

DA 21-0409

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 121

STATE OF MONTANA

Plaintiff and Appellee,

v.

STEVEN WAYNE KEEFE,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. ADV-17-076
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John R. Mills, Genevie Gold, Phillips Black, Inc., Oakland, California

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For Appellee:

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Submitted on Briefs: April 13, 2022

Decided: June 28, 2022

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Steven Wayne Keefe appeals the Amended Judgment and Sentence of the Eighth Judicial District Court following our remand in *State v. Keefe*, 2021 MT 8, 403 Mont. 1, 478 P.3d 830 (*Keefe II*). Keefe raises the following issues:

1. *Whether the District Court failed to comply with our instructions on remand in Keefe II and imposed an illegal sentence by only striking the parole restriction.*
2. *Whether the District Court erred when it denied Keefe's request for a state-funded expert.*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Keefe, then seventeen years old, was charged with burglary and three counts of deliberate homicide for the murders of Constance McKay, her husband David J. McKay, and their daughter Marian McKay Qamar following an October 1985 home invasion where Keefe shot and killed the three family members. A jury convicted Keefe on all counts in October 1986. The District Court sentenced Keefe to three consecutive life sentences without the possibility of parole in the Montana State Prison (MSP), with an additional ten years for the burglary charge, and to a ten-year enhancement on each count for the use of a weapon, for a total sentence of three consecutive life terms plus 50 years. Keefe appealed his conviction, and we affirmed in 1988. *See State v. Keefe*, 232 Mont. 258, 759 P.2d 128 (1988).

¶3 Keefe filed a petition for postconviction relief (PCR) in 2017, asserting that his 1986 life sentence without the possibility of parole was unconstitutional following the United

States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718 (2016), and the Montana Supreme Court's application of those cases to discretionary sentences in *Steilman v. Michael*, 2017 MT 310, ¶ 17, 389 Mont. 512, 407 P.3d 313.

¶4 The District Court granted the PCR petition after agreeing that Keefe must be resentenced under *Miller*, *Montgomery*, and *Steilman* “because the original sentencing hearing did not consider Keefe’s youth, background, mental health, or substance abuse.” *Keefe II*, ¶ 7. The District Court held a resentencing hearing in April 2019, sentencing Keefe to three consecutive life terms at MSP, with fifty years additional time for the burglary charge and weapons enhancements, without the possibility of parole. The District Court determined that Keefe could be sentenced to life without the possibility for parole because he was “irreparably corrupt” and “permanently incorrigible.” *Keefe II*, ¶¶ 24, 27.

¶5 Keefe appealed, asserting that the District Court failed to comply with *Miller* and its progeny when it did not consider un rebutted evidence of rehabilitation and when the court did not consider the *Miller* factors. *See Keefe II*, ¶¶ 13, 24. We reversed, holding that “the District Court did not ‘adequately consider the mitigating characteristics of youth set forth in the *Miller* factors,’” and remanded for a second resentencing hearing to allow the District Court to “appropriately consider[] the *Miller* factors.” *Keefe II*, ¶ 30 (quoting *Steilman*, ¶ 17). We rejected Keefe’s claim, however, that the District Court’s failure to appoint an expert to testify on his behalf violated the Due Process Clause. *Keefe II*, ¶ 16. We held that Keefe failed to meet the threshold criteria required by *Ake v. Oklahoma*,

470 U.S. 68, 105 S. Ct. 1087 (1985), and that the District Court’s appointment of Dr. Page, an independent, neutral expert, “satisfied due process requirements[.]” *Keefe II*, ¶¶ 18-20.

¶6 This appeal arises following further proceedings on remand. Keefe again moved the District Court for expert assistance, acknowledging that we rejected his request in *Keefe II* and noting that the motion served solely to preserve the issue for any subsequent appeals. The District Court denied the motion because our holding in *Keefe II* was the law of the case.

¶7 The District Court held a resentencing hearing on July 16, 2021. At the outset of the hearing, the District Court advised the parties that it had “taken judicial notice of the record in this case and the underlying pleadings” and reviewed “the additional exhibits filed by the Defendant.”

¶8 The court next discussed the scope of the resentencing hearing. It questioned whether it had jurisdiction to grant Keefe his requested relief of time served because Keefe had not “appeal[ed] the constitutionality of . . . [his] life sentence” in *Keefe II*. Keefe’s counsel argued in response that the PCR petition sought a meaningful opportunity for release and the issue on appeal in *Keefe II* was the District Court’s finding that he was “incorrigibly corrupt.” Keefe’s counsel further asserted that “simply striking the parole restriction” is an “insufficient” remedy that fails to provide Keefe with a meaningful opportunity for release. The court declined to “reopen the sentence other than . . . the parole restriction,” holding that Keefe’s requested relief in his PCR petition and before the Supreme Court was an opportunity to appear before the parole board.

¶9 Keefe then proffered testimony from two witnesses, both faith leaders and volunteers with whom Keefe worked at MSP; each would have testified to Keefe’s personal growth and reformation in prison. The family of the victims, Tavie McKay—the daughter and sister of the victims—and Muña Qamar—the granddaughter and daughter of the victims, who was present in the home when they were killed—testified to the lifetime of pain and trauma Keefe’s crimes had caused them. Keefe testified next, apologizing to the family of the victims and speaking to his personal growth in prison.

¶10 The State then recommended three life sentences on all deliberate homicide counts and ten years for the burglary, with an additional ten years per count for the use of a weapon, all to run consecutively. The State did not recommend a parole restriction. Keefe recommended that he be sentenced to time served. Keefe reiterated his position that the District Court was required to provide him with a meaningful opportunity for release and was not limited to only striking the parole restriction.

¶11 The District Court orally pronounced Keefe’s sentence, resentencing him to three life sentences for each deliberate homicide count and to a ten-year sentence for the burglary charge, with a ten-year enhancement on each count for the use of a weapon. The court did not restrict Keefe’s eligibility for parole and gave him credit for time served. In both its oral pronouncement and amended judgment and sentence, the District Court acknowledged both “the position and impact of the victims” and “the positive steps [Keefe] has taken since charges were filed.”

STANDARDS OF REVIEW

¶12 We review criminal sentences for legality. *Keefe II*, ¶ 10 (citing *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897). We review de novo a claim that a sentence violates the constitution and that a district court violated a defendant’s constitutional rights at sentencing. *Keefe II*, ¶¶ 10-11 (citations omitted).

¶13 A district court’s application of the law of the case doctrine is reviewed for an abuse of discretion. *State v. Glider*, 2001 MT 121, ¶ 8, 305 Mont. 362, 28 P.3d 488.

DISCUSSION

¶14 *1. Whether the District Court failed to comply with our instructions on remand in Keefe II and imposed an illegal sentence by only striking the parole restriction.*

¶15 Keefe asserts that, by considering only the parole restriction, the District Court failed to follow our instructions on remand to hold “a new resentencing hearing.” *See Keefe II*, ¶ 37. Because the Court did not remand with instructions for the District Court to strike the parole restriction, but instead to hold a resentencing hearing, Keefe argues that the District Court erroneously determined that it lacked jurisdiction to modify Keefe’s original sentence beyond the parole restriction. The State contends that the District Court crafted an appropriate sentence for Keefe in line with our instructions on remand in *Keefe II* when it considered the *Miller* factors and removed the parole restriction.

¶16 The United States Supreme Court in *Miller* and *Montgomery* held that mandatory sentences of life without the possibility of parole are unconstitutional “for all but the rarest of children, those whose crimes reflect ‘irreparable corruption.’” *Montgomery*, 577 U.S. at 195, 136 S. Ct. at 726 (quoting *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469). Juveniles

sentenced to life without parole prior to *Miller* “must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside the prison walls must be restored.” *Montgomery*, 577 U.S. at 213, 136 S. Ct. at 736-37. We apply *Miller* and *Montgomery* with equal force to life-without-parole sentences imposed against juvenile offenders under Montana’s discretionary sentencing scheme. *Steilman*, ¶ 3. Since our decision in *Keefe II*, the Supreme Court has clarified that *Miller* requires only that a sentencing court sentence a juvenile offender under a “discretionary sentencing procedure.” *Jones v. Mississippi*, ___ U.S. ___, 141 S. Ct. 1307, 1322 (2021). *Miller* does not require a sentencing court to make separate factual findings regarding permanent incorrigibility, nor must it explain the sentence on the record. *Jones*, ___ U.S. at ___, 141 S. Ct. at 1311 (citing *Miller*, 567 U.S. at 483, 132 S. Ct. at 2471-72; *Montgomery*, 577 U.S. at 211, 136 S. Ct. at 735).¹

¶17 Applying *Miller*, we held in *Steilman* that Montana’s sentencing judges must account for “how children are different” by “adequately consider[ing] the mitigating characteristics of youth set forth in the *Miller* factors when sentencing juvenile offenders to life without the possibility of parole[.]” *Steilman*, ¶¶ 16-17. Those factors include consideration of (1) a juvenile offender’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,” (2) “the family and home environment of [a juvenile offender],” (3) the circumstances of

¹ Although *Jones* clarified “how to interpret *Miller* and *Montgomery*,” *Jones*, ___ U.S. at ___, 141 S. Ct. at 1321, we have not had the opportunity to consider whether it would affect our analysis, and we apply the law of the case in reviewing the District Court proceedings on remand from *Keefe II*.

the homicide offense, including the extent of [the juvenile offender's] participation in the conduct and the way familial and peer pressures may have affected him [or her],” (4) whether the juvenile offender “might have been charged and convicted of a lesser offense if not for the incompetencies associated with youth,” and (5) “the possibility of rehabilitation[.]” *Miller*, 567 U.S. at 477, 132 S. Ct. at 2468. The fifth *Miller* factor took center stage in *Keefe II*.

¶18 At Keefe’s first resentencing, the District Court reimposed Keefe’s parole restriction after determining that Keefe was “irreparably corrupt” and “permanently incorrigible” but refused to consider “post-offense evidence of [his] rehabilitation.” Agreeing with Keefe that consideration of “post-offense evidence of rehabilitation is clearly required,” we held that the District Court’s failure to analyze the fifth *Miller* factor in reimposing the sentence without possibility of parole “violated Keefe’s constitutional rights.” We reversed for a new resentencing hearing “which appropriately considers the *Miller* factors.” *Keefe II*, ¶ 30. As presented and decided, the central issue was the constitutionality of the parole restriction without accounting for Keefe’s post-conviction rehabilitation under *Miller* and *Montgomery*, not the constitutionality of Keefe’s life sentences. *Keefe II*, ¶¶ 25, 27, 29-30.

¶19 Though Keefe takes issue with the District Court’s decision to limit its consideration to the parole restriction, the court complied with our remand instructions by evaluating the fifth *Miller* factor and weighing evidence of Keefe’s post-offense rehabilitation. The remand order did not direct the court expressly to confine its inquiry, as we addressed the issue Keefe presented: the constitutionality of his life-without-parole sentence under *Miller* and *Montgomery*. Whether the District Court could have agreed to entertain other

sentencing options does not affect the lawfulness of Keefe's sentence; the court complied with the remand order when it considered Keefe's post-incarceration history, and it imposed a constitutionally permissible sentence.

¶20 Keefe faults the court for declining to hear testimony from Keefe's two witnesses at the resentencing hearing. But the court noted at the outset of the hearing that it had taken judicial notice of the record and underlying pleadings, reviewed numerous letters from faith leaders, social workers, family members, and individuals at MSP, and reviewed documents evidencing Keefe's personal growth while at MSP. It also took "judicial notice of the post[-]offense evidence of rehabilitation that ha[d] been presented throughout the[] proceedings[.]" That evidence included approximately a dozen letters supporting Keefe's release and testimony at the first resentencing hearing from a correctional officer and the former prison warden, who each described Keefe's rehabilitation in prison. From the evidence, the court "acknowledge[d] the positive steps [that Keefe] has taken" in prison. The record demonstrates that the District Court carefully considered the voluminous evidence of Keefe's rehabilitation. That evidence, moreover, was not disputed by the State, which advised the court it would not recommend a restriction against parole.

¶21 Keefe's rehabilitation was not the only factor the court accounted for in its resentencing. The District Court's sentence also "[t]akes into account the position and input of the victims[.]" Family members of the victims, Tavie McKay and Muña Qamar, testified emotionally about the tragedy of the senseless homicides and how the murders of David and Constance McKay and Marian McKay Qamar "continue[] to reverberate throughout this family and their community."

¶22 The District Court’s consideration of Keefe’s rehabilitation, along with his criminogenic needs, criminal history, and financial history, the position and input of the victims, the seriousness of the offense, and the best interest of the community comports with the sentencing policy of Montana. As noted in *Keefe II*, sentencing should not “merely provide for punishment, protection of the public, and restitution, but also for rehabilitation and reintegration of offenders back into the community[.]” *Keefe II*, ¶ 30 (citing § 46-18-101(2), MCA). By removing the parole-eligibility restriction, the District Court’s amended sentence takes Keefe’s “self-improvement,” “rehabilitation,” and future “reintegration . . . back into the community” into account, while still holding him “accountable” for the offenses and considering the need to “protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders[.]” Section 46-18-101(2), MCA.

¶23 Keefe argues that the practical effect of his sentence will keep him from being parole eligible for many years to come, depriving him of a chance to “rejoin society” and “achieve maturity of judgment and self-recognition of human worth and potential.” *Graham v. Florida*, 560 U.S. 48, 79, 130 S. Ct. 2011, 2032 (2010). After Keefe filed his opening brief, however, this Court declined his motion to take judicial notice of Montana Department of Corrections’ sentence calculations he proffered to support this argument because the calculations were not before the District Court at the time of its resentencing hearing. *Keefe v. State*, No. DA 21-0409, Order (Mont. Nov. 2, 2021) (citing M. R. App. P. 8(1)). We instructed the Clerk of Court to remove Keefe’s proffered

evidence from the record on appeal.² Keefe did not raise at the sentencing hearing the objection he now makes. He did not object to the testimony of probation and parole Officer Tim Hides regarding his parole eligibility, nor did he present evidence regarding his parole eligibility calculation or a witness to testify to the intricacies of calculating parole eligibility. Keefe speculates that the District Court would have sentenced him differently had it “properly understood the sentencing calculation[,]” but he failed to preserve his challenge for appeal. We decline to consider this argument further.

¶24 Keefe persists that this Court permits a defendant to challenge a sentence for the first time on appeal “if it is alleged that such sentence is illegal or exceeds statutory mandates.” *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). A sentence is illegal if it falls outside “the statutory parameters for that sentence,” or if the sentencing court lacks statutory authority to impose it. *State v. Rambold*, 2014 MT 116, ¶ 14, 375 Mont. 30, 324 P.3d 686. Keefe asserts that his sentence is unconstitutional and does not comport with *Miller* and *Steilman* because it does not provide him with a meaningful opportunity for release. He points to his argument at the resentencing hearing that, even without the parole exemption, consecutive terms on each offense rendered the sentence unconstitutional. Though the District Court struck the parole restriction as it determined *Miller* to require, Keefe contends that the only constitutional sentence—one that would

² For the same reason, we decline to consider Appendix D, the Montana Board of Pardons and Parole disposition of Keefe’s continuation hearing, to the Notice of Supplemental Authority Keefe submitted on June 24, 2022.

give him a meaningful opportunity for release—is for the Court to “impose a sentence of time served.”

¶25 *Miller* and its progeny do not stand for the proposition that a juvenile homicide offender is constitutionally entitled to any specific term of years if found not to be irreparably corrupt. *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *Steilman*, ¶ 21 (both citing *Graham*, 560 U.S. at 75, 82, 130 S. Ct. at 2030, 2034). The “meaningful opportunity to obtain release[.]” that *Miller* requires is accomplished by prohibiting mandatory life sentences without the possibility of parole for all but the most severe cases. *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *Jones*, ___ U.S. at ___, 141 S. Ct. at 1322 (holding that *Miller* and *Montgomery* require no more than “a discretionary sentencing procedure”). In providing “some meaningful opportunity to obtain release[.]” the State “is not required to guarantee eventual freedom[.]” *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030).

¶26 The District Court considered evidence of Keefe’s post-offense rehabilitation and, upon a showing that Keefe “has changed or is capable of changing,” struck the parole restriction from Keefe’s sentence. *Keefe II*, ¶ 30 (quoting *United States v. Briones*, 929 F.3d 1057, 1067 (9th Cir. 2019) (en banc)) (emphasis omitted). In so doing, the court imposed a constitutional sentence that provides Keefe with a meaningful opportunity for release. That the court did not limit his sentence to time served or consider the specific calculation now estimated for Keefe’s parole eligibility date does not render the sentence unconstitutional.

¶27 2. *Whether the District Court erred when it denied Keefe’s request for a state-funded expert.*

¶28 Keefe urges the Court to reconsider its prior ruling that he is not entitled to state-funded expert assistance under *Ake*, 470 U.S. 68, 105 S. Ct. 1087. *Keefe II*, ¶ 20. As this issue was already litigated and decided by this Court in *Keefe II*, the District Court properly declined to revisit the issue, and we do as well. *See Glider*, ¶ 9 (citing *State v. Wooster*, 2001 MT 4, ¶ 12, 304 Mont. 56, 16 P.3d 409) (“a prior decision of this Court resolving a particular issue between the same parties in the same case is binding and cannot be relitigated”).

CONCLUSION

¶29 The District Court adequately considered evidence of Keefe’s post-offense rehabilitation under *Miller* and imposed a constitutional sentence by striking the parole restriction. We affirm the District Court’s July 16, 2021 Amended Judgment and Sentence.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE