2014 WL 5149185 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Miami-dade County

State of FLORIDA, Plaintiff,
v.
Eric ELLINGTON, Defendants.

No. F11-20364A.
October 6, 2014.

Sentencing Order

Miguel M. de la O, Judge.

***1 THIS CAUSE** came before the Court on September 19, 2014 for sentencing of Defendant, Eric Ellington ("Ellington"). The Court presided over the trial, reviewed the applicable case law, heard testimony and argument of counsel, and is fully advised in the premises.

I. THE BACKGROUND.

Not long after midnight on July 25, 2011, Julian Soler and Kennia Duran drove into a Mobil gas station in Miami Gardens driving a white Ford Mustang. As Mr. Soler finished refueling the Mustang and reentered the car, Ellington and two other males exited a stolen green Nissan Pathfinder and approached the Mustang. Ellington ran up to the driver's side and opened the car's door by gripping the door's handle with his left hand, while holding a gun in his right. Mr. Soler exited the car with his hands up, palms facing Ellington, in the universally recognized sign of submission. The video shows that Mr. Soler and Ms. Duran never put up any resistance. Nevertheless, 11 seconds after Mr. Soler exited the car, Ellington began firing his gun at Mr. Soler, nine shots in all, directly striking Mr. Soler with eight. Mr. Soler died almost immediately at the scene. Another male shot Ms. Duran once, which proved fatal an hour later.

Crime scene technicians were able to lift latent prints from the Mustang's driver's side door handle and above the door handle. The testimony at trial established that these latent prints belonged to Ellington. During police questioning after his arrest, Ellington admitted shooting Julian Soler.

The State has claimed that Ellington shot Mr. Soler because "he didn't looked scared enough." This Court's review of the interview by Det. Joseph Zellner of Ellington does not support this claim. Although admittedly the audio recording is difficult to understand at many points, the Court can find no reference in the recording of the questioning that supports the claim that Ellington shot Mr. Soler *because* "he wasn't scared enough." Describing the scene to Det. Zellner, Ellington does state that Mr. Soler "wasn't scared at all." This hardly militates in Ellington's favor, but accuracy matters. Likely, Mr. Soler appeared calm because he could not imagine Ellington would shoot him if he cooperated with the robbery.

It is natural to seek explanations in the wake of unspeakable tragedy. But there is no satisfactory explanation as to why Ellington decided to murder Mr. Soler. There never will be; nor would any ever suffice.

II. THE LAW.

Prior to July 1, 2014, Florida trial courts had only two sentencing options for a person (juvenile or adult) convicted of a capital felony: death or life imprisonment without the possibility of parole. § 775.082(1), Fla. Stat. (2013).

In a series of cases over the past decade, the United States Supreme Court has issued a number of decisions concerning the sentencing of juveniles. In *Roper v. Simmons*, 543 U.S. 551 (2005), it invalidated the death penalty for juvenile offenders. In *Graham v. Florida*, 560 U.S. 48 (2010), it held that sentencing juveniles to mandatory life without parole in non-capital cases violates the Eighth Amendment because juveniles have lessened culpability due to immaturity and have a greater capacity to change.

***2** Most recently, and most pertinent to Ellington's sentencing, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court held that imposing a mandatory life sentence without parole on juvenile offenders violates the Eighth Amendment. *Miller* requires a trial court to consider all mitigating factors, particularly factors unique to juvenile offenders, in determining whether to impose a sentence of life imprisonment without parole.

The Supreme Court expressly held that it did "not foreclose a sentencer's ability" to sentence a juvenile to life in prison without the possibility of parole in homicide cases, but the sentencing judge is "require[d] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469. The Supreme Court identified some of those differences that the sentencing judge must consider, including: "immaturity, impetuosity, and [the] failure to appreciate risks and consequences"; the "family and home environment that surrounds" the defendant; "the circumstances of the homicide"; "the extent of [the defendant's] participation in the conduct and the way familial and peer pressures may have affected him"; and "the possibility of rehabilitation." *Id.* at 2468. The Supreme Court took care to note that "given … children's diminished culpability and heightened capacity for change," the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

Prior to July 1, 2014, Florida Statute § 775.082(1) conflicted with *Miller* because it required a trial court to automatically impose a life sentence without possibility of parole on a juvenile convicted of first degree murder. *See Hernandez v. State*, 117 So. 3d 778, 782 (Fla. 3d DCA), *review denied*, 132 So. 3d 221 (Fla. 2013).

