STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County

William H. Seals, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAVARIO DORMELL BRUNSON,

APPELLANT

Appellate Case No. 2012-211593

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

The trial court violated the Eighth Amendment's ban on cruel and unusual punishment by sentencing Appellant, who was seventeen-years old at the time of the crime, to life imprisonment without parole on the charge of murder where such a sentence is prohibited. In the alternative, Appellant's sentence violates the Eighth Amendment because the trial court failed to consider Appellant's age as a mitigating factor and failed to provide constitutionally adequate sentencing procedures.

STATEMENT OF THE CASE

During its July 2011 term, a Florence County Grand Jury indicted Appellant for murder, attempted murder, armed robbery, possession of a weapon during the commission of a violent crime, and burglary first degree. R. 145 (Indictment). Appellant was tried before the Honorable William H. Seals and a jury during the week of April 9, 2012 in Florence County. E.L. Clements, III and Todd Tucker represented the state, while Scott Floyd and William Vickery Meetze represented Appellant. R. 1. On the second day of trial, the prosecutor moved to amend count five of the indictment to charge Appellant with burglary in the second degree, not first degree, because the location allegedly entered by Appellant was a business, not a residence. R. 77, l. 8 – R. 78, l. 21. Over Appellant's objection, R. 79, l. 1 – R. 80, l. 6; R. 94, ll. 4-12, Judge Seals permitted the amendment, R. 94, ll. 13-18.

At the conclusion of the trial, the jury found Appellant guilty as charged. R. 128, l. 25 – R. 129, l. 14. Judge Seals sentenced Appellant to life in prison on the murder conviction, thirty years' imprisonment on the attempted murder conviction, thirty years' imprisonment on the armed robbery conviction, fifteen years' imprisonment on the burglary second degree conviction, and five years' imprisonment on the possession of a weapon conviction. R. 143, l. 22 – R. 144, l. 10. He ordered the sentences to run consecutively. R. 144, ll. 9-10.

On December 17, 2012, Appellant filed a motion to stay appeal pending this Court's decision in Aiken, et al. v. Byars, App. Case No. 2012-213286 (cert. granted May 6, 2013) in the Court of Appeals. On January 2, 2013, Respondent filed a motion in opposition to the stay request. On January 3, 2013, the Court of Appeals acknowledged receipt of the motion

in opposition to the request for a stay and ordered Appellant to file a reply. The Court also advised that the time limits for perfecting the appeal were held in abeyance pending the Court's decision on the motion. On January 9, 2013, Appellant filed a reply. On May 8, 2013, this Court certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR, denied Appellant's motion to stay, and ordered Appellant to file an initial brief and designations.

This brief follows.

STATEMENT OF THE FACTS

Donna Robinson testified that on April 12, 2011, while she was working at Rick's Pawn Shop, someone entered the store with a gun. She was unable to see the individual because the individual's head was covered. R. 2, line 24 – R. 3, line 1; R. 3, lines 9-11; R. 4, lines 4-6; R. 4, lines 13-18; R. 4, line 25 – R. 5, line 2. The individual shot her co-worker upon entering the store. R. 5, lines 3-11. The individual then pointed a gun at her and directed her to fill a garbage bag with gold. R. 6, lines 15-19. The individual shot her co-worker again. R. 7, lines 1-5. She and the individual filled the trash bag with jewelry. R. 16, lines 2-6. Additionally, Robinson gave the individual the money from the cash register. R. 20, lines 11-13. Then, the individual instructed her to get on the floor, and she complied. The individual shot her R. 20, line 19 – R. 21, line 15. When the individual left, she called for help. R. 22, lines 10-11.

When Appellant was arrested for the crimes at Rick's Pawn Shop, he gave a statement to police. In his statement, he admitted he robbed the pawn shop. He stated he "was just trying to help [his] family" because they were struggling and "money was short." R. 120, lines 2-12. He had not planned to shoot anyone or kill anyone. He shot because he was scared. After he shot, he did not look because he did not want to see what he had done. He informed the officer that he "wish[ed] [he] could take it all back. [He] didn't mean for nobody to get hurt. [He] was scared. [He] didn't know what else to do." He panicked. R. 120, line 14 – R. 121, line 19.

ARGUMENT

The trial court violated the Eighth Amendment's ban on cruel and unusual punishment by sentencing Appellant, who was seventeen-years old at the time of the crime, to life imprisonment without parole on the charge of murder where such a sentence is prohibited. In the alternative, Appellant's sentence violates the Eighth Amendment because the trial court failed to consider Appellant's age as a mitigating factor and failed to provide constitutionally adequate sentencing procedures.

Relevant facts

Appellant was seventeen-years old at the time of the crimes for which he was convicted. R. 140, ll. 9-10; R. 141, ll. 22-25. The solicitor's presentation during sentencing included his opinion that the trial judge "may have a tougher job" than the solicitor. He remarked that he, the solicitor had two sons, and he did "not know what [he] would do if something like this happened to one of them." He acknowledged that the judge had a son as well. R. 139, line 24 – R. 140, line 3. He then relayed Appellant's prior criminal history, which consisted only of a juvenile record. The solicitor informed the judge of an assessment from the Pee Dee Mental Health Center that resulted from a juvenile conviction regarding Appellant's mental health. Specifically, he claimed "there's nothing there that says he has any mental issues whatsoever." However, the solicitor relied upon other statements in the assessment to support his argument for the greatest possible sentence for Appellant. He claimed the assessment indicated Appellant had homicidal ideation, including a plan to carry out the thought. Per the solicitor, the report indicated Appellant "like[d] to kill things, animals, frogs, insects," often lost his temper, and was defiant against rules. The solicitor glossed over the fact that the

assessment indicated Appellant had refused to forgive his mother "for beatings he received from ages eight to nine." R. 140, line 9 – R. 141, line 7.

The prosecutor then asked the judge to sentence Appellant to life in prison "based on [his] demeanor and attitude." R. 141, lines 8-12. He elaborated "[i]f he [were] not [seventeen] years old at the time of this offense, my office would have sought the death penalty, but since that is not allowable by the United States Supreme Court, we did not." R. 141, lines 20-25. Further, he asked the judge to order the sentences to run consecutively in the event that "life ever gets changed by our legislature so that it's no longer a natural life." R. 142, lines 1-5.

The state's sentencing presentation included statements by members of the deceased's family and the victim of the attempted murder. The victim stated that Appellant would be held accountable for his actions "not only here on Earth, but that God would ultimately judge him with all the vengeance and justice that a father should when one of his children is murdered." R. 131, line 18 – R. 133, line 1. Dale Ginn, the deceased's aunt, informed the court of the impact of the deceased's death on his family, particularly, his mother, father, and daughter, and of the family events the deceased will miss. R. 133, line 4 – R. 134, line 23. The deceased's cousin advised the court that his internet research relative to Appellant uncovered he was involved in a gang. He argued Appellant deserved the maximum sentence to deter others from "go[ing] into this lifestyle." R. 135, lines 2-20. The deceased's stepmother and father discussed their love of the deceased, his good deeds, and good nature. His father argued Appellant to receive the maximum sentence as his "justice ... on Earth," but remarked that "his eternal security [was] between him and God." R. 135, line 22 – R. 139, line 1. Finally, the

mother of the deceased's child advised the court of the impact of the death on her child. She described it as "pure hell" to "even think that [Appellant] could ever walk out of jail one day." She described Appellant as "evil." R. 139, lines 5-22.

In stark contrast, only Appellant's lawyer spoke on his behalf. He had met with Appellant's mother and family members. He opined that Appellant did not "come from a background where this would be something that you would expect." R. 142, line 13 – R. 143, line 18.

Additionally, Appellant informed the judge that a case was pending in the Supreme Court of the United States challenging sentencing juveniles to life imprisonment as cruel and unusual punishment. R. 142, line 20 – R. 143, line 6. Nevertheless, the trial judge sentenced Appellant to life in prison for the murder conviction without regard to Appellant's age. R. 143, lines 22-25. Additionally, he sentenced Appellant to thirty years' imprisonment for attempted murder, thirty years' imprisonment for armed robbery, fifteen years' imprisonment for burglary in the second degree, and five years' imprisonment for possession of a weapon. Just as the solicitor had requested, the judge ordered the sentences to run consecutively. The judge offered no reasoning for his sentencing decision. R. 143, line 22 – R. 144, line 10.

Discussion

Error Preservation

South Carolina requires that an issue be raised to and ruled upon by the trial judge in order to be preserved for appellate review. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003)(citing Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001)). However, the objecting party is not required to "use the exact name of a legal

doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694 (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)). Appellant informed the court of a case pending on appeal in the United States Supreme Court challenging the application of life sentences to individuals less than eighteen years of age. Clearly, this was an objection to the imposition of a life sentence. The only purpose trial counsel would have had in informing the trial court of the pending case was to object. Thereafter, the Honorable William H. Seals sentenced Appellant to life in prison indicating his overruling of trial counsel's objection.

Even if this Court determines trial counsel failed to preserve the issue for review, a reviewing court would consider the issue in the interest of judicial economy. The Court of Appeals' recent decision in State v. Bonner, 400 S.C. 561, 735 S.E.2d 525(Ct. App. 2012) provides ample support for this position. Bonner was seventeen-years old at the time of the crimes for which he was convicted. During the sentencing proceedings, trial counsel asked the court to consider Bonner's age and youth, but mistakenly told the judge that Bonner was nineteen-years old, when he was actually eighteen at the time of sentencing. Id. at 563, 735 S.E.2d at 526. The judge then sentenced Bonner to LWOP for burglary in the first degree, a non-homicide offense. Trial counsel did not object or raise any issue as to the sentence in a post-trial motion. Id. Nevertheless, the Court of Appeals addressed the issue in the interest of judicial economy. The state conceded that the trial court erred in sentencing Bonner to life without parole in light of Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011 (2010), but argued the appropriate avenue to address the claim was in post-conviction relief proceedings. The Court found Bonner's case presented an exceptional circumstance requiring appellate review in the interest of judicial economy coupled with the concession of

error in the state's brief. Id. at 565-567, 735 S.E.2d at 527-528. Therefore, if this Court determines the error in Appellant's case is not preserved for review, this Court should review the matter in the interest of judicial economy as an exceptional circumstance.

Unconstitutional sentence

"[C]hildren are constitutionally different from adults for purpose of sentencing." Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2464 (2012). On June 25, 2012, the United States Supreme Court held mandatory sentences of life without parole (LWOP) imposed upon juveniles violate the Eighth Amendment to the United States Constitution. Id. Beginning in 2005 with its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court began a steady evolution of juvenile justice jurisprudence applicable to the states and federal government. In Roper, the Court held death sentences for juveniles were cruel and unusual punishment. Four years later, the Court held that a LWOP sentence imposed upon a juvenile for a non-homicide offense violated the Eighth Amendment's ban on cruel and unusual punishment. Graham, supra. Not surprisingly, when presented with the question of whether mandatory LWOP sentences for juveniles in homicide cases violated the Eighth Amendment, the Supreme Court held they did. Miller, 132 S.Ct. at 2464.

The Miller Court reserved ruling on whether juveniles could ever be sentenced to LWOP. Id. at 2469. Nevertheless, this Court should hold the Eighth Amendment precludes life imprisonment for juveniles. Although the Miller Court was not required, and did not, address the issue, the same constitutional reasoning prohibiting mandatory LWOP sentences applies equally in non-mandatory sentencing schemes. The Court's decision was not based upon the mandatory nature of the penalty, but on the character of

children in general. The Miller Court repeatedly focused on the notion that the character traits of children are "more transitory and less fixed." Id. at 2464. Children by definition lack maturity and responsibility; thus, they are more likely to act with "recklessness, impulsivity, and needless risk-taking." Id. The Court eloquently explained that due to the innate characteristics of children at large, there is a "great difficulty ... of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." In fact, the Court stated "incorrigibility is inconsistent with youth." Id. at 2469. The Court emphasized the potential for reform present in all juveniles. The Court emphasized the mitigating qualities of youth and noted "[i]t is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness.'" Id. at 2467(quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). Appellant respectfully requests this Court hold LWOP sentences for juveniles are cruel and unusual punishment prohibited by the Eighth Amendment.

Unconstitutional sentencing procedure

Although the Miller Court did not hold LWOP to be an unconstitutional sentence in non-mandatory sentencing schemes, the Court held Eighth Amendment jurisprudence governing imposition of death sentences applied equally to cases involving juveniles facing the possibility of LWOP. Id. at 2470. The Court's decision created a presumption against LWOP sentences for juveniles, and most importantly, the Court imported the principles of capital sentencing into cases where juveniles face the possibility of LWOP. Specifically, the court explained that "death is different" and "children are different too." Id. at 2470.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" Id. at 2463 (quoting Roper, 543 U.S. at 560). The Miller Court emphasized that "proportionality is central to the Eighth Amendment." Id. (quoting Graham, 130 S.Ct. at 2021). Focusing on the concept of individualized sentencing, the Court recognized "that children are constitutionally different from adults for purposes of sentencing." Children "have diminished culpability and greater prospects for reform," and therefore, "'they are less deserving of the most severe punishments.'" Id. at 2464 (quoting Graham, 130 S.Ct. at 2026). "[T]he distinctive attributes of youth diminish penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Id. at 2465. As a result, "[a]n offender's age is relevant to the Eighth Amendment." Graham, 130 S.Ct. at 2031. In light of the relevance to the ban on cruel and unusual punishment, "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." Miller, 132 S.Ct. at 2466.

Mandatory sentencing prevents the sentencer from considering the juvenile offender's "chronological age and its hallmark features, among them, immaturity, impetuosity, and failure to appreciate risks and consequences," the offender's family and home environment, the extent of the offender's conduct in the offense and the way familial and peer pressures may have affected him. The Court required sentencers "to take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 2469. Thus, it is clear that sentencing authorities must consider a juvenile offender's age and consideration of such must be a mitigating factor.

Additionally, the Court made clear that the type of individualized sentencing that occurs in capital cases is constitutionally required in sentencing proceedings involving juveniles facing LWOP as a possible sentence. Id. at 2468. Therefore, Appellant urges this Court to remand his case for a sentencing proceeding in compliance with the Eighth Amendment.

CONCLUSION

Appellant respectfully requests this Court declare sentences of LWOP for juveniles unconstitutional and vacate his sentence of LWOP for the murder conviction and remand his case for re-sentencing. In the alternative, Appellant respectfully requests this Court vacate his sentence of LWOP for murder and remand for re-sentencing in compliance with Miller, supra.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of October, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
William H. Seals, Jr., Circuit Court Judge

THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of October, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

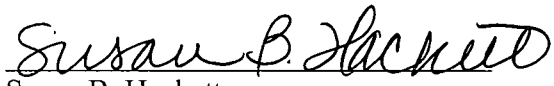
SUBSCRIBED AND SWORN TO before me
this 17th day of October, 2013.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 17, 2013



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