RENDERED: NOVEMBER 16, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001806-MR

SAMUEL MCMILLEN — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 95-CR-00075

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

MOORE, JUDGE: Samuel McMillen appeals the Hardin Circuit Court's denial of his motion for a new sentencing hearing. After considering McMillen's legal arguments, we conclude that the trial court neither abused its discretion nor erred; thus, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

When Samuel McMillen was seventeen years old, he was hired by Cheryl Gabow to kill Gabow's estranged husband.[2] According to the record, Gabow agreed to pay McMillen $10,000.00 to kill her husband. Later, McMillen invaded the husband's home, shooting and killing him. After the murder, McMillen confessed to police. Because McMillen was a juvenile at the time of the murder, the Commonwealth sought to have McMillen transferred to Hardin Circuit Court as a youthful offender to be tried as an adult due to the heinous nature of the crime.

After a preliminary hearing, McMillen was transferred to circuit court, where he was indicted on one count of complicity to commit murder, Kentucky Revised Statutes (KRS) 507.020 and 502.020, which was a capital offense under these circumstances. He was also indicted on one count of wanton endangerment in the first degree, KRS 508.060. In August 1999, several years after being initially charged, McMillen entered into a plea agreement with the Commonwealth. In exchange for McMillen's guilty plea to complicity to commit murder, the Commonwealth agreed to recommend a sentence of life without the possibility of parole until McMillen had served twenty-five years. McMillen then pleaded guilty in reliance on the Commonwealth's offer. Subsequently, in September 1999, the trial court sentenced McMillen to life without the possibility of parole for twenty-five years.

In March 2005, the United States Supreme Court rendered its opinion in the case of *Roper v. Simmons,* 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), which

[2] Gabow hired James Cecil as well, but Cecil's involvement is irrelevant to the resolution of this appeal.

McMillen argues applies to his case. In *Roper*, the appellee, Simmons, who was a juvenile at the time, broke into the home of the victim, abducted and killed the victim. Subsequently, the State of Missouri charged Simmons with murder and tried him as an adult. Due to the heinous nature of the murder, Missouri sought the death penalty. *Id*. Appellee proceeded to trial and was convicted. Although Simmons presented mitigating evidence during the sentencing phase, the jury recommended the death penalty. After Simmons exhausted his post-conviction remedies, the United States Supreme Court rendered its decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), in which it held that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of individuals with mental retardation. Simmons then filed a motion for post-conviction relief arguing that, based on the reasoning of *Atkins*, it was unconstitutional to execute a person who was under the age of eighteen when he or she committed the crime for which he or she was convicted and sentenced to death. Ultimately, the Missouri Supreme Court agreed with Simmons.

Subsequently, the United States Supreme Court granted *certiorari* in *Roper* and affirmed the Missouri Supreme Court's decision. The Supreme Court opined that a changing national consensus and evolving standards of decency indicated that juveniles should not be subjected to capital punishment. *Roper*, 543 U.S. at 563, 125 S.Ct. 1183. Furthermore, the Supreme Court explained that three general differences exist between juveniles and adults. *Id*. at 569, 125 S.Ct. 1183. First, juveniles possess less maturity and a lesser developed sense of responsibility than adults that often leads to

impetuous and poorly considered decisions and actions. *Id*. Second, the Supreme Court opined that juveniles are less resistant than adults to negative influences such as peer pressure. *Id*. Finally, the Supreme Court explained that juveniles possess ephemeral personality traits that are more likely to change, presumably for the better, than adults. *Id*. at 570, 125 S.Ct. 1183. Taking these three differences into consideration, the Supreme Court concluded that juveniles, as a whole, possess "diminished culpability" for the crimes they have committed no matter how heinous. *Id*. at 571, 125 S.Ct. 1183. Because juveniles, as a group, possess diminished culpability, this diminished culpability undermines the two justifications for capital punishment: retribution and deterrence. *Id*. Thus, the Supreme Court concluded that the Eighth and Fourteenth Amendments forbid execution of criminal defendants who were under the age of eighteen when they committed the crimes for which they were convicted and sentenced to death. *Id*. at 578-579, 125 S.Ct. 1183.

In February 2006, McMillen filed a motion with the trial court, pursuant to Kentucky Rule of Civil Procedure (CR) 60.02 and Kentucky Rule of Criminal Procedure (RCr) 11.42, demanding a new sentencing hearing. McMillen argued that, in *Roper*, the Supreme Court extensively discussed the three broad and general differences between juveniles and adults, and the Court went beyond a bright-line rule prohibiting the execution of juveniles and explained the constitutional importance of adolescent brain development in sentencing juvenile criminal defendants. According to McMillen, the

Roper Court established that juvenile criminal defendants possess diminished culpability when compared to adults due to their adolescent brain development. McMillen reasoned

> [w]hen [the trial court] originally sentenced [him] in the case at hand, the extent that adolescent brain development has on a juvenile's degree of culpability had not yet been fully recognized. A juvenile's lack of full brain development is an even greater mitigating factor now than anyone understood at the time of McMillen's plea and sentencing. Therefore, when the [trial court] made its sentencing decision, it was unable to give full and sufficient consideration to the constitutional importance of adolescence as a mitigator with respect to the specific level of brain development of juveniles in general and with respect to [McMillen] specifically.
>
> Further, the appropriate range for sentencing juvenile offenders was not established until the [*Roper*] decision. When the Commonwealth offered its plea and the [trial court] sentenced [McMillen] in this case, the death penalty was still a sentencing option. Had death not been an option and had the [trial court] considered [McMillen's] sentence under the newly-defined appropriate sentencing range, a term of imprisonment for 20-50 years, life, or life without parole for 25 years, the [trial court] may have reached a different sentencing decision.

Based on the holding in *Roper*, McMillen argued that the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections Two, Eleven and Seventeen of the Kentucky Constitution required the trial court to give him a new sentencing hearing.

After the matter was submitted to the trial court, the court entered an order denying McMillen's motion for a new sentencing hearing. According to the trial court,

> the *Roper* case does not demonstrate any applicability to [McMillen's] case. The *Roper* case held that the Eighth and Fourteenth Amendments forbid imposition of the death

> penalty on offenders who were under the age of eighteen when their crimes were committed. It does contain discussion of juvenile brain development, but it does not appear to this Court that anywhere in that opinion does it entitle Defendants in any other situation to a new hearing such as the one requested in [McMillen's] case.

II. STANDARD OF REVIEW

According to CR 60.02, "[o]n motion a court may . . . relieve a party . . . from its final judgment, order or proceeding . . . ." Therefore, when a criminal defendant seeks relief pursuant to CR 60.02, such relief is discretionary. *Gross v. Commonwealth,* 648 S.W.2d 853, 857 (1983). A trial court has abused its discretion when its actions or decisions were arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Jaroszewski v. Flege,* 204 S.W.3d 148, 150 (Ky. App. 2006).

Regarding relief sought pursuant to RCr 11.42, the trial court's decision will be affirmed as long as it was not clearly erroneous. *Commonwealth v. Payton,* 945 S.W.2d 424, 425 (1997).

III. ANALYSIS

On appeal, McMillen raises the same arguments as he did below: that *Roper* mandates that he receive a new sentencing hearing. We disagree.

Despite McMillen's insistence to the contrary and despite the fact that the United States Supreme Court discussed adolescent brain development in very broad and general terms, the holding in *Roper* only established a bright-line rule that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who

were under the age of 18 when their crimes were committed." 125 U.S. at 578, 125 S.Ct. 1183. We acknowledge that *Roper*, like *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), must be retroactively applied. *See Bowling v. Commonwealth,* 163 S.W.3d 361, 370 (Ky. 2005). Nevertheless, we conclude that *Roper's* retroactive effect is limited to those cases involving offenders who were juveniles when they committed their crimes and who were actually sentenced to death. *See United States v. Feemster,* 483 F.3d. 583, 588 (8th Cir. 2007) ("[T]he rationale of [*Roper*] applies only with limited, if any, force outside of the context of capital punishment."). Because *Roper's* retroactive effect is limited and because McMillen was sentenced to life in prison without the possibility of parole for twenty-five years, not death, the holding in *Roper* does not apply in this case.

Furthermore, *Roper* does not contain any language mandating that a trial court must give an offender, who committed a crime while a juvenile and who faced capital punishment but received a sentence less than death, a new sentencing hearing in order to retroactively apply the *Roper* Court's reasoning regarding adolescent brain development. In other words, the *Roper* Court's discussion regarding adolescent brain development is not retroactive as a constitutional matter.

Additionally, in response to the trial court's ruling that *Roper* did not apply to his case, McMillen now argues that

> [t]he *Roper* decision stands for the premise that it is not just unacceptable that a juvenile under the age of eighteen (18) **receive** a death penalty sentence, but that it is unacceptable for the court to **consider** the death penalty as an appropriate

> sentence for any juvenile. Here, the Commonwealth and [McMillen] entered the plea bargain with the understanding that the death penalty was an appropriate sentence. Thus, the [trial] court's denial of [McMillen's] motion for relief failed to recognize that *Roper* is relevant, because [McMillen] faced the possibility of death at his sentencing-**precisely the situation *Roper* proscribed**.

(Appellant's brief at page 9).

McMillen contends that the holding in *Roper* somehow stretches backward through time to prohibit the trial court's consideration of the death penalty at the time he was sentenced. With this argument, McMillen ignores several important facts. He ignores the fact that, at the time the trial court sentenced him, capital punishment for juveniles was an appropriate penalty. McMillen also ignores the fact that he was not sentenced to death but was, instead, sentenced to life without the possibility of parole for twenty-five years. Finally, McMillen ignores the fact that the record contains no evidence that the trial court even entertained the death penalty when it sentenced him. In fact, the trial court sentenced McMillen in accordance with his plea agreement. Under these facts, the holding in *Roper* does not apply to McMillen's situation.

In addition, McMillen argues that under contract law, equity required the trial court to give him a new sentencing hearing because he has lost the benefit of his bargain with the Commonwealth under the reasoning in *Roper*. Pursuant to RCr 11.42, McMillen also argues that he was entitled to a new sentencing hearing because *Roper's* reasoning regarding adolescent brain development was unknown at the time of his sentencing. McMillen raised neither of these arguments below; thus, we will not address

the merits of either. *See Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976) ("The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.").

In sum, McMillen has failed to show that the trial court either abused its discretion or acted erroneously when it denied his motion for a new sentencing hearing. Thus, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rebecca Hobbs
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky