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

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

DENNIS CALABRESE,

Appellant,

v. Case No. 5D19-2858

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed January 8, 2021

Appeal from the Circuit Court
for Brevard County,
Nancy Maloney, Judge.

Donna Duncan, of Sanders and Duncan, P.A., Apalachicola, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

ORFINGER, J.

Dennis Calabrese appeals his concurrent sentences of life in prison imposed after resentencing for two first-degree murders that he committed in 1995 as a juvenile. Calabrese argues that (1) the sentences of life in prison without parole, even with the

current statutorily-provided sentence review at twenty-five years,[1] violate the Eighth Amendment to the United States Constitution because, absent a determination at sentencing that his crimes reflected irreparable corruption, the life without parole sentences are disproportionate and unconstitutional; (2) the resentencing court improperly concluded that life imprisonment was appropriate; and (3) the resentencing court violated his Sixth Amendment rights because the judge, not a jury, made the statutory finding that he killed, attempted to kill, or intended to kill the victims. Finding no error, we affirm.

Shortly after midnight on February 28, 1995, then sixteen-year-old Calabrese, Robert McKevitt, and Geoffrey Calvert carried out their plan to rob Kris Miller of drugs and then kill Miller and anyone who was with him during a pre-arranged drug buy. Their plan culminated in the armed robbery of fifteen-year-old Miller and the shooting deaths of Miller and twenty-two-year-old Matthew Amos. For his role in the crimes, Calabrese was found guilty of two counts of first-degree murder and one count of robbery with a firearm and was sentenced to life imprisonment on each count, running concurrently.[2] His judgment

[1] In 2014, the Florida Legislature created a new sentencing framework for juvenile offenders, sections 921.1401 and 921.1402, Florida Statutes (2014), and amended section 775.082, Florida Statutes (2014), in response to certain federal constitutional concerns. Horsley v. State, 160 So. 3d 393, 401 (Fla. 2015); Bellay v. State, 277 So. 3d 605, 608 (Fla. 4th DCA 2019). Although the effective date of these 2014 laws was prospective, the Florida Supreme Court has held that they apply retroactively. State v. Purdy, 252 So. 3d 723, 725 (Fla. 2018) (citing Falcon v. State, 162 So. 3d 954, 962 (Fla. 2015), Horsley, 160 So. 3d 393, 405–06 (Fla. 2015)). Pursuant to section 921.1402(2)(a), Florida Statutes (2019), Calabrese is entitled to a judicial review of his sentence once he has served twenty-five years.

[2] Calabrese's original sentences for first-degree murder were sentences of life imprisonment without the possibility of parole, as the Florida Legislature eliminated parole eligibility for first-degree murder in 1994. See ch. 94-228, § 1, Laws of Fla.

and sentence were affirmed on appeal. Calabrese v. State, 726 So. 2d 846 (Fla. 5th DCA 1999), review denied, 751 So. 2d 1250 (Fla. 2000).

In 2016, Calabrese sought to have his sentences vacated as unconstitutional pursuant to Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012), which held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. Miller requires the court to first consider the juvenile offender's "youth and attendant characteristics" before imposing the uncommon sentence of life without parole, which is reserved for only the "rare" juvenile offender "whose crime reflects irreparable corruption." Miller, 567 U.S. at 479–80, 483. Calabrese sought resentencing pursuant to Falcon v. State, 162 So. 3d 954 (Fla. 2015) (holding that Miller applies retroactively, and resentencing is the proper remedy for a Miller violation), receded from on other grounds by Williams v. State, 242 So. 3d 280 (Fla. 2018). Calabrese's motion was granted, and his sentences were vacated. In 2019, a resentencing hearing was held and a new sentencing order rendered.

