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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MOHAMMED WARD, Defendant and Appellant.	C085118 (Super. Ct. Nos. 94F02382, 16HC00247)

Defendant Raymond Mohammed Ward was sentenced to life without the possibility of parole (LWOP) in 1995 for first degree murder with a robbery special circumstance (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17), 190.5, subd. (b)),[1] plus a consecutive term of five years for an associated firearm enhancement (former

[1] Undesignated statutory references are to the Penal Code.

§ 12022.5, subd. (a)).[2] He was 17 years 10 months old at the time of the offense. Defendant's conviction and sentence were upheld by this court in an unpublished decision (C021981) filed on February 24, 1997. The California Supreme Court denied his subsequent petition for review (S060273).

In 2016, defendant's request for resentencing was granted under *Miller v. Alabama* (2012) 567 U.S. 460, 465 [183 L.Ed.2d 407, 414-415] (*Miller*). The *Miller* hearing occurred in February 24, 2017. On April 7, 2017, the court issued a lengthy ruling articulating its findings on the factors relevant to defendant's resentencing request before reimposing the original sentence. Defendant appealed, arguing the sentencing court failed to properly exercise its discretion in accordance with *Miller* and section 190.5.

We determine that Senate Bill No. 394 (2017-2018 Reg. Sess.) (Senate Bill 394) applies to defendant and renders this appeal moot. Accordingly, we deny his request for judicial notice of the files associated with his original conviction and prior appeal as unnecessary. However, we will remand the matter for the limited purpose of allowing the sentencing court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620) to determine whether to strike defendant's consecutively imposed firearm enhancement.

DISCUSSION

A. *Juvenile Sentencing Law*

The Supreme Courts of the United States and California have issued a series of decisions limiting the types of sentences that may be imposed on juvenile offenders. (See *Roper v. Simmons* (2005) 543 U.S. 551, 575 [161 L.Ed.2d 1, 25] [juveniles not eligible for death penalty]; *Graham v. Florida* (2010) 560 U.S. 48, 82 [176 L.Ed.2d 825, 850]

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[2] Defendant's sentence for carjacking and its associated firearm enhancement were stayed pursuant to section 654.

[juvenile convicted of a nonhomicide offense may not be sentenced to LWOP]; *People v. Caballero* (2012) 55 Cal.4th 262, 268-269 [extending *Graham* to juveniles who receive sentences which are the functional equivalent of LWOP].)

In *Miller*, the United States Supreme Court held that a mandatory LWOP sentence for juvenile offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. (*Miller*, *supra*, 567 U.S. at pp. 465, 479.) Although *Miller* did not foreclose an LWOP term for juveniles, it noted the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (*Id.* at p. 479.) To that end, *Miller* outlined a range of factors a sentencing court should consider before imposing LWOP on a juvenile offender. (*Id.* at pp. 477-479; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1388-1389 (*Gutierrez*) [listing five factors required by *Miller*]; *In re Kirchner* (2017) 2 Cal.5th 1040, 1048 (*Kirchner*) [same].) In *Montgomery v. Louisiana* (2016) 577 U.S. ___ [193 L.Ed.2d 599] the Supreme Court held *Miller* operates retroactively because it announced a substantive rule of constitutional law. (*Montgomery*, *supra*, 577 U.S. at pp. ___, ___ [193 L.Ed.2d at pp. 618-620, 622].)

In response to *Miller*, *Graham*, and *Caballero*, our Legislature enacted Senate Bill No. 260 (2013-2014 Reg. Sess.) (Senate Bill 260), which became effective January 1, 2014. Senate Bill 260 provided an offender who was under the age of 18 at the time of his crime with a "youth offender parole hearing" during the 15th, 20th, or 25th year of incarceration, depending on the "controlling offense." (§ 3051, subds. (a) & (b).) At the youth offender parole hearing, the Board of Parole Hearings is directed 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).) Senate Bill 260 excluded certain categories of offenders, including individuals who were sentenced to LWOP. (Former § 3051, subd. (h).)

The California Supreme Court examined Senate Bill 260 in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). The defendant in *Franklin* was 16 years old when he shot and killed another teenager. He was convicted of first degree murder with a firearm enhancement and received a sentence of two consecutive 25-year-to-life terms. (*Franklin*, *supra*, at p. 268.) He challenged his 50-year-to-life sentence on the ground it was the functional equivalent of LWOP, arguing that he should be afforded the protections outlined in *Miller*. (*Franklin*, *supra*, at p. 273.) The high court agreed that "a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*." (*Id.* at p. 276.) Nonetheless, because Senate Bill 260 entitled the defendant to a parole hearing during his 25th year in prison, his *Miller* challenge was deemed moot. (*Franklin*, *supra*, at pp. 276-277.) The court reasoned that the operation of Senate Bill 260 "means 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." (*Franklin*, *supra*, at pp. 279-280.) *Franklin* specifically noted the Legislature did not intend to require any additional resentencing procedures. (*Id.* at pp. 278-279.)

On October 11, 2017, during the pendency of this appeal, Senate Bill 394 (2017-2018 Reg. Sess.) became law. Senate Bill 394 expands the youth offender parole hearing process under Senate Bill 260 (2013-2014 Reg. Sess.) to juvenile offenders sentenced to LWOP. (Stats. 2017, ch. 684, § 1.5.) To that end, Senate Bill 394 amends section 3051 to add subdivision (b)(4), which provides: "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 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."

