

RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000100-MR

CHARLES MICHAEL KIRKLAND

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NOS. 98-CR-00190 AND 98-CR-00190-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Charles Michael Kirkland appeals from an order of the Fayette Circuit Court denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and Rules of Civil Procedure (CR) 60.02. For the reasons stated below, we affirm.

The pertinent facts of this case were stated by the Kentucky Supreme Court in *Kirkland v. Commonwealth*, 53 S.W.3d 71 (Ky. 2001), wherein

Kirkland's conviction was affirmed on direct appeal. Having reviewed the record, we adopt the facts as stated in *Kirkland*, 53 S.W.3d at 73-74, as follows:

Kirkland [who was then a juvenile] and McKee entered a Lexington liquor store intending to rob the owner. Both defendants knew the owner kept a pistol behind the counter. McKee, unarmed, entered first, while Kirkland, armed with a 9 millimeter handgun, followed. The store surveillance camera showed that as McKee ran around the counter presumably to obtain money from the cash register, Kirkland fired a shot which passed through the cash register and struck the owner. Both Kirkland and McKee fled the store without taking any money. The owner died from his wounds. After being questioned by police, McKee confessed and Kirkland made various inconsistent statements to the police.

At trial, Kirkland testified in his own defense and admitted he was the shooter, but claimed that the shooting was accidental. He admitted that he had previously told others that the victim was shot when he went for his gun. He also testified that McKee had hollered "gun" right before the fatal shot was fired. McKee did not testify. A jury determined that both Kirkland and McKee were guilty of murder and robbery in the first degree and sentenced Kirkland to life without parole for 25 years on the murder charge, and a concurrent sentence of 25 years on the robbery charge and sentenced McKee to 25 years on the murder charge and 20 years on the robbery charge to run consecutively.

On February 17, 2006, Kirkland filed a motion pursuant to CR 60.02 and RCr 11.42 requesting a new sentencing hearing based on the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In *Roper*, the Court concluded that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper*, 543 U.S. at 578, 125

S.Ct. at 1200. Because he was a juvenile at the time of his crimes, Kirkland contended that *Roper* required that he be granted a new sentencing hearing. On December 22, 2006, the trial court denied Kirkland's motion for post-conviction relief. This appeal followed.

On appeal, Kirkland contends the following: (1) the trial court failed to understand that his sentence was predicated on the false premise, now eviscerated by *Roper*, that he was culpable as an adult; (2) the trial court erred by not granting relief because equity demands the modification of his sentence; and (3) he is entitled to a new sentencing hearing because the facts and law upon which his RCr 11.42 motion was based were unknown before the Supreme Court decided *Roper*.

With respect to Kirkland's contention that the trial court failed to understand the import of *Roper* to the continued validity of his sentence, this Court has previously held that defendants who were juveniles at the time they committed their crimes, and were subsequently sentenced to life without the possibility of parole for twenty-five years, are not entitled to new sentencing hearings pursuant to *Roper*. *Sims v. Commonwealth*, 233 S.W.3d 731, 732-33 (Ky.App. 2007). Additionally, addressing his second contention, we fail to find a legitimate equitable basis to grant Kirkland a new sentencing hearing. Accordingly, Kirkland's first two contentions are meritless.

Finally, Kirkland contends that he is entitled to a new sentencing hearing because the law upon which his RCr 11.42 motion was based was

unknown before the U.S. Supreme Court decided *Roper*. Despite this contention, this Court previously addressed this exact contention in our *Sims* decision by holding that such a claim was barred due to timeliness pursuant to RCr 11.42(10).¹ *Sims*, 233 S.W.3d at 733. As stated in *Sims*, *Roper* does not have an indefinite retro-application to life sentences as it does for juvenile death penalty sentences. *Id.* Therefore, Kirkland’s RCr 11.42 motion was untimely and does not merit relief.

For the foregoing reasons, the Fayette Circuit Court’s order is affirmed.

ALL CONCUR.

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¹ RCr 11.42(10), in pertinent part, provides that “[a]ny motion under this rule shall be filed within three years after the judgment becomes final.”