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DISTRICT I

November 9, 2021

To:

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2018AP1805 State of Wisconsin v. Mighty T. Howell (L.C. # 1993CF932309)

Before Brash, C.J., Kloppenburg and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mighty Howell, pro se, appeals the trial court's order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2019-20).[1] Howell, who was a juvenile when he committed his crimes, contends that he received a de facto life-without-parole sentence, and that the sentence was contrary to United States Supreme Court case law. Based upon our review

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We affirm.

In 1993, when Howell was seventeen years old, he was charged in adult court with first-degree intentional homicide and attempted armed robbery, both as party to a crime, and with possession of a firearm as a juvenile. He was convicted on all three charges after a bench trial. In sentencing Howell on the homicide charge, the trial court imposed a life sentence, but made Howell eligible for parole when Howell would be sixty-two years old.[2]

In August 2018, Howell filed the postconviction motion that is the subject of this appeal.[3] Howell contended that the trial court had imposed a de facto life-without-parole sentence, and that the sentence was contrary to the United States Supreme Court's decisions in ***Miller v. Alabama***, 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 577 U.S. 190 (2016). The trial court denied Howell's motion.

On appeal, Howell renews his argument that his sentence is contrary to ***Miller*** and ***Montgomery***. Howell's argument has two main parts. First, Howell argues that his sentence was a de facto life-without-parole sentence. As grounds for this argument, Howell asserts that the life expectancy of a Black male born in the year that he was born is 62.9 years. Second, Howell argues that ***Miller*** and ***Montgomery*** prohibit life-without-parole sentences for juveniles absent a finding that the juvenile is permanently incorrigible, and that the trial court made no such finding here. The State contends that Howell's life sentence with parole eligibility at age

[2] The court imposed shorter concurrent sentences on the remaining two charges.

[3] We have omitted procedural history regarding prior postconviction motions because that history is not relevant to our decision in this appeal.

sixty-two does not implicate ***Miller*** and ***Montgomery*** and that, even if it did, the sentence comports with ***Miller*** and ***Montgomery***.

Subsequent to briefing, we placed this case on hold pending the Wisconsin Supreme Court's decision on a petition for review filed in ***State v. Jackson***, No. 2017AP712, unpublished slip op. (WI App Aug. 28, 2018). The petition for review presented the issue of whether Jackson's de facto life-without-parole sentence for crimes he committed as a juvenile was unconstitutional under ***Miller*** and ***Montgomery***.[4] The Wisconsin Supreme Court held the petition in abeyance pending a decision by the United States Supreme Court in ***Jones v. Mississippi***, 141 S. Ct. 1307 (2021). When the United States Supreme Court issued its opinion in ***Jones*** in April 2021, the Court addressed the scope of its decisions in ***Miller*** and ***Montgomery***. On August 11, 2021, the Wisconsin Supreme Court denied the petition for review in ***Jackson***. We then provided the parties here with the opportunity to submit letters stating their positions on how Howell's case should proceed subsequent to the decision in ***Jones***. Howell has not filed a letter. The State filed a letter in which it contends that ***Jones*** clarified that ***Miller*** and ***Montgomery*** do not require a sentencing court to make a finding that a juvenile is permanently incorrigible in order to impose a life sentence.

We will assume, without deciding, that Howell's sentence could be characterized as a de facto life-without-parole sentence that implicates ***Miller*** and ***Montgomery***. Even so, we conclude that Howell's challenge to his sentence fails. We agree with the State that ***Miller*** and ***Montgomery***, as now clarified by the United States Supreme Court in ***Jones***, do not require a

[4] Jackson was not eligible for parole until he was 101 years old. *See* ***State v. Jackson***, No. 2017AP712, unpublished slip op. ¶17 (WI App Aug. 28, 2018).

sentencing court to make a finding of permanent incorrigibility when imposing a life-without-parole sentence on a juvenile. *See* ***Jones***, 141 S. Ct. at 1311, 1314, 1316-17. Rather, according to ***Jones***, the sentencing court must "consider youth as a mitigating factor." ***Id.*** at 1316. The Court in ***Jones*** concluded:

> In short, ***Miller*** followed the Court's many death penalty cases and required that a sentencer consider youth as a mitigating factor when deciding whether to impose a life-without-parole sentence. ***Miller*** did not require the sentencer to make a separate finding of permanent incorrigibility before imposing such a sentence. And ***Montgomery*** did not purport to add to ***Miller***'s requirements.

Id.; *see also* ***id.*** at 1311 ("In ***Miller***, the Court mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence.").

Here, the trial court's sentencing remarks show that the court considered Howell's youth as a mitigating factor when imposing Howell's sentence. The court stated that it did not give much weight to Howell's or his co-defendant's lack of remorse because "[m]aybe they're too young." The court also stated that, given Howell's age, the court essentially viewed Howell as a first-time offender, regardless of any juvenile record. Additionally, the court stated: "There's not much here in these backgrounds other than your age, other than the fact that you're still teenagers[,] that provides any real sense for what the appropriate sentence is." Ultimately, the court concluded that there were other factors that justified the lengthy sentence imposed. The weight the court gave to those other factors does not make Howell's sentence contrary to ***Miller*** and ***Montgomery***.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals