STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS ROBERT SHEWTZUK,

APPELLANT

APPELLATE CASE NO 2016-001957

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The trial judge erred when she denied Appellant's request for a continuance and/or bifurcation of the sentencing proceeding and sentenced Appellant to life imprisonment without the possibility of parole without the benefit of an individualized sentencing hearing.

In its brief, Respondent noted "Appellant does not cite to any cases extending Miller[1] or Aiken[2] to people such as appellant who were adults at the time of their offense." BOR at 17. Without question, the issue presented is a novel one; thus, the number of cases throughout the country addressing the matter is understandably few. Additionally, the intersection between the Eighth Amendment's prohibition on cruel and unusual punishment and juvenile justice is ever evolving as the recent spate of opinions from the Highest Court in the land demonstrates. Nevertheless, Appellant will endeavor to provide some additional authority for applying Miller and Aiken to Appellant and others like him.

As explained in the brief, the Supreme Court of Washington held "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender," and that based on "advances in scientific literature," it is known that "age may well mitigate a defendant's culpability, **even if that defendant is over the age of 18.**" State v. O'Dell, 358 P.3d 359, 366 (Wash. 2015) (emphasis added). The court acknowledged that "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." Id. Nevertheless, the court was compelled to "conclude that youth may, in fact, relate to [a defendant's] crime" based upon "what we know today about adolescents' cognitive and emotional development." Id. (internal citation omitted, alteration in original). The court

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

[2] Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014).

explained "youth can" "amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range." Id.; see also Matter of Light-Roth, 401 P.3d 459, 465-467 (Wash. Ct. App. 2017) (finding that O'Dell announced a significant change in the law that was material to Light-Roth's sentence because he was only nineteen years old when he committed his crime, which warranted an opportunity to seek an exceptional sentence based on his youth).

In addition to the Washington Supreme Court's interpretation of the constitutional significance of youth, the United States District Court for the District of Connecticut recently addressed whether a defendant was entitled to a new sentencing hearing where he received a mandatory life sentence when he was 18 years and 20 weeks old. Cruz v. United States, No. 11-CV-787 (JCH), 2018 WL 1541898 (D. Conn. Mar. 29, 2018). The court refused to "infer by negative implication that the Miller Court also held that mandatory life without parole is necessarily constitutional as long as it is applied to those over the age of 18." Id. at *14. "Nothing in Miller ... then states or even suggests that courts are prevented from finding that the Eighth Amendment prohibits mandatory life without parole for those over the age of 18." Id. Just as the state has done in this case, the government argued, in Cruz, that "Miller drew a bright line at 18 years old," preventing courts from applying the rule in Miller to an 18-year-old. Id. at *15. The court rejected this argument. The court explained, "there are different kinds of lines." Id. According to the court, the Supreme Court's line drawing in Miller protected offenders falling under the line while remaining silent as to offenders who fall above the line. Id.

The court recognized that several courts declined to apply Miller to defendants over the age of 18 when asked to do so. Id. at *16. However, the court explained the other courts did not have or did not consider the scientific evidence of adolescent brain development. Id.

Next, the court turned to the evolving standards of decency to analyze Cruz's claim under the Eighth Amendment's ban on cruel and unusual punishments. Id. at *17. According to the data, "24 states and the federal government [had] statutes" prohibiting mandatory life imprisonment without the possibility of parole for offenders who commit murder at the age of 18 or older. Id. at *19. Additionally, Congress "enacted 41 statutes with a sentence of mandatory life without parole for premeditated murder." Id. The court rejected the governments' argument that in light of this data there was no national consensus that a mandatory LWOP sentence is unconstitutional as applied to persons aged 18 and older. Id. The court explained "that merely counting the number of states that permitted the punishment was not dispositive." Id.

The court also noted that some states recognized "an intermediate classification of 'youthful offenders' applicable to certain crimes." Id. At least sixteen states "provide protections, such as expedited expungement, Youth Offender Programs, separate facilities, or extended juvenile jurisdiction, for offenders who are 18 years old up to some age in the early 20s, depending on the state." Id. According to the court, these statutes "indicate a recognition of the difference between 18-year-olds and offenders in the mid-twenties for purposes of criminal culpability." Id.

