NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2013-KA-1614**
VERSUS	*	
		COURT OF APPEAL
DERRICK JONES	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 334-122, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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AFFIRMED
AUGUST 20, 2014

After his second resentencing hearing, the defendant was sentenced to life imprisonment with the possibility of parole. He now appeals this sentence. For the following reasons, we affirm.

STATEMENT OF CASE

The defendant, Derrick Jones, was convicted of aggravated rape, armed robbery, and attempted first degree murder in 1989. He was seventeen at the time of the offenses. In the same year, he was sentenced to life imprisonment without benefits for the aggravated rape[1] conviction. He also received two fifty-year sentences for his remaining convictions.[2] On appeal, the defendant's conviction for attempted first degree murder was vacated as it constituted double jeopardy. His remaining convictions and sentences were affirmed. *See State v. Jones*, 572 So.2d 769 (La. App. 4th Cir. 1990).

In 2011, the defendant filed an application for post-conviction relief and motion to correct an illegal sentence in which he alleged that, pursuant to the United States Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48, 130

[1] At the time of the offense, La R.S. 14:42(D) provided: "[w]hoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence."
[2] All sentences were to run concurrently.

S.Ct. 2011, 176 L.E.2d 825 (2010),[3] his sentence of life imprisonment without benefit of parole for the crime of aggravated rape committed while he was a juvenile was constitutionally excessive. The trial court granted the defendant's application, and subsequently resentenced him to fifty years at hard labor in accordance with the statutory provisions relative to attempted aggravated rape, because that was the most serious penalty for a lesser-included offense available at the time of the commission of the crime. This Court later granted the State's writ application and ordered the trial court to resentence the defendant in conformity with the requirements set forth in *State v. Shaffer*, 11-1756, 11-1758 (La. 11/23/11), 77 So.3d 939.[4]

On remand, the trial court set aside the previous fifty-year sentence and resentenced the defendant to serve life imprisonment with the benefit of parole, subject to the provisions of La. R.S. 15:574.4(D).[5] The defendant's motion to reconsider sentence was denied, and this appeal followed.

STATEMENT OF FACT

The facts of the offense, as set out in this Court's previous opinion, are as follows:

> At 3:30 a.m. on March 27, 1989 the defendant, whose mother was a friend of the victim, called the victim. He told her that he was locked out of his mother's house and asked if he could come over to the victim's house. The victim agreed. Once the defendant arrived, the victim asked the defendant if he would walk her over to her aunt's house. She wanted to go there because she did not feel well. She went to the closet to get her shoes. When she turned back around, the defendant took a knife out of his jacket and ordered her to take her clothes off. Once she did so, he pushed her on the bed and raped her.

[3] The *Graham Court* held that the Eighth Amendment precludes sentencing a juvenile to life imprisonment without the possibility of parole for commission of a non-homicide offense.
[4] When KeyCiting *Shaffer*, a yellow flag appears to underscore that the case was superseded by amendments and enactments to La. R.S. 15:574.4, discussed *infra*.
[5] La. R.S. 15:574.4(D) establishes the criteria by which juveniles serving a life sentence for a non-homicide crime may become eligible for parole. (Note: A red flag appears when KeyCiting this provision due to amendments have no application to the instant case.)

> Afterwards he asked her if she had any money. She gave him a money order for $187.00.
>
> In an attempt to get help, she told the defendant that her next door neighbor had $100.00 belonging to her and suggested that she call the neighbor for it. She called the neighbor and told her she was coming over. She went next door with the defendant following her. She tried to indicate to the neighbor that she was in trouble. The defendant became angry and dragged her by her hair back to her apartment. He hit her with a stick until the stick broke. Then he started strangling her. She fainted and remembered nothing else until she woke up in the hospital. The emergency room doctor testified that the victim had numerous injuries to her head, neck, upper chest and back.

State v. Jones, 572 So.2d at 770.

