2021 IL App (5th) 180343-U

NO. 5-18-0343

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Hamilton County.
	)	
v.	)	No. 01-CF-02
	)	
ROBERT L. COLE,	)	Honorable
	)	Barry L. Vaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying the defendant's motion for leave to file a successive postconviction petition because the defendant cannot make a *prima facie* showing of prejudice regarding his *Miller* claim where the record shows that the circuit court considered youth and its attendant characteristics before imposing a 60-year sentence.

¶ 2 The defendant, Robert L. Cole, appeals from an order of the circuit court of Hamilton County, denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2018)). In his motion for leave to file a successive petition, the defendant, who was 18 at the time of his offenses, asserted that his 60-year sentence constituted a *de facto* life sentence that violated the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of

the Illinois Constitution (Ill. Const. 1970, art. I, § 11). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 On January 15, 2001, the defendant and his friends, Christopher Currie and Abbey Jones, traveled to the home of the defendant's grandfather, Milton Irvin, in Hamilton County, Illinois, arriving at approximately 3 a.m. The defendant and Currie went inside the residence while Jones waited outside in the car. Inside the house, the defendant and Currie retrieved a 12-gauge shotgun, a .22-caliber bolt action rifle, and other personal property belonging to Irvin. Before leaving the house, the defendant entered Irvin's bedroom and shot Irvin in the head with the shotgun, killing him in his sleep. The defendant and Currie left the residence with the two firearms and placed them in the trunk of the car. The defendant then drove Currie and Jones to Adams County, Illinois.

¶ 5 The next day, the defendant was arrested in Adams County and confessed to murdering Irvin. The State subsequently charged the defendant with first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)), residential burglary (720 ILCS 5/19-3 (West 2000)), home invasion (720 ILCS 5/12-11 (West 2000)), and theft (720 ILCS 5/16-1(a)(1)(A) (West Supp. 2001)). On April 5, 2001, the defendant pled guilty to all four charges. In exchange for his plea, the State agreed to cap the defendant's sentence at 60 years' imprisonment.

¶ 6 Prior to sentencing, the circuit court ordered that a presentence investigation report (PSI) be prepared. The PSI revealed that the defendant had a juvenile record. In 1995, the defendant admitted to charges of burglary, unlawful use of intoxicating compounds, and theft and received 18 months' probation. The theft charge indicated that the defendant stole a shotgun and three .22-caliber rifles. In 1997, the defendant admitted to another theft charge. The defendant was

again placed on probation and ordered to complete a three-month residential program at the Adams County Youth Home. The defendant did not have any adult criminal convictions but admitted to having several traffic citations including for driving without a license and no insurance.

¶ 7 The defendant's family history revealed that the defendant did not know his biological father and was primarily raised by his mother and stepfather, Patty and Jerry Leffers, with whom the defendant claimed to have a good relationship. Before marrying Jerry, Patty had an unmarried relationship with Rusty Cole, whom the defendant described as extremely abusive toward Patty. The PSI also noted that Patty was the victim's daughter. Patty reported, however, that she had a good relationship with the defendant. Patty added that the defendant was in the Boy Scouts for several years and regularly attended church for more than 15 years. Patty was unaware as to whether the defendant abused any substances.

¶ 8 The defendant conveyed that he began consuming alcoholic beverages at the age of 15 and was drinking almost daily by the age of 17, but the defendant stated that he had not consumed alcoholic beverages "for quite some time." The defendant reported that be began abusing drugs when he was 14 years old. He admitted to using cannabis, methamphetamine, acid, cocaine, and ecstasy. The defendant alleged that he had been using methamphetamine at the time of his crimes.

¶ 9 No mental health diagnoses, handicaps, or disabilities were disclosed, and the defendant was not prescribed any medication. The defendant did suffer a concussion at approximately 12 or 13 years old but considered himself in good health.

¶ 10 The PSI also discussed the defendant's schooling. The defendant reported that he was not enrolled in school at the time of the offense and was last enrolled as an eleventh-grade student at

Ombudsman Alternative School. The defendant stated he had difficulty in school and was expelled after throwing a "chapstick" at a teacher. He was then referred to an alternative school. The defendant reported that he made average grades and was able to read and write. The defendant quit school because he did not have enough credits to graduate but wished to finish school and enlist in the Army. He also expressed an interest in psychology and biology.

¶ 11 Attached to the PSI were several progress reports detailing the defendant's stay at the Adams County Youth Home. These reports indicated that the defendant was verbally aggressive and inconsiderate towards peers and authority figures as well as quickly and easily angered. The reports noted that the defendant had difficulty with "fronting" to his peers and "talk[ed] a big game" to impress others. The "Final Treatment Report," however, stated that the defendant had positively demonstrated the ability and skills to appropriately deal with authority figures and his peers. The "Final Treatment Report" also observed that "[t]here is no doubt that [the defendant] clearly understands the links between behavior and consequences, and understands the concept of personal responsibility."

¶ 12 At sentencing, the State presented several witnesses who testified to the facts and circumstances of the case as well as the defendant's behavior following the shooting. Abbey Jones, the defendant's friend who waited in the car during the shooting, testified that the defendant and Currie discussed "how stuff exploded" referring to the victim, Milton Irvin. When asked about the demeanor of the defendant and Currie, Jones stated, "[I]t didn't faze them any. They just talked about how their adrenaline was pumping, and *** it didn't bother them. They were kind of excited." Jones testified that the defendant further stated he should have killed his mother as well and called her a "stupid drunk." The defendant also made a comment to a friend's mother, asking if she had ever seen a pumpkin explode.

¶ 13 Jonathan Wear, a correctional officer with the Adams County Sheriff's Department, testified that he overheard the defendant speaking with his mother on the phone. The defendant told his mother that he shot her father and would explain later. The defendant requested that his mother send him money. Wear also assisted in transporting the defendant and Currie to an airport in Quincy. Wear described the defendant's demeanor as "boastful and arrogant." Wear testified that the defendant and Currie were joking and making light of the situation. Wear further testified that the defendant and Currie appeared proud and showed no remorse. Another correctional officer with the Adams County Sheriff's Department, Chad Downs, testified that the defendant acted as if "[h]e didn't have a care in the world, just like he was out on a Sunday cruise, just laughing, joking, just no cares."

¶ 14 Finally, Detective David Roll, a special agent with the Illinois State Police, testified that he interviewed the defendant on January 16, 2001, regarding the shooting of Irvin. Detective Roll recorded a portion of the interview which was submitted by the State and played in open court at the defendant's sentencing. During the interview, the defendant admitted to shooting Irvin.

¶ 15 The defendant presented no evidence. The State then argued that numerous factors in aggravation applied to the defendant's case, including: (1) the defendant's conduct caused serious harm; (2) the defendant had a history of prior delinquency or criminal activity; (3) the victim was 60 years or older; (4) the offense was committed against a person who was physically handicapped; and (5) deterrence of others. The State recommended that the circuit court sentence the defendant to 60 years' imprisonment, the maximum sentence pursuant to the plea agreement. In arguing for a lesser sentence, defense counsel repeatedly referred to the defendant as a "young man 18 years of age." Defense counsel highlighted that the defendant admitted his guilt and,

even under the minimum allowable sentence, the defendant would spend a substantial portion of his life in prison. Defense counsel concluded by recommending the circuit court sentence the defendant to the "minimum term allowable by law." In allocution, the defendant apologized for his offenses and acknowledged he was wrong.

¶ 16 Before imposing sentence, the circuit court indicated that it had considered the PSI and the evidence presented at sentencing. The circuit court agreed with the State as to the factors in aggravation and found that no mitigating factors applied to the defendant's case. The circuit court observed that the defendant could have received a sentence of natural life in prison but for the plea agreement. The circuit court then contemplated whether the defendant's sentence should be reduced any further from 60 years. Based on the evidence before it, the circuit court stated that it found no reason to impose a sentence of less than 60 years' imprisonment and sentenced the defendant to an aggregate term of 60 years in the Illinois Department of Corrections. The defendant did not appeal his convictions or sentence.

¶ 17 On March 8, 2004, the defendant filed a petition for relief from judgment arguing that the truth in sentencing statute (730 ILCS 5/3-6-3 (West 2000)) was unconstitutional and void at the time of his sentencing. The circuit court recharacterized the petition for relief from judgment as a postconviction petition and summarily dismissed the petition as frivolous and patently without merit. The defendant appealed the circuit court's dismissal, but the appeal was dismissed on the defendant's motion. *People v. Cole*, No. 5-04-0236 (Aug. 24, 2004) (unpublished order).

¶ 18 On April 28, 2018, the defendant filed a motion for leave to file a successive postconviction petition along with a petition for postconviction relief. In his pleadings, the defendant contended his 60-year sentence constituted a *de facto* life sentence that violated the eighth amendment and the proportionate penalties clause. The defendant alleged that he had just

recently turned 18 years old and was more similar to an adolescent, moving towards maturation, rather than a mature adult. He also asserted that the imposition of a 60-year sentence gave no consideration to his potential for rehabilitation, remorse, or any other relevant factors. In his pleadings, the defendant cited to various authorities including *Miller v. Alabama*, 567 U.S. 460 (2012), *People v. Harris*, 2016 IL App (1st) 141744, and *People v. House*, 2015 IL App (1st) 110580. The defendant did not attach any affidavits, records, or other evidence to support his pleadings other than his own affidavit in which he generally asserted that the facts asserted were true and correct to the best of his knowledge and belief.

¶ 19 On May 24, 2018, the circuit court denied the defendant's motion for leave to file a successive postconviction petition. The circuit court found that the cases cited in the defendant's motion did not apply to the defendant because he was 18 at the time of his offenses and received a discretionary sentence. The circuit court also stated that it was clear the sentencing judge, who had retired, considered the necessary factors in aggravation and mitigation before imposing sentence. The circuit court concluded that, even if the defendant was allowed to file his successive postconviction petition, it would have been dismissed as frivolous or patently without merit.

¶ 20 On June 13, 2018, the defendant filed a motion for rehearing arguing that the circuit court did not properly consider the proportionate penalties clause at sentencing. The defendant also argued that the record did not contain any discussion by the circuit court regarding the defendant's rehabilitative potential. The defendant asserted that the circuit court should have granted the defendant's motion for leave to file a successive postconviction petition and allow him to develop his arguments. The circuit court subsequently denied the motion for rehearing stating that the defendant's motion reargued his prior motion for leave to file a successive

postconviction petition. The circuit court reiterated that the sentencing judge had considered the proper factors in aggravation and mitigation. This appeal follows.

¶ 21 II. ANALYSIS

¶ 22 A. Successive Postconviction Petitions Under the Act

¶ 23 The Act provides a statutory remedy by which criminal defendants may challenge their convictions or sentence for violations of the state or federal constitutions. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). Our supreme court has made it clear that only one postconviction proceeding is contemplated under the Act. *People v. Edwards*, 2012 IL 111711, ¶ 22. Nevertheless, the bar against successive postconviction proceedings will be relaxed if the defendant establishes either cause and prejudice or actual innocence. *Edwards*, 2012 IL 111711, ¶¶ 22-23. Before a defendant may file a successive postconviction petition, the defendant must first obtain leave of the court. 725 ILCS 5/122-1(f) (West 2018). Leave to file a successive postconviction petition should be denied where, following a review of the petition and supporting documentation, it is clear that the claims alleged by the defendant fail as a matter of law or where the petition with supporting documentation is insufficient to justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35. We review the circuit court's denial of the defendant's motion for leave to file a successive petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 24 On appeal, the defendant contends that the circuit court erred in denying the defendant leave to file a successive postconviction petition asserting that he demonstrated both cause and prejudice. Although not a juvenile at the time of his offenses, the defendant sought to raise an as-applied constitutional challenge to his *de facto* life sentence under the eighth amendment and the proportionate penalties clause based upon the heightened protections afforded to juveniles at

sentencing under *Miller* and its progeny. A defendant may show "cause" by identifying an objective factor that impeded the defendant's ability to raise a specific claim in the defendant's initial postconviction petition. *People v. White*, 2020 IL App (5th) 170345, ¶ 18; 725 ILCS 5/122-1(f) (West 2018). "Prejudice" may be shown by demonstrating that the claim not raised in the defendant's initial postconviction petition so infected the proceedings that the resulting conviction and sentence violated due process. *White*, 2020 IL App (5th) 170345, ¶ 18; 725 ILCS 5/122-1(f) (West 2018). The defendant bears the burden of establishing a *prima facie* showing of cause and prejudice in order to be granted leave of the court, and both elements must be satisfied for the defendant to prevail. *White*, 2020 IL App (5th) 170345, ¶ 18.

¶ 25 Here, the State concedes that the defendant has established a *prima facie* showing of cause for failing to raise the defendant's claim in his initial postconviction petition. Thus, the only issue before this court is whether the defendant made a *prima facie* showing of prejudice regarding his claim that *Miller* applies to his case.

