

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs December 4, 2013

**FLOYD LEE PERRY, JR. v. STATE OF TENNESSEE**

**Direct Appeal from the Circuit Court for Obion County**  
**No. 8-438 (2-130) William B. Acree, Jr., Judge**

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**No. W2013-00901-CCA-R3-PC - Filed April 7, 2014**

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The petitioner, Floyd Lee Perry, Jr., appeals the dismissal of his motion to re-open his original petition for post-conviction relief. The petitioner is currently serving a sentence of life with the possibility of parole for a murder he committed as a juvenile. On appeal, he claims that he is entitled to relief pursuant to the new precedent established in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which held that it violated the Eighth Amendment prohibition against cruel and inhuman punishment to sentence a juvenile to life imprisonment without the possibility of parole without individual consideration of mitigating circumstances. Following review of the applicable law and the record before us, we conclude that the motion was properly denied and affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the Court, in which THOMAS T. WOODALL and JEFFREY S. BIVINS, JJ., joined.

John M. Miles, Union City, Tennessee, for the appellant, Floyd Lee Perry, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Thomas A. Thomas, District Attorney General; and Jim Cannon, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Procedural History**

In 1998, when the petitioner was seventeen years old, he shot and killed Christopher Yates in a robbery, the facts of which are detailed in *State v. Floyd Lee Perry, Jr.*, No. W1999-01715-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 836, \*\*2-16 (Tenn. Crim. App. Oct. 23, 2000). Because of his age, the petitioner was originally brought before the juvenile court, but he was thereafter transferred to the Obion County Circuit Court to be tried as an adult. During the October 1998 term, an Obion County grand jury indicted the petitioner for first degree premeditated murder, first degree felony murder in the perpetration of a robbery, and especially aggravated robbery. The State filed notice of intent to seek the enhanced punishment of life imprisonment without the possibility of parole based upon the existence of an aggravated circumstance under Tennessee Code Annotated section 39-13-204(i)(7) which states that:

The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

The petitioner was tried by a jury in the Obion County Circuit Court. From the record, it appears that the State withdrew its request for an enhanced sentence because the jury was instructed that the State was not seeking such and that the sentence would automatically be life imprisonment if the petitioner was convicted. After hearing all the evidence, the jury returned convictions for second degree murder, first degree felony murder, and especially aggravated robbery. Following the merger of the two murder convictions, the trial court sentenced the petitioner to life imprisonment with the possibility of parole for the felony murder conviction. The court also imposed a concurrent twenty-three year sentence for the especially aggravated robbery conviction. Following the denial of his motion for new trial, the petitioner filed notice of appeal with this court, challenging the sufficiency of the evidence and admission of autopsy photographs. *Id.* at \*2. This court affirmed the trial court, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal.

Although it is not included within the record before us, it is clear at some point that the petitioner filed a pro se petition for post-conviction relief. After counsel was appointed, an amended petition, styled as an "amended answer," was filed with the court raising various issues. A hearing was held on the matter on April 16, 2002, after which the post-conviction court issued an order dismissing the petition for lack of merit. The petitioner appealed that dismissal to this court, but the decision was affirmed. *Floyd Lee Perry, Jr. v. State*, No. W2002-02303-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 40, \*1 (Tenn. Crim. App. Jan.

21, 2004). Our supreme court denied permission to appeal on May 24, 2004.

Almost eight years later, on August 7, 2012, the petitioner filed a pro se motion to reopen his post-conviction petition in which he argued that his original petition should be reopened pursuant to Tennessee Code Annotated section 40-30-117(a)(1). To support his argument for re-opening, he relied upon the United States Supreme Court case of *Miller v. Alabama*. The post-conviction court determined that a colorable claim had been presented, and counsel was appointed to represent the petitioner. Following the filing of an amended motion for relief, a hearing was held before the post-conviction court. However, no evidence was presented, as the case was submitted on a principle of law. After hearing arguments, the post-conviction court took the matter under advisement. The court subsequently entered a written order denying relief. The petitioner thereafter filed notice of appeal.

### **Analysis**

On appeal, the petitioner contends that the post-conviction court erred in denying his motion to reopen his petition for post-conviction relief. The Post-Conviction Procedure Act sets forth narrow circumstances in which a petition for post-conviction relief may be reopened. The statute provides that a petitioner may only file a petition to reopen if:

- (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
- (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
- (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid[.]

T.C.A. § 40-30-117(a)(1)-(3) (2010).

