COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1517 **Cir. Ct. No. 1995CF954600**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICO SANDERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Rico Sanders, *pro se*, appeals from an order denying his WIS. STAT. § 974.06 (2011–12) motion for postconviction relief.[1] He seeks relief from his sentence based on ***Graham v. Florida***, 560 U.S. 48 (2010), and ***Miller v. Alabama***, ___ U.S. ___, 132 S. Ct. 2455 (2012).[2] We affirm.

BACKGROUND

¶2 In 1995, Sanders was charged with breaking into the homes of four women, sexually assaulting each woman, and taking property from the homes. Sanders was fifteen years old when the crimes were committed. The criminal complaint indicates that Sanders gave an interview to the police during which he admitted the crimes and offered details about them.

¶3 In 1997, Sanders reached a plea bargain with the State pursuant to which he entered ***Alford*** pleas to four counts of first-degree sexual assault, one count of second-degree sexual assault, and one count of armed robbery with use of force, contrary to WIS. STAT. §§ 940.225(1)(b) and (2)(a) and 943.32(2) (1995–96).[3] Sanders's exposure for those six crimes was two hundred and ten years. The State agreed to recommend a total sentence of fifty to seventy years of imprisonment for the sexual assault charges, plus a lengthy imposed and stayed

[1] The Honorable David A. Hansher accepted Sanders's pleas, sentenced him, denied the 2009 WIS. STAT. § 974.06 motion, and denied the 2012 § 974.06 motion that is at issue in this appeal.

All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

[2] Sanders's motion asked the trial court to "[v]acate, modify, or set aside [his] sentence."

[3] When a defendant enters an ***Alford*** plea, the defendant maintains his or her innocence but accepts the consequences of the charged offense. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

sentence with probation for the armed robbery charge. Two counts of armed robbery and two counts of aggravated battery—which would have subjected Sanders to an additional one hundred years of imprisonment—were dismissed and read in.

¶4 The trial court said that Sanders's crimes were "some of the most horrific and horrible sexual assaults that [it had] seen" and concluded that the State's sentencing recommendation was "insufficient to protect the community and … punish the defendant." The trial court sentenced Sanders to a total of 140 years of imprisonment, with 595 days of presentence credit. Sanders will be eligible for parole after serving thirty-five years in prison.

¶5 Sanders did not immediately pursue a direct appeal. His direct appeal rights were reinstated in 2006. In 2007, represented by a lawyer, he filed a motion to withdraw his ***Alford*** pleas. The trial court denied his motion and we affirmed.[4] *See* ***State v. Sanders***, No. 2007AP1469, unpublished slip op. (WI App Sept. 9, 2008).

¶6 In 2009, Sanders filed a *pro se* WIS. STAT. § 974.06 motion, asserting that his postconviction lawyer had provided constitutionally deficient representation with respect to moving for plea withdrawal. The trial court denied the motion and we affirmed. *See* ***State v. Sanders***, No. 2009AP3190, unpublished slip order (WI App Mar. 16, 2011).

¶7 In May 2012, Sanders filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. Sanders's motion raised two issues, both of

[4] The Honorable Jeffrey A. Wagner denied Sanders's 2007 postconviction motion.

which were based on ***Graham***, which held that the United States "Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." ***Id.***, 560 U.S. at 82. ***Graham*** explained: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." ***Id.*** at 75.

¶8 Sanders's motion asserted that because he would not be eligible for parole until he was fifty years of age, he was being denied a "meaningful opportunity for parole," which was contrary to ***Graham***.[5] Sanders's motion also argued that his sentence was "unduly harsh and excessive" and that, under ***Graham***, the trial court should have taken Sanders's "age and youthfulness into consideration" at sentencing.

¶9 The trial court concluded that Sanders's motion was procedurally barred under ***Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), because Sanders failed to raise the issues in his previous WIS. STAT. § 974.06 motion. Sanders filed a motion for reconsideration, arguing that he should not be procedurally barred from raising issues based on ***Graham*** because the case had not yet been decided when Sanders filed his first § 974.06 motion. The trial court denied the motion, but in doing so, it briefly addressed the merits of Sanders's § 974.06 motion. The trial court concluded:

[5] The State asserts that Sanders will be eligible for parole when he is fifty-one or fifty-two years old. Our analysis in this case is the same whether Sanders is eligible for parole at age fifty, fifty-one, or fifty-two.

> ***Graham*** is inapplicable here. The ***Graham*** court held that the Eighth Amendment does not permit a juvenile to be imprisoned for life without parole. Because Florida had abolished its parole system, [Graham] had no meaningful opportunity for parole in that state. Wisconsin has not abolished its parole system, and [Sanders] is eligible for parole in September of 2030. He is not serving a life sentence without parole as in ***Graham***.

(Underlining omitted; bolding and italics added.)

DISCUSSION

¶10 Sanders presents three issues on appeal. First, he argues that the trial court erroneously exercised its discretion when it concluded that Sanders's motion was procedurally barred by ***Escalona-Naranjo***. Second, he questions whether the structure of his sentence "affords him a meaningful opportunity for parole." (Bolding and capitalization omitted.) Third, Sanders asserts that his sentence "is cruel and unusual [as] guided by the principles set forth in ***Graham*** and echoed in ***Miller***." (Bolding and italics added.)

¶11 For purposes of this appeal, we will assume that Sanders's motion was not procedurally barred by ***Escalona-Naranjo*** and will instead focus on whether Sanders is entitled to relief based on ***Graham*** and ***Miller***. Even if we further assume that ***Graham*** and ***Miller*** apply retroactively and could form the basis for Sanders's challenge to his sentence, we are not convinced that those cases entitle Sanders to relief from his sentence.

¶12 Sanders concedes that he is not serving a life sentence without the possibility of parole and that his case is "therefore not controlled by ***Graham***." (Bolding and italics added.) Further, it is clear that ***Miller***, which was released after Sanders filed his postconviction motion, is also not directly on point, as it concerned juveniles who committed homicides and were given mandatory

sentences of life without parole. *See* ***Miller***, ___ U.S. at ___, 132 S. Ct. at 2460 ("[M]andatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"). Nonetheless, Sanders suggests that the principles discussed in both cases support his claim that his sentence "is cruel and unusual."

¶13 As noted, ***Graham*** held that a defendant must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See* ***id.***, 560 U.S. at 75. The State acknowledges that some courts have "extended ***Graham*** to … consecutive sentences under which the defendant was first eligible for parole at a date beyond his life expectancy." (Bolding added.) For example, in ***People v. Caballero***, 282 P.3d 291 (Cal. 2012), the California Supreme Court considered the case of a juvenile who was given consecutive sentences that did not make him eligible for parole for "over 100 years." *See* ***id.*** at 293, 295. Citing ***Graham***, the court concluded "that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." ***Caballero***, 282 P.3d at 295.

¶14 We need not decide whether Wisconsin would follow ***Caballero***'s reasoning or cases holding that ***Graham*** prohibits only the imposition of a sentence of life imprisonment without the possibility of parole for a juvenile who commits a non-homicide offense, because even under ***Caballero***'s reasoning, Sanders is not entitled to relief. As the State points out, "Sanders does not assert, much less prove, that his parole eligibility date exceeds his natural life

expectancy." Indeed, Sanders admits in his reply brief that his eligibility for parole is within his life expectancy, which he asserts is 63.2 years.[6]

¶15 Further, Sanders has not provided any case law holding that where a defendant is eligible for parole in his early fifties, he is nonetheless being denied the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" that is referenced in ***Graham***. *See* ***id.***, 560 U.S. at 75. Sanders faults the State for not developing an argument concerning the definition of "meaningful opportunity," but the burden is on Sanders to show that he is entitled to relief. Sanders's motion asserted that juveniles should be eligible for parole in their late twenties, when their minds are "fully matured," but he has not demonstrated that ***Graham*** or other cases have held that the United States Constitution requires such an early parole eligibility date for juveniles convicted of non-homicide crimes.

¶16 In summary, Sanders has not shown that he is entitled to relief from his sentence based on the United States Supreme Court's holdings in ***Graham*** and ***Miller***. We affirm the trial court's order.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] The State contends that Sanders's life expectancy is 70.6 years. We need not determine which life expectancy figure is accurate, because using either figure, Sanders's life expectancy is years beyond his parole eligibility date.