IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: JUNE 16, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0853-MR

DATE 7-7-05 Elia Grouith, D.C.

LESTER E. COOK, JR. — APPELLANT

V.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
2001-CR-0148

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a final judgment and sentence entered on September 7, 2004. The jury returned a verdict for a 50 year sentence and the judge sentenced Cook for a term of 50 years in prison.

The questions presented are whether it was error not to admit sentences in similar vehicle homicide cases thereby depriving the defendant of his right to introduce evidence in mitigation and whether the 50 year sentence was cruel and unusual punishment in that it is grossly disproportionate to the offense committed and is in excess of 20 years.

Originally, Cook had been convicted of the death of a pregnant woman in the front yard of her home when his 1984 Chevrolet Corvette drove into their yard striking and killing the victim. There was overwhelming evidence of guilt resulting from

intoxication on the part of the driver, and additional facts were developed in the opinion which are not necessary to recount here.

In the case of Cook v. Commonwealth, 129 S.W.3d 351 (Ky. 2004), this Court affirmed the conviction of Cook for wanton murder but vacated his sentence and remanded the case for a new penalty phase. A new sentencing jury heard arguments with regard to the sentence and returned to the trial judge a sentence of 50 years in prison. This appeal followed.

I. Other sentences

The trial judge correctly declined to admit evidence of sentences imposed in other cases during the penalty phase of the trial. Cook sought to introduce evidence of other sentences imposed in six other cases that he claimed were similar to his own. His argument is that the trial judge erred in not admitting these cases because it deprived him of the right to present evidence in mitigation or in support of leniency. None of the cases presented involved a conviction for wanton murder under KRS 507.020(1)(b).

Thus, the cases were not relevant to the sentence imposed in this case. Cook acknowledges the existence of Dean v. Commonwealth, 844 S.W.2d 417 (Ky. 1992), *cert denied* 512 U.S. 1234, 114 S.Ct. 2737, 129 L.Ed. 858 (1994), in which this Court held that evidence of other defendant's judgment or plea agreement is outside the realm of the sentencing statute, KRS 532.055. In addition, Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003), held that it was proper to refuse to admit evidence of sentences imposed on other defendants because an individualized sentence is required which considers the background of the defendant and the nature of the crime for which

he or she has been convicted. See also, Commonwealth v. Bass, 777 S.W.2d 233 (Ky. 1989).

Here, all of the cases offered by the defendant involved convictions of lesser crimes. Naturally their conviction for manslaughter or reckless homicide received lesser sentences than might be imposed for a wanton murder conviction. The invitation to reexamine the position of this Court in Dean, supra, is rejected.

II. 50 year sentence

Cook contends that the 50 year sentence was cruel and unusual punishment. He admits that this issue is not properly preserved for appellate review but requests consideration pursuant to RCr 10.26. Cook concedes that he did not challenge the constitutionality of his sentence so the alleged error was not presented to the trial judge. Clearly, this Court may address an alleged error not properly preserved for appellate review pursuant to RCr 10.26 if the alleged error is palpable, affects the substantial rights of the party or is a manifest injustice. Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997).

Under KRS 532.030(1), Cook could have been sentenced to life in prison or a term of years not less than 20, nor more than 50, for the crime of wanton murder. If a penalty is given within the maximum and minimum time set out by statute, a reviewing court will not disturb the sentence. Marshall v. Commonwealth, 60 S.W.3d 513 (Ky. 2001). In addition, where the punishment is within the limits set out by statute, such penalty could not be properly considered cruel punishment. Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968). It has long been held that the courts will not interfere with the legislative decision as to the adequacies of penalty unless the penalty is manifestly cruel and unjust. Weber v. Commonwealth, 303 Ky. 56, 196

S.W.2d 465 (1946). See also Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). The citations to other legal authorities in different states are unpersuasive to this Court.

KRS 507.020 defines the crimes of capital murder and KRS 532.030(1) sets out the punishments therefor. The sentence imposed here does not violate either statute. The sentence imposed was not disproportionate to the crime and was not constitutionally invalid.

The judgment of sentence is affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, Scott and Wintersheimer, JJ., sitting. All concur.

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