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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: DECEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2011-SC-000143-MR

DOMINIQUE NATHANIEL SANFORD — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 10-CR-00735-2

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Dominique Nathaniel Sanford, appeals from a judgment entered by the Fayette Circuit Court pursuant to an unconditional[1] guilty plea convicting him of one count of first-degree robbery and one count of second-degree robbery, and sentencing him to a total of twenty years' imprisonment. He appeals as a matter of right. Ky. Const. §110.

As grounds for relief Sanford claims that the twenty-year sentence, including twelve years of violent offender time subject to an eighty-five percent parole eligibility requirement, is disproportionate to the charges to which he pled guilty, given his age and prior criminal history, and that, therefore, the

[1] In the introduction to his brief, appellate counsel states that Sanford "entered a conditional guilty plea . . . ." The plea documents, however, do not notate that any issue was reserved for appeal pursuant to RCr 8.09, and the discussions at the plea hearing and sentencing hearing further reflect that the plea agreement itself was unconditional, subject only to the Commonwealth's sentencing recommendation. This issue is further discussed below.

sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Section Seventeen of the Kentucky Constitution.

While Sanford's unconditional guilty plea included a waiver of his right to appeal a lawfully imposed sentence, and the sentence imposed in this case was within the authorized sentencing range, since Sanford filed presentencing motions in support of his argument, and the Commonwealth has not objected to Sanford's challenge to the constitutionality of the sentence either in the trial proceedings or upon appeal, we address the issue on the merits. Upon the merits, we agree with the trial court that the sentence does not rise to the level of cruel and unusual punishment.

I. FACTUAL AND PROCEDURAL BACKGROUND

During the morning of April 23, 2010, between approximately 2:00 a.m. and 9:30 a.m., Sanford and his accomplice, Jettadia Johnson, committed five armed robberies against a total of nine victims. Not long after the fifth robbery the police spotted them in a vehicle and attempted to pull them over. A chase ensued, which ended when the robbers crashed into several occupied cars. Sanford and Johnson fled on foot. A single handgun was found near the crash scene, though police believed, based upon the statements of victims, that both robbers had a gun during the robberies.

Johnson was eventually identified as one of the occupants of the vehicle and arrested. Johnson confessed and implicated Sanford as his accomplice in

the robberies. As a result of the events, Sanford was indicted for nine counts of first-degree robbery; one count of first-degree fleeing or evading; four counts of first-degree wanton endangerment; one count of leaving the scene of an accident/failure to render aid or assistance; failure of a non-owner to maintain required insurance; and one count of no operator's license.

Sanford entered into a plea agreement with the Commonwealth under which he would plead guilty to one count of first-degree robbery in exchange for a twelve-year sentence; and plead guilty to one count of, as amended, second-degree robbery in exchange for an eight-year sentence. Under the agreement the Commonwealth would argue for consecutive sentencing, but Sanford was free to argue for concurrent sentencing; further, the Commonwealth agreed to drop all other charges stated in the indictment.

During the *Boykin* discussion[2] at the plea hearing, Sanford specifically agreed that he understood that he was waiving his right to appeal, and the trial court made a finding to this same effect near the conclusion of the hearing. The trial court accepted the plea agreement and set a date for final sentencing.

Notwithstanding the unconditional nature of Sanford's plea, at the conclusion of the plea hearing, trial counsel informed the court that she was considering filing "presentencing motions," and "depending on the court's ruling, [] might appeal those motions." Trial counsel acknowledged, however, that "we have no issue of appeal on anything that's happened up to this point."

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[2] *See Boykin v. Alabama*, 395 U.S. 238, 241–42 (1969) (requiring that courts ensure that the defendant's plea is voluntary by engaging in "an affirmative showing, on the record, that a guilty plea is voluntary and intelligent.").

The Commonwealth made no objection to the proposed motions, and did not suggest that this procedure would be in violation of the unconditional guilty plea.

Before the day of sentencing Sanford filed a "Motion for a Sentence of Concurrent Time." The motion argued that "[s]entencing Mr. Sanford to consecutive time in these cases would violate his constitutional right to be protected from Cruel and Unusual Punishment under both the VIIIth Amendment of the United States Constitution as well as Section 17 of the Kentucky Constitution." Sanford also filed a "Motion to Declare the Defendant not Subject to Violent Offender Classification Due to his Age." In this motion Sanford requested that the court "declare that he is ineligible to be classified as a violent offender due to his age," and "to declare KRS 439.3401 unconstitutional as applied to him and others twenty-one years of age and younger."[3] The Commonwealth responded in opposition to the motions but, again, made no objection to Sanford's right to file the motions.

