

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0960

September Term, 2015

KENNETH BENJAMIN ALVIRA

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Krauser, C.J.

Filed: June 28, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2009, Kenneth Benjamin Alvira, appellant, was convicted by a jury, sitting in the Circuit Court for Wicomico County, of first-degree murder, armed carjacking, armed robbery, and related offenses. He was thereafter sentenced to life without the possibility of parole for first-degree murder and to thirty years' imprisonment for armed carjacking, to run consecutive to the life sentence. And his convictions were subsequently affirmed by this Court. *Kenneth Benjamin Alvira v. State of Maryland*, No. 1680, September Term, 2009 (filed June 10, 2011).

Alvira was 16 years old when the crimes were committed. Three years after he was sentenced, the United States Supreme Court, in *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2460 (2012), held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” Although the Supreme Court did “not foreclose a sentencer’s ability” to impose a life sentence without parole “in homicide cases,” the Supreme Court stated that the sentencer must “take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” 132 S.Ct. at 2469.

In 2015, Alvira, relying on *Miller*, filed a motion to correct an illegal sentence in which he asserted that his sentence to life without parole was unconstitutional because the sentencing court had not considered his youth. The circuit court summarily denied the motion, without a hearing or an explanation, an order which Alvira appeals. For the reasons discussed, we reverse.

After Alvira filed this appeal, the Supreme Court, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), held that *Miller* applies retroactively.

The *Montgomery* Court summarized the import of the *Miller* decision:

Miller, then, did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of the “distinctive attributes of youth.” **Even if a court considers a child’s age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects “unfortunate yet transient immaturity.”** Because *Miller* determined that sentencing a child to life without parole is excessive for all but “the rare juvenile offender whose crime reflects irreparable corruption,” it rendered life without parole an unconstitutional penalty for “a class of defendants because of their status” – that is, juvenile offenders whose crimes reflect the transient immaturity of youth.

136 S.Ct. at 734 (internal citations omitted) (emphasis added).

To comply with *Miller*, the *Montgomery* Court stated:

A hearing where “youth and its attendant characteristics” are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.

136 S.Ct. at 735 (citation omitted).

The State agrees with Alvira that his sentence to life without parole should be vacated and this case remanded for re-sentencing in accordance with *Miller* and *Montgomery*.

BACKGROUND

In a nutshell, Alvira (16 years old) and two others (both 19 years old) carjacked a woman, stabbed her, and dumped her in a field. The victim, although alive when found, died soon thereafter. At trial, an acquaintance of Alvira's testified that Alvira admitted to him that he killed the victim with a knife and that "he put an arm around [the victim's] neck and got her underneath the ribs twice," and then he left her "on a dark road."

Prior to sentencing, a pre-sentence investigation report was prepared. The report, while addressing Alvira's family background, juvenile offenses, mental and physical health and the like, did not specifically address his capacity for rehabilitation. The report recommended a sentence to life without parole, "[d]ue to the vicious and heinous nature of [the] offense."

A sentencing hearing was held on September 3, 2009. After hearing from the parties, the court stated:

All that can be said about this horrific, senseless crime has been said already [by] others. The jury found you to be a prime actor, Mr. Alvira. I was convinced, hearing the evidence, that you were a prime actor. [The victim] was completely innocent, she happened to be in the wrong place at the wrong time and she has been removed from us for eternity.

Now I have considered the Pre-Sentence Investigation, I have taken into consideration the [sentencing] guidelines, I have considered what I've heard here today. Despite all of that **I'm arriving at my sentence independently. And I don't do this lightly because you are 16, you will be 17 next month.**

But you were consumed with evil on the night of January 22nd of this year. I expect you are filled with evil. **I do not see any hope of rehabilitation** and I do believe that the appropriate sentence is the following.

(Emphasis added.)

The court then sentenced Alivra to life without parole for murder, thirty years' imprisonment for armed carjacking, to run consecutive to the life sentence, and to fifteen years for theft of property having a value over \$500, to run concurrent with the armed carjacking sentence.

DISCUSSION

Although the sentencing judge acknowledged Alivra's age in imposing sentence, and he stated that he did not "see any hope of rehabilitation," the record does not reflect that Alivra's youth and prospect for rehabilitation were addressed in any significant manner by either the State or the defense, much less by the sentencing judge. Accordingly, we hold that the circuit court erred in denying Alivra's motion to correct an illegal sentence because it appears that the sentencing court failed to consider whether Alivra was one of those "rare juvenile offenders[s] whose crime reflects irreparable corruption" warranting a sentence of life without parole or whether, instead, his crimes "reflect[ed] the transient immaturity of youth." As the Supreme Court in *Montgomery* reminds us, "*Miller* require[s] that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison." 136 S.Ct. at 726 (quoting *Miller*, 132 S.Ct. at 2469). We, therefore, reverse the circuit court's denial of Alivra's motion to correct an

illegal sentence, vacate his life sentence without the possibility of parole, and remand the case for re-sentencing in light of the *Miller* and *Montgomery* decisions.

RE-SENTENCING

Neither *Miller* nor *Montgomery* provide much guidance to the sentencing court upon remand for re-sentencing. As noted, however, the Supreme Court in *Mongomery* did state that a “hearing where ‘youth and its attendant characteristics’ are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not.” 136 S.Ct. at 735 (quoting *Miller*, 132 S.Ct. at 2460).¹ The *Miller* Court suggested that, before a sentence of life without parole is imposed, the sentencer consider the offender’s “chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences”; the offender’s “family and home environment”; and the offender’s “participation in the conduct and the way familial and peer pressures may have affected him.” 132 S.Ct. at 2468. Moreover, the sentencer must take into consideration the offender’s “‘heightened capacity for change’

¹ The Supreme Court in *Montgomery* also noted that, in “[g]iving *Miller* retroactive effect,” a new sentencing hearing is not necessarily required in every case. 136 S.Ct. at 736. Rather, the Supreme Court suggested that a State “may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” *Id.* That option, it seems, is one for the legislature to consider.

before condemning him or her to die in prison.” *Montgomery*, 136 S.Ct. at 726 (quoting *Miller*, 132 S.Ct. at 2469).

**JUDGMENT OF THE CIRCUIT COURT
FOR WICOMICO COUNTY DENYING
MOTION TO CORRECT AN ILLEGAL
SENTENCE REVERSED. SENTENCE TO
LIFE IMPRISONMENT WITHOUT THE
POSSIBILITY OF PAROLE VACATED.
CASE REMANDED TO THE CIRCUIT
COURT FOR RE-SENTENCING. COSTS
TO BE PAID BY WICOMICO COUNTY.**