

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ANTHONY DUWAYNE HORSLEY, JR.,

Appellant,

v.

Case No. 5D12-138

STATE OF FLORIDA,

Appellee.

/

Opinion filed August 30, 2013

Appeal from the Circuit Court
for Brevard County,
Charles G. Crawford, Judge.

James S. Purdy, Public Defender, and
Kathryn Rollison Radtke, Assistant Public
Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Kellie A. Nielan,
Assistant Attorney General, Daytona
Beach, for Appellee.

LAWSON, J.

Anthony Horsley, Jr. appeals his convictions for first-degree felony murder, robbery with a firearm while inflicting death, and two counts of aggravated assault with a firearm. He also appeals his resentencing to life without parole on the murder count. Regarding his resentencing, Horsley, who was seventeen years old at the time of these offenses, argues that the trial court erred by rejecting the idea that it had discretion

under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to sentence him to a term of years. *Miller* held that a mandatory life sentence without parole for capital murders committed by juveniles -- the only sentence allowed by section 775.082(1), Florida Statutes -- violated the Eighth Amendment to the United States Constitution. Although this issue has been addressed by the First, Second and Third Districts, none of them have given definitive direction to trial courts regarding the available sentencing alternatives after *Miller*. See *Neely v. State*, 38 Fla. L. Weekly D851 (Fla. 3d DCA Apr. 17, 2013); *Hernandez v. State*, 38 Fla. L. Weekly D660 (Fla. 3d DCA Mar. 20, 2013); *Walling v. State*, 105 So. 3d 660 (Fla. 1st DCA 2013); *Partlow v. State*, 38 Fla. L. Weekly D94 (Fla. 1st DCA Jan. 4, 2013); *Washington v. State*, 103 So. 3d 917, 920 (Fla. 1st DCA 2012); *Rocker v. State*, 37 Fla. L. Weekly D2632 (Fla. 2d DCA Nov. 14, 2012). Applying the principle of statutory revival, we hold that the only sentence now available in Florida for a charge of capital murder committed by a juvenile is life with the possibility of parole after twenty-five years. Accordingly, we vacate the life without parole sentence on the murder charge, and remand for resentencing on that charge only. We affirm in all other respects. Although Horsley argues that several alleged errors warrant a new trial on all charges, we find that none of the other issues raised by Horsley merit relief or further discussion.

With respect to the sentencing issue on which we have granted relief, we also find further elaboration to be largely unnecessary in light of two thorough and well-reasoned opinions out of the First District, authored by Judges Wolfe and Makar. In a concurring opinion, Judge Wolfe disagreed with the majority's failure to provide guidance to the trial court regarding the possible sentencing options available on

remand, and thoroughly analyzes the available alternatives. *Washington*, 103 So. 3d at 920 (J. Wolfe, concurring). Judge Wolfe advocates for allowing judicial discretion to select a term of years sentence for those cases where life without parole would not be permitted by *Miller* -- and a life without parole sentence for the rare case¹ where *Miller* would allow that sentence. *Id.*

In a competing thorough and thoughtful analysis, with which we fully agree, Judge Makar concluded that statutory revival should be used to revive the 1993 version of section 775.082(1), Florida Statutes, which mandated a sentence of life with the possibility of parole after twenty-five years. *Partlow v. State*, 38 Fla. L. Weekly D94, 96-97 (Makar, J., concurring in part and dissenting in part). As noted by both Judges Wolfe and Makar, the judiciary's role in a case like this -- where a legislative enactment is declared unconstitutional and the alternative of having no option to address the subject would be untenable -- is largely guided by the doctrine of separation of powers. In other words, the judiciary is attempting to fill a statutory gap while remaining as faithful as possible to expressed legislative intent, but also attempting to avoid judicial intermeddling by crafting our own statute to address the issue with original language. The advantage of relying upon the doctrine of statutory revival is that we simply revert to a solution that was duly adopted by the legislature itself -- thereby avoiding the type of "legislating from the bench" that would be required if we were to essentially rewrite the existing statute with original language which we feel might better meet the policy goals of the current legislature. And, while we are certainly cognizant of the fact that the legislature of late appears to be less than enamored with the concept of parole, we also

¹ See *Miller*, 132 S. Ct. at 2469 ("appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon").

note that the legislature has always been adverse to judicial discretion in sentencing in homicide cases, which could result in a perceived "lenient" term of years sentence in a case of this type. We also strongly believe that many of the considerations outlined in *Miller* would be far better addressed years after sentencing in a parole-type setting, once the juvenile has matured into an adult and his or her conduct during decades of confinement has been evaluated, than through the forward-looking speculation necessitated if these issues are to be addressed with finality at the time of sentencing.

Our resolution of the sentencing issue renders moot Horsley's argument that the trial court's attempt to address the individual mitigation factors required by *Miller* was inadequate, rendering his life without parole sentence illegal for failure to fully comply with the dictates of *Miller*.

Finally, consistent with our agreement with Judge Makar's opinion in *Partlow*, we certify to the Florida Supreme Court as a matter of great public importance the following question: "Whether the Supreme Court's decision in *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), which invalidated section 775.082(1)'s mandatory imposition of life without parole sentences for juveniles convicted of first-degree murder, operates to revive the prior sentence of life with parole eligibility after 25 years previously contained in that statute?" *Partlow*, 38 Fla. L. Weekly at 98 n.16 (J. Makar, J., concurring in part and dissenting in part).

AFFIRMED in part; REMANDED with instructions for resentencing on single charge.

ORFINGER and WALLIS, JJ., concur.