

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0430

STATE OF LOUISIANA

VERSUS

LEE ROY JENKINS¹

Judgment Rendered: JAN 23 2015

Handwritten signature and initials: JRM w.f.c. by JRM

APPEALED FROM THE TWENTIETH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST FELICIANA
STATE OF LOUISIANA
DOCKET NUMBER 71-CR-10742, DIVISION "B"

HONORABLE JEROME WINSBURG, AD HOC JUDGE

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE², JJ.

¹ Although the defendant's first name is spelled "Leroy" in the indictment, his signature appearing elsewhere in the record shows the proper spelling is "Lee Roy."

² Holdridge, J., serving as Supernumerary Judge pro tempore of the Court of Appeal, First Circuit, by special appointment of the Louisiana Supreme Court.

Handwritten note: CJH - I respectfully concur in the result. I would have preferred to hold this matter in abeyance pending the United States Supreme Court opinion in Toca v Louisiana, 135 S. Ct. 781 (2014). While I disagree with the holding in Smith v. Tote, nevertheless at present we are bound to follow it.

McDONALD, J.

Lee Roy Jenkins, a fifteen year old defendant, was charged by grand jury indictment with the murder³ of Edward Trask, committed on July 3, 1971, a violation of La. R.S. 14:30. A sanity commission was appointed, and the defendant was found competent to stand trial. He then entered a plea of not guilty and not guilty by reason of insanity. Later, he withdrew that plea and entered a plea of guilty to avoid capital punishment. On March 1, 1972, he was sentenced to imprisonment at hard labor "for the balance of his natural life time." In light of the United States Supreme Court's decision in **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), on March 28, 2013, the defendant filed a motion to correct illegal sentence. On April 16, 2013, the trial court vacated the defendant's previously imposed sentence without objection from the State, and following a later contradictory hearing on December 16, 2013, resentenced him to imprisonment at "hard labor, for the balance of his natural life," without benefit of probation, parole, or suspension of sentence. The defendant now appeals, arguing the sentence imposed was unconstitutionally excessive. For the following reasons, we affirm the defendant's conviction, vacate his December 26, 2013 sentence, and reinstate his March 1, 1972 sentence of life imprisonment at hard labor "for the balance of his natural life time."

STATEMENT OF FACTS

Because of the defendant's guilty plea, many of the facts and circumstances of the crime are undeveloped. Evidence in the record demonstrates that, in early July 1971, the defendant went to the home of Edward Trask, the victim, in Norwood, Louisiana, to burglarize the home. The defendant was unarmed at this time. After Mr. Trask saw the defendant, he shot at the defendant, who then ran away. On July 3, 1971, Mr. Trask again found the defendant on his property. The defendant was armed with a .22 caliber rifle, and Mr. Trask had a .22 caliber revolver. Mr. Trask accosted the

³ The current differentiation of first degree murder and second degree murder was made after the commission of the criminal conduct involved herein. See 1973 La. Acts No. 109, §1 (changing the crime identified in La. R.S. 14:30 from "murder" to "first degree murder") and 1973 La. Acts No. 111, §1 (adding La. R.S. 14:30.1 defining the crime of second degree murder).

defendant, and when he did, the defendant raised his rifle. Mr. Trask first fired several shots at the defendant, none of which struck the defendant. The defendant then fired at Mr. Trask, striking him twice. Mr. Trask's wife, who observed the confrontation between the two men, got into her car and drove to find help. Though the defendant tried to stop her, he did not shoot at her. The defendant then returned to Mr. Trask, took his wallet containing several hundred dollars, and fled to Mississippi. Mr. Trask died before help arrived. A few days later, the defendant was apprehended near Woodville, Mississippi. After he pled guilty, was sentenced, and began serving his sentence, the defendant escaped from Louisiana State Penitentiary in Angola, Louisiana, and subsequently fled to Chicago, Illinois. He remained in Chicago for nearly a decade until he was apprehended by authorities after applying to become a Chicago police officer. He was returned to prison in Louisiana.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant contends his sentence is unconstitutionally excessive in light of **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Specifically, he claims that his "lack of any criminal history, the isolated nature of the offense[,] and his demonstrated rehabilitation support the conclusion that life with the possibility of parole is the most appropriate sentence."

In **Miller**, the United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders, finding instead that the sentencing court must first hold a hearing to consider mitigating factors, such as a defendant's youth and attendant characteristics, before imposing this severe penalty. **Miller**, 567 U.S. at ___, 132 S.Ct. at 2469, 2475; see **State v. Graham**, 11-2260 (La. 10/12/12), 99 So.3d 28, 29 (per curiam). Citing **Graham v. Florida**, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the **Miller** court stated that too great a risk of disproportionate punishment is created by making youth irrelevant to imposition of the harshest prison sentence. The **Miller** court further indicated that the **Graham** decision was sufficient to decide the

case, and the Court did not consider the alternative argument that a categorical bar on life imprisonment without parole for juveniles was required. The **Miller** court further held that, although it was not foreclosing the sentencer's ability to make that determination in homicide cases, it did require the trial court to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. **Miller**, 567 U.S. at ___, 132 S.Ct. at 2469. After **Miller** was decided, the Louisiana legislature enacted La. C.Cr.P. art. 878.1 and LSA-R.S. 15:574.4(E), both of which provide procedural guidelines for parole eligibility regarding offenders who commit first or second degree murder when they are under eighteen years of age.

Also following **Miller**, the Louisiana Supreme Court in **State v. Tate**, 12-2763 (La. 11/5/13), 130 So.3d 829, 834, cert. denied, ___U.S. ___, 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014), addressed the *res nova* issue of whether the holding in **Miller** applied retroactively to juvenile offenders whose homicide convictions were final when **Miller** was rendered. The Supreme Court held that **Miller** established a new rule, but found that the rule was procedural in nature, as opposed to substantive, as it did not alter the range of conduct or persons subject to life imprisonment without parole for homicide offenders; nor did it eliminate a State's power to impose such a sentence on a juvenile offender; and, it did not alter the elements necessary for a homicide conviction. Rather, the new rule simply altered the range of permissible methods for determining whether a juvenile offender could be sentenced to life imprisonment without parole for such a conviction. **Id.**, 130 So.3d at 835-37. Further, the **Tate** court held that the new rule announced in **Miller** did not apply retroactively as it was "a new rule of criminal constitutional procedure that [was] neither substantive nor a watershed rule that alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding." **Id.**, 130 So.3d at 841. Additionally, the Louisiana Supreme Court found that La. C.Cr.P. art. 878.1 and La. R.S. 15:574.4(E)(1), which codified **Miller** in Louisiana, only applied prospectively. **Id.**, 130 So.23 at 842-44.

Due to the unique procedural history in this case, we find the recent decision of **State v. Stewart**, 13-639 (La. App. 5 Cir. 1/31/14), 134 So.3d 636, writ denied, 14-0420 (La. 9/26/14), 149 So.3d 260, to be instructive. In **Stewart**, the defendant, a juvenile, was convicted of second degree murder, and in February 1982, was sentenced to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The Louisiana Supreme Court affirmed the defendant's conviction and sentence in September 1983. **State v. Stewart**, 437 So.2d 872 (La. 1983). On August 14, 2012, the defendant filed a "Motion to Vacate and Correct an Illegal Sentence," citing the United States Supreme Court's pronouncement in **Miller**. On March 28, 2013, prior to the Louisiana Supreme Court's decision in **Tate**, the trial court granted the defendant's motion, vacated his original sentence, and resentenced the defendant to life imprisonment at hard labor "with the benefit of parole." **Stewart**, 134 So.3d at 638.

Without addressing the defendant's unconstitutional and excessive sentence assignment of error, the Fifth Circuit noted that, after the defendant received his new sentence, the Louisiana Supreme Court decided **Tate**, which held that **Miller** "cannot be retroactively applied to those defendants whose underlying convictions and sentences are, and have been, final." **Stewart**, 134 So.3d at 640. The appellate court concluded that, "[b]ased on the supreme court's recent pronouncement in **Tate**, which is the law of Louisiana on this issue, we find that defendant's sentence of life imprisonment with eligibility of parole is illegally lenient." **Id.** As such, the Fifth Circuit amended the defendant's sentence to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.⁴ **Id.**

Similarly to the **Stewart** defendant, the instant defendant also filed a motion to correct illegal sentence between the **Miller** and **Tate** decisions. However, based on

⁴ See also **State v. Griffin**, 49,146 (La. App. 2 Cir. 6/25/14), 145 So.3d 545, 546, where a juvenile defendant was convicted of second degree murder and sentenced to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence in 1988. Following **Miller**, the defendant filed a motion to correct illegal sentence. On September 4, 2013, prior to **Tate**, the trial court granted the motion, and sentenced the defendant to life imprisonment at hard labor, with the benefit of parole. **Griffin**, 145 So.3d at 547. On appeal, the Second Circuit noted the defendant's sentence was illegally lenient, and amended the defendant's sentence to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence. **Griffin**, 145 So.3d at 449-50.

Tate, the defendant is not entitled to a substantive **Miller** hearing, because his sentence was final at the time both **Miller** and **Tate** were decided. Thus, we vacate the defendant's December 16, 2013 sentence, and reinstate the defendant's original March 1, 1972 sentence – life imprisonment at "hard labor for the balance of his natural life time."⁵ As such, this assignment of error is without merit.

**CONVICTION AFFIRMED; DECEMBER 16, 2013 SENTENCE VACATED;
MARCH 1, 1972 SENTENCE REINSTATED.**

⁵ We note that by vacating the defendant's newly imposed sentence, and reinstating the earlier one, this creates a distinction without a difference. However, such action is necessary to be consistent with **Tate**.