

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001195-MR

ANTHONY P. WADE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 00-CR-002313

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

LAMBERT JUDGE: Anthony Wade appeals the trial court's denial of his CR 60.02 motion to be resentenced in light of *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Because we hold that *Roper v. Simmons* does not require resentencing here, we affirm the decision of the trial court to deny relief under CR 60.02.

Background

The facts in this case are undisputed. When aged 17, Anthony Wade participated in the murder of Miriam Hickman. Due to the seriousness of his crime,

Wade was transferred from the juvenile court system to circuit court to be tried as an adult. The Commonwealth sought the death penalty, and, in response, Wade entered a guilty plea in exchange for a lesser sentence of life in prison without the possibility of parole for 25 years.

Several years after the finality of his plea to life without the possibility of parole for 25 years, the United States Supreme Court rendered *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), wherein it held that juveniles could not be sentenced to death. Seeking to take advantage of this postconviction precedent, Wade moved for resentencing under CR 60(e) & (f), contending that, in light of the reasoning in *Roper v. Simmons*, equity required he be resentenced on the ground that he only agreed to serve life in prison without the possibility of parole for 25 years to avoid the death penalty, which now could no longer be imposed upon him. The trial court denied relief.

Issue and Legal Standards

Under CR 60.02(e) & (f), which applies to criminal cases under RCr 13.04, may grant relief when “it is no longer equitable that the judgment should have prospective application” or when any extraordinary circumstance demands. Ordinarily, developments in the law subsequent to a final judgment will not justify modification under CR 60.02. *See, Taylor v. Commonwealth*, 175 S.W.3d 68, 75 (Ky. 2005). But, on rare occasion it will. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (civil case applying federal analog of CR 60.02). Finally, we review

the trial court's rulings under CR 60.02 only for abuse of discretion. *See, Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959).

Analysis

In contending for resentencing in light of *Roper v. Simmons*, Wade only invokes broad principles of equity. He cites no precedents that are factually similar to his own nor any specific authority indicating that the trial court abused its discretion in denying extraordinary relief from his long-since final conviction and sentence. In contrast, the Commonwealth points to *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), which we find persuasive.

In *Brady*, a federal criminal defendant sought post-finality relief from his kidnapping guilty plea, which was given in part to avoid the possibility of a death sentence. After the Court obviated the possibility of a death sentence under the federal kidnapping statute, Brady sought relief from his conviction and 30 year sentence. The Court held that “a defendant is not entitled to withdraw his plea merely because he discovers long after his plea bargain has been accepted that his calculus misapprehended . . . the likely penalties attached to it,” nor does a plea become involuntary “simply because the fear of [a] death [sentence] played a role in the defendant's decision.”

In light of *Brady*, it would appear that the United States Supreme Court probably would not countenance Wade's attempt to wiggle out of his plea to a life sentence without the possibility of parole for 25 years even if he had been mistaken about the possibility of the imposition of the death penalty at the time of his plea. But, as Wade

was not incorrect about that – he was in fact facing a possible death sentence at the time of his plea because rendition of *Roper v. Simmons* was still years away – we most certainly cannot see an equitable case for resentencing. To the contrary, Wade does not challenge his guilt, and a sentence of life in prison without the possibility of parole for 25 years is an entirely equitable and constitutional penalty for such a heinous crime, even if it was committed when Wade was 17 years of age. Hence, as Wade's sentence is not inequitable, equity does not require it to be revisited.

Conclusion

For the foregoing reasons, we hold that the trial court did not abuse its discretion in denying extraordinary relief under CR 60.02. The judgment of the Jefferson Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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