During this year's legislative session, the Florida Legislature enacted significant amendments to Florida's juvenile sentencing scheme in order to render it constitutional under the holdings in *Graham* and *Miller*. However, the applicability of these amendments to Ellington's case is not clear. On the one hand, section 775.082(1) was amended to include subsection (b), which applies exclusively to persons who commit capital felonies prior to turning 18 years of age and eliminates mandatory life imprisonment for first degree murder. Subsection (b) further provides, in part, "A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a)." § 775.082(1)(b), Fla. Stat. (2014). This addition provides the possibility of parole to a juvenile sentenced to life imprisonment.

On the other hand, section 921.1402, which implements the procedure for reviewing life sentences imposed on juveniles, by its express terms does *not* apply to crimes committed prior to July 1, 2014. *See* § 921.1402(1), Fla. Stat. (2014) ("For purposes of this section, the term "juvenile offender" means a person sentenced to imprisonment in the custody of the Department of Corrections for an offense committed on or after July 1, 2014, and committed before he or she attained 18 years of age.").

As a result of this conflicting language, it remains an open question whether the post-*Miller* amendments to Florida's juvenile sentencing laws apply only to crimes that were committed after July 1, 2014, the date that the amendments took effect, or whether the amendments apply retroactively to non-final cases like this one. [1] *See Falcon v. State*, No. SC13-865 (Fla., Jun. 26, 2014) ("In light of the juvenile sentencing legislation passed by the Florida Legislature during the 2014 Regular Session, see ch. 2014-220, Laws of Fla., which was signed into law by Governor Scott on June 20, 2014, the Court has determined that supplemental briefing is necessary to address the impact, if any, of the juvenile sentencing legislation on the issues in this case.").

***3** Consequently, although the Florida Legislature has now provided for the equivalent of parole for juvenile offenders – by providing judicial review after a set term of years depending on the original sentence – the new law *may* not affect this case because Ellington murdered Mr. Soler and Ms. Duran prior to July 1, 2014.

This Court need not resolve at this juncture the retroactivity of these amendments. The courts and the legislature will sort out these issues in due course. Whether Ellington is entitled to a sentence review many years from now does not impact the sentence which he deserves for his crimes today – life imprisonment. The Court finds that Ellington's is the uncommon case which *Miller* recognizes warrants imposition of a life sentence (even without possibility of parole) on a juvenile. Therefore, the pre-July 1, 2014 version of section 775.082(1) is constitutional as applied to Ellington.

III. THE SENTENCING HEARING.

Although the constitutionality of Florida's juvenile sentencing scheme for capital offenses remains unsettled, this much is clear: "[u]nder *Miller*, a sentence of life without the possibility of parole remains a constitutionally permissible sentencing option." *Washington v. State*, 103 So. 3d 917, 920 (Fla. 1st DCA 2012). To make that determination, trial courts must hold a sentencing hearing which allows all parties to present testimony and argument regarding application of the *Miller*/921.1401 factors. As the Third DCA has noted:

> Under *Miller*, a sentence of life without the possibility of parole remains a constitutionally permissible sentencing option. A discourse by this Court on other sentencing options is premature.... The better course calls for this Court to exercise restraint and for the parties to make their case before the trial court, where testimony may be taken, evidence presented, and argument made on all material issues to include the potential range of sentencing options.

Hernandez v. State, 117 So. 3d 778, 784 (Fla. 3d DCA 2013) (quoting *Washington*).

The 2014 amendments provide some guidance to this Court regarding the post-*Miller* factors it should apply in determining whether Ellington should be sentenced to life imprisonment.

In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.

(b) The effect of the crime on the victim's family and on the community.

(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.

(d) The defendant's background, including his or her family, home, and community environment.

(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.

(f) The extent of the defendant's participation in the offense.

(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.

(h) The nature and extent of the defendant's prior criminal history.

(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

***4** § 921.1401(2), Fla. Stat. (2014).

Consequently, this Court held a sentencing hearing on September 19, 2014 and invited the parties to present evidence and argument relevant to the *Miller*/921.1401 factors. In addition to relying on the testimony and exhibits introduced during trial, this Court heard testimony from various witnesses. The State called five witnesses who were friends or family of the victims: Jacqueline Serra, Jacqueline Parrish, Armando Soler, Jr., Armando Soler, Sr., and Janine Diaz. Ellington called two witnesses: Dr. Andrew Klein, a clinical and forensic psychologist who interviewed Ellington after trial, and Erica Love, Ellington's mother. The Court gave Ellington the opportunity to allocute, which he declined.