At sentencing, the trial court entered final judgment pursuant to the plea agreement and ordered that the sentences be ran consecutively for a total of twenty years to serve. The trial court overruled Sanford's presentencing motions from the bench, expressly rejecting his constitutional arguments. The court additionally stated in the judgment that "[i]t is further ORDERED BY THE COURT that the Defendant's Motion to Declare KRS 439.3401

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[3] During the sentencing hearing, trial counsel stated that she had informed the Attorney General pursuant to KRS 418.075 concerning her constitutional challenge to KRS 439.3401, although the notice is not included in the record.

unconstitutional is OVERRULED. The Court finds the defendant has been afforded his due process and equal protection rights and there is a legitimate statement of interest in the Statute. Further, the Statute is not arbitrary nor does the sentence amount to cruel and unusual punishment based upon the severity of [the] offense and punishment imposed."

Sanford filed a notice of appeal, wherein he stated "the defendant reserved the right to appeal the decision on any pre-sentencing motions, and also the decision of the Court on the defendant's Motion to Declare KRS 439-3401 unconstitutional," presumably referring to counsel's comments, at the conclusion of the plea hearing, and/or the presentencing motions.

II. THE TWENTY-YEAR SENTENCE IS NOT CRUEL AND UNUSUAL

Sanford's sole argument is that his twenty-year sentence is disproportionate to the charges he pled guilty to given his age and prior criminal history, and that the sentence, therefore, amounts to cruel and unusual punishment under the Eighth Amendment and Section Seventeen of the Kentucky Constitution. As previously noted, pursuant to his plea agreement with the Commonwealth, Sanford was sentenced to twelve years for the first-degree robbery conviction (a violent offender offense) and to eight years for the second-degree robbery conviction, with the sentences to run consecutively for a total of twenty years to serve. Moreover, pursuant to the violent offender statute, KRS 439.3401, Sanford will not be eligible for parole

until he has served eighty-five percent of the twelve-year first-degree robbery sentence, or 10.2 years.[4]

We begin our discussion by again noting that as grounds for preservation of this issue Sanford states "[t]his issue is preserved for appellate review by [his] 'Motion for a sentence of concurrent time' and 'Motion to declare the defendant not subject to violent offender due to his age.'" Though not challenged by the Commonwealth, because this is an appeal from an unconditional guilty plea, a type of judgment not normally subject to appeal, it is necessary to initially consider whether the issue raised by Sanford is properly before us.

The general rule is that pleading guilty unconditionally waives all defenses except that the indictment did not charge an offense. *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986); *Hendrickson v. Commonwealth*, 450 S.W.2d 234, 235 (Ky. 1970) ("The effect of a plea of guilty is to waive all defenses except that the indictment charged no offense and to authorize the imposition of the penalty prescribed by law."); *Cf. Cummings v. Commonwealth*, 226 S.W.3d 62, 66 (Ky. 2007) (sentencing issues may be raised for the first time on appeal because sentencing is jurisdictional).

Nevertheless, RCr 8.09 provides: "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw

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[4] KRS 439.3401(3).

such plea upon prevailing on appeal." We recently clarified when a defendant may appeal from a judgment entered upon a guilty plea in *Dickerson v. Commonwealth*, 278 S.W.3d 145, 149 (Ky. 2009):

> we will consider issues on appeal from a conditional guilty plea only if those issues: (1) involve a claim that the indictment did not charge an offense or the sentence imposed by the trial court was manifestly infirm, or (2) the issues upon which appellate review are sought were expressly set forth in the conditional plea documents or in a colloquy with the trial court, or (3) if the issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy.

Here, there is no indication that any of the actual plea documents reserved any issue for appeal, and the plea agreement was accepted by the trial court as an unconditional plea.[5] As noted, however, *Dickerson* considers an argument preserved if the "issues upon which appellate review is sought were brought to the trial court's attention before the entry of the conditional guilty plea even if the issues are not specifically reiterated in the guilty plea documents or plea colloquy." While here, the issues were not raised *before* entry of the conditional guilty plea, nevertheless, at the conclusion of the plea hearing trial counsel stated she would be filing motions; motions seeking deviation from the plea agreement were filed; the Commonwealth responded to the motions without asserting that they were improper as in violation of the

[5] The only documentation of the plea agreement contained in the record is Sanford's "Waiver of Further Proceedings with Petition to Enter Plea of Guilty." *See* AOC Form 034-30. There is not included in the record, for example, an AOC Form 491.1 (Commonwealth's Offer on a Plea of Guilty) nor AOC Form 491 (Motion to Enter Guilty Plea), forms which are often executed in connection with a plea agreement.

plea agreement; the court ruled on the motions at the sentencing hearing; the trial court included language addressing the motion in its final judgment; and the Commonwealth asserts no claim of lack of preservation in its arguments in the present appeal. This case being reasonably similar to situation three identified in *Dickerson, and in the absence of the Commonwealth's objection* at any stage of the proceedings, we will treat the issue as preserved and consider the arguments raised by Sanford upon the merits.

In *Turpin v. Commonwealth*, ____ S.W.3d ____ (Ky. 2011), we noted that the United States Supreme Court has explained that the Eighth Amendment, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," prohibits not only barbaric punishments such as torture, but also punishments disproportionate to the crime. *Graham v. Florida*, 130 S.Ct. 2011 (2010).[6] This "proportionality principle," the Supreme Court cautioned, is narrow and "'does not require strict proportionality between crime and sentence' but rather forbids only extreme sentences that are 'grossly disproportionate' to the crime." 130 S.Ct. at 2021 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–1001); *Weems v. United States*, 217 U.S. 349, 367 (1910). ("[I]t is a precept of justice that punishment for crimes should be graduated and proportioned to offense."). In determining whether this principle has been breached in a particular case,

[6] In *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003), we noted that Section Seventeen of the Kentucky Constitution is identical to the Eighth Amendment "except that it proscribes "cruel punishment" instead of "cruel and unusual punishments[,]" and that "we regard this variation in phraseology as a distinction without a difference." Accordingly, our State Constitution affords no greater protections in this area than its Federal counterpart.

> [a] court must begin by comparing the gravity of the offense and the severity of the sentence . . . . "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions . . . . If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Graham, 130 S.Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005); *Turpin* S.W.3d at ___ (sentence of 20 years imprisonment for possession of a firearm by a convicted felon, as a first-degree persistent felony offender, was not excessive, even though defendant's prior felony convictions were non-violent offenses, and thus did not constitute palpable error).

We have previously observed that "[p]roportionality review has never (or hardly ever) been used to strike down a mere prison sentence." *Hampton v. Commonwealth*, 666 S.W.2d 737, 741 (Ky. 1984) *citing Rummel v. Estelle*, 445 U.S. 263, 271 (1980); *see also Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) ("if the punishment is within the maximum prescribed by the statute violated, courts generally will not disturb the sentence."). And so the relief being requested by Sanford - a declaration that a particular term of year sentence is in violation of the Eighth Amendment - is seldom, if ever, available under a cruel and unusual punishment claim.

Upon application of the above principles, here, Sanford's consecutive twelve-year and eight-year sentences, with the possibility of parole after serving eighty-five percent of the twelve year sentence (a little over ten years) is simply not an extreme sentence for convictions for first-degree armed robbery (a Class

B felony[7] carrying a sentence of ten to twenty years[8]) and second-degree robbery (a Class C[9] felony carrying a sentence of five to ten years[10]). These convictions were far from petty crimes, and a twenty-year sentence for the conduct involved invokes no sense of fundamental unfairness.[11]

Further, this sentence does not begin to approach the upper limits of Kentucky's sentencing structure, nor can it be deemed "grossly disproportionate" as the Supreme Court has employed that term, since according to the Court, even a life sentence for crimes less harmful than Sanford's and posing less risk of violence cannot be characterized as "grossly disproportionate." *See Ewing v. California,* 538 U.S. 11 (2003) (upholding under recidivist statute a sentence of twenty-five years to life for the theft of three golf clubs priced at $399 apiece); *Rummel v. Estelle,* 445 U.S. 263 (1980) (upholding under recidivist statute a sentence of life with the possibility of parole for the obtaining of $120.75 by false pretenses).

Sanford also argues that his age at the time of the crimes – he had just turned twenty-one – should bear on our cruel and unusual punishment

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[7] *See* KRS 515.020(2).

[8] *See* KRS 532.050(2)(b).

[9] *See* KRS 515.030(2).

[10] *See* KRS 515.060(2)(c).

[11] It is worth noting that if all of the allegations charged in the indictment are true, then Sanford participated in one of the most prodigious crime sprees in Fayette County history (encompassing fourteen felonies, **thirteen** victims, and six crime scenes, all within a period of 7.5 hours). Further, given the voluminous number of felonies charged, absent the plea agreement, Sanford risked consecutive sentencing of up to the seventy-year cap imposed under KRS 532.110(1)(c). The sentence he received was but 2/7ths of that.

analysis. While age certainly may be relevant to proportionality review, *Roper v. Simmons*, 543 U.S. 551, (2005) (holding that the execution of offenders who were under eighteen years of age at time their crimes were committed is prohibited by the Eighth and Fourteenth Amendments of the United States Constitution) and *Graham*, 130 S.Ct. 2011 (holding that the Eighth Amendment prohibits imposition of a sentence of life without the possibility of parole on a juvenile offender who did not commit a homicide), we reject out of hand that age considerations are relevant to cruel and unusual punishment analysis when, as here, the defendant was over the age of twenty-one when he committed the crimes under review.[12]

As noted above, the United States Constitution "does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime." *Graham*, 130 S.Ct. at 2021 (internal quotation marks omitted). As the sentence in this case was neither extreme within our sentencing scheme nor grossly disproportionate for the conduct he pled guilty to, Sanford is not entitled to relief upon his claim that the sentence amounted to cruel and unusual punishment.

III. CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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[12] *Cf.* KRS 532.080 (Excluding prior felonies for PFO purposes that were committed before the defendant turned twenty-one).

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