Resentencing on Eighth Amendment Grounds

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Some inmates are serving long sentences for older crimes that would receive a much shorter sentence under today's law. It is clear at this point that they cannot have today's law applied to them retroactively, as Jessie discussed in this prior post. That's true for inmates who received longer sentences under Fair Sentencing, State v. Whitehead, 365 N.C. 444 (2012), or earlier versions of Structured Sentencing, State v. Lee__ N.C. App. __, 745 S.E.2d 73 (2013). And it is so because the legislature has always made changes to the sentencing law apply prospectively.

That's all well and good as a matter of legislative intent, but do those inmates have a constitutional argument that their sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment? After all, the amendment is informed by the "evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97 (1976). Does a downward change in the way the legislature punishes an offense demonstrate an evolved standard? Two recent cases conclude it does not.

In State v. Stubbs, __ N.C. App. __, 754 S.E.2d 174 (2014), the defendant received a life sentence for a second-degree burglary committed in 1973. He filed an MAR arguing that after almost forty years in prison, he had already served "nearly ten times the length of time that any defendant could be ordered to serve today." (The maximum possible sentence today for second-degree burglary, a Class G felony, is 47 months.) The trial judge agreed, granted the motion, and resentenced the defendant to 30 years, which made him due for immediate release. The State filed a petition for a writ of certiorari with the court of appeals.

A divided court of appeals reversed, concluding that the trial judge applied the wrong test to determine whether the sentence violated the Eighth Amendment. A prison sentence does not become cruel and unusual by virtue of ordinary disproportionality. Rather, it must be *grossly disproportionate*. Harmelin v. Michigan, 501 U.S. 957 (1991) (Kennedy, J., concurring). After a quick review of the leading cases—*Hamerlin*, 501 U.S. at 961 (upholding a life sentence for possession of 650 grams of cocaine; Ewing v. California (upholding a sentence of 25 years to life for felony grand theft under California's three strikes law)—the court concluded that Stubbs' sentence did not meet that high standard.

The court also rejected the Mr. Stubbs' argument that the Supreme Court's more recent guidance in Graham v. Florida, 560 U.S. 48 (2010) (discussed here), dictated a different result. In *Graham* the Court barred sentences of life without parole for non-homicide offenses committed by defendants under 18 at the time of their offense. Mr. Stubbs was 17 years old at the time of his burglary, but he was not sentenced to life without parole. Rather, as a life-sentenced inmate from 1973 he was eligible for parole after 10 years. In fact, he *was* paroled in 2008. But his parole was revoked and he was returned to prison after a DWI conviction in 2010. With that in mind, the court of appeals determined that Stubbs *did* have a "meaningful opportunity to obtain release," and that his sentence was therefore not unconstitutional under *Graham*.

The second case is State v. Wilkerson, __ N.C. App. __, 753 S.E.2d 829 (2014). In *Wilkerson* the defendant was originally sentenced in 1991 to a total of 50 years on 10 felonies (one second-degree burglary and several larceny, breaking or entering, and stolen property crimes). He was 16 at the time of the crimes and had no criminal record. Mr. Wilkerson filed an MAR in 2012 arguing that his 50-year sentence was grossly disproportionate to the sentence a first-time offender could receive for the same crimes today. (By my estimation the maximum possible consecutive sentence

for the same crimes today would be around 17 years.) The trial court granted the motion and resentenced Mr. Wilkerson to 21 years, which was the time he had already served. As in *Stubbs* the state petitioned the court of appeals for a writ of certiorari.

And as in *Stubbs* the court of appeals reversed. The appellate court held that the trial court erred by first comparing the sentence the defendant received with the sentence a person would receive for the same crimes committed today. The proper first step in the analysis, the court said, is to weigh the gravity of the offense and the severity of the sentence—and that step must be completed "without taking subsequent sentencing amendments into account." Only when that threshold test gives rise to an inference of gross disproportionality should you continue to the step of comparing the defendant's sentence with the sentences of other offenders. *Harmelin*, 501 U.S. at 1005. The court concluded that under the proper analytical framework the trial court never would have made it past step one in Wilkerson's case. Yes, the defendant was young and his crimes were nonviolent. But there were still 10 felony convictions, one of which (the burglary) was "particularly serious." With that in mind the court of appeals found "no basis for concluding that this is one of the 'exceedingly rare noncapital cases' in which the sentence imposed is 'grossly disproportionate' to the crimes."

Stubbs and *Wilkerson* reaffirm something we already knew: it's hard to succeed on an Eighth Amendment claim. Recent Supreme Court cases like *Graham* and *Miller v. Alabama* (discussed here) may have broadened our understanding of "cruel and unusual," but they don't appear to have started a full-blown Eighth Amendment revolution. Occasionally our appellate courts have said things like "as long as the judge sentences within the limits established by the legislature, the Eighth Amendment is not offended." State v. Streeter, 146 N.C. App. 594 (2001). That probably goes a little too far (at some extreme, the Constitutional obviously trumps the General Statutes), but it's still true to say that a sentence will be found to violate the Eighth Amendment "only in exceedingly unusual non-capital cases." State v. Ysaguire, 309 N.C. 780 (1983).

Finally, these cases also raised—and perhaps resolved—an important procedural question about the court of appeals' jurisdiction to issue a writ of certiorari related to a trial court order *granting* a motion for appropriate relief. Rule 21 of the Rules of Appellate Procedure mentions only orders *denying* MARs, and a prior case, State v. Starkey, 177 N.C. App. 264 (2006) (discussed here by Jeff) appeared to limit the state's ability to obtain review. Obviously both the *Wilkerson* and *Stubbs* courts saw things differently, as they issued the writ and reversed the new sentences. *Wilkerson* expressly distinguished *Starkey*. 753 S.E.2d at 833 ("As a result, however, of the fact that *Starkey* conflicts with several decisions of the Supreme Court that authorize review of trial court decisions granting motions for appropriate relief filed by a defendant, our decision in *Starkey* does not stand as an obstacle to the allowance of the State's *certiorari* petition."). This post is far too long so I'll leave it at that for now, but it's a topic worth revisiting soon.