REL: April 12, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-1059

Christopher Jackson

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-05-1088.61)

McCOOL, Judge.

AFFIRMED BY UNPUBLISHED MEMORANDUM.

Windom, P.J., and Minor, J., concur. McCool, J., concurs specially, with opinion, which Kellum, J., joins. Cole, J., recuses himself.

McCOOL, Judge, concurring specially.

Christopher Jackson appeals a judgment of the Jefferson Circuit Court summarily denying his Rule 32, Ala. R. Crim. P., petition for postconviction relief in which Jackson challenged the constitutionality of his sentence. In an unpublished memorandum, this Court concludes that the circuit court's summary denial of Jackson's petition was proper because the constitutional claims asserted therein were precluded by the procedural bars of Rule 32.2, Ala. R. Crim. P. See Abrams v. State, 978 So. 2d 794, 795 (Ala. Crim. App. 2006) (noting that "[a] constitutional challenge is nonjurisdictional and therefore subject to the procedural bars set forth in Rule 32"). I write specially to note that, even if Jackson's petition had not been precluded, Jackson would not be entitled to relief because his claims lack merit.

In 2006, Jackson was convicted of attempted murder, a violation of §§ 13A-6-2 and 13A-4-2, Ala. Code 1975, for an offense he committed when he was 24 years old. Because Jackson had three prior felony convictions, he was sentenced, as a habitual felony offender, see § 13A-5-9, Ala. Code 1975, to life imprisonment without the possibility of parole. Two

of the three prior felony convictions supporting the enhancement of Jackson's sentence were convictions Jackson received for offenses he committed when he was a juvenile but for which he was tried as an adult. See § 12-15-204, Ala. Code 1975. Specifically, Jackson was convicted of shooting into an occupied dwelling, a violation of § 13A-11-61, Ala. Code 1975, when he was 16 years old and of first-degree robbery, a violation of § 13A-8-41, Ala. Code 1975, when he was 17 years old.[1] In 2017, Jackson filed the instant petition in which he argued, as he does on appeal, that his sentence is unconstitutional on two separate, but related, grounds.

First, Jackson cites Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012), in support of his contention that it is unconstitutional to sentence a juvenile offender to life imprisonment without the possibility of parole for a nonhomicide offense. Although Jackson concedes he was 24 years old when he committed the nonhomicide

[1]Because Jackson had three prior felony convictions, at least one of which was a Class A felony, and because attempted murder is a Class A felony, § 13A-5-9(c)(4) mandated that Jackson receive a sentence of life imprisonment without the possibility of parole.

offense that resulted in his sentence of life imprisonment without the possibility of parole, he relies on Graham and Miller to argue that it is equally unconstitutional to use an adult offender's juvenile-age convictions to enhance the adult's sentence for a nonhomicide offense to a sentence of life imprisonment without the possibility of parole. Second, Jackson cites Kennedy v. Louisiana, 554 U.S. 407 (2008), for the proposition that it is unconstitutional to impose a death sentence for a nonhomicide offense. Although Jackson concedes he did not receive a death sentence, he argues that, in Graham and Miller, the United States Supreme Court "acknowledged a sentence of [life imprisonment without the possibility of parole] as akin to the death penalty." Jackson's brief, at 10. Thus, Jackson argues, because he received a sentence of life imprisonment without the possibility of parole for his attempted-murder conviction, he essentially received a death sentence for a nonhomicide offense. Neither of these arguments, which I address in turn, has any merit.

I. Graham and Miller Claim

As a threshold matter, I note that, on their faces, Graham and Miller do not entitle Jackson to relief. In

Graham, the United States Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide," Graham, 560 U.S. at 82 (emphasis added), and in Miller, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." Miller, 567 U.S. at 479 (emphasis added). Thus, neither Graham nor Miller recognized a constitutional limit on a sentence of life imprisonment without the possibility of parole for an adult offender. Accordingly, because Jackson was undisputedly an adult when he committed the offense that resulted in his sentence of life imprisonment without the possibility of parole, his sentence does not violate Graham or Miller. See Romero v. State, 105 So. 3d 550, 552 (Fla. Dist. Ct. App. 2012) ("Not a single court in this country has extended Graham to an adult offender. On the contrary, several courts have reaffirmed that Graham is inapplicable to adult offenders."); Jean-Michel v. State, 96 So. 3d 1043, 1044 (Fla. Dist. Ct. App. 2012) (rejecting appellant's contention that Graham barred a sentence of life imprisonment without the possibility of

parole for an offense he committed when he was 19 years old because Graham "limited the application of the rule to juveniles, meaning persons less than eighteen years of age"); and Sloan v. State, 418 S.W.3d 884, 892 (Tex. App. 2013) (noting that "Miller's holding is limited to juveniles").

As noted, however, Jackson argues that the principles of Graham and Miller should be extended to prohibit an adult who commits a nonhomicide offense from receiving a sentence of life imprisonment without the possibility of parole when that sentence is the result of enhancement by the adult's juvenile-age convictions. Multiple federal circuits have considered and rejected this argument. Regarding the scope of Graham, in United States v. Scott, 610 F.3d 1009 (8th Cir. 2010), the United States Court of Appeals for the Eighth Circuit stated:

> "Finally, Scott argues that the Eighth Amendment prohibits enhancing his sentence based on his previous felony drug convictions because he was a juvenile when he committed those crimes. We note that while Scott committed his prior felony drug offenses as a juvenile, he was charged and convicted of both crimes as an adult. ...
>
> "The U.S. Supreme Court cases that Scott cites, Roper [v. Simmons, 543 U.S. 551 (2005),] and Graham, ... established constitutional limits on certain sentences for offenses committed by juveniles. However, Scott was twenty-five years old at the time he committed the conspiracy offense in this case.

> Neither Roper nor Graham involved the use of prior offenses committed as a juvenile to enhance an adult conviction, as here. ... [T]he Court's analysis in Graham was limited to defendants sentenced to life in prison without parole for crimes committed as juveniles. The Court in Graham did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult."

Scott, 610 F.3d at 1018 (emphasis added).

Similarly, in United States v. Banks, 679 F.3d 505 (6th Cir. 2012), the United States Court of Appeals for the Sixth Circuit stated:

> "Relying on Graham ..., Banks insists that using an offense committed as a juvenile to enhance the maximum penalty to life without parole ... categorically violates the Eighth Amendment's prohibition against cruel and unusual punishment. But Graham ... only categorically prohibited sentencing a juvenile to life without parole when neither the current conviction nor the predicate convictions involved a homicidal offense; the Supreme Court has yet to categorically prohibit courts from considering juvenile-age offenses when applying enhancements to an adult's conviction. See United States v. Graham ..., 622 F.3d 445, 462–63 (6th Cir. 2010) (collecting cases from other circuits concluding that Graham v. Florida limited its holding to juvenile offenders, leaving untouched the practice of considering juvenile-age criminal history when sentencing an adult offender)."

Banks, 679 F.3d at 507 (some emphasis added).

In United States v. Orona, 724 F.3d 1297 (10th Cir. 2013), the United States Court of Appeals for the Tenth

Circuit explained why Graham's restriction on a sentence of life imprisonment without the possibility of parole for a juvenile offender does not preclude the use of juvenile-age convictions to enhance an adult offender's sentence:

> "Orona argues that the practice of using a juvenile adjudication as a predicate offense under [the Armed Career Criminal Act ('ACCA')] conflicts with the Supreme Court's holdings regarding juvenile offenders in Roper [v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005,] and Graham. In the former case, the Court concluded that the imposition of the death penalty upon juvenile offenders violates the Eighth Amendment. Roper, 543 U.S. at 560, 125 S. Ct. 1183. It reached this conclusion based in large part on the differences between juveniles and adults. Juveniles, the Court held, have 'a lack of maturity and an underdeveloped sense of responsibility.' Id. at 569, 125 S. Ct. 1183 (alteration and quotation omitted). They 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.' Id. And the 'personality traits of juveniles are more transitory, less fixed.' Id. at 570, 125 S. Ct. 1183. These differences 'render suspect any conclusion that a juvenile falls among the worst offenders.' Id. Juvenile offenders must be considered less culpable because they 'have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment,' and 'a greater possibility exists that a minor's character deficiencies will be reformed.' Id. The Graham Court extended this logic, prohibiting the imposition of mandatory life without parole sentences for non-homicide juvenile offenders. 130 S. Ct. at 2034. This holding was again based on the 'fundamental differences between juvenile and adult minds.' Id. at 2026. And in Miller, the Court held that mandatory life without parole sentences for

juveniles are entirely impermissible for the same reasons. 132 S. Ct. at 2464.

