Filed 8/16/18 P. v. Askew CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DAVID WAYNE ASKEW, Defendant and Appellant.	B279887 (Los Angeles County Super. Ct. No. BA103697)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Abzug, Judge. Appeal dismissed.

Lise M. Breakey, 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, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

While he was 16 and 17 years old, a juvenile went on a "murderous rampage," killing three people and injuring a fourth. A judge sentenced him to life in prison without the possibility of parole. Years later, he sought and obtained a resentencing hearing. The trial court resentenced the juvenile (who is now middle aged) to life without the possibility of parole after finding that he was one of "'the rare juvenile offender[s] whose crime[s] reflect[] irreparable corruption'" within the meaning of *Miller v. Alabama* (2012) 567 U.S. 460, 479-480 (*Miller*) and *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, 734 (*Montgomery*). The former juvenile appeals, arguing that (1) *Miller* and *Montgomery* erect a presumption *against* a sentence of life without the possibility of parole that the People failed to rebut by not introducing any evidence during the resentencing; and (2) the "rare juvenile offender" finding must be made by a jury beyond a reasonable doubt. We conclude that the juvenile's challenge to the constitutionality of his sentence is moot in light of the availability of a "youth offender parole hearing" under Penal Code section 3051,[1] and that his challenge lacks merit in any event. Accordingly, we dismiss the appeal, albeit with instructions to correct clerical errors in the abstract of judgment.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In November 1993, when David Wayne Askew (defendant) was 16 years old, he fired five shots at a pedestrian standing on the sidewalk. The passenger was talking to someone in the truck defendant was riding in. The victim lived.

---

1 All further statutory references are to the Penal Code unless otherwise indicated.

Less than a week later, defendant and a companion watched a 73-year-old man withdraw money from a bank and then followed the man as he drove back to his home. When defendant confronted the man and the man refused defendant's demands to hand over the money, defendant told him he was going to kill him and then shot him twice. The man succumbed to the gunshot wounds three months later.

Nearly two months after that, and after defendant's 17th birthday, defendant and two of his friends were hanging out at his apartment. He killed both of them. He shot one of the friends 37 times with a large caliber weapon. And when the other friend fled, defendant tracked him down and shot him five times in the stomach.

Defendant went into hiding, and was apprehended soon after he was featured in an episode of "America's Most Wanted."

II. Procedural Background

A. *Prosecution, Conviction, and Appeal*

The People charged defendant with three counts of first degree murder (§ 187, subd. (a)) and one count of attempted premeditated murder (§§ 187 & 664, subd. (a)), and alleged several firearm enhancements and special circumstances with respect to the murders.

A jury convicted defendant of the first degree murder of the 73-year-old man and of the friend defendant tracked down; of the second degree murder of the friend defendant shot 37 times; and of the attempted premeditated murder of the pedestrian. The jury found two special circumstances justifying a sentence of life without the possibility of parole—namely, that defendant committed multiple murders and that the murder of the 73-year-old man occurred during a robbery. The jury also found that all

four offenses involved defendant's personal use of a firearm (§ 12022.5, subd. (a)), and, as to the attempted murder, defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)) and discharged a firearm from a motor vehicle (§ 12022.55).

The trial court sentenced defendant to prison for 17 years plus four consecutive life sentences. The court calculated that sentence by: (1) sentencing defendant to life without the possibility of parole for the three murders, each with an additional four years for the personal use of a firearm; (2) sentencing defendant to life (with the possibility of parole) for the attempted premeditated murder, with an additional five years for the drive by shooting; and (3) running each of those sentences consecutively.

We affirmed defendant's convictions on appeal, but modified his sentenced to substitute the life without the possibility of parole sentence for the friend defendant shot 37 times with a sentence of 15 years to life, plus the four-year firearm enhancement. As modified, defendant's total, aggregate sentence was 32 years to life (the 15-year sentence for the second degree murder plus 17 years' worth of enhancements), followed by a life sentence and then two sentences of life without the possibility of parole. (*People v. Askew* (Jan. 26, 1999, B107911) [nonpub. opn.].)

B. *Motions for Resentencing, and Resentencing*

In 2015, defendant filed (1) a petition for recall and resentencing pursuant to section 1170, subdivision (d)(2), and (2) a petition for a writ of habeas corpus seeking a resentencing pursuant to *Miller* and *Montgomery*.

The court issued an 18-page tentative ruling detailing the procedural history of the case and granting defendant's request

for resentencing. The court evaluated the evidence presented by defendant in his filings, considered the factors set forth in *Miller*, and ultimately reimposed the same sentence as the original trial court because, in its view, defendant's "crimes reflect[] irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity."

The trial court then held an evidentiary hearing. Defendant presented the testimony of an expert witness on adolescent development. The court entertained extensive argument from the parties before taking the matter under submission.

A few days later, defendant reaffirmed its tentative ruling that "this [was] one of the unhappy, unfortunate and rare instances where the defendant is irredeemably corrupt, and poses a continuing threat to the community if he is released." The court accordingly denied defendant's petition for a writ of habeas corpus, and reimposed the same sentence as the trial court (as corrected by the Court of Appeal).

C. *Appeal*

Defendant filed a timely notice of appeal.

DISCUSSION

Both the United States and California Constitutions prohibit the imposition of sentences so excessive that they constitute "cruel *and* unusual" punishment (under the federal Eighth Amendment) or "[c]ruel *or* unusual" punishment (under the California Constitution). (U.S. Const., 8th Amend., italics added; Cal. Const., art. I, § 17, italics added; see *People v. Palafox* (2014) 231 Cal.App.4th 68, 82 [difference in conjunction does not translate to a different meaning when it comes to excessive sentences].) Under these provisions, a sentence of life without

the possibility parole is unconstitutionally excessive if (1) imposed against a juvenile (that is, a person under the age of 18) for a crime other than a homicide (*People v. Contreras* (2018) 4 Cal.5th 349, 359); or (2) imposed against a juvenile for a homicide, *unless* a court determines—after considering five factors enumerated by the United States Supreme Court[2]—that the juvenile is "'the rare juvenile offender whose crime reflects irreparable corruption'" rather than one whose crime "'reflects unfortunate yet transient immaturity'" (*Miller*, *supra*, 567 U.S. at pp. 479-480, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 573; *Montgomery*, *supra*, 136 S.Ct. at p. 734).

In attacking the trial court's reimposition of life without the possibility of parole on two of his first degree murder convictions, defendant argues that: (1) *Miller*'s requirement that life without the possibility of parole be reserved for only "the rare juvenile offender" effectively erects a presumption *against* imposing such a sentence unless and until the People produce evidence that

---

2 Those factors are: (1) the juvenile's "'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences'"; (2) the juvenile's "'family and home environment,'" from which "'he cannot usually extricate himself'"; (3) "'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'"; (4) whether the juvenile "'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 . . . or his incapacity to assist his own attorneys'"; and (5) any other evidence "bearing on 'the possibility of rehabilitation.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1388-1389, quoting *Miller*, *supra*, 567 U.S. at pp. 477-478.)

rebuts that presumption (and here, defendant argues, the People did not); and (2) the finding that a juvenile is the "rare juvenile offender whose crime reflects irreparable corruption" must be found by a jury beyond a reasonable doubt (rather than by a court) because it operates as a factual finding necessary to increase the statutory maximum of the offense (see *Apprendi v. New Jersey* (2000) 530 U.S. 466). The People assert that we need not confront defendant's arguments because a recent amendment to section 3051 now permits defendants sentenced to life without the possibility of parole to seek parole after 25 years, which means he is no longer sentenced to life without the possibility of parole and thus moots out his constitutional challenge. We will address the threshold issue of mootness first.

I. Mootness

As of January 1, 2018, section 3051 proclaims that a juvenile sentenced to life without the possibility of parole "shall be eligible for release on parole . . . during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or [otherwise] entitled to an earlier parole consideration . . . ." (§ 3051, subd. (b)(4).) Our Supreme Court has held that section 3051's grant of a youth offender parole hearing to juveniles sentenced to sentences short of a life sentence renders a juvenile's attack on the excessive length of his sentence moot because the statute "provide[s] [the juvenile] with the possibility of release after 25 years of imprisonment." (*People v. Franklin* (2016) 63 Cal.4th 261, 268-269 (*Franklin*).) This logic applies with equal force to juveniles, like defendant, who were sentenced to life without the possibility of parole. (*People v. Lozano* (2017) 16 Cal.App.5th 1286, 1290-1292 [so holding], review granted Feb. 21, 2018, S246013.)

Defendant raises four arguments in response.

First, he argues that his request for resentencing is based in *California* law, not federal law, and that section 3051's grant of a parole hearing after 25 years only moots out his claims based on federal law. We reject this argument because, as defendant concedes elsewhere, state law "mirrors federal constitutional law" in this area.

Second, defendant contends that a parole hearing 25 years from now cannot cure the injury he suffers by having an unconstitutionally excessive sentence imposed in the first place. However, the remedy that defendant seeks in his habeas petition—namely, parole consideration after 25 years—is precisely the remedy afforded by section 3051. Section 3051 also requires the parole board to consider the very same factors from *Miller* that defendant urges us to evaluate on appeal. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) Because section 3051 appears to give defendant all of the relief he seeks, his constitutional challenge is moot. Defendant tries to distinguish himself from the defendant in *Franklin*, reasoning that *Franklin's* sentence was lawful at the time it was imposed (because it was imposed *before Miller* placed limitations on the length of juvenile sentences) while his sentence was unlawful at the time it was imposed (because the trial court resentenced him *after Miller* and misapplied its factors). But whether his sentence was lawful or unlawful at the time it was imposed has no bearing on whether section 3051 affords him all the relief he seeks and therefore renders his constitutional challenge moot.

