

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002619-MR

JOSHUA CHENG

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 96-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

BUCKINGHAM, SENIOR JUDGE : Joshua Cheng appeals from an order of the Scott Circuit Court denying his motion for a new sentencing hearing pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(e) and (f) and Kentucky Rule of Criminal Procedure (RCr) 11.42. We affirm.

Cheng was charged with murder and robbery in connection with the shooting death of a store clerk at the Shell One Stop in Georgetown, Kentucky, on September 19, 1994. He was 17 years old at the time. Because of the nature of the

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(b) of the Kentucky Constitution and KRS 21.580.

crime the case was transferred to the Circuit Court and he was to be tried as an adult. Facing the possible imposition of the death penalty, Cheng accepted a plea offer by the Commonwealth. He pleaded guilty to the offenses, and the court sentenced him to life without parole for 25 years pursuant to the plea agreement. The final judgment was entered on July 1, 1996.

On February 17, 2006, Cheng filed a motion requesting that his sentence be vacated and that he have a new sentencing hearing. As grounds for his motion, Cheng cited *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Therein, the U.S. Supreme Court held the death penalty unconstitutional as to juveniles. 543 U.S. at 568, 125 S.Ct. at 1194.

The essence of Cheng's argument is stated in his brief as follows:

Given the facts upon which the *Roper* decision was based, it is no longer equitable for Mr. Cheng to be held to the bargain he made in 1987 to preclude a death sentence. Based on our new understanding of this class of juvenile offenders, of which Mr. Cheng is a member, the Commonwealth's promise to recommend a sentence less than death has become meaningless. Moreover, at the time Mr. Cheng was sentenced, the circuit court could not have fully considered Mr. Cheng's mitigation evidence because the facts and concomitant constitutional rights were unknown to the circuit court before the pronouncement in *Roper*.

This precise issue was addressed by this court recently in *Gussler v. Commonwealth*, 236 S.W.3d 22 (Ky.App. 2007). Therein, we held that the holding in the *Roper* case “does not affect the imposition of a sentence of life imprisonment without the possibility of parole for a minimum of 25 years[.]” *Gussler*, 236 S.W.3d at 24.

For the reasons stated in the *Gussler* case, we affirm the order of the Scott Circuit Court denying Cheng's motions.

ALL CONCUR.

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