

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

BRANDON MOORE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0055

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 02 CR 525

BEFORE:

Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:

Affirmed

Atty. Paul Gains, Prosecutor and *Atty. Ralph Rivera*, Assistant Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503 for Plaintiff-Appellee and

Atty. Rachel Bloomekatz, 1148 Neil Avenue, Columbus, Ohio 43201, for Defendant-Appellant.

Dated:
September 23, 2020

Donofrio, J.

{¶1} Defendant-appellant, Brandon Moore, appeals from a Mahoning County Common Pleas Court judgment sentencing him to 50 years in prison on his convictions for three counts of aggravated robbery, three counts of rape, three counts of complicity to rape, kidnapping, aggravated menacing, and multiple firearm specifications.

{¶2} This matter began on August 21, 2001, when appellant was 15 years old. That night,

Jason Cosa pulled into his driveway and was confronted by appellant, who pushed a gun into Jason's face and demanded money. * * * The other two passengers in Jason's car were Christine Hammond and Jason's grandfather. After the victims handed over their possessions, appellant fled down the driveway and entered a dark, noisy, older-model automobile that was waiting for him.

That same evening, appellant approached M.K., a 21-year-old student at Youngstown State University. As she was opening the trunk of her car, appellant put a gun into her stomach and demanded money. Appellant was wearing a mask, but removed the mask during the robbery. He began telling M.K. how beautiful she was and forced her to the passenger side of her car. Appellant entered the driver's seat and began following a dark, older-model vehicle [driven by codefendant Andre Bundy]. M.K. had noticed this vehicle stopping nearby prior to the attack.

As they drove, appellant continued commenting on M.K.'s beauty. He demanded that she turn over any jewelry, and she complied. M.K. asked to be released, but appellant refused. Soon afterward, appellant stopped the car and codefendant Chaz Bunch entered M.K.'s car through the back door. Bunch put a gun to M.K.'s head and demanded money. Throughout the ordeal M.K. pleaded with them not to kill her.

As they continued to follow the other vehicle, appellant inserted his fingers into M.K.'s vagina several times. At this point, M.K. tried to memorize the license plate of the dark vehicle they were following, which she remembered as CTJ 6423.

The cars turned down a dead-end street and stopped on a gravel lot. Bunch and appellant ordered M.K. to get out of the car and pointed their guns at her. They grabbed her by the hair and forced their penises into her mouth, taking turns holding her head and orally raping her. This was repeated two or three times. Again M.K. pleaded that they not kill her, and they then took M.K. to the trunk of her car.

Once at the trunk, codefendant Jamar Callier began going through M.K.'s possessions in the car. Some items taken were a green Nike bag, tennis shoes, clothes, a bag from Old Navy, jewelry, and a purse. As M.K. faced the trunk of her car, appellant and Bunch told her to pull her pants down and turn around. M.K. resisted, and told her attackers she was pregnant, in an attempt to avoid being raped again. Appellant and Bunch pushed her, face forward, against the car and one of them anally raped her. Bunch then put his gun into her back and forced her to the front of the car.

Bunch threw M.K. to the ground. While she was on the ground, appellant and Bunch took turns vaginally and orally raping her. While one was vaginally raping her, the other would perform an oral rape, and vice versa.

At some point, codefendant Callier came over and forced them to stop. Bunch stated that he wanted to kill her, but Callier would not let him. Appellant put his gun in M.K.'s mouth and told her, "Since you were so good, I won't kill you." Callier helped M.K. back into her car. They threatened to kill her and her family if she told anyone what had happened.

M.K. drove to the home of her boyfriend's uncle and began screaming out the license plate number of the car she had seen. It later

was discovered that she had inverted two numbers; the license plate was actually CTJ6243. M.K. was immediately taken to the hospital, and the Youngstown Police Department was contacted. Officer Colleen Lynch was at the hospital on an unrelated call and followed M.K. into the emergency room. She observed bruises, scrapes, and swelling. A sexual-assault nurse completed a rape examination of M.K.'s mouth, vagina, and rectum and recorded several injuries including bruises, bite marks, scratches, and abrasions and injuries to her vagina and anus.

