18-P-410 Appeals Court

COMMONWEALTH vs. VANCE WASHINGTON.

No. 18-P-410.

Suffolk. September 13, 2019. - June 9, 2020.

Present: Wolohojian, Hanlon, & Desmond, JJ.

Constitutional Law, Sentence. Due Process of Law, Sentence. Practice, Criminal, Postconviction relief, Sentence.

Indictments found and returned in the Superior Court Department on September 12 and December 12, 1985.

A motion for postconviction relief, filed on November 27, 2017, was considered by Christine M. Roach, J.

David F. Segadelli for the defendant.
Amanda Teo, Assistant District Attorney, for the Commonwealth.

HANLON, J. After a jury trial in 1987, the defendant was convicted of rape of a child by force, unarmed robbery, and kidnapping, offenses that he had committed when he was seventeen

years old.[1] He was given a sentence of from twenty-four to forty years, and a concurrent nine to ten years sentence on the kidnapping charge, to be served in State prison (the Massachusetts Correctional Institution at Cedar Junction, or Cedar Junction). His convictions were affirmed by this court. Commonwealth v. Washington, 28 Mass. App. Ct. 271 (1990).

In 2017, the defendant filed a motion, pursuant to Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001), to "Free Him from Unlawful Restraint and Correct an Illegal Sentence"; he argued that the sentence was presumptively disproportionate under art. 26 of the Massachusetts Declaration of Rights and that he should be released, with the balance of the sentence vacated, unless, after a hearing to consider the factors articulated in Miller v. Alabama, 567 U.S. 460, 477-478 (2012) (Miller hearing), the Commonwealth could "sufficiently establish 'extraordinary circumstances' to justify the . . . sentence." The Commonwealth filed an opposition and, twelve days later, apparently without a hearing, the motion judge, who was not the

[1] At the time the underlying crimes were committed and at the time the defendant was tried, under Massachusetts criminal law he was considered an adult. The law was amended in 2013, making eighteen the age of adulthood. See G. L. c. 119, § 52, as amended through St. 2013, c. 84, § 7 ("'Delinquent child', a child between seven and 18"). For that reason, "[t]hroughout this opinion, the term 'juvenile' offender refers to an offender who was under the age of eighteen at the time of the offense." Commonwealth v. LaPlante, 482 Mass. 399, 401 n.2 (2019).

trial judge,[2] denied the motion with a handwritten endorsement, saying, in part, "Denied, for the reasons stated by the Commonwealth in its opposition."

The defendant now appeals, arguing that recent cases from the Supreme Judicial Court, including Commonwealth v Lutskov, 480 Mass. 575 (2018), which was decided after the motion judge made her decision, make clear that, when imposing a sentence that requires a juvenile defendant in a nonhomicide case to serve a longer minimum time before becoming eligible for parole than a fifteen-year mandatory sentence for juveniles convicted of murder in the first degree, a hearing is required to determine whether extraordinary circumstances warrant such a sentence. See Commonwealth v. Perez, 477 Mass. 677, 686 (2017) (Perez I). Therefore, he contends, we should vacate the ruling on his rule 30 (a) motion and remand for a so-called Miller hearing. For the following reasons, we agree.

Background. As noted, the defendant was convicted after a jury trial of kidnapping, unarmed robbery, and rape of a child by force (five counts) -- crimes that he had committed when he was seventeen years old.[3] At the sentencing hearing, the

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[2] The trial judge had since retired.

[3] The facts are summarized in this court's prior opinion. "The fourteen year old victim testified that the defendant, previously unknown to her, grabbed her and threw her to the ground on a street in Dorchester as she was walking home from a friend's house. He asked her for money, which she didn't have,

prosecutor recommended an aggregate sentence of from thirty-five to fifty years in State prison. Defense counsel submitted a sentencing memorandum advocating, among other things, that the defendant's youth should be considered a mitigating factor in his sentencing.[4] Immediately after defense counsel's argument at the hearing, the trial judge, without comment, sentenced the defendant, in the aggregate, to a term of from twenty-four to forty years in State prison; in so doing, he did not disclose any of the factors contributing to his decision. As noted, this court upheld the defendant's convictions.[5]

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took her jewelry, and then took her to a nearby park, where he raped her. According to the victim's testimony, the defendant then demanded that she accompany him to various places, acting as if she were his girlfriend and doing what he wanted her to do. The victim remained with the defendant for the next several hours, walking the streets of Dorchester and Roxbury, visiting several apartments, a cellar, and a variety store, and riding in a taxicab. Additional sex acts took place between the victim and the defendant and also, upon the defendant's order, between the victim and a friend of the defendant. . . . [W]hile being taken by the defendant and his friend to Boston's 'Combat Zone,' she saw an officer in a police cruiser signal to her and she ran to the cruiser and told the police officer that she had been raped." Washington, 28 Mass. App. Ct. at 271-272.

[4] The defendant's sentencing memorandum requested "a sentence with a minimum of nine or ten years and a maximum between twelve and fifteen years, at [Cedar Junction]. If this type of sentence were awarded, he would be required to serve a minimum of six to eight years before being eligible for parole."

[5] The sentence was not an issue in the appeal, which centered principally on the argument that "the prosecutor made an improper appeal to racial prejudice by putting certain questions to various witnesses," arguably exploiting the racial difference between the victim and the defendant and appealing to

In his rule 30 (a) motion, the defendant argued that the "[twenty-four] year minimum term of [the defendant's] sentence for 'non-murder offenses' committed when he was seventeen years old made [him] eligible for parole later than a similarly aged 'juvenile defendant convicted of murder.'"[6] Citing Perez I, and its progeny, the defendant contended that his sentences, in the aggregate, are presumptively disproportionate under art. 26 absent a "Miller hearing," and that, after that hearing, the balance of his sentence should be vacated.

In denying the defendant's motion, the motion judge noted that the defendant had "been afforded multiple meaningful opportunities to be heard for parole suitability, and was released in 2005." Accordingly, "[t]he reasons for his current

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racial bias. Washington, 28 Mass. App. Ct. at 272. This court disagreed, viewing the questions, and the prosecutor's closing argument, as relevant to the issue of why the victim delayed in reporting what was happening to her. In a concurring opinion, one judge agreed to affirm, "because of (1) the paucity of the objections to the inappropriately phrased questions and (2) the lack of objections to the closing argument and the judge's instructions and because, in light of the sensitive and careful 'individual voir dire [of] each potential juror on the subject of racial bias,' it is difficult to conclude that there was a substantial risk of a miscarriage of justice." Id. at 276 (Brown, J., concurring).

[6] As the Commonwealth's brief appropriately notes, "More likely, the defendant -- who was sentenced in 1987 before the enactment of the Truth in Sentencing Act, St. 1993, c. 432 -- was parole eligible after serving two-thirds ([sixteen] years) of the lower end ([twenty-four] years) of his sentence. See G. L. c. 127, § 133 (1986)."

incarceration are not subject to Diatchenko [v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013), S.C., 471 Mass. 12 (2015) (Diatchenko I)] relief."

Discussion. We review the denial of a motion under Mass. R. Crim. P. 30 for abuse of discretion or error of law. See Commonwealth v. Perez, 480 Mass. 562, 567 (2018) (Perez II); Perez I, 477 Mass at 681-682. "Under that standard, the issue is whether the judge's decision resulted from a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). Commonwealth v. Plasse, 481 Mass. 199, 204 (2019).

This defendant was sentenced before the United States Supreme Court's decision in Miller, where the court held that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing" what, in that case, was a life sentence without the possibility of parole. 567 U.S. 489. In the years since Miller, both the United States Supreme Court and the Supreme Judicial Court have reinforced and extended that holding. In Massachusetts, the court described the evolution in this way:

> "In Diatchenko I, 466 Mass. at 667, we interpreted art. 26 more broadly than the United States Supreme Court has interpreted the Eighth Amendment. See Miller, [supra] at 479 (mandatory sentence of life in prison without parole for juvenile offenders violates Eighth Amendment;

> individualized sentence required). Based on the science undergirding the Supreme Court's determination that 'children are constitutionally different from adults for purposes of sentencing,' id. at 471, we held that a life sentence without the possibility of parole violates art. 26, regardless of whether such a sentence is mandatory or imposed in the sentencing judge's discretion. Diatchenko I, supra at 671. The point of our departure from the Eighth Amendment jurisprudence was our determination that, under art. 26, the 'unique characteristics of juvenile offenders' should weigh more heavily in the proportionality calculus than the United States Supreme Court required under the Eighth Amendment. Id." (Footnote omitted.)

Perez I, 477 Mass. at 682-683.

In Perez I, the court concluded where "a juvenile defendant's aggregate sentence for [a] nonmurder offense[] with parole eligibility exceed[s] that applicable to a juvenile defendant convicted of murder[, that sentence] is presumptively disproportionate" under art. 26. 477 Mass. at 686.[7] This

[7] Juveniles convicted of the more serious crime of murder at the time of the offenses at issue in Perez I were eligible for parole after fifteen years. See Perez I, 477 Mass. at 682. At the time that this defendant committed his offenses, the sentence for a juvenile convicted of homicide depended upon the result of a transfer hearing pursuant to G. L. c. 119, § 61, which has been repealed, see St. 1996, c. 200, § 7. If, after that hearing, the judge determined that, although there was probable cause to believe that the juvenile committed the offense, the juvenile was nonetheless amenable to treatment within the juvenile system, he was therefore retained in that system. See Commonwealth v. Matthews, 406 Mass. 380, 384-385 (1990). If the judge concluded he was not, the juvenile was transferred to the adult correctional system, where the sentence for murder in the first degree was a mandatory life sentence without the possibility of parole; for second degree murder, it was a mandatory life sentence with parole eligibility after fifteen years. See G. L. c. 265, § 1. However, the court held in "Diatchenko[I, 466 Mass. at 671], [that, going forward,] a juvenile sentenced to life without the possibility of parole

presumption is conclusive, absent a hearing to consider the factors articulated in Miller, 567 U.S. at 477-478, to consider whether "extraordinary circumstances warrant a sentence treating the juvenile defendant more harshly for parole purposes than a juvenile convicted of murder." Perez I, supra. The court then "remand[ed] the matter to the Superior Court for a Miller hearing to determine whether the sentence comport[ed] with the requirements of art. 26. If not, then the defendant [was to] be resentenced." Id. at 679. The judge on remand, who was not the trial judge, held a Miller hearing and then denied the motion for resentencing, effectively reimposing the original sentence, based largely on the seriousness of the underlying offenses.[8] Perez II, 480 Mass. at 566-567.

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would be eligible for parole after fifteen years. See Commonwealth v. Brown, 466 Mass. 676, 688-689, (2013), S.C., 474 Mass. 576 (2016)." Lutskov, 480 Mass. at 582. Cf. G. L. c. 127, § 133A, as amended through St. 2000, c. 159, § 230 (providing mandatory sentence of life in prison with possibility of parole in fifteen years). We note, as did the court in Brown, that "[t]his statute was amended by St. 2012, c. 192, §§ 37-39, [on August 2, 2012,] to provide discretion in sentencing defendants convicted of murder in the second degree to life in prison with the possibility of parole between fifteen and twenty-five years. See G. L. c. 279, § 24, as amended through St. 2012, c. 192, § 46. This discretionary range will not apply to [this defendant], however." Brown, supra at 689 n.10.

[8] The offenses were extremely serious; there were two armed robberies and an attempt at a third; the victim was an off-duty police officer. Perez II, 480 Mass. at 572. Perez shot him several times, inflicting "catastrophic" injuries. Id. at 566.

In Perez II, the court vacated the order denying the defendant's motion for resentencing. 480 Mass. at 574. In doing so, the court saw "no reason to remand this matter for a second Miller hearing at [that] point. The record before [the court was] sufficient. The crime spree was vicious and comparable to murder." Id. at 573. However, "given the defendant's lack of criminal history, his low intelligence and mental health problems, and his terrible upbringing," "the Commonwealth [would] not be able to demonstrate that there [was] no reasonable possibility of rehabilitation within the probationary period provided to juvenile murderers." Id. Accordingly, the court amended the defendant's sentence "to conform his parole eligibility to that available to juveniles convicted of murder." Id.

In its opinion, the court stressed:

> "We clarify today that, for juveniles, the criminal conduct alone is not sufficient to justify a greater parole eligibility period than is available for murder. The juvenile's personal and family history must also be considered independently; this consideration of the individual's personal and family history is not the ordinary mitigation analysis associated with sentencing. We emphasize today that both the crime and the juvenile's circumstances must be extraordinary to justify a longer parole eligibility period. . . .
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> "The Miller principles we apply arise from the Supreme Court's recognition 'that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, . . . "they are less deserving of the most severe punishments."'. . . As the Court further explained,

> 'children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking'; they 'are more vulnerable . . . to negative influences and outside pressures' and less able 'to extricate themselves from horrific, crime-producing settings'; and their character traits 'are "less fixed" and [their] actions less likely to be "evidence of irretrievabl[e] deprav[ity]."' Miller, 567 U.S. at 471, quoting Roper v. Simmons, 543 U.S. 551, 569-570 (2005). This recognition is based in part on advances in scientific research concerning the development of the juvenile brain, Miller, supra at 471-472, research that we have relied on as well, Diatchenko [I], 466 Mass. at 669-670." (Emphasis added.)

