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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002456-MR

SOPHAL PHON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 96-CR-00599-005

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Sophal Phon (Phon) was less than 18 years of age when the Warren Circuit Court sentenced him to life in prison without the possibility of parole. Because he had been charged with a capital offense and the jury considered the death penalty among other possible sentences, Phon filed a motion for a new sentencing hearing based on *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The circuit court

denied Phon's motion and it is from that order of denial that Phon appeals. For the following reasons, we affirm.

FACTS

Two appeals have been prosecuted as a result of Phon's conviction. In *Commonwealth v. Phon,* 17 S.W.3d 106 (Ky. 2000), the Commonwealth unsuccessfully challenged the inclusion of life without the possibility of parole in the jury instructions. In *Phon v. Commonwealth*, 51 S.W.3d 456 (Ky.App. 2001), Phon unsuccessfully sought post-conviction relief based on a claim of ineffective assistance of counsel.

As set forth in *Commonwealth v. Phon*, 17 S.W.3d at 107,

> Sophal Phon and his co-defendants . . . were jointly indicted for the 1996 burglary, robbery, and execution-style murder of a Warren County couple. The Commonwealth filed notice of its intent to seek the death penalty against four of the five defendants, including Phon, then a seventeen year old juvenile.

Before Phon's trial, two significant procedural events occurred. First, the trial court refused to sever Phon's trial from that of one of his co-defendants, Outh Sananikone (Sananikone). According to Phon, Sananikone had ordered the shootings and Phon complied with Sananikone's order out of fear for his life and the lives of his relatives. Phon's attorney feared that a jury would want to impose the death penalty on Sananikone and, having done so, would feel compelled to sentence Phon to death as well.

The second procedural event was the passage of HB 455 by the legislature. HB 455 provided for a sentence of life without parole in capital cases. Although passed by the legislature during the 1998 legislative session, the Act was not scheduled to take effect until after Phon's trial. In a pre-trial motion, the Commonwealth moved to exclude

that sentence from the jury instructions. The trial court found that, although the legislation would not be effective until after the trial, Phon could opt to include the sentence of life without the possibility of parole in the jury instructions.

Faced with the possibility, if not probability, of a death sentence, "the day before his trial was scheduled to begin, Phon pled guilty . . . to two counts of murder, first degree assault, first degree robbery, and first degree burglary." *Commonwealth v. Phon*, 17 S.W.3d at 107. Phon also opted to include the sentence of life without parole in the jury instructions. We note that Phon was not motivated to enter into this plea by any offers or promises by the Commonwealth. The primary factor motivating Phon was avoidance of the death penalty, which his attorney believed could best be accomplished by a guilty plea and reliance on the mercy of a jury. After a jury trial on the sole issue of what sentence to impose, the jury recommended a sentence of life without the possibility of parole, which the circuit court imposed.

In 2005, approximately seven years after Phon's trial, the United States Supreme Court held that a death sentence for a defendant under the age of 18 was constitutionally prohibited. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Phon filed his motion for a new sentencing hearing following the *Roper* decision arguing that, because he had been subject to the death penalty when he pled guilty, he should be entitled to a new sentencing hearing. The circuit court disagreed and, for the reasons set forth below, we affirm.

STANDARD OF REVIEW

CR 60.02 provides that a court may "relieve a party or his legal representative from its final judgment, order, or proceeding[.]" Because the granting of

relief is at the discretion of the trial court, we review the trial court's decision for abuse of that discretion. *See White v. Commonwealth*, 32 S.W.3d 83 (Ky.App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004).

ANALYSIS

As noted by the Commonwealth in its brief, this Court had rendered a number of unpublished opinions arising from the *Roper* decision. By previous order, the Commonwealth's citations to those unpublished opinions have been stricken from the record. However, one of those opinions, *Sims v. Commonwealth*, 233 S.W.3d 731 (Ky.App. 2007), has now been published. In *Sims*, the defendant was subject to the death penalty and pled guilty in exchange for a recommendation from the Commonwealth of a sentence of life in prison without the possibility of parole for 25 years. This Court held that

> the constitutional right established in *Roper* was that someone who was under 18 when he committed murder cannot be sentenced to death, not that he might escape a life sentence. Indeed, the *Roper* opinion contains an *obiter dictum* to the effect that life imprisonment without the possibility of parole remains a permissible sentence . . . .

Id. at 733.

This case differs from *Sims* because Phon received no consideration from the Commonwealth in exchange for his guilty plea. However, it is similar to *Sims* because both Sims and Phon entered into guilty pleas in an attempt to avoid the death penalty. During testimony at the hearing regarding Phon's ineffective assistance of

counsel claim, Phon's trial counsel testified that he did not believe that Phon could win an acquittal and that a guilty plea leaving sentencing to the mercy of a jury was the only viable way for Phon to avoid the death penalty. Furthermore, as noted above, Phon's counsel believed it was of paramount importance to sever Phon's trial from Sananikone's and a guilty plea accomplished that goal. Based on the preceding considerations, Phon agreed to plead guilty and consented to including life without the possibility of parole in the jury instruction in the hope of avoiding a death sentence. *Phon v. Commonwealth*, 51 S.W.3d 456, 460 (Ky.App. 2001).

Phon's primary argument is that, if the death penalty had not been a possibility, he never would have opted to include the sentence of life without the possibility of parole in the jury instructions. Furthermore, Phon argues that inclusion of the now unconstitutional sentence of death in the jury instructions invalidated the jury's sentence. In support of that position, Phon cites to *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). However, that case can be easily distinguished. The *Leary* case involved convictions for possession of marijuana. Under the statutory provisions then in place, the government was required to establish a number of elements of the crime in order to obtain a conviction. The statute provided that mere possession of marijuana resulted in the presumption of certain elements of the crime, thus relieving the government of the burden of proving those elements. The Supreme Court held that the presumption was unconstitutional and therefore overturned the possession convictions. In doing so, the Supreme Court stated that "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Id.* at 31-32. *Leary* addresses a faulty jury

instruction involving alternative theories of conviction, not alternative theories of sentencing. Therefore, we hold that *Leary* has no application to the case herein.

We find *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), to be more persuasive. As the Supreme Court noted in *Brady*

> [o]ften the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, *cf. Von Moltke v. Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then-existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.
>
> We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Brady, 397 U.S. at 756-57.

Although *Brady* deals specifically with the voluntariness of a guilty plea in light of changing penalties, the Supreme Court's logic applies to Phon's case. Phon was advised by counsel of the then existing possible penalties. Phon was advised by counsel that he likely would be found guilty. Phon entered his plea of guilty in the hope of receiving a lighter sentence and Phon entered his plea in order to sever his case from his co-defendants. Just as Phon cannot now change his guilty plea because the maximum penalty would no longer apply, he cannot now obtain a new sentencing hearing simply because the maximum penalty would no longer apply.

Finally, we note that Phon has cited extensively to *Roper.* As noted above, this Court previously determined, albeit with somewhat different facts, that *Roper* only applies retroactively to "those cases in which a sentence of death was imposed upon a defendant who was under the age of 18 at the time he committed the crime." *Sims v. Commonwealth*, 233 S.W.3d 731, 733 (Ky.App. 2007). We find no reason to alter that earlier determination and hold that, because the death penalty was not imposed on Phon, *Roper* has no application to this appeal.

CONCLUSION

For the reasons set forth above, we hold that *Roper* has no application to Phon's case and that the circuit court did not abuse its discretion when it denied Phon's motion for a new sentencing hearing. Therefore, we affirm the circuit court.

ALL CONCUR.

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