IN THE COURT OF APPEALS OF IOWA

No. 2-335 / 11-1214
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DESIRAE MONIQUE PEARSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Cynthia H. Danielson, Judge.

A defendant who was a minor at the time she is alleged to have committed the crimes of robbery and burglary contends two consecutively-imposed mandatory minimum prison sentences of seventeen-and-a-half years each violate her right to be free from cruel and unusual punishment under the federal and state constitutions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

A jury found seventeen-year-old Desirae Pearson guilty of two counts of first-degree robbery and two counts of first-degree burglary. On appeal, Pearson contends two consecutively-imposed mandatory minimum prison sentences of seventeen-and-a-half years violate her right to be free from cruel and unusual punishment under the federal and state constitutions.

I. Background Facts and Proceedings

Pearson came to the door of Zachary Moore's home and, when Moore opened the door, pointed a gun at him and told him he was being robbed. She and co-defendant Devon Lukinich entered Moore's house, stole several items, and left, while Moore cowered on the ground with his face to the floor.

Later, Pearson and Lukinich broke into the home of eighty-one-year-old Joan Wright. When Wright awoke and yelled for her son, Lukinich pushed her down, causing an injury to her shoulder. Pearson and Lukinich again left the home with several items.

Officers subsequently stopped the two. On searching Pearson's vehicle, they discovered items taken from Wright's house. A later search of the home Pearson shared with Lukinich uncovered items taken from Moore's house.

The State charged Pearson with two counts of first-degree robbery and two counts of first-degree burglary, as well as criminal mischief arising from a third incident that evening. The jury found Pearson guilty on the robbery and burglary counts, but the jury deadlocked on the criminal mischief count. The district court declared a hung jury on that count.

The court sentenced Pearson to twenty-five-year prison terms on each of the four remaining counts. The court ordered the sentences on counts one and two (robbery and burglary relating to the first home) to be served concurrently and the sentences on counts three and four (robbery and burglary on the second home) to be served concurrently but ordered counts three and four to be served consecutively to counts one and two. As a result, Pearson was sentenced to an indeterminate prison term of fifty years.

The two robbery counts were subject to mandatory minimum sentences of seventy percent. *See* Iowa Code § 902.12(5) (2009). Accordingly, Pearson's mandatory minimum sentence on each robbery count was seventeen-and-a-half years. Because the district court ordered Pearson to serve the robbery counts consecutively, the total mandatory minimum sentence was thirty-five years.

On appeal, Pearson asserts "the seventy percent mandatory minimum sentence . . . violates the constitutional ban on cruel and unusual punishments as applied to [her]." Review of this constitutional claim is de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

II. Analysis

"The United States Constitution prohibits the imposition of 'cruel and unusual' punishment." *Id.* at 872 (citing U.S. Const. amend. VIII). The Iowa Constitution contains materially identical language. Iowa Const. art. I, § 17; *Bruegger*, 773 N.W.2d at 882. Embodied in this ban "is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (citing *Weems v.*

United States, 217 U.S. 349, 367 (1910)). This "concept of proportionality is central to the Eighth Amendment." *Id.*

United States Supreme Court opinions addressing the proportionality of sentences under the Eighth Amendment fall into two classifications. *Id.* "The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case." *Id.* The second "comprises cases in which the Court implements the proportionality standard by certain categorical restrictions" on the penalty. *Id.*; *see also Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012) (distinguishing between "the characteristics of a defendant and the details of [the] offense" and "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty").

Pearson does not make a categorical proportionality challenge to her robbery sentence. Instead, she asserts "that the imposition of the seventy percent mandatory minimum sentence under section 902.12, particularly when applied in consecutive terms of imprisonment, is a violation of the cruel and unusual punishment prohibitions as that prohibition is applied to [her] in this specific instance." Her challenge, therefore, implicates the first type of proportionality review articulated in *Graham*, "challenges to the length of term-of-years sentences given all the circumstances in a particular case." *See Graham*, 130 S. Ct. at 2021.

In *Graham*, the Court stated that, under this type of review, only "extreme sentences that are 'grossly disproportionate' to the crime" will not pass muster under the Eighth Amendment to the United States Constitution. *Id.* (quoting

Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)). In determining whether a term of years is grossly disproportionate, the Court stated, "[A] court must begin by comparing the gravity of the offense and the severity of the sentence." *Id.* at 2022. The Court continued,

> "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.

Id. (quoting *Harmelin*, 501 U.S. at 1005). It characterized this standard as a "narrow proportionality principle." *Id.* at 2021.

While the *Graham* Court concisely framed the proportionality classifications and standards, its discussion of the individualized proportionality standard was not necessary to its holding, as the Court was faced with a challenge implicating a categorical sentencing practice rather than a challenge based on a defendant's particular circumstances. *See id.* at 2022–23. Similarly, the concurring opinion in *Harmelin* that the Court extensively cited was not directly applicable, as *Harmelin* involved an adult, rather than a juvenile, offender. *See Miller*, 132 S. Ct., at 2470.

The United States Supreme Court emphasized the limited applicability of *Harmelin* to juvenile offenders in its recent *Miller* opinion. There, the Court stated, "*Harmelin* had nothing to do with children, and did not purport to apply its holding to the sentencing of juvenile offenders." *Id.* Reiterating that "children cannot be viewed simply as miniature adults," the Court concluded that *Harmelin* was inapposite. *Id.* (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404

(2011)). The *Miller* Court did not apply the "gross disproportionality" test articulated in *Harmelin* and *Graham*.

In *Miller*, the Court was faced with a minor's proportionality challenge to a mandatory homicide sentence of life without parole. The Court concluded the mandatory sentence violated the Eighth Amendment and held that, in the case of minors, the sentencing court was obligated to consider "an offender's youth and attendant characteristics" before imposing a particular penalty. *Id.* at 2471. The Court specifically stated:

> [A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 2475.

The Iowa Supreme Court essentially said the same thing in *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009), decided before *Miller*. Faced with a proportionality challenge under the Eighth Amendment as well as the analogous provision in Iowa's Constitution, the court concluded age could be a factor for cruel and unusual punishment analysis under the Iowa Constitution. *Bruegger*, 773 N.W.2d at 883–84. The court allowed Bruegger to make an "as applied"[1] cruel-and-unusual-punishment challenge to his sentence, finding that Bruegger's

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[1] In a subsequent opinion, *State v. Oliver*, 812 N.W.2d 636, 639–40 (Iowa 2012), the court noted that the "as applied" terminology has been superseded in the Eighth Amendment context by a "gross proportionality challenge to [the] particular sentence." (citing *Graham*, 130 S. Ct. at 2022).

was the "relatively rare case" involving "an unusual combination of features that converge to generate a high risk of potential gross disproportionality—namely, a broadly framed crime, the permissible use of preteen juvenile adjudications as prior convictions to enhance the crime, and a dramatic sentence enhancement for repeat offenders." *Id.*[2]

It is clear from *Miller* and *Bruegger* that, for cruel-and-unusual-punishment challenges involving crimes by minors, sentencing courts can and should make individualized sentencing determinations before imposing the harshest of sentences.

The district court did that in this case. But, in Pearson's view, the court got it wrong. She contends the court's imposition of consecutive mandatory minimum terms on the robbery counts amounted to cruel and unusual punishment because, as she puts it: (1) robbery is "a broadly defined crime which carried a severe mandatory sentence with its far more severe mandatory minimum requiring defendant to spend thirty-five years in real time in prison," (2) she was young and immature at the time the offenses were committed, and (3) she only minimally participated "in offenses commanded and carried out by her co-defendant."

A sentence will more likely be found disproportionate to the crime where a defendant is "inadvertently caught by a broadly written statute." *Oliver*, 812 N.W.2d at 651. For example, in *Bruegger*, the statute encompassed conduct that the court characterized as less blameworthy as well as conduct with the

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[2] As noted, *Miller* did not peg its holding on the gross disproportionality standard, but the court in *Breugger* did not have the benefit of that opinion.

hallmarks of punishable criminal activity. 773 N.W.2d at 884–85. The same cannot be said of the robbery statute as it relates to Pearson's conduct.

The robbery statute defines the crime as follows:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property;
> 1. Commits an assault upon another.
> 2. Threatens another with or purposely puts another in fear of immediate serious injury.
> 3. Threatens to commit immediately any forcible felony.
>
> It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

Iowa Code § 711.1. First-degree robbery is committed when a person, "while perpetrating a robbery, . . . purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." *Id.* § 711.2. The mandatory minimum sentencing provision states in pertinent part:

> A person serving a sentence for conviction of the following felonies, including a person serving a sentence for conviction of the following felonies prior to July 1, 2003, shall be denied parole or work release unless the person has served at least seven-tenths of the maximum term of the person's sentence:
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> . . . .
>
> 5. Robbery in the first or second degree in violation of section 711.2 or 711.3.

Id. § 902.12(5).

While Pearson is correct that robbery can occur under a variety of circumstances, Pearson's actions fell squarely within the well-defined parameters of that statute. Pearson told Moore she intended to rob him. She threatened to shoot him if he did not let her into his home. She also entered Wright's home without Wright's permission in order to steal items from the home, and she stood

by as her co-defendant pushed and injured Wright. Therefore, her plea of disproportionality based on the breadth of the statute fails.

We turn to Pearson's age. As noted, the Court in *Miller* reiterated the importance of age in sentencing, stating the mandatory sentencing scheme at issue there made "youth (and all that accompanies it) irrelevant to imposition" of life in prison without possibility of parole and, for that reason, posed "too great a risk of disproportionate punishment." 132 S. Ct. at 2469. The court continued, "youth matters for purposes of meting out the law's most serious punishments." *Id*. at 2471.

Pearson was seventeen years old at the time the crimes were committed and will be fifty-three when the mandatory minimum period of thirty-five years expires. Pearson asserts that this fact renders the sentence disproportionate to the crimes. The district court disagreed. The court noted that Pearson was almost an adult when she committed the crimes and had a history of "serious" assaultive behavior dating back to the age of fourteen. The court also pointed out that Pearson "and her family were provided with numerous services to attempt to address and resolve any underlying issues" and rehabilitate Pearson, but "those efforts were unsuccessful." We concur in this assessment. While it is true that Pearson will have to spend the better portion of her life behind bars, the consecutively-imposed mandatory minimum sentence of thirty-five years was not disproportionate to the serious crimes she committed after numerous failed efforts at rehabilitation.[3]

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[3] Our supreme court has observed "[t]here is nothing cruel and unusual about punishing a person committing two crimes more severely than a person committing one crime,

Pearson finally asserts that she only minimally participated in the crimes, and for that reason, the sentence should be deemed disproportional to the crimes. She contends “that other than knocking on the door to Zachary Moore’s house,” she never took the lead in committing the offenses.

The record reveals that the robberies were a joint enterprise. Pearson did not wait in a vehicle while Lukinich pointed a gun at Moore. *C.f. Miller*, 132 S. Ct. at 2461 (noting that in a companion case, defendant initially stayed outside while other two boys went in to rob a video store). She entered the homes with what appeared to be a real gun[4] and participated in violent conduct that traumatized Moore and Wright long after the commission of the crimes.

We conclude the district court properly considered Pearson’s age and other factors in sentencing Pearson to consecutive mandatory minimum sentences, and we further conclude Pearson’s sentence was not disproportionate to the crimes she committed. Accordingly, she cannot prevail on her individualized challenge under the cruel and unusual punishment provisions of the federal and state constitutions.

We affirm Pearson’s judgment and sentences.

AFFIRMED.

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which is the effect of consecutive sentencing.” *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) (concluding that an eighteen-year-old defendant’s two consecutive sentences totaling fifty years, with a mandatory minimum of forty-two and one-half years, was not cruel and unusual punishment). Although *August* was decided under the principles recited in *Harmelin*, *see August*, 589 N.W.2d at 743–44, Pearson’s “as applied” claim must be viewed in light of the commission of two offenses. Certainly arguments can be made that the seventy percent mandatory minimum is longer than our society finds acceptable, but the prerogative to make such a change lies with our legislature.

[4] The guns turned out to be BB guns.