Additionally, the court examined a 2017 report from the United States Sentencing Commission indicating that between 2010 and 2015, 86,309 youthful offenders were sentenced in the federal system. Id. at *20. Of those, 96 received life sentences. Id. "Of those 96, 85 were 21 years or older at the time of sentencing, 6 were 20 years old, 4 were 19 years old, and only one was 18 years old." Id. The court explained these findings "indicate[d] the rarity with which life sentences are imposed on 18-year-olds like Cruz, at least in the federal system." Id. While the court did not consider the report dispositive of a national consensus, the court concluded the

report "clearly indicate[d] the extreme infrequency of the imposition of life sentences on 18-year-olds in the federal system." Id. at *21.

Next, the court examined the directional trend of how states treat individuals over the age of eighteen. The court found no state legislation prohibiting mandatory LWOP for eighteen-year-olds, but looked at where society draws the age line for important purposes. Id. The court cited a decision from Kentucky declaring the death penalty unconstitutional as applied to those under the age of twenty-one "based on a finding of a consistent direction of change that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21)." Id. (internal quotations omitted).

The court also considered a Resolution from the American Bar Association (ABA) issued in February 2018 urging the prohibition of capital punishment on individuals twenty-one years old or younger at the time of the offense. Id. In arriving at this resolution, the "ABA considered both increases in scientific understanding of adolescent brain development and legislative developments in the legal treatment of individuals in late adolescence." Id. "For example, it recognized a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18." Id. (internal quotation omitted).

Continuing to examine the "trend," the court noted that "between 2016 and 2018, 5 states and 285 localities raised the age to buy cigarettes from 18 to 21" and that "as of 2016, all fifty states and the District of Columbia recognized extended age jurisdiction for juvenile courts beyond the age of 18, in comparison to only 35 states in 2003." Id. at *21-22.

Finally, the court looked at the compelling scientific evidence. Based upon unconverted scientific testimony, the court concluded that the scientific evidence "reveal[ed] that 18-year-olds

display similar characteristics of immaturity and impulsivity as juveniles under the age of 18." Id. at *23. Additionally, the expert who testified on Cruz's behalf explained that the ability to resist peer pressure is still developing during late adolescence – between ages 18 and 21. Id. at *24. "[S]usceptibility to peer pressure is higher in late adolescence than in adulthood, but slightly lower than in middle adolescence," which is between the ages of 14 and 17. Id. "[U]p until the age of 24, people exhibit greater risk-taking and reward-sensitive behavior when in the presence of their peers," but adults over age 24 do not. Id. "[L]ike juveniles under the age of 18, 18-year-olds also experience similar susceptibility to negative outside influences." Id. Finally, the expert testified "that people in late adolescence are, like 17-year-olds, more capable of change than are adults." Id. In short, "development is still ongoing in late adolescence." Id.

"[R]elying on both the scientific evidence and the societal evidence of national consensus," the District Court for the District of Connecticut held "that the hallmark characteristics of juveniles that make them less culpable also apply to 18-year-olds." Id. at *25. "As such, the penological rationales for imposing mandatory life imprisonment without the possibility of parole cannot be used as justification when applied to an 18-year-old." Id. Thus, the court held, "Miller applies to 18-year-olds" and the Eighth Amendment forbids a sentencing scheme that mandates life imprisonment for offenders who were 18 years old at the time of their crimes. Id. The court held, sentencers must "take into account how adolescents, including late adolescents are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. (internal quotation omitted).[3]

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[3] The Superior Court of New Jersey ordered re-sentencing for a twenty-one-year-old defendant for the offenses of murder and attempted murder, citing Miller v. Alabama, 567 U.S. 460 (2012) as persuasive authority for the decision to remand. State v. Norris, 2017 WL 2062145 at *5 (N.J. Super. Ct. App. Div. 2017). This unreported case is cited to rebut the state's argument that there are no cases extending the reasoning of Miller to individuals over age 18.

