

Before the Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellee

v.

KYLE PATRICK,

Defendant-Appellant

} Case No
}
}
}
}

On Appeal from the Court of Appeals
for Mahoning County, Ohio
Seventh Appellate District
Case No 2017 MA 0091

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION
OF APPELLANT KYLE PATRICK

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EXPLANATION OF WHY THIS IS A CASE OF GREAT GENERAL OR PUBLIC INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is one of great general or public interest and involves a substantial constitutional question because the United States Supreme Court has held that juveniles are constitutionally different than adults for sentencing purposes. The Supreme Court, of course, was interpreting and applying the Federal Constitution's Eighth Amendment. While that Amendment doubtless applies to Ohio criminal prosecutions by virtue of the Fourteenth Amendment's Due Process Clause, Ohio, too, has its own separate constitutional provision that bars excessive punishments by the government of Ohio.

This is a homicide case involving a seventeen year old offender who was tried as an adult. After conviction, virtually nothing was done either by counsel or the trial court to explore the developmental differences between this Appellant and an adult male. The Court of Appeals in this case, with all due deference, brushed aside the Appellant's arguments by making the simple, yet only partially accurate, distinction that this case, because it involved a homicide, was not subject to the relatively recent strictures that the United States Supreme Court has placed upon juvenile sentencing in applying the Eighth Amendment.

This Court has held that Ohio's Constitution is a separate document of independent force, standing alone and independent from the Federal Constitution. In determining how best to breathe life into the Ohio constitutional protection, the Court

should borrow from the standard adopted long ago by the United States Supreme Court and applied to the Federal Constitution: that the imposition of punishment, while presumptively governed by legislative enactment and judicial discretion, is nonetheless further limited by the Constitution. Any punishment must demonstrate a mixture of justice with the enlightenment of evolving standards of decency that mark the progress of a maturing society.

Much has been learned in recent years about the differences between juveniles in adults—not simply the physical growth, but marked differences in maturity and brain development. The inability of the Appellant here to completely comprehend the gravity of his legal situation demonstrates that lack of maturity. Appellant’s trial counsel at sentencing told the judge that he (counsel) was never completely able to have the Appellant understand the concept of complicity—that he might be punished as severely as the person whom Appellant claims pulled the trigger. And so the United States Supreme Court has rightly recognized the constitutional difference and distinction between juvenile sentencing and adult sentencing. If the United States Constitution as applied in the courts of this State, and if the Ohio Constitution is to truly guard against excessive punishment, then, even in a case involving a homicide, where there is a juvenile offender who is tried as an adult, the trial court may not simply nod and punish the juvenile as if he were an adult. Neither the Eighth Amendment nor the Ohio Constitution permit this dropping of the ball, as it were. The failure to take into

account at sentencing that the Appellant was 17 years old at the time of the commission of these offenses and should not be sentenced as if he were an adult without at least *considering* the mitigating factors of youth and incomplete development was constitutional error. This Court must not only instruct the lower courts in this case, but all of the trial and appellate courts of the State.

Thus, this case presents an opportunity for this Court to buttress public confidence in the justice system by demonstrating that juvenile offenders in this State who are tried as adults, nonetheless must be treated as constitutionally “different” for sentencing purposes, and by holding that any sentencing process that fails to take into account this crucial difference is constitutionally infirm. In addition to providing the Court an opportunity to buttress public confidence in our justice system, the case presents an opportunity for the Court to furnish clear guidance to the lower courts of the State. The case therefore both presents a substantial constitutional question and is one of great general or public interest. It of course involves a felony.

COMBINED STATEMENT OF FACTS AND OF THE CASE

On April 27, 2012 Michael Abighanem (known throughout the trial as “Big Mike”) was shot and killed at a home on the west side of Youngstown, in Mahoning County. A Youngstown Police Department investigation revealed that Big Mike and his friend, Michael Nakoneczny (“Little Mike”), drove to the west side home hoping to sell a Playstation gaming system. The investigation also showed that 4 others may have

been at the home. They were JuJuan Jones, Eric Longcoy, Reginald Whitfield, and the Defendant-Appellant KYLE PATRICK. PATRICK was just 17 years old at the time. A juvenile probation officer from the Mahoning County Juvenile Court, accompanied by other officers, later searched PATRICK's residence. With others, PATRICK was charged with big Mike's murder. The juvenile court bound PATRICK to the general division to be tried as an adult. At one point, PATRICK entered a plea, then attempted to vacate it. The trial judge refused, but the Court of Appeals for the Seventh Appellate District reversed. PATRICK's plea was vacated and he went to trial.

