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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENYUN DASHAWN ROBINSON, Defendant and Appellant.	B294169 (Los Angeles County Super. Ct. No. NA051400)

APPEAL from an order of the Superior Court of Los Angeles County. Laura L. Laesecke, Judge. Affirmed.

Juvenile Innocence & Fair Sentencing Clinic, Christopher Hawthorne, Marisa Sacks, and Kayla Burchuk, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Kenyun Dashawn Robinson (defendant) appeals from an order denying a hearing to consider whether defendant's sentence violated the Eighth Amendment, under the factors enumerated in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) and *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*),[1] as well as a resentencing hearing pursuant to the procedure set forth in Penal Code section 1170, subdivision (d)(2).[2] Defendant requests remand to a different courtroom. We determine that the Eighth Amendment claim is moot and that defendant's statutory request for resentencing is not ripe for review. We thus affirm the trial court's order and deny defendant's request for remand.

BACKGROUND

In 2003, a jury convicted defendant of a murder committed in 1992, when defendant was 16 years old. The trial court sentenced defendant to life without the possibility of parole

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[1] In *Miller*, the United States Supreme Court held that a mandatory life imprisonment without the possibility of parole sentence imposed upon a juvenile offender violated the Eighth Amendment, and that sentencing courts must therefore have discretion, upon an individualized consideration of factors relating to youth and its attendant characteristics, to impose a lesser term. (*Miller*, *supra*, 567 U.S. at pp. 479-480.) In *Gutierrez*, the California Supreme Court held that the sentencing court's discretion whether to impose a lesser sentence must be exercised in the first instance at initial sentencing, and it summarized the factors outlined in *Miller* and other authorities which the sentencing court must consider in exercising its discretion. (*Gutierrez*, *supra*, 58 Cal.4th at pp. 1379, 1387-1390.)

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

(LWOP) plus four years for the use of a firearm. Defendant appealed, arguing error in the admission of his statements to police. We affirmed the judgment in 2004. (See *People v. Robinson* (June 2, 2004, B166845) [nonpub. opn.] (*Robinson I*).)[3] In 2013, defendant filed a petition for writ of habeas corpus seeking resentencing under *Miller* and *Gutierrez*. In 2015, the trial court held such a hearing, considered the sentencing factors outlined in *Miller* and *Gutierrez*, and determined that LWOP was the appropriate sentence. Defendant appealed the trial court's order, which we affirmed. (See *People v. Robinson* (Sept. 1, 2016, B264801) [nonpub. opn.] (*Robinson II*).)

On December 30, 2016, the California Supreme Court granted defendant's petition for review and transferred the matter back to this court with directions to vacate our decision and reconsider the cause in light of *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718] (*Montgomery*). In that case, the United States Supreme Court held that *Miller*'s holding -- that the Eighth Amendment prohibited sentencing a child whose crime reflects "transient immaturity" to life without parole -- was retroactive; thus LWOP must be restricted to the rare juvenile offender who "exhibits such irretrievable depravity that rehabilitation is impossible." (*Montgomery*, at pp. 733-736.)

Upon reconsideration we found that the trial court's finding that LWOP was "appropriate" did not satisfy *Montgomery*'s requirements. We thus reversed and remanded to the trial court for a new sentencing hearing consistent with *Montgomery*. (See

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[3] We take judicial notice of our prior opinions in this case. As the facts of the case are fully summarized in *Robinson I* and are not relevant to our discussion here, we do not repeat them.

People v. Robinson (Aug. 22, 2017, B264801) [nonpub. opn.] (*Robinson III*).)

In October 2017, before the trial court held the new sentencing hearing ordered by this court, the Legislature passed Senate Bill No. 394, amending section 3051 (see Stats. 2017, ch. 684, § 1.5), which provides for a "youth offender parole hearing" during the 15th, 20th, or 25th year of incarceration, depending on the "controlling offense" committed before the age of 18 years. (§ 3051, subds. (a) & (b).) Before the 2017 amendment became effective on January 1, 2018, the statute excluded offenders who had been sentenced to LWOP. The amended statute now provides for a youth offender parole hearing to consider release of youth offenders who have served 25 years of their LWOP sentences.

In the trial court the prosecution argued that the order to resentence defendant was moot due to the amendment of section 3051, and that defendant was instead entitled to a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), to preserve any evidence in mitigation for defendant's youth offender parole hearing. In response, defendant requested a resentencing hearing in compliance with *Miller*, and in the alternative hearings pursuant to section 1170, subdivision (d)(2), and *Montgomery*, in addition to a *Franklin* hearing. On July 18, 2018, the trial court agreed with the prosecution, scheduled a *Franklin* hearing, and declined to set the resentencing hearings requested by defendant. Defendant filed a timely notice of appeal from the court's order.

DISCUSSION

I. Mootness

Defendant contends that the trial court erred in denying a resentencing hearing as ordered by this court. Our order was that the resentencing hearing must be consistent with the principles stated in *Montgomery*. (See *Robinson III*.) Defendant argues that to comply with the *Montgomery*'s directives, the trial court was required to make a finding of either "transient immaturity" or "irretrievable depravity" by considering the factors outlined in *Miller* and summarized in *Gutierrez*, as well as evidence of postconviction conduct. However, in *Montgomery*, the Supreme Court also held: "Giving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6-10-301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity -- and who have since matured -- will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (*Montgomery, supra*, 136 S.Ct. at p. 736.)

As amended by Senate Bill No. 394, section 3051 was meant to bring California into compliance with *Miller* and *Montgomery*. (Sen. Com. on Public Safety, Bill Analysis, S.B. 394 (2017-2018 Reg. Sess.) ¶¶ 2, 4.) As "[t]he Legislature has made the determination in Senate Bill 394 that [no] juvenile homicide offender . . . will face a sentence that possibly runs afoul of the

Eighth Amendment as interpreted in *Miller*," defendant's claim that the Constitution requires resentencing is moot. (*People v. Lozano* (2017) 16 Cal.App.5th 1286, 1292 (*Lozano*), rev. dism. as moot, Aug. 29, 2018, S246013).)[4]

Defendant contends that *Lozano* is distinguishable because the defendant in that case had already received "complete" *Miller* hearings, whereas here, defendant has not been afforded an "appropriate and complete *Miller* resentencing hearing." Such differences do not make *Lozano* any less applicable as the court relied on the California Supreme Court's analogous reasoning in *Franklin*. (See *Lozano*, *supra*, 16 Cal.App.5th at p. 1289.)

In *Franklin*, the juvenile offender had been sentenced to 50 years to life in prison, a sentence the California Supreme Court previously deemed in *People v. Caballero* (2012) 55 Cal.4th 262, to be the "functional equivalent of LWOP," and thus prohibited by the Eighth Amendment under the principles stated in *Miller* and *Graham v. Florida* (2010) 560 U.S. 48. (*Franklin, supra*, 63 Cal.4th at p. 268.) After the defendant was sentenced, Senate Bill No. 260 enacted former section 3051, making him entitled to a parole hearing during his 25th year in prison, and requiring the "[Parole] Board not just to consider but to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' [Citation.]" (*Franklin*, at pp. 276-277; see Stats. 2013,

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[4] The California Supreme Court's order dismissing review states: "The above-captioned matter is dismissed as moot in light of Senate Bill No. 394, signed into law on October 11, 2017. (Cal. Rules of Court, rule 8.528(b).)"

ch. 312, § 4.) The court concluded that the appeal was moot. (*Franklin*, at pp. 279-280.) The court explained that the defendant "is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because [the defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here." (*Ibid*.) As section 3051 has "changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole . . . no additional resentencing procedure [is] required. [Citation.]" (*Id.* at pp. 278-279.)

We find *Franklin*'s reasoning equally applicable here. We thus agree with *Lozano* that "[a]s now amended, section 3051 expressly affords . . . a juvenile homicide offender sentenced to LWOP, a chance to participate in a youth offender parole hearing, which provides 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' [Citation.]" (*Lozano, supra*, 16 Cal.App.5th at p. 1290, quoting *Graham v. Florida, supra*, 560 U.S. at p. 75.)

Defendant contends that more is required. He argues that without a court finding that he is not "irreparably corrupt" he will be stigmatized as such. He concludes that the Eighth Amendment requires resentencing in order to eliminate that stigma and other collateral consequences of having been sentenced to LWOP in the first place, such as the unavailability of education and vocational training, which could impair his opportunity for release on parole.

Defendant's argument is based on speculation, not evidence in the record, and he points to nothing in *Graham*, *Miller*, or *Montgomery* which would require resentencing due to such possible collateral consequences. Moreover, "'a life sentence that includes a meaningful opportunity for release during [the] 25th year of incarceration . . . is neither [life without parole] nor its functional equivalent.' [Citation.]" (*In re Cook* (2019) 7 Cal.5th 439, 449, quoting *Franklin, supra*, 63 Cal.4th at pp. 279-280.) Such a sentence does not give rise to a presumption of incorrigibility. (*Cook*, at p. 449.)

II. Law of the case

Defendant contends that the law of the case doctrine prevents mootness. He argues that because this court ordered the trial court to resentence him in compliance with *Montgomery*, the court was required to do so regardless of section 3051.

"'"[W]here, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . ."'" (*People v. Stanley* (1995) 10 Cal.4th 764, 786.) The doctrine is a rule of procedure, not jurisdiction, and "will not be adhered to where . . . controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations. [Citation.]" (*Id*. at p. 787.)

Defendant contends that this exception does not apply, because the California Supreme Court has not yet expressly ruled on the mootness issue raised here. Defendant cites no authority for this assertion, and we have found none. We thus adhere to the rule that "'the doctrine will be rejected *[w]here there is an*

intervening or contemporaneous change in law.' [Citation.]" (*People v. Sequeira* (1982) 137 Cal.App.3d 898, 901, quoting *Davies v. Krasna* (1975) 14 Cal.3d 502, 507, fn. 5.)

III. Statutory petition to recall sentence

Defendant asks that we direct the trial court to hold a hearing to recall his sentence pursuant to section 1170, subdivision (d)(2). That statute provides that "a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, . . . may submit to the sentencing court a petition for recall and resentencing." (§ 1170, subd. (d)(2)(A)(i).) The petition "shall" be filed with the sentencing court, a copy "shall be served" on the prosecuting agency, and "shall" include specified enumerated statements by the defendant. (§ 1170, subd. (d)(2)(B).)

We decline defendant's request as the appellate record does not reflect that defendant ever filed or served the required petition. Instead, defendant merely requested a hearing pursuant to section 1170, subdivision (d)(2), in his memorandum of points and authorities in response to the prosecutor's "Memorandum for *Franklin* hearing" which was filed in the trial court after our remand in *Robinson III*. The trial court denied the requested hearing without explanation. We infer from the record that the hearing was denied because defendant had not complied with any of the procedural requirements of section 1170, subdivision (d)(2).

Respondent refers to the statute's phrase, "offense for which the defendant *was sentenced to* imprisonment for life without the possibility of parole," and asks that we interpret the

phrase as stating instead, "offense for which the defendant *is currently serving a term of* imprisonment for life without the possibility of parole." Thus, respondent would have us declare that offenders whose sentences have been effectively reduced to 25 years to life under section 3501 are not eligible to petition for resentencing under section 1170, subdivision (d)(2). Respondent asks that we reach this result by disagreeing with *People v. Lopez* (2016) 4 Cal.App.5th 649, in which a similar argument was rejected based upon the plain meaning of the words of the statute.

With some exceptions, we do not undertake to rewrite a statute's unambiguous language. (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) Moreover, "we do not issue advisory opinions indicating '"what the law would be upon a hypothetical state of facts."' [Citations.]" (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084.) As defendant has not yet filed or served a petition, and it appears that the trial court refused to consider the issue for that reason, the matter is not ripe for review.

IV. Remand to a different judge

Defendant asks that we order the assignment of a different judge on remand due to Judge Laeseke's "erroneous rulings" and refusal "to provide him with a complete *Miller* hearing 'in light of *Montgomery*,'" as ordered by this court in *Robinson III*. No remand is called for here, as we have found no error in Judge Laeseke's rulings, and we have concluded that the order for resentencing "in light of *Montgomery*" is moot. Finally, we have determined that the denial of a hearing pursuant to section 1170, subdivision (d)(2), is not ripe for review. We thus have no occasion to order remand to any courtroom.

DISPOSITION

The trial court's order of July 18, 2018, is affirmed without prejudice to the filing of a petition in compliance with the procedural requirements of section 1170, subdivision (d)(2).

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT