



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

January 25, 2022

To:

Hon. Kendall M. Kelley
Circuit Court Judge
Electronic Notice

Donald V. Latorraca
Assistant Attorney General
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Adam Stevenson
Electronic Notice

Alicia D'Addario
Electronic Notice

Bryan Stevenson
Electronic Notice

David L. Lasee
District Attorney
Electronic Notice

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

2016AP2098

State of Wisconsin v. Omer Ninham (L. C. No. 1999CF523)

Before Stark, P.J., Hruz and Gill, 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).

Omer Ninham appeals a circuit court order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2019-20).¹ Ninham, who was fourteen years old when he

¹ The Honorable Kendall M. Kelley presided over Ninham's postconviction motion. The Honorable J.D. McKay presided over Ninham's sentencing hearing. We refer to them as the circuit court and the sentencing court, respectively.

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

committed the crimes at issue, contends that his life-without-parole sentence violates the Eighth and Fourteenth Amendments to the United States Constitution and recent United States Supreme Court precedent. Based upon our review 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.

A jury found Ninham guilty of one count of first-degree intentional homicide, as a party to the crime, and one count of physical abuse of a child. The charges stemmed from an incident in which Ninham and another juvenile, unprovoked, threw a thirteen-year-old boy from the top level of a parking ramp. The boy fell approximately forty-five feet to the ground and eventually died from his injuries. The sentencing court sentenced Ninham to life imprisonment without parole eligibility on the first-degree intentional homicide count and to five years in the Wisconsin state prison system on the physical abuse of a child count, consecutive to the homicide count.

Following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), Ninham filed a postconviction motion seeking resentencing.² Relying upon *Miller*, Ninham argued that the sentencing court had failed to adequately consider his youth and its attendant circumstances when sentencing him to life without parole. The circuit court denied Ninham's motion, concluding that *Miller* did not apply to Ninham's sentence because the sentencing court had discretion under Wisconsin law to impose life without parole for Ninham's homicide offense and because the sentencing court nevertheless "considered Ninham's youth and related characteristics."

² We have omitted some procedural history that is not relevant to our decision in this appeal.

On appeal, Ninham contends that *Miller* applies to discretionary life-without-parole sentences, such as his own. He also argues that the sentencing court did not comply with the standards set forth in *Miller* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), because the court did not consider his youth and its attendant circumstances as mitigating factors, nor did it consider whether he was permanently incorrigible. The State contends that *Miller* does not apply to Ninham's sentence because the sentencing court had discretion to impose life without parole. The State alternatively argues that the court did consider Ninham's youth and its attendant circumstances.

We certified Ninham's appeal to the Wisconsin Supreme Court, but our certification was denied. We subsequently held our decision in this case in abeyance 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 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*. The Wisconsin Supreme Court held that petition in abeyance pending a decision by the United States Supreme Court in *Jones v. Mississippi*, 593 U.S. ___, 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 subsequently denied the petition for review in *Jackson*.

With the benefit of *Jones* having now been decided, we conclude that Ninham's arguments fail. The *Jones* Court held that "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient" under the Eighth Amendment for a case involving a juvenile offender who committed a homicide offense. *Jones*, 141 S. Ct. at

1313. “*Miller* ... mandated ‘only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing’ a life-without-parole sentence.”

Jones, 141 S. Ct. at 1316 (citation omitted). The Court further explained that

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.

Jones, 141 S. Ct. at 1316. The Court concluded that a sentencing court does not need to provide an on-the-record sentencing explanation with an explicit or implicit factual finding of permanent incorrigibility. *See id.* at 1318-21.

Here, the sentencing court considered Ninham’s youth and its attendant circumstances as mitigating factors when it sentenced him to life without parole. Ninham’s attorney repeatedly asked the court to consider Ninham’s age and his emotional immaturity. The sentencing court, in turn, explicitly discussed Ninham’s youth in its sentencing remarks, stating: “I’ll concede for the sake of discussion that Omer Ninham is a child, but he’s a child beyond description to this Court. ... I recognize his age. He’s a young man. ... I recognize his emotional stability or lack thereof.” The court also acknowledged Ninham’s difficult upbringing, noting that “I can’t condone at all the circumstances that Omer Ninham found himself in, but I certainly cannot allow that to become an excuse for the horrific conduct that took place” Ultimately, the court gave more weight to other factors, including the “horrific” nature of the offense and the need to protect the public, than Ninham’s age and its attendant circumstances. It concluded that life without parole eligibility was the appropriate sentence. Ninham’s sentence was therefore not contrary to *Miller* or *Montgomery*.

Because the sentencing court properly considered Ninham's youth and its attendant circumstances, we need not address Ninham's final argument regarding whether the circuit court erred by concluding that a life-without-parole sentence was still warranted in light of current United States Supreme Court precedent. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (we need not address all issues raised by the parties if one is dispositive).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals