

IN THE SUPERIOR COURT OF PENNSYLVANIA

MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA

VS.

MICHAEL LEE BOURGEOIS

570 MDA 2018

BRIEF FOR APPELLEE

Appeal from the Resentencing of the Court of
Common Pleas of Lancaster County, Pennsylvania
Criminal No. 4224 of 2001, entered November 3, 2017

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

- I. Did Bourgeois receive a *de facto* life sentence where the sentence for each of the murders he committed was 40 years to life?**

Suggested Answer: No.

Answered in the negative by the Court of Common Pleas

- II. Was the sentencing court required to consider the *Miller* factors on the record where the sentencing court did not impose a sentence of life without the possibility of parole?**

Suggested Answer: No.

Answered in the negative by the Court of Common Pleas

- III. Did the sentencing court abuse its discretion in sentencing Bourgeois based on a thoughtful evaluation of all appropriate sentencing factors?**

Suggested Answer: No.

Answered in the negative by the Court of Common Pleas

COUNTER-STATEMENT OF THE CASE

The Appellant, Michael Bourgeois, appeals from the judgment of sentence imposed by the Honorable David L. Ashworth of the Court of Common Pleas of Lancaster County.

A. Relevant procedural history

In September of 2001, Bourgeois was charged with, *inter alia*, two counts of Criminal Homicide for the murders of his mother, Lucy Smith, and stepfather, Terry Smith. Bourgeois committed these crimes when he was 17 years old.

Bourgeois originally pled guilty on January 27, 2003, and was sentenced as part of a negotiated plea agreement to consecutive terms of life imprisonment without the possibility of parole (“LWOP”). Following a series of United States Supreme Court decisions impacting individuals sentenced to LWOP, Bourgeois’ sentence was vacated and he stood for resentencing on November 3, 2017.

At Bourgeois’ resentencing hearing, five witnesses testified on Bourgeois’ behalf, and he also presented voluminous records detailing his progress and behavior in the state correctional system. Bourgeois himself also testified, and attempted to explain his crimes and also the steps he has taken to better himself. On direct examination, Bourgeois downplayed his responsibility for planning and carrying out

the murders. (N.T., pp. 72-73).¹ He also devoted scant time to expressing regret or remorse for his actions, despite his extensive testimony about how kind, loving, and patient his mother had been to him. On cross-examination, he admitted that the murders had been his idea and that he took a lead role in carrying them out. (N.T., pp. 111-17). He also admitted that he knew at the time that killing his parents was wrong, but he chose to do it anyway. (N.T., pp. 117-19).

At the conclusion of the sentencing hearing, Judge Ashworth explained that he took into consideration all of the standard sentencing factors, including “the protection of the public, the gravity of the offense as it relates to the impact on the life of the victims and the community, and the rehabilitative needs of the defendant.” (N.T., p. 152). Judge Ashworth also noted that his sentence was “guided by Title 18, Section 1102.1(a), which provides for a minimum of at least 35 years to life where the offender was 15 years of age or older at the time of the crime.” *Id.* Judge Ashworth explained that he had reviewed the sentencing memoranda submitted by both parties, the victim-impact statements, all of the transcripts of the prior proceedings in Bourgeois’ case, all of the transcripts of the prior proceedings in Bourgeois’ codefendants’ cases, and all of the materials reviewed by the original sentencing judge. (N.T., pp. 153-54). He further explained that he had considered

¹ Unless noted otherwise, the notation “N.T.” refers to the notes of testimony from Bourgeois’ resentencing hearing held on November 3, 2017.

the *Miller* factors. (N.T., pp. 155-57). Judge Ashworth noted that he had weighed all of these considerations. (N.T., pp. 157-58). Additionally, Judge Ashworth took into consideration the extensive testimony presented by Bourgeois and his witnesses at the sentencing hearing. (Opinion Sur PA. R.A.P. 1925(a), pp. 34-35).

Judge Ashworth explained that while Bourgeois' conduct in prison was exemplary, he still needs to answer for the exceedingly heinous crimes he committed. *Id.* The sentencing court further explained that Bourgeois is not entitled to "a volume discount" for the multiple murders he committed. *Id.* Judge Ashworth sentenced Bourgeois to 40 years to life for each murder, and ran the two sentences consecutively, for an aggregate total of 80 years to life. The court's reason for imposing a 40-year minimum for each victim is the 35-year recommended sentence under Section 1102.1, plus an additional five years for the torture that he inflicted on each victim. (Opinion Sur PA. R.A.P. 1925(a), p. 35).

Bourgeois' timely post-sentence motion was denied, and this appeal followed.

B. Relevant facts

Bourgeois gave a counseled, stenographically recorded statement to the authorities prior to his guilty plea in which he explained the facts and circumstances attendant to the murders at issue in this case. The entire transcript of that interview was attached to the Commonwealth's sentencing memorandum, and is summarized as follows:

Bourgeois was living with his girlfriend, Drene Rodriguez (also known as “Momma Dee”) in 2001. Bourgeois was tired of the persistent attempts by his adoptive mother, Lucy Smith, and step-father, Terry Smith, at getting him to move back home, and so he “decided [he] wanted to get rid of them.” (Ex. A, pp. 83-84).² Bourgeois hatched a plan with three coconspirators to murder both Mr. and Mrs. Smith and then to stage the scene to look like a robbery. (Ex A, p. 85). In the process, they would use threats to obtain the Smiths’ Personal Identification Numbers. (Ex. A, p. 87-88). The coconspirators would then withdraw money from the Smiths’ bank accounts and use the money to bail out their friend Steven Estes, who they were afraid might otherwise inform police about their previous criminal endeavors. (Ex. A, pp. 94-95, 99).

Bourgeois and coconspirator Landon May went to the Smith residence in the early morning hours of September 6, 2001, armed with stolen handguns, though only Bourgeois’ gun was loaded. (Ex. A. pp. 88, 105-06). They wore gloves but did not bring masks, because they knew they would not leave any survivors who could identify them. (Ex. A, p. 88).

Bourgeois entered the residence through a window and then let May in through the door. (Ex. A, p. 104). They first went to the basement and there they

² Unless noted otherwise, “Ex. A” refers to the transcription of Bourgeois’ interview attached to the Commonwealth’s sentencing memorandum.

had “a little pep talk” about how they could not back out of their plan. (Ex. A, pp. 104-05). They then entered the Smiths’ bedroom and Bourgeois turned on a light, waking up both victims. (Ex. A, pp. 106-07). Bourgeois and May drew their weapons and told the Smiths to lie back down. (Ex. A, p. 107). According to Bourgeois, he and his mother had a 10-minute conversation, during the course of which his mother disclosed to location of her money and her PIN. (Ex. A, pp. 109, 111). May instructed Terry Smith to use duct tape to bind Bourgeois mother, and then Bourgeois bound Terry Smith. (Ex. A, p. 107).

Bourgeois carried Terry Smith to another room and switched guns with May. (Ex. A, pp. 109-10, 112). May remained with Lucy Smith and told Bourgeois to turn on a stereo so that Terry could not hear what was happening to Bourgeois’s mother. (Ex. A, pp. 111-13). After approximately 10 to 15 minutes, May told Bourgeois to come to the bedroom and that he had shot Lucy. (Ex. A, p. 112). Bourgeois then took the loaded gun and shot his mother in the throat, but the gun may have misfired. (Ex. A, pp. 113, 116, 118).

May and Bourgeois then returned to the room where they left Terry Smith and May shot him two or three times in the head. (Ex. A, pp. 113-14). They came back to Lucy Smith and discovered she was still alive, so May again shot her in the head. (Ex. A, pp. 115-16). At some point, Bourgeois returned to Terry Smith and shot him

twice in the head himself. (Ex. A, p. 119). At this point, Bourgeois and May ran out of bullets, but both Terry and Lucy Smith are still alive. (Ex. A, p. 119).

Bourgeois went down to the kitchen and retrieved two knives, one of which he gave to May. (Ex. A, pp. 119-20). May then used his knife to stab Terry Smith, and Bourgeois saw him slice Terry with the knife and “heard Terry...gargling and stuff.” (Ex. A, p. 120-21). Eventually the sound of Terry’s gargling bothered May, at which point May suffocated Terry with a beanbag chair. (Ex. A, p. 123). Bourgeois estimated that Terry Smith was alive for one hour after Bourgeois first made contact with him that night. (Ex. A, p. 121).

When May returned to Lucy Smith, he cut her throat, at which point she let out what Bourgeois described as “a gargle scream” and fell off the bed. (Ex. A, pp. 122-23). She somehow made it to the bathroom and closed the door, at which point Bourgeois and May told her that being in there would not do her any good. (Ex. A, p. 123). In Bourgeois’s words, Lucy Smith responded by saying, “[Y]ou guys aren’t getting me. I don’t want to die, blah-blah-blah.” (Ex. A, p. 124). Eventually, they tricked Smith into coming out of the bathroom by telling her they were leaving. (*Id.*). When she came out of the bathroom, May came up behind her and cut her throat again. (*Id.*).

Lucy Smith was still alive, clutching her throat, coughing, and trying to crawl back onto the bed. (Ex. A, p. 125). At that point, Bourgeois retrieved a claw hammer

and beat her with it. (*Id.*). Lucy Smith somehow still clung to life and begged Bourgeois and May to spare her. (Ex. A, pp. 127-28). It was then that Bourgeois used a large knife to hack at her throat. (Ex. A, p. 128). Bourgeois and May also picked up a large television and dropped it on the back of her head, but she was still breathing. (Ex. A, pp. 128-29). They then put blankets over Smith's head and each of them applied pressure until Lucy Smith smothered to death. (Ex. A, p. 129).

SUMMARY OF THE ARGUMENT

The consecutive 40-years-to-life sentences imposed on Bourgeois do not constitute a *de facto* life sentence. Where a juvenile is responsible for multiple murders, a reviewing court is required to individually examine the sentence imposed for each murder, and not the aggregate sentence. The 40-year minimum terms here do not individually constitute the functional equivalent of life without the possibility of parole.

The sentencing court was not required to engage in a detailed, on-the-record consideration of the factors from *Miller v. Alabama*, 567 U.S. 460 (2012), because the Commonwealth did not seek a sentence of life without the possibility of parole.

The sentencing court did not abuse its discretion in imposing an aggregate sentence of 80 years to life. The record reflects that Bourgeois' sentence is the product of the careful weighing of all appropriate sentencing factors.

ARGUMENT

I. Bourgeois did not receive a *de facto* life sentence because the sentence for each of the murders he committed was 40 years to life.

Bourgeois argues strenuously that the aggregate 80-years-to-life sentence he received constitutes a *de facto* sentence of life without the possibility of parole (“LWOP”). In support, he cites to case law from other jurisdictions. Notwithstanding the way that other states have resolved this issue, this Honorable Court’s precedent plainly holds that Bourgeois’ sentence is lawful.

To decide whether the aggregate sentence of a juvenile with multiple murder convictions constitutes a *de facto* life sentence, this Honorable Court considers each murder sentence individually, rather than looking to the aggregate sentence. *Commonwealth v. Foust*, 180 A.3d 416, 434 (Pa. Super. 2018). While no bright-line test exists, a sentence does not constitute a *de facto* life sentence if it is “at least...*plausible* that one could survive until the minimum release date with some consequential likelihood that a non-trivial amount of time at liberty awaits.” *Commonwealth v. Bebout*, 186 A.3d 462, 468 (Pa. Super. 2018). The *Bebout* Court specifically found that a 45-year minimum sentence imposed upon a 15-year-old defendant was not a *de facto* life sentence.

Here, Bourgeois received 40-year minimum sentence for each of his two homicides. He was 17 years old when he was initially incarcerated. As to each sentence, then, his parole date would occur when he is 57 years old. Neither

sentence, when considered individually, could be considered a *de facto* life sentence. Indeed, each of Bourgeois' sentences are less than the 45-year minimum sentence found permissible in *Bebout*.

Because neither of Bourgeois' sentences constitute a *de facto* life sentence, he is not entitled to relief with respect to this claim.

II. The sentencing court was not required to consider the *Miller* factors on the record because the sentencing court did not impose a sentence of life without the possibility of parole.

Bourgeois next claims that the sentencing court should have considered all of the factors enunciated in *Miller v. Alabama*, 567 U.S. 460 (2012), on the record, and that the sentencing court's failure to engage in such consideration renders his sentence illegal. This Honorable Court has squarely and repeatedly rejected this claim. *See Commonwealth v. White*, 193 A.3d 977, 983 (Pa. Super. 2018); *Commonwealth v. Melvin*, 172 A.3d 14, 24 (Pa. Super. 2017). An on-the-record consideration of the *Miller* factors is only necessary where the Commonwealth seeks the imposition of LWOP. *Id.* The Commonwealth did not seek such a sentence, and therefore the sentencing court did not need to consider the *Miller* factors.

Further, even though the sentencing court was not required to consider the *Miller* factors on the records, Judge Ashworth noted that he had considered those

factors, and briefly addressed each of them on the record. Therefore, this claim is frivolous and entitles Bourgeois to no relief.

III. The sentencing court did not abuse its discretion in sentencing Bourgeois because the sentence is based on a thoughtful evaluation of all appropriate sentencing factors.

Bourgeois contends that the sentencing court did not adequately explain why it imposed the sentence at issue in this appeal, and that its failure to do so constitutes an abuse of discretion. The standard for what constitutes an abuse of discretion is exceedingly deferential to the sound judgment of the sentencing court:

[A]n abuse of discretion is not merely an error in judgment...rather, discretion is abused when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record.

Commonwealth v. Brooks, 104 A.3d 466, 469 (Pa. 2014) (quoting *Commonwealth v. Randolph*, 873 A.2d 1277, 1281 (Pa. 2005)).

Here, the sentencing court did not abuse its discretion. Indeed, the sentencing court thoughtfully and thoroughly explicated the reasons underlying Bourgeois' sentence. The Rules of Criminal Procedure only require a sentencing judge to "state on the record the reasons for the sentence imposed." Pa.R.Crim.P. 704(C)(2). Here, Judge Ashworth explained that he took into consideration all of the standard sentencing factors, including "the protection of the public, the gravity of the offense as it relates to the impact on the life of the victims and the community, and the

rehabilitative needs of the defendant.” (N.T., p. 152). Judge Ashworth also noted that his sentence was “guided by Title 18, Section 1102.1(a), which provides for a minimum of at least 35 years to life where the offender was 15 years of age or older at the time of the crime.”³ (*Id.*). Judge Ashworth explained that he had reviewed the sentencing memoranda submitted by both parties,⁴ the victim-impact statements, all of the transcripts of the prior proceedings in Bourgeois’ case, all of the transcripts of the prior proceedings in Bourgeois’ codefendants’ cases, and all of the materials reviewed by the original sentencing judge. (N.T., pp. 153-54). He further explained that he had considered the *Miller* factors. (N.T., pp. 155-57). Judge Ashworth noted that he had weighed all of these considerations. (N.T., pp. 157-58). Additionally, Judge Ashworth took into consideration the extensive testimony presented by Bourgeois and his witnesses at the sentencing hearing. (Opinion Sur PA. R.A.P. 1925(a), pp. 34-35).

³ In his brief, Bourgeois contends that Judge Ashworth mistakenly believed that he was required to impose at least a 35-year sentence. (Appellant’s Brief, pp.34-35). The record of the sentencing hearing indicates that such was not the case: Judge Ashworth explicitly stated that he was merely “guided by” 18 Pa.C.S. § 1102.1(a). N.T., p. 152. The sentencing court’s Opinion Sur PA. R.A.P. 1925(a) further notes that Section 1102.1 constitutes sentencing guidelines that should be considered. (Opinion Sur PA. R.A.P. 1925(a), p. 31).

⁴ The sentencing memorandum submitted by Bourgeois included voluminous information pertaining to Bourgeois’ conduct and activities in the state correctional system.

Judge Ashworth explained that while Bourgeois' conduct in prison was exemplary, he still needs to answer for the particularly heinous crimes he committed. (*Id.*) The sentencing court further explained that Bourgeois is not entitled to "a volume discount" for the multiple murders he committed. (*Id.*) Following a mature and thoughtful consideration of all factors, Judge Ashworth sentenced Bourgeois to 40 years to life for each murder, and ran the two sentences consecutively. The court's reason for imposing a 40-year minimum for each victim is the 35-year recommended sentence under Section 1102.1, plus an additional five years for the torture that he inflicted on each victim.

In imposing this sentence, Judge Ashworth did not commit an abuse of discretion. This sentence is not the result of bias, prejudice, ill will, or any other inappropriate motive, nor is it a manifestly unreasonable application of the law in light of all of the facts and circumstances of this case. This Honorable Court "has never held that running sentencing for first-degree murder consecutively was an abuse of discretion." *Foust*, 180 A.3d at 441. Lengthy consecutive sentences for taking multiple innocent lives is permissible, "even with the reduced culpability recognized in *Roper*, *Graham*, and *Miller*." *Id.* Nothing in the precedent of this Commonwealth or the Supreme Court of the United States requires a sentencing court to steeply discount or entirely disregard the value of individual human lives in

deference to the possibility of a youthful slayer's rehabilitation. There was certainly no reason for the sentencing court to do so in this case.

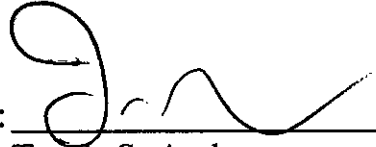
CONCLUSION

The sentence imposed upon Bourgeois is lawful, appropriate, and just. It is the product of a mature and thoughtful consideration of all of the appropriate sentencing factors. Bourgeois' sentence is consistent with this Honorable Court's precedent, and it should not be disturbed.

Respectfully submitted,

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Dated: January 3, 2019

**IN THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

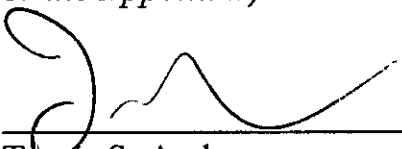
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellee	:	
	:	No. 570 MDA 2018
vs.	:	
	:	
MICHAEL LEE BOURGEOIS	:	
Appellant	:	

CERTIFICATE OF SERVICE

I hereby certify that, in compliance with Rule of Appellate Procedure 121(b), I am this day causing to be served a true and correct copy of the foregoing brief upon the following person(s) in the manner indicated below.

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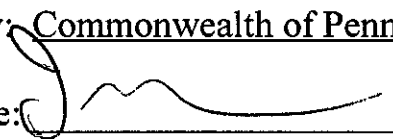
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Dated: January 3, 2019

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Commonwealth of Pennsylvania

Signature: 

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