IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. NO. 02C01-9412-CC-00265
APPELLEE,	*	HENRY COUNTY
VS.	*	HON. JULIAN P. GUINN, JUDGE
TERESA DEION SMITH HARRIS,	*	(First Degree Felony Murder)
APPELLANT.	*	

DISSENTING OPINION

I concur with my colleagues that the conviction should be affirmed. In my view, however, there should be a remand on the sentence. Thus, I must dissent in part.

The jury clearly found that one of the two aggravating circumstances applied to the defendant: "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another[.]" Tenn. Code Ann. § 35-13-204(i)(6). My concern is with the jury report on the second aggravating circumstance found to be applicable.

My colleagues characterize issue 4(a) as whether "the trial court improperly sentenced the appellant to life without parole [because of] the failure of the jury to completely fill in the verdict form with all the elements of the first aggravating factor." That is a misstatement, in my view, because the record establishes that the jury found applicable only a portion of the "heinous, atrocious, or cruel in that it involved torture or serious abuse" circumstance but nevertheless used that factor in the enhancement of the sentence. See Tenn. Code Ann. § 39-13-204(i)(5).

When the jury returned with the verdict, the following exchange occurred between the trial judge and the jury foreman:

> THE COURT: I notice that where you set out the aggravating circumstances number one that you do not have the entire aggravating circumstance written out.
> Is there some reason?
>
> JURY FOREMAN: Well, we just[--]
>
> THE COURT: Was it intended to be that you found the entire circumstance there?
>
> JURY FOREMAN: Well, just what I've got written out.
>
> THE COURT: You've written here that you found that the murder was especially heinous and atrocious.
>
> JURY FOREMAN: Yes, sir.
>
> THE COURT: You have omitted that it was cruel, involved torture or serious physical abuse beyond that necessary to produce death.
> Is that what you intended for it to be?
>
> JURY FOREMAN: Yes, sir.
>
> THE COURT: All right, but then you have found that the second aggravating circumstance there in its entirety is correct.
>
> JURY FOREMAN: Yes, sir.
>
> THE COURT: Based upon that you fixed a sentence of life imprisonment without the possibility of parole.
> Have I read it correctly?
>
> JURY FOREMAN: That's correct.

(Emphasis added).

The statute provides as follows: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or serious abuse beyond that necessary

to produce death[.]" Tenn. Code Ann. § 39-13-204(i)(5). It is apparent the jury did not find all the necessary elements of the first aggravator; that is, they did not find that "it involved torture or serious abuse." In effect, they applied this section of the statute without finding all elements present. The majority appears to treat that as an oversight. I must conclude that the jury, perhaps in its desire to compromise an internal disagreement, improperly applied the first aggravating factor. The entire section of the statute must be established by the proof and accepted by the jury before it can be considered as an aggravating circumstance. Their lack of unanimity on this important issue is evident.

In State v. Howell, 868 S.W.2d 238, 259 (Tenn. 1993), cert. denied, 510 U.S. 1215 (1994), our supreme court developed a standard to determine whether the jury's use of an invalid aggravating factor in imposing death might qualify as harmless beyond a reasonable doubt. That is, would the jury have reached the same conclusion (life without the possibility of parole) had they not considered the invalid aggravator? The Howell court considered four factors in determining whether the error was harmless: (1) the number and strength of remaining valid aggravating circumstances; (2) the prosecutor's argument at sentencing; (3) the evidence admitted to establish the invalid aggravator, and (4) the nature, quality, and strength of mitigating evidence. Id. at 261.

In its consideration of the first of the four factors, our supreme court ruled as follows:

> [W]e necessarily consider the number of remaining valid aggravating circumstances ...; but even more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it.

Howell, 868 S.W.2d at 261 (emphasis added). The single legitimate aggravating

circumstance left is that the murder was committed to "prevent the lawful arrest or prosecution" of the defendant. That there were no other aggravating circumstances would weigh against a finding of harmlessness. Although there is clearly a "quantum of proof supporting" the remaining statutory aggravating circumstance, the "persuasiveness" of a single remaining factor is often not enough to warrant either the death penalty or the imposition of a life sentence without the possibility of parole. This may be best understood by comparing the facts here to those in Howell, where the supreme court affirmed the death sentence even though there was only one remaining aggravator. Id. In Howell, the remaining aggravator was that the defendant had prior violent felony convictions. See Tenn. Code Ann. § 39-13-204(i)(2). The defendant had committed a "cold-blooded execution style murder ... within twenty-four hours of [the second victim's] murder" as well as an attempted murder in a shootout with police. State v. Howell, 868 S.W.2d at 261. That the defendant committed two execution style murders within a twenty-four hour time period is especially persuasive when compared to the facts here. Moreover, in State v. Walker, 910 S.W.2d 381, 398 (Tenn. 1995), cert. denied, _____S. Ct. _____, 1996 WL 183342 (Oct. 7, 1996), our supreme court held that the single remaining aggravator, the defendant's prior conviction for manslaughter, was "not nearly as positive" as that remaining in Howell. Thus, remand for resentencing was ordered. Id. The circumstances here align more closely with those in Walker.

The second factor to consider in determining the harmlessness of the error is the prosecutor's argument at the sentencing hearing. Howell, 868 S.W.2d at 261. In opening statement, the prosecutor briefly argued that both aggravators were applicable. One received no more emphasis than the other. The bulk of closing argument was directed toward discrediting the mitigating evidence. This factor, in my view, is relatively neutral. Had the state emphasized the avoiding detection

aggravator, it might weigh more favorably for the state. In State v. Nichols, 877 S.W.2d 722, 739 (Tenn. 1994), cert. denied, _____ U.S. _____, 115 S. Ct. 909 (1995), a death sentence was affirmed when the "bulk of the argument relative to aggravating circumstances focused" on the remaining valid factor. Using the ruling in Nichols as a guide, I would consider this factor to weigh slightly against a finding of harmlessness.

The third factor is whether the evidence admitted to establish the invalid aggravator would have been allowed into proof anyway. If proof of the invalid aggravator included the admission of prejudicial evidence, the factor would weigh in favor of the defendant. Howell, 868 S.W.2d at 261. Obviously, however, the heinous nature of this killing and what occurred afterwards was admissible. Thus, the factor weights favorably for the state.

The final Howell factor is the nature of the mitigating evidence. Id. The defendant presented evidence that she had had drug and alcohol problems since she was twelve or thirteen years of age. She also presented proof that she suffered from post-traumatic stress disorder and that a personality disorder that made her dependent and passive. The defendant has a history of being sexually abused and she has attempted suicide more than once. While it is true that there "was virtually no mitigating evidence relating to the good character of the defendant, other than the evidence offered to explain [her] anti-social behavior," Id. at 262, there was at least some evidence admitted to mitigate or explain her behavior. This factor, in my view, is neither helpful to the defendant nor the state.

Obviously, this is a close case. A sentence of life without the possibility of parole, however, requires the same kind of procedure and proof utilized

in a death penalty case. See Tenn. Code Ann. § 39-13-204(a) and -207. Our supreme court has consistently and carefully scrutinized verdicts in which an aggravating circumstance has been misapplied. Despite the gruesome nature of this crime, the same reasoning should apply here. I hesitate, in these circumstances, to substitute my own opinion for that of the jury.

On the balance, I am unable to conclude beyond a reasonable doubt that the jury would have rendered the same sentence had they not considered the inappropriate aggravator. Accordingly, I would remand for resentencing. I do recognize that under these particular facts, the same result may very well occur.

_____
Gary R. Wade, Judge