STATE OF LOUISIANA

VERSUS

KEITH STEWART

NO. 17-KA-297

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 80-2360, DIVISION "C"
HONORABLE JUNE B. DARENSBURG, JUDGE PRESIDING

November 29, 2017

HANS J. LILJEBERG
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson, and Hans J. Liljeberg

AFFIRMED; REMANDED FOR CORRECTION OF UNIFORM COMMITMENT ORDER; MOTION TO WITHDRAW GRANTED

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FHW
MEJ

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STATE OF LOUISIANA

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KEITH STEWART

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LILJEBERG, J.

Defendant appeals his sentence of life imprisonment with parole eligibility, which was imposed on resentencing, for his 1982 second degree murder conviction. For the following reasons, we affirm defendant's sentence, and we remand for correction of the uniform commitment order. We also grant appellate counsel's motion to withdraw as counsel of record.

PROCEDURAL HISTORY

This is defendant's third appeal.

In 1982, defendant was convicted by a jury of second degree murder in violation of La. R.S. 14:30.1.[1] The trial judge sentenced defendant to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The Louisiana Supreme Court affirmed defendant's conviction and sentence on September 8, 1983. *State v. Stewart*, 437 So.2d 872 (La. 1983).

In 2012, in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. On August 14, 2012, defendant filed a "Motion to Vacate and Correct an Illegal Sentence" pursuant to *Miller*. After a hearing, the trial judge granted the motion, vacated the original sentence, and resentenced defendant to life imprisonment at hard labor with the benefit of parole. Defendant filed a Motion to Reconsider Sentence, which was denied, and a motion for appeal, which was granted. *State v. Stewart*, 13-639 (La. App. 5 Cir. 1/31/14), 134 So.3d 636, 638, *writ denied*, 14-420 (La. 9/26/14), 149 So.3d 260.

While defendant's second appeal was pending, the Louisiana Supreme Court in *State v. Tate*, 12-2763 (La. 11/5/13), 130 So.3d 829, *cert. denied*, - - U.S. - - , 134 S.Ct. 2663, 189 L.Ed.2d 214 (2014), held that *Miller* "sets forth a new rule of

[1] Defendant was 16 years old at the time of the offense.

criminal constitutional procedure, which is neither a substantive nor a watershed rule implicative of the fundamental fairness and accuracy of the criminal proceeding," and thus *Miller*'s pronouncement was not retroactive. In defendant's second appeal, he challenged his sentence of life imprisonment at hard labor with parole. This Court found that based on the Louisiana Supreme Court's pronouncement in *Tate*, defendant's sentence of life imprisonment with eligibility for parole was illegally lenient. *Stewart*, 134 So.3d at 640. Accordingly, this Court amended the sentence to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence, as mandated by La. R.S. 14:30.1, and affirmed as amended. *Id.*

On January 25, 2016, the United States Supreme Court held in *Montgomery v. Louisiana*, - - U.S. - - , 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), that *Miller* announced a substantive rule of constitutional law that applies retroactively, thereby abrogating *State v. Tate, supra*. Thereafter, defendant filed a pro se "Motion to Vacate an [sic] Correct an Illegal Sentence" on February 2, 2016.

On December 5, 2016, a hearing was held on defendant's motion, after which the matter was taken under advisement. On January 19, 2017, the trial court vacated defendant's life sentence without the benefit of parole and resentenced him to life imprisonment with the benefit of parole under the conditions established in La. R.S. 15:574.4(E).[2] Defendant now appeals for the third time.

FACTS

In the opinion in defendant's second appeal, *Stewart*, 134 So.3d at 637-638, this Court set forth the following underlying facts from the co-defendant's appeal in *State v. Robinson*, 421 So.2d 229 (La. 1982):

> On August 5, 1980, [Jimmy Robinson, co-defendant] and Keith Stewart knocked at the door of the apartment of Mrs.

[2] We note that La. R.S. 15:574.4(E) was subsequently amended by Act 2017, No. 277, effective August 1, 2017. Throughout this opinion, we refer to Subsection E as it existed at the time defendant filed his motion and before its amendment.

> Joyce Waites, who managed an apartment complex. They told Mrs. Waites that they wanted to apply for a job, but they left when she advised that there were no positions available. Approximately 30 minutes later, Mrs. Waites answered another knock at the door and was confronted by the same two men, who drew guns and demanded money. When Mrs. Waites pointed to her purse, [Robinson] placed a gun against her head and told her to lie on the floor.
>
> [Robinson] held the gun to Mrs. Waites' head, while Stewart searched the house for valuables. Mrs. Waites warned that her husband was coming home for lunch soon and begged them to leave, but they did not do so. When [Mr. Waites] arrived, [Robinson] and Stewart used the gun to require him to lie on the floor next to Mrs. Waites. [Robinson] then made Mrs. Waites accompany him upstairs to search for more money. When they came back downstairs, [Robinson] again told her to lie on the floor next to her husband.
>
> Mrs. Waites told [Robinson] that she could not stop shaking and asked for a cigarette, which [he] gave her. At [Robinson]'s instruction, she placed her head on the floor and closed her eyes. When she heard a shot, she looked up and started screaming when she saw that her husband had been shot. [Robinson] placed the gun against her head and told her to shut up or she would be next. Shortly thereafter, [Robinson] and Stewart left the apartment with the stolen money in the Waites' car.
>
> Mr. Waites died of a gunshot wound to the head. Later the same day, [Robinson] was arrested and confessed to the shooting.

ANDERS BRIEF

Under the procedure adopted by this Court in *State v. Bradford*, 95-929 (La. App. 5 Cir. 6/25/96), 676 So.2d 1108, 1110-11,[3] appointed appellate counsel has filed a brief asserting that he has thoroughly reviewed the trial court record and cannot find any non-frivolous issues to raise on appeal. Accordingly, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241 (per curiam), appointed counsel requests permission to withdraw as counsel of record.

[3]In *Bradford*, *supra*, this Court adopted the procedures outlined in *State v. Benjamin*, 573 So.2d 528, 530 (La. App. 4 Cir. 1990), which were sanctioned by the Louisiana Supreme Court in *State v. Mouton*, 95-0981 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam).

In *Anders*, *supra*, the United States Supreme Court stated that appointed appellate counsel may request permission to withdraw if he finds his case to be wholly frivolous after a conscientious examination of it.[4] The request must be accompanied by "'a brief referring to anything in the record that might arguably support the appeal'" so as to provide the reviewing court "with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability" and to assist the reviewing court "in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 439, 108 S.Ct. 1895, 1902, 100 L.Ed.2d 440 (1988) (quotation omitted).

In *Jyles*, 704 So.2d at 241, the Louisiana Supreme Court stated that an *Anders* brief need not tediously catalog every meritless pretrial motion or objection made at trial with a detailed explanation of why the motions or objections lack merit. The supreme court explained that an *Anders* brief must demonstrate by full discussion and analysis that appellate counsel "has cast an advocate's eye over the trial record and considered whether any ruling made by the trial court, subject to the contemporaneous objection rule, had a significant, adverse impact on shaping the evidence presented to the jury for its consideration." *Id.*

When conducting a review for compliance with *Anders*, an appellate court must conduct an independent review of the record to determine whether the appeal is wholly frivolous. *Bradford*, 676 So.2d at 1110. If, after an independent review, the reviewing court determines there are no non-frivolous issues for appeal, it may grant counsel's motion to withdraw and affirm the defendant's conviction and sentence. However, if the court finds any legal point arguable on the merits, it may

[4] The United States Supreme Court reiterated *Anders* in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

either deny the motion and order the court-appointed attorney to file a brief arguing the legal point(s) identified by the court, or grant the motion and appoint substitute appellate counsel. *Id.*

DISCUSSION

Defendant's appellate counsel asserts that after a detailed review of the record, he could find no non-frivolous issues to raise on appeal.[5] Although defendant alleged in his motion to reconsider sentence that his sentence was excessive, appellate counsel notes that the penalty for a conviction of second degree murder remains the same today as it was in 1980 when defendant committed the offense, namely, life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. Appellate counsel asserts that under *Miller* and *Montgomery*, and applying La. C.Cr.P. art. 878.1 and La. R.S. 15:574.4(E), if the defendant was under the age of 18 at the time of the offense, there are now two potential sentences for second degree murder--life imprisonment without the benefit of parole eligibility or life imprisonment with the benefit of parole eligibility. He notes that of the two sentencing options available, defendant received the less severe of the two, life imprisonment with the benefit of parole eligibility. As such, appellate counsel maintains that although defendant's sentence is severe, it is not constitutionally excessive.

The State responds that appellate counsel correctly notes that this case presents no non-frivolous issues for appellate review. It further responds that the sentence follows the mandates of *Miller* and *Montgomery*, and is not constitutionally excessive.

Appellate counsel has filed a motion to withdraw as attorney of record which states he has notified defendant that he filed an *Anders* brief and that

[5] Defendant's conviction is final and is not before this Court at this time. However, defendant is entitled to review of his sentence, which was imposed on January 19, 2017.

defendant has a right to file a pro se brief in the appeal. Additionally, this Court sent defendant a letter by certified mail informing him that an *Anders* brief had been filed and that he had until August 5, 2017, to file a pro se supplemental brief. Defendant has not filed a supplemental brief in this matter.

An independent review of the record supports appellate counsel's assertion that there are no non-frivolous issues to be raised on appeal.

The record reflects that on February 2, 2016, defendant filed a motion to vacate and correct an illegal sentence. Based on the United States Supreme Court case of *Montgomery*, *supra*, a hearing was held, and on January 19, 2017, the trial judge vacated the previous sentence and resentenced defendant to life imprisonment with parole eligibility. Appellate counsel does not believe that defendant's sentence is excessive; however, defendant in his motion to reconsider sentence argued that it is excessive.

As previously stated, in 2012 the United States Supreme Court in *Miller* held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. The Court indicated that the State must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 132 S.Ct. at 2469. Thereafter, in *Tate*, 130 So.3d at 844, the Louisiana Supreme Court held that *Miller*, which set forth a new rule of constitutional procedure for sentencing, was not subject to retroactive application and was to be applied prospectively only. However, in January of 2016, the United States Supreme Court in *Montgomery*, 136 S.Ct. at 737, held that *Miller* retroactively applied to defendants whose convictions and sentences became final prior to the *Miller* decision, thereby abrogating the *Tate* decision.

On remand, in *State v. Montgomery*, 13-1163 (La. 6/28/16), 194 So.3d 606, 607, the Louisiana Supreme Court stated as follows:

> The Supreme Court held in *Miller* that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. The Supreme Court found 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." *Miller*, 132 S.Ct. at 2469. The Supreme Court clarified in *Montgomery*, 136 S.Ct. at 734, "that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" and life without parole can only be a proportionate sentence for the latter.
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> ***
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> To implement *Miller*'s "meaningful opportunity to obtain release" for those juveniles who commit murder but are not found to be irreparably corrupt, the Legislature in 2013 La. Acts 239 enacted La. C.Cr.P. art. 878.1 and La. R.S. 15:574.4(E). Article 878.1 requires the District Court to conduct a hearing "[i]n any case where an offender is to be sentenced to life imprisonment for a conviction of first degree murder (R.S. 14:30) or second degree murder (R.S. 14:30.1) where the offender was under the age of eighteen years at the time of the commission of the offense ... to determine whether the sentence shall be imposed with or without parole eligibility pursuant to the provisions of R.S. 15:574.4(E)." La. R.S. 15:574.4(E) then provides the conditions under which any person serving a sentence of life imprisonment for first or second degree murder committed under the age of 18 can become parole eligible, provided a judicial determination has been made the person is entitled to parole eligibility pursuant to Article 878.1.

In the instant case, at the resentencing hearing, several exhibits were admitted into evidence. The State argued that a "number to tack" against defendant was that there was a manifestation of deliberate cruelty to the victim in this case, though he acknowledged that defendant was upstairs when his co-defendant shot and killed the victim. The State also noted that defendant had committed several violations while imprisoned.

Defense counsel responded that the co-defendant who pulled the trigger was 24 years old and that defendant was only 16 years old and not in the room at the time of the killing. He indicated that the co-defendant was more persuasive, influential, and in control than defendant. Defense counsel argued that the trial judge should sentence defendant to a fixed term of years rather than a life sentence

with or without parole eligibility, because Louisiana's parole system did not offer a "meaningful opportunity for release" as set forth in *Miller* and *Montgomery*.

The State replied that *Miller* and *Montgomery* made clear that the single issue before the court was whether defendant would be sentenced to life imprisonment with or without parole eligibility. It asserted that any sentence to a fixed number of years would be illegal, as the statute mandates a life sentence. Afterward, the trial judge took the matter under advisement.

On January 19, 2017, the trial judge issued her ruling at a hearing. After setting forth several factors that she considered, the trial judge found that defendant had demonstrated maturity and rehabilitation and that his crime reflected an "unfortunate yet transient immaturity," and therefore, he must be afforded parole eligibility. As such, the trial judge vacated the life sentence imposed without the benefit of probation, parole, or suspension of sentence and resentenced defendant pursuant to Article 878.1 to "life with the benefit of parole" and "the conditions" established in La. R.S. 15:574.4(E).

On January 27, 2017, defendant filed a pro se motion to reconsider sentence, which was denied by the trial court. In his motion, defendant argued that his sentence was excessive, it ignored the *Miller* and *Montgomery* mandates, and it did not reflect individualized sentencing because every juvenile was exposed to the same sentence. He further contended that placing the decision with the parole board was not a substitute for a judicially imposed sentence.

In *State v. Brown*, 51,418, 2017 La. App. LEXIS 1132, at *11-12 (La. App. 2 Cir. 6/21/17), the Second Circuit found that eligibility for parole was the sole question to be answered in a *Miller* hearing. Accordingly, the Court noted that there was no consideration of whether the defendant was entitled to a downward departure from the mandatory sentence of life imprisonment at hard labor. Rather,

the trial court was required to consider only whether that mandatory sentence should include parole eligibility.

In the instant case, the record shows that the trial judge adhered to the law set forth in *Miller* and *Montgomery* at the resentencing hearing. According to that law, the trial judge's purpose at the hearing was to determine whether to resentence defendant to life imprisonment with parole eligibility or life imprisonment without parole eligibility. After reviewing the law, the exhibits, and the facts of the case, the trial judge chose to vacate defendant's sentence and resentence him to life imprisonment with parole eligibility, the less severe of the two potential penalties. Defendant's sentence now provides him with a meaningful opportunity for release. In light of the foregoing, we find that defendant's sentence was not excessive. Further, the law does not support defendant's contention that he should have been sentenced to a set number of years.

Because appellate counsel's brief adequately demonstrates by full discussion and analysis that he has reviewed the trial court proceedings and cannot identify any basis for a non-frivolous appeal, and an independent review of the record supports counsel's assertion, we grant appellate counsel's motion to withdraw as counsel of record.

ERRORS PATENT

Defendant requests an error patent review of his case; however, he received such a review by this Court in his second appeal. Therefore, this error patent review is limited to the January 19, 2017 resentencing. *See State v. Taylor*, 01-452 (La. App. 5 Cir. 11/14/01), 802 So.2d 779, 783-784, *writ denied*, 01-3326 (La. 1/10/03), 834 So.2d 426. Our review reveals one error that requires corrective action.

The transcript and the commitment indicate that the trial judge imposed a life sentence with the benefit of parole; however, the State of Louisiana Uniform

Commitment Order only reflects that the trial judge imposed a life sentence. For accuracy and completeness, we remand this matter and order the trial court to correct the uniform commitment order to reflect that defendant's life sentence is imposed with the benefit of parole. *See State v. Lyons*, 13-564 (La. App. 5 Cir. 01/31/14), 134 So.3d 36, 41, *writ denied*, 14-481 (La. 11/7/14), 152 So.3d 170. We also direct the Clerk of Court for the Twenty-Fourth Judicial District Court for the Parish of Jefferson to transmit the original of the corrected uniform commitment order to the officer in charge of the institution to which defendant has been sentenced and the Department of Corrections' legal department. *See State v. Barnes*, 15-268 (La. App. 5 Cir. 11/19/15), 179 So.3d 885, 891.

DECREE

For the foregoing reasons, we affirm defendant's sentence, and we remand for correction of the State of Louisiana Uniform Commitment Order. We also grant appellate counsel's motion to withdraw as counsel of record.

AFFIRMED; REMANDED FOR CORRECTION OF UNIFORM COMMITMENT ORDER; MOTION TO WITHDRAW GRANTED.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 29, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-297

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE JUNE B. DARENSBURG (DISTRICT JUDGE)
TERRY M. BOUDREAUX (APPELLEE)

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