Third, defendant asserts that section 3051 does not moot out his constitutional challenges because, until his youth offender parole hearing occurs during his 25th year of incarceration, he is

still considered a prisoner under a sentence of life without the possibility of parole and, as such, is (1) currently entitled to fewer custody credits, and (2) subject to a higher security classification that limits his access to rehabilitative programs. Although the collateral consequences of a court ruling can, in some circumstances, prevent an issue from becoming moot (*People v. Lindsey* (1971) 20 Cal.App.3d 742, 744 [prisoner who has served full term of sentence may appeal conviction "for the sake of clearing his name"]), those collateral consequences must be "sufficiently concrete . . . to avoid a finding of mootness" (*People v. DeLeon* (2017) 3 Cal.5th 640, 646, fn. 2). But defendant has not demonstrated that the collateral consequences he cites are sufficiently concrete at this point in time to overcome the mootness of his central claim.

Lastly, defendant argues that it is better for judges to apply the *Miller* factors than for a parole board to do so because "[t]he imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions." (*People v. Clancey* (2013) 56 Cal.4th 562, 580.) Were we to accept this argument, we would effectively be overruling our Supreme Court's ruling, in *Franklin*, that the youth offender parole hearings guaranteed by section 3051 moot out a defendant's constitutionally based request for resentencing by a court (*Franklin*, *supra*, 63 Cal.4th at pp. 268-269). This is not something we are allowed to do. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

For these reasons, defendant's petitions are moot. However, we will nevertheless address their merits.

II. Merits

A. *Presumption Against Life Without the Possibility of Parole*

Defendant's first substantive attack on the trial court's resentencing rests on a two-step argument: (1) *Miller* and *Montgomery* erect a presumption *against* imposing a sentence of life without the possibility of parole on a juvenile convicted of a homicide offense; and (2) the People did not rebut that presumption because it introduced no evidence during the resentencing hearing. We need not grapple with whether the first step of defendant's argument is valid because the second step is not valid.[3] When the law erects a rebuttable presumption, what matters is whether the evidence presented rebuts the presumption; *who* introduced that evidence is of no concern. (See *Cowell v. Snyder* (1915) 171 Cal. 291, 297 ["such presumption may be rebutted by evidence offered by either party"]; *Woosley v. State of California* (1992) 3 Cal.4th 758, 786 ["If the Legislature intended something so unusual as a presumption rebuttable by one party and not the other, we believe it would have said so"].) Thus, it does not matter that the People introduced no evidence. And even if we assume that the trial court's failure to apply a rebuttable presumption against the imposition of life without the possibility of parole was error, that error was harmless beyond a reasonable doubt. As detailed in the trial court's exhaustive written analysis, defendant's "murderous rampage"—which included shooting an elderly man

---

[3] The first issue was pending before our Supreme Court in *People v. Mendoza*, review granted January 25, 2017, S238032, but was subsequently dismissed as moot in light of the amendment of section 3051 discussed above (§ 3051, subd. (b)(4)).

to take his money, shooting a friend 37 times, and then tracking down and putting five bullets in the gut of the witness to that shooting—was all defendant's doing, was not the product of peer pressure, was not prompted by a particularly bad upbringing, was not prompted by any mental or other illness, and until recently elicited no expression of remorse from defendant. Viewing this evidence through the lens of a rebuttable presumption would not have altered the trial court's conclusion that "[s]omething much darker was at work besides [defendant's] youth" and that this "dark" impulse renders him a "rare juvenile offender whose crime reflects irreparable corruption."

B. *Jury Findings Beyond a Reasonable Doubt*

Defendant's second substantive attack on the trial court's resentencing is the argument that a *jury*—not the court—should have been the entity responsible for applying the *Miller* factors and deciding whether the People had proven, beyond a reasonable doubt, that he was one of the "'the rare juvenile offender[s] whose crime reflects irreparable corruption'" (*Miller*, *supra*, 567 U.S. at pp. 479-480). This argument was rejected in *People v. Blackwell* (2016) 3 Cal.App.5th 166, 192-194, and we agree with *Blackwell's* analysis and conclusion.

III. Abstract of Judgment

The abstract of judgment incorrectly reflects that defendant was sentenced to life without the possibility of parole on counts 1, 2, and 4. It should be corrected to reflect that defendant was sentenced to life with the possibility of parole on count 1. Additionally, the abstract contains three factual errors. It states: (1) that defendant committed the first degree murder of Robert Hamilton (count 2) in 1998–the crime was committed in 1993; (2) that defendant committed the second degree murder of

Michael Harris (count 3) in 1998–the crime was committed in 1994; and (3) that defendant committed the first degree murder of Eddie Chillies (count 4) in 1998–the crime was committed in 1994. The abstract should be corrected to reflect the true years the crimes were committed.

DISPOSITION

The appeal is dismissed. The trial court is directed to prepare an amended abstract of judgment to reflect that defendant was sentenced to life with the possibility of parole on count 1, that count 2 was committed in 1993, and that counts 3 and 4 were committed in 1994. The amended abstract of judgment is to be forwarded to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST