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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WAJUBA ZYMAAL MCDUFFY Defendant and Appellant.	B277418 (Los Angeles County Super. Ct. No. TA037979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Appeal dismissed.

Jonathan E. Demson, 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, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Wajuba Zymaal McDuffy was 17 years old at the time he shot and killed Mr. Dixie Gibson during an attempted robbery. In 1998, a jury convicted him of first degree murder and found true a personal firearm use enhancement. The trial court sentenced him to a prison term of life plus 10 years without the possibility of parole (LWOP). We affirmed the conviction on appeal.

While in prison, McDuffy participated in work and education activities, completed self-help programs, and achieved the lowest security level possible for an inmate serving an LWOP sentence. He has always maintained his innocence, claiming he was at his own birthday party at the time of the murder.

In 2012, the United States Supreme Court held in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Id.* at p. 479.) A court sentencing a juvenile homicide offender must take into account "youth (and all that accompanies it)," as well as a juvenile's "diminished culpability and heightened capacity for change." (*Ibid.*) In 2016, the Court held that an LWOP sentence is barred "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." (*Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718, 734, 193 L.Ed.2d 599].)

In 2014, the California Supreme Court held that a juvenile offender who received an LWOP sentence prior to *Miller* may seek resentencing, and the trial court in reconsidering the sentence must "consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before

imposing life without parole on a juvenile offender." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1361.) The question is whether the defendant "can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Id*. at p. 1391.)

In May 2015, McDuffy petitioned for a writ of habeas corpus, requesting that the superior court vacate his sentence and resentence him in light of *Miller*. Prior to the hearing, McDuffy offered reports from Hans H. Selvog, Ph.D., and Richard J. Subia, a longtime employee of the California Department of Corrections and Rehabilitation. Dr. Selvog reported that McDuffy grew up in an "unstable home environment where drugs, poverty, and negative role models impacted . . . his way of thinking." He had been abandoned by his biological father, and his mother and stepfather both abused cocaine. He grew up in gang territory and participated in criminal activity to gain approval, yet earned average to above average grades in school and participated in sports and band programs. During his incarceration, McDuffy "renounced his past negative lifestyle and [was] focused on becoming a good man."

Subia reported that McDuffy had "demonstrated significant acts of rehabilitation" during his 17 years of incarceration. He had "made every effort to participate in rehabilitative programming," but his opportunities were limited due to the "lack of available programs offered at maximum security prisons."

Subia testified at the hearing that McDuffy "takes advantage of rehabilitative programming, which would indicate

his ability to be rehabilitated." However, he admitted McDuffy "only started getting [certificates for self-help programs] around 2013."

McDuffy read from a written statement at the hearing. He stated he was "guilty of participating [in] and glorifying the gang and criminal lifestyle," but was "serving a sentence without possibility of parole for crimes that [he] did not commit." He maintained that he had changed his life, "not just for [him]self but in honor of Mr. Gibson." In a colloquy with the trial judge, McDuffy said he had been advised to admit to the murder in order to demonstrate rehabilitation and receive a more lenient sentence, and it would have been "very easy" to do so, but he could not "live with a lie." He said, "how can I sit here in court and I know I'm innocent and say I did something and I didn't do it[?] [¶] . . . I can't show remorse for a crime I didn't do."

The trial court found McDuffy had done "an outstanding job in an institutional setting." He was "a leader," and "a role model and mentor and an intelligent individual and one who . . . is seeing the mistakes of his life[. He] obviously turned it around to make a difference." However, the trial court found that "one of the components of . . . being rehabilitated is to admit that you were involved." The court stated, "you can . . . define irreparably corrupt as someone who kills somebody and then denies ever doing it." The court concluded that because McDuffy was "still in denial" and "steadfast in [maintaining his] innocence," he was "not remorseful" and did not have the capacity to be rehabilitated.

The court therefore reimposed a sentence of LWOP plus 10 years. McDuffy timely appealed, contending that in light of *Miller*, he should be resentenced to 35 years to life.

On October 11, 2017, after briefing in this appeal was complete, Governor Brown signed Senate Bill No. 394 (2016-2017 Reg. Sess.) (Senate Bill 394), which amends Penal Code section 3051 to make a juvenile offender serving an LWOP sentence eligible for parole after 25 years.

The Attorney General apprised us of the enactment and argued that pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), which involved analogous circumstances and a similar enactment, McDuffy's appeal is moot.

We invited McDuffy to address whether newly amended Penal Code section 3051 rendered his Eighth Amendment claim moot. He responded with a supplemental brief in which he contends his claim is not moot because the amendment could be repealed before he has served 25 years, and in any event a parole suitability hearing for a nominally LWOP inmate provides no meaningful opportunity to obtain release because rehabilitative programming is largely unavailable to such inmates. He argues that removal of the "LWOP" designation would open up rehabilitative opportunities for him in prison.

DISCUSSION

Prior to the passage of Senate Bill 394, McDuffy's sentence meant he would never be eligible for a parole suitability hearing. Senate Bill 394 amends Penal Code section 3051 to add subdivision (b)(4) as follows: "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board [of Parole Hearings] during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration

hearing pursuant to other statutory provisions." Under Senate Bill 394, McDuffy is now eligible for a parole suitability hearing during his 25th year of incarceration.

In *Franklin*, a juvenile homicide offender was given a mandatory 50-year-to-life sentence, and "would first become eligible for parole at age 66." (*Franklin*, *supra*, 63 Cal.4th at p. 276.) He appealed, contending that pursuant to *Miller*, his sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.

After Franklin was sentenced the Legislature enacted Senate Bill No. 260, which set forth a youth offender parole hearing process by adding sections 3051, 3046, subdivision (c), and 4801, subdivision (c) to the Penal Code. The Supreme Court held that "section 3051 . . . superseded Franklin's sentence so that notwithstanding his original term of 50 years to life, he is eligible for a 'youth offender parole hearing' during the 25th year of his sentence. Crucially, the Legislature's recent enactment also requires the 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.' (§ 4801, subd. (c).) For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Franklin*, *supra*, 63 Cal.4th at p. 277.) Therefore, the Court concluded, Franklin's appeal was moot. (*Id.* at p. 286.)[1]

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[1] Penal Code section 3051 as first enacted did not apply to a juvenile offender serving an LWOP sentence.

Franklin controls our result.

As originally enacted, Penal Code section 3051, subdivision (h), "exclude[d] several categories of juvenile offenders from eligibility for a youth offender parole hearing," including those, like McDuffy, "who [were] sentenced to life without parole." (*Franklin*, *supra*, 63 Cal.4th at pp. 277-278.) As now amended, however, section 3051 affords a juvenile homicide offender such as McDuffy a chance to participate in a youth offender parole hearing and demonstrate a level of maturity and rehabilitation suitable for release from prison. This statutory scheme "effectively reformed" the parole eligibility date of McDuffy's sentence so that the longest possible term of incarceration before parole eligibility is 25 years. (*Id.* at p. 286.)

Last month our colleagues in Division Five reached the same conclusion on materially indistinguishable facts. In *People v. Lozano* (2017) 16 Cal.App.5th 1286, Lozano was sentenced to LWOP in 1996 for a murder she committed when she was 16 years old. She sought resentencing pursuant to *Miller*, and the trial court again sentenced her to LWOP. (*Lozano*, *supra*, at p. 1289.) She appealed, and after briefing on Lozano's appeal was complete the Legislature enacted Senate Bill 394. Division Five held that pursuant to *Franklin*, the appeal was moot. (*Lozano*, *supra*, at p. 1201.)

McDuffy argues Senate Bill 394 does not render his appeal moot because the Legislature might repeal the amendment before he is eligible for a parole hearing. We disagree. Although the law might change in the future, the current version of Penal Code section 3051 controls for now.

McDuffy argues his appeal is not moot because as long as he is designated an "LWOP" inmate, no youth offender parole

hearing will afford a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. This is so, he argues, because developing a record of mitigation is unachievable in practice given resource constraints in the prison system, where offenders serving lengthy sentences have little access to education and rehabilitative programs.

In *Franklin*, Amicus curiae Post-Conviction Justice Project of the University of Southern California Gould School of Law (PCJP) made the same argument. (*Franklin*, *supra*, 63 Cal.4th at pp. 261, 285.) This was the Court's response:

"We have no occasion in this case to express any view on the concerns raised by PCJP. As noted, the Legislature enacted Senate Bill No. 260 with 'the intent . . . to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.' (Stats. 2013, ch. 312, § 1.) Section 4801, subdivision (c) directs that the Board, in conducting a youth offender parole hearing, 'shall 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.' And section 3051, subdivision (e) says: 'The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.'

"As of this writing, the Board has yet to revise existing regulations or adopt new regulations applicable to youth offender parole hearings. In advance of regulatory action by the Board, and in the absence of any concrete controversy in this case concerning suitability criteria or their application by the Board or the Governor, it would be premature for this court to opine on whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law. So long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Franklin*, *supra*, 63 Cal.4th at pp. 285-286.)

Penal Code section 3051 effectively reformed McDuffy's sentence so that he will become eligible for parole during his 25th year of incarceration, "at a hearing that must give great weight to youth-related mitigating factors." (*Franklin*, *supra*, 63 Cal.4th at p. 286.) His sentence "is not functionally equivalent to LWOP, and the record here does not include evidence that the Legislature's mandate that youth offender parole hearings must provide for a meaningful opportunity to obtain release is unachievable in practice." (*Ibid.*) We thus conclude that McDuffy's Eighth Amendment challenge has been rendered moot.

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.