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Opinion following transfer from Supreme Court

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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.

IZAC MC CLOUD,

Defendant and Appellant.

B251262

(Los Angeles County
Super. Ct. No. BA331910)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed, modified, and remanded with directions.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Victoria B. Wilson, and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

In January 2008, Izac McCloud and a companion fired 10 gunshots into a crowd at a party, killing two people and wounding a third. McCloud was 16 years old at the time. A jury convicted him of two counts of second degree murder and 46 counts of assault with a firearm. He was sentenced to 202 years to life in state prison.

In 2012, we affirmed the murder convictions and held that the evidence was sufficient to support only eight of the 46 assault convictions. (*People v. McCloud* (2012) 211 Cal.App.4th 788 (*McCloud*.) We vacated his sentence and remanded the matter to the trial court for resentencing. (*Id.* at pp. 807-808.)

On remand, the trial court sentenced McCloud to 113 years and 4 months to life in state prison, calculated as follows: on count 1 (murder), 15 years to life, plus 25 years to life for the firearm enhancement; on count 2 (murder), 15 years to life, plus 25 years to life for the firearm enhancement; on count 3 (assault with a firearm), the high term of 4 years, plus 10 years for the firearm enhancement, plus 3 years for the great bodily injury enhancement; on counts 10, 11, 12, 26, 36, 47, and 48 (assault with a firearm), one year (one-third of the mid-term), plus 16 months (one-third of the mid-term) for the firearm enhancement; all sentences to run consecutively. The court dismissed the remaining counts. McCloud appealed.

On February 27, 2015, we filed an opinion that addressed McCloud's contention, among others, that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States because he was only 16 years old at the time of the charged crimes and his sentence is functionally equivalent to life without the possibility of parole (LWOP). We concluded that McCloud's sentence was not the functional equivalent of LWOP in light of the California Legislature's recent enactment of Penal Code section 3051.¹ That statute requires a "youth offender parole

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

hearing” during McCloud’s 25th year of incarceration that “provide[s] for a meaningful opportunity to obtain release.” (§ 3051, subd. (e).)

We noted that Courts of Appeal had expressed conflicting views on the effect of section 3051 on sentences that would otherwise be functionally equivalent to LWOP and that the issue was then pending before the California Supreme Court. The Supreme Court granted review of this case on this issue and deferred further action pending its decision in several cases, including *People v. Franklin*, S217699.

On May 26, 2016, the Supreme Court issued its opinion in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). In that case, the Court held that the availability of the youth offender parole hearing provided by section 3051 and its companion statutes rendered the defendant’s constitutional challenge moot. (*Id.* at pp. 268, 276-277.) The court, however, remanded the case to the trial court to determine whether the defendant had been given an adequate opportunity to make a record of mitigating evidence that would be relevant at his youth offender parole hearing. (*Id.* at pp. 269, 283-284.)

On August 17, 2016, the Supreme Court transferred this case to this court with directions to vacate our decision and reconsider the cause in light of *Franklin*.² We have done so, and conclude that McCloud’s Eighth Amendment argument is moot under *Franklin*. We also reject McCloud’s arguments that the evidence is insufficient to support the convictions of assault, that the court made certain sentencing errors, and that his attorney was constitutionally deficient. Although we affirm the convictions and McCloud’s sentence, we remand the matter to the trial court with directions to provide a hearing where McCloud can, in accordance with *Franklin*, make a record of mitigating evidence relevant to a youth offender parole hearing. We will also direct the trial court to correct a clerical error in the abstract of judgment.

² McCloud has submitted a supplemental brief pursuant to rule 8.200(b)(1) of the California Rules of Court, which we have considered. The Attorney General did not file a supplemental brief.

DISCUSSION

I. *Sufficiency of the Evidence*

McCloud argues that his convictions for assault on counts 10, 11, 12, 26, 36, 47, and 48 must be reversed because the record contains insufficient evidence that he possessed the present ability to commit a battery on the victims named in those counts.³ Respondent contends that McCloud's argument is barred by the law of the case, and we agree. In the previous appeal, McCloud argued that there was insufficient evidence of present ability as to all of the assault counts other than count 3. In a unpublished part of our opinion, we expressly considered and rejected his argument. (*People v. McCloud* (Dec. 5, 2012, B228209) [nonpub. opn.].) We therefore must reject it now as well. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 470, p. 528.) McCloud argues that the issue presented on this appeal "only ripened and could be briefed after the trial court selected the seven counts" for resentencing on remand, and that our prior opinion consequently did not decide "whether substantial evidence supported the convictions on these particular counts." We disagree. In the previous appeal, McCloud argued that the evidence of present ability was insufficient as to every assault count except count 3, because the prosecution did not show which victims the shooter had the present ability to assault. (*People v. McCloud* (Dec. 5, 2012, B228209) [nonpub. opn.].) We rejected the argument and therefore must reject it now as well.

