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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIANO DIAZ, JR.,

Defendant and Appellant.

F068070

(Super. Ct. No. VCF107543)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Paul V. Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Galen Farris and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In this case we examine the tension between the Eighth Amendment’s prohibition against “cruel and unusual” punishment and the sentencing of a nonhomicide juvenile offender to 55 years to life in prison. Appellant Mariano Diaz, Jr., received this sentence for crimes he committed when he was 17 years old. He contends his sentence is the functional equivalent of a life sentence without the possibility of parole (LWOP) in violation of the Eighth Amendment as set forth in *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). He argues this matter should be remanded for resentencing under these authorities. He also maintains the need for resentencing has not been rendered moot by the passage of Senate Bill No. 260, which promulgated, in part, Penal Code section 3051.¹

Based on his sentence, section 3051 provides appellant with a parole eligibility hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).) Because section 3051 gives appellant a parole eligibility hearing well within his natural life expectancy, we determine he is not facing a de facto LWOP sentence. As such, appellant cannot establish an Eighth Amendment violation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Underlying Crime.

These facts are taken from this court’s nonpublished opinion in *People v. Diaz* (Dec. 22, 2008, F052637). In March 2003, appellant, a gang member, fired a handgun in Tulare County at two rival gang members. He used gang slurs just prior to the attack and he fired his weapon after an older male told him to shoot. One of the victims suffered multiple gunshot wounds but survived. Appellant fled the scene and was not apprehended until September 2005. He was 17 years old when these crimes occurred.

¹ All future statutory references are to the Penal Code unless otherwise noted.

In 2007, a Tulare County jury convicted appellant of two counts of attempted premeditated murder (§§ 664/187, subd. (a); counts 1 & 2) and two counts of assault with a deadly weapon (§ 245, subd. (a); counts 3 & 4). Several gun use enhancements, a great bodily injury enhancement, and a criminal street gang enhancement were all found true. (§§ 186.22, subd. (b), 12022.7, subd. (a), 12022.53, subs. (c)-(d).) Appellant was sentenced to a total term of 75 years to life. On December 22, 2008, this court affirmed the judgment and the Supreme Court subsequently denied review. (*People v. Diaz* (Dec. 22, 2008, F052637) [nonpub. opn.], review denied March 11, 2009, S170006.)

2. The Habeas Corpus Petitions.

In 2011, appellant filed a petition for writ of habeas corpus in this court, arguing his sentence was a de facto LWOP and violated the Eighth Amendment, in part, under *Graham, supra*, 560 U.S. 48. (*In re Mariano Diaz, Jr.*, on Habeas Corpus (June 2, 2011, F062572).) In 2012, our Supreme Court issued *Caballero, supra*, 55 Cal.4th 262, which held the Eighth Amendment's prohibition against cruel and unusual punishment is violated in a nonhomicide case when a juvenile offender is sentenced to a term of years with a parole eligibility date that falls outside the juvenile's natural life expectancy. (*Caballero, supra*, at p. 268.)

On August 29, 2012, this court denied appellant's petition without prejudice in light of *Caballero*. Appellant was permitted to file a petition for writ of habeas corpus in the trial court to allow the lower court to weigh the mitigating evidence and determine the extent of incarceration before a parole eligibility hearing. (*In re Mariano Diaz, Jr.*, on Habeas Corpus (Aug. 29, 2012, F062572) [nonpub. opn.].) Appellant subsequently filed a habeas petition in the trial court, which ultimately resulted in a second sentencing hearing.

3. The Resentencing.

On September 11, 2013, the trial court conducted a hearing to modify appellant's sentence. Appellant's counsel filed a statement in mitigation prior to the resentencing

hearing. The statement outlined the requirements of *Graham* and *Caballero*, and argued the trial court's indicated sentence of 55 years to life would violate those authorities. Defense counsel took the position appellant's life expectancy was 78.9 years based on the United States Life Tables by Hispanic Origin, Vital and Health Statistics (October 2010) Series 2, No. 152, p. 18 from the United States Department of Health and Human Services, Centers for Disease Control and Prevention. The defense pointed out appellant's youthfulness, lack of a criminal history, and strong support from friends and family as evidenced by numerous letters submitted in support in his original probation file. The defense also submitted that he was a member of a gang, and subjected to intense peer pressure and codes of behavior, and appellant reluctantly engaged in the shooting after an adult gang member told him to shoot. The defense outlined the California Rules of Court factors affecting probation and mitigation before concluding that the court should use counts 3 and 4 rather than counts 1 and 2 as the unstayed terms, and impose concurrent rather than consecutive terms.

Prior to the resentencing hearing, the prosecution filed a sentencing brief which argued appellant's anticipated minimum parole eligibility date was September 5, 2060, based on his custody credits from the time of his arrest on September 5, 2005. Based on the trial court's indicated sentence of 55 years, the prosecution asserted both *Graham* and *Caballero* were satisfied, in part, because appellant would be 74 years old at that time of parole eligibility, which would be more than four years before his statistical life expectancy.

On September 11, 2013, the trial court heard oral arguments from appellant's counsel and the prosecution. Appellant's counsel stated, in part, that the trial court's indicated sentence of 55 years would give appellant a minimum parole eligibility when he was 74 or 76 years old, which would provide him a life expectancy of approximately "two point something years longer than that." Defense counsel argued this approach ran

against the “thrust” of *Graham* and *Caballero*, which required that the juvenile offender have a “meaningful or realistic opportunity” to show rehabilitation.

The prosecution argued appellant’s statistical life expectancy was 80 years old based on an unidentified report from the United States Government, which was handed to the court during the arguments. The prosecution contended the indicated sentence was proper under *Caballero* because it gave appellant a chance at parole within his lifetime, and appellant was not guaranteed a “long happy life afterwards.”

At the conclusion of oral arguments, the trial court modified appellant’s sentence to 55 years to life in prison, broken down in relevant portion as follows:

Count 1: 15 years to life (§§ 664/187, subd. (a)) plus an additional consecutive 25 years to life (§ 12022.53, subd. (d));

Count 2: 15 years to life (§§ 664/187, subd. (a)) consecutive to count 1;

Count 3: three years (§ 245, subd. (a)), which was stayed (§ 654); and

Count 4: three years (§ 245, subd. (a)), which was stayed (§ 654).

The court struck or stayed all remaining enhancements found true by the jury. The court awarded appellant credit with 3,014 days in custody

DISCUSSION

Appellant asserts that his modified sentence of 55 years to life is unconstitutional as it continues to represent cruel and unusual punishment under *Graham, supra*, 560 U.S. 48 and *Caballero, supra*, 55 Cal.4th 262. He argues he will not be eligible for parole within his life expectancy or, if he is, it will be for only several “meaningless” years. He further contends Senate Bill No. 260 does not render moot his constitutional challenge and the need for resentencing.

Respondent counters that appellant does not have a de facto life sentence because the trial court gave him a parole eligibility date within his life expectancy, meeting the requirements of *Graham* and *Caballero*. Respondent further contends Senate Bill No. 260 has rendered moot any need for further resentencing.

1. The Controlling Cases.

We begin our analysis with an overview of the three controlling cases regarding the Eighth Amendment and juvenile sentencing.

First, in *Graham, supra*, 560 U.S. 48, the court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of nonhomicide offenses to LWOP. (*Graham, supra*, at p. 75.) The Supreme Court noted a “moral” difference between homicide and nonhomicide crimes, and it commented on various scientific data showing the developmental differences between juvenile and adult minds, including the ability of juveniles to change more readily than adults. (*Id.* at pp. 68-69.) *Graham* determined that a state, while not required to guarantee eventual freedom to a juvenile offender, must give such offenders “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Id.* at p. 75.) A state is prohibited from making a judgment at the outset that a juvenile offender will never be fit to reenter society. (*Ibid.*)

Second, in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*) the court held that the Eighth Amendment prohibits the imposition of a mandatory LWOP sentence on a juvenile offender even in a case of homicide. (*Miller, supra*, 132 S.Ct. at p. 2469.) *Miller* determined that the Eighth Amendment does not necessarily foreclose an LWOP sentence on a juvenile but the trial court, before imposing such a sentence, must “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Miller, supra*, 132 S.Ct. at p. 2469.) *Miller* sets forth a list of factors for the trial court to determine before imposing an LWOP sentence, including “immaturity, impetuosity, and failure to appreciate risks and consequences”; whether “the family and home environment that surrounds” the juvenile is “brutal and dysfunctional”; “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him”; and “the possibility of rehabilitation.” (*Miller, supra*, 132 S.Ct. at p. 2468.) LWOP may then be sentenced if the court, after considering all the

relevant information, determines the case involves one of the “rare juvenile offender[s] whose crime reflects irreparable corruption.” [Citations.]” (*Miller, supra*, 132 S.Ct. at p. 2469.)

