IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-291

No. COA20-213

Filed 15 June 2021

Cumberland County, No. 98 CRS 34831

STATE OF NORTH CAROLINA

v.

FRANCISCO EDGAR TIRADO

Appeal by defendant from judgments entered 30 August 2019 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 11 May 2021.

Joshua H. Stein, Attorney General, by Assistant Attorney General Kimberly N. Callahan, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant.

ARROWOOD, Judge.

¶ 1 Francisco Edgar Tirado ("defendant") appeals from judgments entered 30 August 2019 resentencing defendant to two consecutive life imprisonment without parole ("LWOP") sentences for two first-degree murder convictions. For the following reasons, we affirm.

I. Background[1]

¶ 2 Defendant's convictions stem from two separate gang-initiated criminal episodes during the night of 16 August 1998 and early morning hours of 17 August 1998. Defendant was one of nine members of the Crips gang who undertook a number of "missions," or criminal acts, during the night of 16-17 August 1998, in Fayetteville, North Carolina. In addition to defendant, the gang members included gang leader or "queen" Christina Walters ("Walters"), Ione Black ("Black"), Tameika Rose Douglas ("Douglas"), Eric Queen ("Queen"), Carlos Frink ("Frink"), John Juarbe ("Juarbe"), Carlos Nevills ("Nevills"), and Darryl Tucker ("Tucker"). These individuals belonged to different "sets," or subgroups, of the Crips gang.

¶ 3 On 16 August 1998, the gang members, including defendant, gathered at Walters' residence to prepare for the evening's missions. Thereafter, Walters, Douglas, and an unidentified male drove to the local Wal-Mart to steal toiletries and clothing and to purchase cartridges. The unidentified male returned alone to the

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[1] Pursuant to N.C. Gen. Stat. § 7A-27(a)(1), defendant and Eric Devon Queen jointly appealed their convictions for first-degree murder and the resulting judgments imposing the sentence of death, which were entered 11 April 2000. Our Supreme Court allowed that appeal to bypass the Court of Appeals and rendered a decision in the matter on 13 August 2004. *See State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). The Supreme Court vacated defendant's death sentence and remanded for a new sentencing hearing. *See id.* On 13 September 2007, the trial court resentenced defendant to two consecutive LWOP sentences. Because the factual background of defendant's instant appeal has not materially changed since the Supreme Court's decision in *State v. Tirado*, we recite many of the same facts and events discussed in the Supreme Court's 2004 decision.

trailer with a box of cartridges. Using fingernail polish from Walters' bedroom, defendant painted the tips of the bullets blue, the color identified with the Crips gang. Meanwhile, Queen directed Black and Nevills to return to Wal-Mart and retrieve Walters and Douglas.

¶ 4 After the group returned from Wal-Mart, Walters assigned a mission to Douglas, Black, and Nevills, directing them to find a victim to rob, steal the victim's car, put the victim in the trunk of the car, then return to Walters' residence within an hour and a half. After providing Nevills with a gun, Walters and the unidentified male drove away. Douglas, Black, and Nevills walked around looking for a car to steal, and at about 12:30 a.m., they spotted Debra Cheeseborough ("Ms. Cheeseborough") closing and locking the door to a Bojangles restaurant where she worked as a manager. They abducted Ms. Cheeseborough at gunpoint and forced her into the back seat of her car.

¶ 5 On the way back to Walters' residence, the gang members robbed Ms. Cheeseborough of her jewelry and money, and then remembering their instructions, stopped and forced her into the trunk. When they reached Walters' trailer, everyone gathered around the car, arguing over who would shoot Ms. Cheeseborough. While defendant stated, "I'll shoot the b****," Queen, Walters, Douglas, and Frink drove away in Ms. Cheeseborough's car. *State v. Tirado*, 358 N.C. 551, 560, 599 S.E.2d 515, 523 (2004). The rest of the gang remained at Walters' trailer, where defendant

mumbled several times, "Damn, they should have let me go." *Id.* at 561, 599 S.E.2d at 523.

¶ 6 Queen drove Ms. Cheeseborough's car to Smith Lake, a location on the Fort Bragg military base. Ms. Cheeseborough was removed from the trunk, and Douglas took from Ms. Cheeseborough a cross that she was wearing around her neck. Walters then pointed a handgun at her and pulled the trigger. When the pistol jammed, Walters recocked it and fired a bullet into Ms. Cheeseborough's right side, knocking her to the ground on her stomach. As she lay there, Walters fired another shot that passed through Ms. Cheeseborough's glasses, grazed her eyelid, and hit her in the thumb. Walters fired additional shots into Ms. Cheeseborough's back, side, right leg, and chest. Ms. Cheeseborough feigned death as the gang members drove away. The next morning, a passerby found Ms. Cheeseborough. She was taken to a hospital and treated for multiple gunshot wounds. Ms. Cheeseborough ultimately survived.

¶ 7 After the group left Ms. Cheeseborough for dead, they returned to Walters' trailer, where the rest of the gang remained congregated. Walters then ordered a second "mission" to find another victim to kidnap, place in the trunk of his or her car, and bring the victim and vehicle back to the trailer. Douglas, Queen, Walters, and several others drove Ms. Cheeseborough's car to hunt for another victim. They eventually targeted a Pontiac Grand Prix driven by Susan Moore ("Ms. Moore") and in which Tracy Lambert ("Ms. Lambert") was a passenger. After following the Grand

Prix for some distance, Queen was able to trap it at the end of a dead-end road. Walters handed a gun to Tucker and someone in the car told him to "go ahead." *Id.* at 561, 599 S.E.2d at 524. Queen, Walters, and Frink then drove away in Ms. Cheeseborough's car after Queen directed Black, Douglas, and Tucker to return to Walters' trailer in forty-five minutes. Douglas and Tucker forced Ms. Moore and Ms. Lambert into Ms. Moore's trunk at gunpoint, and then Black, Douglas, and Tucker drove Ms. Moore's car to Walters' trailer. At one point during the drive, Tucker stopped the car so that Black and Douglas could open the trunk and rob Ms. Moore and Ms. Lambert of their jewelry.

¶ 8 Upon this group's arrival at Walters' trailer, the entire gang surrounded the car. While the gang divided Ms. Moore's and Ms. Lambert's money and jewelry and burned their purses and identifications, they discussed who would kill the women. On instructions from Walters, the gang members then drove Ms. Cheeseborough's and Ms. Moore's cars to a location in Linden, North Carolina. Ms. Moore and Ms. Lambert were forced out of the trunk of the Grand Prix. Both were pleading for mercy. Queen told Ms. Lambert to shut up, then shot her in the head. Defendant held a large knife to Ms. Moore's neck while she watched her friend be executed. Ms. Moore begged defendant not to cut her and to shoot her instead. Despite her cries for mercy, defendant shot Ms. Moore in the back of the head. Both Ms. Lambert and Ms. Moore died of their wounds.

¶ 9 The gang members returned to Walters' trailer in Ms. Cheeseborough's and Ms. Moore's cars, and then split up. Defendant and six other members of the gang fled to Myrtle Beach, South Carolina, where they were later arrested in a motel room. Defendant was seventeen years of age at the time of the crimes committed in August 1998.

¶ 10 In January 1999, defendant was indicted for two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, one count of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree kidnapping, and one count of conspiracy to commit robbery with a dangerous weapon, all involving crimes committed against victims Ms. Moore and Ms. Lambert on 17 August 1998. Defendant was additionally indicted for attempted first-degree murder, conspiracy to commit first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree kidnapping, and robbery with a dangerous weapon for crimes committed against Ms. Cheeseborough on 17 August 1998.

¶ 11 Defendant was tried capitally before a jury at the 7 February 2000 Criminal Session of Superior Court, Cumberland County. On 3 April 2000, the jury found defendant guilty on all fourteen of the submitted charges. The verdicts of first-degree murder as to each victim were based both on premeditation and deliberation and on felony murder. The jury recommended that defendant be sentenced to death for the

murders of Ms. Moore and Ms. Lambert, and the trial court entered judgments accordingly. The trial court also sentenced defendant to consecutive terms for the other twelve felony convictions. Defendant appealed.

