

STATE OF MICHIGAN
THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,
PLAINTIFF,

v.

HON. QIANA D. LILLARD
Case No. 76-005890-01-FC

CHARLES LEWIS,

DEFENDANT.

ORDER AND OPINION DENYING DEFENDANT'S MOTION TO DISMISS
AND MOTION TO SENTENCE TO A TERM OF YEARS

This matter is before the Court on Defendant's motion to dismiss and motion to sentence to a term of years. The primary questions presented by these motions are whether the loss of Defendant's court file requires the dismissal of Defendant's case or whether the loss of the court file precludes a sentence of life imprisonment without the possibility of parole under MCL 769.25a. The Court answers both questions in the negative and, accordingly, DENIES Defendants motions.

I. BACKGROUND

Defendant's motions arise out of his sentence to life imprisonment without the possibility of parole for an offense committed before his 18th birthday. On July 18, 1977, following a jury trial in the Detroit Recorder's Court, the Defendant was convicted of first degree murder for the fatal shooting of an off-duty police officer in Detroit. The Defendant, who was 17 years old at the time of the murder, was sentenced to mandatory life imprisonment without the possibility of parole on July 27, 1977. The Michigan Court of Appeals affirmed Defendant's conviction and sentence, and the Michigan Supreme Court denied Defendant's application for leave to appeal.

Defendant has filed many post-conviction motions since his sentence in 1977. Pertinent here is Defendant's motion to remand to the Third Circuit Court for an entry of sentence that complies with *Miller v. Alabama*, 132 S. Ct 2455 (2012), a Supreme Court decision that held the Eighth Amendment forbids mandatory life imprisonment without the possibility of parole for juvenile homicide offenders. On October 17, 2012, Judge Edward Ewell, Jr., this Court's predecessor, found the holding of *Miller* applied retroactively and granted Defendant's motion. The People appealed Judge Ewell's decision, and, on August 29, 2013, the Court of Appeals reversed in a peremptory order. The Defendant applied for leave to appeal in the Michigan Supreme Court, and the Supreme Court denied the application on December 30, 2014.

Defendant later filed a petition for a writ of certiorari in the United States Supreme Court. On March 7, 2016, the United States Supreme Court granted the petition for writ of certiorari and remanded Defendant's case to the Michigan Supreme Court for consideration in light of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), its decision which held the holding of *Miller* must be applied retroactively to all juvenile offenders whose convictions and sentences were final when *Miller* was decided. In response to the Supreme Court's order, the Michigan Supreme Court vacated Defendant's sentence for first degree murder and remanded his case to this Court for resentencing in accordance with MCL 769.25 and MCL 769.25a.

MCL 769.25a provides that if the Michigan Supreme Court or the United States Supreme Court were to hold the decision of *Miller* applies retroactively to all defendants, the prosecuting attorney would have 180 days after that decision became final to file a motion for resentencing in any case in which the prosecutor would be requesting a sentence of life imprisonment without the possibility of parole. If the prosecuting attorney were to file the motion for resentencing, the trial court would then be obligated to hold a hearing on the motion and consider the factors listed

in *Miller*. MCL 769.25(6). If the prosecuting attorney did not file the motion for resentencing, the court would be obligated to sentence the defendant "to a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25a(4)(c).

The People have filed a motion to resentence the Defendant to life imprisonment without the possibility of parole under MCL 769.25a; however, a complication has arisen with Defendant's case: most of Defendant's trial court file was lost sometime after Judge Ewell granted Defendant's motion for resentencing. The matter of Defendant's missing court file came to this Court's attention well before the People filed their motion to resentence. On March 2, 2016, the Defendant, by and through his former attorney Felicia O'Connor, filed a motion before this Court entitled, "Motion to Compel Wayne County to Produce Case File." In this motion, Ms. O'Connor stated that an attorney from her law firm had reviewed Defendant's file at a Wayne County facility early in 2013. She stated, however, that when attorneys from her firm later requested the file, representatives from the Wayne County Clerk's office told them the file could not be found. On March 17, 2016, this Court granted the motion to compel, and, on April 21, 2016, heard testimony from David Baxter, a supervisor at the Wayne County Clerk's branch office at the Frank Murphy Hall of Justice.

Mr. Baxter testified that the Wayne County Clerk's Office had been searching for Defendant's court file for almost two years but could not find the file. He stated the County Clerk's records indicated the last person to have possession of the file was Joanne Gaskin, Judge Ewell's administrative assistant. Several weeks later, this Court heard testimony from Ms. Gaskin, who stated she had returned Defendant's file to the Wayne County Clerk's Office in June of 2013.

After discussing the matter of the missing file with the Presiding Judge of the Third Circuit Court's Criminal Division, it was this Court's understanding that representatives from the court administration of the Third Circuit Court would conduct an independent search of the Vigliotti Building, the building where the Wayne County Clerk's Office maintains older files such as the Defendant's. However, due to security restrictions at that facility, that search was never conducted. Meanwhile, on September 28, 2016, the Defendant filed a pro se motion to dismiss, arguing the loss of his court file entitled him to have his case dismissed. At a hearing on October 11, 2016, this Court decided it would not rule on Defendant's motion until it had heard further testimony about what efforts had been made to locate Defendant's file. On October 21, 2016, the Defendant's attorney, Valerie Newman, filed a motion entitled "Motion to Sentence Charles Lewis to a Term of Years." In this motion, Ms. Newman asked the Court to dismiss the People's motion to sentence the Defendant to life imprisonment without the possibility of parole and sentence the Defendant to a term of years under MCL 769.25a because the file was missing.

On October 28, 2016, this Court heard additional testimony concerning the missing file from David Baxter and another supervisor at the Wayne County Clerk's Office, Lisa Peterson. Mr. Baxter stated that after he testified on April 21, 2016, personnel from the Wayne County Clerk's Office diligently searched the Vigliotti Building but were unable to locate Defendant's court file. He stated that a special search for the file was conducted by 5 employees of the Wayne County Clerk's Office on October 22, 2016, but, again, the file could not be found. Lisa Peterson testified that she was one of the 5 employees from the Clerk's Office who searched the Vigliotti Building on October 22, 2016. She, too, testified that the Defendant's file could not be found. According to the Clerk's Office's representatives' testimony, efforts to locate the file are ongoing.

II. DISCUSSION

After hearing the testimony of Mr. Baxter and Ms. Peterson on October 28th, the Court concludes there is little chance the missing portions of Defendant's trial court file will ever be found. Nevertheless, having reviewed Defendant's motions, the Court is unconvinced the loss of Defendant's file requires the dismissal of his case or that the loss of the court file mandates a term of years' sentence. Defendant has cited various cases in support of his arguments, particularly *Chessman v. Teets*, 354 U.S. 156 (1957), *People v. Adkins*, 436 Mich. 878 (1990), and *People v. Abdella*, 200 Mich. App. 473 (1993). The Court is unpersuaded by the case law cited by Defendant because those cases involve situations where records were missing or the accuracy of transcripts were called into question on direct appeal or collateral attack of a defendant's conviction or sentence. Here, on the other hand, the Defendant's sentence has already been vacated, and, in complying with the Michigan Supreme Court's order to resentence, this Court would not be reevaluating the validity of Defendant's conviction. Instead, to comply with the order, this Court would be required to hold a hearing on the People's motion and consider the factors listed in *Miller*. These factors include the nature of the crime, the Defendant's age at the time of the offense, and certain age related characteristics. *Miller*, 132 S. Ct. at 2475. The Court sees no reason why the loss of Defendant's court file precludes it from considering these factors, primarily for three reasons.

First, in considering the factors listed in *Miller*, the Court is not restricted to the contents of Defendant's court file. At the hearing on the People's motion, this Court may consider testimony from witnesses, the Defendant's record while incarcerated, and any other evidence relevant to the People's motion. Second, other than transcripts, a court file generally does not contain much information that would be relevant to the *Miller* factors, and, even if the missing

portions of Defendant's court file did contain relevant information, that information could likely be obtained from other sources. *Miller*, for example, directs courts to consider a defendant's age at the time of the offense. Certainly, the Court could ascertain the Defendant's age on the date of the offense from information other than what is in the missing portions of Defendant's court file.

Miller also directs courts to consider certain age related characteristics such as immaturity, impetuosity, the failure to appreciate risks and consequences, and the defendant's family history and home environment. The Court can think of no document ordinarily kept in a court file that would address these age related characteristics. Although a defendant's family history and home environment might be addressed in a pre-sentence investigation report, pre-sentence investigation reports are not kept in a defendant's court file. Even if the missing portions of Defendant's court file did contain information about his age related characteristics, that information could likely be obtained from other sources. The Court, for example, could hear testimony from Defendant's family about his family history and home environment.

Finally, and perhaps most importantly, the Court finds the loss of Defendant's court file does not preclude it from considering the *Miller* factors because many, if not all, of the documents in the missing file can be replaced by duplicates, which can be obtained from various sources. The People, for instance, have stated in their response that they have copies of Defendant's trial transcripts. The Defendant's attorney has also acknowledged that she has obtained documents from the Defendant's previous attorney. Some of these documents might be duplicates of the missing records. It also came to this Court's attention on November 9, 2016, that the Clerk's Office has obtained copies of various documents from the Attorney General's Office, including a copy of Defendant's trial transcript. Additionally, Defendant's case has been before other courts such as the Michigan Court of Appeals, the Michigan Supreme Court, the

United States District Court for the Eastern District of Michigan, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. Duplicates of the documents missing documents might be obtained from records maintained at these courts.

As a court of record, this Court has the inherent authority to restore the lost records from Defendant's file, *Newton v. Newton*, 166 Mich. 421, 426 (1911), and the Court will now exercise that authority. The People and the State Appellate Defenders Office are hereby ordered to meet with representatives of the Wayne County Clerk's Office to arrange for the restoration of Defendant's court file from copies of the various documents in their possession. The parties will have a designated area in the Frank Murphy Hall of Justice at their disposal for this endeavor and the file must be restored by January 6, 2016. If either party believes Defendant's court file cannot be sufficiently restored, they will have until January 13, 2016, to bring that belief to the Court's attention.

III. CONCLUSION

For the reasons set forth above, the Court DENIES Defendant's motions to dismiss and sentence to a term of years.



QIANA D. LILLARD
THIRD CIRCUIT COURT

Dated: November 11, 2016