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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4073-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALTOWAN NIXON,

Defendant-Appellant.

Argued November 30, 2017 — Decided December 14, 2017

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 94-
06-2161.

Lauren S. Michaels, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Lauren S. Michaels, of counsel and on the
briefs).

Sarah D. Brigham, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney; Sarah
D. Brigham, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant appeals from the January 13, 2016 order of the Law Division denying his motion to correct an illegal sentence. We affirm.

We begin by referencing the essential background facts set forth in our prior opinion on defendant's direct appeal of his conviction and sentence. State v. Nixon, No. A-5055-94 (App. Div. Mar. 24, 1998). At approximately 4:00 a.m. on September 28, 1993, defendant and three or four of his friends were standing on a Newark street, where one member of the group was selling cocaine. Nixon, slip op. at 3. Defendant was fifteen years old at the time. Id. at 1.

The two victims approached the group and one of them began asking the dealer questions about the quality of the cocaine. Id. at 3. In response, defendant took out a handgun and "brandished it" at the victims before putting it away. Ibid. The men then paid for the drugs and began walking back to their car. Ibid.

At that point, defendant and two of his companions stopped the victims. Ibid. Defendant again took out his handgun and told the victims "to hand over the drugs they had bought, in addition to any money they were carrying." Ibid. One of the victims gave back the cocaine. Ibid. However, the other victim "lunged at defendant, and defendant's gun discharged, shooting the victim in the left upper breast." Id. at 4. As the victim attempted to get

to his car, defendant shot him "in the backside." Ibid. The victim later died at the hospital.¹ Ibid.

After defendant was "waived to adult court," a jury convicted him of felony murder, N.J.S.A. 2C:11-3(a)(3); aggravated manslaughter, N.J.S.A. 2C:11-4(a); first-degree robbery, N.J.S.A. 2C:15-1; criminal conspiracy, N.J.S.A. 2C:5-2; and two weapons offenses, N.J.S.A. 2C:39-5(d) and N.J.S.A. 2C:39-4(a). Id. at 1. At oral argument at defendant's sentencing, his attorney acknowledged that because defendant had been convicted of felony murder, the trial judge did not "have too many options, he has to get at least [thirty] years in jail before he's eligible for parole." See N.J.S.A. 2C:11-3(b)(5) (stating that "[a] juvenile who has been tried as an adult and convicted of murder shall be sentenced pursuant to" N.J.S.A. 2C:11-3(b)(1), which provides that a defendant may be sentenced to a term of thirty years without parole, or to a specific term of years between thirty and life, with a thirty-year period of parole ineligibility).

Defendant's attorney went on to highlight defendant's age at the time he committed the offense, his immaturity, and his poor family and home environment. The attorney stated that because

¹ Just one week earlier, defendant had been "charged with a separate murder" for beating another man to death with a baseball bat. Id. at 15.

defendant's mother was "a crack addict" and his father "was not around[,] . . . nobody taught him right or wrong, he just lived on the streets and, unfortunately, he got on the street where he had a gun, somebody got shot." Defense counsel also asserted that "[w]hen [defendant's] in some structured environment, there's nothing wrong with this person[.]" In arguing for the imposition of a life sentence with a thirty-year period of parole ineligibility, the prosecutor noted that defendant could be released in his mid-40's, which was approximately the same age as the man he murdered.

After considering these arguments and reviewing defendant's presentence report, the judge imposed a life sentence with a thirty-year period of parole ineligibility on the felony murder charge. Nixon, slip op. at 12-13. The judge imposed concurrent sentences on the remaining charges that did not merge into the felony murder conviction. Id. at 2.

On direct appeal, we affirmed defendant's conviction and sentence. Id. at 16. We concluded defendant's sentence was "in accord with the applicable statutory guidelines," and that the trial judge "properly considered" the aggravating and mitigating factors. Id. at 13, 16. "We [also] note[d] that defendant may,

at some point when the combined terms^[2] of parole ineligibility are served, be considered for parole, notwithstanding the life term." Id. at 16.

The Supreme Court denied defendant's petition for certification. State v. Nixon, 156 N.J. 384 (1998). Defendant subsequently filed three unsuccessful petitions for post-conviction relief between 1999 and 2010.

Beginning in 2005, the United States Supreme Court issued a series of four opinions concerning the sentencing of juvenile offenders. In Roper v. Simmons, 543 U.S. 551, 578 (2005), the Court declared capital punishment unconstitutional under the Eighth Amendment for juvenile offenders. Five years later, in Graham v. Florida, 560 U.S. 48, 82 (2010), the Court held that the Eighth Amendment prohibits sentences of life without parole for juveniles convicted of non-homicide offenses.

In its next case on this subject, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."

² Following sentencing in this case, defendant pled guilty to aggravated manslaughter in connection with the beating death of the victim in defendant's earlier case. The trial court sentenced defendant to fifteen years in prison, concurrent to the life sentence imposed in this case, with a five-year parole disqualifier consecutive to the thirty-year period of parole ineligibility imposed in this case. Defendant does not challenge this subsequent sentence in this appeal.

Miller v. Alabama, 567 U.S. 460, 479 (2012). Significantly, the Court did not bar trial courts from imposing life sentences without parole for juveniles convicted of a homicide offense. Id. at 480. However, before imposing a life sentence without parole, sentencing judges must consider the following five factors (the Miller factors):

Mandatory life without parole for a juvenile

[1] precludes consideration of his [or her] chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences.

[2] It prevents taking into account the family and home environment that surrounds him [or her] – and from which he [or she] cannot usually extricate himself [or herself] – no matter how brutal or dysfunctional.

[3] It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her].

[4] Indeed, it ignores that he [or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys.

[5] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

[State v. Zuber, 227 N.J. 422, 445 (2017),
cert. denied, ___ U.S. ___ (2017) (quoting
Miller, 567 U.S. at 477 (citations omitted).]

Finally, in Montgomery v. Louisiana, 577 U.S. ___ (2016) (slip op. at 29), the Court held that Miller "announced a substantive rule of constitutional law" that applies retroactively.

Thereafter, our Supreme Court extended Miller to a juvenile offender who was sentenced to "the practical equivalent of life without parole[,]" and subject to "multiple terms-of-years sentences that, in all likelihood, will keep him [or her] in jail for the rest of his [or her] life." Zuber, 227 N.J. at 446, 448. In the first of the two cases that were considered in Zuber, the trial court sentenced defendant to 110 years in prison with fifty-five years of parole ineligibility. Id. at 428. In the second case, the juvenile was serving a seventy-five-year term and was ineligible for parole for sixty-eight years and three months. Ibid.

The two juveniles, the Court observed, may not have been "officially" sentenced to life without the possibility of parole, but the practical effect of the "real-time consequences" of their sentences was the same. Id. at 447-48. Thus, the Court held "that youth matters in each case that calls for a lengthy sentence that is the practical equivalent of life without parole" and,

accordingly, the sentencing judge must consider the Miller factors before imposing such a sentence. Id. at 448 (emphasis added).

On May 27, 2015, after the United States Supreme Court's decisions in Graham and Miller, but before its decision in Montgomery, and our Supreme Court's decision in Zuber, defendant filed a motion to correct an illegal sentence. Defendant argued that his sentence violated Graham and Miller because the sentencing court did not adequately consider his age at the time of sentencing.

Following oral argument, the motion judge rendered a thorough written decision denying defendant's motion. The judge found that Graham did not apply because defendant was convicted of homicide and not sentenced to life without parole. The judge found that defendant's sentence did not violate Miller because N.J.S.A. 2C:11-3(b)(1), as applied to juveniles under N.J.S.A. 2C:11-3(b)(5), does not impose a mandatory sentence of life without parole and, in any event, defendant had not been sentenced to a life sentence without parole.

The judge also concluded that even if Miller applied, "[t]he motion record shows that the sentencing court did in fact give appropriate consideration to all mitigating factors, including age." As discussed above, defendant's attorney specifically discussed defendant's age, immaturity, family and home

environment, lack of a prior juvenile record,³ and need for structure in his life. After considering these arguments, the sentencing judge concluded that the appropriate sentence was life with a thirty-year period of parole ineligibility, and the judge did not impose consecutive sentences on defendant's other convictions. Under these circumstances, the motion judge found no constitutional infirmity in defendant's sentence. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THE DEFENDANT'S SENTENCE OF LIFE IMPRISONMENT WITH A [THIRTY]-YEAR PAROLE DISQUALIFIER, IMPOSED UPON HIM FOR A CRIME COMMITTED WHILE A JUVENILE, VIOLATED THE EIGHTH AMENDMENT AND ARTICLE ONE, PARAGRAPH TWELVE BECAUSE IT WAS IMPOSED BASED UPON A MISTAKE OF LAW, WITHOUT CONSIDERATION OF HIS AGE AT THE TIME OF THE CRIME. THEREFORE, HIS SENTENCE IS ILLEGAL, REQUIRING RESENTENCING UNDER STATE V. ZUBER.

- A. Miller v. Alabama and other United States Supreme Court Cases Requiring Consideration of A Juvenile's Age and Attendant Circumstances Because Children are Constitutionally Different from Adults for Purposes of Sentencing Are Not Limited To Mandatory Life-Without-Parole Sentences Or Non-Homicide Cases.

³ As noted previously, defendant had a second murder charge pending against him at the time of sentencing.

- B. In State v. Zuber, The Supreme Court of New Jersey Held That Resentencing Is Required When A Juvenile Is Sentenced To A "Lengthy" Term Without Consideration Of The Youth Factors Set Forth in Miller.
- C. The Motion Judge Erred In Denying [Defendant's] Motion To Correct An Illegal Sentence; His Case Must be Remanded For A New Sentencing Hearing Pursuant to Zuber.
- 1. Miller and Zuber Apply To A Life Sentence With a [Thirty]-Year Parole Disqualifier Imposed for Felony Murder.
- 2. [Defendant's] Sentence Was Imposed Contrary To The Eighth Amendment Principles Set Forth In Graham, Miller, Montgomery, and Zuber Because It Was Imposed Solely Upon A Finding That The Offense Was A "Senseless Killing," Without Any Consideration Of His Age And Attendant Circumstances At The Time Of The Crimes.
- 3. The Motion Was Neither Time- Nor Procedurally-Barred Because An Illegal-Sentence Motion Under Rule 3:21-[10(b)(5)] Can Be Brought At Any Time.^[4]

⁴ Defendant filed a pro se supplemental brief that does not include any point headings to be argued as required by Rule 2:6-4(a) and Rule 2:6-2(a)(6). Nevertheless, we have reviewed defendant's supplemental contentions and conclude that they are clearly without merit and do not warrant further discussion. R. 2:11-3(e)(2).

We have considered defendant's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following comments.

As defendant correctly points out, a request to correct an illegal sentence can be made at any time under Rule 3:21-10(b)(5). State v. Schubert, 212 N.J. 295, 309 (2012). "[A]n illegal sentence is one that 'exceeds the maximum penalty provided in the Code for a particular offense' or a sentence 'not imposed in accordance with law.'" State v. Acevedo, 205 N.J. 40, 45 (2011) (quoting State v. Murray, 162 N.J. 240, 247 (2000)). Contrary to defendant's contention, however, the sentence imposed by the sentencing judge was not an illegal sentence under Graham, Miller, or Zuber.

As the motion judge properly found, Graham and Miller are not applicable to the circumstances of this case. Here, and unlike in Graham and Miller, defendant was not sentenced to life without the possibility of parole. Instead, he received a life sentence with the thirty-year period of parole ineligibility required by N.J.S.A. 2C:11-3(b)(1). Under Graham and Miller, this sentence clearly did not violate the Eighth Amendment.

Our Supreme Court's decision in Zuber does not change this result. In Zuber, the Court held that a sentencing judge may not

impose "a lengthy sentence that is the practical equivalent of life without parole" without first considering the Miller factors. Zuber, 227 N.J. at 448. Defendant's sentence in this case is simply not "the practical equivalent of life without parole" because he will be eligible for parole after serving thirty years.⁵ Moreover, the motion judge's finding that the sentencing judge adequately considered defendant's age and the other Miller factors as presented by defense counsel at the sentencing hearing is amply supported by the record, and we discern no basis for disturbing that principled determination.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁵ Defendant's current parole eligibility date is September 28, 2028. He will be fifty years old at that time. Defendant would have been eligible for parole in 2023, at age forty-five, on his felony murder conviction had he not been later convicted and sentenced for aggravated manslaughter in connection with the man he beat to death before killing the victim in this case.