The State's trial testimony was far from cohesive. Big Mike went upstairs to demonstrate to Whitfield that the PlayStation that Big Mike had come to sell was actually operable. There was conflicting testimony about what Longcoy knew and heard; conflicting testimony about whether Jones was inside the house or outside the house when the fatal shots were fired, conflicting testimony about whether PATRICK shot Big Mike. "Little Mike" testified that while "Big Mike" went upstairs, he, Little Mike, was detained by someone, probably Jones, asking Little Mike to look at jewelry. Jones, however, claimed that he never went into the house and showed Little Mike the jewelry on the porch. Longcoy claimed not to have seen anything, giving a frail "they pointed a gun to my head" rendition of facts.

PATRICK admitted to being upstairs hiding. When he talked to Youngstown police, each version of his events indicated that he was not the shooter who killed Big

Mike. Big Mike died from a gunshot wound that pierced the aorta and liver.

The trial jury was given only the option to find PATRICK guilty of aggravated murder or to acquit him. The jury, which heard that PATRICK admitted to the Youngstown Police that he, PATRICK, was hiding in the closet when Big Mike was escorted into the upstairs bedroom by Whitfield, found PATRICK guilty. The trial court sentenced PATRICK the following week. If there was a pre-sentence report or anything else that the judge reviewed to tell him about this juvenile, the trial record fails to disclose it. The trial judge sentenced PATRICK to life imprisonment with no eligibility for parole until after serving 30 full years. There was also a three year firearm specification. From the conviction and sentence, PATRICK appealed. The Court of Appeals for Mahoning County, Ohio, Seventh Appellate District, affirmed the trial court on March 29, 2019. Its judgment appears in the Appendix, *post*.

ARGUMENT

Proposition of Law No 1: Imposition of a Any Life Imprisonment Sentence Upon a Juvenile Offender Without Taking Into Consideration Factors Commanded by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of Ohio violates those provisions.

The Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Ohio Constitution require a judge sentencing a juvenile offender tried as an adult to consider more than traditional sentencing factors, and to consider the lessened moral and mental development of a juvenile and likelihood of

rehabilitation upon attaining moral and mental maturity.

The trial judge declared “easy” what sentence should be imposed. It should have been anything *but* easy. The trial court lost sight of two important factors, each of tremendous constitutional significance. First, by instructing on complicity without a separate verdict form to allow the jury to decide whether PATRICK was guilty as the actual killer or an aider and abettor, the court left itself no conclusion but that PATRICK was the actual killer. He was sentenced as an adult with no *consideration* of the mitigation afforded by Appellant’s youth and incomplete brain development. But PATRICK’s sentence violates the Eighth Amendment and Article I, Section 9 of Ohio’s Constitution. The trial court also lost sight that PATRICK was a juvenile when the crimes occurred. The trial court failed to account for this fact, even if the statutory law of Ohio has not kept abreast of sentencing juveniles tried as adults.

In the recent past, the United States Supreme Court has decided 3 cases holding that the juvenile sentencing practice in each violated the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), held that imposing the death penalty on juvenile offenders violates the Eighth Amendment. *See*, 543 U.S., at 578. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), held that a life without parole sentence for juveniles convicted of non-homicide offenses violates the Eighth Amendment. *See*, 560 U.S. at 82. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), held that a mandatory life without parole sentence imposed on

juveniles convicted of homicide offenses violates the Eighth and Fourteenth Amendments. *See*, 460 U.S., at 479. The core of these opinions is the immutable recognition that children, when compared to adults, are less culpable than adults and more capable of rehabilitation than adults; and, it is precisely these differences that make it cruel and unusual to impose the most severe sentences upon children. While it must be conceded here that the *most* severe sentence of life without parole was not imposed, it must also be acknowledged that the sentence here is one that is imposed on a hard-core adult offender who demonstrates little opportunity for rehabilitation, and without so much as considering youth and lack of mental and moral development. The sentence imposed ignored the settled fact that “[a] juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’” *See*, *Graham v. Florida*, 560 U.S., at 68, quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

Proportionality is not to be ignored or discarded; quite the opposite is true. The sentencing of juvenile offenders tried as adults *requires* the trial court to consider proportionality. This trial judge, who gave the person whom PATRICK claims was the actual killer, Whitfield, a 13 year sentence, found it “easy” to sentence PATRICK to life without a *chance* at parole for *at least* 33 years. Are we to believe that a judge as intelligent and experienced as this one was uninformed about the underlying facts of the case when he handed down the 13 year sentence to Whitfield, who at the time was

a young adult? PATRICK's sentence here flouts the rationale of these cases because the sentence, and indeed the sentencing hearing, fails to take account of PATRICK's diminished culpability and his greater capacity for change as a juvenile. "An offender's age," the Supreme Court made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham, supra*, 560 U.S., at 76. Chief Justice John Roberts concurred in the judgment in *Graham*. Although rejecting the Court's categorical bar on life-without-parole sentences for juveniles, he wrote:

But the fact that *Roper* does not support a categorical rule barring life sentences for all juveniles does not mean that a criminal defendant's age is irrelevant to those sentences. On the contrary, our cases establish that the "narrow proportionality" review applicable to noncapital cases itself takes the personal "culpability of the offender" into account in examining whether a given punishment is proportionate to the crime. *Solem, supra*, at 292. There is no reason why an offender's juvenile status should be excluded from the analysis. Indeed, given *Roper's* conclusion that juveniles are typically less blameworthy than adults, 543 U.S., at 571, an offender's juvenile status can play a central role in the inquiry.

Graham, 560 U.S., at 90 (ROBERTS, Ch.J., concurring in the judgment). Just as poignant were the brief words of the invariably insightful John Paul Stevens. Stevens and Justices Ruth Bader Ginsburg and Sonia Sotomayor challenged Justice Clarence Thomas' "rigid" interpretation of the Eighth Amendment:

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied

in the Eighth Amendment, *proportionality review must never become effectively obsolete, post*, at ___-___, 176 L. Ed. 2d, at 864-865, and n. 2.

560 U.S., at 85 (STEVENS, J., joined by GINSBURG and SOTOMAYOR, J.J., concurring). Knowledge has accumulated. We now know these are not adults masquerading in the body of the youth. Rather, these are youths, often masquerading in men's bodies, often unfortunately carrying men's deadly weapons, but still with the brain and morality of a child. *See, e.g.*, Elizabeth S. Scott, "Children are Different": Constitutional Values and Justice Policy, 11 OHIO ST. J. CRIM. L. 71 (2013).

Graham held that a juvenile who does not commit homicide cannot be sentenced to life without parole because such juveniles "are categorically less deserving of the most serious forms of punishment than are murderers ... [A] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *See, Graham, supra*, 560 U.S., at 69. Here, PATRICK did not admit that he was the principal in the homicide (and denied it through his counsel at sentencing), and we do not know if the jury found that he killed or intended a killing to take place. We simply know that the jurors found him guilty of *either* the principal offense or of being a complicitor. The Court of Appeals passed on this as briefly as it did ineffectively, *viz.*, "In this case, appellant was convicted of a homicide offense and was sentenced to life with parole possibility after 33 years. These facts make *Graham* and *Thompson* distinguishable to the extent that appellant can be paroled after 33 years." *Opinion of Court of Appeals*, 15.

The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders, but it also “guarantees individuals the right not to be subjected to excessive sanctions.” *See, Roper v. Simmons*, 543 U.S., at 560. That right “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’” to both the offender and the offense. The trial court failed to consider PATRICK’s age, the Supreme Court’s “proportionality principle,” *see, Note, “The Eighth Amendment, Proportionality, and the Changing Meaning of “Punishments,”* 122 HARV. L. REV. 960, 963 (2009).

Roper and *Graham* make clear that children are constitutionally different from adults for sentencing purposes. Their “‘lack of maturity’” and “‘underdeveloped sense of responsibility’” lead to recklessness, impulsivity, and heedless risk-taking. *See, Roper, supra*, 543 U.S., at 569. Children unquestionably “are more vulnerable * * * to negative influences and outside pressures,” including from their family and peers. Children also have limited “contro[l] over their own environment.” Children lack the ability to extricate themselves from horrific, crime-producing settings. And, the Court held in *Roper*, because a child’s character is not as “well formed” as an adult’s, his traits are “less fixed” and his actions are less likely to be “evidence of irretrievabl[e] deprav[ity].” *See, Roper, supra*, 543 U.S., at 570. *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Thus, the

imposition of 33 years to life should have been anything but “easy.” The fact that there is a life “tail” which was imposed without considering any of the facts peculiar to juvenile offenders does not guarantee a juvenile a sentence that is not “excessive.”

The categorical ban on life without parole in *Graham* was for non-homicide crimes. However, nothing that the Court in *Graham* said about children and their delayed development and maturity was crime-specific. Thus, *Graham*'s reasoning applies with equal force here. The mandatory penalty scheme here, that prohibits consideration of parole for 33 years was the direct product of the sentencer failing to consider youth, and failing to assess whether that harsh term of imprisonment proportionately punishes a juvenile offender. *Graham* also makes relevant cases that demand individualized sentencing. Accordingly, the trial court, by sentencing a 17 year old to a term where he cannot even be *considered* for parole until he is more than 50 years old, violated the Eighth Amendment and Article I, Section 9 of the Ohio Constitution. This Court must accept jurisdiction, and, after briefing, remand for re-sentencing with instructions to consider the factors elucidated in *Graham*, *Miller*, and *Roper*. This Court cannot say what sentence should be imposed in a given case, but it can say what the Constitution requires a sentencing court to consider.