"Orona argues that the use of a juvenile adjudication as a predicate offense under ACCA similarly violates the Eighth Amendment because juveniles are less morally culpable. The problem with this line of argument is that it assumes Orona is being punished in part for conduct he committed as a juvenile. This assumption is unfounded. The Supreme Court 'consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant.' Nichols v. United States, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994) (quotation omitted). 'When a defendant is given a higher sentence under a recidivism statute ... 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's status as a recidivist.' United States v. Rodriquez, 553 U.S. 377, 386, 128 S. Ct. 1783, 170 L. Ed. 2d 719 (2008) (quotation omitted).

"Unlike the defendants in Roper and Graham, Orona is being punished for his adult conduct. As we recently explained in rejecting a substantive due process challenge to ACCA's use of juvenile adjudications, the cases upon which Orona relies 'involve sentences imposed directly for crimes committed while the defendants were young. In the case before us, an adult defendant faced an enhanced sentence for a crime he committed as an adult.' United States v. Rich, 708 F.3d 1135, 1140 (10th Cir. 2013). A juvenile's lack of maturity and susceptibility to negative influences, see Roper, 543 U.S. at 569, 125 S. Ct. 1183, cannot explain away Orona's decision to illegally possess a firearm when he was twenty-eight years old."

Orona, 724 F.3d at 1307-08 (emphasis added).

Federal circuits have reached the same conclusion regarding the scope of Miller. In United States v. Hoffman, 710 F.3d 1228 (11th Cir. 2013), the United States Court of Appeals for the Eleventh Circuit stated:

> "Hoffman points to Miller ..., in which the Supreme Court recently held that the Eighth Amendment prohibits a mandatory life-without-parole sentence for defendants who were under age 18 when they committed the crime. But Miller is inapposite because it involved a juvenile offender facing punishment for a crime committed when he was a juvenile, and thus it focused on the reasons why it would be cruel and unusual for a juvenile to face a mandatory life sentence. See id. at 2464–68. Nothing in Miller suggests that an adult offender who has committed prior crimes as a juvenile should not receive a mandatory life sentence as an adult, after committing a further crime as an adult. ... [T]he Supreme Court in Miller did 'not deal specifically -- or even tangentially -- with sentence enhancement,' and it is a far different thing to prohibit sentencing a juvenile offender to a mandatory sentence of life imprisonment without parole than it is 'to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood.' [United States v.] Wilks, 464 F.3d [1240,] 1243 [(11th Cir. 2006)]."

Hoffman, 710 F.3d at 1233 (some emphasis added).

Similarly, in United States v. Hunter, 735 F.3d 172 (4th Cir. 2013), the United States Court of Appeals for the Fourth Circuit considered whether it violates Miller to use juvenile-age convictions to enhance an adult offender's sentence.

After noting that Miller "emphasized that 'children are constitutionally different from adults for purposes of sentencing' due to their 'diminished culpability and greater prospects for reform,'" Hunter, 735 F.3d at 174 (quoting Miller, 567 U.S. at 471), the Fourth Circuit concluded that "[n]one of this helps Defendant, however, because the sentence he challenges punishes only his adult criminal conduct." 735 F.3d at 175.

> "In this case, Defendant is not being punished for a crime he committed as a juvenile, because sentence enhancements do not themselves constitute punishment for the prior criminal convictions that trigger them. See [United States v.] Rodriquez, 553 U.S. [377,] 385–86, 128 S. Ct. 1783 [(2008)]. Instead, Defendant is being punished for the recent offense he committed at thirty-three, an age unquestionably sufficient to render him responsible for his actions. Accordingly, Miller's concerns about juveniles' diminished culpability and increased capacity for reform do not apply here.
>
> "In sum, Defendant was no juvenile when he committed the crime for which he was sentenced here. Miller, with its concerns particular to juvenile offenders, thus does not apply, and Defendant's Eighth Amendment challenge to his sentence, grounded in Miller, must fail."

Id. at 176 (emphasis added).

