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SUPREME COURT OF ARKANSAS

No. CV-17-439

JOHN LOHBAUER APPELLANT V. WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION APPELLEE	**Opinion Delivered:** February 1, 2018 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [35CV-16-603] HONORABLE JODI RAINES DENNIS, JUDGE AFFIRMED.

ROBIN F. WYNNE, Associate Justice

John Lohbauer appeals from the denial of his petition for writ of habeas corpus. He contends that he should be resentenced because the sentence of life imprisonment imposed for an offense committed when he was a juvenile violates the Eighth Amendment pursuant to the decision in *Miller v. Alabama*, 567 U.S. 460 (2012), in which the Supreme Court of the United States held that a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendment if the defendant was a juvenile when the offense was committed. Because a recent statutory amendment by the Arkansas General Assembly created the possibility of parole for appellant, we affirm.

In 1977, appellant was charged with capital murder and other offenses after he killed a law-enforcement official and injured a second during a burglary. He was fifteen years old when the offenses were committed. Appellant entered a negotiated plea of guilty

to first-degree murder, for which he was sentenced to life imprisonment. He also entered pleas of guilty to charges of first-degree battery, for which he was sentenced to twenty years' imprisonment, and burglary, for which he was also sentenced to twenty years' imprisonment. The sentences were ordered to be served consecutively, resulting in a total sentence of life plus forty years' imprisonment.

In September 2016, appellant filed a petition for writ of habeas corpus. In the petition, he alleges that his sentence of life imprisonment violates the Eighth Amendment because he was a juvenile when the offense for which he was sentenced to life was committed. The Jefferson County Circuit Court denied the petition, finding that the Supreme Court of the United States held that a mandatory sentence of life imprisonment without parole for juvenile offenders is unconstitutional, and because the range of punishment for first-degree murder at the time appellant committed the offense was either a term of years or life imprisonment, the life sentence imposed on appellant was not mandatory and was therefore not imposed in violation of the United States Constitution.[1] This appeal followed.

A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacks jurisdiction over the cause. *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503. Under our statute, a petitioner for the writ who does not allege his or her actual innocence and proceed under Act 1780 of 2001 must plead either the facial

[1] This court has held that, because it is possible to impose a term of years on a conviction for first-degree murder, the imposition of a life sentence on that charge is not mandatory and does not trigger the application of *Miller*. *Brown v. Hobbs*, 2014 Ark. 267.

invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing by affidavit or other evidence of probable cause to believe that he is being illegally detained. Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006). A circuit court's decision on a petition for writ of habeas corpus will be upheld unless it is clearly erroneous. *Darrough v. Kelley*, 2017 Ark. 314, 530 S.W.3d 332. A decision is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* Unless the petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Id.*

As stated above, in *Miller*, 567 U.S. 460, the Supreme Court of the United States held that the imposition of a mandatory sentence of life imprisonment without the possibility of parole imposed on a defendant who was a juvenile when the offense was committed violates the prohibition on cruel or unusual punishment contained in the Eighth Amendment to the United States Constitution. Appellant's petition is premised on his assertion that his sentence of life imprisonment falls within the holding in *Miller* because he was a juvenile when the offense for which he was sentenced was committed. Although appellant's sentence of life imprisonment was not mandatory under the applicable sentencing statute, he contends that it was essentially mandatory because he was required to accept a life sentence to plead down from the capital-murder charge, which carried the possibility of capital punishment. Alternatively, he argues that, if it is determined that his sentence was not mandatory, *Miller* and *Montgomery v. Louisiana*, 136

S.Ct. 718 (2016), nonetheless require the sentencer to consider a juvenile offender's youth and characteristics before a sentence of life imprisonment may be imposed.

Miller clearly states that it is the imposition of mandatory sentences of life imprisonment *without the possibility of parole* that are unconstitutional when applied to juvenile offenders. *Montgomery* does not alter that holding. In the Fair Sentencing of Minors Act of 2017, the Arkansas General Assembly amended Arkansas Code Annotated section 5-10-102 to provide that persons who were under the age of eighteen when they were convicted of first-degree murder shall be eligible for parole after serving a minimum of twenty-five years' imprisonment. Ark. Code Ann. § 5-10-102(c)(2) (Supp. 2017). The Act also amended Arkansas Code Title 16, Chapter 23, Subchapter 6 to provide that minors who were convicted of first-degree murder and sentenced prior to the passage of the Act are eligible for parole after twenty-five years of incarceration. Ark. Code Ann § 16-93-621(a)(2)(A) & (B) (Supp. 2017). The provisions make no distinction between life sentences that are mandatory and those that are discretionary. In *Montgomery*, the Court specifically referenced the granting of parole eligibility as a method of remedying a violation of the holding in *Miller*. 136 S. Ct. at 735 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them."). Although the trial court could not have relied on the Act, as it was passed after the order denying appellant's petition was entered, this court is not constrained by the trial court's rationale and may go to the record for additional reasons to

affirm a decision by a trial court. *State of Washington v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999).