¶ 12 On 13 August 2004, our Supreme Court issued an opinion vacating defendant's death sentence and remanding the case to the trial court for resentencing. *Tirado*, 358 N.C. at 604, 599 S.E.2d at 549. In the interim, the Supreme Court of the United States decided *Roper v. Simmons*, which prohibited the imposition of capital punishment on juvenile murderers. *See Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) (holding that the execution of individuals who were under eighteen years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments). Defendant was subsequently resentenced to two consecutive LWOP sentences for his first-degree murder convictions.

¶ 13 In September 2016, defendant filed a motion for appropriate relief arguing that his mandatory LWOP sentences violated the United States and North Carolina Constitutions citing *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012) (holding that mandatory life imprisonment without parole for persons under the age of eighteen at the time of their crimes violates the Eighth Amendment of the United States Constitution). On 20 July 2018, the trial court granted the unopposed motion, vacated defendant's LWOP sentences for his first-degree murder convictions, and ordered a resentencing hearing pursuant to *Miller*.

¶ 14 After the resentencing hearing in August 2019, the trial court again imposed consecutive LWOP sentences for defendant's first-degree murder convictions. Defendant gave oral notice of appeal at the close of the hearing. On 16 March 2020, the trial court entered a written order memorializing its findings of fact and conclusions of law supporting its LWOP sentence (the "Order").

¶ 15 Defendant's appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444.

II. Discussion

¶ 16 Defendant argues that the trial court erred by resentencing him to two consecutive LWOP sentences. More specifically, defendant argues that the trial court erred by making findings of fact that were not adequately supported by the evidence and abused its discretion by failing to properly weigh mitigating factors militating against an LWOP sentence. Defendant also contends that the two consecutive LWOP sentences are unconstitutional and that the trial court applied the wrong legal standard in imposing the same. We address each argument in turn.

A. Findings of Fact

¶ 17 On appeal, defendant contends that two of the trial court's findings of fact in the Order were unsupported and contradicted by the evidence, namely, the first and third findings: *i.e.*, that defendant is highly articulate and intelligent and that defendant did not express remorse for his actions. We disagree.

¶ 18 On appeal of a sentence imposed on a juvenile convicted of first-degree murder, we review the trial court's findings of fact to determine if they are supported by competent evidence and, if so, such findings are binding on appeal even if the evidence is conflicting. *State v. Ames*, 268 N.C. App. 213, 218, 836 S.E.2d 296, 300 (2019) (citation omitted). " 'Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.' " *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) (quoting *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013)).

¶ 19 Competent evidence in the record supports both findings. With respect to defendant's intelligence and oratory abilities, defendant's own expert concluded that defendant was of "above-average intelligence" and test results from the Wechsler Adult Intelligence Scale confirmed the same. Moreover, according to defendant's expert, defendant's strengths included his "verbal reasoning, which was in the Very Superior range, and his non-verbal reasoning, which was in the Superior range." These findings were corroborated by evidence and testimony elicited at both the original sentencing hearing and the August 2019 resentencing hearing.

¶ 20 There is also competent evidence in the record to support the court's finding regarding defendant's remorse (or lack thereof). For example, at the original sentencing hearing, Dr. Thomas Hardin ("Dr. Hardin") testified that defendant had an anti-social personality disorder, a symptom of which is a tendency to "have very

little remorse when you do something wrong." In addition, at the resentencing hearing, defendant unsympathetically testified to shooting Ms. Moore in the head because a fellow gang member kept dropping the gun and defendant did not like sand in his gun. Indeed, defendant's "remorse" appears to derive from his decision to shoot Ms. Moore in the head, as opposed to her body, so that death would be "quick." Furthermore, since defendant has been incarcerated, he has committed roughly twenty-eight infractions including disobeying orders, assault on the staff, profane language, misuse of medicine, selling medicine, theft, possession of a weapon, threats, escape, possession of a dead animal, gang involvement, fighting, bribery, and so on. In June 2019, just prior to the resentencing hearing, defendant was found guilty of assault with a deadly weapon in a gang-related stabbing in the confinement facility. Prior to this episode, defendant had threatened to escape, become a terrorist, and kill military personnel. The infraction summary stated that it was "apparent that [defendant] had no concern for life of a person, violating any NC laws, etc." The actions described above do not comport with the actions of a remorseful individual, and the evidence in the record (including defendant's own testimony) does not show otherwise. Because the trial court's findings are supported by competent evidence, they are binding on appeal. *See Ames*, 268 N.C. App. at 218, 836 S.E.2d at 300; *accord State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citations omitted) (acknowledging the lofty deference afforded to the trial court's findings of

fact because the "trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence.").

B. Mitigating Factors

¶ 21 Defendant next argues that the trial court "abused its discretion by failing to appropriately weigh mitigating factors where the uncontroverted evidence supported the mitigating factors." We again disagree.

¶ 22 "The trial court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion." *State v. Sims*, 260 N.C. App. 665, 671, 818 S.E.2d 401, 406 (2018) (citation omitted). For juveniles convicted of premeditated and deliberate first-degree murder, "the court shall conduct a hearing to determine whether the defendant should be sentenced to [LWOP], as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2019). At such a hearing, the defendant may submit any mitigating factor or circumstance to the trial court. *See* N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9) (enumerating non-exhaustive list of mitigating factors). The trial court "shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of [LWOP]." N.C. Gen. Stat. § 15A-1340.19C(a) (2019). The trial court must enter a

sentencing order that "include[s] findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order." *Id.* The sentencing court must "expressly state the evidence supporting or opposing those mitigating factors . . . ." *State v. Santillan*, 259 N.C. App. 394, 403, 815 S.E.2d 690, 696 (2018). "To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (citation omitted).

¶ 23 In this case, the trial court considered all relevant evidence of mitigating circumstances, including, but not limited to, evidence connected to the enumerated mitigating factors set out in N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9), such as defendant's immaturity, intellectual capacity, mental health, familial or peer pressure exerted upon defendant, and the likelihood that defendant would benefit from rehabilitation in confinement. The Order—which was entered following the August 2019 resentencing hearing—demonstrates that the trial judge carefully weighed the credibility of the evidence presented as to each mitigating factor set out in N.C. Gen. Stat. § 15A-1340.19B(c)(1)-(9). It is clear that the trial court also properly analyzed whether each individual mitigating factor existed in the first place, and, if so, whether it had mitigating value or not. During this process, the trial court considered all pertinent evidence supporting and opposing the same. We have

emphasized that the "balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is 'manifestly unsupported by reason[.]' " *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502-503 (1985) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Based on the record before us, we conclude that the trial court properly considered and weighed the evidence concerning the statutory factors in N.C. Gen. Stat. § 15A-1340.19B(c) and that the trial judge's balancing of competing evidence regarding those factors was not manifestly unsupported by reason or so "arbitrary that it could not have been the result of a reasoned decision." *Id.* at 315 N.C. at 259, 337 S.E.2d at 503; *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citation omitted); *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983) (citations omitted) ("The sentencing judge, even when required to find factors proved by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term.").

C. Constitutionality of Sentence

¶ 24 Defendant next argues that the imposition of his consecutive LWOP sentences violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution because the evidence established that defendant was not one of the "rare juveniles who is

permanently incorrigible or irreparably corrupt." Applying the United States Supreme Court's recent decision in *Jones v. Mississippi*, we disagree. *See Jones v. Mississippi*, 141 S. Ct. 1307, __ U.S. __, 209 L. Ed. 2d 390 (2021).

¶ 25 On 22 April 2021, the Supreme Court of the United States decided *Jones v. Mississippi* in which it held that *Miller* and its progeny do not require the sentencing judge to make a separate factual finding of permanent incorrigibility before sentencing a juvenile defendant to LWOP. *Jones*, 141 S. Ct. at 1309, __ U.S. at __, 209 L. Ed. 2d at 395. In other words, per *Jones*, the sentencer is not required to provide an on-the-record sentencing explanation containing an implicit (or explicit) finding of the offender's permanent incorrigibility. *Id.* at 141 S. Ct. at 1321, __ U.S. at __, 209 L. Ed. 2d at 407.

¶ 26 Our review of *Jones* leads us to conclude that the instant case is undisturbed by its holding. Here, the trial court conducted a resentencing hearing pursuant to *Miller* and its progeny and proceeded under the applicable statutory guidelines set out in N.C. Gen. Stat. § 15A-1340.19A *et seq*. The trial court applied North Carolina's discretionary sentencing procedure and considered all relevant mitigating circumstances and evidence before deciding whether to impose the LWOP sentences. *See Jones*, 141 S. Ct. at 1322, __ U.S. at __, 209 L. Ed. 2d. at 408-409 ("The States, not the federal courts, make those broad moral and policy judgments in the first instance when enacting their sentencing laws. And state sentencing judges and

juries then determine the proper sentence in individual cases in light of the facts and circumstances of the offense, and the background of the offender."). Defendant, moreover, does not challenge his LWOP sentences on the grounds that the trial court failed to make a finding of permanent incorrigibility; rather defendant argues that the "evidence established that [defendant] was not one of the rare juveniles who is permanently incorrigible or irreparably corrupt." As discussed herein, the evidence shows otherwise and *Jones* has no effect on defendant's sentence. Lastly, defendant fails to present this Court with any authority supporting his position that the imposition of two consecutive LWOP sentences is unconstitutional *per se* or that said sentences run afoul of any North Carolina statute.

¶ 27 In sum, the resentencing in defendant's case complied with binding statutory authority and case law precedent as the sentence imposed was not mandatory and because the trial judge had the discretion to impose a lesser punishment in light of defendant's youth. For these reasons, and those discussed above, we need not address any as-applied constitutional challenge. *See State v. Goodman*, 298 N.C. 1, 20, 257 S.E.2d 569, 582 (1979) (citations omitted) ("In accord with a well-established precept of appellate review, this court refrains from deciding constitutional questions when there is an alternative basis upon which a case may properly be decided.").

D. Legal Standard

¶ 28 Lastly, defendant maintains that the trial court erred by applying the incorrect legal standard and by improperly comparing defendant to adult offenders in contravention to *Miller* and *Ames*. Defendant's argument misses the mark.

¶ 29 In the case *sub judice*, the trial court applied the correct legal standard as set out in N.C. Gen. Stat. § 15A-1340.19C(a) and adhered to binding North Carolina and federal precedent in making its sentencing determination. In the Order, the trial court expressly recognized those standards and imposed a sentence after analyzing "all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*." *State v. James*, 371 N.C. 77, 89, 813 S.E.2d 195, 204 (2018). After making numerous findings of fact and considering the relevant legal standards, the trial court concluded, in part, that "[a]ny mitigating circumstance attendant to the Defendant's youth did not in this case lessen his culpability or show any prospect for reform, as compared with if the Defendant had committed these crimes eight months later, when he reached the age of adult criminal responsibility." This determination is consistent with *Miller's* directive requiring the sentencing court "to take into account the differences among defendants and crimes." *Miller*, 567 U.S. at 480 n.8, 183 L. Ed. 2d at 424 n.8. Unlike *Ames*, the trial court here appropriately considered all mitigating evidence as well as the statutorily enumerated mitigating factors and considered them through a lens consistent with the substantive standard enunciated in *Miller*. Put otherwise, the trial court applied the correct legal standard

in determining that defendant is the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and LWOP is justified. *See Montgomery v. Louisiana*, 577 U.S. 190, 208, 193 L. Ed. 2d 599, 619 (2016). This disposition was not based on an improper comparison to adult offenders but rather upon a consideration of the totality of the circumstances in light of the relevant substantive standard set out in *Miller*. *See James*, 371 N.C. at 90, 813 S.E.2d at 205.

III. Conclusion

¶ 30 For the foregoing reasons, we affirm the judgements entered and the sentences imposed by the trial court in August 2019.

AFFIRMED.

Judges COLLINS and GORE concur.

Report per Rule 30(e).