

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

S.C. Supreme Court

BRIAN ANSELM DIGGS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000285

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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ISSUE PRESENTED

Whether the PCR court erred in summarily dismissing petitioner's PCR application without allowing him the opportunity to prove at an evidentiary hearing that his receipt of an erroneous mandatory life sentence for a crime committed as a juvenile violates the Eighth Amendment?

STATEMENT

A Lancaster County grand jury indicted petitioner for a murder and attempted armed robbery that were committed on May 16, 1994. App. 153-156. On the date of the crime, petitioner was barely seventeen years old. App. 153-156. Petitioner was indicted on February 24, 1995.

The State sought the death penalty. App. 3. Three years after he was indicted, petitioner's trial was scheduled to begin on April 13, 1994. App. 1. Petitioner was represented by Leon Banks and Jerry Screen. App. 1. Banks was subsequently disbarred for inappropriately handling funds in capital cases. In re Banks, 344 S.C. 17, 542 S.E.2d 721 (2001). John Justice and Douglas Barfield represented the State. App. 1.

The Honorable Paul E. Short, Jr. was scheduled to try the case. App. 1. On the day the trial was to begin, the solicitor informed the court that petitioner wished to plead guilty. App. 3, ll. 10 – 23. The State withdrew its notice of intent to seek the death penalty in exchange for the plea. App. 8, ll. 8 – 15. Judge Short accepted petitioner's plea and sentenced him to life imprisonment for murder and a consecutive ten year sentence for attempted armed robbery. App. 44, l. 16 – 45, l. 2. Petitioner did not appeal.

Prior to the instant action, petitioner filed two PCR applications. App. 118-20. The Honorable Kenneth G. Goode denied petitioner's first application after an evidentiary hearing in 2003. App. 118. In 2009, the Honorable Brooks P. Goldsmith denied petitioner's second application without an evidentiary hearing. App. 119-120.

Petitioner delivered his current PCR application to the correctional institution's mail room on May 5, 2011. App. 71. His application was returned because it lacked a notarized signature, which petitioner subsequently obtained on May 16, 2011. App. 70-71. App. 52. The Lancaster County Clerk of Court stamped petitioner's current application as "filed" on June 7, 2011. On

December 20, 2012, Judge Goldsmith denied petitioner's application. App. 130. On January 31, 2013, Judge Goldsmith denied petitioner's Rule 59(e) motion. App. 151. The PCR court did not hold a hearing on petitioner's claims. This petition follows.

ARGUMENT

The PCR court erred in summarily dismissing petitioner's PCR application without allowing him the opportunity to prove at an evidentiary hearing that his receipt of an erroneous mandatory life sentence for a crime committed as a juvenile violates the Eighth Amendment.

By mistake, Petitioner received a mandatory life sentence for a crime he committed when he was a juvenile. His current PCR application alleges that this sentence violates the Eighth Amendment. Miller v. Alabama, 132 S.Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010). Because Miller and Graham are new constitutional decisions that apply retroactively, his successive application is not barred. S.C. Code Ann. § 17-27-45(B). Petitioner alleges facts that require an evidentiary hearing, including that he has no meaningful opportunity for release and multiple instances of ineffective assistance of counsel that, if remedied by a new sentencing hearing, would result in a lower sentence. App. 89-98. This Court should reverse and remand to the PCR court for a hearing.

1. Factual Disputes Require Evidentiary Hearings

An evidentiary hearing was necessary in this case in order to allow petitioner the opportunity to prove that he does not have a meaningful opportunity for release. See Graham v. Florida, 560 U.S. 48 (2010) (holding that the Eighth Amendment requires that juvenile non-homicide offenders must be given a meaningful opportunity to obtain release). Petitioner alleged that South Carolina's parole system does not grant parole "to the extent necessary to make it a meaningful opportunity." App. 95. Petitioner alleged that his custodial status denies him access to programs "geared at rehabilitation" which is of pressing concern for juvenile offenders. App. 95. Petitioner also alleged that plea counsel failed to develop any mitigating evidence that would have resulted in a lesser sentence. App. 89-98.

Because this case was decided summarily, the circuit court was required to “assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant.” Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). The PCR court failed to abide by these rules. App. 130-132. The PCR court did not address these factual allegations in its order summarily dismissing petitioner’s application. App. 130-132. Petitioner filed a Rule 59(e) motion calling this error to the PCR court’s attention. App. 136-146. The PCR court issued a summary denial of petitioner’s motion. App. 151.

The PCR court’s failure to consider these facts in the light most favorable to petitioner and conduct an evidentiary hearing constitutes an error of law. This Court “will reverse the PCR judge’s decision when it is controlled by an error of law.” Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). Petitioner must be allowed the opportunity to present evidence that he has no meaningful opportunity for release. The PCR court’s denial of this opportunity requires reversal and remand for a PCR hearing.

2. Petitioner Should Be Allowed to Show that his Sentence Violates the Eighth Amendment

This Court should allow petitioner a hearing to demonstrate that the life sentence he received violates the Eighth Amendment. The PCR court incorrectly concluded that new United States Supreme Court jurisprudence dealing with juvenile sentencing does not apply to petitioner because he is eligible for parole. App. 130-32. The PCR court’s conclusion is erroneous because it fails to appreciate the facts which led to petitioner’s sentence. The PCR court also failed to correctly apply recent United States Supreme Court jurisprudence to the unique facts of petitioner’s case.

Even though petitioner is eligible for parole, the peculiar way in which he was given a life sentence violates the Eighth Amendment. The specific holding of Miller is that it bars mandatory

life imprisonment without parole for juveniles. Miller, 132 S.Ct. at 2475. However, the decision's mandate is broader and requires that juveniles receive individualized sentencing. 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.

The trial judge in this case did not understand that a life sentence was not mandatory. Even though the State withdrew its death notice, the trial judge seemed to believe that he could only sentence petitioner to life imprisonment. This failure violates Miller.

After conducting a quick competency hearing, the court noted the State's withdrawal of its death notice. App. 8, ll. 8 – 15. The court then asked petitioner's attorneys whether petitioner

understood the maximum sentence, but did not state the sentencing range. App. 9, ll. 2 – 5. After swearing petitioner and questioning him directly during the plea colloquy, the trial judge told him:

And do you understand that under the current law of this state that the court could sentence you up to—Well, 30 years or life imprisonment. However, **this is a case where it is alleged aggravating circumstances when the Court could sentence you up to life imprisonment and you would be required to serve 30 years in jail before you were eligible for parole.** Do you understand that, sir?

App. 13, ll. 6 – 13 (emphasis added). The trial judge later warned petitioner:

Mr. Diggs, do you fully understand that attempted armed robbery is now an **aggravating circumstance under our law, under [section 16-3-20(C)]** by means of an interpretation of the South Carolina Supreme Court, the case State v. Humphries. Do you fully understand that?

App. 14, ll. 10 – 15. Court recessed for the day after hearing from a pastor who, on petitioner's behalf, told the court that sentencing for the "young people in this country" had to be "something better than the death penalty or life in prison." App. 23, ll. 2 – 9. The trial judge did not correct the pastor's impression that these were the only choices available to the court.

The sentencing proceeding continued the next day, with speakers on behalf of the defendant and the State scheduled to appear. Before hearing from any of these people, the trial judge stated:

All right. Well, if there's no objection, gentlemen, the Court does find that yesterday the defendant entered pleas of guilty to the offense of murder and guilty to the offense of attempted armed robbery at the same time as alleged as of the offense of murder, and the Court **makes the finding under section 16-3-20(B) in a separate sentencing proceeding** at this time, and **I so find that this is an aggravating circumstance** beyond a reasonable doubt.

App. 25, ll. 18 – 25 (emphasis added). After hearing from multiple speakers, the judge again said:

Well, let the record reflect that the **only aggravating circumstance** that this Court is considering and find[s] beyond a reasonable doubt **under section 16-3-20(B)** is the aggravating circumstance of attempted armed robbery; that is the **only one I am considering in regard to sentencing.**

App. 43, l. 22 – 44, l. 1 (emphasis added). The court then sentenced petitioner to life in prison.

The trial court's continued references to the capital sentencing statute and an aggravating circumstance show that he felt he had no choice but to sentence petitioner to life imprisonment. South Carolina's death penalty statute requires a life sentence if an aggravating circumstance is found. S.C. Code Ann. § 16-3-20(B). No discretion for the trial judge is allowed. Id. However, petitioner's death notice had been withdrawn. This was not a capital sentencing proceeding. The correct sentencing range was thirty years to life. The trial judge erroneously believed he lacked the authority to sentence petitioner to less than life imprisonment.

The trial judge's error means that petitioner received what the trial judge thought was a mandatory life sentence. The trial judge failed to make any individualized sentencing determination because he thought the capital sentencing statute deprived him of this authority. This failure with respect to sentencing a juvenile is exactly the kind of practice condemned by the Miller Court's reasoning. Furthermore, under South Carolina law, the failure to exercise discretion, however, is itself an abuse of discretion. State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202. In Smith, this Court reversed a sentence because the sentencing judge "did not exercise any discretion but based his ruling on an erroneous view of the law." Id.

This wholesale failure to exercise any discretion at sentencing brings petitioner's case within the ambit of Miller and Graham. The fact that petitioner is eligible for parole does not deprive him of the right to an individualized sentencing proceeding. Nor does it cure the court's mistaken rendering of what it thought was a mandatory life sentence. The PCR court failed to appreciate these fundamental problems with petitioner's mandatory sentence because of his parole eligibility. For these reasons, this Court should reverse the PCR court's summary decision and remand this case for an evidentiary hearing to determine whether he is entitled to a new sentencing hearing.

CONCLUSION

For the above-stated reasons, this Court should reverse and remand for an evidentiary PCR hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of November, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

BRIAN ANSELM DIGGS,

PETITIONER,

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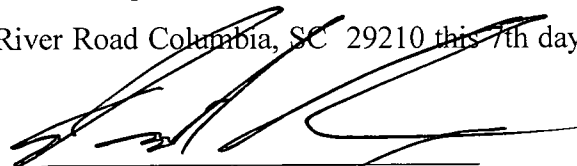
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CERTIFICATE OF SERVICE

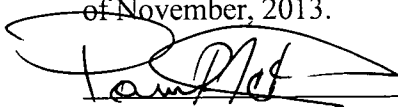
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also upon Mr. Brian Anselm Diggs #248964 Broad River Correctional Institution 4460 Broad River Road Columbia, SC 29210 this 7th day of November, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of November, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.