

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable D. Craig Brown, Circuit Court Judge

RECEIVED
DEC 21 2018
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JON SMART

APPELLANT.

APPELLATE CASE NO. 2017-001754

FINAL REPLY BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY

1., 2., 4.

The court erred in sentencing Appellant to life without parole for an offense committed as a juvenile after a resentencing hearing where the judge failed to afford weight in sentencing to evidence of Appellant’s: drug-ridden and dysfunctional family and home life; neurocognitive disorder, drug use, and subsequent remorse; and his capacity for rehabilitation.....1

3.

The court erred in sentencing Appellant to life without parole absent a finding Appellant was irreparably corrupt, since that conclusion is necessary to sentence a person to life without parole for an offense committed as a juvenile3

CONCLUSION.....6

TABLE OF AUTHORITIES

<i>Aiken v. Byars</i> , 410 S.C. 534, 765 S.E.2d 577 (2014)	2
<i>Budder v. Addison</i> , 851 F.3d 1047 (10th Cir. 2017)	3
<i>Davis v. State</i> , 415 P.3d 666 (Wyo. 2018)	5
<i>Holman v. Illinois</i> , 138 S.Ct. 937 (2018)	4
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	1, 2, 4
<i>Montgomery v. Louisiana</i> , 136 S.Ct. 718 (2016)	2, 3, 4
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	4
<i>Sam v. State</i> , 401 P.3d 834 (Wyo. 2017)	3
<i>Tatum v. Arizona</i> , 137 S.Ct. 11 (2016)	4
<i>Thompson v. State</i> , 423 S.C. 235, 814 S.E.2d 487 (2018)	2
<i>Veal v. State</i> , 784 S.E.2d 403 (Ga. 2016)	5

ARGUMENT IN REPLY

As an initial matter, Appellant did not stab the decedent. Respondent argues Appellant stabbed the decedent. Respondent's brief at 29. That is incorrect. There was no evidence Appellant stabbed anyone. There was evidence that Appellant beat the decedent with a pipe while under the influence of another teenager and after huffing gas. R. 108, ll. 16-18; R. 238, ll. 15-17; R. 65, l. 22 – 66, l. 19.

1., 2., 4.

The court erred in sentencing Appellant to life without parole for an offense committed as a juvenile after a resentencing hearing where the judge failed to afford weight in sentencing to evidence about Appellant's: drug-ridden and dysfunctional family and home life; neurocognitive disorder, drug use, and subsequent remorse; and his capacity for rehabilitation.

Respondent argues the judge did not ignore any of the evidence. Respondent's brief at 4; 22; 26. Respondent neglects to recognize the difference between simply articulating a list of facts and applying the law to those facts. While the court articulated the *Miller*¹ factors, it failed to apply them to the evidence presented. The court did not afford weight to constitutionally significant evidence regarding Appellant's youth that weighed against sentencing him to life in prison without the possibility of parole.

The court heard evidence that Appellant was cognitively younger than his age, had a neurocognitive disorder, and was under the influence of a substance that lead to his impulsive and bad decisions. R. 207, ll. 11-15; R. 209, ll. 17-19; R. 347. However, the court failed to weigh this evidence, as shown by the judge's remark that "every" teenager "is immature." R. 371, ll. 17-21.

¹ *Miller v. Alabama*, 567 U.S. 460 (2012).

The court heard testimony that Appellant was capable of becoming a productive member of society and had achieved cognitive recovery from huffing gas after eighteen years in prison. R. 223, ll. 1-7; R. 213, l. 24 – 214, l. 4; R. 210, ll. 3-10, R. 31, ll. 9-10. Appellant continued to express remorse for his actions. R. 78, ll. 20-21; R. 323. The court stated its recognition that Appellant may be rehabilitated: “The possibility of rehabilitation, there is a possibility.” R. 385, ll. 18-20; R. 394, ll. 12-13. If rehabilitation is possible, then a life without parole sentence is unconstitutional for a juvenile. *Montgomery v. Louisiana*, 136 S.Ct. 718, 733 (2016); *Miller*, 567 U.S. at 479. Because the judge recognized that Appellant may be rehabilitated, it is clear the judge did not afford this factor any weight because he sentenced Appellant to life without parole.

The court did not afford weight to undisputed testimony that Appellant was raised in a drug-ridden home, where his parents had violent arguments when drugs ran out and it was Appellant’s responsibility to procure drugs for his parents. R. 193, ll. 6-15; R. 192, ll. 18-24; R. 208, ll. 1-7. Instead the court cited to unsworn remarks in the 2001 plea transcript by persons who were not before the court, and whose credibility could therefore not be evaluated by the court. R. 378, l. 13 – 382, l. 5. *See Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018) (no deference given where PCR court’s credibility findings were based on reviewing the trial transcript since the witnesses were not before the PCR court).

