Appendix

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1997 SESSION

STATE OF TENNESSEE,	)	C.C.A. No. 03C01-9512-CC-00383
	)	
Appellee,	)	HAMBLEN COUNTY
	)	
VS.	)	**HON. LYNN W. BROWN, JUDGE**
	)	
LEONARD EDWARD SMITH,	)	(Death Penalty)
	)	
Appellant.	)	

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OPINION FILED: October 3,1997

AFFIRMED

JOE G. RILEY,
JUDGE

O P I N I O N

[Case History and Evidence at Re-Sentencing Hearing Deleted]

I. SELECTIVE PROSECUTION

Defendant filed a pre-trial motion requesting that the district attorney general disclose the standards used to determine whether to seek the death penalty in murder cases. The assistant district attorney general explained that aggravating and mitigating circumstances were examined and weighed in order to determine whether to seek the death penalty under particular facts. Defense counsel's request to put the assistant district attorney general under oath to testify was denied by the trial court.

Prosecutorial discretion used in selecting candidates for the death penalty does not result in any constitutional deprivation. Gregg v. Georgia, 428 U.S. 153, 198-99, 96 S.Ct. 2909, 2937, 49 L.Ed. 2d 859 (1976); State v. Brimmer, 876 S.W.2d 75, 86 (Tenn. 1994); State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994). This issue is without merit.

II. RECUSAL OF TRIAL JUDGE

Defendant contends the trial judge should have granted a motion for recusal since the trial judge was the prosecuting attorney in an earlier robbery case that the state relied upon as an aggravating circumstance. A motion for recusal based upon the alleged bias or prejudice of the trial judge addresses itself to the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). A motion for recusal should be granted whenever the judge's impartiality might reasonably be questioned. Tenn. Sup. Ct. Rule 10, Code of Judicial Conduct, Canon 3C; State v. Hines, 919 S.W.2d 573, 578 (Tenn. 1995).

The issue of recusal was addressed in the extraordinary appeal in Smith III. We

noted that the record did not establish that the trial judge acted as a lawyer in any matter "in controversy" and further found no indication of bias. Smith III, 906 S.W.2d at 12. We found that the disqualification provisions of Article 6, § 11 of the Tennessee Constitution precluding a judge from presiding "on the trial of any cause... in which he may have been of counsel..." does not apply to prior concluded trials. Id. at 12 (citing State v. Warner, 649 S.W.2d 580, 581 (Tenn. 1983)). We, nevertheless, concluded that the issue could be more fully litigated in the direct appeal if the defendant establishes that the nature of the trial judge's participation in the earlier prosecution deprived the defendant of a fair and impartial arbiter. Our review of the record indicates no further evidence of the nature of the trial judge's participation in the underlying charge. Accordingly, this issue is without merit.

III. JURY SELECTION EXPERT

Defendant requested the expert services of a licensed private investigator, two (2) psychologists, a medical doctor and a jury selection expert. All services were authorized except the jury selection expert. Defendant challenges this denial.

The decision of whether to authorize expert services lies within the sound discretion of the trial court. *See* State v. Cazes, 875 S.W.2d 253, 261 (Tenn. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995); State v. O'Guinn, 709 S.W.2d 561, 568 (Tenn. 1986) *cert. denied,* 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). The right to these services exists only upon a showing of a particularized need. State v. Shepherd, 902 S.W.2d 895, 904 (Tenn. 1995); State v. Black, 815 S.W.2d 166, 179-80 (Tenn. 1991). "The defendant must show that a substantial need exists requiring the assistance of state paid supporting services and that his defense cannot be fully developed without such professional assistance." State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992), *cert. denied* 510 U.S. 1064, 114 S.Ct. 740, 126 L.Ed.2d 702 (1994).

Our Supreme Court has held that there is no constitutional violation in the denial of a capital murder defendant's request for funds for a jury selection expert, absent a showing of any special need. *See* State v. Black, 815 S.W.2d at 179-80. There was no showing of a particularized need for a jury selection expert in the case at bar. Defense counsel had represented defendant in both of his prior trials and conducted extensive *voir dire* in the present case. The trial court did not abuse its discretion in denying funds for a jury selection expert. This issue is without merit.

IV. JURY SELECTION

A. Questionnaire on Life Imprisonment

Defense counsel was allowed to submit an extensive questionnaire to potential jurors prior to the jury selection process. The trial judge disallowed, however, two (2) questions asking whether the potential juror believed that a person sentenced to life would spend the rest of his life in prison, and if not, how many years he/she thought such a person would serve. One of these questions also asked whether this would make the potential juror less likely to vote for a life sentence.