In this case, the petitioner contends that he is entitled to relief because a new rule of constitutional law was set forth in *Miller v. Alabama* and that the rule is entitled to

retroactive application. He contends that the only sentence available for him to receive in this case was life in prison, a sentence which results in the petitioner spending fifty-one years in incarceration before the possibility of parole. He contends that *Miller* is applicable to his case, even though he did not receive a sentence of life without parole, because the mandatory sentence was imposed without consideration of “the mitigation qualities of youth,” the petitioner’s low IQ, other mental dysfunctions, and his use of alcohol and drugs. The petitioner contends that the question before us is “does the mandatory aspect of life, albeit with the possibility of parole after 51 years, as it applied to [the petitioner], remain constitutional under our 8th amendment prohibition against cruel and unusual punishment, particularly when there is no consideration given to the ‘mitigating qualities of youth’ as is now required after *Miller v. Alabama*?”

The petitioner points the court to multiple cases which have addressed the issue of sentencing law for juvenile offenders. In the first case, *Roper v. Simmons*, 543 U.S. 551, 575 (2005), the United States Supreme Court held that the death penalty for juvenile offenders was an unconstitutional deprivation of their rights under the Eighth Amendment of the United State Constitution. In addition to other considerations, the Court recognized the greater capacity for rehabilitation in juvenile offenders, the lack of the ability for juveniles to appreciate the consequences of their conduct, and that juveniles are more susceptible to peer pressure. *Id.* at 569.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that a life without parole sentence for non-homicide crimes was unconstitutional when applied to minors. 560 U.S. at 82. The Court noted that the “State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.” *Id.* The Court recognized that sentencing schemes have to take into consideration the differences between the mental development of a juvenile and that of an adult. *Id.* at 68.

The last case which the petitioner directs us to is *Miller v. Alabama*, the case relied upon by the petitioner in this case to support his argument. In *Miller*, the Court held that mandatory sentencing schemes which resulted in juveniles being sentenced to life without parole with no individualized considerations violated the Eighth Amendment prohibition against cruel and unusual punishment. 132 S. Ct. at 2475. The Court noted that such sentencing schemes “preclude[] consideration of [a defendant’s] chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Id.* at 2468. The Court stated that “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.* at 2475.

As noted above, the petitioner is attempting to parlay his sentence of life with the possibility of parole after fifty-one years into a comparable sentence to the one in *Miller*, and he asks that it be declared unconstitutional under the same theory as the *Miller* sentence. Essentially, he is attempting to equate his sentence to a sentence of life without parole based upon the lengthy required service before he is eligible for parole. In denying relief on the issue, the post-conviction court noted that it likewise considered there to be little difference between a sentence of life without parole and the one imposed upon the petitioner. However, despite agreeing with the petitioner's analysis of *Miller*, *i.e.*, that the logical extension of the case was that a mandatory life sentence of fifty-one years for a homicide committed by a juvenile violates the Eighth Amendment, the court denied the motion because it had no authority to grant relief in the absence of clearly established precedent.

Before we may reach the issue raised by the petitioner, we must first address a procedural error in bringing this appeal before this court. Following the denial of the motion, notice of appeal was filed with this court. However, a petitioner has no appeal as of right from a lower court's denial of his motion to reopen a post-conviction petition. *See* Tenn. R. App. P. 3(b); *Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007 Tenn. Crim. App. LEXIS 853, \*25 (Tenn. Crim. App. Nov. 7, 2007), perm. app. denied (Tenn. Apr. 14, 2008). Rather, the statute governing motions to reopen post-conviction petitions provides that if a motion to reopen is denied by the lower court, the petitioner shall have thirty days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion. T.C.A. § 40-30-117(c); see also Tenn. Sup. Ct. R. 28, § 10(B); *Graham v. State*, 90 S.W.3d 687, 689 (Tenn. 2002) ("Accordingly, Tennessee Code Annotated section 40-30-217(c) outlines four requirements for an appeal from a motion to reopen to be considered: (1) the timeliness of filing, (2) the place of filing, (3) the application to be filed, and (4) the attachments to the application."). Thus, since the petitioner failed to perfect his appeal according to the statutorily mandated procedure, this court is without jurisdiction to address the motion to reopen. *See Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007 Tenn. Crim. App. LEXIS 853, 2007 WL 3286681, at \*9 (Tenn. Crim. App. at Jackson, Nov. 7, 2007).

A petitioner must comply with the statutory requirements contained in Tennessee Code Annotated section 40-30-117(c). *Timothy Roberson*, 2007 Tenn. Crim. App. LEXIS, at \*9 (citations omitted). The failure of a petitioner to comply with statutory requirements governing review of a denial of a motion to reopen deprives this court of jurisdiction to entertain such matter. *Id.* Finally, neither the Post-Conviction Procedure Act nor the Rules of the Supreme Court permit this court to suspend the statutory requirements. *Id.* Thus, this court is technically without jurisdiction to entertain the matter.

However, our supreme court has determined that a notice of appeal may be construed as an application for permission to appeal if it “contain[s] sufficient substance that it may be effectively treated as an application for permission to appeal.” *Graham*, 90 S.W.3d at 691. The court has noted that “[i]n general, the contents of an application for appeal must include the date and judgment from which the petitioner seeks review, the issue which the petitioner seeks to raise, and the reasons why the appellate court should grant review.” *Id.* This court may not grant discretionary review “unless it appears that the trial court abused its discretion in denying the motion.” T.C.A. § 40-30-117(a).

In this case, the notice of appeal document, which was timely filed in the proper court, states as follows:

COMES NOW the defendant, Floyd Lee Perry, by and through counsel, and pursuant to Rule 3(b) and 4 of the Tennessee Rules of Appellate Procedure, and gives notice that he hereby appeals to the Court of Criminal Appeals the final judgment entered in this action on the 3rd day of April 2013.

The State contends that this may not be construed as an application for permission to appeal under the parameters of *Graham*.

The petitioner acknowledges in his reply brief that an application for appeal should have been filed in this case and should have been accompanied by all of the documents filed by both parties in the trial court, as well as a copy of the order denying the motion. It is further acknowledged that the notice of appeal document is technically deficient as an application for permission to appeal. We must agree, as the notice fails to state the issue to be raised on appeal or the reasons why the appellate court should grant review. *See Charles W. Elsea, Jr. v. State*, No. E2012-01661-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 296, \*6 (Tenn. Crim. App. Mar. 28, 2012), *perm app. denied* (Tenn. Jul. 10, 2013) (dismissing an appeal from the denial of a motion to reopen a post-conviction petition because the notice of appeal simply stated that the petitioner, through counsel, gave “notice of his appeal to the Court of Criminal Appeals of the adverse judgment of the trial court denying his post-conviction petition entered on July 19, 2012.”).

Moreover, as pointed out by the State, even if we were to construe the notice of appeal as sufficient to provide this court with an opportunity to consider discretionary review under Tennessee Code Annotated section 40-30-117(c), review would be precluded because the petitioner cannot show that the trial court abused its discretion when it denied the motion to reopen the petition for post-conviction relief. As noted, the petitioner sought to reopen his petition under Tennessee Code Annotated section 40-30-117(a)(1), arguing that the decision in *Miller* qualified as “ a final ruling of an appellate court establishing a constitutional right

that was not recognized as existing at the time of trial, if retrospective application is required.”<sup>1</sup> However, like the post-conviction court concluded, *Miller* stands for the proposition that a sentence of life imprisonment without the possibility of parole may not be mandatorily imposed upon a defendant who was a juvenile at the time of the crime without individual consideration of the mitigating circumstances. That did not occur in this case. The defendant received a sentence of life with the possibility of parole, albeit with consideration coming after fifty-one years. While the next logical step may be to extend protection to these types of sentences, that is not the precedent which now exists. We are not compelled to grant the petitioner’s request to expand the meaning of the *Miller* holding. As such, there was no abuse of discretion in the denial of the petition to reopen.

### CONCLUSION

Based upon the foregoing, the denial of the petition to reopen the petition for post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE

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<sup>1</sup>Some courts have addressed the retroactivity issue, and a split exists as to the conclusions. *Craig v. Cain*, No. 12-30035, 2013 U.S. App. LEXIS 431 (5th. Cir. Jan. 4, 2013) (“*Miller* does not satisfy the test for retroactivity.”); *Commonweath v. Cunningham*, No. 38 EAP 2012, 2013 Pa. LEXIS 2546 (Pa. 2013) (*Miller* does not apply retroactively.); *but see Harold Evans-Garcia v. United States*, No. 13-1661, 13-1662, 2014 US App. LEXIS 3855 (1st Cir. Feb. 28, 2014) (*Miller* applies retroactively);