We conclude the resentencing court properly applied section 921.1401, Florida Statutes (2019), to determine the appropriate sentences for Calabrese's first-degree murder convictions. Section 921.1401 requires a sentencing court to hold an individualized sentencing hearing to determine whether a sentence of life in prison or a term of years equal to life imprisonment is an appropriate sentence for offenders who were under the age of eighteen years at the time they committed the offense. § 921.1401(1), Fla. Stat. (2019). To guide sentencing courts in making that determination, the statute sets out ten non-exclusive factors relevant to the juvenile offender's "youth and attendant circumstances." § 921.1401(2), Fla. Stat. (2019); see Fla. R. Crim. P.

3.781(b) ("The sentencing court shall allow the state and defendant to present evidence relevant to the offense, the defendant's youth, and attendant circumstances, including, but not limited to those enumerated in section 921.1401(2), Florida Statutes."). The sentencing order includes lengthy findings relevant to Calabrese's youth and attendant circumstances, clearly reflecting that the resentencing court performed the appropriate analysis. After concluding that the factors weighed in favor of life imprisonment, Calabrese was resentenced to life in prison on each of the first-degree murder convictions and to twenty years in prison on the robbery with a firearm conviction.

Calabrese moved for rehearing, arguing in part that his life sentences were unconstitutional because the resentencing court did not first determine whether his crimes reflected "transient immaturity" or "irreparable corruption." Calabrese contended below and on appeal that absent a determination that he was that rare juvenile whose crimes reflected irreparable corruption for which a life sentence was appropriate, the life sentences imposed on him were disproportionate and unconstitutional. See Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (observing that "Miller drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption"; concluding Miller made life without parole an unconstitutional penalty for "juvenile offenders whose crimes reflect the transient immaturity of youth").

The resentencing court rejected Calabrese's rehearing argument, ordering the life sentences to remain in effect. After acknowledging Miller's statement that a sentence of life without parole should only be imposed in the rare situation where a juvenile's crime reflects irreparable corruption, the resentencing court wrote:

> However, the Defendant was not resentenced to a term of life without parole. Instead, the Defendant was sentenced under the juvenile sentencing scheme under sections 775.082, 921.1401, and 921.1402, Florida Statutes, which went into effect after Miller was decided. Under this scheme, the Defendant is entitled to a review hearing once he has served 25 years of his sentence. Because the Defendant does have a meaningful opportunity for release, it was appropriate for the Court to impose a life sentence without making findings of irreparable corruption and rarity.

While the resentencing court agreed with Calabrese that there are differences between a sentence review under section 921.1402 and a parole hearing, it found that a sentence review provides a juvenile "with a reasonable opportunity for release."

On appeal, Calabrese recognizes that section 921.1401 requires consideration of factors related to youth and attendant circumstances consistent with Miller, but argues that more is required. He asserts that Montgomery, when read in conjunction with Miller, requires a sentencing court to also determine that the crime evidenced irreparable corruption before a sentencing court can impose a constitutional life sentence on a juvenile offender. Absent a determination of irreparable corruption, he argues, a life without parole sentence imposed on a juvenile violates Montgomery's caution that although a formal fact finding requirement was not imposed by Miller, "[s]tates [are not] free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, Miller established that this punishment is disproportionate under the Eighth Amendment." Montgomery, 136 S. Ct. at 735. He concludes that the Florida Legislature's failure to explicitly require a sentencing court to make a determination of irreparable corruption before imposing a sentence of life without parole results in juvenile offenders, whose crimes reflect only transient immaturity, being unconstitutionally sentenced to life without parole. We disagree.

Florida law does not require a sentencing court to determine, as a condition of a constitutional life sentence, whether a juvenile's crime reflects irreparable corruption. The requisite proportionality review, as discussed in Graham and Miller, is satisfied by the sentencing court's consideration of the factors set out in section 921.1401. Smith v. State, 45 Fla. L. Weekly D2600, D2600 (Fla. 1st DCA Nov. 18, 2020); Phillips v. State, 286 So. 3d 905, 912 (Fla. 1st DCA 2019). Accordingly, a sentence imposed after proper consideration of the section 921.1401 factors, with the opportunity for a judicial review of the sentence at twenty-five years pursuant to section 921.1402, is constitutional under the Eighth Amendment. Our supreme court appears to agree. Cf. Landrum v. State, 192 So. 3d 459 (Fla. 2016) (referencing section 921.1401 factors as codification of Miller, as reaffirmed by Montgomery). Other appellate courts have reached the same conclusion. See, e.g., Phillips, 286 So. 3d at 910 ("The sentencing court . . . did not have to conclude that he was 'the rare juvenile whose crime reflects irreparable corruption' as required by Graham and Miller" because the "life-with-review sentence provides [the juvenile] with a meaningful opportunity for release . . . ."), review denied, No. SC20-81, 2020 WL 3412398 (Fla. June 22, 2020); Nelms v. State, 263 So. 3d 88 (Fla. 4th DCA 2019) (rejecting juvenile homicide offender's argument that he had no meaningful opportunity for release and that, because no finding of irredeemable corruption was made, his life sentence with judicial review at twenty-five years violated Eighth Amendment; concluding that because judicial sentence review provision offered opportunity for release, sentence was not tantamount to life in prison without parole). Because the resentencing court properly considered the section 921.1401 factors and Calabrese is entitled to a sentence review at twenty-five

years, Calabrese's life sentences are constitutional under Eighth Amendment considerations.

To the extent that Calabrese argues that the resentencing court improperly weighed the section 921.1401 factors, he has not established any abuse of discretion. Although the unrebutted evidence presented at the resentencing hearings reflects that Calabrese demonstrated remarkable rehabilitation in the past almost twenty-four years while in prison, and the resentencing court acknowledged that Calabrese has demonstrated his ability to be rehabilitated through his behavior in prison, rehabilitation alone did not require the imposition of a lesser sentence. Rehabilitation is not the sole focus of section 921.1401. Rather, it is one of the statutory factors to be considered at sentencing, and the resentencing court did so. In contrast to section 921.1401, evidence of rehabilitation and the juvenile's maturation play a much greater role in the subsequent sentence review hearing held pursuant to section 921.1402. See, e.g., Phillips, 286 So. 3d at 910 ("At the sentence-review hearing, while the court must again consider the circumstances leading up to and including the offense, the primary focus is on the offender's maturity and rehabilitation."); Bellay v. State, 277 So. 3d 605, 609 (Fla. 4th DCA 2019) (noting that section 921.1402 factors require consideration of "who the juvenile offender is at the time of the judicial review, i.e., whether the offender 'has been rehabilitated and is reasonably believed to be fit to reenter society'" (quoting § 921.1402(7), Fla. Stat. (2017))). This evidence may be significant at Calabrese's sentence review hearing.[3]

[3] To initiate the sentence review, Calabrese must submit an application that requests a sentence review hearing. § 921.1402(4), Fla. Stat. (2019).

Finally, we do not reach the issue of whether the resentencing court violated Calabrese's Sixth Amendment rights when the judge, not a jury, made the statutory finding that he killed, attempted to kill, or intended to kill the victims. Calabrese did not object either to the propriety of the trial court making such a finding or conducting a harmless error analysis. Furthermore, Calabrese did not raise a claim of fundamental error relating to this determination in his initial brief. Consequently, this claim of error has been waived for appellate review, and this Court is not required to undertake a fundamental error analysis on Calabrese's behalf. *See Fike v. State*, 4 So. 3d 734, 739 (Fla. 5th DCA 2009) (noting that burden is on appellant to demonstrate fundamental error); *Williams v. State*, 845 So. 2d 987 (Fla. 1st DCA 2003) (holding that defendant failed to preserve claim of fundamental error where he did not raise issue until he filed reply brief).

AFFIRMED.

EDWARDS and SASSO, JJ., concur.