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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ADRIAN ALEX GONZALEZ

on Habeas Corpus.

E060770

(Super.Ct.No. RIC1306030)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Reversed.

Paul E. Zellerbach, District Attorney, and Matt Reilly, Deputy District Attorney, for Plaintiff and Appellant.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal the grant of defendant Adrian Alex Gonzalez's petition for writ of habeas corpus.¹ Defendant was convicted of six counts of attempted murder and six counts of assault with a firearm and the special allegation for these counts that he personally and intentionally used a firearm; participation in a criminal street gang; and committing the aforementioned crimes for the benefit of a gang, for his involvement in a shooting at six people. He was sentenced to a determinate term of 81 years, four months plus four consecutive life terms. Defendant appealed his conviction to this court in *People v. Adrian Alex Gonzalez* (October 18, 2010, E048653 [nonpub. opn.]) (Op.). We affirmed his conviction in its entirety.

On May 16, 2013, defendant filed a petition for writ of habeas corpus (petition) in the superior court arguing under the authority of *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*) and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) that his sentence violated his Eighth Amendment rights against cruel and unusual punishment. He alleged that at the time of the offense he was 16 years old and the 81 years, four months to life sentence amounted to a de facto life-without-the-possibility-of-parole (LWOP) sentence. The trial court granted his petition and set the matter for resentencing.

¹ Pursuant to Penal Code section 1506, the People are entitled to appeal the partial grant of the petition for writ of habeas corpus.

The People argue on appeal that since the California Legislature enacted Penal Code section 3051,² which entitles defendant to a parole hearing after he has served 25 years on his sentence, he was not subject to an impermissible LWOP sentence.

Both parties recognize that this issue is currently under review in the California Supreme Court and the final decision on these issues will be determined by that court.³ This Court recently issued its opinion in *People v. Scott* (Mar. 20, 2015, E060028) ___ Cal.App.4th ___ [2015 Cal.App. Lexis 251]) (*Scott*) in which we concluded that section 3051 complies with the constitutional requirement that the state provide a juvenile offender with a meaningful opportunity to obtain release within his or her expected lifetime. We follow the findings in *Scott* as the law in this court and find that with the passage of section 3051, defendant is not subject to an impermissible de facto LWOP sentence and resentencing is not required. We reverse the superior court's ruling.

I

PROCEDURAL BACKGROUND

The facts of the underlying crime are not pertinent to the issues raised on appeal. Briefly on April 16, 2005, defendant and his co-defendant, Hector Bibian Gil, approached a house located on 12th Street in Riverside. There were six people standing outside the

² All further statutory references are to the Penal Code unless otherwise indicated.

³ Review has been granted in *In re Alatraste*, review granted February 19, 2014, S214652 and *In re Bonilla*, review granted February 19, 2014, S214960. Review has been granted in numerous other cases involving the same issues that we need not mention here.

house. Gil started shooting at the house but did not hit anyone. Both Gil and defendant were yelling their gang name and throwing gang signs before and during the shooting.

Defendant was found guilty of six counts of attempted premeditated, willful, and deliberate murder (§§ 664/187), six counts of assault with a firearm (§ 245, subd. (a)(2)), one count of firing at an inhabited building (§ 246), and one count of participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true the allegations that he committed the crimes for the benefit of or at the direction of a criminal street gang (§ 186.22, subd. (b)) and that he personally and intentionally discharged a firearm (§ 12022.53). He was sentenced to a determinate term of 81 years, four months. In addition, he was sentenced to four consecutive life terms for the attempted murder convictions.

On May 16, 2013, defendant filed his petition alleging that he was 16 years old at the time of his offenses. He contended that his sentence constituted a de facto LWOP sentence in violation of the Eighth Amendment citing to *Caballero* and *Graham*. He sought resentencing. On June 27, 2013, the superior court found that the petition stated a prima facie case for relief and ordered the People to show cause why the petition should not be granted.

On July 12, 2013, the People filed a response essentially conceding under the authority of *Caballero* that defendant was entitled to resentencing. On January 9, 2014, the People filed a supplemental brief. The People referred the superior court to section 3051, effective January 1, 2014, that provided for a youth offender parole hearing at an earlier date, e.g. after serving 25 years. The need for resentencing was rendered moot by

section 3051 as defendant would be eligible for parole when he was 41 years old. He no longer had a de facto LWOP sentence.⁴

Defendant filed a response. Defendant argued that a hearing was necessary in order to determine the matter, and that section 3051 did not moot his argument as it was not clear that the statute applied to him.

