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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County
D. Craig Brown, Circuit Court Judge

Opinion No. 5830 (S.C.Ct.App. filed July 7, 2021)

THE STATE, Respondent,

v.

JON PAUL SMART, Appellant.

Appellate Case No. 2017-001754

RETURN TO PETITION FOR REHEARING

Smart, with co-defendant Stephen Hutto, murdered Tracey Pack. Of this there is no doubt. In a vicious, unprovoked attack, Smart beat Tracey Pack to death with a metal pipe. Smart plead guilty to avoid the death penalty, and was sentence to life without parole on August 9, 2001.[1] (R. p.14-17; pp. 164-65 and 167). Over 14 years later, on May 26, 2016, Smart moved for resentencing pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), because he was sixteen-years-old at the time of the crime. (R. p. 150; pp.181-82). He received that opportunity and a resentencing hearing was held on May 24, 2017, before the Honorable D. Craig Brown. Judge Brown resolved a life without parole sentence was appropriate. (R. p. 388). By Opinion issued on July 7, 2021, this Court affirmed. Smart fails to show an error of law or misunderstanding of the record that would warrant the rehearing he seeks. Simply, Judge Brown

[1] Smart pled guilty prior to the decision holding the Eighth Amendment barred capital punishment for juvenile offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005). Not of little note is that part of the reason for the exemption rests on the belief that juveniles could receive a life without parole sentence. *See id.,* at 572 ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.").

did not abuse his discretion in this sentencing matter.

Even so, in his petition to this Court, Smart offers two basic arguments for rehearing: one, that this Court failed to understand "that the burden of proof should be on the State," and, two, that it failed to recognize that Judge Brown did not "give the constitutional weight due to the mitigating factors of youth." (Petition, p. 5 and 9). As to his burden argument, Smart concedes by his phrasing that there is no such established burden, thus, no error could have been made.[2] As to his weight argument, Smart misapprehends the established law – there is no guarantee to the weight of evidence, and no established presumption against a life without parole sentence. Smart's arguments are not well-founded in law or fact. His petition should be denied.

No burden of proof on State

As a first point, Smart attempts an expansion of his original argument. In briefing, Smart argued that "the court did not determine that Appellant was irreparably corrupt – the conclusion needed to sentence a juvenile to life without parole." (FBOA, p. 36). Whether there is a presumption against a life without parole sentence was not raised to and ruled upon in the circuit court; thus, this Court correctly found that argument procedurally barred. (Opinion, p. 11). Smart's argument also fails on the preserved issue. The resentencing judge did not err in failing to make a finding on permanently incorrigible because the Supreme Court does not mandate such a finding. This Court observed:

> In *Montgomery v. Louisiana*, the United States Supreme Court noted that *Miller* did not require that states follow a particular procedure for the sentencing hearings or that courts make a formal finding that the juvenile offender was irreparably corrupt. 577 U.S. 190, 211 (2016); *see id.* ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (alterations in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986))). Rather, "*Miller* established that [an LWOP sentence] is disproportionate under the Eighth Amendment" for a juvenile

[2] In his brief, Smart similarly conceded there was no general "national consensus regarding which party bears the burden of proof applicable to the determination that a juvenile is irreparably corrupt." (FBOA, p. 36).

> offender "whose crime reflects transient immaturity." *Id.* The Court recently reiterated "that a separate factual finding of permanent incorrigibility is *not required* before a [court] imposes a[n LWOP] sentence on a [juvenile] murderer." *Jones v. Mississippi*, 141 S. Ct. 1307, 1318–19 (2021) (emphasis added).

(Opinion, p. 6).

The Court accurately stated, and applied, the relevant law. While precedent requires an examination of the evidence offered, it does not constitutionally require formal fact-findings. *Jones, supra.* Smart has conceded this point in noting *Jones*. (See Petition for Rehearing, p. 6 n. 6). Consequently, this Court properly found the resentencing judge did not err in failing to make a finding regarding "permanent incorrigibility" because he was not required to do so. (See Opinion, p. 9). Even so, this Court found that the related concern regarding rehabilitation was considered. (See Opinion, p. 10). Further, and again contrary to Smart's argument in the petition, the records shows the resentencing judge properly followed the law in evaluating the evidence presented.

Evaluation of Evidence

In *Miller v. Alabama*, 567 U.S. 460 (2012), the United States Supreme Court held mandatory life without parole sentences for juvenile homicide offenders violated the Eighth Amendment's prohibition against cruel and unusual punishment. 567 U.S. at 465, 470. *Miller* did not categorically bar life sentences for juvenile murderers; rather, the Court held only that a sentencing court is required to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id*. at 480. Two years later, in *Aiken v. Byars,* our Supreme Court held *Miller* applied retroactively to juveniles in South Carolina previously sentenced to life without parole. 410 S.C. at 540-41, 765 S.E.2d at 575. Thus, precedent secures individualized sentencing, but does no more.

Smart posits, however, that there is a "weight" component to the precedent. He argues that this Court erred in failing to recognize a deficiency in not affording the proper "constitutional weight due to the mitigating factors of youth…." (Petition for Rehearing, p. 9). However, there is no constitutional guarantee for weight of the evidence – if it had been so, the Supreme Court would have found an exemption – taking the possibility of the life without parole sentence away – which it did not. The majority in *Aiken* made reference to the "constitutional meaning" of the evidence, but the sway afforded that phrasing must be limited. The *Aiken* majority was expressly placing the term in context of giving effect to *Miller*. Consequently, this, too, goes back to procedure and allowing a more expanded view of the hallmarks of youth to be considered, *i.e.,* individualized sentencing and discretion to the sentencer. Smart was afforded such review under these terms.

The resentencing judge allowed the presentation of evidence and properly considered the testimony and evidence before him for a sentence of less than life imprisonment. However, and in contrast to Smart's view, the opportunity to present such evidence and have it considered did carry the right to have the judge to accept the conclusion offered. For instance, the judge noted inconsistencies in Dr. Price's testimony regarding Smart's drug use while incarcerated, Smart's SCDC disciplinary history which included assaults, use of contraband, and two escape attempts, and found Smart "has taken no efforts while incarcerated for rehabilitation" given his disciplinary record. (R. pp. 384-88). Dr. Price did not mention or testify he considered Smart's work history while incarcerated, yet, some of the jobs ended because he was placed in special custody following a disciplinary action. (See R. pp. 349-52). Accordingly, the evidence before the judge supported that Smart failed to conform to the rules within SCDC which is not in keeping with the "central intuition" of *Miller* that juveniles who commit even violent crimes are

capable of change. The judge considered the evidence of the type the Court in *Montgomery* declared relevant. *See Montgomery*, 136 S.Ct. at 736 (noting the evidence the petitioner sought to submit which demonstrated "his evolution from a troubled, misguided youth to a model member of the prison community"). But Smart carries the murder with him. The judge noted in his order the brutality of the murder. Smart stabbed to death a person he called a friend, a man who tried to help appellant and his co-defendant learn job skills they could use upon their release from DJJ. (See R. pp. 361-63). While Smart contends this Court overlooked error in the resentencing judge's consideration of evidence going to youth, background and rehabilitation, the record rebuffs his arguments.

On May 26, 2016, at the start of the hearing, the judge acknowledged the "most important" things for him to consider when determining an appropriate sentence for appellant are the five factors "our Supreme Court addressed in the *Aiken v. Byars* case." (R. p. 189). [3] The purpose of the proceeding and the listed factors to consider were prominently before the court.

Not only did counsel put up a robust case, counsel argued peer pressure and drug abuse played roles in the murder. (R. p. 275). Counsel stated Smart was sixteen years old when the crime occurred and, while huffing was not a defense, it should be considered mitigation because Smart did not get the drug treatment he should have received. (R. p. 278). Counsel also asserted Smart's family life was a factor because he was left without proper supervision by parents who also used drugs, did not regularly attend school, and he ended up with a drug addiction and frontal lobe dysfunction which led to a failure to appreciate risks and consequences. (R. p. 276). Counsel maintained there was a possibility of rehabilitation as evidenced by Dr. Price's

[3] The five factors are: (1) the hallmark features of youth; (2) the family and home environment; (3) circumstances of the homicide; (4) incompetency associated with youth and how they navigate the legal system; and; (5) the possibility of rehabilitation. *Aiken*, 410 S.C. at 544, 765 S.E.2d at 577 (citing *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012)).

evaluation, despite his history of disciplinary actions. (R. p. 277). Counsel argued the minimum sentence of thirty years for murder would be the appropriate sentence for appellant because of his youth and its mitigating factors at the time of the crime. (R. p. 277-78).

The State, however, argued the record demonstrated Smart appreciated the risks and consequences of his actions because he and his co-defendant "planned to do something big" and when "the opportunity presented itself and they had huffed enough gas to give them the courage to do it, they went about doing what they planned to do," including commit a murder, hide the body, rob a store, and run from police. (R. pp. 282-83). The State also asserted rehabilitation was not likely given records from the South Carolina Department of Corrections (SCDC) indicated appellant could not follow rules, continued to use drugs, and had other disciplinary problems. (R. p. 286-87). The State asked again for life without parole. (R. p. 287).

Before ruling, the court again recognized the five factors the *Aiken* Court held it must consider prior to sentencing a juvenile to life without parole and stated the factors "will be addressed by the court [] in rendering its decision," but noted the *Aiken* Court "went on to say that without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances." (R. p. 358-59).

The resentencing judge discussed the presentation and factors. He considered that age 16 would reflect immaturity. (R. p. 371). The court noted Dr. Price testified Smart was cognitively younger than sixteen years old given his drug use due to frontal lobe damage, and noted Dr. Price also testified his ability to make decisions was influenced by huffing gas, his family life, and diagnosis of attention deficit disorder. (R. p. 371-74). But the court resolved, having reviewed "all of the information pertaining to this case … that it was not a sudden or rash action" to commit murder given the statements made to police which reveal both young men knew what

they were doing, the statements by the other juveniles who overheard conversations in which appellant and his co-defendant planned the crime, and the letter appellant wrote his co-defendant in which he told him to stick to their story. (R. pp. 375-77). The court found looking at the totality of the circumstances, Smart knew there could be consequences for his actions because, had he not, he would not have wrapped the victim in a tarp, moved the body, and tried to clean the scene. (R. p. 378). This Court's opinion correctly found both that precedent "does not require consideration of a juvenile's cognitive age," and that the resentencing court need only consider the circumstances flowing from actual age, such as "immaturity, impetuosity, and failure to appreciate … risks and consequence[s]." (Opinion, p. 7). There was no abuse of discretion as the appropriate consideration was made.

Further, the court also considered home and family environment, the parent's drug use, their absence, and Smart's taking care of her when they were young. (R. pp. 378-79). This Court correctly found the trial court's reference to drug use not being a "defense" was more properly viewed as a comment the evidence of same did not show "a compelling mitigating circumstance," than as some type of aggravation. (See Opinion, p. 7). It is difficult to shape the evidence into a non-capital circumstance of aggravation when such a paradigm does not exist – there is no eligibility factor that must be shown beyond a reasonable doubt before a certain sentence may be considered, and no numbers weighing that is conducted. Again, the comment is more easily and readily understood as not as compelling in light of the context presented.

Further, the Court fairly noted that the resentencing judge considered Smart's expert's "testimony regarding Smart's drug use and his ability to appreciate the wrongfulness of his actions." (Opinion, p. 8). The court noted Dr. Price testified as to Smart's ability to make decisions was influenced by huffing gas, his family life, and diagnosis of attention deficit

disorder. (R. pp. 373-74). The court also discussed previous evaluations, and noted Dr. Price acknowledged an MRI might have been beneficial to show possible frontal lobe atrophy. (R. pp. 374-75). The court found Dr. Price testified Smart appreciated the wrongfulness of his conduct and the huffing of gas affected his aggressiveness. (R. pp. 375). But, while there was immaturity at issue, reviewing "all of the information pertaining to this case, reveals that it was not a sudden or rash action … to commit murder given the statements made to police which reveal both young men knew what they were doing, the statements by the other juveniles who overheard conversations in which appellant and his co-defendant planned the crime, and the letter appellant wrote his co-defendant in which he told him to stick to their story. (R. pp. 375-77). The court found looking at the totality of the circumstances, appellant knew there could be consequences for his actions because, had he not, he would not have wrapped the victim in a tarp, moved the body, and tried to clean the scene. (R. p. 378). Additionally, the court found there was little concern regarding the incompetency of youth because Smart gave statements to police, there was a plea agreement he and plea counsel signed, and there was no indication from counsel he was not able to assist or understand the proceeding. (R. pp. 382-84). Further, based on Smart's disciplinary record, the court resolved Smart "has taken no efforts while incarcerated for rehabilitation." (R. p. 388).

The circuit court ruled having "fully addressed each of the factors as set forth in *Aiken v. Byars*" to deny the motion to set aside the life sentence. (R. p. 388). Defense counsel objected to the findings particularly as it related to home and family. (R. p. 389). The court noted the objection, but stated he looked at the entire record when ruling:

> Dr. Price, the only person Dr. Price talked to, and correct me if I'm wrong, the only person Dr. Price talked to and gathered information from was [appellant]. He reviewed now, voluminous amounts of records. Over 2,000 pages. And I remember that

specifically.

. . .

And one of the last questions that I asked whether or not [appellant] had appreciated the consequences of his actions. In which Dr. Price says that he could appreciate. And then he does say, talks about the huffing and the aggressiveness. No question about that. There are questions about, there are issues pertaining to the failure for him to get certain amounts of treatment. There's problems there. I see that. But from the beginning of time, from the beginning of time, in no civilized society has murder been acceptable. Under any circumstances.

In looking at all of this, his age, immaturity, impetuosity, failure to appreciate risk and consequences, his family and home environment, the circumstances of the offense, his participation, which there is no question, he committee a brutal murder. Beating the [victim] about his body, crushing his skull.

. . .

The possibility of rehabilitation. There's always a possibility. But there are also impossibilities as well. And I think I have addressed all of those issues, in trying to address each one of those factors. . . . I looked at everything.

. . .

[This] is not a decision I have taken lightly, nor any decision I make up here, do I take lightly. I have methodically gone through each bit of information that's been provided to me. And made what I believe to be, not easy, not easy on my part, but made what I believe to be the right decision in this case.

One of the hardest parts of my job, and I know having done criminal defense work. But one of the hardest parts of my job, to see the terrible, terrible decisions that children make, young people make. People in general make, that have tremendous consequences on their lives. Tremendous. It is with no pleasure at all that I affirm so to speak, or deny [Smart's] motion and impose a life sentence. There's nothing more than I've told countless defendants that have come in front of me, I want you to succeed. I want you to do the right thing. But at the end of the day, it's your decision. At the end of the day, albeit he was 16-years-old, it was his decision to huff gas. It was his decision to pick up that pole,

> that 15 or 16-pound pole, and beat Tracy Pack to death. It was his decision. I have taken all of these factors into consideration and I still believe it's the right decision. Will I lose sleep over it, probably so. Probably so. But I always wonder whether or not you did the right thing. These decisions aren't easy. . . And I've tried to hit on each of these points in coming to this conclusion. Again that's not – it wasn't easy. But I have tried to address each of those issues. Each of them. And I think I have. If I haven't, I am sorry, but I tried to.

(R. p. 392, line 20-p.396, line 13).

To sum up, Smart, a juvenile homicide offender, received the relief mandated. He had his individualized sentencing. Though not required to do so, the resentencing judge even made specific findings on the record based on the *Miller* factors. The record demonstrates the judge acted within his discretion to tailor a sentence appropriate to Smart given all the information he had before him. Smart is not entitled to anything further.

CONCLUSION

For all the above reasons, and those more fully argued and presented in the Final Brief of Respondent, Smart has not shown a deficiency in the proceedings below. Further, Smart has not shown an error in this Court's opinion. Consequently, rehearing is not warranted, and the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Melody Brown, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Joanna K. Delany, Esquire via email today, August 2, 2021 to jdelany@sccid.sc.gov, and to her assistant Kat Kasperski, at KKasperski@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of August, 2021.

s/ Melody J. Brown

Melody J. Brown
Senior Assistant Deputy Attorney General