Only one published opinion has examined the effect of Senate Bill 394 on a juvenile offender's Eighth Amendment challenge to an LWOP sentence, concluding the *Miller* claim was moot. (*People v. Lozano* (2017) 16 Cal.App.5th 1286, 1288 (*Lozano*), review dism. as moot, Aug. 29, 2018, S246013.) It was immaterial that the defendant may have been eligible for parole at an earlier date if she had received her requested sentence. (*Id*. at pp. 1291-1292.) California was free under *Montgomery* to remedy any *Miller* violations by providing, through Senate Bill 394, an opportunity for "meaningful parole consideration" without providing for individual resentencing. (*Lozano, supra*, at p. 1291.)

B. *Application*

Defendant argues the sentencing court abused its discretion under *Miller* and section 190.5 when it resentenced him to LWOP. He further argues these contentions are not mooted by the passage of Senate Bill 394 (2017-2018 Reg. Sess.). We disagree.

The analysis in *Franklin* applies equally here, as Senate Bill 394 extended Senate Bill 260 (2013-2014 Reg. Sess.) by amending section 3051 to expressly provide that a person in defendant's situation is entitled to a youth offender parole hearing after 25 years of incarceration. (Stats. 2017, ch. 684, § 1.5; § 3051, subd. (b)(4).) This change applies retrospectively to all eligible youth offenders regardless of the date of conviction. (See *Franklin, supra*, 63 Cal.4th at p. 278; § 3051, subd. (b).) Like the defendant in *Franklin*, defendant is serving a life sentence that includes a meaningful opportunity for parole during his 25th year of incarceration. Therefore, defendant is no longer serving an LWOP sentence, disposing of his *Miller* claim. (*Franklin, supra*, at pp. 279-280.) Senate Bill 394 effectively provides defendant the relief he sought at resentencing, the least severe term for which he was eligible upon resentencing: 25 years to life. (§ 190.5,

subd. (b).) Thus, except as discussed *post*, we conclude that defendant's appeal is moot. (See *Lozano*, *supra*, 16 Cal.App.5th at pp. 1288, 1290.)

Defendant argues his appeal is not moot because he will continue to suffer disadvantageous collateral consequences as a result of his LWOP sentence. Defendant points to differing rules regarding accrual of conduct credit, conditions of confinement, and the availability of programming. These assertions are not properly before us and are impermissibly speculative, as there is no information in the record regarding how the Department of Corrections and Rehabilitation will treat inmates subject to Senate Bill 394 (2017-2018 Reg. Sess.). (See, e.g., *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998 ["the ripeness requirement prevents courts from issuing purely advisory opinions, or considering a hypothetical state of facts in order to give general guidance rather than to resolve a specific legal dispute"].) In any event, as noted in *Lozano*, defendant is not entitled to *resentencing* now that Senate Bill 394 has cured any *Miller* defect. (*Lozano*, *supra*, 16 Cal.App.5th at pp. 1291-1292.)

We also reject defendant's argument that the sentencing court's alleged misapplication of factors under section 190.5 renders his sentence illegal when imposed, thus avoiding mootness. It is apparent that defendant's state law claims are identical to, and rest on, his federal claims. Defendant was granted resentencing in light of *Miller* and asserts error based upon the sentencing court's alleged failure to properly consider the *Miller* factors.[3]

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[3] The Supreme Court's dismissal of *People v. Padilla* (June 13, 2018, S239454) and *People v. Mendoza* (June 13, 2018, S238032) as moot further belie defendant's attempt to recharacterize these claims. (See *People v. Padilla* (2016) 4 Cal.App.5th 656, review granted Jan. 25, 2017, S239454, dism. as moot June 13, 2018; *People v. Arzate et al.* (*Mendoza*) (Sept. 29, 2016, B259259) [nonpub. opn.] [2016 Cal.App.Unpub. LEXIS 7115], review granted Jan. 25, 2017, S238032, dism. as moot June 13, 2018.)

Defendant's reliance on *Kirchner* and *Gutierrez* is also misplaced. The Supreme Court's recognition in *Kirchner* that a juvenile offender sentenced to LWOP could seek habeas corpus relief under *Miller* without exhausting the section 1170, subdivision (d)(2) request for resentencing remedy (*Kirchner*, *supra*, 2 Cal.5th at pp. 1043, 1055) does not change the fact that defendant received his *Miller* hearing as contemplated by *Gutierrez, supra*, 58 Cal.4th at pages 1360-1361, 1390-1391 and is appealing only from that determination.

We do recognize, however, that a limited remand for resentencing is required by the passage of Senate Bill 620, which amended section 12022.5, effective January 1, 2018 (Stats. 2017, ch. 682, § 1), to permit a sentencing court to strike a firearm enhancement: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c).) This amendment applies retroactively to defendant's pending appeal. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091.)

Although a sentence to the maximum term available could, under appropriate circumstances, indicate futility and eliminate the need to remand (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427), those circumstances are not present. There was no discussion in the resentencing record of the court's decision to impose the maximum term available. In fact, there was no discussion at all of the firearm enhancement. Rather, the court was solely focused on its decision to reimpose the LWOP sentence for the murder conviction. As such, we cannot say the record demonstrates that the sentencing court would not have exercised its newly authorized discretion under Senate Bill 620 (2017-2018 Reg. Sess.). (See *McDaniels*, *supra*, at p. 427 [heinous nature of crime, recidivism, and use of consecutive sentencing does not "alone establish what the court's discretionary decision would have been"].) Therefore, remand for resentencing is required.

DISPOSITION

The matter is remanded for the limited purpose of allowing the sentencing court to exercise its discretion authorized by Senate Bill 620 (2017-2018 Reg. Sess.). The judgment is otherwise affirmed.

KRAUSE, J.

We concur:

HULL, Acting P. J.

HOCH, J.