

Court of Appeals, State of Michigan

ORDER

People of MI v Mike Torres Zuniga

Docket No. 324157

LC No. 10-002810-FC

William B. Murphy
Presiding Judge

Kurtis T. Wilder

Stephen L. Borrello
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued February 16, 2016 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 29 2016

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 29, 2016

v

MIKE TORRES ZUNIGA,
Defendant-Appellant.

No. 324157
Kent Circuit Court
LC No. 10-002810-FC

ON RECONSIDERATION

Before: MURPHY, P.J., and WILDER and BORRELLO, JJ.

PER CURIAM.

On September 9, 2010, a jury convicted defendant of first-degree murder and the trial court sentenced him to life without parole. Defendant committed the offense when he was a juvenile. On December 13, 2011, this Court affirmed defendant's conviction.¹ Thereafter, the United States Supreme Court decided *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), wherein the Court held that mandatory life sentences without the possibility of parole for juvenile offenders violated the Eighth Amendment. To conform Michigan's sentencing scheme to the mandates of *Miller*, the Legislature enacted MCL 769.25, which created a default term-of-years' sentence for juvenile first-degree homicide offenders. The default term-of-years' sentence can be elevated to life without parole upon the prosecution's filing a motion and following factual findings on the *Miller* factors as codified at MCL 769.25(6).

In this case, following the enactment of MCL 769.25, the prosecution moved for a life without parole sentence. After an evidentiary hearing, the trial court made findings of fact on the *Miller* factors and resentenced defendant to life without the possibility of parole. In doing so, the trial court elevated what would have been a term-of-years' sentence to life without parole. On October 16, 2014, defendant appealed that sentence as of right and on February 16, 2016, this Court vacated defendant's sentence and remanded for resentencing before a jury pursuant to

¹ *People v Zuniga*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2011 (Docket No. 301473).

People v Skinner, 312 Mich App 15; 877 NW2d 482 (2015).² The state moved for reconsideration and this Court entered an order holding resolution of the motion in abeyance pending the decision in *People v Hyatt*, ___ Mich App ___, ___ NW2d ___ (2016) (Docket No. 325741). After this Court decided *Hyatt* on July 21, 2016, we granted the state’s motion for reconsideration. For the reasons set forth in this opinion, and because *Hyatt* is binding on this Court, we vacate our February 16, 2016 opinion, and affirm defendant’s sentence.

I. SIXTH AMENDMENT

Defendant argues that the trial judge made factual findings when it increased his sentence to life without parole in violation of the Sixth Amendment. In *Hyatt*, this Court convened a conflict panel and rejected the analysis and holding of *Skinner*. The *Hyatt* Court held that when a prosecutor seeks to enhance a juvenile’s default term-of-years’ sentence to life without the possibility of parole, a juvenile defendant does not have the right to have a jury make the factual findings necessary to elevate his or her sentence. Rather, according to the conflict panel in *Hyatt*, a judge must make the factual findings mandated by *Miller*. *Hyatt* is binding on this Court. MCR 7.215(J)(1). Accordingly, although defendant correctly notes that the trial judge made findings of fact that elevated his sentence to life without parole, according to *Hyatt*, those findings did not violate the Sixth Amendment and his argument therefore fails.

II. EIGHTH AMENDMENT

Next, defendant argues that the trial court erred in applying the *Miller* factors such that his life without parole sentence violates the Eighth Amendment.

MCL 769.25 provides in relevant part as follows:

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in [*Miller*, 576 US at ___], and may consider any other criteria relevant to its decision, including the individual’s record while incarcerated.

(7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court’s reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.

In *Miller*, the United States Supreme Court set forth the following factors that should be considered in determining whether a juvenile offender is “irreparably corrupt” such that a life without parole sentence is warranted:

² *People v Zuniga*, unpublished per curiam opinion of the Court of Appeals, issued February 16, 2016 (Docket No. 324157).

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. [*Miller*, 567 US at ____, 132 S Ct at 2468.]

Thus, the *Miller* factors include consideration of the juvenile’s chronological age, immaturity, impetuosity, failure to appreciate risks and consequences, family and home environment, the circumstances of the homicide offense including the consideration of the extent of the defendant’s participation in the crime, familial and peer pressures, whether the defendant would have been charged and convicted of a lesser offense if not for the incompetencies associated with youth, and the possibility of rehabilitation.

In weighing these factors, “a trial court must begin with the understanding that, in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue. Thus, a sentencing court must begin its analysis with the understanding that life-without-parole is, unequivocally, only appropriate in rare cases.” *Hyatt*, __ Mich App at __ (slip op at 23). Furthermore, “[s]entencing courts are to do more than pay mere lip service to the demands of *Miller*. A sentencing court must operate under the understanding that life without parole is, more often than not, not just inappropriate, but a violation of the juvenile’s constitutional rights.” *Id.* In addition, “the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without parole sentence.” *Id.* at 24. Rather, “[t]he court must undertake a searching inquiry into a particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life without parole is constitutionally proportionate. . . .” *Id.* “[T]o warrant the imposition of a life-without-parole sentence, the juvenile must be, as *Miller* unequivocally stated, the truly rare individual who is incapable of reform.” *Id.* at 28.

