

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001725-MR

MICHAEL M. SHEPHERD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 04-CR-01468-003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Michael M. Shepherd, *pro se*, appeals from the Fayette Circuit Court's order denying his second Kentucky Rules of Criminal Procedure (RCr) 11.42 motion. Finding no error, we affirm.

Shepherd was convicted of murder, first-degree robbery, and tampering with physical evidence following a jury trial. He was ultimately

sentenced to life without the possibility of parole for twenty-five years for the murder conviction, twenty years for the robbery conviction, and five years for the tampering conviction, in accordance with the jury's recommendation. On direct appeal, the Supreme Court of Kentucky affirmed Shepherd's convictions in a final published opinion on May 22, 2008. *Shepherd v. Commonwealth*, 251 S.W.3d 309 (Ky. 2008). The Supreme Court summarized the underlying facts as follows:

On September 15, 2004, Michael Shepherd, Robert Miller, and Patrick Cook were "hanging out" on the corner of Woodhill and Codell Drive, near the Ashford Place Apartments in Lexington, drinking and smoking marijuana. Cook and Miller, who had grown up together, shared an Ashford Place apartment with Elisha Epps, who is Cook's cousin and the mother of Miller's child. Both Shepherd and Miller were sixteen years old at this time, while Cook was seventeen. At some point during the afternoon, Miller and Shepherd agreed that they needed some money and should "hit a lick," meaning find someone to rob. Later in the evening, Miller went into his apartment and retrieved his revolver and a holster. Shepherd, who wanted to hold the gun, got a belt, put the holster on, and placed the gun in the holster. Cook, who was the only eyewitness to testify at trial, stated that Shepherd was carrying the gun when the three-some entered the English Manor apartment complex. After walking around the parking lot for awhile, the three boys saw eighteen-year-old [Megan] Liebengood unloading groceries from her car and decided to rob her. They sneaked up on Liebengood, and Shepherd ordered her to give him her money. Liebengood responded that she had no money. Miller then found Liebengood's purse in her car and took it. Next, Shepherd ordered Liebengood to give him her keys and get in the trunk of her car. After Liebengood refused, Miller grabbed her arm and struggled with her at

the edge of her trunk. Then, Shepherd hit Liebengood in the face and she fell to the ground. Cook testified that things were getting out of hand at this point so he started to walk away toward the grass. Before leaving, however, Cook saw Shepherd standing over Liebengood, pointing the gun down at her, and heard Shepherd ask if he “should shoot this bitch?” Cook stated that he then saw Shepherd shoot Liebengood. After seeing two shots, Cook ran away and headed back toward his and Miller’s apartment. Shepherd and Miller also fled the scene after the shooting.

Elisha Epps testified at trial that when Miller returned to their apartment, he seemed upset. After asking him what was wrong, Miller replied, “Your boy Mike [Shepherd] is crazy.” Elisha then helped Miller get rid of Liebengood’s purse by throwing it over the fence behind their apartment. Elisha also testified that when Shepherd returned to the apartment, he still had the holster in his hand, was wiping it with his shirt, and kept saying, “I killed that white bitch.”

The next day, on September 16, 2004, the police arrested Shepherd and brought him to the police station for questioning. Shepherd first denied knowing anything about the murder. Then, he blamed the shooting on Josh Champagne, which Shepherd later admitted doing because he did not like Josh. Eventually, Shepherd confessed to the police that he and Cook were the ones who tried to put Liebengood into her trunk, but she was fighting and screaming and would not go in the trunk. Shepherd stated that it was Miller who then shot the victim. Shepherd also admitted to throwing both the gun and the keys to Liebengood’s car in a dumpster on the way back to Miller’s apartment.

The following day, Cook and Miller were also brought in for questioning and subsequently arrested. On December 7, 2004, Shepherd, Miller, and Cook were indicted for murder and first-degree robbery. Before the

trial began, Cook pled guilty to the first-degree robbery charge and agreed to testify at trial, naming Shepherd as the shooter. Cook was eventually sentenced to ten years in prison for the robbery and the murder charge against him was dismissed. The joint trial of Miller and Shepherd began on March 6, 2006, and lasted approximately two weeks. At trial, the Commonwealth introduced the statements Miller and Shepherd had given to the police shortly after the offense, each of which was redacted to eliminate any reference to the other defendant. Neither defendant testified at trial nor put forth a defense after the close of the Commonwealth's case. Instead, in their respective closing arguments, each defendant admitted to being present during the robbery, but contended that his co-defendant committed the murder.

Id. at 312-13.

Following his direct appeal, Shepherd moved for post-conviction relief pursuant to RCr 11.42 and requested an evidentiary hearing. The trial court rejected several of Shepherd's issues without a hearing, though the court did conduct a hearing on the issue of the failure of Shepherd's counsel to present mitigating evidence during the penalty phase of trial. Following the hearing, the court entered a thorough opinion and order denying this remaining issue on the basis that trial counsel followed a professionally reasonable trial strategy in not presenting mitigating evidence during the penalty phase. Shepherd appealed that decision to this Court.

While that appeal was pending, Shepherd filed a *pro se* motion to vacate his sentence pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

The trial court entered an order denying that motion, from which Shepherd appealed. In a consolidated opinion, this Court affirmed the trial court's denial of both motions.

On January 23, 2017, Shepherd filed a second motion for post-conviction relief, specifically pursuant to RCr 11.42(10)(b).¹ Appointed counsel supplemented Shepherd's motion with a memorandum of facts and law. Shepherd's principal argument in that motion was that his sentence was unconstitutional in light of the United States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), regarding juvenile offenders serving life sentences. The trial court denied the motion without conducting an evidentiary hearing. Shepherd now appeals from that second post-conviction relief denial.

