COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1014-CR **Cir. Ct. No. 1992CF924027**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONT ELLIOT MOORE,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JONATHAN D. WATTS, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 PER CURIAM. Lamont Elliot Moore, *pro se*, appeals a circuit court order denying his claim that a new factor warrants modification of his life sentence. He also appeals an order denying reconsideration. We conclude that Moore has not identified a new factor, and we affirm.

Background

¶2 In 1992, when Moore was seventeen years old, the State charged him with first-degree intentional homicide. A jury found him guilty. In April 1993, the circuit court sentenced him to life in prison with parole eligibility after twenty-five years.

¶3 Moore filed a direct appeal with the assistance of appointed counsel. This court summarily affirmed. *See* ***State v. Moore***, No. 1993AP3648-CRNM, unpublished op. and order (WI App Aug. 30, 1994). He thereafter filed a series of unsuccessful *pro se* postconviction motions and appeals.[1] In April 2016, he filed the postconviction motion underlying the instant appeal, claiming that a new factor warranted sentence modification. In support, he pointed to ***Miller v. Alabama***, 132 S. Ct. 2455 (2012), which holds that the Eighth Amendment to the United States Constitution "forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *See* ***Miller***, 132 S. Ct. at 2469. Moore argued that ***Miller*** and cases applying it entitle him to relief.

¶4 The circuit court denied the claim as procedurally barred pursuant to WIS. STAT. § 974.06 (2015-16),[2] and ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994) (prohibiting a second or subsequent postconviction motion under § 974.06 absent a sufficient reason for failing to raise the claim presented in earlier proceedings). Moore sought reconsideration,

[1] We recently summarized Moore's appellate litigation history in ***State v. Moore***, No. 2015AP946, unpublished op. and order at 2 (WI App Feb. 16, 2016), his seventh appeal in this matter.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

arguing that ***Escalona-Naranjo*** does not apply to motions alleging that a new factor warrants sentence modification. The circuit court denied reconsideration on the ground that Moore had not identified a new factor. He appeals.

Discussion

¶5 The State concedes that Moore's claim is not procedurally barred to the extent it alleges the existence of a new factor warranting sentence modification. We accept the State's concession. A circuit court has inherent power to modify a sentence based upon a new factor. ***State v. Nickel***, 2010 WI App 161, ¶8, 330 Wis. 2d 750, 794 N.W.2d 765. Because sentence modification based on an alleged new factor is a function of the circuit court's inherent power and is not governed by WIS. STAT. § 974.06, the procedural bar set forth in ***Escalona-Naranjo*** is inapplicable here. We turn to the substance of Moore's claim.

¶6 A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts constitutes a new factor warranting sentencing relief is a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in the analysis. ***Id.***, ¶38. If a new factor exists, however, then the circuit court has discretion to determine whether the new factor warrants sentence modification. *See* ***id.***, ¶37.

¶7 Moore alleges that the Supreme Court's decision in ***Miller*** constitutes a new factor. We cannot agree.

¶8 As we recently explained, ***Miller*** prohibits as cruel and unusual punishment "a statute that mandates a sentence of life imprisonment without the possibility of parole for a juvenile convicted of capital murder." *See* ***State v. Barbeau***, 2016 WI App 51, ¶31, 370 Wis. 2d 736, 883 N.W.2d 520. We went on to identify the principle guiding ***Miller***: "the Eighth Amendment requires that before a sentence of life imprisonment without the possibility of parole may be imposed ... a judge must be able to make an 'individualized' sentencing determination, allowing for the consideration of the juvenile's age." ***Barbeau***, 370 Wis. 2d 736, ¶41. We then concluded that ***Miller's*** guiding principle was not at stake in ***Barbeau*** because the offender in that case "was not sentenced to life in prison without the possibility of parole, and the circuit court's discretion was not totally circumscribed." ***Id.***, 370 Wis. 2d 736, ¶41.

¶9 As was the case for the offender in ***Barbeau***, ***Miller*** is of no help to Moore. Like the defendant in ***Barbeau***, Moore was not sentenced under a statute mandating life imprisonment without parole. To the contrary, Moore was sentenced under WIS. STAT. § 973.014 (1991-92), which required the sentencing court to make a parole eligibility determination when imposing a life sentence. Pursuant to § 973.014(2), the circuit court established Moore's parole eligibility date as twenty-five years after the date of sentencing. Life sentences that include the possibility of parole for juvenile offenders are not unconstitutional under ***Miller***. *See* ***Barbeau***, 370 Wis. 2d 736, ¶33. Because ***Miller*** does not apply to Moore's sentence, ***Miller*** is not highly relevant to the imposition of that sentence and accordingly is not a new factor within the meaning of ***Harbor***. *See* ***id.***, 333 Wis. 2d 53, ¶40.

¶10 Moore contends, however, that ***Miller*** should be read in conjunction with a later case, ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016). There, the

Supreme Court determined that because ***Miller*** sets forth a substantive rule of constitutional law, ***Miller*** applies retroactively on collateral review of a juvenile offender's life sentence. *See* ***Montgomery***, 136 S. Ct. at 727, 736. According to Moore, ***Montgomery*** demonstrates that he is entitled to relief "because he was sentenced to a life sentence."

¶11 Moore's reliance on ***Montgomery*** is misplaced. To benefit from ***Montgomery***'s holding that ***Miller*** applies retroactively, a juvenile offender must be imprisoned under the kind of sentence that ***Miller*** forbids, namely, a life sentence imposed under a scheme barring the possibility of parole. Moore received a sentence under which he is eligible for parole after twenty-five years. Accordingly, ***Miller*** does not prohibit his sentence. The Supreme Court's declaration in ***Montgomery*** that ***Miller*** applies retroactively is therefore simply inapplicable to Moore and thus not highly relevant to the imposition of his sentence within the meaning of ***Harbor***. *See* ***id.***, 333 Wis. 2d 53, ¶40.

¶12 Next, Moore suggests that ***Miller*** is a new factor when viewed in light of ***McKinley v. Butler***, 809 F.3d 908 (7th Cir. 2016). ***McKinley*** is not a decision of the Wisconsin courts, and we are not bound by it. *See* ***State v. Webster***, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983) ("This court is bound on the subject of federal law only by the pronouncements of the United States Supreme Court."). Of course, we may consider decisions from jurisdictions outside of Wisconsin to the extent such decisions are helpful, *see* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930, but ***McKinley*** is not persuasive here.

¶13 ***McKinley*** involved a juvenile who received an aggregate 100-year sentence with no chance for early release. *See* ***id.***, 809 F.3d at 909. The Seventh

Circuit Court of Appeals concluded that this aggregate sentence was "such a long term of years ... as to be ... a *de facto* life sentence, and so the logic of ***Miller*** applies." *See* ***McKinley***, 809 F.3d at 911. Moore, however, did not receive a *de facto* life sentence without the possibility of parole. He received a sentence that included the opportunity for parole after serving twenty-five years in prison. Parole eligibility after twenty-five years in prison ensures that a juvenile offender has not received a disproportionate sentence in violation of the Eighth Amendment. *See* ***Montgomery***, 136 S. Ct. at 736. Moore has exactly that parole eligibility, so the logic of ***Miller*** is inapplicable to his circumstances.

¶14 Finally, Moore suggests that he is entitled to relief because "juvenile offenders serving life are having a very hard time getting parole." Moore's contention that parole is rare does not affect the analysis here. As we explained in ***Barbeau***, the United States Supreme Court holds that "[w]here a juvenile has been convicted of a nonhomicide crime, 'a State is not required to guarantee eventual freedom,' but it must give such an offender 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *See* ***id.***, 370 Wis. 2d 736, ¶46 (citing ***Graham v. Florida***, 560 U.S. 48, 75 (2010) (one set of brackets and some quotations marks omitted)). To the extent that this holding applies to Moore—an offender convicted of a homicide crime—his sentence affords him the opportunity for release that the Supreme Court describes.

¶15 In Wisconsin, release on parole for eligible inmates is determined under the procedures set forth in WIS. ADMIN. CODE ch. PAC. Accordingly, when Moore reaches his eligibility date, the parole commission will consider whether to release him in light of the criteria set forth in § PAC 1.06. Such criteria include, *inter alia*, whether "[t]he inmate has served sufficient time so that release would not depreciate the seriousness of the offense," *see* § PAC 1.06(16)(b), and whether

"[t]he inmate has reached a point at which the [parole] commission concludes that release would not pose an unreasonable risk to the public and would be in the interest of justice," *see* § PAC 1.06(16)(h). As we explained in ***Barbeau***, a juvenile offender entitled to seek release based on a demonstration that he or she is no longer a danger and has been rehabilitated "has a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See* ***id.***, 370 Wis. 2d 736, ¶48.

¶16 In sum, Moore fails to show that anything in recent federal decisions regarding life sentences without parole for juvenile offenders constitutes a new factor as to him, given that he received a life sentence with parole eligibility after twenty-five years in prison. Accordingly, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).