No. 514PA11-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	No. COA15-684
HARRY SHAROD JAMES	)	

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DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE PRESUMPTION IN FAVOR OF LIFE WITHOUT PAROLE UNDER N.C.G.S. § 15A-1340.19A, *ET SEQ.*, DID NOT VIOLATE THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The State argues that N.C.G.S. § 15A-1340.19A, *et seq.*, does not operate with a presumption in favor of life without parole, but even if it did, such a presumption would not be unconstitutional. The State is mistaken.

First, the State asserts that nothing in the language of N.C.G.S. § 15A-1340.19A, *et seq.*, establishes a presumption in favor of life without parole and that the language in the statutory scheme is used "merely to distinguish between the sentencing options of life without parole and life with parole." State-Appellee's Brief, p. 12. The thrust of the State's argument appears to

be that in order for a presumption to exist, a statute must explicitly state that it operates with a presumption. However, presumptions do not always arise through explicit statutory language. For two decades, California courts construed a seemingly neutral sentencing statute for juveniles convicted of first-degree murder as having a presumption in favor of life without parole. *People v. Gutierrez*, 324 P.3d 245, 249 (Cal. 2014). In *United States v. Black*, 512 F.2d 864, 868 (9th Cir. 1975), the Ninth Circuit Court of Appeals observed that a federal statute barring distribution of controlled substances by physicians operated with an unconstitutional presumption even though the statute itself was "not worded in presumptive language."

Similarly, although N.C.G.S. § 15A-1340.19A, *et seq.*, does not explicitly state that sentencing hearings must begin with a presumption in favor of life without parole, the statute nevertheless operates in that fashion. As described in Mr. James' opening brief as the appellant, the statutory scheme contains only mitigating factors and does not require the State to prove any aggravating factors that would support the higher sentence of life without parole. Defendant-Appellant's Brief, pp. 16-19. Thus, in practice, this means that in order to justify a sentence of life with parole, juvenile defendants must bear the burden of proving mitigating factors. If the juvenile defendant fails to present sufficient evidence of any mitigating factors, the trial court

would not have a basis to impose the lesser sentence of life with parole. A hearing under N.C.G.S. § 15A-1340.19A, *et seq*., thus begins with the scales tilted in favor of life without parole.

Second, the State asserts that it should not be required to prove aggravating factors because aggravating factors would be "harmful to *Miller's* intent." State-Appellee's Brief, p. 14. According to the State, aggravating factors would actually "lessen the possibility" that life without parole sentences would be uncommon. State-Appellee's Brief, p. 15. The State has misapprehended how aggravating factors function. Aggravating factors serve to "punish more severely those defendants who have acted with culpability beyond that necessary to commit the crimes of which they stand convicted." *State v. Thompson*, 318 N.C. 395, 397-98, 348 S.E.2d 798, 800 (1986). Aggravating factors also serve as guidelines to "circumscribe" and "channel" the sentencer's discretion so that the resulting sentence is not arbitrarily imposed. *Gregg v. Georgia*, 428 U.S. 153, 206-07, 96 S. Ct. 2909, 2941 (1976). It is this function that N.C.G.S. § 15A-1340.19A, *et seq*. lacks. Without aggravating factors, sentencing courts are not required to determine whether there are facts that justify the higher sentence of life without parole. Courts can impose life without parole without finding any aggravating factors at all.

Further, there is no indication that the lack of any requirement that

courts find aggravating factors has led to fewer life without parole sentences. Rather, life without parole is still being imposed with some regularity. Without finding any aggravating factors, the trial court in this case imposed a sentence of life without parole. In at least six other appeals, trial courts around the state imposed sentences of life without parole – all without aggravating factors. *See* Defendant-Appellant's Brief, pp. 18-19. Thus, even without being required to find aggravating factors, courts continue to impose life without parole sentences.

Third, the State asserts in its brief as the appellee that even if N.C.G.S. § 15A-1340.19A, *et seq*., contains a presumption of life without parole, such a presumption is constitutional. State-Appellee's Brief, pp. 11, 16-17. However, in its brief as the appellant, the State plainly concluded that a presumption in favor of life without parole would be "injurious to *Miller's* intent . . . ." State-Appellant's Brief, p. 10. The State also conceded that it was "clear" under *Miller* that the "only presumption with which a juvenile defendant can enter the sentencing hearing is one of LWP." State-Appellant's Brief, p. 10. This Court generally disapproves when a party presents opposing positions in an appeal. *State v. Hooper*, 358 N.C. 122, 127, 591 S.E.2d 514, 517 (2004). The concern is relevant in this case as the State's opposing positions involve one of the core disputes in this appeal. Ultimately,

a presumption in favor of life without parole is simply inconsistent with the Supreme Court's repeated pronouncements in *Miller* and *Montgomery* that life without parole can only be imposed for the rare juvenile who is irreparably corrupt.

Fourth, the State asserts that a juvenile defendant convicted of first-degree murder must bear the burden of proving that he or she qualifies for "protected status" and warrants a sentence of life with parole. State-Appellee's Brief, pp. 10, 14. The State's assertion is inconsistent with *Miller* and *Montgomery*. Based on *Miller*, the Supreme Court explained in *Montgomery* that a sentence of life without parole is unconstitutional for the "vast majority of juvenile offenders" and only justified for the rare juvenile who is "irreparably corrupt" or "permanently incorrigible." *Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 622 (2016). Thus, under *Miller* and *Montgomery*, a sentence of life with parole is not reserved for a small subset of cases deserving of special treatment, but should instead be the norm or presumptive sentence. To overcome a presumption of life with parole, the State must bear the burden of proving that the higher sentence of life without parole is warranted. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000).

A similar argument regarding the burden of proof was recently

considered in *Commonwealth v. Batts*, No. 45 MAP 2016, slip op. (Pa. Jun. 26, 2017). There, the Commonwealth asserted that a juvenile defendant bore the burden under *Miller* and *Montgomery* to prove that he or she was not eligible for sentence of life without parole. *Id*. at 69. The Supreme Court of Pennsylvania rejected the Commonwealth's arguments, observing that it was based on "[c]ertain isolated statements" in *Miller* and *Montgomery*. *Id*. The Court instead held that "any suggestion of placing the burden on the juvenile offender [was] belied by the central premise of *Roper*, *Graham*, *Miller* and *Montgomery* – that as a matter of law, juveniles are categorically less culpable than adults." *Id*. at 70.

The Court also went further, however, holding that if the Commonwealth intends to sentence a juvenile defendant to life in prison without parole, it must prove that the sentence is warranted beyond a reasonable doubt. *Id*. at 76. As support for its holding, the Court reasoned that the risk of an erroneous sentence of life without parole would result in the irrevocable loss of liberty for the juvenile, even if the juvenile later proved amenable to rehabilitation. *Id*. at 74. By contrast, the risk of erroneous sentence of life with parole was minimal for the Commonwealth. "[I]f the juvenile offender is one of the very rare individuals who is incapable of rehabilitation, he or she simply serves the rest of the life sentence without

ever obtaining release on parole." *Id*. at 75. Consequently, as explained in *Batts*, the burden of proof at *Miller* sentencing hearings must be borne by the State.

II. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE PROCEDURES UNDER N.C.G.S. § 15A-1340.19A, *ET SEQ.*, WERE NOT UNCONSTITUTIONALLY VAGUE AND WOULD NOT LEAD TO ARBITRARY SENTENCING DECISIONS.

The State argues that N.C.G.S. § 15A-1340.19A, *et seq.*, does not violate Due Process. The State is mistaken.

As part of its argument, the State asserts that N.C.G.S. § 15A-1340.19A, *et seq.*, is constitutional because the balancing function that courts employ under the statute is similar to the "weighing and balance[ing] which the trial court does under the Structured Sentencing Act, in order to determine whether to depart from the presumptive range of a sentence." State-Appellee's Brief, pp. 19-20. This assertion is incorrect. Under Structured Sentencing, a court may impose an aggravated sentence if it finds that any aggravating factors are "sufficient to outweigh any mitigating factors" in the case. N.C. Gen. Stat. § 15A-1340.16(b). Thus, the procedures under N.C.G.S. § 15A-1340.19A, *et seq.*, are distinct from the procedures under Structured Sentencing precisely because there is no requirement that a trial court find or weigh any aggravating factors before sentencing a juvenile defendant to life in prison without parole. In fact, a comparison to

Structured Sentencing actually exposes one of the flaws in N.C.G.S. § 15A-1340.19A, *et seq*.: Sentencing courts are not required to identify any aggravating factors that would justify the greater sentence of life without parole. In other words, courts can impose the highest possible sentence for juveniles without finding specific circumstances demonstrating that the juvenile is irreparably corrupt and warrants a sentence of life without parole.

The State also argues that aggravating factors are not necessary to narrow the class of juveniles to those who warrant life without parole because *Miller* itself "provided such narrowing." State-Appellee's Brief, pp. 13, 20. Again, the State is mistaken. Neither *Miller* nor *Montgomery* are self-executing. Put another way, the opinion in *Miller* did not itself winnow cases down to the rare juvenile who warrants a sentence of life without parole. Instead, the act of identifying those rare juveniles requires specific procedures that trial courts must employ in individual cases. For this reason, legislatures around the country have enacted "*Miller*-fix" laws. Consequently, the State cannot rely on the opinion in *Miller* as a substitute for specific, constitutional procedures that enable sentencing courts to identify those juvenile defendants who truly warrant a sentence of life without parole.

III. THE COURT OF APPEALS ERRED WHEN IT HELD THAT APPLYING N.C.G.S. § 15A-1340.19A, *ET SEQ.*, TO MR. JAMES' CASE DID NOT VIOLATE THE PROHIBITIONS AGAINST *EX POST FACTO* LAWS.

The State asserts that the trial court did not violate the prohibitions against *ex post facto* laws by applying N.C.G.S. 15A-1340.19A, *et seq.*, to Mr. James. The State is mistaken.

As part of its argument, the State relies primarily on *Dobbert v. Florida*, 432 U.S. 282, 53 L. Ed. 2d 344 (1977). State-Appellee's Brief, pp. 24-29. In *Dobbert*, the defendant argued that he was improperly sentenced to death because the death penalty statutes in effect on the offense date for his case were later held to be unconstitutional. The Supreme Court disagreed, holding that the statutes in effect on the offense date "clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers." *Id.* at 297, 53 L. Ed. 2d 344 at 359. However, there is an important distinction between *Dobbert* and this case. In *Dobbert*, the relevant death penalty statutes were held unconstitutional based on procedural defects. That is, when the Supreme Court ruled on the death penalty in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972), it did not hold that the death penalty itself was unconstitutional. Instead, the Court held that the procedural mechanisms for imposing the death penalty were unconstitutional.

By contrast, the penalty at issue in this case – a mandatory sentence of life without parole – was not found to be unconstitutional merely on procedural grounds. Rather, the Supreme Court held that the sentence itself was unconstitutional. *Miller v. Alabama*, 567 U.S. 460, 479, 183 L. Ed. 2d 407, 424 (2012). Thus, although the mandatory sentence of life without parole reflected North Carolina's view of the severity of murder, the sentence no longer constituted a valid punishment at all. For this reason, the General Assembly created two entirely new discretionary sentences of life with parole and life without parole after the opinion in *Miller* was issued. Unlike *Dobbert*, therefore, Mr. James received a sentence that did not exist on the offense date for this case. The prohibitions against *ex post facto* laws forbid laws that "impose[] a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver v. Graham*, 450 U.S. 24, 28, 67 L.Ed.2d 17, 22 (1981) (*quoting Cummings v. Missouri*, 4 Wall. 277, 325-326 (1867)). In this case, Mr. James received a new kind of sentence than the sentence he could have received based on the offense date for his case. As a result, *Dobbert* is distinguishable and does not control the outcome of this case.

The State also argues that the opinion in *United States v. Under Seal*, 819 F.3d 715, 726 (4th Cir. 2016), "differs significantly" from this case

because Congress did not alter the sentencing scheme for the federal crime of murder in the aid of racketeering after the opinion in *Miller* was issued, whereas our General Assembly created a new sentencing scheme in response to *Miller*. State-Appellee's Brief, p. 31. However, the part of the opinion that the State relies on to support its position was not part of the holding of *Under Seal*. Instead, later in the opinion, the Fourth Circuit Court of Appeals held that the Government could not apply a new penalty for the murder charge filed against the juvenile defendant because no penalty other than death or mandatory life imprisonment existed "[w]hen the crime at issue in this case occurred . . . ." *Under Seal*, 819 F.3d at 726 (emphasis added). Thus, contrary to the State's assertion, the opinion in *Under Seal* did not turn on whether Congress had ever altered its sentencing statutes to address *Miller*. The relevant inquiry was whether a sufficient alternative was in place on the offense date for the case. Consequently, *Under Seal* actually is similar to this case and speaks to the *ex post facto* question at issue in this appeal.

"Trial courts are required to enter criminal judgments in compliance with the sentencing provisions in effect at the time of the offense." *State v. Whitehead*, 365 N.C. 444, 447, 722 S.E.2d 492, 495 (2012). At the time of the offense in this case, the sentence for first-degree murder for a juvenile defendant was a mandatory sentence of life without parole. The mandatory

sentence of life without parole was later found unconstitutional in *Miller*. The next sentencing provision in effect on the offense date for this case was for second-degree murder. Based on the provisions in effect on the offense date for this case, the trial court should have imposed a sentence for the lesser offense of second-degree murder.

CONCLUSION

For the foregoing reasons, Mr. James respectfully requests that this Court reverse the Court of Appeals' opinion in this case, vacate his sentence, and remand this case to superior court for resentencing.

Respectfully submitted this the 28th day of July, 2017.

(Electronic Submission)
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing reply brief has been duly served pursuant to Appellate Rule 26 upon Sandra Wallace-Smith, Special Deputy Attorney General, North Carolina Department of Justice, Appellate Section, Post Office Box 629, Raleigh, North Carolina, 27602, by sending it in an email to: swsmith@ncdoj.gov.

This the 28th day of July, 2017.

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