

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2016AP2094-CR

Cir. Ct. Nos. 1993CF934260

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY LEE ROGERS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Roy Rogers, pro se, appeals orders denying separate postconviction motions to vacate his 1994 sentence and modify it to life imprisonment with parole eligibility on January 1, 2020. He argues: (1) his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment; (2) decisions of the United States Supreme Court regarding sentencing for juvenile offenders constitute a new factor warranting sentence modification; and (3) the sentencing court erroneously exercised its discretion when it imposed the same sentence it imposed for an adult co-defendant. We reject these arguments and affirm the orders.

BACKGROUND

¶2 The complaint charged Rogers with first-degree intentional homicide and armed robbery, both as a party to the crimes. According to the complaint, which served as a factual basis for Rogers' guilty plea, sixteen-year-old Rogers and two adults robbed and brutally murdered the victim. Each of the defendants made inculpatory statements to police minimizing his own involvement. The first to make a statement, twenty-four-year-old Darrell Tyler, told police he, Dewan Turner, and Rogers robbed the victim and stole his car. He further stated Rogers pointed a gun at the victim and ordered him to turn over his valuables. The victim said he had no money and begged "please don't kill me." Rogers then tied the victim's hands behind his back and Turner placed duct tape over the victim's mouth. Rogers ordered the victim into the trunk of his car.

¶3 After the perpetrators drove around for at least an hour, the victim apparently succeeded in loosening his hands and removing the tape from his mouth. Rogers opened the trunk, aimed at the victim, and shot him. The perpetrators then drove around for a short time until they pulled into an alley

behind an old factory. Rogers again got out of the car and opened the trunk. Tyler said he saw the victim's "head up and his arms raised." Rogers then pointed the gun at the victim's head and shot him again. Rogers then closed the trunk, got back in the car, and said, "I shot him in the head." The perpetrators later attempted to set the car on fire to destroy the evidence.

¶4 Rogers' admitted to police he had tied the victim's hands and ordered him into the trunk. Rogers claimed Turner fired the first shot, after which the victim moaned. After they drove around for a while, Rogers and Tyler got out of the car, Tyler shot in the direction of the victim, and the victim's body jerked. When they returned to the car, Rogers said Tyler told him "It's your turn KG," which Rogers said is his rap name. Rogers then aimed at the victim's head and fired one shot. The victim moved as Rogers shot him in the head.¹

¶5 Rogers entered a guilty plea to first-degree intentional homicide charge as party to a crime and the robbery charge was dismissed and read in. In March 1994, the court sentenced Rogers to life imprisonment with parole eligibility on January 1, 2020, approximately twenty-six years after his confinement commenced. The statutory scheme at that time required the court to

¹ These allegations were repeated in the presentence investigation report (PSI). At the sentencing hearing, Rogers' attorney disputed that account, claiming Rogers told Tyler he had shot the victim when he actually had not. He also contended the police misunderstood Rogers' statement. The PSI reported Rogers, when asked who killed the victim, stated Tyler shot the victim in the chest and Turner shot him in the buttocks. Rogers' counsel clarified that Rogers did not know "who did what," and only knows what someone told him.

set parole eligibility after no less than twenty years. *See* WIS. STAT. § 973.014(1) (1993-94).²

DISCUSSION

¶6 We reject Rogers’ argument that his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment.³ Rogers characterizes the sentence as the “most severe and harsh sentence the court could impose”⁴ and argues the sentence fails to take into account a juvenile’s diminished culpability and greater prospects for reform, making him less deserving of the most severe punishments. This argument was rejected in *State v. Barbeau*, 2016 WI App 51, ¶33, 370 Wis. 2d 736, 883 N.W.2d 520.

¶7 Furthermore, Rogers’ reliance on *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012), is misplaced. In *Miller*, the Court held the Eighth Amendment prohibits sentencing schemes that make life without parole mandatory for juvenile homicide defenders. Juvenile killers may be sentenced to life without parole provided the sentencing court determines that the juvenile’s crime does not reflect only “unfortunate yet transient immaturity.” *Id.* This case is distinguishable from *Miller* because the sentencing court was permitted by statute to set a parole

² Rogers contends the court could have made him eligible for parole after thirteen years and four months, citing WIS. STAT. § 304.06 (1993-94). Rogers apparently reaches that conclusion by calculating the mandatory release time for a person sentenced to twenty years imprisonment. A person sentenced to a life term was not entitled to a mandatory release date. *See* WIS. STAT. § 302.11(1m) (1993-94).

³ The State argues this claim is procedurally barred because Rogers failed to raise the issue in earlier postconviction proceedings. We elect to address the merits.

⁴ Because the court made Rogers eligible for parole after approximately twenty-six years, Rogers’ repeated statement that he faced the worst sentence Wisconsin had to offer is hyperbole.

eligibility date, and it did so. Because the statutory scheme did not prevent the sentencing court from considering mitigating qualities of youth, the statute does not violate the Eighth Amendment.⁵

¶8 The diminished culpability of juveniles is not a new factor warranting sentence modification because the sentencing court took account of Rogers' youth. 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, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Although the United States Supreme Court cases involving juvenile sentencing were not in existence at the time of Rogers' sentence, and although the sentencing court did not use the same wording as the Supreme Court, Rogers' age and diminished culpability were considered at the sentencing hearing. The court discussed Rogers' youth and that "kids make bad decisions or bad mistakes." It also recognized that "sentences [are] based upon the individual characteristic of the defendant" including "the vicious or aggravated nature of the offender [and] the degree of culpability." The cause of the victim's death was a gunshot wound to the head. From the facts recited in the complaint and Rogers' statements to police, the sentencing court could reasonably view Rogers as the defendant whose

⁵ Rogers cites *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014), for the proposition that a mandatory life sentence violates contemporary norms. That decision was made pursuant to the Iowa Constitution and has no precedential effect in Wisconsin.

gunshot caused the victim's death. The sentence the court imposed reflects Rogers' personal culpability, which offsets the mitigating factors of youth.

¶9 Finally, Rogers contends the sentencing court erroneously exercised its discretion by failing to adequately consider his youth. That issue may be brought either by direct appeal or by a motion under WIS. STAT. § 974.06 (2015-16). It is not properly brought as part of a motion seeking resentencing based upon a new factor. The motion is procedurally barred by Rogers' failure to have raised the issue in earlier postconviction proceedings. Rogers filed postconviction motions alleging a *Miranda/Goodchild* violation, pursued a direct appeal of his conviction, filed a motion under § 974.06 (2015-16), and appealed the denial of that motion without contending the sentencing court erroneously failed to adequately consider Rogers' youth. Because that issue could have been raised in the earlier postconviction proceedings, and Rogers has not established sufficient reason for his failure to do so, the issue is procedurally barred. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 178, 517 N.W.2d 157 (1994).

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