After leaving the scene of the crime, the assailants went to a Dairy Mart on Mahoning Avenue. Officer Anthony Vitullo had heard a broadcast of the license plate of the suspects' vehicle (with two numbers transposed) and noticed a similar vehicle in the Dairy Mart parking lot. Officer Vitullo observed and followed the vehicle, which soon ran a stop sign and pulled into a driveway on Edwards Street in Youngstown. Codefendant Bunch, who was driving, stopped the car and ran. Officer Vitullo radioed for backup assistance and arrested the other occupants of the car. Items found in the car included M.K.'s bag from Old Navy, a stuffed animal, a leather purse, tennis shoes, female clothing, a vehicle-registration card, and a credit-union card belonging to victim Jason Cosa, a .38-caliber handgun, a black face mask, blue and black caps, bullets, and shotgun shells. Police also found a piece of paper in the pocket of appellant's pants that stated "Property of [M.K.]."

After the police took appellant into custody, juvenile proceedings were initiated against him in the Mahoning County Court of Common Pleas, Juvenile Division. The case was transferred to the general division, and a 12-count complaint, with 11 firearm specifications, was filed against appellant on May 16, 2002.

State v. Moore, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85 (7th Dist.), ¶ 2-12.

{¶3} Appellant, Bunch, and Bundy were tried together. The jury found appellant guilty of all counts and all specifications. The trial court subsequently sentenced him to maximum, consecutive sentences on the felony counts. The court also sentenced appellant to a prison term for each of the firearm specifications, also to be served consecutively. Appellant’s total sentence was 141 years. At the sentencing hearing, the court told appellant, “I want to make sure you never get out of the penitentiary, and I’m going to make sure that you never get out of the penitentiary.”

{¶4} As the Ohio Supreme Court aptly observed, appellant’s “appellate history is lengthy and knotty.” *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 14. Relevant to this appeal the Ohio Supreme Court set out the following:

In Moore's first appeal, *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85 (7th Dist.) (“*Moore I*”), the appellate court vacated Moore's conviction for conspiracy to commit aggravated robbery as well as the accompanying firearm specification. *Id.* at ¶ 23. As for the other ten firearm specifications, the appellate court instructed the trial court to impose at resentencing a total of four separate terms: one for the specification attached to the charge for the aggravated robbery of Cosa and Hammond and three for the specifications attached to the charges for the aggravated robbery, rape, and kidnapping of M.K. *Id.* at ¶ 55.

On September 7, 2005, the trial court, on remand, resentenced Moore according to the appellate court's instruction. The new sentence totaled 112 years. Moore appealed again, and in *State v. Moore*, 7th Dist. Mahoning No. 05 MA 178, 2007-Ohio-7215, 2007 WL 4696843 (“*Moore II*”), the appellate court vacated the entire sentence and remanded for resentencing because Moore's previous sentence had involved judicial fact-finding of the kind declared unconstitutional by this court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

On February 5, 2008, the trial court resentenced Moore to the aggregate 112-year prison term. The judge told Moore at the sentencing

hearing, “[I]t is the intention of this court that you should never be released from the penitentiary.”

* * * Moore appealed his resentencing, but his court-appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), seeking to withdraw from the case; * * *. The court went on to consider the assignment of error that Moore had raised in his pro se brief-that his resentencing pursuant to *Foster* violated his due-process rights-and reviewed the entire record, concluded that Moore's appeal was meritless, and affirmed the trial court's judgment. [*State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2009-Ohio-1505, 2009 WL 825758 (“*Moore III*”),] at ¶ 24. The court announced its decision on March 24, 2009. It is this decision that Moore moved the court to reconsider-but he did not do so until September 16, 2013.

In the meantime, Moore pursued other avenues of relief, and in that branch of his appellate history, first sought relief based on *Graham [v. Florida]*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825. On December 30, 2009, Moore filed a petition for a writ of mandamus and/or a writ of procedendo in the Seventh District Court of Appeals, seeking to compel the trial court to issue a final, appealable judgment entry of sentence for his original 2002 convictions that would comply with Crim.R. 32(C), containing all the elements set forth by this court in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. On March 30, 2010, the court of appeals partially granted Moore's petition, ordering the trial court to issue a revised sentencing entry that complied with Crim.R. 32(C). *State ex rel. Moore v. Krichbaum*, 7th Dist. Mahoning No. 09 MA 201, 2010-Ohio-1541, 2010 WL 1316230 (“*Moore IV*”).

On April 20, 2010, the trial court issued a nunc pro tunc sentencing entry that complied with Crim.R. 32(C). On May 17, 2010, the United States Supreme Court decided *Graham*, holding that “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life

without parole.” *Graham* at 74, 130 S.Ct. 2011. That same day, Moore filed a notice of appeal from the trial court's nunc pro tunc entry; in his brief in support filed December 9, 2010, Moore raised several issues, including that pursuant to *Graham*, his 112-year sentence violated the Eighth Amendment to the United States Constitution.

* * *

On September 16, 2013, about a month after gaining new counsel, Moore filed an application for delayed reconsideration of the court of appeals' decision in *Moore III*, pursuant to App.R. 26(A)(1) and 14(B). * * * Moore argued that the court should reconsider his appeal because his sentence was unconstitutional pursuant to *Graham* and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In *Miller*, a case involving a juvenile who had been convicted of murder and sentenced to a mandatory term of life imprisonment without parole, the court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,” reasoning that “[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Id.* at 479, 132 S.Ct. 2455.

Moore, 149 Ohio St.3d at ¶¶ 15-22.

{¶5} This court denied appellant’s application for delayed reconsideration on procedural grounds. Appellant appealed the denial of his application for reconsideration to the Ohio Supreme Court where he raised one proposition of law: “The Eighth Amendment prohibits sentencing a juvenile to a term-of-years sentence that precludes any possibility of release during the juvenile's life expectancy.” *Moore*, 149 Ohio St.3d at ¶ 29.

{¶6} The Ohio Supreme Court reversed the judgment denying delayed reconsideration, vacated appellant’s 112-year sentence, and remanded the matter to the trial court for resentencing in accordance with *Graham*, supra. It held that “pursuant to *Graham*, a term-of-years prison sentence that exceeds a defendant's life expectancy

violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender.” *Moore*, 149 Ohio St.3d at ¶ 1.

{¶7} In so holding, the Court first examined *Graham*. The *Graham* Court explained that a juvenile nonhomicide offender has “twice diminished moral culpability” given the nature of the crime and the juvenile’s age. *Moore* at ¶ 36, citing *Graham* at 69. The Court noted that while crimes like rape and robbery deserve serious punishment, morally they differ from homicide in that the offenders are categorically less deserving of the most severe punishment than murderers are. *Id.* at ¶36, citing *Graham* at 69. The *Moore* Court explained that because of a juvenile’s characteristics of youth, “a depraved crime committed by a juvenile may not be indicative of an irredeemable individual.” *Id.* at ¶ 38. The Court also observed that the severity of life-without-parole sentences are harsher when imposed on a juvenile because, on average, a juvenile offender will spend a greater percentage of his life in prison than an adult offender. *Id.* at ¶ 40, citing *Graham* at 70-71. The *Moore* Court then observed that “[t]he most important attribute of the juvenile offender is the potential for change.” *Id.* at ¶ 42.

{¶8} *Moore* acknowledged that “*Graham* does not foreclose the possibility that a defendant who commits a heinous crime as a youth will indeed spend his entire remaining lifetime in prison; *Graham* does not guarantee an eventual release.” *Id.* at ¶ 44. Instead, the Court stated, the state must give juvenile nonhomicide offenders some meaningful chance for release based on demonstrated maturity and rehabilitation. *Id.*, citing *Graham* at 75. *Moore* noted that *Graham* did not establish a limit as to how long a juvenile offender can remain in prison before demonstrating sufficient maturity and rehabilitation. *Id.* at ¶ 45. But it found that *Graham*’s intent was “not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society.” *Id.* at ¶ 46.

