COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2462-CR **Cir. Ct. No. 2012CF512**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATHAN J. PAAPE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Judgment modified and as modified, affirmed; order affirmed; cause remanded with directions.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 NEUBAUER, C.J. Nathan J. Paape appeals from a judgment entered upon a jury verdict convicting him of first-degree intentional homicide and an order denying his motion for postconviction relief. Paape contends that a

sentence of life imprisonment with the possibility of release to extended supervision after thirty years of confinement amounts to a "de facto" life sentence because, when he first becomes eligible to seek release, he will not have a "meaningful opportunity" to demonstrate to the court that he has matured and been rehabilitated and, thus, should be released. We disagree.

¶2 Thirteen-year-olds Paape and Antonio Barbeau murdered Barbeau's great-grandmother and stole $150 from her.[1] Paape was charged with first-degree intentional homicide, as a party to the crime. His request for a reverse waiver to juvenile court was denied, and the matter proceeded to trial. The jury returned a verdict finding Paape guilty of first-degree intentional homicide.

¶3 At sentencing, the circuit court imposed a life sentence with eligibility for parole in thirty years.[2] In imposing that sentence, the court discussed the factors it considered. It noted that this crime was "very high on the scale of seriousness … even within the scope of first degree intentional homicide," pointing to the fact that this murder involved the use of a hammer or hatchet, and not the "squeeze of a trigger," which might have an element of "unreality," particularly for a young person. Next, the court considered Paape's character. Paape was thirteen years old at the time he committed the murder. Paape "did not have an easy time growing up." His father was imprisoned and was not involved

[1] The underlying facts of the murder are discussed in detail in ***State v. Barbeau***, 2016 WI App 51, ¶¶2-4, 370 Wis. 2d 736, 883 N.W.2d 520.

[2] Like in ***Barbeau***, the circuit court erred in concluding that precedent of the United States Supreme Court precluded the circuit court from imposing a life sentence without the possibility of parole. *See* ***Barbeau***, 370 Wis. 2d 736, ¶¶7 & n.2, 32. Although the Supreme Court has counseled that life imprisonment without the possibility of parole will be for only "the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," that punishment still remains a possibility. ***Montgomery v. Louisiana***, 136 S. Ct. 718, 734 (2016).

in Paape's life. Paape's mother struggled to support him. Based on testing that was done, it appeared that Paape was "easily manipulated" and had a "strong need for acceptance." To this point, Barbeau was the one who hit the victim first, and the court was "willing to accept that … Paape was more the follower," making him less culpable than Barbeau to a small degree. However, the court said, "[H]ow far do you follow someone when they ask you to do something that you know absolutely … is wrong." The court reiterated that Paape was "still an adolescent" and, thus, the court "expect[s] there will be changes." But, even if Paape's "executive brain function might improve, would he continue to be manipulated based upon other aspects of his personality," and to the point of following a person "in horrendous action?" No one could say "at this particular time." What was "foremost in the mind of [the] court" was "protection of the public." The court needed to ensure that in the future Paape did not "follow someone else in some other horrendous act." In addition, there was a need for general deterrence, to send a message to young people in the community who might be inclined to murder, that "there will be a serious consequence."

¶4 The following day, the Department of Corrections wrote the court, informing it that Paape had to be sentenced to extended supervision, not parole. The district attorney requested a hearing to correct the error, but the court said that a written order making the change from parole to extended supervision would suffice. The judgment, however, was never amended.

¶5 Paape moved for postconviction relief pursuant to WIS. STAT. RULE 809.30 (2015-16).[3] The circuit court denied the motion.

¶6 Under WIS. STAT. § 973.014(1g)(a), when a court imposes a sentence of life imprisonment, it has three options: eligibility for release to extended supervision after twenty years, after some time later than twenty years, or not eligible for release to extended supervision. *See* ***State v. Barbeau***, 2016 WI App 51, ¶24, 370 Wis. 2d 736, 883 N.W.2d 520. Here, as in ***Barbeau***, the circuit court chose the second option, making Paape eligible for release on extended supervision in thirty years. Once Paape reaches his date of eligibility for release to extended supervision in 2043, he may "petition the sentencing court." WIS. STAT. § 302.114(2). The sentencing court may not grant the petition for release to extended supervision "unless the inmate proves, by clear and convincing evidence, that he or she is not a danger to the public." Sec. 302.114(5)(cm). Before deciding the petition, the sentencing court may hold a hearing without a jury and with the district attorney who prosecuted the inmate representing the state. Sec. 302.114(5)(b), (c).

¶7 Based on these two statutes, Paape claims that there is no "meaningful opportunity for release on extended supervision based on demonstrated maturity and rehabilitation," as the United States Supreme Court has required, which makes his sentence of life imprisonment with eligibility for release to extended supervision in thirty years one that is a de facto life sentence. A de facto life sentence for a juvenile offender is just as unconstitutional as a

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

sentence that is, in fact, for life, Paape argues. Paape asserts that his challenges to WIS. STAT. §§ 302.114 and 973.014 are facial ones. He says that the statutes are unconstitutional "for all juvenile offenders tried and convicted in adult court and sentenced as if they were adults under statutes that render their sentences 'de facto' life sentences because the statutory apparatus provides no meaningful opportunity for release."[4] Paape's challenges rest on the Due Process Clause and the Eighth Amendment to the United States Constitution.

¶8 Paape concedes that the arguments he raises on appeal were not raised in the circuit court, but asserts that they are not waived or forfeited because he raises facial challenges. The State counters that Paape's arguments are forfeited.

¶9 We assume, without deciding, that Paape did not forfeit his facial challenges, to the extent they truly are facial challenges, to WIS. STAT. §§ 302.114 and 973.014(1g)(a).[5] *See* ***State v. Bush***, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80; ***State v. Talley***, 2015 WI App 4, ¶¶2, 17, 359 Wis. 2d 522, 859 N.W.2d 155 (2014) (assuming without deciding that facial challenge was not forfeited). In any case, even if Paape had forfeited his challenges, forfeiture is a

[4] In his reply brief, Paape argues that these statutes "affect adult offenders" and that "there is an argument" that these statutes are unconstitutional for these offenders as well. Paape, however, never develops his argument as it relates to adult offenders.

[5] In reality, Paape's challenge is to a limited subset of persons: "juvenile offenders tried and convicted in adult court and sentenced as if they were adults under statutes that render their sentences 'de facto' life sentences." *See* ***American Fed'n of State, Cty., & Mun. Emps. Council 79 v. Scott***, 717 F.3d 851, 865 (11th Cir. 2013). Rather than try to mark the line demarcating facial versus as-applied challenges, we simply assume that, as Paape claims, these are facial challenges. We recognize that there is a difference in the analysis of facial versus as-applied challenges, but it is Paape who has plotted this line of litigation. *See* ***Appling v. Walker***, 2014 WI 96, ¶17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888. In any event, whether facial or as-applied, as we explain below, Paape's challenges are without merit.

rule of judicial administration, and we exercise our discretion to review them. *See* ***State v. Hershberger***, 2014 WI App 86, ¶22 n.6, 356 Wis. 2d 220, 853 N.W.2d 586.

¶10 Next, the State argues that Paape lacks standing to raise these facial challenges because whether he will have a "meaningful opportunity" to seek release is way off in the future, making his claimed injury speculative. Again, we assume, without deciding, that Paape has standing.

¶11 In a facial challenge to a statute, the challenging party alleges that the statute is unconstitutional under all circumstances. ***State v. Smith***, 2010 WI 16, ¶10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90. This is a question of law that, on appeal, is reviewed independently of the circuit court. ***Id.***, ¶8. The statute is presumed constitutional, and the party challenging it must establish, beyond a reasonable doubt, that the statute is unconstitutional. ***State v. Wood***, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63.

¶12 In ***Graham v. Florida***, 560 U.S. 48 (2010), the United States Supreme Court held that it violated the constitutional prohibition against cruel and unusual punishment to sentence a juvenile to life imprisonment without the possibility of parole for a nonhomicide offense. ***Id.*** at 52. However, the court added, "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do … is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." ***Id.*** at 75.

¶13 The United States Supreme Court then held, in ***Miller v. Alabama***, 567 U.S. 460 (2012), "that a statute that mandates a sentence of life imprisonment without the possibility of parole for a juvenile convicted of capital murder violates

the prohibition against cruel and unusual punishment." ***Barbeau***, 370 Wis. 2d 736, ¶3 (citing ***Miller***, 132 S. Ct. at 2460). The rationale was that "such a statute precludes a judge from considering a juvenile's lessened culpability due to age." ***Id.*** (citing ***Miller***, 132 S. Ct. at 2460, 2467). Thus, "[p]recluding a judge from considering the characteristics of youth, and the way they weaken the rationale for punishment, can render a sentence of life without parole for intentional homicide disproportionate as to a juvenile." ***Id.***

¶14 Then, in ***Montgomery v. Louisiana***, 136 S. Ct. 718 (2016), the petitioner claimed that his automatic sentence of life imprisonment without the possibility of parole, imposed in 1969, violated ***Miller***, that ***Miller***, although decided decades later, should apply retroactively to him, and that he should be resentenced. ***Montgomery***, 136 S. Ct. at 725-26, 736-37. The United States Supreme Court held that the rule announced in ***Miller***—which it characterized as requiring a sentencing court to consider a juvenile offender's youth before imposing a sentence of life imprisonment without parole, *as well as* restricting such a sentence to the "rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility" when sentenced—was a substantive one, making it retroactive and, further, applicable to the states. ***Montgomery***, 136 S. Ct. at 732-36.

¶15 Applying these cases to the matter at hand, Paape was not sentenced to a term of life imprisonment without the possibility of release to extended supervision, and the circuit court explicitly considered the influence of Paape's immaturity on his commission of the crime. There is no ***Miller*** violation here. More to the point, Paape's sentence is not, as he claims, a "de facto life sentence," because there is a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." When the United States Supreme

Court said in ***Graham***, and reiterated in ***Miller***, that states must provide a juvenile sentenced to life imprisonment a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," it did so without elaboration, leaving it to the states "in the first instance, to explore the means and mechanisms for compliance." ***Graham***, 560 U.S. at 75; *see* ***Miller***, 132 S. Ct. at 2469.

¶16 However, in ***Montgomery***, the United States Supreme Court effectively put its imprimatur on a parole hearing as consistent with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Indeed, Paape recognizes that the United States Supreme Court "suggested parole boards were a good choice" for remedying ***Miller*** violations.

¶17 In ***Montgomery***, while the Supreme Court gave ***Miller*** retroactive effect, this, it said, did not require states to relitigate sentences in every case where a juvenile offender received life imprisonment. ***Montgomery***, 136 S. Ct. at 736. To require this would pose practical problems, as one dissenting justice highlighted, ***id.*** at 743-44 (Scalia, J., dissenting). Thus, the majority said, states could remedy a violation of ***Miller*** "by [legislatively] permitting juvenile homicide offenders to be considered for parole rather than by resentencing them," ***Montgomery***, 136 S. Ct. at 736, as some states had already opted to do. *See, e.g.*, WASH. REV. CODE § 9.94A.730 (2015). "Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment," the Supreme Court said. ***Montgomery***, 136 S. Ct. at 736. A parole hearing was not an onerous burden for the states, nor did it disturb the finality of state convictions. ***Id.*** Notably for our purposes, with a parole hearing "[*t*]*he opportunity for release* will be afforded to those who demonstrate the truth of ***Miller***'s central intuition—that

children who commit even heinous crimes are capable of change." ***Montgomery***, 136 S. Ct. at 736 (emphasis added); *see* ***Virginia v. LeBlanc***, No. 16-1177, 2017 WL 2507375, at *3 (U.S. June 12, 2017) (in the context of the deferential analysis applicable in a federal habeas proceeding, holding that it was not an unreasonable application of ***Graham*** for a state court to conclude that a geriatric release program, which allowed older inmates to receive conditional release under some circumstances, satisfied ***Graham***'s requirement that a juvenile convicted of a nonhomicide offense and sentenced to life imprisonment have some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, because the program employed normal parole factors).

¶18 The United States Supreme Court's holding in ***Montgomery*** that a parole hearing is sufficient compels denial of Paape's claim that the lack of access to appointed counsel and state-funded expert witnesses will deprive him of a "meaningful opportunity" to demonstrate his entitlement to release. At a hearing for release on parole, there is no constitutional right to appointed counsel or to have the state pay for expert witnesses. ***Holup v. Gates***, 544 F.2d 82, 84-85 (2d Cir. 1976) (holding that the Constitution did not prevent the state from excluding counsel from parole release hearings); *see* ***Ganz v. Bensinger***, 480 F.2d 88, 90 (7th Cir. 1973) (holding that the Constitution does not require the appointment of counsel at a parole release hearing); *see also* ***Gagnon v. Scarpelli***, 411 U.S. 778, 783, 787 (1973) (holding that there is no absolute constitutional right to appointed counsel at a parole revocation hearing); *see generally* ***Greenholtz v. Inmates of Neb. Penal & Corr. Complex***, 442 U.S. 1, 14-16 (1979) (holding that process due in the context of a parole hearing is an opportunity to be heard and an explanation for why parole was denied). Paape provides no basis to distinguish parole from extended supervision as it pertains to the right to counsel. Thus, Paape's argument

that, without the assistance of counsel or experts paid at the state's expense when he is eligible for extended supervision in thirty years, he does not have a meaningful opportunity to obtain release has no merit.[6]

¶19 Paape further complains that WIS. STAT. § 302.114 deprives him of his right to a meaningful opportunity for release because "the severity of the offense will always trump all other considerations," leaving "out of the analysis … the transient immaturity of youth, the diminished culpability of children, and the attendant circumstances of children."

¶20 Under WIS. STAT. § 302.114(5)(cm), an inmate must prove, by clear and convincing evidence, that he or she "is not a danger to the public." ***Barbeau***, 370 Wis. 2d 736, ¶47. As we explained in ***Barbeau***:

> Whether an inmate is no longer a danger to the public is obviously informed by whether that inmate has matured and been rehabilitated. In other words, contrary to Barbeau's contention, there is more than "only one criterion for the release determination;" that criterion subsumes other inquiries. A lack of maturity and underdeveloped sense of responsibility in juveniles often leads to impetuous and ill-considered actions. Juveniles make rash decisions without reflecting on the harm their actions may have to others and to themselves. Over time, however, it is possible that these "deficiencies will be reformed," that the offender will mature, develop a greater sense of responsibility, and a greater capacity for reflection on the consequences of an action before taking it.

[6] Paape cites to ***Diatchenko v. District Attorney for Suffolk Dist.***, 27 N.E.3d 349, 353 (Mass. 2015) as persuasive authority for the right to state-paid counsel and expert witnesses, but that decision predated the United States Supreme Court's decision in ***Montgomery***, 136 S. Ct. at 718, which established that a parole hearing provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Of course, our legislature is free to grant greater rights than that of the United States Supreme Court. *See, e.g.*, FLA. STAT. § 921.1402 (2015) (establishing periodic review of the sentences of certain juvenile offenders and providing a right to appointed counsel).

Id. (citations omitted).

¶21 "In short, once eligible for release to extended supervision … [Paape] will likely seek to prove that he is no longer a danger to the public by showing that his criminal conduct was influenced by his youth." ***Id.***, ¶48.

¶22 Paape's claim that the severity of the offense will always trump all other considerations is pure speculation. His claim would also require us to assume that the sentencing court would refuse to fulfill its statutory obligation under WIS. STAT. § 302.114(5)(cm) to consider whether the inmate has proven that he or she "is not a danger to the public," which, of course, we decline to do.[7]

¶23 Accordingly, we reject Paape's challenges, whether facial or as applied, to WIS. STAT. §§ 302.114 and 973.014. The circuit court, upon remittitur shall amend the judgment of conviction to reflect that Paape is first eligible for release on December 12, 2043, to extended supervision, not parole.

By the Court.— Judgment modified and as modified, affirmed; order affirmed; cause remanded with directions..

Not recommended for publication in the official reports.

[7] By making this sort of claim Paape also shifts the focus from a facial challenge to an as applied challenge, for he is looking at the particular circumstances of his offense. To the extent Paape is raising an as-applied challenge, it would also be forfeited since he did not raise that challenge to the circuit court, ***State v. Bush***, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80, and, in any event, his as-applied challenge has no merit.