The South Carolina Supreme Court in *Aiken v. Byars*, 410 S.C. 534, 542-43, 765 S.E.2d 576 (2014), recognized *Miller*’s holding that “youth has constitutional significance. As such, **it must be afforded adequate weight** in sentencing.” (emphasis added). Trial judges must “**weigh the factors** discussed herein and [] sentence juveniles in light of this new constitutional jurisprudence.” *Id.* at 545, 765 S.E.2d at 578 (emphasis added).

“*Miller* requires more than a procedural checkmark before imposing a ‘sentence that would deny the juvenile offender a realistic opportunity of release in the offender’s lifetime.’” *Sam v. State*, 401 P.3d 834, 860 (Wyo. 2017) (quoting *Budder v. Addison*, 851 F.3d 1047, 1058 (10th Cir. 2017)).

Appellant presented mitigating evidence which the court failed to weigh and apply. Without weighing and applying this evidence, the court committed an error of law when it sentenced Appellant to life without the possibility of parole.

3.

The court erred in sentencing Appellant to life without parole absent a finding Appellant was irreparably corrupt, since that conclusion is necessary to sentence a person to life without parole for an offense committed as a juvenile.

Respondent argues the judge is not required to make a finding of irreparable corruption before sentencing a juvenile to life without parole. Respondent’s brief at 27 – 30. Respectfully, Respondent’s contention mischaracterizes the Supreme Court’s precedent. The trial court must determine that a juvenile is irretrievably depraved, permanently incorrigible, or irreparably corrupt before condemning him to die in prison.

The United States Supreme Court uses these phrases interchangeably, and all stand for the proposition that a person’s conduct shows them so corrupt as to be beyond the possibility of redemption. While respondent is correct that the United States Supreme Court in *Montgomery*² stated that “*Miller* did not impose a formal factfinding requirement,” the line of cases discussed below mandate that a trial court must determine that a juvenile is irreparably corrupt to be eligible for life without parole, although it is free to couch this finding as “irretrievably

² *Montgomery v. Louisiana*, 136 S.Ct. 718, 735 (2016).

depraved,” “permanently incorrigible,” “irreparably corrupt,” or in some other way that reflects the court has found the juvenile to be so evil and depraved as to be beyond the possibility of redemption.

The United States Supreme Court concluded that a life without parole sentence is only proper for “the rare juvenile offender whose crime represents **irreparable corruption.**” *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012) (internal quotations omitted) (emphasis added). Even a “heinous crime” committed by a juvenile is not necessarily evidence of “**irretrievably deprived** character.” *Roper v. Simmons*, 543 U.S. 551, 570 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (emphasis added).

In *Montgomery v. Louisiana*, 136 S.Ct. at 734, the United States Supreme Court observed that *Miller* barred life without parole “for all but the rarest of juvenile offenders, those whose crimes reflect **permanent incorrigibility.**” (emphasis added). The Eighth Amendment “requires that a sentencer decide whether the juvenile offender before it is a child whose crimes reflect transient immaturity or is one of those rare children whose crimes reflect **irreparable corruption** for whom a life without parole sentence may be appropriate. *Tatum v. Arizona*, 137 S.Ct. 11, 13 (2016) (mem.) (Sotomayor, J., concurring) (internal quotations omitted) (emphasis added).

The United States Supreme Court recently denied certiorari in *People v. Holman*, 91 N.E.3d 849, 863, *cert. denied sub nom. Holman v. Illinois*, 138 S.Ct. 937 (2018), which while not binding precedent, left in place the Illinois Supreme Court’s conclusion that under *Miller* and *Montgomery*, “a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant’s conduct showed **irretrievable depravity, permanent incorrigibility, or irreparable corruption** beyond the possibility of rehabilitation.”

(emphasis added). *Accord Veal v. State*, 784 S.E.2d 403, 412 (Ga. 2016) (remanded because trial court did not make “distinct determination” on the record whether the juvenile is “irreparably corrupt or permanently incorrigible,” as necessary for LWOP); *Davis v. State*, 415 P.3d 666, 684 (Wyo. 2018) (sentencing court must make a finding in light of *Miller* factors that juvenile’s crime reflects irreparable corruption resulting in permanent incorrigibility, if it sentences juvenile to life or its functional equivalent).

The court erred when it sentenced Appellant to life without the possibility of parole absent a determination that he was irretrievably depraved, permanently incorrigible, or otherwise irreparably corrupt.

CONCLUSION

Appellant requests the order of the resentencing judge be reversed and the case remanded. In addition, Appellant respectfully requests this Court appoint a different judge for resentencing.

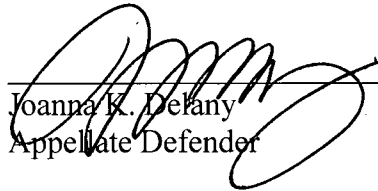

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


Joanna K. Defany
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

This 21st day of December, 2018.

RECEIVED
DEC 21 2018
SC Court of Appeals