STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CURTIS L. WALKER,

Appellant,

-v-

Case No. 2016AP1058
Circuit Court Case No. 94Cf944079

STATE OF WISCONSIN,

Respondent.

APPELLANT'S REPLY BRIEF

ON APPEAL FROM AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY THE HONORABLE JONATHAN D. WATTS

Submitted by:
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ISSUES PRESENTED

The issues presented are as stated in appellant's initial brief.

STATEMENT OF THE CASE & STATEMENT OF THE FACTS

The Statement of the Case and the Statement of the Facts are as they were presented in the appellant's initial brief.

ARGUMENT

> Miller v. Alabama, 132 S.Ct. 2455 (2012) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) do apply to de facto life without parole sentences. The state may have misunderstood my two arguments here as they seem to have combined the two and reached the singular conclusion that State v. Ninham, remains good law and so renders my arguments to be without merit.

I. Whether Miller applies to discretionarily imposed de facto life without parole sentences. The answer: yes.

The state argues otherwise because "Miller expressly recognized the continued authority of a court to sentence a juvenile to a life term without the possibility of parole." (State' reply brief (hereafter: R.B.) pg 7), so long as it takes "into account how children are different, and how those differences counsel against irrevocably sentencing them to a

lifetime in prison." Miller at 2469. But Miller also announced the principles and standards by which the juvenile offender must be judges in order for that lifetime sentence not to be in violation of the 8th Amendment. "Instead, it [the decision in Miller] mandates only that a sentencer follow a certain process--considering an offender's youth and attendant characteristics--before imposing a particular penalty." Id. at 2471.

The U.S. Supreme Court has been clear about what that "certain process" entails. The sentencer has to find that the juvenile "forever will be a danger to society". Graham v. Florida, 130 S.Ct. 2011, 2029; (More than individualized sentencing required to justify a life without parole sentence) Adams v. Alabama, 136 S.Ct. 1796, 1799 (2016); "That Miller did not impose a formal factfinding requirement does not leave states free to sentence a child whose crime reflects transient immaturity to life without parole." Montgomery at 735.

Since Miller extended Graham to juveniles convicted of

homicide, declaring that Graham's reasoning implicates any life without parole sentence imposed on a juvenile, even as its categorical ban relates only to nonhomicide offenses, it should stand to reason that in light of the fact of Montgomery making Miller retroactive that Miller's reasoning implicates any life-time without parole sentence imposed on a juvenile, even as its categorical ban relates only to mandatory life without parole sentences.

The state argues that because Wisconsin sentencing law already required circuit courts to make individualize sentencing determinations that Miller does not apply to my case. (R.B. pg 5). However, Montgomery spoke toward this when it declared that a court could use the fact that it use a flawless sentencing procedure to legitimate a sentence that is constitutionally barred. Montgomery at 730.

The sentencing principles in State v. Borrell, 167 Wis. 2d 749 as well as State v. McCleary, 49 Wis. 2d 263 apply to my case as the state argues. (R.B. pg 9, 10). Yet those

sentencing principles and standards alone are not sufficient where juvenile offenders are concerned because the sentencer must do more than "consider" "the defendant's age" as Borrell says when it is weighing an offender's youth. Montgomery at 736.

After their decision in Miller the U.S. Supreme Court has not been silent on whether Miller has effect beyond its ban on mandatory life without parole sentences for juveniles and if its decision extends to discretionary lifetime sentences. In Montgomery they said that Miller did bar life without parole for all juvenile offenders except the ones "whose crimes reflect permanent incorrigibility". Montgomery at 734. Montgomery went on to clarify that even if, as was in my case, the sentencer is required to consider age as a factor, the sentence still in violation of the 8th Amendment if the sentencer does not adhere to the guiding principles of Miller. Id. at 734.

The Court proceeded to demonstrate their fuller meaning and intent of Miller and Montgomery in their decision in Tatum

v. Arizona, where they granted certiorari, vacated and remanded the sentences of petitioners sentenced for offenses committed as juveniles to discretionary life without parole. 137 S.Ct. 11, 12 (2016). The decision was driven by the fact that the sentencers in those cases did not address "the question Miller and Montgomery require a sentencer to ask". Id. at 12.

The 7th Circuit reached the same conclusion regarding discretionary sentences in McKinley v. Butler, 809 F.3d. 908 (2016). In its reply brief the state believes that McKinley has limited persuasive value because of what the state sees as an inconsistency between the decisions in McKinley and Croft v. Williams, 773 F.3d 170, 171 (2014). But the earlier Croft was addressed by the later McKinley:

> "although our Court said in Croft v. Williams, that Miller is inapplicable even to a defendant sentenced to life without provided that the legislature does not require such a sentence but leaves the matter to the sentencing judge, the court did not discuss the "children are different" passage in Miller." Id. at 911

So while Croft reiterated that the categorical ban applied only to mandatory life without parole, McKinley addressed the broader

implications of the language and intent of Miller. Id. at 914. With there being no inconsistency in the 7th Circuit's findings, the persuasive value of McKinley is all the more defined when taken with the significance of of the U.S. Supreme Court's application of Miller and Montgomery to the discretionary cases in Tatum v. Arizona.

II. Whether Wis. stat. §973.014 (1993-94) was misapplied by by the circuit court, producing an unconstitutional de facto life without parole sentence. Answer: yes.

"There are two accepted methods for interpretation of statutes. The first determining legislative intent, looks for extrinsic factors for construction of the statute. The second, determining what the statute means, looks to intrinsic factors such as punctuation or common meaning of word construction of the statute." State ex rel. Kalal v. Circuit Court for Dane County, 271 Wis. 2d 633, 659.

The state relies on State v. Ninham, 333 Wis. 2d 335 and State v. Barbeau, 370 Wis. 2d 736, to respond to my argument, where the Wisconsin Supreme Court decided that it was not

categorically unconstitutional to sentence a 14 year old to life without parole. Ninham, 333 Wis. 2d 335 ¶4. And this court held in Barbeau that Ninham remains good law, with Barbeau being a facial challenge to state statute.

Ninham was convicted under the amended version of Wis. stat. §973.014 (after 1995) which allowed for a defendant to be sentenced to life without parole. Ninham's categorical challenge sprang from there. Whereas I was convicted and sentenced under the earlier version which did not provide for a sentence of life without parole. My challenge comes from the statute being applied to me the same way that the later version was applied to defendants such as Ninham.

Because the legislature did not anticipate that a juvenile offender would be sentenced under §973.014 to life without the possibility of parole in the 1993-94 version of the statute, as is evidenced by the legislature's changing of the law later to allow for a no parole sentence, my sentence is in excess

of what the statute allowed.

This is not a matter of ambiguity as it is a matter of contrast between the language and intent of the two versions of the statute. "Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." State ex re. Kalal, at 662.

There is an added texture to the interpretation of this statute in the light of Miller, because even if a court was inclined to stretch its view of §973.014 beyond it legislative intent, that court would still be bound by the admonishments in Miller.

ARGUMENT

THE CIRCUIT COURT DID NOT EXERCISE THE DISCRETION CONTEMPLATED UNDER MILLER WHEN IT SET MY PAROLE ELIGIBILITY DATE.

The state wishes this court to search the record to determine whether the circuit court's exercise of discretion

comports with Miller and cites State v. McCleary toward that end. (R.B. pg 13). However, the sentencing judge was unambiguous in his reasoning for the sentence handed down. (R41:29-30).

In his reasoning lay an absence of what Miller require, therefore the sentence runs afoul of the 8th Amendment. What is the purpose of Miller's requirement that a sentencer make a determination of a juvenile's ability to be rehabilitated if not to have that court reflect that determination in its sentence as Montgomery articulates: "[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption." At 736.

The state argues that the"information in the record supports the conclusion that the circuit court properly sentenced Walker in a manner that accounted for his youth" and that the court set a "parole eligibility date consistent with its duty to impose the minimum amount of confinement in light of the need to protect the public, the gravity of the offense, and Walker's rehabilitative needs." (R.B. pg 14). But consistency

in the circuit court's sentence with its duty toward those three factors can found only if the court believed me to be forever dangerous, not just in the instant of the crime or even during adolescence.

The state then goes through various possible penological justifications in support of the de facto no parole sentence. (R.B. pg 14-17). All of which are legitimate concerns of a sentencer, including the one given the most weight at my hearing by the judge (R:41:31-32) - the gravity of the offense.

With 1st degre intentional being the highest degree of homicide, if the gravity of the offense proves to be the primary factor in delivering a no-parole or de facto no parole sentence, then that sentence would be common and frequent for those juveniles who have committed the offense. This would be contrary to the admonishment of the U.S. Supreme Court: "That the Gruesomeness of a crime is not sufficient to demonstrate that a juvenile offender is beyond redemption: 'The reality that juveniles still struggle to define their identity means it is

less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.' Roper v. Simmons, 543 U.S. 570, 125 S.Ct. 1183,161 L.Ed 2d 1; see also id., at 573, 125 S.Ct. 1183,161 L.Ed 2d 1; Miller, 567 U.S., at ___, 132 S.Ct. 2455, 183 L.Ed 2d 407, 430." Adams v. Alabama, 136 S.Ct. at 1796, 1800 (2016).

In spite of the gravity of the offense being the primary factor in the sentencing court's decision, the state argues that the court also based its decision on the "protection of the public" and "Walker's character" (R.B. pg 17):

I. Protection Of The Public. A life sentence under §973.014 can allow for parole eligibility in 20 years at the earliest. Eligibility guarantees a reassessment of the offender to weigh their dangerousness and ensure the protection of the community. This is what Miller and Montgomery envisioned when they observed states' need to continue to protect the public. "Extending parole eligibility to juveniles offenders does not impose an onerous burden on the States..." "Those prisoners who have shown an

inability to reform will continue to serve life sentences." Montgomery at 735.

II. Character Of The Offender. The state argues that my character could have been judge by the court, by the seriousness of the crime, to be so depraved that a lifetime sentence could be justified. (R.B. pg 19-20). The evaluations of me before the court as well as Graham suggested otherwise (the two presentencing reports and the psychological evaluation (R:41:28, 30)). "It remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" Graham at 2026,2027, (quoting Roper).

CONCLUSION

For the reasons stated in my initial brief and this reply, I respectfully restate my request that my sentence be vacated and resentencing ordered in line with Miller v. Alabama, and with the application of the proper interpretation on §973.014. Dated at New Lisbon, Wisconsin - May 24, 2017.

Respectfully submitted by:

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