Finally, in *Caballero, supra*, 55 Cal.4th 262, our Supreme Court reviewed *Graham* and *Miller* and held the Eighth Amendment’s prohibition against cruel and unusual punishment is violated in a nonhomicide case when a juvenile offender is sentenced to a term of years with a parole eligibility date that falls outside the juvenile’s natural life expectancy. (*Caballero, supra*, at p. 268.) In *Caballero*, the juvenile defendant received a 110-year-to-life sentence after he was convicted of three counts of attempted murder. The *Caballero* court concluded the sentence was the “functional equivalent” of LWOP and it reversed because the Eighth Amendment was violated. (*Caballero, supra*, at pp. 267-268.)

In reversing, *Caballero* emphasized *Graham*’s requirement that a state must provide a juvenile offender with a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” within his or her expected lifetime. (*Caballero, supra*, 55 Cal.4th at p. 269.) The state may not deprive juvenile offenders “at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.” (*Id.* at p. 268.) Our Supreme Court stated “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, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison ‘based on demonstrated maturity and rehabilitation.’ [Citation.]” (*Id.* at pp. 268-269.)

Caballero, however, neither analyzed nor determined how much potential life expectancy a state must provide a juvenile offender beyond the initial parole eligibility hearing date in order to satisfy the Eighth Amendment.

2. Senate Bill No. 260 Renders Moot Appellant’s Eighth Amendment Challenge to His Current Sentence.

Generally, “the term ‘life expectancy’ means the normal life expectancy of a healthy person of defendant’s age and gender living in the United States.” (*Caballero, supra*, 55 Cal.4th at p. 267, fn. 3.) The parties do not agree on appellant’s “normal life expectancy” and dispute whether or not his current sentence is the functional equivalent of an LWOP sentence. Appellant cites data from, and requests that we take judicial notice of, the Centers for Disease Control and Prevention, National Vital Statistics Reports, showing his shortest life expectancy of 71.9 years when measured from his birth year. He notes other longer life expectancies exist depending on how the data is viewed. He argues he will not be eligible for parole until he is 72 years old (17 + 55), and further contends reaching that age may be optimistic when the health hazards of prison life are considered.

Respondent asserts we should disregard appellant’s life expectancy data on appeal because it is outside the appellate record, was not considered by the trial court, and is contrary to the life expectancy of 78.9 years that the parties submitted to the trial court at the resentencing hearing. In any event, respondent contends appellant’s current sentence is not a de facto LWOP because his minimum parole eligibility date falls within his natural life expectancy.

We grant appellant’s request to take judicial notice of the National Vital Statistics Reports, United States Life Tables, attached to his opening brief as exhibits A and B. (Evid. Code, §§ 452, subd. (h), 459, subd. (a); *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 534, fn. 7.) However, we need not resolve the parties’ dispute regarding how to measure appellant’s life expectancy and whether his current sentence is a de facto

LWOP. Even if we assume, without so deciding, that appellant’s current sentence is LWOP in violation of the Eighth Amendment, remand for resentencing is not required in light of Senate Bill No. 260.

In *Caballero*, our Supreme Court urged the Legislature to establish a “parole eligibility mechanism” for juvenile defendants serving a de facto life sentence without possibility of parole for nonhomicide crimes. (*Caballero, supra*, 55 Cal.4th at p. 269, fn. 5.) The Legislature responded and in September 2013 the Governor signed Senate Bill No. 260, which amended sections 3041, 3046, and 4801, and added section 3051. (Sen. Bill No. 260 (2013-2014 Reg. Sess.) § 1.) These changes went into effect January 1, 2014, as a mechanism to give juvenile defendants the opportunity to obtain release in accordance with *Miller, Graham, and Caballero*. (§ 3051, Notes.)

Section 3051 provides that “any prisoner who was under 18 years of age at the time of his or her controlling offense” shall be afforded a “youth offender parole hearing” before the Board of Parole Hearings (the board). (§ 3051, subd. (a).) Juvenile offenders with determinate sentences of any length shall receive a hearing during the 15th year of incarceration. (*Id.*, subd. (b)(1).) Those sentenced to life terms of less than 25 years to life shall receive a hearing during the 20th year of incarceration. (*Id.*, subd. (b)(2).) Those sentenced to an indeterminate base term of 25 years to life will receive a hearing during the 25th year of incarceration.² (§ 3051, subd. (b)(3).) The hearing “shall provide for a meaningful opportunity” for the former juvenile defendant to obtain release. (*Id.*, subd. (e).) When considering a juvenile offender’s parole suitability, the board is 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

² Section 3051 does not apply to certain limited inapplicable exceptions, including sentencing pursuant to section 1170.12, subdivisions (b) to (i), inclusive, of section 667, or section 667.61, or where the juvenile was sentenced to life in prison without the possibility of parole. (§ 3051, subd. (h).)

prisoner in accordance with relevant case law.” (§ 4801, subd. (c), see also § 3051, subd. (f)(1).)

California Courts of Appeal have issued dividing opinions regarding the constitutional effect of section 3051 on de facto LWOP sentences for juvenile defendants. Our Supreme Court has granted review on those cases, rendering them not citable by grant of review.³ (Cal. Rules of Court, rules 8.1105(e)(1), 8.1115.)

Appellant argues that Senate Bill No. 260 has not mooted his constitutional challenge or the need for remand to the trial court for further modification of his sentence. However, because of section 3051, appellant has an opportunity for parole well within his expected lifetime regardless of which actuarial table is used or how that data is viewed. He will receive a parole eligibility hearing during his 25th year of incarceration (§ 3051, subd. (b)(3)) and will have a “meaningful opportunity” to obtain release. (§ 3051, subd. (e).) When considering appellant’s parole suitability, the board is to give “great weight” to his diminished culpability as a juvenile along with any subsequent growth and increased maturity. (§ 4801, subd. (c), see also § 3051, subd. (f)(1).)

Because of Senate Bill No. 260, appellant has the required “meaningful opportunity” to obtain release within his natural life expectancy. (*Graham, supra*, 560 U.S. at p. 75.) Appellant is neither facing a “functional” nor a “de facto” LWOP sentence. Accordingly, appellant cannot establish that his sentence violates the Eighth Amendment under the statutory scheme in place for juvenile parole eligibility hearings.

Appellant, however, asserts reversal is required because the trial court failed to indicate on the record a consideration of his youthfulness or other personal factors, his

³ Those cases include the following authorities cited by the parties in their respective briefing: *People v. Solis*, review granted June 11, 2014, S218757; *In re Rainey*, review granted June 11, 2014, S217567; *People v. Franklin*, review granted June 11, 2014, S217699; *In re Heard*, review granted April 20, 2014, S216772; *People v. Martin*, review granted March 26, 2014, S216139; and *In re Alatraste*, review granted February 19, 2014, S214652.

development, or his environment. He further notes the probation report was also virtually devoid of information about his life, although it recommended a sentence of 40 years to life. He generally contends the trial court failed to articulate the factors set forth in *Miller* and *Caballero* during the resentencing hearing. He maintains that this missing information will assist the parole board in determining when he should be released. In the alternative, he argues his current sentence is “facially unconstitutional” and asks this court to modify his sentence to include an appropriate minimum parole eligibility date. These contentions are unpersuasive.

A trial court must utilize the factors set forth in *Miller* when exercising discretion to sentence a juvenile to either LWOP or 25 years to life sentence pursuant to section 190.5, subdivision (b). (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360-1361.) In such a circumstance, the Eighth Amendment requires a trial court “to 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.” (*Id.* at p. 1361, quoting *Miller, supra*, 132 S.Ct. at p. 2465.) Because section 190.5, subdivision (b), is not involved in the present matter, the trial court was not required to engage in a *Miller* analysis.

Further, *Graham* does not require a trial court to make any particular findings when prescribing a sentence for a nonhomicide juvenile offender. To the contrary, *Graham* made it the states’ responsibility to provide such offenders with a meaningful opportunity to obtain release, although it noted a juvenile offender is not guaranteed eventual freedom. (*Graham, supra*, 560 U.S. at p. 75.) *Graham* required each state to “explore the means and mechanisms for compliance.” (*Ibid.*)

Senate Bill No. 260 was not yet promulgated when our Supreme Court handed down *Caballero*. Indeed, it was *Caballero* that noted legislative action was required to establish “a parole eligibility mechanism” for juvenile defendants serving de facto life sentences. (*Caballero, supra*, 55 Cal.4th at p. 269, fn. 5.) In the interim, *Caballero*

instructed trial courts to consider the mitigating circumstances when sentencing a juvenile offender in order to determine a constitutionally suitable time for parole eligibility review. (*Id.* at pp. 268-269.) Senate Bill No. 260, however, was California’s response to *Graham* and it provides a uniform parole eligibility mechanism for all juvenile offenders, including the factors that the parole board must consider in determining parole eligibility. (§ 3051, subd. (f)(1), § 4801, subd. (c).) In light of the enacted statutory scheme, remand is unnecessary for further consideration or action by the sentencing court.

Finally, we decline appellant’s request to modify his sentence to include an appropriate minimum parole eligibility date. Current law provides for such a date. (§ 3051, subd. (b)(3).) Should section 3051 be amended or appealed, appellant continues to have appropriate relief, such as a petition for habeas corpus.

DISPOSITION

The judgment is affirmed.

LEVY, Acting P.J.

WE CONCUR:

KANE, J.

POOCHIGIAN, J.