In People v. House, 72 N.E.3d 357, 384 (Ill. App. Ct. 2015), the Illinois Court of Appeals held House's young age of nineteen at the time of the commission of the offense was relevant in consideration under the circumstances of the case. House was convicted of murder under an accomplice liability theory, which subjected him to a mandatory natural life sentence. Id. The court bluntly "question[ed] the propriety of mandatory natural life for a 19 year old defendant convicted under a theory of accountability." Id. at 385. House acted as a lookout for the crime, but he was not involved in the planning. Id. at 384. The court noted that House received "the same sentence applicable to the person who pulled the trigger." Id. at 385. The court recognized that the Supreme Court "delineated a division between juvenile and adult at 18," but the court disabused the notion that the demarcation "created a bright line rule." Id. at 386.

Relying upon the language of the United States Supreme Court, the Illinois Court of Appeals concluded "the designation that after age 18 an individual is a mature adult appears to be somewhat arbitrary." Id. at 387. The court pointed to "[r]ecent research and articles" discussing "the differences between young adults" "and a fully mature adult." Id. That research indicated the brain does not finish developing until the mid-20s. Id. Thus, young adults are more similar to adolescents than to fully mature adults. Id. The court characterized House as "barely a legal adult and still a teenager" when the crime occurred. Id. at 388. Thus, his youthfulness was relevant to sentencing. Id. The Court held that "[g]iven [House]'s age, his family background, his actions as a lookout as opposed to being the actual shooter, and lack of any prior violent convictions," his "mandatory sentence of natural life shocks the moral sense of the community." Id. at 389. Therefore, the court held, House's life sentence violated the proportionate penalties clause of the state constitution. Id. See also People v. Harris, 70 N.E.3d

718, 730 (Ill. App. Ct. 2016) (holding that a seventy-six-year sentence for an eighteen-year old defendant violated the state constitution using the analysis in Miller).[4]

In addition to the case law supporting Appellant's argument for applying the reasoning and rationale of Miller and Aiken to individuals aged eighteen at the time of their offenses, at least one state legislature has enacted statutes taking into account how individuals aged eighteen are much the same as those under the age of eighteen. California amended its statute governing youth offender parole hearings to extend such hearings to "any prisoner who was 25 years of age or younger" at the time of his or her offense. Cal. Penal Code § 3051(a)(1)(2018); see also Cal. Penal Code § 3046(c)(2018); Cal. Penal Code § 4801(c)(2018). The statute requires the parole hearing to "provide for a meaningful opportunity to obtain release." Cal. Penal Code § 3051(e)(2018). The parole board is required to consider "the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." Cal. Penal Code § 4801(c)(2018). Any psychological evaluations and risk assessment instruments used by the parole board must "take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." Cal. Penal Code § 3051(f)(1)(2018).

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[4] The District Court for the Eastern District of Wisconsin relied upon the Miller factors when sentencing a nineteen-year old charged with theft of mail and assaulting/impeding a postal employee. United States v. Walters, 253 F.Supp.3d 1033, 1036 (E.D. Wisc. 2017). The judge "took into account that defendant was a teen at the time he committed" the offenses and that research indicated "teens are prone to doing foolish and impetuous things, like stealing parcels to get marijuana and struggling with postal carriers" "given their immaturity and undeveloped sense of responsibility." Id. The judge noted that it appeared defendant "was brought into this by the co-actor," which was "not unusual with young offenders, who are more susceptible to peer pressure." Id.

Based upon the arguments presented, Appellant respectfully requests this Court vacate his sentence of life imprisonment without the possibility of parole and remand his case for an individualized sentencing proceeding in compliance with the Eighth Amendment to the United States Constitution and the South Carolina Constitution.

II. The judge erred by admitting DNA evidence where the state failed to prove the chain of custody as far as practicable by failing to present evidence of how the DNA evidence was transported from the local sheriff's office to the SLED laboratory.

Recently, the South Carolina Supreme Court reversed a conviction where the state failed to present a complete chain of custody. State v. Pulley, 423 S.C. 371, 815 S.E.2d 461 (2018). On June 23, 2013, Officers Brewer and Craven stopped Pulley for speeding. Id. at 373, 815 S.E.2d at 462. When Pulley stopped and exited his car, Craven recognized Pulley and knew he was driving under suspension. Id. at 374, 815 S.E.2d at 462. When the officers tried to arrest Pulley, a struggle ensued. Id. Eventually, the officers handcuffed Pulley and placed him into Brewer's car. Id.

