IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1995

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 02C01-9412-CC-00269
	)	
	)	Henry County
v.	)	
	)	Hon. C. Creed McGinley, Judge
	)	
DAVID WILLARD PHIPPS, JR.	)	(Interlocutory Appeal)
	)	
Appellant.	)	

For the Appellant:

Lionel R. Barrett, Jr.
Washington Square Two - Suite 417
222 Second Avenue, North
Nashville, TN 37201

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Christina S. Shevalier
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

G. Robert Radford
District Attorney General
P.O. Box 686
Huntingdon, TN 38344-0686

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The state was granted an interlocutory appeal from the Henry County Circuit Court's order that essentially bars the state from seeking the death penalty for the defendant, David Willard Phipps, Jr., upon his retrial for first degree murder. The defendant was originally convicted of first degree murder, but this court reversed the conviction and remanded the case for a new trial. State v. Phipps, 883 S.W.2d 138 (Tenn. Crim. App. 1994). The state did not seek the death penalty in the first trial, but filed a Notice of Intent to Seek the Death Penalty after the case was remanded. The trial court struck the Notice, thereby barring the state from seeking the death penalty in the retrial. The state contends that the trial court abused its discretion, arguing in support that neither the Double Jeopardy Clause, nor Rule 12.3(b), Tenn. R. Crim. P., nor the potential for vindictive or piecemeal litigation prohibit the state from pursuing the death penalty at the defendant's retrial. Although we agree that neither the Double Jeopardy Clause nor Rule 12.3(b),Tenn. R. Crim. P., prohibits the state from seeking the death penalty, we affirm the decision of the trial court under the analysis provided by this court in State v. John David Terry, No. 01-C-01-9210-CR-00304, Davidson Co. (Tenn. Crim. App. June 28, 1995), applic. filed (Tenn. Aug. 31, 1995), relative to attempts by the state to seek the death penalty upon retrial for grounds not presented at the original trial.

I

Relative to the Double Jeopardy Clauses of the United States and Tennessee constitution, we agree with the state that they do not bar it from seeking the death penalty in the defendant's retrial. The defendant's reliance on Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852 (1981) and Arizona v. Rumsey, 467 U.S. 203, 211, 104 S.Ct. 2305, 2310 (1984) to refute this contention is misplaced. In Bullington, the state unsuccessfully sought the death penalty at the defendant's first sentencing

hearing. Recognizing the similarities between the defendant's sentencing hearing and a trial, the Supreme Court viewed the jury's decision not to impose the death penalty at the defendant's first sentencing hearing as an acquittal of "'whatever was necessary to impose the death sentence.'" Bullington, 101 S. Ct. at 1861 (citation omitted). Thus, it held that jeopardy attached at the first sentencing hearing, and the state could not seek a death sentence on remand. Id. at 1862.

In Rumsey, the Court applied the holding in Bullington to a case in which the trial judge had considered the issue during a sentencing proceeding and had refused to impose the death penalty. The Court emphasized that the sentencing proceeding was similar to a trial and held that the trial court could not sentence the defendant to death on remand. Rumsey, 104 S. Ct. at 2310-11.

Unlike the sentencing courts in Bullington and Rumsey, at the first sentencing hearing in this case, the trial court did not conduct a trial-like proceeding to decide whether the defendant's crime warranted a death sentence. The state did not seek a death sentence. Therefore, the trial court did not decide whether the prosecution presented sufficient evidence to warrant a death sentence. Under Bullington, "the proper inquiry is whether the sentencer or reviewing court has 'decided that the prosecution has not proved its case' that the death penalty is appropriate." Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 1755 (1986) (emphasis and footnote omitted). Because the trial court in this case did not consider the issue during the defendant's first trial, it did not rule that there was insufficient evidence to warrant a death sentence, and the Double Jeopardy Clause does not bar the imposition of the death penalty at the defendant's retrial.

II

Also, we agree with the state's contention that Rule 12.3(b), Tenn. R. Crim. P., does not apply so as to bar pursuit of the death penalty at the defendant's retrial. Rule 12.3(b) provides that the state must file written notice of the intent to seek the death penalty at least thirty days before trial. The defendant asserts that the required notice is analogous to an indictment and that once he has been tried without the notice, the state was prohibited from seeking the death penalty at a second or subsequent trial of the case. He refers, by analogy to Rule 8(a), Tenn. R. Crim. P., which prohibits prosecution by separate indictments, and separate trials, for offenses based upon the same conduct.

In Terry, though, this court rejected such an argument relative to a notice of intent to seek the death penalty and an indictment. "The differences between a notice pleading and a charging instrument are fundamental, and the differences are obvious. There is absolutely no similarity between the two documents." Terry, slip op. at 17. As well, Rule 8(a) relates to indictments, not notice pleadings. Thus, the rules of criminal procedure provide no bar to the state's pursuit of the death penalty.

III

However, we believe that the policy considerations provided in Terry bar the state from pursuing the death penalty in the retrial of this case. The record indicates that the trial court's primary concern in striking the state's notice was the potential for vindictiveness and the prevention of piecemeal litigation. The state argues that nothing in the record indicates that the state is seeking the death penalty merely because the defendant successfully appealed his conviction and that it should be permitted to seek the death sentence at the retrial absent a showing of bad faith. We disagree.

This court has previously recognized that a capital defendant may be protected from potentially vindictive prosecution or from piecemeal litigation upon retrial. See State v. Carter, 890 S.W.2d 449 (Tenn. Crim. App. 1994); State v. Craig Thompson, No. 02-C-01-9308-CR-00195, Shelby Co. (Tenn. Crim. App. March 9, 1994) (Order Denying Petition to Rehear), app. granted (Tenn. Oct. 24, 1994). Most recently, this court addressed a similar issue in Terry in which Terry was originally sentenced to death. The trial court granted Terry a new sentencing hearing, and the state notified him that it intended to rely on an aggravating circumstance that it did not present at the first sentencing hearing. Recognizing the importance of protecting a capital defendant from the risk of vindictive prosecution and piecemeal litigation, in the context of fairness, this court held that the state could not assert a new aggravating circumstance at the new sentencing trial unless "(a) it has discovered new evidence which will establish the new aggravating circumstance and (b) the new evidence was unavailable and undiscoverable prior to the initial sentencing hearing despite the state's diligent effort to fully investigate its case against the accused." Terry, slip op. at 21 (emphasis in original). Because the state did not seek a death sentence at the defendant's first trial, a greater risk of vindictive and piecemeal litigation exists in this case than was present in Terry. Therefore, the analysis in Terry should apply in this case.

The only aggravating circumstance listed in the Notice of Intent to Seek the Death Penalty is that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." See T.C.A. § 39-13-204(j)(5). The defendant argues that the evidence the state plans to use to support this aggravating factor existed at the time of the defendant's first trial. The state concedes that the evidence it intends to rely upon existed at the time of the defendant's first trial, but argues that "it did not exist to the extent that it was useful to the state." Specifically, the state intends to rely on a letter

that was taken into the state's custody at the crime scene. The state argues that the letter supports the aggravating circumstance and that it should be allowed to use the letter to pursue the death penalty because it did not discover the contents of the letter until after the defendant's first trial. This argument is without merit. The state possessed the letter before the defendant's first trial. Its contents were not undiscoverable and unavailable to the state.

The state also contends that it should be permitted to pursue the death penalty based on information it learned from a witness less than a week before the defendant's first trial. The state argues that it should be allowed to use the information to seek the death penalty in the defendant's second trial because before the first trial, it did not know about the information in time to file a timely notice as required by Rule 12.3(b), Tenn. R. Crim P. We disagree. Rule 12.3(b) specifies that the remedy for an untimely notice of intent is a continuance, but the record does not reflect that the state sought this option.

Before the first trial, the state became aware of the nature of the crime the defendant allegedly committed. Even though it had access to all the evidence upon which it now seeks to rely, the state chose not to pursue the death penalty. Absent new evidence that was unavailable and undiscoverable at the time of the defendant's first trial, the state cannot seek the death penalty at the defendant's retrial.

Given the record before us, we conclude that the trial court did not abuse its discretion by striking the Notice of Intent to Seek the Death Penalty. The trial court is affirmed.

_____

Joseph M. Tipton, Judge

CONCUR:

_____
Joe B. Jones, Presiding Judge

_____
John K. Byers, Senior Judge