IV. THE SENTENCING FACTORS.

A. MILLER V. ALABAMA.

Miller sets forth various factors which the Supreme Court instructs trial courts to consider in deciding whether to impose a life sentence on a juvenile. These factors have been incorporated by section 921.1401 and will be discussed, *infra*.

Miller also notes that cases involving juveniles fall along a spectrum, and the trial court should look at where an individual case falls within that spectrum to determine if it is the uncommon case which warrants a life sentence. For example, *Miller* distinguishes between 14 year olds and 17 year olds. *Miller*, at 2467. Ellington was only three months shy of his 17th birthday when he murdered Mr. Soler.

Miller distinguishes between juveniles from stable homes and ones from "chaotic and abusive" ones. *Id.* at 2467-68. Other than a single instance of possible domestic violence by a boyfriend against Ellington's mother, there was no testimony introduced to this Court that would warrant a finding that Ellington's home life was chaotic or abusive. The worst that can be said about Ms. Love was that she worked hard to provide for her children. Although Ellington had no contact with his biological father, that does not mean he had a chaotic home life. There was testimony about an extended family where he also spent time.

Miller distinguishes between juveniles who kill and those who are charged as principals but did not personally commit the murder. *Miller*, at 2468. Ellington personally shot Mr. Soler eight times. [2]

Miller distinguishes between sober juveniles and those who commit offenses while under the influence of alcohol or drugs. *Id.* at 2469. There has been no testimony introduced that Ellington was not stone-cold sober when he decided to shoot Mr. Soler. Nor did Ellington advise the police during his questioning that he was under the influence of any substance at the time of the murder.

On each of these metrics, Ellington and his crimes fall on the end of spectrum which warrants imposition of a life sentence.

B. APPLICATION OF THE *MILLER* AND SECTION 921.1401 FACTORS.

1. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE COMMITTED BY THE DEFENDANT.

***5** Ellington murdered Mr. Soler without provocation and for monetary gain. Ellington admitted that he and his co-conspirators' intent that evening was to take everything of value that Mr. Soler and Ms. Duran had on them. The victims did nothing to resist or provoke Ellington to shoot.

Moreover, Ellington personally fired the eight bullets which killed Mr. Soler. His intent to kill Mr. Soler was obvious. Ellington continued to fire into Mr. Soler's lifeless body even after the initial bullets felled him. Ellington's case is far different from *Miller*. In *Miller*, the Supreme Court consolidated two cases from Arkansas and Alabama. In the Arkansas case, the 14 year old juvenile defendant participated in the robbery but was not armed and did not fire the bullet which killed the victim. *Miller*, at 2461. In the Alabama case, the defendant (also 14 years old) killed the victim with a bat in response to the victim grabbing the defendant by the throat during a robbery. *Id*. at 2462.

2. THE EFFECT OF THE CRIME ON THE VICTIMS' FAMILY AND ON THE COMMUNITY.

As is to be expected, the sudden, inexplicable loss of two young people has torn a hole in the fabric of two families. Even now, more than three years later, the wounds are obvious and the emotions raw. There is never closure for deaths which come so violently, so unexpectedly. As if the situation were not tragic enough, Ms. Duran's family was also left to explain the unexplainable to her then 6 year old son. His loss is immeasurable and will last a lifetime.

3. THE DEFENDANT'S AGE, MATURITY, INTELLECTUAL CAPACITY, AND MENTAL AND EMOTIONAL HEALTH AT THE TIME OF THE OFFENSE.

Dr. Klein testified that Ellington has low intellectual ability, but does not suffer from an intellectual disability. He testified that Ellington is emotionally immature, has low problem solving skills, and sometimes acts without thinking. Dr. Klein did not compare Ellington's deficits in these areas to his peers, or even to adults. The Court is left to speculate whether Ellington was a typical 16 year old, or whether Ellington's intellect, immaturity and impulsivity was a degree more pronounced so that this Court should give it greater weight in militating against a sentence of life imprisonment. Given the skill and experience of Ellington's defense counsel, and Dr. Klein's experience in conducting these evaluations and testifying in court, this Court cannot help but conclude that the mitigation testimony presented during the sentencing hearing was “as good as it gets.” Moreover, Dr. Klein could not say that any of these factors caused, or even contributed, to the murders.

Dr. Klein repeatedly testified that Ellington was “irritable.” There was again no testimony that Ellington was any more irritable than the typical 16 year old teenager, or how his irritability contributed to the murder of Mr. Soler. Nor is it apparent what Mr. Soler or Ms. Duran did that would have “irritated” Ellington to the point of murder. There is no support in the record for this Court to conclude that Ellington's irritability caused, or even contributed, to the murders.

Despite the testimony lacking definitive conclusions, the Court has considered Ellington's age, maturity, intellectual capacity, and mental and emotional health, in determining the appropriate sentence to impose upon him for the murders of Mr. Soler and Ms. Duran.

4. THE DEFENDANT'S BACKGROUND, INCLUDING HIS OR HER FAMILY, HOME, AND COMMUNITY ENVIRONMENT.

***6** Dr. Klein reported that Ellington grew up in a neighborhood filled with violence. He further testified that a woman was stabbed in Ellington's apartment. It is unclear if Ellington witnessed the stabbing and/or death. Regardless, taken in the light most favorable to Ellington's cause, it is distressing that Ellington could have viewed such extreme violence and embraced it by engaging in it, rather than being repelled by violence. Nevertheless, the Court has considered as mitigation the possibility that Ellington was desensitized to violence as a result of the unquantified violence in his neighborhood and the possibility that he viewed a fatal stabbing in his apartment.

Erica Love testified that she had conflicts with Ellington because he did not like to see her dating. On one occasion, Ellington intervened when he thought he heard (through a bedroom door) a boyfriend striking Ms. Love. The testimony was unclear as to whether Ms. Love's boyfriend actually struck her. There was no testimony that anyone ever physically, emotionally, or

sexually abused Ellington. The Court has considered as mitigation the possible impact this one instance of domestic violence had on Ellington.

5. THE EFFECT, IF ANY, OF IMMATURITY, IMPETUOSITY, OR FAILURE TO APPRECIATE RISKS AND CONSEQUENCES ON THE DEFENDANT'S PARTICIPATION IN THE OFFENSE.

Dr. Klein testified he could not attribute the murders to Ellington's immaturity, impetuousness, or youth. Basically, Dr. Klein has no explanation for the murders of Mr. Soler and Ms. Duran, or for Ellington's roles in those murders. This lack of explanation is not attributable to any failure on the part of Dr. Klein – it is near impossible to explain the unexplainable. Nevertheless, the Court has considered as mitigation the possibility that Ellington's age, immaturity and impetuousness played a role in his decision to participate in the crimes.

6. THE EXTENT OF THE DEFENDANT'S PARTICIPATION IN THE OFFENSE.

Ellington's participation was full and complete. He personally shot and killed Mr. Soler. No one else fired at Mr. Soler. No one forced Ellington to pull the trigger once, much less eight times.

7. THE EFFECT, IF ANY, OF FAMILIAL PRESSURE OR PEER PRESSURE ON THE DEFENDANT'S ACTIONS.

There was no testimony presented during the sentencing hearing about any familial or peer pressure which might in any way account for Ellington murdering Mr. Soler.

8. THE NATURE AND EXTENT OF THE DEFENDANT'S PRIOR CRIMINAL HISTORY.

Prior to the murder of Mr. Soler, Ellington was arrested in 2010 for battery on the principal of his school. Subsequent to the murders, but prior to his arrest in this case, Ellington was arrested for resisting an officer without violence, and burglary of an unoccupied conveyance. Subsequent to his arrest in this case, Ellington's latent fingerprints were matched to a home burglary and grand theft that occurred on June 28, 2011. The State abandoned the case.

9. THE EFFECT, IF ANY, OF CHARACTERISTICS ATTRIBUTABLE TO THE DEFENDANT'S YOUTH ON THE DEFENDANT'S JUDGMENT.

Dr. Klein could not testify whether, or to what extent, the murders were attributable to Ellington's youth, except that his age generally means Ellington was immature, irritable, and impetuous. Although the testimony is generalized, the Court has considered the effects of Ellington's youth on his judgment.

10. THE POSSIBILITY OF REHABILITATING THE DEFENDANT.

Dr. Klein believes that Ellington, as most people, is capable of change with the passage of enough time, effort, and abundant therapy. Dr. Klein could not quantify the probability that Ellington is capable of rehabilitation. The Court has taken into account that "[j]uveniles are more capable of change than are adults." *Graham*, 560 U.S. at 68.

11. OTHER FACTORS.

***7** Section 921.1401 does not limit the court to consider only those factors found in the statute. The statute embodies the *Miller* court's requirement that the sentencing judge consider "any mitigating factors" that would impact the sentencing decision. *Miller*, at 2467.

The Court also considered as mitigation that Ellington confessed his participation in the crime to Detective Zellner, although he has now denied his involvement to Dr. Klein. The Court attributes the latter denial to the fact Ellington's conviction will be appealed. One issue on appeal will be the admissibility of his confession. Likely, Ellington was advised not to make any admission which would essentially nullify the possibility of a successful appeal of the Court's denial of the motion to suppress his statements.

V. THE SENTENCE.

A. COUNT I - FIRST DEGREE MURDER OF JULIAN SOLER.

After careful consideration of all *Miller* and section 921.1402 factors, Ellington is sentenced to life imprisonment. Try as it did, this Court could not justify imposing a lesser sentence on Ellington. It is this Court's duty to follow the law. In this case, following the Court's oath requires imposition of a life sentence on Eric Ellington. It is the clear intent of the Florida Legislature to authorize such a penalty, and it is the clear intent of the Supreme Court to not (yet) prohibit such a penalty. The Supreme Court expressly stated in *Miller* that it was not foreclosing the possibility that a trial court could impose a life sentence in the uncommon case. The Legislature reaffirmed its intent to see life sentences imposed on juvenile offenders when it recently amended Florida's homicide statute to continue to allow for imposition of life sentences on juveniles. The Court concludes that if the murder of Mr. Soler does not warrant imposition of a life sentence on Ellington, in light of the weak mitigating evidence, then no juvenile can ever be sentenced to life imprisonment.

In addition, pursuant to section 775.087(2)(d), Fla. Stat. (2013), the Court imposes a 25 year minimum mandatory term. The 25 year minimum mandatory term will run consecutive to the 25 year minimum mandatory terms imposed as to Counts II and III. *See Morgan v. State*, 137 So. 3d 1075 (Fla. 3d DCA 2014). The Court further orders restitution to Mr. Soler's Estate in the amount of $10,000.00.

B. COUNT II - FIRST DEGREE MURDER OF KENNIA DURAN.

Based on the consideration of all *Miller* and section 921.1402 factors, imposition of a life sentence for the murder of Ms. Duran would violate the Eighth Amendment. Consequently, Ellington is instead sentenced to 50 years in state prison with a 25 year minimum mandatory term pursuant to section 775.087(2)(d), Fla. Stat. (2013). The 50 year prison sentence to run concurrently with the sentences imposed as to Counts I, III, and VI. The 25 year minimum mandatory term will run consecutive to the 25 year minimum mandatory terms imposed as to Counts I and III. *See Morgan v. State*, 137 So. 3d 1075 (Fla. 3d DCA 2014). The Court further orders restitution to Ms. Duran's Estate in the amount of $10,841.00.

C. COUNT III - ARMED CARJACKING OF JULIAN SOLER AND KENNIA DURAN.

Based on the consideration of all *Miller* and section 921.1402 factors, Ellington is sentenced to 30 years in state prison with a 25 year minimum mandatory term pursuant to section 775.087(2)(d), Fla. Stat. (2013). The 30 year prison sentence to run concurrently with the sentences imposed as to Counts I, II, and VI. The 25 year minimum mandatory term will run consecutive to the 25 year minimum mandatory terms imposed as to Counts I and II. *See Morgan v. State*, 137 So. 3d 1075 (Fla. 3d DCA 2014).

D. COUNT V - TRESPASS OF AN UNOCCUPIED CONVEYANCE.

***8** Ellington is sentenced to the time he has already served.

E. COUNT VI - CONSPIRACY TO COMMIT AN ARMED ROBBERY OF JULIAN SOLER AND KENNIA DURAN.

Ellington is sentenced to 15 years in state prison, to run concurrently with the sentences imposed as to Counts I, II, and III.

DONE and ORDERED in Miami-Dade County, Florida this 6th day of October, 2014.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 For reasons known only to the Florida Legislature, it chose to focus on the date of the commission of the offense rather than the date of sentencing. It is inexplicable to this Court why a juvenile offender who commits a crime on June 30, 2014 should be barred from having a sentence review hearing, but a juvenile committing the same exact crime the next day is entitled to this hearing. It is understandable, and well within its prerogative, for the Legislature to deny retroactive application to the new juvenile sentence structure. *See Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). However, the policy foundation for denying retroactivity is to foster finality and certainty. *See Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) ("The importance of finality in any justice system, including the criminal justice system, cannot be understated."). Such goals are understandable for juveniles who have already been sentenced. But it is much less understandable where the juveniles have not been sentenced, and there is no sentence that requires finality. *Id.* ("The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications.").

2 This Court focuses primarily on the murder of Mr. Soler. By doing so, it intends no disrespect to Ms. Duran's memory or her family, nor does it minimize Ellington's involvement in her murder. Rather, the Court recognizes that, pursuant to *Miller*, the Court cannot lawfully sentence Ellington to life imprisonment for his role in the murder of Ms. Duran.

End of Document