DISCUSSION

The defendant raises four principal assignments of error regarding the validity of his sentence:[6] 1) the trial court's sentence was inconsistent with the applicable law; 2) in applying *Shaffer* and La. R.S. 15:574.4(D), the trial court violated the separation of powers doctrine and the prohibition against *ex post facto* laws; 3) the trial court failed to impose an individualized sentence in conformity with *Miller v. Alabama*, -- U.S. --, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); and the sentence is excessive.

In his first assignment of error, the defendant asserts two arguments: his sentence was not imposed in accordance with the law at the time of the offense; and the trial court lacked the authority to impose the sentence. The defendant first argues the trial court erred in vacating his legal fifty-year sentence for attempted aggravated rape, which was consistent with the applicable law at the time of the offense. In support of this argument, the defendant relies on *State v. Craig*, 340 So.2d 191 (La. 1976), in which the Court held that the mandatory death sentence

[6] The defendant filed both a counseled and a *pro se* brief. Since the *pro se* assignments are substantially similar to the counseled assignments, they are addressed simultaneously.

for aggravated rape was unconstitutional, and that the appropriate remedy for the illegal sentence was to resentence the defendant according to the next lesser included offense, attempted aggravated rape. Thus, he concludes that his life sentence with parole was illegal, as it was not in compliance with the applicable law at the time of the offense.

This argument was squarely addressed and rejected by the Louisiana Supreme Court in *State v. Shaffer*, 11-1756, (La. 11/23/11), 77 So.3d 939. There, the Court opined that all that was required under the United States Supreme Court decision in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.E.2d 825 (2010), was for the juvenile defendants' life sentences for non-homicide crimes to be amended to delete the restrictions on parole eligibility such that there is a "meaningful opportunity to secure release based on demonstrated maturity and rehabilitation." *Shaffer*, 11-1756 at 3, 77 So.3d at 941. The Court ultimately concluded that the requirements of *Graham* were met by amending defendant's sentence to delete the restriction on parole eligibility. *Shaffer*, 11-1756 at 4, 77 So.3d at 942. As directed by this Court, the trial court correctly resentenced the defendant in accordance with *Shaffer*.

Next, the defendant contends that the trial court had no authority to impose a sentence that did not exist at the time the offense was committed. However, the defendant failed to recognize that whenever a statute contains unobjectionable provisions severable from those found to be unconstitutional, it is the duty of the court to so declare and to maintain the act insofar as it is valid. *State v. Cox*, 352 So.2d 638, 642 (La. 1977). As in S*haffer*, the trial court appropriately severed the offending portion of the statute, the prohibition of parole for defendants under the

age of eighteen at the time of the offense, and applied the remaining provision, life in prison.

In his second assignment of error, the defendant argues that in applying *Shaffer* and La. R.S. 15:574.4(D), the trial court violated the prohibition against *ex post facto* laws and the separation of powers doctrine. He contends that the application of La. R.S. 15:574.4(D) violates the prohibition against *ex post facto* laws since the law was not in effect at the time the offense was committed, and it put him at a disadvantage.

Before the defendant received the sentence at issue, the Louisiana Legislature enacted La. R.S. 15:574.4(D)[7] in response to *Shaffer*, and *Graham*.[8] Therefore, the trial court made the defendant's sentence subject to La. R.S. 15:574.4(D).

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[7] La. R.S. 15:574.4(D) provides:
D. (1) Notwithstanding any provision of law to the contrary, any person serving a sentence of life imprisonment who was under the age of eighteen years at the time of the commission of the offense, except for a person serving a life sentence for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1), shall be eligible for parole consideration pursuant to the provisions of this Subsection if all of the following conditions have been met:
(a) The offender has served thirty years of the sentence imposed.
(b) The offender has not committed any disciplinary offenses in the twelve consecutive months prior to the parole eligibility date.
(c) The offender has completed the mandatory minimum of one hundred hours of prerelease programming in accordance with R.S. 15:827.1.
(d) The offender has completed substance abuse treatment as applicable.
(e) The offender has obtained a GED certification, unless the offender has previously obtained a high school diploma or is deemed by a certified educator as being incapable of obtaining a GED certification due to a learning disability. If the offender is deemed incapable of obtaining a GED certification, the offender shall complete at least one of the following:
(i) A literacy program.
(ii) An adult basic education program.
(iii) A job skills training program.
(f) The offender has obtained a low-risk level designation determined by a validated risk assessment instrument approved by the secretary of the Department of Public Safety and Corrections.
(g) The offender has completed a reentry program to be determined by the Department of Public Safety and Corrections.
(h) If the offender was convicted of aggravated rape, he shall be designated a sex offender and upon release shall comply with all sex offender registration and notification provisions as required by law.
(2) For each offender eligible for parole consideration pursuant to the provisions of this Subsection, the committee shall meet in a three-member panel and each member of the panel shall be provided with and shall consider a written evaluation of the offender by a person who has expertise in adolescent brain development and behavior and any other relevant evidence pertaining to the offender.
(3) The panel shall render specific findings of fact in support of its decision.

[8] In particular, the *Shaffer* Court recognized that its decision to delete the parole restrictions was "an interim measure (based on the legislature's own criteria) pending the legislature's response to *Graham*." *Shaffer*, at 943 n. 6.

The focus of an *ex post facto* analysis is whether a legislative change "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *State ex rel. Olivieri v. State*, 779 So.2d 735, 743 (La. 2/21/01); *See also* La. Const. Art. I, § 23. The operative inquiry is whether the law can be considered punishment or an alteration of the definition of criminal conduct. *Id*.

La. R.S. 15:574.4(D) sets forth the criteria for the defendant to become eligible for parole. Since the sentence the defendant was previously serving was without parole, his penalty was lessened by La. R.S. 15:574.4. Therefore, we cannot say that La. R.S. 15:574.4(D) increased his penalty; nor did it alter the definition of criminal conduct. Accordingly, the trial court did not violate the prohibition against *ex post facto* laws when it subjected the defendant to the guidelines in La. R.S. 15:574.4(D).

The defendant also claims that the application of La. R.S. 15:574.4(D) violates the separation of powers doctrine, because it shifts the judiciary's sentencing responsibility to the parole board, which is part of the executive branch. Louisiana's Constitution divides the state's governmental powers among three distinct branches: legislative, executive and judicial. La. Const. art. II, § 1. The Louisiana Constitution further provides: "Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." La. Const. art. II, § 2. "This division creates in the judicial branch powers with which the legislative and executive branches shall not interfere." *State v. LeCompte*, 406 So.2d 1302, 1311 (La. 1981)(citing *Singer Hutner Levine Seeman & Stuart v. La. State Bar Ass'n*, 378 So.2d 423 (La. 1979)). La. Const. Art. V, § 1 provides: "The judicial

power is vested in a supreme court, court of appeal, and other courts authorized by this article."

One of the traditional, inherent and exclusive powers of the judiciary is the power to sentence. *LeCompte*, 406 So.2d at 1311 (on rehearing). After a defendant is convicted of a crime, the determination of his sentence is within the sound discretion of the trial judge. *State v. Jackson*, 298 So.2d 777, 780 (La.1974). However, the trial judge's sentencing discretion is not unbridled, as the legislative branch of government is free to decide what constitutes a crime as well as "what punishments shall be meted out by a court after the judicial ascertainment of guilt." *State v. Normand*, 285 So.2d 210, 211 (La. 1973)(quoting *Smith v. U.S.*, 284 F.2d 789, 791 (5th Cir. 1960)). Therefore, the fixing of penalties is purely a legislative function, but the trial judge has the discretion to determine the appropriate sentence within the sentencing range fixed by the legislature. "It is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies." *State v. Dorthey*, 623 So.2d 1276, 1278 (La. 1993)(citations omitted). Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. *Id*. The legislature is also free to limit the discretion of the court in imposing a sentence. *LeCompte*, 406 So.2d at 1306 (citing *Normand*, 285 So.2d at 211). As for parole decisions , "[t]he determination of whether [a defendant] may be released on parole falls within the exclusive purview of the Board of Parole, charged with the duty of ordering parole 'only for the best interest of society, not as an award of clemency.' " *State v. Richards*, 11-349, p. 15 (La. App. 4 Cir. 12/1/11), 78 So. 3d 864, 872, *writ denied*, 11-2807 (La. 4/27/12), 86 So. 3d 627 (citing *Shaffer*, 11-1756 at 4, 77 So.3d at 943).

Contrary to the defendant's contention, the parole board has the exclusive right to make parole determinations. La. R.S. 15:574.4(D) established criteria for parole eligibility in relation to the parole board's decisions to release an offender on parole. This statute does not implicate the judicial branch much less transfer any of its power or authority to the parole board. It is clear that the trial court's sentencing discretion was limited by the legislature, just as it was when it first sentenced the defendant in 1989. Thus, in accord with its sentencing responsibility, it imposed a sentence congruent with both legislative and constitutional directives. *See Dorthey*, *supra*, and *Normand*, *supra*.

The defendant also suggests that due to the mandatory nature of the sentence, the trial court was precluded from considering alternative sentences tailored to his circumstances. However, the defendant overlooks the fact that in a situation where the mandatory minimum is excessive for a particular defendant, a trial court may exercise a downward departure from the mandated sentence and impose a lesser sentence. Article I, Section 20 of the Louisiana Constitution; *State v. Lindsey*, 99-3256, 99-3302, p. 5 (La. 10/17/00), 770 So.2d 339, 343; *Dorthey*, *supra*. Thus, his implication is incorrect. In light of the foregoing, we cannot say that the application of La. R.S. 15:574.4(D) violates the separation of powers doctrine.

In his third assignment of error, the defendant claims that the trial court failed to impose an individualized sentence as required by *Miller*, *supra*. However, *Miller* is inapposite to the instant case. *Miller* involved mandatory life sentences without parole for **homicide** offenders; whereas, the defendant in the instant case did not commit a homicide. Moreover, the Louisiana Supreme Court in *State v. Tate,* 12-2763 (La. 11/5/13), 130 So 3d 829, *cert. denied*, 13-8915 (5/27/14), held

that *Miller* does not retroactively apply to cases on collateral review. Given that this case is on collateral review, *Miller* does not apply.

In his final assignment of error, the defendant maintains that the trial court failed to consider his youth or other mitigating factors which demonstrate his maturity and rehabilitation. Thus, he concludes that his sentence is excessive under *Graham* and *Miller*.

As discussed, in *Graham*, the United States Supreme Court held that the Eight Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a non-homicide offense. *Id.*, 560 U.S. at 75, 130 S.Ct. at 2030. The Court explained that while a State must not guarantee the eventual release of the offender, they must be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Id.* La. R.S. 15:574(D) establishes the criteria a defendant must meet to demonstrate these characteristics.

Contrary to the defendant's contention, the Court in *Graham* did not mandate an evaluation of the defendant's characteristics at the time of sentencing. Instead, *Graham* stressed the importance of a categorical rule under the circumstances, and prohibited States from "making a determination at the outset that an offender will never be fit to reenter society." *Id.*, 560 U.S. at 75, 130 S.Ct. at 2030. In allowing the defendant an opportunity for parole (or release) under La. R.S. 15:574.4(D), the trial court has complied with the holding in *Graham*. *See Shaffer*, 11-1756 at4, 77 So.3d at 943 (providing a defendant access to the parole board's consideration satisfies the mandate in Graham). Thus, the defendant's sentence was not excessive.

CONCLUSION

Based on the preceding discussion, the defendant's sentence is affirmed.

AFFIRMED