Although this Court is not bound by federal courts' interpretation of decisions from the United States Supreme

Court, I find the above-quoted cases persuasive insofar as they conclude that Graham's and Miller's restrictions on sentences of life imprisonment without the possibility of parole are limited to juvenile offenders and do not "categorically prohibit courts from considering juvenile-age offenses when applying enhancements to an adult's conviction." Banks, 679 F.3d at 507. As the Eleventh Circuit stated: "[I]t is a far different thing to prohibit sentencing a juvenile offender to life imprisonment without parole than it is 'to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood.'" Hoffman, 710 F.3d at 1233 (quoting United States v. Wilks, 464 F.3d 1240, 1243 (11th Cir. 2006)). Thus, because Jackson was 24 years old when he committed the offense that resulted in his sentence of life imprisonment without the possibility of parole, "an age unquestionably sufficient to render him responsible for his actions," Hunter, 735 F.3d at 176, the "concerns particular to juvenile offenders" discussed in Graham and Miller do not apply to Jackson. Id. Put differently, Jackson's "lack of maturity and susceptibility to negative influences" at the time he committed his juvenile-age

offenses simply cannot "explain away" his decision to commit attempted murder as an adult, Orona, 724 F.3d at 1308, and Jackson's sentence of life imprisonment without the possibility of parole punishes only that offense. See id. at 1307 (noting that "repeat-offender laws ... penaliz[e] only the last offense committed by the defendant" (quoting Nichols v. United States, 511 U.S. 738, 747 (1994)). Thus, Jackson, who "elected to continue a course of illegal conduct" after becoming an adult, id. at 1308, is now "an adult 'being punished for his adult conduct,'" Hunter, 735 F.3d at 176 (quoting Orona, 724 F.3d at 1307), and neither Graham nor Miller "mandate[s] that we wipe clean [Jackson's criminal] records ... on his ... eighteenth birthday." Hoffman, 710 F.3d at 1232 (quoting Wilks, 464 F.3d at 1243). Accordingly, Jackson's sentence of life imprisonment without the possibility of parole for an offense he committed as an adult does not violate either Graham or Miller, even though the sentence was enhanced by Jackson's juvenile-age convictions.

II. Kennedy Claim

Jackson fares no better with his argument that his sentence of life imprisonment without the possibility of

parole violates Kennedy's prohibition of a death sentence for a nonhomicide offense. As noted, although Jackson concedes he did not receive a death sentence, he contends that Graham and Miller acknowledge that a sentence of life imprisonment without the possibility of parole is "akin to the death penalty." Jackson's brief, at 10. Thus, because Jackson received a sentence of life imprisonment without the possibility of parole for his attempted-murder conviction, he argues that he essentially received, in violation of Kennedy, a death sentence for a nonhomicide offense.

To be sure, the United States Supreme Court acknowledged in Graham and Miller that sentences of life imprisonment without the possibility of parole "'share some characteristics with death sentences that are shared by no other sentences.'" Miller, 567 U.S. at 474 (quoting Graham, 560 U.S. at 69). However, in those cases, the Court was clearly concerned with only the constitutionality of imposing on a juvenile offender a sentence of life imprisonment without the possibility of parole, which, after Roper v. Simmons, 543 U.S. 551 (2005), is the most severe penalty a juvenile offender can receive and is therefore analogous to imposing the death penalty on an adult

offender. A sentence of life imprisonment without the possibility of parole is not the most severe penalty an adult offender can receive, however, and nothing in Graham or Miller even remotely suggests that the Court questioned the constitutionality of imposing on an adult offender "'the second most severe penalty permitted by law'" for an adult offender, even when that adult is relatively young. Graham, 560 U.S. at 69 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)). Indeed, in Graham, the Court drew a bright line separating those offenders who are and are not eligible for a sentence of life imprisonment without the possibility of parole for a nonhomicide offense: "Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." Graham, 560 U.S. at 74 (quoting Roper, 543 U.S. at 574 (emphasis added)). Likewise, in Miller, the Court expressly noted that "children are constitutionally different from adults for purposes of sentencing," Miller, 567 U.S. at 471, and reiterated that Graham "liken[ed] life-without-parole sentences imposed on

juveniles to the death penalty itself." Id. at 474 (emphasis added).

Thus, neither Graham nor Miller can be interpreted as equating an adult offender's sentence of life imprisonment without the possibility of parole to a death sentence. Accordingly, although Kennedy does indeed prohibit a death sentence for a nonhomicide offense, Kennedy does not prohibit a sentence of life imprisonment without the possibility of parole for an adult who commits such an offense. As a result, Jackson's sentence of life imprisonment without the possibility of parole for his attempted-murder conviction does not violate Kennedy.

Kellum, J., concurs.