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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3182-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARIEN WESTON,

Defendant-Appellant.

Submitted October 12, 2017 – Decided November 27, 2017

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 08-01-0209.

Joseph E. Krakora, Public Defender, attorney for appellant (Brian P. Keenan, Assistant Deputy Public Defender, of counsel and on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Brian Uzdavinis, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

We vacate the sentence imposed on defendant Darien Weston, and remand for a new sentence hearing to be conducted pursuant to State v. Zuber, 227 N.J. 422 (2017). In order to comply with the mandates of Zuber, the trial judge will also have to more closely adhere to the mandates of State v. Yarbough, 100 N.J. 627 (1985).

The horrific details of defendant's murder of the victim, and the fear and consequences inflicted on eyewitnesses to the crime, need not be recounted here in detail. Our Supreme Court has already done so. See State v. Weston, 222 N.J. 280-82 (2015). For our purposes, it suffices to explain that during a carjacking, defendant forced the driver into a dumpster and shot him while he wept. The event, from start to finish, took some ten to fifteen minutes and was witnessed by bystanders, including children, who were outside enjoying the summer evening. Defendant committed the crime when he was seventeen and a half years old, and was waived to adult court.

The Court remanded the matter to our court for consideration of certain issues we did not previously address. Weston, supra, 222 N.J. at 279-80. On remand, we affirmed the convictions on the issues not previously discussed, but sent the matter back to the trial judge for resentencing. State v. Weston, No. A-2396-09, (App. Div. November 9, 2015) (slip op. at 19). We specifically instructed the court to not only correct an illegal sentence

imposed on a fourth-degree tampering conviction, but also directed the court to re-examine and explain its decision to impose consecutive versus concurrent terms.

We noted that the judge had mistakenly concluded that kidnapping, one of defendant's offenses, required a consecutive sentence. Because of that error, we found that the judge should revisit the Yarbough factors in resolving whether defendant's sentence should be served consecutively or concurrently. Weston, supra, No. A-2396-09 (slip op. at 17). Contrary to the trial judge, we did not agree that as a general proposition that the victim of a crime who is kidnapped solely to eliminate the possibility of identification acts with a purpose distinct from the objective of a killing committed for the same reason. Additionally, the judge erroneously imposed a five-year prison term on a fourth-degree crime. Id. at 18.

Having been sentenced after his second trial to an aggregate of thirty-five years to be served consecutive to a life term based on errors of law, defendant was nonetheless again sentenced by the trial judge on remand to virtually the same terms. Defendant received a No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, life sentence on the first-degree murder conviction, N.J.S.A. 2C:11-3a(1) and (2) (count one), to be served consecutive to a thirty-year custodial sentence on the first-degree kidnapping, N.J.S.A.

2C:13-1b(1), (2) (count five), also subject to NERA, and a five-year term of imprisonment imposed on the third-degree terroristic threats conviction, N.J.S.A. 2C:12-3a (count seven). The judge merged the first-degree felony murder, N.J.S.A. 2C:11-3a(3) (count six) and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 39-4a (count three). The judge further imposed five-year terms of imprisonment for the third-degree offenses of possession of a weapon without a permit, N.J.S.A. 2C:39-5b (count two), hindering apprehension, N.J.S.A. 2C:29-3b(1) (count nine), and an eighteen-month term on a fourth-degree tampering with evidence, N.J.S.A. 2C:28-6(a) (count eight). On the first-degree carjacking, N.J.S.A. 2C:15-2a(1)-(4) (count four), defendant was sentenced to a thirty-year term to be served concurrently to counts 1, 2, 5, 7, 8, and 9. Thus, despite the language of our remand, which directed the judge to more closely consider Yarbough in relation to the kidnapping and murder, the judge imposed a similar 110-year aggregate sentence, subject to the same NERA eighty-nine years of parole ineligibility.

In other words, not calculating credit for time served, this defendant, who by 2016 was twenty-six years old, would not be eligible for parole for approximately eighty-nine years. This is, obviously, effectively a life sentence.

On appeal, defendant raises the following points:

POINT ONE

BECAUSE WESTON WAS SEVENTEEN YEARS OLD AT THE TIME OF THE OFFENSE, THE DE FACTO LIFE-WITHOUT-PAROLE SENTENCE THAT HE RECEIVED VIOLATED THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

A. WESTON RECEIVED A DE FACTO LIFE-WITHOUT PAROLE SENTENCE BASED ON THE STANDARD ESTABLISHED BY THIS COURT IN STATE V. ZUBER.

B. THE IMPOSITION OF A DE FACTO LIFE-WITHOUT-PAROLE SENTENCE ON A JUVENILE OFFENDER VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS.

C. WESTON'S DE FACTO LIFE-WITHOUT-PAROLE SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE THE SENTENCING COURT FAILED TO GIVE CONSIDERATION TO THE YOUTH FACTORS SET FORTH IN MILLER V. ALABAMA.

POINT TWO

THE TRIAL JUDGE ERRED IN IMPOSING CONSECUTIVE SENTENCES CONTRARY TO STATE V. YARBOUGH, AND THIS COURT'S OPINION REMANDING THIS MATTER FOR RESENTENCING.

We begin and end our consideration of defendant's appeal with our discussion regarding the impact on defendant's sentence resulting from Zuber. In Zuber, the trial court sentenced a juvenile defendant to an aggregate 110 year sentence with 55 years of parole ineligibility. Supra, 227 N.J. at 428. The sentence

was vacated because the Court followed the dictates of Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In Miller, two juvenile offenders were subjected to "the practical equivalent of life without parole[,]" and subjected to "multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life." Zuber, supra, 227 N.J., at 446-47. In its discussion, the Court noted that life-without-parole sentences, other than capital sentences, are the most harsh permitted by law. Id. at 442 (citation omitted). It also observes that a juvenile will "serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored." Ibid. (quoting Graham v. Florida, 560 U.S. 48, 70-71, 130 S. Ct. 2011, 2028, 176 L. Ed. 2d 825, 843 (2010)).

In addition to that reality, that life without parole is effectively a far greater sentence when imposed on a juvenile than an adult, none of the traditional sentencing goals apply to life without parole for a juvenile. Id. at 442 (citation omitted). Retribution does not justify it. Deterrence fails as a justification. Id. at 443. Incapacitation does not justify such a sentence because it assumes that a juvenile will forever be a danger to society. Ibid. Rehabilitation is not an appropriate

consideration, because such defendants have no hope of re-entry into society. Ibid. (citation omitted). The Court's discussion included not only Graham, regarding punishment in non-homicide cases, but Miller, applying the restriction to homicide cases.

Although the court did not "foreclose" a life-without-parole sentence for juveniles convicted of murder, those same considerations, known as the Miller factors, must be taken into account before such a sentence is imposed. Such sentences:

> [1] Preclude[] consideration of [a juvenile's] chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
>
> [2] [] prevent[] taking into account the family and home environment that surrounds [a juvenile] - and from which he cannot usually extricate himself - no matter how brutal or dysfunctional.
>
> [3] [] neglect[] 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.
>
> [4] [] ignore[] that [the juvenile] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

> [5] . . . disregard[] the possibility of rehabilitation even when the circumstances most suggest it.
>
> [Id. at 445 (citing Miller, supra, 567 U.S. at 477, 132 S. Ct. at 2468, 183 L. Ed. 2d at 423.)]

It is noteworthy that the sentences imposed in Zuber were a minimum of fifty-five years imprisonment for Zuber and sixty-eight years and three months for the other defendant whose case was decided that same day. Id. at 448. Those minimums were less than imposed on this defendant. They were vacated by the Court.

The theoretical underpinning for Zuber is that to impose a life-without-parole sentence upon a juvenile conflicts with the prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution. The limits enunciated in Zuber are intended to keep sentences imposed on juveniles at least in line with those imposed upon adults.

In instructing how these guidelines are to be implemented, our Court combined the familiar Yarbough factors with the Miller factors. Id. at 449-50. In the Zuber cases, the defendants had the possibility of release when they were in their seventies and eighties. Id. at 449. Here, the sentence imposed upon defendant, realistically, means that he will never be released. Release would not occur until he was more than 100 years old. Clearly, the sentence in this case implicates the principles enunciated in

Graham and Miller, and is controlled by Zuber. The trial judge must reconsider his sentencing calculus.

As Zuber mandates, the sentencing judge must weigh the Miller factors. See Zuber, supra, 227 N.J. at 453. He must apply those factors to determine not only the length of the sentence, but the question of whether the sentences should be served consecutively.

Additionally, the trial judge in resentencing this defendant must take into account any rehabilitative efforts defendant may have engaged in since his original sentence, and sentence the person who stands before him at the time of the new sentence proceeding. Ibid. (citing State v. Randolph, 210 N.J. 330, 354 (2012)).

Reversed and remanded.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION