SJC-13035

COMMONWEALTH vs. SUNIL SHARMA.

Suffolk. March 5, 2021. - August 3, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Homicide. Parole. Imprisonment, Parole. Constitutional Law, Sentence. Due Process of Law, Sentence. Practice, Criminal, Parole, Sentence. Regulation. Statute, Construction.

Indictments found and returned in the Superior Court Department on November 25, 1996.

A motion to vacate sentences, filed on November 4, 2019, was considered by Christine M. Roach, J.

The Supreme Judicial Court granted an application for direct appellate review.

Emma Quinn-Judge for the defendant.

Paul B. Linn, Assistant District Attorney, for the Commonwealth.

Rebecca Rose, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

CYPHER, J. On April 16, 1996, the defendant, Sunil Sharma, who was seventeen years old at the time,[1] shot and killed the victim at a restaurant in the Chinatown section of Boston. The defendant also shot and injured two other individuals. On April 28, 1999, the defendant pleaded guilty to murder in the second degree, G. L. c. 265, § 1; two counts of armed assault with intent to murder, G. L. c. 265, § 18 (b); and one count of illegal possession of a firearm, G. L. c. 269, § 10 (a). He was sentenced to life in prison with the possibility of parole for the murder conviction, and two sentences of from seven to ten years for the assaults to run concurrent to each other but consecutive to the life sentence.[2]

The defendant was paroled from his life sentence for murder on June 11, 2019, to serve his sentences on the remaining charges, pursuant to 120 Code Mass. Regs. § 200.08 (2017) (§ 200.08). He then moved to vacate the remaining sentences and for resentencing pursuant to Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001). The motion was denied by a

[1] The defendant filed a motion to dismiss, arguing that he was sixteen years old at the time of the shooting. After an evidentiary hearing, the judge found the evidence that the defendant was seventeen, rather than sixteen, more credible and denied the motion.

[2] The defendant also received a sentence of from one year to one year and one day for illegal possession of a firearm to run concurrently with his sentence on the first assault charge.

Superior Court judge (motion judge), and the defendant appealed. Because § 200.08 distinguishes parole for life sentences from other sentences and is therefore invalid, see Dinkins v. Massachusetts Parole Bd., 486 Mass. 605, 610-614 (2021), and the defendant already has served the aggregate minimum of his sentences, we conclude that the defendant is entitled immediately to a parole hearing.

In regard to the legality of the defendant's sentences, we conclude that the motion judge failed to consider the specific circumstances and unique characteristics of the defendant as a juvenile. Accordingly, we remand for a hearing to consider whether the defendant's sentences comport with art. 26 of the Massachusetts Declaration of Rights and, if necessary, resentencing.[3]

Background. At the plea hearing, the defendant admitted to the following facts. On April 16, 1996, Kyung Shin, the victim, was eating dinner with friends at a restaurant in the Chinatown section of Boston. Two of the victim's friends, Rick Lee and Tuan Nguyen, were planning to meet the defendant and two of his friends at the restaurant that evening.

[3] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services, Juvenile Law Center, and Massachusetts Association of Criminal Defense Lawyers.

The defendant and his friends arrived at the restaurant around 8:30 P.M. Lee and one of the defendant's friends began to argue. During the argument, the defendant went outside to get a gun he had hidden under a car. The defendant brought the gun into the restaurant and fired the gun five times at Lee and Nguyen. Nguyen was shot in the hand and groin; Lee was shot in the back; and the victim, who was sitting behind Lee, was shot in the chest. The victim died from the piercing of her heart and lung by a bullet. The defendant and his friends fled from the restaurant.

The defendant was arrested a few months later in Detroit, Michigan, and was returned to Boston, where he confessed to the shooting. The defendant also took police to retrieve the murder weapon that he had thrown into a river in the East Boston neighborhood of Boston.[4]

On November 4, 2019, the defendant filed the motion at issue in this case for relief from unlawful confinement under Mass. R. Crim. P. 30 (a) (rule 30 [a]). The Commonwealth filed an opposition to the motion. On March 9, 2020, the motion judge denied the motion without a hearing, and the defendant filed a timely notice of appeal. We granted the defendant's application for direct appellate review.

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[4] Ballistics testing established that the gun recovered from the river in East Boston was consistent with the murder weapon.

Discussion. 1. Parole eligibility. We first address the defendant's parole eligibility in light of our decision in Dinkins, 486 Mass. at 610-611. General Laws c. 127, § 130, provides that once an inmate is granted parole, he or she "shall be allowed to go upon parole outside prison walls and inclosure upon such terms and conditions as the parole board shall prescribe." General Laws c. 127, § 133, requires the parole board to establish a single parole eligibility date when an inmate is serving two or more consecutive sentences. "Once an inmate has served the minimum term of his or her sentence, the inmate may be eligible for parole. See G. L. c. 127, § 133." Dinkins, supra at 609. When an inmate receives two or more consecutive sentences, the inmate's "parole eligibility date is calculated by aggregating the minimum parole eligibility dates for each component sentence and using the latest date as the parole eligibility date -- a process often referred to as 'aggregation' or the 'aggregation rule.'" Id. See 120 Code Mass. Regs. § 200.08(2).

In Dinkins, supra at 610-611, we held that 120 Code Mass. Regs. § 200.08(3)(c) (§ 200.08[3][c]), which creates an exception to the aggregation rule resulting in multiple parole eligibility dates for individuals with sentences consecutive to a life sentence, contravenes the plain meaning of G. L. c. 127, §§ 130 and 133, and therefore is invalid. Section 200.08(3)(c)

provides: "A sentence for a crime committed . . . which is ordered to run consecutive to a life sentence shall not be aggregated with the life sentence for purposes of calculating parole eligibility on the consecutive sentence." We concluded, however, that inmates are entitled to a single parole eligibility date, even if one of their sentences is a life term. Dinkins, supra at 615-616. We recognized that to hold otherwise would result in inmates being paroled and released into confinement. Id. at 615.

Our decision in Dinkins, 486 Mass. at 615, was based in large part on the fact that the statutory purpose of parole is to determine whether a prisoner is rehabilitated and can be released without again breaking the law. See Henschel v. Commissioner of Correction, 368 Mass. 130, 136 (1975). To require more than one parole hearing "would make little sense, be wasteful of the board's limited time and resources, and create additional burdens on the inmates seeking parole." Dinkins, supra. Accordingly, the parole eligibility date for an inmate serving consecutive sentences should instead be calculated by aggregating the minimum parole eligibility dates for each sentence. Id.

The same regulation at issue in Dinkins resulted in the defendant in this case being paroled into prison. Under § 200.08(3)(c), the defendant became eligible for parole on his

life sentence in 2011, but not eligible for parole on his nonhomicide sentences until seven years after he was paroled on his life sentence. On June 11, 2019, following his second parole hearing, the defendant was paroled from his life sentence after twenty-two years of incarceration to serve his on-and-after nonhomicide sentences. At that time, the parole determination only applied to his life sentence, despite the fact that the parole board (board) formed "the unanimous opinion that [the defendant] is rehabilitated and, therefore, merits parole at this time."

Applying our holding in Dinkins, 486 Mass. at 606, that the regulation at issue is "contrary to the plain terms of the statutory framework governing parole and thus is invalid," we conclude that the defendant is entitled immediately to a parole hearing. The defendant already has served the aggregate minimum of his sentences, twenty-two years. Provided nothing has changed since the defendant's last parole hearing, he should be parole eligible immediately.

2. Legality of the sentence. Although we conclude that the defendant is entitled to an immediate parole hearing, we separately analyze the legality of the defendant's sentence.

a. Standard of review. We review the judge's denial of a rule 30 (a) motion for abuse of discretion or error of law. Commonwealth v. Perez, 480 Mass. 562, 567 (2018) (Perez II).

When reviewing claims of constitutional error, we accept the judge's factual findings absent clear error but independently review the application of constitutional principles. Id. at 567-568.

b. Proportionality. The defendant argues that his consecutive sentences for homicide and nonhomicide offenses are unconstitutionally disproportionate under the Eighth Amendment to the United States Constitution and art. 26. We resolve this issue under art. 26, which affords a defendant greater protections than the Eighth Amendment. See Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 668 (2013), S.C., 471 Mass. 12, 27 (2015). "The touchstone of art. 26's proscription against cruel or unusual punishment . . . [is] proportionality." Commonwealth v. Concepcion, 487 Mass. 77, 86 (2021), quoting Commonwealth v. Perez, 477 Mass. 677 (2017) (Perez I). "The essence of proportionality is that punishment for crime should be graduated and proportioned to both the offender and the offense" (citation and quotation omitted). Perez I, supra at 683. "To reach the level of cruel and unusual, the punishment must be so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'" Commonwealth v. LaPlante, 482 Mass. 399, 403 (2019), quoting Cepulonis v. Commonwealth, 384 Mass. 495, 497 (1981). Because the Legislature has broad discretion in

prescribing penalties for criminal offenses, the defendant has the burden of proving disproportionality. Cepulonis, supra.

We apply a three-pronged proportionality analysis. "To determine whether a sentence is disproportionate requires (1) an 'inquiry into the nature of the offense and the offender in light of the degree of harm to society,' (2) 'a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth,' and (3) 'a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions." Concepcion, 487 Mass. at 86, quoting Cepulonis, 384 Mass. at 497-498. See Perez I, 477 Mass. at 684 (applying Cepulonis to juvenile sentencing). For juvenile offenders, this analysis is "supplemented with the greater weight given to a juvenile defendant's age." Perez I, supra.

The defendant argues that his aggregate sentences are disproportionate as applied because of the circumstances of his youth and his characteristics as a juvenile offender. The Commonwealth responds that the defendant's sentences are proportionate despite the unique considerations given to juveniles because the record suggests that the defendant was not, in fact, capable of rehabilitation within fifteen years. We agree with the defendant that the motion judge failed to consider the mitigating circumstances of the defendant's youth

and his rehabilitation in recent years and remand for a fact-intensive proportionality analysis under Cepulonis.

For a sentence to be permissible under art. 26, the nature of the offense and the offender must be proportionate to the punishment. See Perez I, 477 Mass. at 683; Cepulonis, 384 Mass. at 497. "Disproportionality is not, however, an abstract inquiry." Perez I, supra at 684. Instead, the proportionality analysis requires specific consideration of the characteristics of a juvenile offender. "[T]he constitutionality of the defendant's sentence, including the aggregate term to be served before parole eligibility, is to be evaluated in light of the particular facts presented." LaPlante, 482 Mass. at 403.

In Miller v. Alabama, 567 U.S. 460, 471 (2012), the United States Supreme Court concluded that we must consider a juvenile's unique capacity for rehabilitation, his or her social vulnerability to negative influences and pressures, and his or her biologically limited maturity and development. See id. ("three significant gaps between juveniles and adults" relevant to juvenile sentencing); Perez II, 480 Mass. at 573 (applying Miller principles). In Perez I, 477 Mass. at 685, we reasoned that "[b]ecause of those characteristics, imposition of an aggregate sentence . . . -- with parole eligibility exceeding that available to a juvenile defendant convicted of murder -- while perhaps within the range of a judge's discretion, may

satisfy the first prong of the disproportionality test only if the factors described in Miller, supra at 477-478, are considered by the sentencing judge."

The same is true of the imposition of the aggregate sentence here. The first prong of the disproportionality test requires consideration of "the unique characteristics of juvenile offenders, including their 'diminished culpability and greater prospects for reform.'" Perez I, 477 Mass. at 684, quoting Miller, 567 U.S. at 471. We must consider the actual juvenile offender as a first step before comparing the offense, the offender, and the punishment. See Cepulonis, 384 Mass. at 497 ("The first prong of the disproportionality test requires inquiry into the 'nature of the offense and the offender in light of the degree of harm to society'").

In LaPlante, 482 Mass. at 406, we concluded that the resentencing judge properly conducted a fact-intensive proportionality analysis under Cepulonis and Miller. Ultimately, a period of forty-five years of incarceration before parole eligibility was proportional to both the offender and the offense where the defendant was convicted of three counts of murder in the first degree. See id. The resentencing judge properly concluded that "the evidence submitted at the hearing did not reflect that at the time of the murders he displayed the 'hallmark features' of a juvenile, that is, immaturity,

impetuosity and failure to appreciate risks and consequences." Id. The judge also considered the defendant's family and home environment and found it to be "relatively unremarkable." Id. Finally, the judge considered testimony about the defendant's psychological state. Id. After a thorough consideration of the offender himself and the circumstances of his youth, the judge concluded that the defendant's prognosis for rehabilitation was "guarded." Id.

Unlike in LaPlante, the judge in this case made no findings of fact in denying the defendant's rule 30 (a) motion. The judge indicated only that she denied the defendant's motion for "the reasons stated by the Commonwealth in its opposition" and that "defendant's sentences pursuant to his plea remain lawful under Miller and Diatchenko." The judge did not consider the unique characteristics of the defendant as a juvenile offender.

Moreover, consideration of the Miller factors includes consideration of the "'possibility of rehabilitation' -- as well as an assessment of the defendant's postsentencing conduct." LaPlante, 482 Mass. at 404. In granting the defendant parole on his life sentence, the parole board found that he "has not had a violent disciplinary report in over [ten] years." The board credited the defendant's testimony that he "has matured and . . . has been able to engage in additional programming" while incarcerated. Most significantly, the board formed "the

unanimous opinion that [the defendant] is rehabilitated and, therefore, merits parole at this time. Because the judge did not factor the considerations of the first prong into her decision, we need not discuss the second and third prongs.[5] See Cepulonis, 384 Mass. at 497-498. Accordingly, we remand for a fact-intensive proportionality analysis, including consideration under the three prongs of Cepulonis.[6]

c. Presumptive disproportionality. The defendant argues that his sentences are presumptively disproportionate under Diatchenko, 466 Mass. at 658-659, because his aggregate sentences caused him to be punished more severely than a juvenile convicted of murder in the first degree at the time of his conviction. The Commonwealth counters that the defendant's sentences are not presumptively disproportionate because Miller and Diatchenko only require a juvenile offender to be granted a meaningful opportunity to obtain release, which the defendant

[5] We do, however, address the second prong infra, in relation to the defendant's argument that his sentence is presumptively disproportionate.

[6] Because we remand for the judge to consider the mitigating circumstances of the defendant's youth, we do not address the defendant's argument that he is entitled to resentencing because the sentencing judge, exercising discretion, could not have foreseen the impact of constitutional changes and scientific developments in the juvenile sentencing landscape. Nor do we address the defendant's argument that he should be granted a new sentencing hearing based on newly discovered evidence concerning the cognitive characteristics of juveniles.

was afforded. We decline to establish a bright-line rule that the aggregate sentence for a juvenile convicted of murder in the second degree and nonhomicide offenses presumptively is disproportionate if it exceeds the punishment for a juvenile convicted of murder in the first degree.

"The second prong of the disproportionality analysis involves a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth." Cepulonis, 384 Mass. at 498. We have held that juveniles convicted of nonhomicide crimes cannot be treated more harshly than juveniles convicted of murder except in extraordinary circumstances. See Commonwealth v. Lutskov, 480 Mass. 575, 583-584 (2018) (Miller hearing required prior to imposition of twenty-year sentence for nonhomicide offense); Perez I, 477 Mass. at 686-687 (Miller hearing required prior to imposition of consecutive sentences totaling twenty-seven and one-half years for nonhomicide offenses).

The defendant's argument that he was punished more severely for murder in the second degree than he would have been if convicted of murder in the first degree, however, is flawed. The defendant received a sentence of life with parole after fifteen years for murder in the second degree. His sentence for murder in the second degree, standing alone, is the same as the sentence any juvenile would have received for murder in the

first or second degree after Diatchenko, 466 Mass. at 673. See Commonwealth v. Okoro, 471 Mass. 51, 58 (2015). Sentencing juveniles convicted of murder in the second degree to the same penalty as juveniles convicted of murder in the first degree is not so disproportionate as to violate art. 26. Id. The remaining length of the defendant's sentence results from his commission of additional crimes. The defendant was convicted not only of killing one person, but also of intending to kill two others. Therefore, it is not accurate to say that his punishment for murder in the second degree is more severe than the punishment for murder in the first degree. Rather, the punishment for committing multiple crimes, including one count of murder in the second degree, is more severe than the punishment for committing murder in the first degree.

In Perez I, 477 Mass. at 683, 686, we considered "proportionality in [the] nonmurder context for juvenile defendants" and concluded that the defendant's sentence for nonhomicide offenses, which exceeded the sentence for a juvenile convicted of murder, was presumptively disproportionate under art. 26. There, the defendant's aggregate sentence for nonmurder crimes required him to serve twenty-seven and one-half years before being eligible for parole. Id. at 681. We concluded that a Miller hearing was required before imposing such a sentence for nonhomicide crimes. Id. at 688. Our

reasoning was rooted in the notion that juvenile "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Id. at 685, quoting Graham v. Florida, 560 U.S. 48, 69 (2010).

Today we conclude that an aggregate sentence for a juvenile convicted of murder in the second degree and nonhomicide offenses that is more severe, as to parole eligibility, than the maximum penalty for a juvenile convicted of murder in the first degree is not presumptively disproportionate under art. 26. The disparity between murder in the first and second degrees is not comparable to the disparity between homicide and nonhomicide offenses. "Although [murder in the second degree] does not include acts of deliberate premeditation or extreme atrocity or cruelty, murder in the second degree is an intentional crime involving the killing of another person; the severity of the offense, even when committed by a juvenile offender, goes without saying." Okoro, 471 Mass. at 58.

The defendant relies on Commonwealth v. Costa, 472 Mass. 139 (2015), to support his argument that his sentence presumptively is disproportionate. The facts here are distinguishable from those in Costa. There, we ordered a Miller hearing to resentence a juvenile serving two consecutive life terms for committing two murders in the first degree. Id. at

149. Our holding rested on the notion that when the juvenile was first sentenced, he was given two consecutive terms of life without parole, and any punishment consecutive to life without parole sentence is "somewhat symbolic." Id. at 144. After Diatchenko, the juvenile's second life sentence suddenly had practical consequences: it would make him ineligible for parole for an additional fifteen years. Id. Because of this material change in circumstance, resentencing was warranted. Here, the defendant was sentenced to life with the possibility of parole in the first instance. The sentencing judge was aware that ordering a consecutive sentence would lengthen his incarceration. Cf. Commonwealth v. Wiggins, 477 Mass. 732, 748 (2017) (applying Costa because "the sentencing judge likely believed that the defendant would never be eligible for parole on his murder conviction"). Although we remand for consideration of the Miller factors under the first prong, we decline to conclude that the defendant's sentence presumptively is disproportionate under the second prong. See Cepulonis, 384 Mass. at 498.

Conclusion. Because § 200.08 is invalid, we order that the defendant receive a parole hearing immediately. We vacate the denial of the defendant's rule 30 (a) motion and remand to the Superior Court for a hearing pursuant to Cepulonis and, if necessary, for resentencing.

So ordered.