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DISTRICT II

February 12, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1354-CR State of Wisconsin v. Theodore W. Oswald (L.C. #1994CF227)

Before Brown, C.J., Reilly and Gundrum, JJ.

Theodore W. Oswald appeals pro se from an order denying his WIS. STAT. § 974.06 (2011-12) postconviction motion seeking the appointment of counsel to argue for sentence modification based on *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012).¹ We agree with the circuit court that *Miller* is inapposite to Oswald's situation. Based upon our review of the

¹ The United States Supreme Court decided *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), five years after Oswald's no-merit direct review, providing him a sufficient reason for not raising this claim at that time. See *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994), and *State v. Tillman*, 2005 WI App 71, ¶¶25-27, 281 Wis. 2d 157, 696 N.W.2d 574.

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

briefs and the record, we conclude that this case is appropriate for summary disposition, *see* WIS. STAT. RULE 809.21, and affirm.

In 1994, Oswald and his father went on a crime spree that included bank robberies, kidnapping, hostage taking, a police chase and gun battle, the wounding of one police officer, and the death of another. Ultimately convicted of seventeen felonies, Oswald was sentenced to two life prison terms. With additional consecutive terms for the other offenses, Oswald's total sentence exceeds five hundred years. He will be eligible for parole in 2095.

As a threshold matter, the State argues that retroactivity principles bar the application of *Miller* to Oswald's case. Assuming without deciding that *Miller* could be applied retroactively, we conclude that it still affords Oswald no relief.

First, *Miller* does not apply to an offender of Oswald's age. The *Miller* Court held that "mandatory 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.'" *Miller*, 132 S. Ct. at 2460 (citation omitted). The circuit court found, and Oswald concedes, that he was two months beyond his eighteenth birthday at the time of the offenses.

Oswald argues, however, that it was unreasonable for the circuit court to read *Miller* as "foist[ing] an age-based bright-line rule" upon a sentencing court. It was not the circuit court here that drew the line at eighteen. Rather, the *Miller* Court extensively relied on *Roper v. Simmons*, 543 U.S. 551 (2005), which invalidated the death penalty for juvenile offenders under the age of eighteen. The *Roper* Court explained:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities

that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.... The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.

Id., at 574. The circuit court’s reading of *Miller* was not unreasonable.

Miller also does not apply because the court did not sentence Oswald to “mandatory life without parole.” Indeed, it could not. Oswald received life sentences for first-degree intentional homicide and for hostage-taking,² at the time both Class A felonies punishable by life imprisonment. See WIS. STAT. §§ 940.01(1), 940.305(1), 939.50(3)(a) (1993-94). When sentencing a person to life imprisonment, a court either had to order that the person would be eligible for parole under WIS. STAT. § 304.06(1) (1993-94) or set a parole eligibility date itself. WIS. STAT. § 973.014(1) (1993-94). “Without parole” was not an option. Here, the circuit court set Oswald’s parole eligibility date: May 31, 2095. Since *Miller* does not apply to Oswald’s circumstances, the court did not err in denying his motion. Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

² Oswald has not raised the issue either below or here as to whether the Eighth Amendment bars his life sentence on the hostage-taking charge. See *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the Eighth Amendment prohibits imposing a life-without-parole sentence on a juvenile offender for a nonhomicide offense). In any event, Oswald was not a juvenile at the time of the offense.