II. *Cruel and Unusual Punishment*

In his opening brief on appeal, McCloud argued that his sentence of 113 years 4 months to life in prison is the functional equivalent of life without the possibility of parole, and that because he was only 16 years old at the time of the charged offenses, such a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States.

³ The victim named in count 3 (i.e., the one assault conviction that McCloud does not challenge) was the individual who was wounded but not killed.

The Eighth Amendment’s prohibition on cruel and unusual punishment prohibits punishment that is grossly disproportionate to the offender’s culpability. (U.S. Const., 8th Amend.) In the context of juvenile offenders, because they “cannot with reliability be classified among the worst offenders,” categorical rules have developed to prevent the imposition of disproportionate punishment. (*Roper v. Simmons* (2005) 543 U.S. 551, 569.)

In *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), the Supreme Court held a juvenile who commits a nonhomicide offense may not be sentenced to LWOP. (*Id.* at p. 74.) The Court required juvenile offenders be given “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” absent exceptional circumstances. (*Id.* at p. 75.)

In *Miller v. Alabama* (2012) 132 S.Ct. 2455 (*Miller*), the Supreme Court prohibited sentencing a juvenile homicide offender to mandatory LWOP and required the sentencing court to consider the mitigating qualities of youth, including: (1) “age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences”; (2) family and home environment; and (3) circumstances of the homicide offense, including the extent of his participation and the effects of familial or peer pressure. (*Id.* at pp. 2467-2468, 2475.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court relied on *Graham* and *Miller* to hold that a term-of-years sentence that amounted to the “functional equivalent” of LWOP for juvenile nonhomicide offenders was unconstitutional. (*Id.* at pp. 267-268.) The court explained that the Eighth Amendment requires that a juvenile nonhomicide offender be provided at sentencing with “a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future,” and “the sentencing court must consider all mitigating circumstances attendant in the juvenile’s crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development.” (*Id.* at pp. 268-269.)

In response to *Graham*, *Miller*, and *Caballero*, the Legislature enacted in 2013 Senate Bill No. 260 to establish section 3051 and other statutes to address juvenile sentencing concerns. Section 1 of 2013 Senate Bill No. 260 states in relevant part: “The Legislature finds and declares that, as stated by the United States Supreme Court in [*Miller*], ‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior,’ and that ‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,’ including ‘parts of the brain involved in behavior control.’ The Legislature recognizes that youthfulness both lessens a juvenile’s moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*].” (Stats. 2013, ch. 312, § 1.)

Section 3051 provides in pertinent part that, subject to exceptions inapplicable here, “[a] person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the [Board of Parole Hearings (Board)] 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.”⁴ (§ 3051, subds. (b)(3) & (h).) The “[B]oard shall conduct a youth offender parole hearing,” which “shall provide for a meaningful opportunity to

⁴ A “[c]ontrolling offense” is defined as “the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.” (§ 3051, subd. (a)(2)(B).)

obtain release.” (§ 3051, subds. (d) & (e).) The Board shall “take into consideration” and “give great weight to the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.” (§§ 3051, subd. (f)(1); 4801, subd. (c).)

In *Franklin*, our Supreme Court stated that section 3051 was intended “ ‘to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.’ ” (*Franklin, supra*, 63 Cal.4th at p. 285, quoting Stats. 2013, ch. 312, § 1.) The statute “effectively reforms the parole eligibility date of a juvenile offender’s original sentence so that the longest possible term of incarceration before parole eligibility is 25 years.” (*Franklin, supra*, 63 Cal.4th at p. 281.) The statute “thus superseded the statutorily mandated sentences of inmates who . . . committed their controlling offense before the age of 18.”⁵ (*Id.* at p. 278.) Because under section 3051, such inmates are “by operation of law, . . . entitled to a parole hearing and possible release after 25 years of incarceration” they are “not serving an LWOP sentence or its functional equivalent.” (*Id.* at pp. 281-282.) The defendant’s constitutional challenge to his sentence was therefore moot. (*Id.* at pp. 268, 276-277.)

Franklin is controlling here. By operation of section 3051, McCloud, like the defendant in *Franklin*, “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.” (*Franklin, supra*, 63 Cal.4th at pp. 279–280.) Because McCloud’s sentence cannot be characterized as a de facto LWOP, his Eighth Amendment challenge to his sentence is similarly moot.

⁵ Section 3051 originally applied to persons who committed a controlling offense before the person was 18 years old. (Former section 3051; Stats. 2013, ch. 312, § 4.) The Legislature amended the statute in 2015 to include persons under 23 years of age. (Stats. 2015, ch. 471, § 1.)

McCloud does not attempt to distinguish *Franklin* or argue that it does not control the outcome here.⁶ Indeed, he relies on *Franklin* in arguing that “he is entitled to a baseline hearing in the trial court” at which “additional evidence, consistent with section 3051 and *Franklin* would be submitted.” We agree.⁷

In order for the youth offender parole hearing to provide a meaningful opportunity for release, the Board is required 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’ ” (*Franklin, supra*, 63 Cal.4th at p. 283, quoting § 4801, subd. (c).) As the *Franklin* Court acknowledged, the “statutory provisions echo language in constitutional decisions of the high court and this court.” (*Franklin, supra*, 63 Cal.4th at p. 283.) The *Franklin* Court then emphasized that the newly enacted statutes “also contemplate that information regarding the juvenile offender’s characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board’s consideration”—his or her cognitive ability, character, and social and family background at the time of the offense. (*Id.* at pp. 269, 283.) Developing and assembling that information, the Court observed, is typically a task more easily done at or near the time of the juvenile’s offense rather than decades later. (*Id.* at pp. 283-284.) Because the Supreme Court could not determine whether the defendant had a sufficient opportunity to put such information on the record, the Court remanded the matter for the limited purpose of determining “whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (*Id.* at p. 284.)

⁶ McCloud notes that he does not concede the Eighth Amendment issue because that issue can be “finally decided only in the United States Supreme Court.” He does not dispute, however, that unless and until then we are bound by *Franklin*. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455; *People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, 702-703.)

⁷ The Attorney General did not submit a supplemental brief or otherwise respond to this argument.

Here, the trial court's initial sentencing hearing occurred before the United States Supreme Court's *Miller* decision and the Legislature's enactment of sections 3051 and 4801. Like the trial court in *Franklin*, it thus had no reason to consider the type of evidence that is now relevant under those authorities. (See *Franklin, supra*, 63 Cal.4th at p. 269.) Indeed, the probation report and the record of the initial sentencing hearing includes no meaningful discussion of facts bearing upon the "hallmark features of youth" referred to in section 4801, subdivision (c), and the *Miller* decision. (See *Miller, supra*, 132 S.Ct. at p. 2468.) Although a second sentencing hearing took place after *Miller* was decided (and before the effective date of section 3051), our record indicates that no evidence concerning the *Miller* factors was submitted or considered. Therefore, we will remand the matter to the trial court for a hearing at which, as the *Franklin* court stated, "the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [McCloud] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin, supra*, 63 Cal.4th at p. 284.)

III. *Other Sentencing Issues*

McCloud argues that the trial court erred by failing to order a new probation report for the second sentencing hearing. But in reply to the Attorney General's contention that any such error was harmless, McCloud's only argument is that "[p]rejudice is shown in this case because none of the *Miller* factors was established or investigated, resulting in a violation of the Eighth Amendment." *Miller*, however, applies when LWOP sentences are imposed on juveniles. Because, under *Franklin*, the court did not sentence McCloud to a de jure or de facto LWOP, it was not required to consider the *Miller* factors *in pronouncing sentence*. (See *Franklin, supra*, 63 Cal.4th at p. 284 [although it was not clear whether defendant had sufficient opportunity to put on the record the kind of information that would be relevant to a youth offender parole hearing, his "two

consecutive 25-year-to-life sentences remain[ed] valid”).) Thus, because the trial court was not required to consider those factors *in sentencing*, argument concerning the prejudicial effect of failure to order a second probation report fails as well.

McCloud also argues that, at the resentencing hearing, the court erred by failing to state its reasons for imposing consecutive sentences. We conclude that McCloud has again failed to show prejudice, for two reasons. First, when the trial court sentenced McCloud the first time (before his previous appeal), the court stated its reasons for imposing consecutive sentences, and McCloud does not articulate any reason why there was a reasonable probability that the court’s reasoning would have been different at resentencing on remand. Second, even if the court had imposed concurrent sentences, by McCloud’s own calculation, he would have been sentenced to 40 years to life. But under section 3051, he is eligible for parole in his 25th year of incarceration. McCloud does not explain how, given the operation of section 3051, the imposition of consecutive sentences prejudiced him.

Finally, McCloud argues that his trial counsel rendered ineffective assistance by failing to raise these issues (the *Miller* factors, a new probation report, and reasons for consecutive sentences) at the resentencing hearing. Because we have already concluded that McCloud’s arguments on those issues fail on the merits, we reject the ineffective assistance claim as well.

IV. *Clerical Error*

Respondent contends that the abstract of judgment incorrectly states that in counts 1 and 2 McCloud was convicted of assault with a firearm. We agree and will direct the court to prepare a new abstract of judgment to reflect that in counts 1 and 2 McCloud was convicted of second degree murder.

DISPOSITION

Our opinion filed February 27, 2015 is vacated. The clerk of the trial court is directed to prepare a new abstract of judgment reflecting that McCloud was convicted of second degree murder on counts 1 and 2. The clerk shall send a certified copy of the new abstract of judgment to the Department of Corrections and rehabilitation. In all other respects, the judgment is affirmed.

Upon remand, the trial court shall hold a hearing, pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 and this opinion, to allow the parties an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.