

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

TERRILL HICKS

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1822 WDA 2011

Appeal from the Judgment of Sentence August 2, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006205-2007

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J.

FILED NOVEMBER 21, 2013

Terrill Hicks appeals from the judgment of sentence entered in the Court of Common Pleas of Allegheny County following his conviction for one count of Murder in the First Degree,¹ two counts of Aggravated Assault,² one count of Criminal Attempt-Homicide,³ one count of Possession of Firearm by a Minor⁴ and one count of Criminal Conspiracy.⁵ After our review, we vacate the judgment of sentence and remand for a new sentencing hearing

¹ 18 Pa.C.S.A. § 2502.

² 18 Pa.C.S.A. § 2702.

³ 18 Pa.C.S.A. § 901.

⁴ 18 Pa.C.S.A. § 6110.1.

⁵ 18 Pa.C.S.A. § 903.

in accordance with the United States Supreme Court's holding in ***Miller v. Alabama***, ___ U.S. ___, 132 S. Ct. 2455 (2012), and our Pennsylvania Supreme Court's holding in ***Commonwealth v. Batts***, 66 A.3d 286 (Pa. 2013).

At trial, the Commonwealth presented evidence that Hicks shot approximately ten times at Kendall Dorsey and Kevin Harrison while they were on the porch of Harrison's house. Dorsey avoided injury by going inside the house; Harrison died after three bullets struck him.

The Commonwealth charged Hicks, who was 16 years old, as an adult. Following trial, on April 27, 2010, a jury convicted Hicks of the above crimes. On August 2, 2010, the court sentenced Hicks to a mandatory sentence of life without the possibility of parole on the charge of Murder in the First Degree, a consecutive ten to twenty years for the Criminal Attempt-Homicide count, a consecutive five to ten years for the Aggravated Assault and no further penalty on the remaining charges. Hicks filed post-sentence motions, which the court denied on August 25, 2010; he did not file a timely notice of appeal.

On June 29, 2011, Hicks filed a *pro se* petition under the Post-Conviction Relief Act ("PCRA"),⁶ seeking to have his appellate rights reinstated *nunc pro tunc*. On November 7, 2011, the PCRA court reinstated his appellate rights. Hicks filed a notice of appeal on November 17, 2011 and

⁶ 42 Pa.C.S.A. §§ 9541-9546.

a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal on November 30, 2011. The trial court filed its Pa.R.A.P. 1925(a) opinion on February 8, 2012.

On July 5, 2012, while the case was on direct appeal, Hicks filed a Petition for Remand, averring that the United States Supreme Court's decision in **Miller**, which held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at ___, 132 S. Ct. at 2469, renders his sentence illegal. Hicks requested this Court remand the case for resentencing "in accordance with Pa.R.Crim.P. 720(C)."⁷

This Court held the matter in abeyance pending the Pennsylvania Supreme Court's decision in **Batts**, which concerned a direct appeal from the imposition of a mandatory life sentence for crimes committed by a minor. In **Batts**, the Pennsylvania Supreme Court held that the appellate remedy for the unconstitutional imposition of a mandatory life-without-parole sentence upon a juvenile situated similarly to Hicks is a remand for resentencing. **See Batts**, 66 A.3d at 296-97. At that hearing, the trial court could consider the factors detailed in **Miller** and impose a life sentence either with or without parole. **Batts**, 66 A.2d at 297-98. The **Batts** Court noted: "**Miller** neither barred imposition of a life-without-parole sentence

⁷ Pursuant to Pa.R.Crim.P. 720(C), "after-discovered evidence discovered during the direct appeal process must be raised promptly during the direct appeal process, and should include a request for a remand to the trial judge[.]" Pa.R.Crim.P. 720(C)-Comment.

on a juvenile categorically nor indicated that a life sentence with the possibility of parole could never be mandatorily imposed on a juvenile.” **Miller**, ---U.S. at ----, 132 S.Ct. at 2469. Rather, **Miller** requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition upon a juvenile of a sentence of life imprisonment without the possibility of parole. **See id.** at ---, 132 S.Ct. at 2467–68.⁸

In Pennsylvania, “we adhere to the principle that a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occur[] before the judgment has become final.” **Commonwealth v. Steward**, 775 A.2d 819, 824 n.4 (Pa. Super. 2001). As Hicks’ judgment of sentence is not yet final, he is entitled to the benefit of the change in the law. **See** 42 Pa.C.S.A. § 9545(b)(3) (recognizing that a judgment becomes final at the conclusion of direct review, including discretionary review in the

⁸ As in **Batts**, Hicks’s judgment of sentence pre-dated the legislature’s enactment of a new sentencing statute. Under the new statute, a person under fifteen years of age at the time of the offense may receive “a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 25 years to life.” 18 Pa.C.S. § 1102.1(a)(2). A person at least fifteen but under eighteen years of age may receive “a term of life imprisonment without parole, or a term of imprisonment, the minimum of which shall be at least 35 years to life.” 18 Pa.C.S. § 1102.1(a)(1) (emphasis added). The new sentencing statute, by its terms, applies only to minors convicted of murder *on and after the date that Miller was issued* (June 25, 2012). **See** Act of Oct. 25, 2012, P.L. ____ , No. 204 § 2; 18 Pa.C.S.A. § 1102.1(a). Hicks was convicted of murder on April 27, 2010. Accordingly, the new statute does not apply to Hicks, nor does it moot the present controversy.

Supreme Court of Pennsylvania and the Supreme Court of the United States, or at the expiration of time for seeking the review).

The United States Supreme Court's decision in **Miller** rendered Hicks's sentence for first-degree murder unconstitutional. In accordance with the Pennsylvania Supreme Court's decision in **Batts**, we vacate Hicks's judgment of sentence and remand for resentencing. As required by **Batts**, on remand, Hicks is subject to a mandatory maximum sentence of life imprisonment "as required by Section 1102(a) [of the Crimes Code], accompanied by a minimum sentence determined by the common pleas court upon resentencing." **Batts**, 66 A.3d at 297.

At resentencing, the trial court should consider, at a minimum,

[the] juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Id. (quoting with approval **Commonwealth v. Knox**, 50 A.3d 732, 745 (Pa. Super. 2012)).

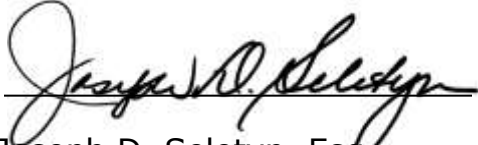
Judgment of sentence vacated; case remanded for resentencing in accordance with **Miller** and **Batts**.⁹ Jurisdiction relinquished.

SHOGAN, J., concurs in the result.

⁹ Pursuant to our disposition, appellant's Motion for Remand is granted.

J-S39017-12

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/21/2013