible for parole, any alleged error in imposing a 900-month sentence is no longer prejudicial. The trial court erred in granting Scott a resentencing.

II. CONCLUSION

Scott's motion for relief from judgment was erroneously granted by the lower court. It should have been transferred to this Court as an untimely collateral attack, converted to a personal restraint petition and dismissed.

DATED this 31st day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jeffrey Ellis, the attorney for the respondent, at jeffreyerwinellis@gmail.com, containing a copy of the Reply Brief of Appellant in State v. Jaimar Eli Scott, Cause No. 75168-9, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 2/ day of August, 2016.

Name:
Done in Seattle, Washington