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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ANTHONY MAURICE COOK, JR.

on Habeas Corpus.

G050907

(Super. Ct. No. WHCSS1400290)

O P I N I O N

Original proceedings; petition for writ of habeas corpus after a judgment of the Superior Court of San Bernardino County, Katrina West, Judge. Petition granted.

Anthony Maurice Cook, Jr., in pro. per.; and Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Parag Agrawal and Lynne McGinnis, Deputy Attorneys General, for Respondent.

* * *

INTRODUCTION

In 2009, the convictions against petitioner Anthony Maurice Cook, Jr. (Petitioner), for two counts of murder, one count of attempted murder, and firearm enhancements were affirmed in *People v. Shaw and Cook* (May 28, 2009, G041439) (nonpub. opn.). By petition for writ of habeas corpus, Petitioner challenged his sentence of 125 years to life in prison. Petitioner, who was 17 years old when he committed the crimes, contended his sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*) and, as relief, asked to be resentenced.

In *In re Cook* (Apr. 6, 2016, G050907) (nonpub. opn.) (*Cook*), we denied Petitioner's petition for writ of habeas corpus. We concluded, based on *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], that *Miller* applied retroactively to cases on collateral review but that recently enacted Penal Code sections 3051 and 4801 had the effect of curing the unconstitutional sentence imposed on Petitioner. (*Cook, supra*, G050907.) In July 2016, the California Supreme Court granted Petitioner's petition for review of our opinion and transferred the matter to us with directions to vacate our decision and consider, in light of *People v. Franklin* (2016) 63 Cal.4th 261, 268-269, 283-284 (*Franklin*) "whether petitioner is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'"

Following transfer, Petitioner filed a supplemental opening brief. Respondent did not file a supplemental brief. We have considered the matter in light of *Franklin* and, in accordance with that opinion, affirm the sentence but remand with directions to the trial court to grant Petitioner a hearing at which he can make a record of mitigating evidence tied to his youth.

BACKGROUND

In December 2003, Petitioner and Rufus Raymond Shaw shot and killed Odrum Nader Brooks and his son, Demarcus T. Brooks, while they sat in an automobile. Petitioner was 17 years old at the time. In 2007, a jury convicted Petitioner of two counts of first degree murder (Pen. Code, § 187, subd. (a)) and one count of attempted murder (*id.*, §§ 664, 187, subd. (a)), and found true the allegations that Petitioner personally and intentionally discharged a firearm (*id.*, § 12022.53, subd. (c)) and personally and intentionally discharged a firearm proximately causing great bodily injury (*id.*, § 12022.53, subd. (d)).

The trial court sentenced Petitioner to an indeterminate term of life with the possibility of parole for the attempted murder, plus five consecutive indeterminate terms of 25 years to life for murder and discharging a firearm, for a total sentence of 125 years to life. The convictions and sentence were affirmed in *People v. Shaw and Cook, supra*, G041439.

In 2014, Petitioner filed a petition for writ of habeas corpus in the superior court in which he had been convicted. The superior court denied the petition without an evidentiary hearing in September 2014.

One month later, Petitioner, who was self-represented at the time, filed a petition for writ of habeas corpus in the Court of Appeal. He sought relief based on *Miller, supra*, 567 U.S. ___ [132 S.Ct. 2455]. Counsel was appointed to represent Petitioner, and counsel filed a supplement to the petition for writ of habeas corpus and an appendix of exhibits. We issued an order to show cause, in response to which respondent filed a return. Petitioner filed a traverse, thereby joining the issues for review. In April 2016, we issued our opinion in *Cook, supra*, G050907, denying the petition for writ of habeas corpus.

DISCUSSION

We noted in *Cook, supra*, G050907, it was undisputed that Petitioner’s sentence of 125 years to life was a de facto sentence of life without the possibility of parole and that, when sentencing Petitioner, the trial court did not consider his age, youthful attributes, and capacity for reform and rehabilitation. We concluded that *Miller* applies retroactively to matters on collateral review. (*Montgomery v. Louisiana, supra*, 577 U.S. ___ [136 S.Ct. 718].) As a consequence, we concluded, Petitioner’s sentence was unconstitutional under *Miller, supra*, 567 U.S. at page ___ [132 S.Ct. at page 2460] and *People v. Caballero* (2012) 55 Cal.4th 262. (*Cook, supra*, G050907.) But we were compelled by *Montgomery v. Louisiana, supra*, 577 U.S. ___ [136 S.Ct. 718] to conclude that Penal Code section 3051 cured the constitutional error in sentencing by giving Petitioner the right to a parole hearing after serving 25 years of his sentence. (*Cook, supra*, G050907.)

In *Franklin, supra*, 63 Cal.4th at page 269, the defendant was 16 years old when he shot and killed the victim. A jury convicted the defendant of first degree murder and found true a personal firearm-discharge enhancement. (*Id.* at p. 268.) The defendant was sentenced to two 25-year-to-life sentences, giving him a total sentence of life in state prison with the possibility of parole after 50 years. (*Ibid.*) The California Supreme Court concluded that Penal Code sections 3051 and 4801 mooted the defendant’s claim that the sentence was unconstitutional because “those statutes provide [the defendant] with the possibility of release after 25 years of imprisonment (Pen. Code, § 3051, subd. (b)(3)) and require the Board of Parole Hearings (Board) 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’ (*id.*, § 4801, subd. (c)).” (*Franklin, supra*, at p. 268.)

The California Supreme Court also concluded, however, that the defendant had raised “colorable concerns” over “whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth.” (*Franklin, supra*, 63 Cal.4th at pp. 268-269.) The court explained: “The criteria for parole suitability set forth in Penal Code sections 3051 and 4801 contemplate that the Board’s decisionmaking at [the defendant]’s eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense. Because [the defendant] was sentenced before the high court decided *Miller* and before our Legislature enacted [Penal Code sections 3051 and 4801], the trial court understandably saw no relevance to mitigation evidence at sentencing. In light of the changed legal landscape, we remand this case so that the trial court may determine whether [the defendant] was afforded sufficient opportunity to make such a record at sentencing. This remand is necessarily limited; as section 3051 contemplates, [the defendant]’s two consecutive 25-year-to-life sentences remain valid, even though the statute has made him eligible for parole during his 25th year of incarceration.” (*Id.* at p. 269.)

If, after remand, the trial court were to determine the defendant did not have sufficient opportunity to make a record at sentencing, then “the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence.” (*Franklin, supra*, 63 Cal.4th at p. 284.) “[The defendant] 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. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender’s characteristics and circumstances at

the time of the offense so that the Board, years later, may properly discharge its obligation to ‘give great weight to’ youth-related factors ([Pen. Code,] § 4801, subd. (c)) in determining whether the offender is ‘fit to rejoin society’ despite having committed a serious crime ‘while he was a child in the eyes of the law’ [citation].” (*Ibid.*)

Petitioner argues he should be given the opportunity to make a record in the trial court of mitigating factors related to his youth. He asserts, “the record of [his] characteristics and circumstances at the time of the offense is bare bones at best, with the probation officer’s report consisting of less than a half page of ‘personal history’; as opposed to ensuring a full and accurate record, the report noted that the information in that personal history section was ‘not independently verified.’”

We agree with Petitioner. In *Franklin, supra*, 63 Cal.4th at page 284, it was “not clear” whether the defendant “had sufficient opportunity to put on the record the kinds of information that [Penal Code] sections 3051 and 4801 deem relevant at a youth offender parole hearing.” Here, in contrast, it is clear that Petitioner was not given sufficient opportunity to make such a record. Petitioner’s sentence was imposed before the decision in *Miller* and before enactment of Penal Code sections 3051 and 4801. We noted in *Cook* that the trial court, when sentencing Petitioner, did not consider his age, youthful attributes, and capacity for reform and rehabilitation. (*Cook, supra*, G050907.)

Thus, rather than direct the trial court to make the determination whether Petitioner had sufficient opportunity at sentencing to make a record of “information that will be relevant to the Board as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801” (*Franklin, supra*, 63 Cal.4th at pp. 286-287), we will direct the trial court to conduct a hearing at which Petitioner will have the opportunity to make such a record.

DISPOSITION

We affirm Petitioner's sentence but remand the matter with directions to the trial court to grant Petitioner a hearing at which he can make a record of mitigating evidence tied to his youth.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.