{¶9} The *Moore* Court next proceeded to apply *Graham* to the case before it. The Court noted that the 112-year sentence was functionally a life sentence. *Id.* at ¶ 59. It determined that the state could not, at the outset, impose its most severe sentence on an offender with twice-diminished moral culpability. *Id.* Thus, it concluded,

pursuant to *Graham*, a sentence that results in a juvenile defendant serving 77 years before a court could for the first time consider based on

demonstrated maturity and rehabilitation whether that defendant could obtain release does not provide the defendant a meaningful opportunity to reenter society and is therefore unconstitutional under the Eighth Amendment.

Id. at ¶ 64. The Court further determined that the Eighth Amendment’s prohibition of life imprisonment without parole, or its functional equivalent, for juvenile offenders applies equally to those juvenile offenders who commit multiple offenses as it does to those who commit a single offense. *Id.* at ¶ 74.

{¶10} In sum, the Court found that the 112-year sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment. *Id.* at ¶ 100. It reversed the judgment denying delayed reconsideration, vacated the sentence, and remanded the matter to the trial court for resentencing.

{¶11} On remand from the Ohio Supreme Court, the trial court held a resentencing hearing on April 17, 2018. This time, the trial court sentenced appellant to eight years on each of the three aggravated robbery counts, ten years on each of the three rape counts, ten years on each of the three complicity to rape counts, eight years on the kidnapping count, and six months on the aggravated menacing count. The court ordered the three eight-year aggravated robbery sentences to run concurrent with each other and concurrent with the other sentences. It ordered the three ten-year rape sentences to run consecutively to each other and concurrent with the other sentences. It ordered the three ten-year complicity to rape sentences to run concurrent with each other and concurrent with the other sentences. It ordered the eight-year kidnapping sentence to run consecutive to the other sentences. And it ordered the six-month aggravated menacing sentence to run concurrent with the other sentences. The court also sentenced appellant to four three-year terms on each of four firearm specifications, after merging several of the specifications, to be served prior to and consecutive to the other sentences. Thus, the trial court sentenced appellant to a total of 50 years in prison.

{¶12} Appellant will be eligible for parole after serving 47 years in prison.¹ He will be 62 at that time.

{¶13} Appellant filed a timely notice of appeal on May 16, 2018. He now raises two assignments of error.

{¶14} Appellant’s first assignment of error states:

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT, A JUVENILE NONHOMICIDE OFFENDER, TO FIFTY YEARS’ INCARCERATION – A SENTENCE THAT DOES NOT PROVIDE A “MEANINGFUL OPPORTUNITY FOR RELEASE,” IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I §9 OF THE OHIO CONSTITUTION.

{¶15} Appellant argues that a 50-year sentence does not offer him a “meaningful opportunity for release” as contemplated by *Moore*, supra. He asserts he will be incarcerated until he is a senior citizen no matter how much rehabilitation he demonstrates. He argues that in order to be meaningful, an opportunity for release must come early enough so that juvenile offenders who demonstrate maturity and rehabilitation can live a substantial part of their lives outside of prison.

{¶16} Appellant goes on to argue that his sentence is unconstitutional because it does not allow him to spend a substantial part of his life outside of prison. He asserts that when it comes to matters like employment, having a spouse and family, and developing friendships, he will be just starting when most others are “about to finish.”

{¶17} Next, appellant argues that this court cannot adopt an actuarial approach based on life-expectancy tables. He contends that such an approach is at odds with the constitutional requirement of a meaningful opportunity for release. Furthermore, he argues, that while the Ohio Supreme Court held that a prison term that exceeds a defendant’s life expectancy violates the Eighth Amendment, it did not hold that any sentence within the defendant’s life expectancy is necessarily constitutional. Moreover,

¹ Appellant was sentenced to a total of 50 years in prison: 42 mandatory years and eight non-mandatory years. He will be eligible for parole after he serves the 42 mandatory years plus five years after completing his mandatory term. See R.C. 2929.20(C)(4).

if this court did adopt an actuarial approach, appellant argues that taking into consideration the facts that he is African American, that he entered prison as a juvenile, and that he has a heart condition all decrease his life expectancy so that he likely will not survive his sentence.

{¶18} Appellant further argues that a 50-year sentence for a nonhomicide juvenile offender violates evolving standards of decency under the Eighth Amendment. He urges this court to apply the approach outlined by *Graham* in considering a categorical challenge to a term-of-years sentence:

The Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, supra, at 572, 125 S.Ct. 1183. Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” *Kennedy*, 554 U.S., at 421, 128 S.Ct., at 2650, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper*, supra, at 572, 125 S.Ct. 1183.

Graham, 560 U.S. at 61. Appellant claims that both prongs of this analysis demonstrate that his sentence violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

{¶19} In her concurring opinion in *Moore*, Justice Lanzinger observed, “While we hold that 77 years is too long to wait, how exactly does the trial court follow our instruction and resentence Moore? What is a constitutional sentence, and how is it arrived at? We have chosen not to say.” *Moore*, at ¶ 138. Thus, we turn to other courts’ interpretations of what constitutes a constitutional sentence for guidance.

{¶20} In support of his position, appellant cites several decisions from other states that have found sentences of approximately 50 years for juvenile offenders to violate *Graham*.

{¶21} For instance, in *People v. Contreras*, 4 Cal.5th 349, 411 P.3d 445, 229 Cal.Rptr.3d 249 (2018), the California Supreme Court found that the sentences of two nonhomicide juvenile offenders of 50 years to life and 58 years to life violated the Eighth Amendment under the standard set out in *Graham*. The Court reasoned that even if the offenders’ parole eligibility dates were within their expected lifespans, the chance for their release would come near the end of their lives and they would have spent the vast majority of adulthood in prison. *Id.* at 368. The Court opined that the sentences reflected a judgment that the offenders were “irretrievably incorrigible” and the sentences did not give them “the realistic chance for release contemplated by *Graham*.” *Id.*

{¶22} And in *Casiano v. Commr. of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015), which was a homicide case, the Connecticut Supreme Court held that the juvenile offender’s sentence of 50 years without the possibility of parole violated the Eighth Amendment pursuant to *Miller v. Alabama*, 567 U.S. 460. In so doing, the Court also applied *Graham*’s reasoning. It observed that *Graham* and *Miller* viewed the concept of life “more broadly than biological survival;” instead they “implicitly endorsed the notion that an individual is effectively incarcerated for ‘life’ if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.” *Id.* at 78. The Connecticut Supreme Court concluded that the procedure set out in *Miller* (requiring that a trial court must engage in an individualized sentencing process that accounts for the mitigating circumstances of youth and its attendant characteristics before sentencing a juvenile homicide offender to life in prison), must be applied before sentencing a juvenile homicide offender to 50 years in prison. *Id.* at 79.

{¶23} But in numerous cases, other states have found sentences of approximately 50 years not to violate *Graham*.

{¶24} In *Ira v. Janecka*, 2018-NMSC-027, 419 P.3d 161, ¶ 4, the New Mexico Supreme Court first determined that *Graham* applies to multiple term-of-years sentences that will likely keep a juvenile offender in prison for his entire life because the juvenile is deprived of a meaningful opportunity to demonstrate his maturity and rehabilitation in order to obtain release. In that case, the juvenile offender was convicted of ten counts of criminal sexual penetration and several other crimes. The juvenile offender was sentenced to 91½ years in prison with parole eligibility after 46 years. At the time he

would be eligible for parole, he would be 62. The New Mexico Supreme Court determined that this sentence provided the offender with a meaningful opportunity for release pursuant to *Graham*. *Id.* at ¶ 34. The Court did note, however, that serving almost 46 years before being given an opportunity to obtain release “is the outer limit of what is constitutionally acceptable.” *Id.* at ¶ 38.

{¶25} In *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017), cert. denied, 138 S.Ct. 315, 199 L.Ed.2d 208 (2017), a juvenile burglary and kidnapping offender was sentenced to 90 years to life in prison. His sentence made him eligible for parole at the age of 62, after serving approximately 46 years. In upholding the sentence as not violating the Eighth Amendment, the Nebraska Supreme Court noted that “a number of courts have held that sentences that allow the juvenile offender to be released in his or her late sixties or early seventies satisfy the ‘meaningful opportunity’ requirement.” *Id.* at 977. It further reasoned that parole eligibility at age 62 did not equate to “geriatric release” since many people in today’s society work well into their seventies and have a meaningful life well beyond age 62 or even at age 77. *Id.* at 978.

{¶26} And in *Williams v. State*, 197 So.3d 569, 572 (Fla.App.2016), a Florida appellate court upheld a juvenile nonhomicide offender’s 50-year sentence reasoning, “[e]ven if Williams is required to serve every day of his fifty-year sentence, he would be released from prison at age sixty-eight.”

{¶27} Moreover, in *People v. Lehmkuhl*, 2013 COA 98, 369 P.3d 635, ¶ 13 (Colo. App.), a Colorado appellate court upheld a sentence of 76 years to life for a juvenile nonhomicide offender where the offender would become eligible for parole at age 67.

{¶28} Considering how other states have dealt with similar sentences, we must determine whether appellant’s 50-year sentence, with parole eligibility after 47 years when appellant will be 62 years old, violates the Eighth Amendment.

{¶29} The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

{¶30} *Moore*’s specific holding was “that pursuant to *Graham*, a term-of-years prison sentence that exceeds a defendant’s life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile

nonhomicide offender.” *Moore*, 149 Ohio St.3d at ¶ 1. Appellant urges us to expand this holding so that juvenile nonhomicide offenders are given the opportunity to spend a “substantial part” of their lives outside of prison. This is not what *Graham* and *Moore* require, however. In discussing *Graham*’s intent, the *Moore* Court stated, “[t]he intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live *part* of their lives in society.” (Emphasis added); *Id.* at ¶ 46. Neither *Graham* nor *Moore* used the modifier “substantial” before “part.” These cases only require that juvenile nonhomicide offenders be given a meaningful opportunity to demonstrate rehabilitation so that they may spend *part* of their lives outside of prison.

{¶31} Appellant will be eligible for parole at age 62. He claims that by this time, people are “about to finish” their lives. Appellant takes for granted, however, that most people are living full, productive lives at age 62.

{¶32} Appellant also urges that a national consensus exists against the sentencing practice at issue. But, as demonstrated by a review of how other states have handled similar sentences, there does not exist a national consensus against a 50-year sentence with an opportunity for judicial release after 47 years at which time the offender will be 62 years old. To the contrary, numerous states have upheld similar sentences as constitutional and not in violation of *Graham*.

{¶33} In consideration of all of the above, we cannot conclude that appellant’s sentence in this case violates the Eighth Amendment, *Graham*, or *Moore*. Appellant’s 50-year sentence with the opportunity for release at age 62 provides a meaningful opportunity for release with the chance to live part of his life outside of prison.

{¶34} Accordingly, appellant’s first assignment of error is without merit and is overruled.

{¶35} Appellant’s second assignment of error states:

TO THE EXTENT THAT THE CONSTITUTIONALITY OF THE DEFENDANT’S SENTENCE RELIES UPON THE OPPORTUNITY FOR JUDICIAL RELEASE UNDER R.C. 2929.20, THE TRIAL COURT ERRED BECAUSE JUDICIAL RELEASE AS A PROCEDURAL MECHANISM DOES NOT PROVIDE A “MEANINGFUL OPPORTUNITY FOR RELEASE”

IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES
CONSTITUTION AND ARTICLE I §9 OF THE OHIO CONSTITUTION.

{¶36} In this assignment of error, appellant contends that we should not factor judicial release into our analysis of whether his sentence is constitutional. He claims that whether he is released at age 62 or age 65 is immaterial under *Graham* and *Moore*. He claims his sentence is unconstitutional either way.

{¶37} Appellant goes on to argue that judicial release can be denied by a judge without reasons and without a hearing. Therefore, he claims that it does not afford a *meaningful* opportunity for release. Moreover, he points out that the judicial release factors do not include the age of the offender as a consideration. Finally, he notes that there is no opportunity to appeal the denial of judicial release.

{¶38} The state relies on *State v. Watkins*, 10th Dist. Franklin No. 13AP-133, 2018-Ohio-5137, in support of considering judicial release. In *Watkins*, Watkins, who was 16 years old at the time of the offenses, pleaded guilty to five counts of aggravated robbery and one count each of robbery, sexual battery, and gross sexual imposition, along with three firearm specifications. The trial court initially sentenced Watkins to 67 years in prison. The court of appeals affirmed the judgment. Watkins appealed to the Ohio Supreme Court, which held its review pending its decision in *State v. Moore*. The Court subsequently, reversed the court of appeals and remanded the matter back to appellate court for the application of *Moore*.

{¶39} On remand, the Tenth District addressed whether Watkins' sentence violated the Eighth Amendment in light of *Moore*. It noted that *Moore* made clear that a juvenile sentence violates the Eighth Amendment when: (1) the total sentence exceeds the juvenile's life expectancy; and (2) the juvenile is not afforded a meaningful opportunity to obtain release and reenter society based upon demonstrated maturity and rehabilitation before completing the sentence. *Id.* at ¶ 22.

{¶40} The court observed that upon completion of his 67-year sentence, Watkins would be 85 years old. *Id.* at ¶ 24. It found that because Watkins' total sentence exceeded his life expectancy, the constitutionality of his sentence depended on whether Watkins had a meaningful opportunity to demonstrate maturity and rehabilitation prior to completing his sentence. *Id.* The court determined that Watkins would be eligible for

judicial release after serving 33½ years of his sentence. *Id.* at ¶ 25. At that time, Watkins would be 50 years old. *Id.* The court found that the potential for judicial release at age 50 provided Watkins with a reasonable opportunity to demonstrate maturity and rehabilitations so that he could reenter society with enough time to lead a meaningful life outside of prison. *Id.*

{¶41} In so finding, the court stated:

Moore implicitly recognized that judicial release is a sufficient procedural mechanism for giving a juvenile offender the opportunity to demonstrate sufficient maturity and rehabilitation to reenter society. Although *Moore* found that the juvenile sentence at issue therein unconstitutional because the defendant would not become eligible for judicial release until he was 92 years old, *Moore* assumed the efficacy of the judicial release mechanism as a means for demonstrating maturity and rehabilitation.

Id. at ¶ 26. The court also noted that the criteria for granting judicial release include factors meant to assess an offender’s maturity, rehabilitation, and ability to safely reenter society. *Id.*, citing R.C. 2929.20(J). Thus, the court affirmed Watkins’ conviction and sentence.

{¶42} As the Tenth District found, the Ohio Supreme Court recognized that a court may consider judicial release when determining whether a juvenile offender has been provided with a meaningful opportunity for release. The *Moore* Court analyzed the sentence at issue in the context of judicial release:

Moore would become eligible to file a motion for judicial release after serving 77 years of his sentence. R.C. 2929.20(C)(5) allows an offender to seek judicial release five years after the completion of the mandatory portions of the offender's sentence. *Moore's* six ten-year sentences relating to rape are mandatory, R.C. 2929.13(F), as are his four three-year sentences under the gun specifications, R.C. 2941.145. *Moore* would have to serve five additional years beyond the mandatory 72 years, for a total of 77 years, before becoming eligible to seek judicial release. *Moore* would

thus be 92 years old before he would have his first chance to move a court for release. There is no dispute that his life expectancy falls well short of 92 years.

Moore, 149 Ohio St.3d at ¶ 30. Because the Ohio Supreme Court considered judicial release when examining appellant’s sentence, it is likewise proper that this court consider judicial release in the same manner.

{¶43} Accordingly, appellant’s second assignment of error is without merit and is overruled.

{¶44} For the reasons stated above, the trial court’s judgment is hereby affirmed.

Waite., P. J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.