Proposition of Law No 2: It is a denial of due process a denial of the right to trial by jury to invade the province of the jury's fact-finding charge by refusing to give a lesser included instruction, thereby giving the jury the option only to convict on the indicted offense or to acquit.

At sentencing, the trial judge said:

Attorney Lavelle did an amazing job for you given the facts, but at the end of the day, the jury unanimously concluded that this wasn't reckless; this wasn't an accident; this wasn't anything other than a purposeful plan to rob Michael Abighanem.

Actually this is an easy call for me given what I now know from the evidence introduced at trial and given the verdict of the Jury.

The verdict of the jury made it an "easy" choice to increase the sentence of *a child* by a minimum of 17 years. It was "easy" without a factual finding as to who was the actual killer to sentence PATRICK to a term that will not permit him to be considered for parole until more than 20 years after his adult co-defendant, whom PATRICK claims was the actual killer, is released from prison. The fact is, the Judge left the jury only one verdict. The trial court said that "the jury unanimously concluded that this wasn't reckless; this wasn't an accident; this wasn't anything other than a purposeful plan to rob Michael Abighanem" was disingenuous. The jury was denied the opportunity to make such a finding, though it was specifically requested by PATRICK's trial counsel. The jury could not possibly find that PATRICK's conduct was reckless. The reasoning behind why this is constitutionally odious comes from the Supreme Court of the United States' decision in *Beck v. Alabama*, 447 U.S. 625, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980). There, the United States Supreme Court held that in capital cases, a state court must

give instructions on lesser-included offenses which are supported by the evidence. Again, the appellate court brushed this off all too quickly. It found, *Opinion of the Court of Appeals*, at ¶28, that “[t]he key distinction between these two offenses is the requisite level of intent.”

Beck might at first blush seem inapplicable, because it is a capital case ostensibly decided on Eighth Amendment grounds. But in *Hopper v. Evans*, 456 U.S. 605, 611, 72 L.Ed.2d 367, 102 S.Ct. 2049 (1982), the Court clarified *Beck*, and held that *due process* requires that a lesser-included offense instruction be given when the evidence warrants such an instruction. In any event, *Beck* could only apply to the Alabama state court prosecution by virtue of the Due Process Clause of U.S. CONST., amend. XIV, so of course due process is implicated even in *Beck*. Indeed, to ignore the due process implications of *Beck* and *Hopper* is to hold that capital defendants have Eighth Amendment rights, but not due process rights. *Hopper* specifically mentioned entitlement to “a lesser-included offense instruction as a matter of due process.” *Hopper*, *supra*, 456 U.S. at 609.

Trial counsel asked for instructions on both voluntary and involuntary manslaughter. It clear that the failure to instruct on involuntary manslaughter was error. Standing alone this error might not make this case one of great public or general interest or raising a constitutional question. But the judge in this case failed to consider PATRICK’S youth and said that the sentence was “easy” to impose because the jury didn’t

find that PATRICK acted recklessly. The judge, however, gave the jury only two choices: find that PATRICK acted purposefully, or find that he did not act at all, and the latter of course was not a realistic possibility.

CONCLUSION

Even though a homicide offense was involved here, the excessive punishment provisions of the Ohio and United States Constitutions require a sentencing court to take into account the mitigating effects of youth. Not only did the trial court not do so here, but the court pronounced the imposition of its "adult" sentence to be "easy" because the jury found that PATRICK acted purposefully. Yet, the insufficient instructions in this case gave the jurors no other realistic choice. Because the excessive punishments provisions of the Ohio and United States Constitutions are involved, this obviously is a case that involves a substantial constitutional question. But this case is also one of great general public-interest because youthful offenders tried as adults may be *tried* as adults but they may not be *sentenced* as adults. This Court should therefore accept jurisdiction, and, after briefing, reverse and remand the case, with clear instructions to the trial court in this case and indeed the trial courts across the State as to how sentencing of juveniles tried as adults must take place.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was: hand delivered; sent by regular U.S. Mail; sent by telecopier; sent by electronic mail this 17 day of May, 2019 to Mr. Ralph M. Rivera, Esq., Mahoning County Prosecutor's Office, 21 West Boardman Street, Youngstown, Ohio 44503.



JOHN B. JUHASZ

APPENDIX

Judgment and Opinion of Court of Appeals App. 1