The scope and extent of *voir dire* is entrusted to the discretion of the trial judge whose actions will not be disturbed absent a clear abuse of discretion. State v. Irick, 762 S.W.2d 121, 125 (Tenn. 1988); State v. Poe, 755 S.W.2d 41, 45 (Tenn. 1988). Defendant contends more leeway should be allowed in *voir dire* so as to enable him to intelligently exercise peremptory challenges. Although we agree with this general statement, we find no abuse of discretion in this instance. Without the opportunity of an explanation from counsel or the court as to these questions on the questionnaire, this could lead to unwarranted speculation as to the meaning of a life sentence. This issue is without merit.

B. Group Voir Dire

The trial judge denied defendant's request for individual *voir dire* on all issues

except pre-trial publicity and views on the death penalty. Defendant cites three (3) instances during group *voir dire* when jurors stated they would be unable to follow the law. He contends he was prejudiced by group *voir dire*. All of these jurors were ultimately excused for cause.

The trial court's authority to question jurors individually is permissive, not mandatory. State v. Hutchison, 898 S.W.2d 161, 167 (Tenn. 1994), *cert. denied* 116 S.Ct. 137 (1994). It is only where there is a significant possibility that jurors have been exposed to potentially prejudicial material that individual *voir dire* is mandated. State v. Cazes, 875 S.W.2d at 262. Our review of the record does not indicate any prejudice to the defendant as a result of group *voir dire*. The three (3) instances related by the defendant did not result in prejudicial information being imparted to other jurors. This issue is without merit.

C. Alternating Voir Dire Questioning

Defendant complains that the trial judge erred in not alternating the order of *voir dire* between the state and the defense. This issue was rejected in Smith II, 857 S.W.2d at 20. We find no abuse of discretion in allowing the state to proceed first in *voir dire* questioning.

D. *Sua Sponte* Dismissals for Cause

Defendant contends the trial court erred by *sua sponte* excusing several prospective jurors for cause. In the instances cited by defendant, each juror had indicated that he or she could not follow the law. It is clear that each juror's views would "prevent or substantially impair the performance of his [her] duties as a juror in accordance with his [her] instructions and his [her] oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985).

The trial court's findings on this issue are entitled to a presumption of correctness since they involve a determination of demeanor and credibility, and the

burden rests on the defendant to establish by clear and convincing evidence that the trial court's determinations were erroneous. State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989). The responses of these jurors gave the judge the "definite impression" they could not follow the law. Wainwright v. Witt, 469 U.S. at 425-26, 105 S.Ct. at 853.

These jurors met the standard for dismissal. *See* State v.Hutchison, 898 S.W.2d 161 (Tenn.1994). Furthermore, the argument that defense counsel should be allowed to rehabilitate such jurors is without merit. State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992).

E. Failure to Excuse for Cause

Defendant contends the trial judge erred in failing to excuse two (2) potential jurors who stated they could not consider mitigating evidence. Although both potential jurors initially stated they would have trouble considering certain kinds of mitigating evidence, the totality of the questions and answers reveals that they could follow the law in weighing aggravating and mitigating circumstances. The trial court has wide discretion in ruling on the qualifications of jurors. State v. Howell, 868 S.W.2d 238, 248 (Tenn. 1993). The failure to exclude these two (2) jurors was not an abuse of discretion.

Furthermore, one of the jurors was excused by defendant's peremptory challenge. Neither did the other juror sit on the panel. The defendant exercised only six (6) peremptory challenges out of the allowed 15 challenges. Therefore, defendant is entitled to no relief. *See* State v. Howell, 868 S.W.2d at 248-49.

[V. Failure to Present Further Mitigating Proof - Deleted]

VI. ADMISSION OF WEBB JUDGMENT OF CONVICTION

The state introduced the judgment showing that the defendant had been found guilty of the first degree murder of Webb. Defendant contends this judgment was erroneously relied upon by the state as an aggravating circumstance.

No contemporaneous objection was made to the introduction of this evidence. The issue is, therefore, waived. Tenn. R. App. P. 36(a); State v. Walker, 910 S.W.2d 381, 386 (Tenn. 1995). We will, nevertheless, address this issue.

This was a re-sentencing hearing only as guilt had already been determined and affirmed on the previous appeal. The state was entitled to show to the jury that the defendant had in fact been convicted of the first degree murder for which the jury was to determine the sentence.

Defendant's primary argument is that the state was improperly allowed to use this first degree murder conviction as an aggravating circumstance in the same case. The state relied upon one (1) aggravating circumstance; namely, the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involved the use or threat of violence to the person. Tenn. Code Ann. § 39-2-203(i)(2) (1982) (emphasis added). Obviously, the state could not rely upon the present conviction as one of the previous violent felony convictions.

However, our reading of the record does not indicate that the state relied upon this conviction as one of the prior violent felonies. From *voir dire* through final argument the state contended that the defendant had been convicted of three (3) prior felony offenses involving violence or the threat of violence; namely, two (2) robberies and the first degree murder of Pierce. The trial judge further instructed the jury that the state alleged the defendant had been previously convicted of murder in the first degree and two (2) robberies. The trial court was obviously referring to the

Pierce first degree murder conviction which had been made an exhibit. This issue is without merit.

VII. PRIOR VIOLENT FELONIES

As previously stated, the prosecution relied upon the prior violent felonies aggravating circumstance. Tenn. Code Ann. § 39-2-203(i)(2) (1982), the statute in effect at the time of this crime, defined this aggravating circumstance as follows:

> The defendant was previously convicted of one (1) or more felonies, other than the present charge, which involved the use or threat of violence to the person.

Defendant contends the state was erroneously allowed to introduce evidence in support of this aggravating circumstance.

A. Pierce Judgment

Defendant argues that the introduction of his conviction and redacted Order of Judgment for the first degree murder of Pierce was erroneously allowed as evidence. Smith I condemned the use of defendant's life sentence in the Pierce case as evidence in the Webb case. 755 S.W.2d at 767-69. Upon re-trial the state again failed to observe the warning in Smith I and related to the jury that the defendant had received a life sentence for the Pierce murder. On appeal in Smith II the Court again condemned this evidence and remanded for a new sentencing hearing. 857 S.W.2d at 25. Both Smith I, 755 S.W.2d at 769, and Smith II, 857 S.W.2d at 25, recognized the sentencing relevance of the Pierce conviction but not the Pierce life sentence.

The trial judge conducted an extensive jury-out hearing and redacted the Pierce judgment omitting any reference to the sentence. Upon being asked if there were any objections to the redactions, defense counsel made no objection. The issue is, therefore, waived. Tenn. R. App. P. 36(a); State v. Walker, 910 S.W.2d at 386. Furthermore, the jury was specifically instructed by the trial judge not to speculate as to the significance of any redactions. The jury is presumed to have followed the

instructions of the court. State v. Woods, 806 S.W.2d 205, 211 (Tenn. Crim. App. 1990).

The admission of the redacted judgment showing the conviction but not the sentence is in compliance with the dictates of Smith I and Smith II. This issue is without merit.

B. Direct Participation in Violence

Defendant contends that he did not directly participate in the use of violence in the Pierce murder as a co-defendant was the person who actually fired the shot that killed Pierce. He argues that direct participation is necessary to trigger this homicide as a prior violent felony. This issue was decided contrary to defendant's argument in Smith II, 857 S.W.2d at 10. *See also* State v. Teague, 680 S.W.2d 785, 789 (Tenn. 1984). This issue is without merit.

C. Introduction of Indictment

Defendant contends the trial court erred in allowing the introduction of an armed robbery indictment since the judgment of conviction was only for simple robbery. This issue has also been determined contrary to defendant's argument in both Smith I, 755 S.W.2d at 764, and Smith II, 857 S.W.2d at 20. This issue is without merit.

[VIII. Victim Impact Testimony - Deleted]

IX. PROSECUTORIAL MISCONDUCT

Defendant contends that prosecutorial misconduct undermined his rights to a fair trial and a reliable sentencing determination. No contemporaneous objection was made to any of the alleged improper arguments. The issue is waived. Tenn. R. App. P. 36(a); State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994). Nevertheless, we will address these issues.

A. Intentional Murder

Defendant contends the prosecutor improperly argued to the jury that the homicide was intentional as opposed to being accidental. Our review of the argument does not substantiate this claim. The prosecutor merely related the facts and circumstances surrounding the murder and stated the barrel of the gun "ended up in her nose, and that's where Leonard Smith pulled the trigger." This argument was not improper.

B. Deterrence

Defendant contends the prosecutor unlawfully argued the need for deterrence. Any argument based upon general deterrence is improper. State v. Irick, 762 S.W.2d 121, 131 (Tenn. 1988); Smith II, 857 S.W.2d at 13.

The questioned argument was actually an explanation as to why felony murder was a first degree murder, the most serious offense under our law. The prosecutor stated that without felony murder, there would be no protection for those victimized by someone like the defendant and his co-defendant. We do not view this as a deterrence argument. This issue is without merit.

C. Webb Conviction

Defendant contends the prosecutor improperly argued that the present conviction was a prior violent felony which the jury could consider as an aggravating circumstance. The prosecutor clearly argued to the jury that the exhibit representing the present conviction was the offense for which the jury was now going to be required to sentence the defendant to either life imprisonment or death. He reviewed the other three (3) judgments as those to be relied upon for prior felony convictions. The prosecutor did not argue that the present conviction could be considered as an aggravating circumstance. This issue is without merit.

X. JURY INSTRUCTIONS

Defendant contends the trial court erred in failing to instruct the jury on specific non-statutory mitigating circumstances. Further, the defendant contends the trial court erred in refusing to instruct the jury to presume that a sentence to life imprisonment meant the defendant would spend the rest of his life in prison, whereas a sentence to death would presume death by electrocution.

A. Non-Statutory Mitigating Circumstances

Defendant requested that the trial court give special jury instructions listing four non-statutory mitigating circumstances. The trial court declined to do so. Defendant contends this is reversible error under State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996).

The present offense was committed prior to November 1, 1989; therefore, sentencing for this capital offense is governed by the statutory law in effect on the date of the commission of the offense. State v. Hutchison, 898 S.W.2d 161, 174 (Tenn. 1994), *cert. denied* 116 S.Ct. 137 (1995). At the time of the commission of this offense, the statute did not require that the jury be instructed as to non-statutory mitigating circumstances. Tenn. Code Ann. § 39-2-203(e)(1982); State v. Hartman, 703 S.W.2d 106, 118 (Tenn. 1985).

State v. Odom required the jury to be instructed on non-statutory mitigating circumstances when raised by the evidence and specifically requested by either the state or the defendant. 928 S.W.2d at 30. However, Odom was based upon the requirements of the new statute, Tenn. Code Ann. § 39-13-204(e)(1991). Odom specifically recognized that neither the United States Constitution nor the Tennessee Constitution required the submission of non-statutory mitigating circumstances to the jury. 928 S.W.2d at 30 (citing State v. Hutchison, 898 S.W.2d at 173-74). We, therefore, conclude that the trial judge did not err in refusing to charge non-statutory mitigating circumstances as was allowable under the statute in effect on the date of the commission of the offense.

B. After-Effect of Verdict

Defendant requested that the jury be instructed that they were to presume that if the defendant were sentenced to life imprisonment, he would spend the rest of his life in prison; and that if he were sentenced to death, he would be executed by electrocution. Alternatively, the defendant requested that the jury be instructed that a sentence of life imprisonment meant the defendant would remain in prison for the rest of his life, and that a sentence of death meant that the defendant would be executed by electrocution. These requests were rejected by the trial court. Our Supreme Court has recently ruled that the jury need not be given information about parole availability. State v. Bush, __ S.W.2d __ (1997). Likewise, a trial court does not err by refusing to instruct jurors that they should presume that the sentence they assess will actually be carried out. State v. Caughron, 855 S.W.2d 526, 543 (Tenn. 1993); *see also* Smith II, 857 S.W.2d at 11. This issue is without merit.

XI. TAKING EXHIBITS TO JURY ROOM

Defendant contends the trial court erred in allowing the jury to take the exhibits with them to the jury room for use in deliberations. More specifically, defendant contends he was prejudiced by the redactions on the Pierce and Webb convictions.

Tenn. R. Crim. P. 30.1 was in effect at the time of trial. This rule provides that the jury shall take to the jury room all exhibits that were received in evidence unless the Court, for good cause, determines otherwise. Defendant's contention that the jury would engage in undue speculation due to the redactions on the Pierce and Webb convictions is without merit. As previously noted, the jury had been specifically instructed not to speculate concerning these matters. There was no abuse of discretion in allowing the jury to take these exhibits to the jury room pursuant to Tenn. R. Crim. P. 30.1.

XII. CONSTITUTIONALITY OF DEATH PENALTY

Defendant contends the Tennessee death penalty statutes are unconstitutional in the following respects:

> (1) the statutes fail to meaningfully narrow the class of death eligible defendants;
>
> (2) the statutes allow the death penalty to be imposed capriciously and arbitrarily;
>
> (3) electrocution constitutes cruel and unusual punishment; and
>
> (4) the appellate review process in death penalty cases is constitutionally inadequate.

Each of these contentions has been rejected by our Supreme Court. State v. Keen, 926 S.W.2d at 741-44. This issue is without merit.

[XIII. Proportionality Review - Deleted]

We find no reversible error; therefore, the judgment of the trial court is AFFIRMED.