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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001281-MR

WILLIAM DALE CLARKE

APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT
v. HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 97-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

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BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: On May 8, 1997, a Hopkins County grand jury indicted William Dale Clarke on one count each of first-degree burglary and first-degree arson, and three counts of wanton murder. The charges arose from a fire set by Clarke and a

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

co-defendant on April 1, 2007, which resulted in three deaths. Clarke was seventeen years old at the time of the offense.

On June 13, 1997, the Commonwealth gave notice that it intended to seek the death penalty against Clarke. Thereafter, on April 24, 1998, Clarke accepted the Commonwealth's offer on a plea of guilty. In exchange for his guilty plea to the charges, the Commonwealth recommended sentences of twenty years' imprisonment for the burglary and arson counts, and life imprisonment without parole for twenty-five years on the murder counts, to run concurrently for a total of life imprisonment without the possibility of parole for twenty-five years.

Prior to his final sentencing, Clarke moved to withdraw his guilty plea, but the trial court denied the motion and imposed the recommended sentence. Clarke appealed from the trial court's order denying his motion to withdraw the guilty plea. However, this Court dismissed his appeal as untimely. *Clarke v. Commonwealth*, 1998-CA-002219-MR (Ky. App. Dec. 2, 1998).

Thereafter, on August 14, 2000, Clarke filed a motion to set aside his conviction pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. In that motion, Clarke asserted that his guilty plea was not knowing and voluntary, and that he received ineffective assistance from his trial counsel. The trial court denied the motion on January 11, 2001. Clarke did not appeal from that order.

On February 20, 2006, Clarke filed this current motion requesting a new sentencing hearing pursuant to Kentucky Rules of Civil Procedure (CR)

60.02(e) and (f). The trial court denied the motion, concluding that Clarke was not entitled to the requested relief. This appeal followed.

Clarke does not seek to set aside his guilty plea. Rather, he contends that he is entitled to a new sentencing hearing in light of the recent decision by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In *Roper*, the Supreme Court declared it unconstitutional under the Eighth Amendment for a state to execute any individual who was under the age of eighteen at the time of the offense. In justifying the prohibition of the death penalty on those less than eighteen years of age, the Court pointed to a juvenile's lack of maturity, underdeveloped senses of responsibility and judgment, and susceptibility to peer pressure and negative influences. *Id.* at 569-72, 125 S. Ct. at 1195-96. Based on these considerations, the Court concluded that juveniles lack the culpability necessary to be subject to the death penalty. The Court in *Roper* specifically overruled its prior decision in *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989), which held that individuals who commit crimes after their sixteenth birthday constitutionally may be subject to the imposition of the death penalty. In light of *Roper*, Clarke argues that he is entitled to a new sentencing hearing at which his age and immaturity can be given proper consideration.

This Court has consistently rejected this argument in three recent and published cases: *McStoots v. Commonwealth*, 245 S.W.3d 790 (Ky. App. 2007); *Gussler v. Commonwealth*, 236 S.W.3d 22 (Ky. App. 2007); and *Sims v.*

Commonwealth, 233 S.W.3d 731, 733 (Ky. App. 2007).² Clarke argues that these opinions were incorrectly decided and should be overruled. We find no basis to revisit the holdings in these cases.

The holding in *Roper* was specifically limited to death sentences, not to all sentencing of juveniles in capital cases. While *Roper* clearly applies to all cases in which the death penalty was imposed on an individual who was under the age of eighteen at the time he committed the offense, the rule does not apply retroactively to cases in which a juvenile was charged with a capital offense, or where the death penalty was sought but not imposed. *McStoots*, 245 S.W.3d at 791. Consequently, we cannot find that Clarke is entitled to a new sentencing hearing as a matter of law.

In the alternative, Clarke argues that he is entitled to a new sentencing hearing because the trial court did not properly consider the mitigating effect of his youth and immaturity at the original sentencing hearing. However, Clarke makes no claim that his plea was not knowing, voluntary and intelligent at the time it was made. A voluntary plea made in consideration of the law as it existed at the time of its entry “does not become vulnerable because later judicial decisions indicate

² Multiple panels of this Court have reached the same conclusion in a number of unpublished opinions. See *Kirkland v. Commonwealth*, 2007-CA-000100-MR, 2008 WL 2940709 (Ky. App. Aug. 1, 2008); *Cheng v. Commonwealth*, 2006-CA-002619-MR, 2008 WL 1093886, (Ky. App. Apr. 11, 2008); *Devers v. Commonwealth*, 2006-CA-002049-MR, 2008 WL 612246, (Ky. App. Mar. 7, 2008); *Phon v. Commonwealth*, 2006-CA-002456, 2008 WL 612283 (Ky. App. Mar. 7, 2008); *McMillen v. Commonwealth*, 2006-CA-001806-MR, 2007 WL 3406851 (Ky. App. Nov. 16, 2007); and *Denton v. Commonwealth*, 2006-CA-000587-MR (Ky. App. Aug. 3, 2007).

that the plea rested on a faulty premise.” *Sims*, 233 S.W.3d at 733, quoting *Brady v. United States*, 397 U.S. 742, 757, 90 S. Ct. 1463, 1473, 25 L. Ed. 2d 747 (1970).

Likewise, Clarke does not argue that he was precluded from raising his youth as a mitigating circumstance. And even if such mitigating evidence should have been presented, Clarke had the opportunity to raise the issue in his prior RCr 11.42 motion. Since Clarke has shown no reason why the issue could not have been raised in his earlier motion, he is not entitled to raise it at this time.

Finally, Clarke does not point to any specific evidence which would support a lesser sentence in his case. In the absence of any “reason of an extraordinary nature justifying relief,” CR 60.02(e), the trial court properly denied Clarke’s motion for a new sentencing hearing.

Accordingly, the order of the Hopkins Circuit Court denying Clarke’s motion for a new sentencing hearing pursuant to CR 60.02 is affirmed.

ALL CONCUR.

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