We review a trial court’s sentencing of a juvenile offender to life without parole under the three-fold standard of review set forth in *Hyatt*. We review a trial court’s factual findings for clear error, questions of law de novo, and “the court’s ultimate determination as to the sentence imposed [] for an abuse of discretion.” *Id.* at 25. “An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A reviewing court “must give meaningful review to a juvenile life-without-parole sentence and cannot merely rubber-stamp the trial court’s sentencing decision.” *Hyatt*, __ Mich App at __ (slip op. at 27). This review entails conducting a “searching inquiry” and a review court should “view as inherently suspect any life-without parole sentence imposed on a juvenile offender [].” *Id.*

In this case, the trial court held a two-day evidentiary hearing where defendant presented testimony of a substance-abuse counselor he worked with before his conviction when he was on juvenile parole, his former probation officers, an expert in the Michigan Department of Corrections (MDOC) disciplinary system, a psychiatrist, and members of defendant's immediate and extended family. The court also considered the Presentence Investigation Report (PSIR), letters to the court, defendant's prison records, and evidence that was introduced during the jury trial. The court considered each of the *Miller* factors separately, noting that life without parole was only proper in the most unusual circumstances.

The court began by reviewing the facts and circumstances of the crime, noting that the evidence showed defendant robbed the victim, that the victim was beaten, and that the victim was shot four times while on the ground. The court concluded that this factor did not weigh in favor of parole.

Next, the court considered the character and record of defendant. The court noted that defendant was arrested nine times as a juvenile, that he had three felony convictions as a juvenile, including a resisting and obstructing an officer where defendant spit at the officer. Defendant also had one misdemeanor juvenile conviction. The court noted that defendant committed the murder while he was on probation, and noted that, immediately before the murder, defendant shot a gun at a vehicle with several individuals inside. In addition, after the murder, defendant did not show remorse, but rather defendant toasted the killing with his friends. The court found this evidence did not weigh in favor of parole.

The court next considered the chronological age and mental and emotional development of defendant. The court found that defendant was 17 years and three months at the time of the murder, that testimony showed he was intelligent and had insight into youthful behavior and was emotionally mature per the testimony of his former substance abuse counselor. Defendant's mother and father testified that he did not have emotional issues and the psychiatrist testified that, in the time leading up to the murder, defendant was living his life as an adult managing his own affairs. The court concluded that these factors weighed against parole.

Next, the court considered defendant's background and his family and home environment. The court found that neither of defendant's parents had any criminal record and none of their three children were removed from them. The court acknowledged testimony that showed that there was some physical abuse including defendant's father hitting him and noted that defendant's father had alcohol issues. Defendant's father also used homophobic insults against defendant and the parent's home was not perfect. However, the court noted that the parents provided food and housing for their children and attempted to direct them to stay in school all while working long hours. With respect to the alleged physical abuse, the court found that while defendant informed the psychiatrist that his father was physically abusive, in the PSIR, defendant previously stated that neither of his parents was abusive. Thus, the court found that defendant's allegations of physical abuse were not credible and the court ultimately found that this factor did not weigh in favor of parole.

The court considered whether defendant had a history of substance abuse, peer pressure, impulse control, and whether defendant would have been charged and convicted of a lesser offense, but for his young age. The court did not find defendant credible when defendant

informed the psychiatrist that he was high and intoxicated at the time of the murder, noting that in the PSIR, defendant had indicated that he was not under the influence of any drugs or alcohol. The court weighed this factor evenly. With respect to peer pressure, the court reasoned that there was no evidence to support that gang members pressured defendant into committing the crime, that there was nothing to support this was a crime related to lack of impulse control, and that defendant would not have been charged and convicted of a lesser offense, but for his youth. The court weighed these factors against parole.

Next, the trial court considered defendant's prison record and potential for rehabilitation. The court noted that defendant had 16 misconducts, 7 minor infractions, and 6 transfers since he was incarcerated for the murder. The court noted that there were gang symbol drawings in defendant's cell, that defendant was involved in fighting and that defendant was sometimes picked on by other inmates. The court also found that defendant was not remorseful for the offense. The court ultimately weighed these factors against parole. After concluding its findings on the *Miller* factors, the court resentenced defendant to life without the possibility of parole.

Defendant argues that a juvenile should not be sentenced to life without parole. However, *Miller* did not preclude sentencing a juvenile to life without parole. See *Hyatt*, ___ Mich App at ___ (slip op at 25-27). Thus, this aspect of defendant's argument fails.

Defendant also challenges specific factual findings. Defendant argues that the trial court improperly relied on the fact he was 17 at the time he committed the crime, erred in finding that his allegations regarding physical abuse were not credible, and erred with respect to its finding that peer pressure did not favor parole. These arguments lack merit. First, the court did not clearly err in finding that defendant's age did not weigh in favor of parole. The court considered defendant's age as only one of several factors and also considered defendant's maturity, mental acuity, and intelligence level in determining that defendant's age did not weigh in favor of parole. The court did not clearly err in doing so. Similarly, the court did not err with respect to its finding that defendant's allegations that he suffered physical abuse at the hands of his father was not credible. In the PSIR, defendant stated that his parents did not physically abuse him and that he had a good relationship with both parents. As the trier of fact, the trial court was the final arbiter on the credibility of witnesses. See *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008) ("This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses.")

Finally, the court did not err with respect to its finding regarding peer pressure. In stating its findings on the record, the trial court indicated that it was aware that there were drawings of gang symbols in defendant's cell. However, the court indicated that, with respect to this particular crime, there was no evidence to support that defendant was pressured into robbing, beating, and shooting the victim. These findings did not amount to clear error. Nothing in the evidence supported that defendant was pressured by peers to commit the charged offense.

In sum, the trial court did not clearly err with respect to its findings on the *Miller* factors and it did not abuse its discretion in sentencing defendant to life without parole. *Hyatt*, ___ Mich App at ___ (slip op at 25).

Affirmed. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello