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Case Number 448,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONTA E. VICKERS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 448, 2014
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
	)	for Sussex County
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
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NATURE AND STAGE OF PROCEEDINGS

After his arrest on August 15, 2013 (D.I. 1), a Sussex County grand jury indicted Donta E. Vickers on October 21, 2013, charging him with the following: assault first degree;[1] attempted robbery first degree;[2] home invasion;[3] conspiracy second degree;[4] possession of a firearm during the commission of a felony (PFDCF)[5]—three counts; and possession of a firearm by a person prohibited (PFBPP).[6] (D.I. 3). On January 17, 2014, the Superior Court granted Vickers' motion to sever the PFBPP charge. (D.I. 10, 16). A Sussex County grand jury filed an amended indictment on April 29, 2014, retaining all but the PFBPP charge. (D.I. 35). On May 5, 2014, before the conclusion of Vickers' first trial, the Superior Court granted a mistrial without prejudice to allow him to explore potentially exculpatory evidence that came to light during trial. (D.I. 42, 43).

On June 10, 2014, after a second, two-day trial, the jury found Vickers guilty of assault second degree as a lesser-included offense of assault first

[1] DEL. CODE ANN. tit. 11, § 613(a)(1).

[2] DEL. CODE ANN. tit. 11, §§ 531 and 832.

[3] DEL. CODE ANN. tit. 11, § 826A.

[4] DEL. CODE ANN. tit. 11, § 512.

[5] DEL. CODE ANN. tit. 11, § 1447A.

[6] DEL. CODE ANN. tit. 11, § 1448.

degree, and convicted him of all other charges. (D.I. 60, 66; B8-10). The court ordered a pre-sentence investigation. (D.I. 66). On June 20, 2014, the State notified Vickers of its intent to move that he be sentenced as a habitual offender.[7] (D.I. 68; A103-08). Vickers filed a response on August 4, 2014 (D.I. 71), to which the State replied on August 6, 2014. (D.I. 73). Vickers also filed a second response on August 6, 2014. (D.I. 74).

On August 8, 2014, the State moved to sentence Vickers as a habitual offender, which the Superior Court granted. (D.I. 75, 77); Ex. A to Op. Brf. The court sentenced Vickers as follows: attempted robbery first degree—life imprisonment at level V with credit for 359 days previously served; home invasion—life imprisonment at level V; each of three counts of PFDCF—life imprisonment at level V; assault second degree—10 years at level V with credit for 359 days previously served; and conspiracy second degree—2 years at level V. (D.I. 76; A150-51); Ex. B to Op. Brf. On August 20, 2014, the Superior Court filed a corrected sentence to reflect that there would not be an entry of civil judgment, but left all other terms intact. (D.I. 82); Ex. B to Op. Brf.

On January 16, 2015, Vickers filed his opening brief, appealing his sentence. This is the State's Answering Brief.

[7] *See* DEL. CODE ANN. tit. 11, § 4214(b).

SUMMARY OF ARGUMENT

I. DENIED. The Delaware Supreme Court has repeatedly upheld the constitutionality of the habitual offender statute under the Eighth Amendment and none of the United States Supreme Court cases cited by appellant undermine that holding because those three cases (*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*) addressed only sentences for juvenile offenses and Vickers was sentenced as a habitual offender for crimes committed as an adult.

STATEMENT OF FACTS

On August 15, 2013, Amilcar Mercado was living in a rented room in a house on Kimmey Street in Georgetown. (A16). Around 10:30 p.m., he received a phone call from Lenetta Long, a prostitute whom he knew as "Black Nada"; Long had been to his house before, and he invited her to come over. (A17-19, 38, 74). Sometime around midnight, after locking the front door and Mercado's bedroom door, the two proceeded to have sex in the bedroom, but were interrupted when Long answered a call on her cell phone. (A19-20). Mercado, who spoke limited English, did not understand what she was saying on the phone. (A21). After Long hung up, she told Mercado she had to go to the bathroom, and left the bedroom. (*Id*.). When she returned, Mercado locked the bedroom door again, and the two resumed having sex. (A21-22).

Five to ten minutes later, someone kicked the bedroom door open and Vickers entered the bedroom, pointing a gun in Mercado's face and demanding money. (A22-23). Although Vickers had covered his face and head with black cloth, the material was transparent under the bedroom light, so that Mercado, who was close to Vickers, could see "his face and his lips and everything." (A24, 26-27, 67). Because of Vickers' distinctively large eyes, Mercado recognized him "right away" as a former co-worker and

fellow Georgetown resident. (A27, 67). Mercado saw a second man hiding outside the bedroom, but could not see the man's face; however, he noted that both men were "black American" and dressed in black. (A25-26). Mercado described Vickers as "five-ten and skinny" and the other man as "big and strong." (*Id*.).

Mercado told Vickers there was money in his pants, and begged Vickers not to shoot him. (A23). Vickers put the gun to Mercado's head, grabbed the pants and then looked at Long, who made a pointing gesture toward Mercado's piggy bank. (A24-25). Vickers shot Mercado in the right leg, just above the knee, and grabbed the piggy bank. (A25, 29; B1). Long jumped over Mercado, who by then was lying on the floor, and left with Vickers and the other man. (A25, 29). The pants contained approximately $500, and the piggy bank contained approximately $60. (A29, 31).

Putting a towel on his bleeding leg, Mercado exited the house and saw the three people running towards the Perdue plant on Savannah Drive, where Mercado knew Vickers lived in a house owned by Long's mother; Long resided in the same house. (A28-31, 74-75). Returning inside, Mercado called 911. (A31). When the police arrived, he told them that he knew the identity of the shooter and where he lived. (A32). On the way to the hospital, Mercado and the police stopped at Vickers' residence on Savannah

Drive, where Mercado identified Vickers—"the one with the big eyes"—as the shooter. (A32-33). Mercado "recognized him [Vickers] well because he looked nervous; he had these big eyes and he looked scared." (A68).

Detective Brad Cordrey of the Georgetown Police Department, who saw Vickers at the scene on Savannah Drive, noted that he was "sweating profusely" even though the nighttime temperature was approximately 60 degrees. (A69, 80-81). Cordrey also noted that, of the men situated near Vickers when Mercado identified him, "Vickers [was] the only one with big eyes and it's very distinctive." (B7). The police executed a search warrant on the house, finding two dark-colored, transparent "doo-rags" near the bed in Vickers' bedroom. (A77-78). Cordrey confirmed that Vickers was five feet and ten inches tall. (A82).

Ten minutes after Mercado called 911, the police dispatched a K-9 officer, first to Vickers' house on Savannah Drive, and then to Mercado's house on Kimmey Street. (A72; B3) The police dog, who was trained to follow the freshest scent, tracked a scent from Mercado's house to a junkyard across the street from Vickers' house before the K-9 officer halted the search for safety reasons. (A73, 84; B2-6).

After the police took Vickers into custody, Cordrey interviewed him about the incident and recorded his statement. (A81-82). Although his story

changed over the course of the interview, Vickers: conceded that he likely had gunshot residue on his hands (State's Trial Exhibit 15 at 4:16:51); admitted that he was present at the crime scene (*Id.* at 4:41:40); and admitted that he held the gun that shot Mercado (*Id.* at 4:43:07-17), but claimed that the actual shooter handed him the gun after the shooting so that Vickers could feel how hot the gun was. (*Id.* at 4:47:35).

The police never recovered the gun that shot Mercado, nor did they recover his pants, piggy bank, or stolen money. (A96-97). The bullet remained in Mercado's leg, as hospital staff determined that they could not remove it without doing further damage to the leg. (A33-34). Even after three to four months of physical therapy, Mercado was unable to fully bend his leg, and confirmed that he now walks with a limp. (A34-35).

I. SUPERIOR COURT PROPERLY SENTENCED VICKERS AS A HABITUAL CRIMINAL.

Question Presented

Whether the Superior Court properly sentenced Vickers as a habitual offender for his third violent offense under 11 *Del. C.* § 4214(b), where he committed his sentencing offense as a 36-year-old adult.[8]

Standard and Scope of Review

The question of whether the Superior Court properly sentenced appellant as a habitual offender under 11 *Del. C.* § 4214 is a question of law subject to plenary or *de novo* appellate review.[9] Constitutional claims are also subject to *de novo* review.[10]

Merits of the Argument

In opposing the State's motion to sentence him as a habitual offender under 11 *Del. C.* § 4214(b), Vickers readily conceded that he had been convicted of three violent felonies on three separate occasions.[11] Then, as in

[8] Vickers was born on June 6, 1977 (A123), making him 36 years old at the time of his offenses on August 15, 2013.

[9] *State v. Guthman*, 619 A.2d 1175, 1177 (Del. 1993).

[10] *Grace v. State*, 658 A.2d 1011, 1015 (Del. 1995).

[11] *See* A123 ("The Defendant's two predicate violent offenses are Arson 1st (a 1994 case) and Robbery 1st (a 1997 case). The Defendant's third violent felony is the instant case (which occurred in 2013).").

the instant appeal, he opposed application of the statute merely on grounds that his first predicate felony offense should not be counted for purposes of habitual sentencing because he committed it as a 17-year-old juvenile.[12] There is no legal basis for this argument.

As the State argued below, Delaware has repeatedly and consistently held that a juvenile's prior felony convictions, resulting from an adult criminal proceeding,[13] are admissible as proof of habitual offender status.[14] Moreover, when addressing an Eighth Amendment challenge like the one Vickers attempts here, this Court has expressly affirmed the constitutionality of the habitual offender statute, including Section 4214(b), and "ruled that [an Eighth Amendment] proportionality analysis is not required for review of a sentence under the statute."[15] Thus, Vickers' argument that his juvenile conviction should not have counted towards his sentencing as a habitual offender flies in the face of established Delaware precedent.

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[12] In his second response to the State's motion below, Vickers also attempted to argue that he did not have "ample opportunity for rehabilitation" between his 1994 and 1997 convictions. A129-31. The Superior Court expressly rejected this argument during sentencing (A145-48), and Vickers, by not raising it in the body of his opening brief, has waived the issue on appeal.

[13] As Vickers conceded below (A123), he was charged, convicted and sentenced as an adult in Superior Court for his first predicate felony offense.

[14] *Stone v. State*, 1994 WL 276984, at *2 (Del. June 14, 1994) (citing *Fletcher v. State*, 409 A.2d 1254 (Del. 1979); *State v. J.K.*, 383 A.2d 283, 201 n.10 (Del. 1977)).

[15] *Summers v. State*, 2000 WL 1508771, at *1 (Del. Sept. 15, 2000) (citing *Williams v. State*, 539 A.2d 164, 180 (Del. 1988), *cert denied*, 488 U.S. 969 (1988)).

In an attempt to circumvent this controlling precedent, Vickers argues that Section 4214(b) now violates the "constitutional tenets"—though not the actual holdings—of three recent United States Supreme Court cases.[16] First, he cites to *Roper v. Simmons*, which held that the Eighth and Fourteenth amendments barred the execution of individuals who were under the age of 18 at the time they committed capital offenses.[17] Specifically, Vickers relies on language that, viewed in context, stands for the proposition that the death penalty is reserved for only the most culpable class of offenders, and that juveniles cannot be reliably classified as such due to their immaturity, susceptibility to outside influences, and mutable natures.[18] Neither the holding nor the dicta of *Roper* affords Vickers any relief because he was not sentenced to death for a juvenile offense, but rather was sentenced as an adult, habitual offender for crimes committed roughly twenty years after his juvenile offense.

For his second "constitutional tenet," Vickers cites *Graham v. Florida*, which held that "the Constitution prohibits the imposition of a life without parole sentence on a *juvenile* offender who did not commit

[16] Op. Brf. 10. *See also* A123-24.

[17] 543 U.S. 551, 578 (2005).

[18] *Id*. at 568-570.

homicide."[19] As with *Roper*, Vickers neither relies on the opinion's actual holding nor provides any context for the court's statement that "[t]he age of the offender and the nature of the crime each bear on the analysis,"[20] but the surrounding text establishes that *Graham*, like *Roper*, addresses the "diminished moral culpability" and sentencing of a juvenile for crimes committed as a juvenile.[21] Vickers was sentenced as an adult for crimes committed as an adult after several opportunities to rehabilitate, making *Graham* inapposite. As the sentencing judge noted, Vickers was "not getting sentenced as a 17-year-old to life imprisonment," but rather was "going to jail for his third act."[22]

Finally, Vickers attempts to extend the holding of *Miller v. Alabama*, namely, 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.'"[23] Again, Vickers relies on language

[19] 560 U.S. 48, 82 (2010) (emphasis added).

[20] Op. Brf. 9 (quoting *Graham*, 560 U.S. at 69).

[21] *Graham*, 560 U.S. at 68-69.

[22] A145.

[23] 132 S.Ct. 2455, 2460 (2012) (emphasis added).

addressing juvenile sentences for juvenile offenses,[24] invalidating any mandatory life imprisonment for a juvenile offense because such a scheme "prevents those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change."[25] Whatever benefit this consideration might have afforded Vickers as a juvenile, it now cuts against him. Twenty years have passed since his first violent offense, and Vickers is now an adult with—applying the logic of *Miller*—a lessened capacity for change and greater culpability.

Notwithstanding Vickers' repeated insistence that his adult sentencing "violated the fundamental constitutional tenets of *Graham, Roper and Miller*,"[26] he cites no federal authority stretching those cases as far as he invites this Court to go. To the contrary, federal courts have consistently rejected just such an invitation.[27] The Eleventh Circuit deemed *Roper*

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[24] *Cf. Counts v. State*, 338 P.3d 902, 906-07 (Wyo. 2014) ("The sentencing scheme at issue here did not mandate a life sentence for a juvenile. [The defendant] was not a juvenile at the time he was sentenced. The mitigating factors of youth were simply not an issue when he was sentenced. […] He was not sentenced to life in prison for his juvenile offense. He was sentenced to life in prison for committing a fourth felony, and this time a violent one. It was the violence associated with the current felony that placed him within the parameters of the habitual criminal statute.").

[25] *Miller*, 132 S.Ct. at 2460 (quotations omitted).

[26] Op. Brf. 10 (original italics).

[27] *See U.S. v. Edwards*, 734 F.3d 850, 852-53 (9th Cir. 2013) ("We reject [defendant]'s contention and hold that these recent Eighth Amendment cases [*Roper*, *Graham*, and *Miller*] do not prevent the district court from assigning criminal history points for

"inapposite" to the type of challenge Vickers asserts here because that case "concerned imposition of the death penalty, not life imprisonment," and because "*Roper* did not involve sentence enhancement for an adult offender."[28] Previously, that court had reasoned that:

> *Roper* does not deal specifically—or even tangentially—with sentence enhancement. It is one thing to prohibit capital punishment for those under the age of eighteen, but an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood. *Roper* does not mandate that we wipe clean the records of every criminal on his or her eighteenth birthday.[29]

Moreover, Vickers cannot argue that his current sentence punishes him, even in part, for his juvenile offense. The United States Supreme Court "consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant."[30] Under recidivist sentencing

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juvenile convictions. In so holding, we, join the unanimous view of our sister circuits, which have affirmed the use of juvenile convictions to determine criminal history of adults.") (citing *U.S. v. Graham*, 622 F.3d 445, 461-64 (6th Cir. 2010); *U.S. v. Scott*, 610 F.3d 1009, 1018 (8th Cir. 2010); *U.S. v. Mays*, 466 F.3d 335, 339-40 (5th Cir. 2006); *U.S. v. Salahuddin*, 509 F.3d 858, 863-64 (7th Cir. 2007); *U.S. v. Wilks*, 464 F.3d 1240, 1242-43 (11th Cir. 2006).

[28] *U.S. v. Hoffman*, 710 F.3d 1228, 1232 (11th Cir. 2013).

[29] *Id*. (quoting *Wilks*, 464 F.3d at 1243). *Cf. Salahuddin*, 509 F.3d at 864 ("[T]he Eighth Amendment does not prohibit using a conviction based on juvenile conduct to increase a sentence under the armed career criminal provisions.").

[30] *Nichols v. U.S.*, 511 U.S. 738, 747 (1994) (citations omitted). *See also U.S. v. Rodriguez*, 553 U.S. 377, 386 (2008) ("When a defendant is given a higher sentence under a recidivism statute […] 100% of the punishment is for the offense of conviction.

schemes, the enhanced punishment for a current offense is not an additional penalty for earlier crimes but a stiffened penalty for the latest crime, which is considered an aggravated offense because it is repetitive.[31] As such, federal circuits have expressly held that neither *Roper*, *Graham*, nor *Miller* presents any barrier to enhanced sentencing for adult offenses committed by repeat offenders, even when they committed predicate offenses as a juvenile,[32] and even when their latest offense resulted in a mandatory life sentence.[33] As the Tenth Circuit explained, "[u]nlike defendants who receive severe penalties for juvenile offenses and are thus denied a chance to demonstrate growth and maturity, […] recidivists have been given an opportunity to demonstrate rehabilitation, but have elected to continue a course of illegal conduct."[34] Thus, Vickers' reliance on *Roper*, *Graham*, and

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None is for the prior convictions or the defendant's status as a recidivist.") (quotation omitted).

[31] *Riggs v. California*, 119 S.Ct 890, 891 (1999). *See also Urbigkit v. State*, 67 P.3d 1207, 1227 (Wyo. 2003) ("A habitual criminal statute does not punish a defendant for his previous offenses but for his persistence in crime.") (citations omitted).

[32] *U.S. v. Hunter*, 735 F.3d 172 (4th Cir. 2013); *Edwards*, 734 F.3d at 852-53.

[33] *Hoffman*, 710 F.3d at 1232-33.

[34] *U.S. v. Orona*, 724 F.3d 1297, 1308 (10th Cir. 2013). *See also U.S. v. Rich*, 708 F.3d 1135, 1141 (10th Cir. 2013) ("Regardless of the inability of minors to fully understand the consequences of their actions, adults facing enhanced sentences based, only in part, on acts committed as juveniles have had the opportunity to better understand those consequences but have chosen instead to continue to offend."); *U.S. v. Banks*, 679 F.3d 505, 508 (6th Cir. 2012) (distinguishing *Graham* in relation to a 33-year-old offender

Miller is misplaced, the Superior Court could consider his juvenile felony conviction for purposes of sentencing him as an adult habitual offender, and his appeal is utterly without merit.

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who "remained fully culpable as an adult for his violation and fully capable of appreciating that his earlier criminal history could enhance his punishment."); *Scott*, 610 F.3d at 1018 (reasoning that the defendant was 25-years old at the time he committed his instant offense and *Graham* "did not call into question the constitutionality of using prior convictions, juvenile or otherwise, to enhance the sentence of a convicted adult.").

CONCLUSION

Based on the authorities cited and the reasons stated herein, the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF SERVICE

I, Scott D. Goodwin, Esquire, do hereby certify that on February 16, 2015, I have caused a copy of the State's Answering Brief to be electronically served, by Lexis-Nexis File & Serve, upon the following:

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