

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000308-MR

KENNETH WAYNE ROBINSON

APPELLANT

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 89-CR-00007

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

COMBS, CHIEF JUDGE: Kenneth Wayne Robinson appeals from an order of the Lincoln Circuit Court denying his motion for post-conviction relief, which he filed pursuant to the provisions of Kentucky Rules of Civil Procedure (CR) 60.02(3) and (f) and Kentucky Rule of Criminal Procedure (RCr) 11.42. In his motion, Robinson relied on the decision of the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), prohibiting the execution of individuals who were

under the age of eighteen at the time of their offenses. He believes that *Roper* requires that he receive a new sentencing hearing. We disagree and affirm.

In September 1988, five months before his eighteenth birthday, Robinson entered a small market carrying a .22 caliber rifle. Robinson took approximately \$100.00 from the store clerk, Jean Brown. He then shot her five or six times. After she fell to the floor, Robinson again shot her twice.

After his arrest, Robinson gave a statement to the police in which he admitted his murderous intent; *i.e.*, that from the moment that he entered the market, he had intended to rob the store and to murder the store clerk. In February 1989, the Lincoln District Court transferred jurisdiction to the circuit court. Robinson was indicted for capital murder and robbery, and the Commonwealth served notice of its intention to seek the death penalty.

Robinson was tried before a death-qualified jury and was found guilty. During the penalty phase of the proceedings, the jury was instructed that it could consider the punishment either of death or of life imprisonment without the possibility of parole for twenty-five years only if it was persuaded beyond a reasonable doubt that an aggravating circumstance justified the punishment. The court's instructions did not limit or preclude the jury from sentencing Robinson to a term of years regardless of its findings as to the existence of any aggravating factors. Following the jury's deliberations, Robinson was convicted and sentenced to life imprisonment without parole for twenty-five years for the murder and ten-years' imprisonment for the robbery. The sentences were to run concurrently. In February 1992, Robinson's conviction was affirmed by the Supreme Court of Kentucky in a unanimous opinion.

Thirteen years later, on March 1, 2005, the United States Supreme Court rendered its decision in *Roper v. Simmons, supra*. In a five-four decision, the Court overruled its earlier decision in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), and held that the execution of felons for murders which they committed before their eighteenth birthday constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. In February 2006, Robinson filed his motion for post-conviction relief. Although he had not been sentenced to death, Robinson argued that the *Roper* decision nevertheless entitled him to a new sentencing hearing. The Lincoln Circuit Court denied the motion, and this appeal followed.

Robinson's reliance on the *Roper* decision is ill-founded. In *Roper*, the Supreme Court reviewed a decision of the Missouri Supreme Court holding that the death penalty ought to be abandoned as a means of punishment for those who had offended as juveniles. The Missouri Supreme Court based its policy decision on a sense of a developing national consensus to depart from capital punishment for juvenile offenders. As a result of its conclusion, the Missouri Supreme Court vacated the petitioner's death sentence and in its place imposed a sentence of life imprisonment without parole (a sentence harsher than that imposed on Robinson).

The Supreme Court reviewed the legal conclusions of the Missouri Supreme Court. It agreed that juveniles are deemed to possess diminished culpability and that justifications for the death penalty should be applied less vigorously to juveniles than to adults. It determined that the death penalty is a disproportionate and unduly harsh punishment for offenders younger than eighteen years of age. However, the U.S. Supreme Court left in place the life sentence substituted for the death penalty.

The *Roper* decision bars the imposition of the death penalty in cases involving juvenile offenders. Its holding does not affect the imposition of a sentence of life imprisonment without the possibility of parole for twenty-five years, the only sentence at issue in this case. Since Robinson was never under a death sentence, *Roper* has no retroactive application in this case whatsoever. The trial court did not err or abuse its discretion by denying Robinson's motion for relief.

Accordingly, the order of the Lincoln Circuit Court is affirmed.

ALL CONCUR.

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