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DISTRICT I/III

January 25, 2022

To:

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Circuit Court Judge
Electronic Notice

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

2016AP1058 State of Wisconsin v. Curtis L. Walker
(L. C. No. 1994CF944079)

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).

Curtis Walker appeals a circuit court order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2019-20).[1] Walker, who was seventeen years old when he committed the crime at issue, contends that his parole eligibility date in 2071 violates the Eighth

[1] The Honorable Jonathan D. Watts presided over Walker's postconviction motion. The Honorable Stanley A. Miller presided over Walker'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.

Amendment to the United States Constitution and recent United States Supreme Court precedent. He also contends that the sentencing court exceeded its authority under WIS. STAT. § 973.014 (1993-94), and that the circuit court improperly denied him a hearing on his postconviction motion. 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 Walker guilty of first-degree intentional homicide while using a dangerous weapon, as a party to a crime. Evidence presented at trial showed that Walker shot and killed a randomly selected police officer with a scoped .308 caliber rifle after he had planned to kill a police officer with his co-conspirator. The sentencing court subsequently sentenced Walker to life imprisonment with parole eligibility in 2071—seventy-five years from the sentencing date.

Following 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), Walker filed a pro se postconviction motion seeking resentencing.[2] He argued that his sentence violated ***Miller*** and ***Montgomery*** because the sentencing court failed to consider his youth at sentencing. In a written decision, the circuit court denied Walker's motion without a hearing.

On appeal, Walker again argues that his sentence is unconstitutional under ***Miller*** and ***Montgomery*** because the sentencing court did not consider how he, as a juvenile offender, was different from an adult offender, or whether he was beyond rehabilitation. He contends that the court failed to explicitly discuss his youthful characteristics on the record. He also argues that the court failed to find that he had an "irretrievably depraved character." In addition, the Frank J.

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

Remington Center filed an amicus brief, agreeing with Walker that his sentence was unconstitutional because the sentencing court failed to consider Walker's age and its attendant characteristics "before sentencing him to die in prison." The amicus also argued, among other things, that objective indicia of societal standards—nationally and in Wisconsin—demonstrate a consensus against life-without-parole sentences for juvenile offenders.

In response, the State contends that ***Miller*** does not extend to discretionary life-without-parole sentences imposed under WIS. STAT. § 973.014, nor does it extend to de facto life-without-parole sentences. The State alternatively argues that the sentencing court in this case "exercised the sentencing discretion contemplated under ***Miller***" because the court did consider Walker's age, his childhood, and other necessary sentencing factors.

After the briefing was complete, we certified Walker'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 denied the petition for review in ***Jackson***.

We assume, without deciding, that Walker's sentence is a de facto life-without-parole sentence that implicates ***Miller*** and ***Montgomery***. We nevertheless conclude that Walker'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 had discretion to impose a de facto life-without-parole sentence. *See* WIS. STAT. § 973.014(1)(b) (1993-94). Contrary to Walker's and the amicus's arguments, the court considered Walker's youth and its attendant circumstances as a mitigating factor before imposing that sentence. Walker's sentencing argument focused on his youth, his rough childhood, and his future prospects for rehabilitation. The sentencing court, in turn, acknowledged Walker's difficult childhood, noting that Walker "[was] not given a fair chance in life" and that "the hand that [Walker was] dealt was unfair." The court also acknowledged that Walker was very young, but it recognized that efforts to rehabilitate Walker had failed:

> The methods of treating people is amply demonstrated by the history of placements provided for you and the efforts of counseling. They all failed, and unfortunately this Court sees all too often young people such as yourself, young African-American males, coming before it committing very serious crimes at very, very early ages, and we are not able to spout the flow, so in that regard society has failed in its responsibilities to you and many that have come within our state because you deserve a better opportunity.

Although the court expressed "hope" that society would someday "find ways of helping people through the dark tunnel" and help people "become productive citizens," the court recognized that the available methods had not worked on Walker, and he was "dangerous as a result." In the end, the sentencing court gave more weight to other factors, such as the gravity of the offense and Walker's role in the offense, than Walker's age and its attendant circumstances. Walker's sentence is therefore not contrary to ***Miller*** or ***Montgomery***.[3]

Walker also argues that the sentencing court exceeded its authority under WIS. STAT. § 973.014(1) (1993-94), because it imposed a de facto life-without-parole sentence when a life-without-parole sentence was not explicitly authorized under that statute. We reject this argument because Walker has raised it for the first time on appeal. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396. Even if he had previously raised the issue, a sentencing court does not exceed its authority under § 973.014(1)(b) (1993-94), by setting a parole eligibility date beyond a defendant's expected lifetime. *See* ***State v. Setagord***, 211 Wis. 2d 397, 414, 565 N.W.2d 506 (1997). Walker has not identified any authority establishing that this rule does not apply to a juvenile offender.

[3] We need not consider the "objective indicia of societal standards" discussed in the amicus brief because, as the amicus recognizes, "Mr. Walker's claim is not a categorical challenge or a challenge to the facial validity of the sentencing statute. It is limited to his own particular sentence." *See* ***Miller v. Alabama***, 567 U.S. 460, 482 (2012).

Finally, Walker argues that the circuit court improperly denied his postconviction motion without a hearing because he alleged facts that, if true, would have entitled him to relief. We disagree. Consistent with our conclusions discussed above, the record conclusively demonstrates that Walker is not entitled to his requested relief. *See* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to 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