

IN THE SUPERIOR COURT OF PENNSYLVANIA

660 EDA 2015

COMMONWEALTH OF PENNSYLVANIA

V.

MICHAEL FELDER, APPELLANT

REPLY BRIEF OF APPELLANT

Appeal from the October 24, 2014 Judgment of Sentence in the Court of
Common Pleas, Philadelphia County, Docket CP-51-CR-0014896-2009.

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I. STATEMENT OF THE CASE

This matter comes before this Court following a timely filed appeal. Appellant Michael Felder filed his principal brief on August 5, 2016 and the Commonwealth filed its brief as appellee on September 1, 2016. Appellant sought and received an extension of time in which to file his reply brief and now timely files this reply brief. Appellant relies upon the Statement of the Case in his original brief.

II. SUMMARY OF THE ARGUMENT

To justify the sentence of 50 years to life imprisonment meted out to the seventeen-year child in this case the Commonwealth initially contends that such a sentence is not a life sentence. Moreover, the Commonwealth asserts, no attempt was made by counsel to prove that this was a *de facto* life sentence (Commonwealth's Brief as Appellee at 2, 10, 11). The Commonwealth, however, ignores the fact that counsel contended that the sentence was a *de facto* life sentence in a timely filed post-sentence motion and that the trial court never gave counsel a hearing to prove that this was a *de facto* life sentence. Counsel's post-sentence motion was denied by operation of law.

The Commonwealth next declares that statistics from the Internal Revenue Service, the Center for Disease Control, the CIA and the Social Security Administration all suggest that a free citizen living today would live into their 70s or 80s. While statistically true, it is factually irrelevant because Michael Felder is not a free citizen living on the streets, but is a prisoner incarcerated in a dangerous institution. Statistics from New York, for example, suggest that there is a two year decline in life expectancy for each year a person is incarcerated. Brief for Appellant at 15. There is ample case law from other states finding similarly lengthy sentences to be *de facto* life sentences barred by Graham v. Florida, 560 U.S. 48 (2010), Miller

v. Alabama, 132 S. Ct. 2455 (2012) and Montgomery v. Louisiana, 136 S. Ct. 718 (2016). While the Commonwealth does cite some states that permit such lengthy sentences, those decisions are outliers.

Lastly, the Commonwealth attempts to justify the 50 year to life sentence as being part of the inherent legislative function of determining the sentencing range. If true, then the Commonwealth should agree that third degree murder is the only lawful legislatively established sentencing scheme available after the United States Supreme Court decision in Miller v. Alabama, *supra*, invalidated the Pennsylvania first and second degree murder sentencing statutes as applied to juveniles.

III. ARGUMENT

MICHAEL FELDER, A JUVENILE, WAS GIVEN A *DE FACTO* LIFE SENTENCE WITHOUT ANY OF THE PROCEDURAL PROTECTIONS REQUIRED BY MONTGOMERY V. LOUISIANA, 136 S. Ct. 718 (2016) AND MUST, THEREFORE, BE GIVEN A NEW SENTENCING HEARING.

While Michael Felder's appeal was pending in this Court, the United States Supreme Court decided Montgomery v. Louisiana, 136 S. Ct. 718 (2016). As a result, the trial judge did not have an opportunity to evaluate the impact that decision would have had on the sentence she meted out: 50 years to life imprisonment. As that sentence was an abuse of discretion and amounted to a *de facto* life sentence in violation of Graham v. Florida, 560 U.S. 48 (2010), Miller v. Alabama, 132 S. Ct. 2455 (2012) and Montgomery, this Court should remand the instant matter for a new sentencing hearing.

To analyze this issue it is important to recognize the parameters established by the United States Supreme Court in its decisions in Graham, Miller and Montgomery. The Commonwealth correctly recognizes that the United States Supreme Court in Graham mandated that a sentence given a juvenile must provide "some realistic opportunity to obtain release" before that person would die. Commonwealth's Brief as Appellee at 8, quoting Graham, *supra* at 82. The Commonwealth also agrees that,

“It is theoretically possible for a minimum sentence to be so long as to deny the opportunity [for parole] in practice.” Commonwealth’s Brief as Appellee at 11. In describing the “realistic opportunity” for parole, the Graham Court suggested that it is more than the opportunity for release before death; it must provide a “chance for fulfillment outside prison walls,” a “chance for reconciliation with society” and a opportunity for “hope.” Graham, supra at 79. So the question is, is a fifty year minimum such a sentence?

After receiving the 50 years to life sentence, counsel petitioned for reconsideration of that sentence in a timely filed post-sentence motion.¹ In that motion counsel contended that his 50 years to life sentence was a *de facto* life sentence. See Petitioner’s Post-Sentence Motion at paragraphs 2, 9, 10, 11. Counsel further maintained in that motion that the United States Sentencing Commission defined a life sentence as being 470 months. See Petitioner’s Post-Sentence Motion at paragraph 9. Counsel also pointed out that the Pennsylvania Sentencing Guidelines established a 35 year minimum for a conviction such as this. See Petitioner’s Post-Sentence Motion at paragraph 9.

In its brief, the Commonwealth declares that Michael Felder “never tried to

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Counsel’s post-sentence motion was included as Exhibit “B” in his brief.

prove” that he had received a *de facto* life sentence. See Commonwealth’s Brief as Appellee at 2, 10, 11. The facts directly establish the contrary. Counsel had proffered such evidence but the trial court did not permit counsel to prove that he had received a *de facto* life sentence. The trial court did not set up a hearing on the post-sentence motion and it was denied by operation of law.

Appellant cited numerous cases that have held that sentences of about fifty years constitute life sentences and that such sentences are contrary to Graham, Miller and Montgomery. See Casiano v. Commissioner of Correction, 317 Conn. 52, 115 A.3d 1031 (2015), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016) (Brief for Appellant at 14-16), Bear Cloud v. State, 334 P.3d 132 (Wyoming 2014) (Brief for Appellant at 17), State v. Null, 836 N.W. 2d 41 (Iowa, 2013) (Brief for Appellant at 16), Thomas v. Pennsylvania, 2012 WL 6678686 (E.D. Pa. 2012) (Brief for Appellant at 16, n.8). To that growing list can now be added Tyson v. State, No. 5D15-4050, 2016 WL 4585974 (Fla. Dist. Ct. App. Sept. 2, 2016) (45 year sentence with parole eligibility at about age 62) and Peterson v. State, 193 So.3d 1034 (Fla. Dist. Ct. App. 2016) (56 year prison sentence with parole eligibility at about age 74). While there are cases to the contrary (see Commonwealth’s Brief as Appellee at 11-12), an examination of the cases relied upon by appellant reveal better analysis, often utilizing hard data about average life

spans.

Similarly, the Federal Sentencing Commission defines a life sentence as 470 months (just over 39 years) (Brief for Appellant at 17).² To challenge this, the Commonwealth cites United States v. Walton, 537 F. App'x 430, 437 (5th Circuit, 2013) (Commonwealth's Brief as Appellee at 9). However, while the Commonwealth correctly notes that it is an unpublished decision, the Commonwealth neglects to inform this Court that based upon the Fifth Circuit's Rules, an unpublished decision is not precedential. The Walton decision, itself, notes in footnote "*" that "the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4." An examination of the 5th Circuit's Rule 47.5.4 reveals that it is virtually identical to this Court's own rule regarding the citation of unpublished memorandum decision, Internal Operating Procedure Rule 65.37. The 5th Circuit's Rule 47.5.4 reads:

²

The Commonwealth admits that the Federal Sentencing Guidelines do declare that the 470 month number is consistent with the average life expectancy of federal inmates. See Commonwealth's Brief as Appellee at 8, fn. 3. However, the Commonwealth then declares that only 1.1% of federal sentences are life sentences so the sample size makes analysis unreliable. Nothing is cited in support of the Commonwealth's assertion of unreliability. Similarly, nothing is cited to support the Commonwealth's view that the federal government does not allow prisoners to die in prison, but removes them by compassionate release. Continuing on its flight of fancy, the Commonwealth declares with no support that the "470 month" number is no more than a budgetary device to obtain funding.

Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b).

5th Cir. R. 47.5.4.

There is ample basis to support the conclusion by the Federal Sentencing Commission that a 39 year sentence is a *de facto* life sentence. The Casiano Court noted that data from Michigan suggests that juvenile lifers have a life expectancy of a little over 50 years and that data from New York suggests that there is a two year decline in life expectancy for each year spent in prison. See Brief of Appellant at 15-16.

The Commonwealth takes issue with this hard data by citing hard data of its own. The Commonwealth notes that according to the Internal Revenue Service, the Center for Disease Control, the CIA and the Social Security Administration a free citizen living today would live into their 70s or 80s. Commonwealth's Brief as Appellee at 9-10. While statistically true, it is factually irrelevant as we are

examining the life expectancy of people incarcerated in prisons. The Commonwealth does not acknowledge this critical distinction.

A similar situation to that presented here arose in People v. Ellis, 2015 WL 4760322 (Colorado Court of Appeals, 2015). There, while the case was pending on appeal, the United States Supreme Court decided Miller. Here, it was Montgomery that was decided when this case was pending on appeal. People v. Ellis examined the issue of life expectancy in light of Miller and remanded the matter for a determination of Ellis' life expectancy. That might be similarly appropriate here where Michael Felder was denied the opportunity to establish life expectancy, though the issue was timely raised in his post-sentence motion.

On appeal appellant challenged the trial court discretion's in giving out the 50 year to life sentence. Appellant noted that the trial judge relied almost exclusively in her written opinion on the facts as justifying the instant sentence. This was improper. Brief for Appellant at 23-24. Appellant also challenged the standard of review in this Court, maintaining that the traditional abuse of discretion standard is not appropriate when examining a lengthy sentence as the one imposed here. Brief for Appellant at 26-27. Appellant relies upon the arguments contained in his principal brief to respond to the Commonwealth's arguments on these claims.

Appellant argued that he was entitled to the same procedural protections.

accorded capital cases. Appellant relies upon the arguments contained in his principal brief to respond to the Commonwealth's argument on this claim.

Lastly, appellant maintained that a sentence for third degree murder was the only lawful sentence after the United States Supreme Court in Miller rendered invalid the Pennsylvania sentencing statute for juveniles convicted of first and second degree murder. Brief for Appellant at 31-36. This is similarly the conclusion of Songster v. Beard, ___ F.Supp.3d ___, 2016 WL 4379233 (E.D. Pa., 2016). The Commonwealth responded to the argument that Michael Felder received a *de facto* life sentence by declaring that the determination of sentence was "inherently [a] legislative task." Commonwealth's Brief as Appellee at 13. If the Commonwealth is correct, then there is no legislative statute other than third degree murder which would apply after Miller. Hence, appellant agrees with the Commonwealth that a sentence for third degree murder is the only lawful sentence permitted. That may also be the only conclusion from Songster. U.S. CONST., Amend. V, VIII, XIV.

IV. CONCLUSION

This Honorable Court should vacate Michael Felder's *de facto* sentence of life without parole as unconstitutional and remand the instant matter for resentencing. Alternatively, his sentence should be vacated and remanded for resentencing consistent with third degree murder.

Respectfully submitted,

/S/

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