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DISTRICT III

January 25, 2022

To:

Hon. William M. Atkinson
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

David L. Lasee
Electronic Notice

Brian Patrick Mullins
Electronic Notice

Anne Christenson Murphy
Electronic Notice

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

2017AP2357 State of Wisconsin v. Carl Morgan
(L. C. No. 2006CF1082)

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).

Carl Morgan appeals a circuit court order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06 (2019-20).[1] Morgan, who was fifteen years old when he committed the crimes at issue, contends that his consecutive sentences, totaling fifty-five years' initial confinement, are a de facto life-without-parole sentence that violates the Eighth Amendment to the United States Constitution and recent United States Supreme Court precedent.

[1] The Honorable William M. Atkinson presided over Morgan's postconviction motion. The Honorable J.D. McKay presided over Morgan'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.

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 Morgan guilty of second-degree intentional homicide, attempted first-degree intentional homicide, and first-degree recklessly endangering safety. Those convictions arose from a physical altercation in which Morgan shot and killed a man at "point[-]blank range" with a .22 caliber handgun and twice shot at, but missed, another man who had turned to run away. The sentencing court imposed a total sentence of fifty-five years' initial confinement and thirty years' extended supervision. That sentence consisted of thirty-five years' initial confinement and twenty years' extended supervision on count one; twenty years' initial confinement and ten years' extended supervision on count two, consecutive to count one; and five years' initial confinement and two years' extended supervision on count three, concurrent to count two.

Morgan later filed a postconviction motion seeking resentencing or sentence modification, arguing that his aggregate sentence of fifty-five years' initial confinement was contrary to United States Supreme Court precedent in ***Miller v. Alabama***, 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 577 U.S. 190 (2016).[2] The circuit court denied Morgan's motion.

Morgan argues on appeal that the sentencing court imposed a de facto life-without-parole sentence because he will be released from confinement when he is seventy-one years old—seven years after the purported life expectancy of an average prisoner. Morgan further argues that

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

Miller applies to de facto life-without-parole sentences. He also contends that his aggregate sentence does not comply with ***Miller*** because the sentencing court did not consider how he, as a juvenile offender, was different from and less culpable than an adult offender before imposing the consecutive sentences. In response, the State contends that ***Miller*** is inapplicable to Morgan's aggregate sentence because the sentencing court had discretion to impose consecutive sentences. The State also argues that even if ***Miller*** did apply to Morgan's consecutive sentences, the sentencing court properly considered Morgan's youth.

We 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 Morgan's sentence is a de facto life-without-parole sentence that implicates ***Miller*** and ***Montgomery***. Nevertheless, we conclude Morgan'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 Morgan's age and its attendant circumstances. At sentencing, Morgan's attorney emphasized Morgan's age and a recent psychological evaluation that suggested that Morgan could be rehabilitated. Morgan's attorney also discussed ***Roper v. Simmons***, 543 U.S. 551 (2005), explaining that "the Supreme Court and science [have] told us that there is even less justification for holding juveniles responsible at the same level as adults." The court, in turn, discussed Morgan's youth, but it recognized that Morgan was not a typical teenager:

> Carl Morgan was 15 years old, 15 and 11 months, almost 16. A teenager. Certainly not typical. His character was not the character of a normal or even average, if you will, teenager. I say that because the facts of this case would indicate to me that Carl Morgan was for all intents and purposes on his own. He wasn't by law emancipated, but he was by choice emancipated.

The court further recognized:

> There's nothing about Carl Morgan that is typical of a 15-year-old or even a 16-year-old other than the fact that when we study them, teenagers that age or children that age, we tend to categorize them,

> we tend to talk about them in terms of the general characteristics that they evidence. And in this particular case, this Court has to conclude that Carl Morgan was atypical. He was not and isn't as he sits here today a typical teenager.
>
> I understand the science. I understand the information that's been provided not only in the report that I've received from Dr. Miller, but also the information that I received and listened to at length from Dr. Marty Beyer. I understand that science. I understand that information.

Morgan argues that the sentencing court actually failed to consider Morgan's age because it viewed him as atypical, but as the State aptly recognizes, "Just because the court found that Morgan was not a 'typical' teenager does not mean the court did not consider his youth." In essence, the court's comments indicate that it did not view Morgan's crimes as reflecting "unfortunate yet transient immaturity." *See* ***Miller***, 567 U.S. at 479 (citations omitted). Morgan may disagree with that view, but ***Miller*** did not foreclose a sentencing court's ability to make that judgment in homicide cases. *See* ***id.*** at 479-80. Finally, to the extent Morgan argues that the court did not find that he was permanently incorrigible, neither an implicit nor explicit finding of permanent incorrigibility is required. *See* ***Jones***, 141 S. Ct. at 1318-21.

Ultimately, the sentencing court gave more weight to other factors, including the need to protect the public and the gravity of the offenses, than Morgan's age and its attendant circumstances. Morgan's aggregate sentence is therefore not contrary to ***Miller*** or ***Montgomery***.

Morgan's argument that ***Miller*** is a new factor warranting sentence modification also fails for two reasons. First, we need not address that argument because it is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Second, even if we were to address that argument, we have already concluded that the sentencing court considered Morgan's age and its attendant circumstances. Although ***Miller*** had not been decided when

Morgan was sentenced, Morgan's sentence is not contrary to ***Miller*** or ***Montgomery***, especially in light of the Supreme Court's most recent holdings in ***Jones***, interpreting those cases. We therefore conclude that no new factor exists. *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

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