

IN THE
SUPERIOR COURT OF PENNSYLVANIA

1118 WDA 2016

COMMONWEALTH OF PENNSYLVANIA

APPELLEE,

V.

MICHAEL FOUST,

APPELLANT.

REPLY BRIEF OF APPELLANT

On Appeal from the July 5, 2016 Re-Sentence in the Court of Common Pleas,
Venango County, Docket No. CP-61-CR-0000679-1993.

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STATEMENT OF THE CASE

This matter comes before this Court following a timely filed appeal. Appellant Michael Foust filed his principal brief December 22, 2016. The Commonwealth received an extension of time and timely filed its appellee's brief on March 24, 2017, by first-class mail. Appellant now timely files this reply brief. Appellant relies upon the Statement of the Case in his original brief.

SUMMARY OF THE ARGUMENT

Contrary to the Commonwealth's assertion, Mr. Foust challenges the legality of his sentence—specifically, whether the trial court could constitutionally sentence him to a de facto life sentence. The finding of rehabilitation precludes the trial court from constitutionally imposing a sentence that ensures Mr. Foust will spend the rest of his life in prison as *Miller* requires a meaningful opportunity for parole for those whose crimes reflect transient immaturity. To the extent that this Court considers Mr. Foust's appeal as a challenge to the discretionary aspects of his sentence, Mr. Foust has raised a substantial question regarding the trial court's failure to appropriately weigh his rehabilitation.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW A CONSTITUTIONAL CHALLENGE TO A DE FACTO LIFE WITHOUT PAROLE SENTENCE

The Commonwealth's construction of Mr. Foust's sentence as an exercise of permissible discretion ignores *Miller's* constitutional mandate to provide an opportunity for parole to those young offenders whose crimes reflect transient immaturity. Mr. Foust's new sentence of 60 years to life is a de facto life sentence because he will be almost 80 years old before his first opportunity to go before the parole board, well beyond his life expectancy and plainly not a meaningful opportunity to be released before the expiration of his sentence. Since the trial court found Mr. Foust rehabilitated, he is serving an unconstitutional sentence that is subject to this Court's review.

The Court in *Miller* "rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (citations omitted) (internal quotation marks omitted). The Court in *Miller* and *Montgomery* was not solely focused on "life without parole" as the articulation of a sentence, despite the Commonwealth's argument, but the effect of a sentence that condemns a child to die in prison despite the mitigating factors associated with youth and the ability to be rehabilitated. *See Miller v. Alabama*, 132

S. Ct. 2455, 2465-66 (2012) (characterizing the unconstitutional punishment as “a lifetime of incarceration without the possibility of parole,” “[i]mprisoning an offender until he dies,” “this lengthiest possible incarceration”). The Commonwealth’s argument that Mr. Foust’s sentence is not a de facto life sentence ignores the ample jurisprudence across the country construing *Graham*, *Miller*’s underpinning, to include aggregate sentences that are effectively life without parole. (Appellant’s Brief at 13-17.) De facto life sentences are recognized not because defendants are entitled to “volume discounts” as the Commonwealth characterizes it but because multiple offenses do not undermine *Graham* and “*Miller*’s central intuition—that children who commit even heinous crimes are capable of change.” *Montgomery*, 136 S. Ct. at 736. The Court was clear in *Miller* and *Montgomery* that only those children deemed irreparably corrupt after an extensive analysis could be denied a meaningful opportunity for parole. *See Montgomery*, 136 S. Ct. at 735. To allow a court to impose a sentence that almost certainly guarantees a child capable of change will die in prison before having an opportunity for release would render *Miller* and *Montgomery* moot in practice.¹

Because his 60-to-life sentence deprives him of *Miller*’s protections, Mr. Foust is challenging the constitutionality of his sentence, not the discretionary

¹ Such a construction of *Miller* would similarly allow district attorneys to circumvent *Miller* by stacking charges from the same incident to create a minimum term of years that a defendant will not reach in their lifetime.

aspects. Unless a child is found to be irreparably corrupt, serving a life without parole sentence is “a punishment that the law cannot impose upon him.” *Montgomery*, 136 S. Ct. at 734 (citations omitted) (internal quotation marks omitted). “*Montgomery* made clear . . . ‘[e]ven if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects unfortunate yet transient immaturity.’” *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring) (citing *Montgomery*, 136 S. Ct. at 734). Therefore, before imposing a life without parole sentence, the Eighth Amendment “requires that a sentencer decide whether the juvenile offender before it is a child ‘whose crimes reflect transient immaturity’ or is one of ‘those rare children whose crimes reflect irreparable corruption.’” *Id.* at 13 (quoting *Montgomery*, 136 S. Ct. at 734). A trial court thus does not have discretion to sidestep *Miller*’s dispositive question of rehabilitation nor can it impose a de facto life sentence if a child demonstrates the capacity to be rehabilitated. The Commonwealth’s attempt to construe the trial court’s analysis as one that implicates only discretionary sentencing is thus misguided.

To the extent that the Commonwealth relies on *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013) [hereinafter *Batts I*] to support its argument that it is a discretionary challenge, it has been superseded by *Montgomery* and *Tatum*. The Pennsylvania Supreme Court’s characterization in *Batts* that “*Miller* requires only

that there be judicial consideration of the appropriate age related factors . . . prior to the imposition of a sentence,” *id.* at 296, cited by the Commonwealth, is negated by the Court in *Montgomery* clarifying that a sentencer must determine if a defendant is one of the “rarest of juvenile offenders,” *Montgomery*, 136 S. Ct. at 734, not merely check through the factors enumerated in *Miller*. Furthermore, this Court’s previous holding, cited by the Commonwealth, *Commonwealth v. Batts*, 125 A.3d 33, 43 (Pa. Super. Ct. 2015) [hereinafter *Batts II*], *appeal granted in part*, 135 A.3d 176 (Pa. 2016), that this is a review of discretionary aspects of sentencing did not have the guidance of *Montgomery* and *Tatum* demonstrating that the inquiry required by *Miller* is a review of the constitutionality of the sentence, not a matter of discretion, when the equivalent of a life without parole sentence is at stake.²

The ultimate question presented in this appeal is whether the trial court properly applied the legal principles enumerated in *Miller* to the case at hand as a finding of rehabilitation precludes the imposition of a sentence which will effectively deny Mr. Foust an opportunity to live outside of prison walls.³

² *Batts II* at 42-43 relies on *Commonwealth v. Seagraves*, 103 A.3d 839 (Pa. Super. Ct. 2014) for the proposition that such a review is discretionary. However, the question on appeal was posed as a challenge to discretion rather than a constitutional challenge to the sentence imposed. *See Seagraves*, 103 A.3d at 841.

³ Mr. Foust relies on his principal brief for the statutory argument of third degree murder which was only rebutted by the Commonwealth’s assertion that *Batts I* disposed of the question prior to *Montgomery*’s instruction.

II. IF THIS COURT DEEMS THIS APPEAL A DISCRETIONARY CHALLENGE, MR. FOUST DID RAISE SUBSTANTIAL QUESTIONS APPROPRIATE FOR REVIEW

The Commonwealth incorrectly asserts that Mr. Foust only preserved whether there was a sentencing code violation in his Rule 2119(f) statement. Mr. Foust also preserved the imposition of such as an abuse of discretion due to the trial court's finding that Mr. Foust was not irreparably corrupt. (Appellant's Brief at 9-10.) This preserved issue, along with the carefully considered rehabilitative needs balanced with public protection and the offense, present a substantial question for this Court.

Mr. Foust's reliance on *Commonwealth v. Dodge*, 957 A.2d 1198 (Pa. Super. Ct. 2008) to support review due to the court's failure to address all sentencing criteria is particularly apt. In *Dodge*, the Superior Court overruled consecutive sentences because "the court did not acknowledge that its sentence essentially guarantees life imprisonment for Appellant," which meant "the trial court abused its discretion in imposing a life sentence" considering the impact of the crime. *Id.* at 1202. Here, the trial court made a similar error as its finding of rehabilitation makes such a sentence clearly unreasonable per *Miller*'s mandate. With such a finding, the sentence is outside of the sentencing guidelines as *Miller* precludes a life sentence for those whose crimes do not reflect permanent incorrigibility. Furthermore, while in other circumstances the weighing of a specific sentencing factor is not dispositive, *Miller* alters the landscape of review by clarifying that the ability to be rehabilitated is

significant enough to render a sentence unconstitutional. *See Tatum*, 137 S. Ct. at 12 (Sotomayor, J., concurring). Under *Dodge* and the additional sentencing requirements of *Miller*, Mr. Foust has raised a substantial question.

The Commonwealth also errs in stating Mr. Foust's Rule 1925(b) statement did not provide sufficient detail for the trial judge. The 1925(b) challenge that the court failed to properly consider defendant's rehabilitative needs leads to the same inquiry whether raised via *Miller* or 9721(b). Mr. Foust noted that *Miller* and *Montgomery* were merely examples of the rehabilitative analysis required by the Court. (Concise Statement of Matters Complained of on Appeal, Appendix E of Appellant's Brief.)

As for the abuse of discretion, Mr. Foust relies on his principal brief's explanation of the improper weighing of factors which are not only a constitutional violation but also an abuse of discretion if reviewed under that theory.⁴

CONCLUSION

For the foregoing reasons, this Court should vacate Mr. Foust's *de facto* life without parole sentence as unconstitutional and remand the instant matter for

⁴ For purposes of clarifying the record, Ms. Webb confirmed that Mr. Foust has not received a misconduct in almost two decades, since 1998. (N.T. 7/5/16, 80:15-19).

resentencing. Alternatively, his sentence should be vacated and remanded for resentencing consistent with third degree murder.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify this 6th day of April, 2017, that the foregoing brief of Appellant contains 1,642 words and complies with the word count limits as set forth in Pa.R.A.P. 2135.

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