On appeal, Shepherd claims the trial court erred in denying his motion without an evidentiary hearing relying on the same cases cited above. He argues that those holdings render his sentence of imprisonment for life without parole for

¹ "Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves . . . that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively."

twenty-five years unconstitutional and that he will not be granted a meaningful opportunity for release on parole.

The standard of review for a trial court's denial of an RCr 11.42 motion is whether the decision constituted an abuse of the court's discretion.

Bowling v. Commonwealth, 981 S.W.2d 545, 548 (Ky. 1998). Abuse of discretion occurs when the court's denial is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted). An evidentiary hearing is necessary only when there is "a material issue of fact that cannot be determined on the face of the record[.]" RCr 11.42(5); *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

We find Shepherd's RCr 11.42 claim to be meritless for two reasons: (1) the cases he cites as authority are inapplicable to his situation and render his successive RCr 11.42 motion procedurally barred, and (2) his claim is not ripe for review. We will address each of these in turn.

We first note that successive RCr 11.42 motions are procedurally barred where the issues contained therein could have been brought in an earlier motion. *See Sanders v. Commonwealth*, 339 S.W.3d 427, 438 (Ky. 2011). In this instance, Shepherd claims that the constitutional issues he raises could not have been addressed in his original RCr 11.42 motion because the Supreme Court decisions had not yet been rendered. This would be acceptable under RCr

11.42(10)(b); however, those cases are inapplicable to Shepherd's situation and, thus, cannot save his second RCr 11.42 motion.

In *Miller v. Alabama, supra*, the U. S. Supreme Court addressed Alabama's mandatory sentencing scheme. It held it was a violation of the Eighth Amendment to the United States Constitution to mandatorily sentence a juvenile homicide offender to life imprisonment without the possibility for parole. *Miller v. Alabama*, 567 U.S. at 489. In its opinion, the Court focused on its decision in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), which held that juvenile offenders could not be sentenced to life without parole for nonhomicide offenses. *Id.* at 470. The Court incorporated *Graham's* emphasis on the youthful status of the defendants and their ability to rehabilitate. *Id.* at 470-71. The Court's main concern was with the mandatory imposition of the sentence; such mandatory sentencing schemes do not allow for the sentencing authority's discretion and consideration of factors relating to a juvenile offender's age, specifically any lessened culpability and greater capacity for change. *Id.* at 465 (internal quotations and citation omitted). The Court concluded in *Miller* based on its reasoning in *Graham* that a sentence of life without parole is possible for a juvenile homicide offender but only where the sentencing authority has discretion to consider mitigating factors related to youth. *Id.* at 480.

The Court, in *Montgomery v. Louisiana*, reaffirmed its holding in *Miller* and held that the rule espoused in *Miller* was substantive and acted retroactively in cases on collateral review. 136 S. Ct. at 726, 732. The Court does point out that the *Miller* holding has a procedural component: the requirement that the sentencing authority consider factors related to the juvenile offender's youth before finding a life sentence without parole to be a proportionate sentence to the crime(s) committed. *Id.* at 734. Significantly, the Court noted that though it had created a retroactive rule regarding sentencing, states would not have to relitigate sentences and convictions in this category of cases. *Id.* at 736. Instead, a state could remedy the violation by permitting juvenile offenders to be considered for parole after a term of years had been served. *Id.*

As Shepherd correctly states, the United States Supreme Court in *Miller* and *Montgomery* decided that life sentences mandatorily imposed on juvenile offenders violate the Eighth Amendment and are subject to collateral attack where the defendant is not afforded a meaningful opportunity to present mitigating evidence. However, as pointed out by the Commonwealth and the trial court, Shepherd was not sentenced to life imprisonment without the possibility of parole; he was sentenced to life imprisonment without the possibility of parole for twenty-five years, which was suggested in *Montgomery* as a remedy in cases where a juvenile homicide offender is mandatorily sentenced to life imprisonment

without parole. The Supreme Court of Kentucky upheld this sentence as constitutional on direct appeal, and his sentence is dissimilar to those about which the Court expressed its concern in *Miller* and *Alabama*. In 2029, Shepherd will have the opportunity to come before the Kentucky Parole Board.

Shepherd has yet to have his case reviewed by the parole board. He cannot allege a due process violation when parole review has not occurred. We cannot speculate as to what the parole board may or may not do or what procedures it will employ to protect Shepherd's due process rights. There remains the possibility that Shepherd will be released on parole, and if not, there is no reason to believe that he will not be given a meaningful opportunity to demonstrate his maturity and rehabilitation when the time comes in 2029. Hence, Shepherd has not been injured, and his RCr 11.42 claim is premature and not justiciable. *See McDaniel v. Commonwealth*, 495 S.W.3d 115, 127 (Ky. 2016).

Because Shepherd's motion does not fall under RCr 11.42(10)(b) due to the inapplicable new case law, his second RCr 11.42 motion is procedurally barred. Additionally, his claim of a future, speculative due process violation is not ripe for review. *Associated Industries of Kentucky v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (stating "the ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues") (citation omitted). Furthermore, Shepherd's claim did not involve a dispute of fact nor did it require a

review of the record. An evidentiary hearing was unnecessary in this case. Thus, we conclude that the trial court did not abuse its discretion in denying Shepherd's motion without an evidentiary hearing.

For the foregoing reasons, we affirm the Fayette Circuit Court's order denying Shepherd's second RCr 11.42 motion.

ALL CONCUR.

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