As appellant's sentence of life imprisonment now carries with it the possibility of parole, his contention that his sentence violates the requirements of *Miller* is incorrect. Accordingly, the circuit court did not err in denying his petition for writ of habeas corpus. The order denying appellant's petition is affirmed.

Affirmed.

BAKER and HART, JJ., concur.
WOMACK, J., concurs in part and dissents in part.
WOOD, J., dissents.

JOSEPHINE LINKER HART, Justice, concurring. In my view, this case should simply be affirmed. Mr. Lohbauer's argument is straightforward and relatively simple to summarize. He argues that his sentence violates *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), because his sentence was mandatory, and even if it was not, it nonetheless violated the Constitution because the circuit court did not consider his youth.

Mr. Lohbauer's argument is easily disposed of. The first part of his argument fails because he was not subjected to a mandatory life sentence. In 1977, first-degree murder was classified as a Class A felony. Ark. Stat. Ann. § 41-1502(3) (Repl. 1977). Accordingly, when Mr. Lohbauer was sentenced for first-degree murder in 1977, the circuit court had discretion to sentence him to not less than five years nor more than 50 years, or life. Ark. Stat. Ann.§ 41-901(a) (Repl. 1976). The second part of Mr. Lohbauer's argument is also

easily disposed of. In *Brown v. Hobbs*, 2014 Ark. 267, this court held that *Miller* does not apply to situations in which a life sentence imposed on a minor was not mandatory. Accordingly, unless this court has abandoned *stare decisis* as an operant principle, the circuit court did not err in denying Mr. Lohbauer's habeas petition.

BAKER, J., joins.

SHAWN A. WOMACK, Justice, concurring in part and dissenting in part. I concur with the majority that the Fair Sentencing of Minors Act controls the outcome of this case; however, I dissent and write separately because the correct outcome would be to dismiss the appeal because the issue is moot. As the majority correctly points out, the Fair Sentencing of Minors Act of 2017[1] amended Ark. Code Ann. § 16-93-621 to provide that a minor who was convicted of first-degree murder before the passage of the Act is eligible for parole after serving twenty-five years in the Arkansas Department of Correction. Ark. Code Ann. § 16-93-621(a)(2)(A) & (B) (Supp. 2017). As I have previously written, the Act on its face eliminates any need for a resentencing hearing, which renders moot Lohbauer's argument that he is entitled to resentencing. *State v. Lasley*, 2017 Ark. 311, at 7, 530 S.W.3d 350, 355 (Womack, J., dissenting); *see also Ark. Dep't of Corr. v. Williams*, 2009 Ark. 523, at 6, 357 S.W.3d 867, 870.

[1] The Supreme Court clearly stated in *Montgomery v. Louisiana* that states are not required to relitigate sentences for juvenile offenders entered before their decision, but could permit them to be eligible for parole in lieu of resentencing. 136 S. Ct. 718, 736 (2016). Our General Assembly has chosen the latter approach. Fair Sentencing of Minors Act of 2017, No. 539, §§ 2 & 13 (Westlaw).

Lohbauer entered his negotiated plea of guilty on August 12, 1977, and has been incarcerated for at least forty years. He has clearly served the twenty-five-year minimum and is eligible for parole on his first-degree-murder offense under the Act. Since the issue regarding resentencing is moot, I would dismiss the appeal.

RHONDA K. WOOD, Justice, dissenting. In 1977, when he was fifteen years old, John Lohbauer killed a law-enforcement officer and injured another during a burglary. He was charged with capital murder among other offenses. In 1977, the punishment for capital murder was the death penalty or life imprisonment. Later that year, Lohbauer entered a plea of guilty to the lesser charge of murder in the first degree and was sentenced to life imprisonment.

"*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016) (citing *Miller v. Alabama*, 564 U.S. 460, 480 (2012)). In the case before us, the record does not contain a transcript of Lohbauer's 1977 plea or sentencing hearings. Therefore, I cannot determine what, if anything, the circuit court considered when sentencing Lohbauer. If Lohbauer, who was charged with capital murder, pled to a life sentence on the charge of first-degree murder in order to avoid the death penalty, his sentence is illegal if it was entered by the circuit court judge with no

consideration of his age. However, if Lohbauer pled to first-degree murder but had an opportunity to implore the circuit court to consider his status as a juvenile and impose a lesser sentence than life, his life-without-parole sentence would arguably be compliant with *Miller*.

Because we do not know what transpired at sentencing, I believe it is an error for us to reach a decision on the merits and affirm. I would remand to supplement the record with the transcript of the plea and sentencing hearings. While it is unclear if he is entitled to resentencing, he is eligible for parole under Arkansas Code Annotated section 16-93-621(a)(2)(A)&(B) (Supp. 2017).

Benca & Benca, by: *Patrick J. Benca*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.