¶ 26 B. Sentencing Under *Miller*

¶ 27 The eighth amendment prohibits "cruel and unusual punishments" and is applicable to the states through the fourteenth amendment. U.S. Const., amend. VIII; *People v. Davis*, 2014 IL 115595, ¶ 18. Inherent in the prohibition of cruel and unusual punishment is the concept of proportionality. *Davis*, 2014 IL 115595, ¶ 18. Accordingly, a criminal sentence must be "graduated and proportioned to both the offender and the offense." *Davis*, 2014 IL 115595, ¶ 18. To determine whether a sentence is so disproportionate as to be cruel and unusual, a court must look beyond history to the evolving standards of decency that mark the progress of a maturing society. *Davis*, 2014 IL 115595, ¶ 18.

¶ 28 In addressing the risk of a disproportionate sentence, the United States Supreme Court has "unmistakably instructed that youth matters in sentencing." *People v. Holman*, 2017 IL 120655, ¶ 33; see *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (eighth amendment prohibits death penalty for juveniles who commit homicide); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (eighth amendment prohibits mandatory life without parole sentences for juveniles who commit nonhomicide offenses); and *Miller*, 567 U.S. at 479 (eighth amendment prohibits mandatory life without parole sentences for juvenile offenders convicted of homicide). In *Miller*, the Supreme Court held that the imposition of a mandatory life sentence without the possibility of parole for a juvenile offender convicted of homicide, regardless of their "age and age-related characteristics and the nature of their crimes," violates the "principle of proportionality, and so the [e]ighth [a]mendment's ban on cruel and unusual punishment." 567 U.S. at 489. Our supreme court has since determined that *Miller* applies to juvenile life sentences whether natural or *de facto* (*People v. Reyes*, 2016 IL 119271, ¶ 9), or whether mandatory or discretionary (*Holman*, 2017 IL 120655, ¶ 40). In Illinois, a sentence of more than 40 years for a juvenile offender is considered a *de facto* life sentence. *People v. Buffer*, 2019 IL 122327, ¶¶ 40-41.

¶ 29 Although *Miller* and its progeny focused on juvenile sentencing, our supreme court has indicated the possibility that young adults may assert an as-applied *Miller* claim. *People v. Harris*, 2018 IL 121932, ¶¶ 46, 48. Assuming that *Miller* applies to cases involving young adults, we find the recent decision of our supreme court in *People v. Lusby*, 2020 IL 124046 instructive. In *Lusby*, a juvenile defendant sought leave to file a successive postconviction petition which asserted his *de facto* life sentence violated the eighth amendment under *Miller*. *Lusby*, 2020 IL 124046, ¶ 22. The State conceded that the defendant made a *prima facie* showing

of cause but argued that the defendant failed to demonstrate prejudice because the trial court considered "youth-related factors" at sentencing. *Lusby*, 2020 IL 124046, ¶ 30.

¶ 30 Before finding the defendant's sentence comported with *Miller*'s requirements, the *Lusby* court explained that "[t]he constitutional flaw with mandatory life sentences is their mandatoriness," because a sentencing court " 'misses too much' " if it cannot consider youth and its attendant characteristics before imposing sentence. *Lusby*, 2020 IL 124046, ¶ 33 (quoting *Miller*, 567 U.S. at 477). Where a sentencing court is able to consider youth and its attendant characteristics, however, the court "does not miss too much." *Lusby*, 2020 IL 124046, ¶ 33. Thus, *Miller* did not foreclose the possibility that juvenile offenders may receive discretionary life sentences. *Lusby*, 2020 IL 124046, ¶ 33. Rather, *Miller* requires sentencing courts to consider youth and its attendant characteristics before finding " 'the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation,' " and imposing a life sentence. *Lusby*, 2020 IL 124046, ¶ 34 (quoting *Holman*, 2017 IL 120655, ¶ 46). Before a sentencing court reaches such a conclusion, the court must consider the "*Miller* factors," which include, but are not limited to, the following:

> "(1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *Holman*, 2017 IL 120655, ¶ 46 (citing *Miller*, 567 U.S. at 477-78).

¶ 31 To determine whether the defendant's sentencing hearing comported with *Miller*'s requirements, our supreme court has instructed that we must look back to the trial and sentencing hearing to determine whether the sentencing court considered evidence and argument related to the *Miller* factors. *Lusby*, 2020 IL 124046, ¶ 35. In doing so, we review the proceedings to ensure that the sentencing court made an informed decision, based on the totality of the circumstances, that a life sentence was appropriate. *Lusby*, 2020 IL 124046, ¶ 35. "No single factor is dispositive." *Lusby*, 2020 IL 124046, ¶ 35.

