IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JONATHAN DERRICK McQUITTY, *Appellant*.

No. 1 CA-CR 16-0505
FILED 7-6-2017

Appeal from the Superior Court in Yuma County
No. S1400CR201401045
The Honorable David M. Haws, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Robert A. Walsh
Counsel for Appellee

Yuma County Public Defender's Office, Yuma
By Raymond Vaca Jr.
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Peter B. Swann and Judge Donn Kessler joined.

H O W E, Judge:

¶1 Jonathan Derrick McQuitty appeals his sentences for 16 counts of sexual exploitation of a minor, class 2 felonies, and one count of child molestation, a class 2 felony. McQuitty argues that his 272-year prison sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment under *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010), because he was a juvenile when he committed two of the counts. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On August 15, 2014, when McQuitty was 20 years old, the FBI and Homeland Security Investigation agents searched McQuitty's house in relation to a child pornography sting. The agents found McQuitty's laptop and after advising him of his *Miranda*[1] rights, asked McQuitty to unlock the laptop so that they could conduct a forensic review of the computer. McQuitty unlocked the laptop and allowed the agents to scan it. The agents found numerous files depicting child pornography. When confronted with this information, McQuitty admitted to downloading the child pornography and showed the agents other devices in the house where he had stored child pornography. According to McQuitty, he had wanted to intern for the FBI and planned to download 50 gigabytes of child pornography before turning his collection over to authorities. The agents took the devices to perform a complete forensic examination.

¶3 About a week later, during the forensic examination, an agent recognized the child in two videos as McQuitty's female relative. In one video, the relative is filmed while masturbating with a cylindrical object. In a different video, the relative is on a bed and the person filming is seen touching the relative's vagina. Because these videos were found on a memory storage device that McQuitty said contained child pornography, the agent went to interview McQuitty. The agent read McQuitty his *Miranda*

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

rights and then asked him whether he was the one that filmed and touched the relative in the videos. McQuitty admitted that he filmed the relative and that his hand was the one seen in the video. The agent asked McQuitty if he knew when he created the two videos. McQuitty stated that he recognized the location in the videos and that he resided there from 2010 to 2011 —when he was between 15 and 17 years old and the relative was 13 or 14 years old.

¶4 The State charged McQuitty with 16 counts of sexual exploitation of a minor: one count for the video he created of his relative masturbating and 15 counts for the videos and pictures he downloaded and possessed as an adult. The State also charged McQuitty with one count of child molestation for the video of him touching his relative's vagina. The State subsequently offered McQuitty a plea agreement for 12 years' imprisonment for all 17 counts, but McQuitty rejected the offer. A six-day jury trial ensued, after which the jury found McQuitty guilty of all 17 counts and classified each as a dangerous crime against a child.

¶5 At the sentencing hearing, the trial court considered McQuitty's young age, other mitigating factors, and aggravating factors before ruling that the presumptive terms were appropriate. Accordingly, the court sentenced McQuitty to consecutive 17-year sentences for each of the 16 counts of sexual exploitation of a minor and 17 years' imprisonment for the child molestation count to run concurrently with the other sentences. McQuitty timely appealed.

DISCUSSION

¶6 McQuitty does not argue that his sentences are grossly disproportionate to the crimes for which he was convicted. He contends only that his 272-year prison sentence is a de facto life without parole ("LWOP") sentence, which the United States Supreme Court has held violates the Eighth Amendment when applied to juveniles.[2] Because McQuitty did not raise this argument in the trial court, we review only for

[2] In support of his argument, McQuitty attached as appendices several medical journals, some of which were appended to the American Medical Association's amicus brief filed in *Miller*, and a transcript from the opening remarks at an Office of Justice Programs discussion panel about young adults. None of the journal articles or the transcript were submitted to the trial court. Thus, we decline to consider them here. *See State v. Saiers*, 196 Ariz. 20, 22 ¶ 7 (App. 1999) (refusing to consider on appeal studies that were not submitted to the trial court).

fundamental error. *State v. Kasic*, 228 Ariz. 228, 231 ¶ 15 (App. 2011). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* Although we will not disturb a sentence that is within the statutory range unless the trial court abused its discretion, the imposition of a sentence in violation of constitutional protections constitutes fundamental error. *Id.* Because McQuitty's sentences for crimes he committed as a juvenile do not constitute LWOP, they do not violate the Eighth Amendment.

¶7 The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishments. U.S. Const. amend. VIII. The clause against cruel and unusual punishment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983). The Supreme Court has held that sentencing a juvenile to LWOP violates the Eighth Amendment's ban on cruel and unusual punishment. *Miller*, 567 U.S. at __; *see also Graham*, 560 U.S. at 50. In Arizona, consecutive sentences that exceed a juvenile's life expectancy do not constitute a de facto LWOP and do not violate the Eighth Amendment. *Kasic*, 228 Ariz. at 232–33 ¶ 20.

¶8 Here, McQuitty was 20 years old when he committed 15 of the 17 counts for which he was convicted. For the two counts committed when he was a juvenile, the court sentenced him to 17 years' imprisonment for each. The court ordered that his sentence for child molestation run concurrently with the other sentences. As such, McQuitty's 272-year prison sentence is comprised of 255 years for crimes committed as an adult and only 17 years for crimes committed as a juvenile. Two 17-year prison sentences, one consecutive and one concurrent with the other counts, are not equivalent to a sentence of LWOP. Thus, under *Miller* and *Graham*, the Eighth Amendment's ban on cruel and unusual punishment does not prohibit McQuitty's sentences for the crimes he committed as a juvenile.

¶9 McQuitty argues that his entire 272-year prison term constitutes a de facto LWOP and as such violates the Eighth Amendment under *Miller* and *Graham*. Notwithstanding the holding in *Kasic*, McQuitty cites to numerous out-of-state cases that hold that a juvenile sentenced to consecutive sentences exceeding the juvenile's natural life is equivalent to LWOP. The cases that McQuitty cites are not persuasive here. Assuming arguendo that *Miller* and *Graham* should extend to consecutive sentences that exceed a juvenile's life expectancy, McQuitty still cannot rely on these extra-jurisdictional cases. McQuitty's 272-year prison sentence was not a

result of crimes McQuitty committed solely as a juvenile. Instead, only 17 of the 272 years were for crimes McQuitty committed while a juvenile. Thus, McQuitty's sentences for crimes he committed as a juvenile do not exceed his natural life and do not constitute a de facto LWOP.

¶10 McQuitty next argues that because he was a young adult when he committed the 15 counts of sexual exploitation of a minor that the reasoning the Supreme Court used in *Miller* and *Graham* pertaining to sentences for juveniles should apply to him. But *Miller* and *Graham* themselves limit their holdings to defendants under 18 years old. In *Graham*, the Supreme Court stated that "[b]ecause age 18 is the point where society draws the line for many purposes between childhood and adulthood, it is the age below which a defendant may not be sentenced to life without parole for a nonhomicide crime." 560 U.S. at 50. The Supreme Court further held in *Miller*, "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." 567 U.S. at __. We decline to extend *Miller* and *Graham* in the manner McQuitty urges.

CONCLUSION

¶11 For the foregoing reasons, we affirm McQuitty's sentences.

AMY M. WOOD • Clerk of the Court
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