

[Cite as *State v. Long*, 2015-Ohio-2114.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140398
	:	TRIAL NO. B-0903962C
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
ERIC LONG,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 3, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Office of the Ohio Public Defender, and *Stephen P. Hardwick*, Assistant Public Defender, for Defendant-Appellant.

FISCHER, Judge.

{¶1} Defendant-appellant Eric Long and his two codefendants were charged in a 13-count indictment with several offenses stemming from two separate shootings, including two counts of aggravated murder under R.C. 2903.01(A). In March 2009, at the time of the offenses, Long was 17 years old, just shy of his 18th birthday, and his codefendants, Fonta Whipple and Jayshawn Clark, were adults.

{¶2} Following a joint trial with his codefendants, a jury found Long guilty of two counts of aggravated murder, three counts of felonious assault, two counts of having weapons while under a disability, one count of improperly discharging a firearm into a habitation, one count of carrying a concealed weapon, and a number of accompanying firearm specifications. At a joint-sentencing hearing with his codefendants, Long was sentenced to two consecutive terms of life imprisonment without parole on the two aggravated-murder counts, and an additional 19 years on the other counts and specifications, to be served consecutively.

{¶3} Long appealed his convictions to this court and we affirmed them in all respects. *See State v. Long*, 1st Dist. Hamilton No. C-110160, 2012-Ohio-3052 (“*Long I*”). Long then appealed to the Ohio Supreme Court, which reversed this court’s decision in part. *See State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890 (“*Long II*”).

{¶4} Relying on the United States Supreme Court’s decision in *Miller v. Arizona*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Ohio Supreme Court stated that the record did not affirmatively show that the trial court had considered that Long was a juvenile at the joint-sentencing hearing. *Long II* at ¶ 27. Consequently, it vacated Long’s sentences of life in prison without parole and remanded the cause to the

trial court for resentencing. *Id.* at ¶ 28-29. It specifically instructed the trial court to “consider Long’s youth as a mitigating factor before determining whether the aggravating factors outweigh it.” *Id.* at ¶ 29.

{¶5} On remand, the trial court held a new sentencing hearing for Long. The court stated that it had reviewed the evidence submitted at the previous sentencing hearing. It also considered his institutional record from the time of his previous sentencing, which included numerous disciplinary incidents and a new drug-trafficking offense while he was in prison, and a psychological report indicating that he had a high risk for committing future violence. The court imposed the same sentence it had previously imposed, including two life sentences without parole. This appeal followed.

{¶6} In his first assignment of error, Long contends that the trial court erred in failing to consider his youth as a mitigating factor, as ordered by the Ohio Supreme Court. He argues that the court’s statements at the sentencing hearing indicated that it gave no weight to that factor, contrary to the Ohio Supreme Court’s decision in *Long II* and the United States Supreme Court’s decision in *Miller*. This assignment of error is not well taken.

{¶7} In *Miller*, the United States Supreme Court held that imposition of mandatory life-without-parole sentences for juveniles violates the Eight Amendment prohibition against cruel and unusual punishments. *Miller*, ___ U.S. ___, 132 S.Ct. at 2464 and 2466, 183 L.Ed.2d 407. It found life sentences for juveniles to be analogous to capital punishment. *Id.* at 2463. The court discussed its previous cases that established “that children are constitutionally different from adults for purposes of sentencing.” *Id.* at 2464. It stated:

Because juveniles have diminished culpability and greater prospects for reform, we explained, “they are less deserving of the most severe

punishments.” Those cases relied on three significant gaps between juveniles and adults. First, children have a “ ‘ lack of maturity and an underdeveloped sense of responsibility,’ ” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable * * * to negative influences and outside pressures,” including from their family and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].”

(Citations omitted.) *Id.*, quoting *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

{¶8} The Supreme Court noted that its cases have also “emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller* at 2465. It went on to state, “Most fundamentally * * * youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.” *Id.*

{¶9} In *Long II*, the Ohio Supreme Court determined that as applied to a juvenile found guilty of aggravated murder, Ohio’s sentencing scheme “does not fall afoul of *Miller*” because the sentence of life without parole is discretionary, and it allows courts to “take into account that a defendant is a youthful offender.” *Long II*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 19. Nevertheless, the court specifically

held that youth is a mitigating factor the trial court must consider when sentencing a juvenile. *Id.*

{¶10} It stated:

The offender's youth at the time of the offense must be weighed against any statutory consideration that might make an offense more serious or an offender more likely to recidivate. Yet, because a life-without-parole sentence implies that rehabilitation is impossible, when the court selects this most serious sanction, its reasoning for the choice must be clear on the record.

Id.

{¶11} Long cites the trial court's statement that there was "zero evidence" to show it that "youth was a mitigating factor." The record shows that despite the use of this inartful language, the trial court followed the Ohio Supreme Court's mandate and considered Long's youth as a mitigating factor.

{¶12} After listening to arguments, the court discussed the first sentencing. It specifically stated that Long's age at the time of the offense, "just two days shy of your 18th birthday," gave the court "great pause." It added, "I did consider your youthfulness and the influence of the other two defendants at that time as well. But I also considered your role in it, * * * the horrific acts that happened. And I wanted to use youth as a mitigating factor back then, * * * and I gave it serious consideration."

{¶13} The court discussed the Ohio Supreme Court's decision, noting that although it felt it had reached the right decision the first time, "I've been given the opportunity to look at everything again with fresh eyes, looking at a different person, looking at a 22 year old now four years later and what will I see. What will I see has

happened over the past four years, and it will give me a chance to evaluate youth as a mitigating factor.”

{¶14} The court then stated that it had reviewed the exhibits submitted at the previous hearing, as well as Long’s institutional record since that time and the court clinic’s report. Finally, the court stated, “I desperately wanted youth to be your mitigating factor, but there is zero evidence before this court, either at the time of the original sentencing or now, given the opportunity four years later to show me that youth is a mitigating factor. * * * Given the evidence before this Court, the original sentence is going to stand.” Thus, the trial court’s reasoning in this case is clear from the record. It considered Long’s youth as mitigating factor, but it found that the aggravating factors outweighed the mitigating factors. The trial court’s decision comports with the requirements of both *Miller* and *Long II*, and we, therefore, overrule Long’s first assignment of error.

{¶15} In his second assignment of error, Long contends that the trial court erred by making factual findings inconsistent with *Miller*. He argues that the trial court’s stated reasons for imposing a life sentence without parole were all “deficiencies of youth” as described in *Miller* and that it should have considered them as mitigating factors, not aggravating ones. Therefore, the trial court’s sentence was contrary to law. This assignment of error is not well taken.

{¶16} If we were to accept Long’s argument, we would essentially be holding that a life sentence without parole could never be imposed on a juvenile, a holding not supported by *Miller* or *Long II*. *Miller* does not stand for the proposition that a sentencing court cannot consider lack of remorse, future dangerousness, and other factors in determining a juvenile’s sentence, which are appropriate factors to consider under Ohio’s sentencing statutes. In imposing sentence, “the sentencing

court has discretion to state its own reasons in choosing a sentence within the statutory range unless a mandatory prison term must be imposed.” *Long II*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 16. “That some of the *Miller* factors did not favor appellant at the sentencing does not mean that the trial court failed to consider appellant’s youth as mitigating.” *State v. Lane*, 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶ 98.

{¶17} Further, in *Miller*, the United States Supreme Court specifically stated that it did not consider the argument that “the Eighth Amendment requires a categorical bar on life without parole for juveniles[.]” *Miller*, ___ U.S. ___, 132 S.Ct. at 2469, 183 L.Ed.2d 407. While the court indicated that the sentence should be “uncommon,” the record shows this case is that uncommon case. Long is “the rare juvenile offender whose crime reflects irreparable corruption.” *See id.*, quoting *Roper*, 543 U.S. at 573, 125 S.Ct. 1183, 161 L.Ed.2d 1, and *Graham*, 560 U.S. at 72, 130 S.Ct. 2011, 176 L.Ed.2d 825.

{¶18} The courts in two Ohio cases decided after *Miller* and *Long II* found that a sentence of life without parole for a juvenile was appropriate. *See Lane* at ¶ 82-109; *State v. Rafferty*, 9th Dist. Summit No. 26724, 2015-Ohio-1629, ¶ 120-125. The *Lane* court stated, “The trial court simply found that, even considering the mitigating factors set forth in *Miller*, life without the possibility of parole was warranted. That conclusion is a function of the facts, not a breakdown of the process.” *Lane* at ¶ 99. The same reasoning applies in this case, and we overrule Long’s second assignment of error.

{¶19} In his third assignment of error, Long asserts that the trial court erred in imposing a life sentence without parole even though he was not convicted of a “homicide” as that term is used in *Miller* and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). He argues that because the trial court gave the jury an instruction on complicity, the jury did not have to specifically find that he killed or

intended to kill anyone in order to convict him of aggravated murder. This assignment of error is not well taken.

{¶20} The state argues that the issue is res judicata because Long could have raised it in the previous appeals and because the Ohio Supreme Court has already addressed it. Long did not raise the issue in the previous appeal before this court. He did raise it before the Ohio Supreme Court, which declined to address it. The court stated that “because Long did not raise this issue in the court of appeals or argue it in his memorandum seeking jurisdiction in this court, we will not consider this issue, as it is not properly before the court.” *Long II*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 9. Thus, the Supreme Court did not decide the issue.

{¶21} Certainly any issues relating to the propriety of the jury instructions or to the findings of guilt would be barred by res judicata. *See State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, paragraph three of the syllabus; *State v. Hall*, 1st Dist. Hamilton No. C-100097, 2011-Ohio-2527, ¶ 12. But, the Supreme Court vacated Long’s sentences of life without the possibility of parole and remanded the cause to the trial court for a complete resentencing. *Long II* at ¶ 28-29. Therefore all issues relating to the sentencing, particularly the sentences of life without parole, are not barred by the doctrine of res judicata.

{¶22} In *Graham*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile for a nonhomicide offense. *Id.* at 82. It stated:

The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. * * * It follows

that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.

Id. at 69.

{¶23} The record shows that the trial court instructed the jury on complicity in the general instructions at the beginning of the jury charge, not, as the state contends, in the section specifically applicable to the other set of shootings. Nevertheless, the court instructed the jury that before it could find the defendants guilty on the aggravated murder counts, it was required to find beyond a reasonable doubt that the defendants “purposely and with prior calculation and design” caused the deaths.

{¶24} The court stated specifically that “[p]urpose to cause the death of another is an essential element of the crime of aggravated murder. * * * It must be established in this case that at the time in question, there was present in the mind of the defendants a specific intention to cause the death[.]” It further instructed that prior calculation and design meant that “the purpose to cause death was reached by a definite process of reasoning in advance of the homicide, which process of reasoning must have included a mental plan involving studied consideration of the methods and the means or instrument with which to cause the death.”

{¶25} The evidence at trial, as described in our previous decision, overwhelmingly supported the finding that Long had an intent to kill as described in *Graham*. See *Long I*, 1st Dist. Hamilton No. C-110160, 2012-Ohio-3052, at ¶ 44-46. The jury rejected Long’s claim that he was just “along for the ride” and did not actively participate in the shootings. We stated that “the record reflects substantial, credible evidence from which the triers of fact could reasonably have concluded that all elements of the charged crimes had been proved beyond a reasonable doubt, including that Long * * * had purposely caused the deaths” of the two victims. *Id.* at ¶ 49. Therefore, the

sentence of life without parole was not cruel and unusual punishment under *Graham*, and we overrule Long's third assignment of error.

{¶26} In his fourth assignment of error, Long contends that he was denied the effective assistance of counsel because his counsel failed to raise the argument that he was ineligible for a sentence of life without parole because the jury could have convicted him of aggravated murder without finding that he had a purpose to kill. This assignment of error is not well taken.

{¶27} Because we have already held that the evidence at trial showed that Long had an intent to kill and that the life sentence without parole did not run afoul of *Graham*, counsel was not ineffective for failing to raise the issue. Long has not demonstrated that his counsel's representation fell below an objective standard of reasonableness or that, but for counsel's unprofessional errors, the result of the proceeding would have been otherwise. Therefore, he has failed to meet his burden to show ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bell*, 1st Dist. Hamilton No. C-140345, 2015-Ohio-1711, ¶ 53. We overrule Long's fourth assignment of error.

{¶28} In his fifth assignment of error, Long contends that the trial court erred in allowing him to effectively waive mitigation without making sure the waiver was knowing, intelligent and voluntary. He argues that the court improperly found that he had forfeited his right to present mitigating evidence by terminating an interview with the court clinic. He further argues that his counsel failed to present mitigating evidence. This assignment of error is not well taken.

{¶29} Nothing in the record shows that Long waived the right to present mitigation or that he was denied the opportunity to do so. Pursuant to R.C. 2947.06, the trial court appointed Dr. Carla Dreyer from the court clinic to evaluate Long for

mitigation purposes. Dr. Dreyer interviewed Long and administered some psychiatric testing. In her report, she referred to the fact that she could not complete some parts of the testing because Long “chose to accept a visit rather than completing the assessment.”

{¶30} Based on the information she had, including the case history, her interview with Long and the completed testing, Dr. Dreyer concluded that Long had no remorse for his crimes. She stated, “While it is clear the defendant meets criteria for Antisocial Personality Disorder, his presentation is even more concerning, given his apparent psychopathic traits and narcissism.” She added that Long’s “difficulties appeared to be related to characterological disorder that is unlikely to change with any treatment programming.”

{¶31} Long takes issue with the trial court’s statement that by terminating the interview with the court clinic, he lost “a chance to change [his] sentence.” Long takes this sentence out of context. In discussing the court clinic report, the trial court stated that it “showed a man who, first of all, showed no remorse.” It added, “Second of all, showed a man who here has the opportunity to help himself with the possibility of reducing his sentence * * * blowing off the psychologist and refusing to continue the interview and testing because he wanted a visitor.” Then, the court stated “quite frankly, I was in shock when I read that, that you terminated the interview that would have given you a chance to change your sentence. I’m not saying it would have, but it didn’t.”

{¶32} Thus, the record shows that the trial court did not find that Long had forfeited his right to mitigation. It was entitled to take into consideration that Long had failed to cooperate and complete the evaluation process.

{¶33} Further, Long had an opportunity to present mitigation evidence. His attorney argued extensively that his youth justified a lesser sentence, and Long also presented the testimony of a family member who discussed Long’s childhood and his

personality traits. That the mitigating factors Long presented did not outweigh the aggravating factors did not mean that he was prevented from presenting mitigation. *See* R.C. 2929.12(C) and (D); *State v. Curless*, 1st Dist. Hamilton No. C-130204, 2014-Ohio-1493, ¶ 8-12; *State v. Bohannon*, 1st Dist. Hamilton No. C-130014, 2013-Ohio-5101, ¶ 4-9. Consequently, we overrule Long's fifth assignment of error.

{¶34} In sum, we hold that the trial court's sentences, including the life sentences without the possibility of parole, were not clearly and convincingly contrary to law. *See* R.C. 2953.08(G)(2); *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). We, therefore, affirm the trial court's judgment.

Judgment affirmed.

HENDON, P.J., and STAUTBERG, J., concur.

Please note:

The court has recorded its own entry this date.