The officers decided to tow Pulley's car. Id. at 374, 815 S.E.2d at 463. During an inventory search, the officers found cocaine. Id. Craven testified that after the drugs were discovered, they were placed in evidence at the police department. Id. at 375, 815 S.E.2d at 463. Brewer testified that he did not take the cocaine from the scene; rather, he recalled that Craven had possession of the drugs. Id. Brewer did not remember how the drugs got from the scene to the police department. Id.

The evidence custodian testified that he retrieved the drugs from a lockbox at the police station. Id. With the drugs was a chain of custody form indicating Craven was the officer who placed the drugs in the lockbox. Id. Oddly, the form showed that Craven personally delivered the drugs to the evidence custodian. Id. When testifying, the evidence custodian said the form was incorrect because he picked up the drugs from the lockbox, not directly from Craven. Id. SLED's forensic analyst testified that she received the drugs from the police department. Id. at 376, 815 S.E.2d at 463.

When an objection was posed regarding the chain of custody, the state called Brewer to the stand again. Id. at 376, 815 S.E.2d at 463-464. Brewer then claimed "that, after reviewing the dash cam video, he remembered leaving [the scene] with the cocaine and turning the drugs over to Craven." Id. at 376, 815 S.E.2d at 464. Brewer further explained he did not sign any paperwork reflecting his transfer of the drugs to Craven. Id. The trial judge found the chain of custody sufficient for admissibility of the cocaine and the forensic analyst's test results. Id.

On appeal, the South Carolina Supreme Court determined the state failed to establish a chain of custody for the cocaine. Id. at 377, 815 S.E.2d at 464. The Court explained that prior to Brewer being recalled as a witness, the state had not established a sufficient chain of custody. Id. at 378, 815 S.E.2d at 464. At that point in the trial, the state presented evidence showing: (1) Craven seized the drugs; (2) the drugs were on the hood of Brewer's car when Craven left the scene; (3) Brewer initially said he did not take the drugs from the scene; (4) Craven placed the drugs in the evidence lockbox at the police station; and (5) the evidence custodian did not receive the drugs directly from Craven as the chain of custody form indicated. Id. There was simply no evidence indicating how the drugs were transported from the hood of Brewer's car to Craven. Id. The Court could not "assume that Brewer transferred the cocaine to Craven" because "who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture." Id. (internal quotation omitted).

Next, the Court addressed whether Brewer's supplemental testimony "cured the missing link." Id. According to the Court, "it did not." Id. Brewer claimed his change in his testimony was the result of watching the dash cam video. Id. at 378, 815 S.E.2d at 464. Brewer claimed he remembered taking the drugs from the scene after watching the video. Id. The Court determined the video did not "reflect Brewer's recollection" as recounted in his supplemental testimony Id.

The Court was also convinced that Brewer's failure to sign any paperwork indicating he transferred the drugs to Craven was persuasive. Id.

Recognizing that a "perfect chain of custody is not required," the Court held "the express denial of handling the cocaine by Brewer, followed by a stipulation of a missing link by the state, the subsequent reversal by Brewer that he did in fact take the cocaine from the scene, coupled with the state's failure to produce testimony from Craven indicating how he obtained possession of the cocaine after the drugs were seen on the hood of Brewer's car" left the chain of custody as conjecture. Id. at 378-379, 815 S.E.2d at 465-466.

Similarly, the state failed to establish a sufficient chain of custody for the cigarette butt, and Appellant's buccal swab, which were used against Appellant at his trial. Although the state presented evidence of who collected the cigarette butts and the buccal swab, the state failed to present any evidence of how the cigarette butts and the buccal swab were transported from the Dorchester County Sherriff's Office to SLED or what happened to those items between collection and arrival at SLED. The evidence did not indicate who had the cigarette butt and buccal swab in the interim. By failing to identify the individual who transported the cigarette and Appellant's buccal swab from the sheriff's office to SLED, the state left the chain of custody to conjecture. In other words, the state failed to establish the chain of custody for those items as far as practicable. The state failed to prove that the cigarette tested by SLED was the cigarette found outside the convenience store. Additionally, the state failed to prove the swab from which the analyst derived DNA was a swab from Appellant's mouth. In short, the state could not show that the evidence tested was the evidence collected.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court vacate his sentence and remand to the circuit court for an individualized sentencing proceeding. Regarding Issue II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of August, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my 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."

August 21, 2018

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