A hearing was conducted on January 23, 2014. Defendant argued under *Caballero* that he was entitled to resentencing that considered his age, maturity, and mental development. The People responded that he was not entitled to resentencing because he was entitled to a parole hearing when he was 41 years old. The People acknowledged that the appellate courts were split on whether the enactment of section 3051 rendered resentencing of youthful offenders unnecessary. Defendant argued the statute was specific and referred to a “25-years-to-life” sentence and not his 81-years-to-life sentence.

The superior court stated that since defendant was not the shooter, it was inclined to do the resentencing. The superior court granted the petition based “on the fact that he was 16 at the time of the crime.” On March 6, 2014, the People filed an appeal from the grant of the petition.

⁴ At oral argument, the People argued that in fact defendant would be eligible for a parole hearing under section 3051 earlier than in his 25th year. The timing of his parole hearing is not at issue in this appeal because, as we conclude *post*, under any provision of section 3051, defendant’s sentence does not constitute a de facto life sentence.

II

ANALYSIS

The People contend that defendant is not entitled to be resentenced on his sentence of 81 years, four months plus life because with the enactment of section 3051, he is not subject to a de facto LWOP sentence. In *Roper v. Simmons* (2005) 543 U.S. 551, 574-575, the United States Supreme Court held that imposing the death penalty on juvenile offenders younger than 18 years is cruel and unusual punishment precluded by the Eighth Amendment. In *Graham, supra*, 560 U.S. 48, the high court extended the constitutional limitations on juvenile punishment, holding “that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” (*Id.* at p. 74.) Later, in *Miller*, the court invalidated any sentencing scheme that mandates LWOP sentences, including for homicide offenses, for juvenile offenders and instead the offender is entitled to consideration of his background or age, i.e. “individualized sentencing.” (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at pp. 2468-2469].)

In *Caballero*, the California Supreme Court considered the impact of *Graham* and *Miller* on a 110-years-to-life aggregate sentence for a 16-year-old defendant who committed several attempted murders. (*Caballero, supra*, 55 Cal.4th at pp. 265-266.) The court concluded that “[c]onsistent with the high court’s holding in *Graham* . . . , we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender’s natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.” (*Id.* at p. 268.) As such, “the state may not deprive [a defendant] at

sentencing of a meaningful opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society in the future.” The court provided as a remedy that “[d]efendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings.” (*Id.* at pp. 268-269.) The court provided in a footnote as follows: “We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.” (*Id.* at p. 269, fn. 5.)

In response, the California Legislature enacted section 3051. (Stats. 2013, ch. 312 (Sen. No. 260).) It provides that those who commit crimes prior to reaching the age of 18 and are sentenced to a determinate term of years or a life term an opportunity to prove their rehabilitation and secure release on parole after serving a prescribed term of confinement.

In *Scott, supra*, __ Cal.App.4th [2015 Cal.App. Lexis 251], this court evaluated the above-mentioned authorities in deciding if the defendant in that case, who was 16 years old when he was convicted of several counts of attempted murder and sentenced to a 120-years-to-life sentence, was subject to a de facto LWOP sentence. (*Id.* at [p. *3].) In *Scott*, we concluded that section 3051 “has abolished de facto life sentences . . . by virtue of its provision for mandatory parole eligibility hearings after no more than 25

years in prison.” (*Id.* at [p. *30].) Further, the Legislature in enacting section 3051 followed exactly the request in *Cabarello* to provide such parole eligibility mechanism. (*Ibid.*) Finally, “[t]he statute [section 3051] simply and clearly makes the current sentencing scheme constitutional by providing each juvenile offender, universally and on a specified schedule, with the meaningful opportunity for release within their lifetime that the *Eighth Amendment* demands.” (*Id.* at [p. *31].)

Under section 3051, defendant will receive a parole hearing and will be given a meaningful opportunity for release during his lifetime. The Board of Parole Hearings will “take into consideration 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 individual.” (§ 3051, subds. (e), (f)(1).) Section 3051 provides defendant with a meaningful opportunity to obtain release - - as required under *Caballero* - - based on demonstrated growth and rehabilitation by affording him his first parole hearing well within his life expectancy. As a result, defendant’s sentence is not a de facto LWOP sentence. Hence, he has no claim that his sentence constitutes cruel and unusual punishment under the Eighth Amendment.

III

DISPOSITION

The judgment is reversed, and the matter is remanded to the superior court. Upon remand, the superior court shall vacate the judgment, discharge the order to show cause, and deny the petition for writ of habeas corpus.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.