Perez II, 480 Mass. at 569-570.

In the case before us, while the sentence at issue is not a mandatory minimum sentence, the lower end of the defendant's sentence was a minimum of twenty-four years, with the possibility of parole after sixteen years. There was nothing like a Miller hearing, either at the time that the defendant was sentenced originally or at the time the motion judge made her ruling. Thus, no judge has made a finding that the circumstances warrant treating this defendant more harshly for parole purposes than a juvenile convicted of murder in the first degree.

The Commonwealth replies that Perez I at most affords the defendant a "meaningful opportunity to obtain release" and the "defendant has already had the benefit of that opportunity, having been before the Parole Board several times since 2002 and

having been released on parole in 2005." This argument misses the mark.

The cases make clear that the relevant inquiry underlying sentencing juveniles is the likelihood of rehabilitation, having in mind all of the factors enumerated in Perez II. Accordingly, a juvenile sentence for a nonmurder offense that commands more time be served before parole eligibility than that required for a murder, without more, is presumptively disproportionate under art. 26. This presumption arises at the time of sentencing. See Lutskov, 480 Mass. at 584 n.7. In Lutskov, the Commonwealth argued that, notwithstanding a mandatory minimum sentence of twenty years, the availability of "good conduct credits" at the time of the defendant's offenses, would make him eligible for parole after serving fourteen and one-half years. Id. The court rejected that argument, stressing that the issue was "parole eligibility date at the time of sentencing." Id.

In the present case, of course, although the defendant was not given a mandatory minimum sentence, he nonetheless became eligible to be considered for parole only after serving sixteen years of the sentence imposed. We express no opinion about what sentence should be imposed after an appropriate hearing. The offense is extremely serious and, on the record before us, the defendant has never disputed the fact that he committed the crimes. In addition, apparently, at the time he was sentenced

on this offense, the defendant was serving a sentence for robbery[9] and earlier had received a suspended sentence and been placed on probation for indecent assault and battery on a child under the age of fourteen. He was paroled in 2004 (released in September, 2005) and, approximately six months later, he was held on a parole detainer. We also note that the Supreme Judicial Court recently has affirmed a sentence imposed after a Miller hearing -- a sentence that carried three consecutive life sentences for a triple homicide (of a pregnant mother and her two children), with a minimum period before parole eligibility of forty-five years. Commonwealth v. LaPlante, 482 Mass. 399, 400, 406-407 (2019).

On the other hand, this defendant has served almost thirty-three years for a nonhomicide crime that he committed when he was seventeen years old. In 1988, soon after he was sentenced, the defendant was "reviewed by a staff psychiatrist who determined that he was not a 'sexually dangerous person.'" Nonetheless, in 2015, he waived consideration for parole "to complete Phase 4 of [sex offender treatment]." There were no new arrests or convictions in the six months he was on parole. The Parole Board's "Record of Decision" dated March 2006 indicates that the defendant's parole was revoked only for

[9] That ten-year "Concord sentence" apparently was subsumed when the present sentence was imposed "[f]orthwith."

"[d]rug use, adjustment problems." While there are fifteen disciplinary reports in the record from over the years, the defendant's prison record also shows a significant work history and completion of a number of education programs. Finally, the record reveals little about his family life before -- or after -- he was arrested. The original sentencing memorandum states that his parents separated when he was three years old; that his father had alcohol problems and that he was not actively involved in raising the family. Although the defendant was not a good student, he had never been evaluated or tested for learning disabilities. A social worker from the Committee for Public Counsel services met with him at the time he was sentenced and reported that, "despite a difficult family and school history, with his parents separated since he was three and the multiple school placements, as well as the lack of supporting services he received through both the schools and [the Department of Youth Services], he has developed some significant ego strengths." He was described as "alert and oriented, although somewhat immature for his age."

In sum, because the defendant's sentence was presumptively disproportionate under art. 26, and the judge imposed the sentences without the benefit of a Miller hearing, we vacate the order denying the defendant's rule 30 (a) motion and remand the

case to the Superior Court for a Miller hearing and, if necessary, for resentencing.[10] See Perez I, 477 Mass at 688.

So ordered.

[10] At the end of his brief, citing G. L. c. 119, § 72, the defendant asks that we remand the case to the Juvenile Court. As that request was neither argued nor briefed, we decline to do so and, instead, remand the matter to the sentencing court.