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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRELL AINSWORTH,

Defendant and Appellant.

In re TYRELL AINSWORTH

On Habeas Corpus.

B269870

(Los Angeles County
Super. Ct. No. NA084832)

B276632

(Los Angeles County
Super. Ct. No. NA084832)

APPEAL from a judgment of the Superior Court for Los Angeles County, Tomson T. Ong, Judge. Vacated, Reversed and remanded; Writ of Habeas Corpus Dismissed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and petitioner Tyrell Ainsworth is before us for the second time. In 2012, he was convicted of first degree murder (Pen. Code,¹ § 187, subd. (a)) with a special allegation that he personally and intentionally used a firearm within the meaning of section 12022.53, subdivision (d). He admitted the allegation that he had suffered one prior strike conviction, and was sentenced to a prison term of 25 years to life, doubled under the Three Strikes law, plus a consecutive term of 25 years to life under the gun use enhancement, for a total term of 75 years to life. He appealed, raising several grounds, including a claim that the matter must be remanded to the trial court because he was a minor at the time of the murder and the court did not consider the factors set forth in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) before imposing a 75 years to life sentence. We agreed, and remanded the matter “with directions [to the trial court] to reconsider its sentencing decision in light of the dictates of *Miller, supra*, 567 U.S. [460].”

Our directions were, perhaps, not as specific as they should have been. Although the trial court on remand did reconsider its sentencing decision (and then imposed the same 75-years-to-life sentence), it did so outside the presence of defendant or counsel, and without notice to either party. Defendant appeals (and has filed a petition for writ of habeas corpus), arguing that he was denied his constitutional right to due process when the trial court sentenced him without notice or his presence. He also argues that the trial judge was biased against him,

¹ Further undesignated statutory references are to the Penal Code.

and asks that the sentence be vacated and the matter remanded to a different judge for re-sentencing.

The Attorney General concedes that the trial court erred by re-sentencing defendant without notice or an opportunity to be heard, but contends there is no evidence that the trial judge was biased. We agree. In addition, we note that the United States Supreme Court recently decided *Montgomery v. Louisiana* (2016) 577 U.S. ____ [136 S.Ct. 718] (*Montgomery*), which requires the trial court to do more than simply consider the *Miller* factors; instead, it must determine whether, in light of the evidence presented, defendant's crime reflects "irreparable corruption" resulting in "permanent incorrigibility" rather than "the transient immaturity of youth." (*Montgomery, supra*, 136 S.Ct. at p. 734.) Accordingly, we vacate the sentence and remand the matter to the trial court with directions to hold a noticed sentencing hearing and reconsider defendant's sentence in accordance with this opinion.

BACKGROUND

After receiving our directions in the first appeal, the trial court called the case for possible modification of sentence on December 2, 2013. Defendant was not given notice of the hearing and neither defendant nor the prosecutor was present. In its minute order, the court stated: "The trial court has considered the defendant's sentence in light of [*Miller, supra*, 567 U.S. 460]. The defendant's conduct in this case represents that rare juvenile offender whose crime reflects irreparable corruptions. He orchestrated the slaying by bringing the victim to the outside of the vehicle for the slaying, and then proudly

declared to the others in the vehicle that he ‘noodled that n****r,’ thereafter he immediately threatened the 2 eyewitnesses. No mitigating factors exist, nor were they presented, to overcome this irreparable corruption. This juvenile is indeed different; he had little mitigation and no remorse. His background and character fail to overcome this irreparable corruption.” The court then sentenced defendant “to the original 75 years to life” and ordered that a copy of the amended abstract of judgment (reflecting a correction of defendant’s custody credits) be forwarded to the California Department of Corrections and Rehabilitation.

Defendant first learned that the court had re-sentenced him when, in April 2015, he received the Attorney General’s motion to dismiss the sentencing issues defendant raised in the petition for writ of habeas corpus he had filed in pro. per. in federal court on September 26, 2014. After conducting research in the prison’s law library, he filed a notice of appeal from the December 2, 2013 order re-sentencing him. Although we initially rejected the notice as untimely, we granted defendant’s request for relief from default and deemed the notice timely. Defendant also filed a petition for writ of habeas corpus in this court (case No. B276632), which raised the same issues as those raised in his appeal. We ordered that determination of the petition be deferred until the appeal was placed on calendar.

DISCUSSION

A. *The Trial Court Must Hold a Noticed Resentencing Hearing and Provide Defendant an Opportunity to be Heard*

As noted, defendant contends, and the Attorney General concedes, that the trial court erred by holding the re-sentencing hearing without providing defendant notice and an opportunity to be heard. We agree.

Under both the United States Constitution and the California Constitution, a criminal defendant has a fundamental right to notice of, and an opportunity to be heard at, a hearing that affects his or her rights. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7; *Fuentes v. Shevin* (1972) 407 U.S. 67, 80; *In re Roger S.* (1977) 19 Cal.3d 921, 937-938.) A defendant also has a fundamental right to counsel and to be present at critical stages of a criminal proceeding, such as sentencing. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *United States v. Cronin* (1984) 466 U.S. 648, 653; *Mempa v. Rhay* (1967) 389 U.S. 128, 134-137; *People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Bradford* (1997) 15 Cal.4th 1229, 1356-1357.) The denial of notice and an opportunity to be heard “violate[s] the most rudimentary demands of due process of law.” (*Armstrong v. Manzo* (1965) 380 U.S. 545, 550.) Similarly, the denial of counsel at a critical stage of a criminal proceeding is “presumptively unfair.” (*Bell v. Cone* (2002) 535 U.S. 685, 695-696 & fn. 3.)

In this case, there is no question that the trial court’s failure to give notice of the resentencing hearing, and the absence of defendant and counsel from that hearing violated defendant’s constitutional

rights. Therefore, the sentence must be vacated and the matter remanded for a noticed resentencing hearing, at which defendant, represented by counsel, must be given an opportunity to be heard.

As we explained in our opinion in the first appeal, in resentencing defendant, the trial court cannot impose the functional equivalent of a life without the possibility of parole sentence (as was the case here) unless, after considering defendant's youth and individual circumstances and taking into account how children are different, the trial court determines that defendant is "the *rare* juvenile offender whose crime reflects irreparable corruption." (Quoting *Miller, supra*, 567 U.S. at p. ____ [132 S.Ct. at p. 2469], italics added.) As summarized by the California Supreme Court, the United States Supreme Court in *Miller* requires a sentencing court to consider the following: "First, a court must consider a juvenile offender's 'chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' [Citations.] . . . [¶] Second, a sentencing court must consider any evidence or other information in the record regarding 'the family and home environment that surrounds [the juvenile] -- and from which he cannot usually extricate himself -- no matter how brutal or dysfunctional.' [Citation.] . . . [¶] Third, a court must consider any evidence or other information in the record regarding 'the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him.' [Citations.] . . . [¶] Fourth, a court must consider any evidence or other information in the record as to whether the offender 'might have been charged and

convicted of a lesser offense if not for incompetencies associated with youth -- for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . .’ [Citation.] [¶] Finally, a sentencing court must consider any evidence or other information in the record bearing on ‘the possibility of rehabilitation.’ [Citations.]” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1388-1389.)

In 2016, the United States Supreme Court issued its decision in *Montgomery, supra*, 577 U.S. ____ [136 S.Ct. 718], which held that *Miller* announced a substantive rule of constitutional law to which state collateral review courts must give retroactive effect. (*Montgomery, supra*, 136 S.Ct. at pp. 732-737.) In *People v. Padilla* (2016) 4 Cal.App.5th 656 (review ordered, Jan. 25, 2017, case No. S239454) (*Padilla*), we examined the high court’s reasoning and concluded that “*Montgomery* significantly recast *Miller*.” (*Padilla, supra*, 4 Cal.App.5th at p. 672.)

We explained that “[u]nder *Montgomery*, *Miller* must be regarded as announcing a substantive rule barring LWOP terms for a specific class of juvenile offenders, namely, those “whose crimes reflect the transient immaturity of youth,” not irreparable corruption. [Citation.] As explained in *Montgomery*, that substantive rule bars LWOP terms “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” [Citation.] The application of *Miller* in state collateral review proceedings thus targets a specific question -- that is, whether the juvenile offender’s crime arose from irreparable

corruption, rather than transient immaturity -- the focal point of which is the existence of “permanent incorrigibility.” [Citation.] [¶]

Furthermore, under *Montgomery*, *Miller* mandates the employment of a procedure that clearly addresses and resolves that question. As set forth in *Montgomery*, *Miller* requires ‘a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish.’ [Citation.]” (*Padilla, supra*, 4 Cal.App.5th at p. 672.)

We concluded that “[i]n our view, the stringent standard set forth in *Montgomery* cannot be satisfied unless the trial court, in imposing an LWOP term, determines that in light of all the *Miller* factors, the juvenile offender’s crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity. . . . In view of *Montgomery*, the trial court must assess the *Miller* factors with an eye to making an express determination whether the juvenile offender’s crime reflects permanent incorrigibility arising from irreparable corruption.” (*Padilla, supra*, 4 Cal.App.5th at p. 673.) In connection with this, we observed that “[u]nder *Montgomery*, irreparable corruption requires ‘permanent incorrigibility,’ not simply the absence of youth-based mitigation.” (*Padilla, supra*, 4 Cal.App.5th at p. 673, fn. 7.)

Although our Supreme Court ordered review of *People v. Padilla* on its own motion, it did not order that the opinion be depublished. (Cal. Rules of Court, rule 8.1115(e)(1).) Thus, although the opinion has no binding or precedential effect, we continue to believe our analysis

was sound. Accordingly, we direct the trial court on remand to hold a noticed hearing, at which defendant and his counsel are present and are able to present evidence relating to the *Miller* factors. The court must then determine whether, in light of the evidence presented and all the *Miller* factors, defendant's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity.

B. *Defendant Has Not Shown a Probability of Actual Bias on the Part of the Trial Judge*

Defendant contends his constitutional right to due process was violated because the trial judge was biased against him. We disagree.

“A fair trial in a fair tribunal is a basic requirement of due process.’ [Citation.] ‘The Supreme Court has long established that the Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge.’ [Citation.]” (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) “[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist “the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.” [Citation.] Where only the appearance of bias is at issue, a litigant’s recourse is to seek disqualification under state disqualification statutes.” (*Id.* at p. 996.)

In this case, defendant argues that the judge’s bias was demonstrated by the fact that the judge (1) held a resentencing hearing

without giving him prior notice or an opportunity to be heard; (2) did not give him post-hearing notice that the hearing had been held; (3) did not comply with the California Rules of Court, which require that sentencing proceedings be transcribed; and (4) found defendant to be irredeemable even though there had been no evidence presented regarding the factors influencing his criminality.

While we find that the trial court's failure to provide notice to defendant and an opportunity for defendant to be represented by counsel and to present evidence relating to the *Miller* factors was error, we do not believe it demonstrates bias on the part of the judge. Neither does the judge's reliance on the facts of the crime, rather than evidence relating to the other *Miller* factors (which evidence had not been presented due to the lack of notice of the resentencing hearing), to conclude that defendant's crime reflects irreparable corruption demonstrate that the judge was biased against defendant. The judge simply erred in conducting the resentencing hearing as he did. In light of our more specific direction, we have no reason to doubt that the judge will properly conduct a new resentencing hearing.

DISPOSITION

The 75-years-to-life sentence is vacated, and the matter is remanded to the trial court with directions to hold a noticed sentencing hearing, at which defendant and the prosecution must be given an opportunity to present evidence and argument regarding the *Miller* factors. In imposing defendant's sentence, the court must consider those factors and the evidence bearing on defendant's possibility of rehabilitation and determine whether his crime reflects permanent incorrigibility arising from irreparable corruption rather than transient immaturity.

In light of our resolution of the issues on appeal, defendant's petition for writ of habeas corpus (case No. B276632) is dismissed as moot.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.