¶ 32 C. The Defendant's Sentencing Hearing

¶ 33 Following our supreme court's guidance in *Lusby*, we look to the record to determine whether the defendant's sentencing hearing was *Miller*-compliant.[1] For each of the *Miller* factors identified in *Holman*, the circuit court below heard and considered the following evidence and arguments.

¶ 34 1. The Defendant's Chronological Age at the Time of the Offense and Any Evidence of His Particular Immaturity, Impetuosity, and Failure to Appreciate Risks and Consequences

¶ 35 Based on the PSI, the defendant was 18 years old when he murdered his grandfather in his sleep. The PSI also had treatment reports from the Adams County Youth Home attached. These reports were prepared by the defendant's treatment coordinator and described the defendant as verbally aggressive, inconsiderate, and easily angered. The reports also noted that the defendant had issues with "fronting." Despite this, the "Final Treatment Report" stated that the defendant had positively demonstrated the ability and skills to deal appropriately with authority figures and his peers. The "Final Treatment Report" also stated that "[t]here is no doubt that [the defendant] clearly understands the links between behavior and consequences, and

[1]By making this analysis, we do not, by implication, hold that *Miller* applies to defendants who are 18 years of age or older.

understands the concept of personal responsibility." Finally, at the sentencing hearing, defense counsel repeatedly highlighted the fact that the defendant was a "young man 18 years of age."

¶ 36 2. The Defendant's Family and Home Environment

¶ 37 While the defendant did not know his biological father and witnessed his mother's involvement in an abusive relationship, the PSI reported that the defendant was primarily raised by his mother and stepfather, with whom he claimed to have a good relationship. The defendant's mother also reported that she had a good relationship with the defendant and that the defendant was in the Boy Scouts and attended church regularly for over 15 years.

¶ 38 3. The Defendant's Degree of Participation in the Homicide and Any Evidence of Familial or Peer Pressures That May Have Affected Him

¶ 39 The evidence at sentencing showed that the defendant was the principal actor in murdering his grandfather. After the defendant and Currie obtained a shotgun and .22-caliber rifle, the defendant went into his grandfather's room and shot his grandfather in the head while he slept.

¶ 40 4. The Defendant's Incompetence, Including His Inability to Deal With Police Officers or Prosecutors and His Incapacity to Assist His Own Attorneys

¶ 41 There was no evidence presented at trial regarding defendant's incompetence. The PSI indicated that the defendant had dropped out of school, but he stated that he wished to finish school and enlist in the military. The defendant also reported that he earned average grades and was able to read and write. While the defendant received anger management counseling through the Adams County Youth Home, the PSI did not report any diagnoses for mental health disorders or illnesses. Moreover, the record does not show that the defendant suffered from any cognitive or developmental impairments. The defendant did report that he had a history of alcohol and drug use.

¶ 42 5. The Defendant's Prospects for Rehabilitation

¶ 43 The PSI detailed the defendant's juvenile record which included prior burglary and theft charges. One of the theft charges was similar to the present case in that the defendant stole a shotgun and three .22-caliber rifles. Although the treatment records from the Adams County Youth Home indicated the defendant had taken some positive steps, the State presented evidence that the defendant was boastful and arrogant, joked about killing his grandfather, and acted as if he "didn't have a care in the world." The defendant did not present any witnesses or offer any evidence but made a statement in allocution, stating he was sorry and admitting he was wrong. Before imposing sentence, the circuit court stated that it had considered the PSI and the evidence presented at sentencing and found that no mitigating factors applied to the defendant's case. The circuit court then found no reason to impose a sentence of less than 60 years and sentenced the defendant accordingly.

¶ 44 The defendant did not file a motion to reconsider or reduce his sentence. In his original proceedings, the defendant had every opportunity to present mitigating evidence but chose not to do so. See *Lusby*, 2020 IL 124046, ¶ 52; see also *Holman*, 2017 IL 120655, ¶ 49 (citing *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016)). The record shows that the circuit court received evidence regarding youth and its attendant characteristics and determined a 60-year sentence was appropriate for this defendant. Consequently, the defendant's discretionary 60-year sentence passes constitutional muster. Accordingly, the defendant has not shown prejudice under section 122-1(f).

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we affirm the circuit court's order denying the defendant's motion for leave to file a successive postconviction petition.

¶ 47 Affirmed.