

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1996 SESSION

<p>FILED</p> <p>March 19, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 APPELLANT,)
)
 v.)
)
 FREDERICK D. BUTLER, DEWAYNE B.)
 BUTLER, AND ERIC D. ALEXANDER,)
)
 APPELLEES.)

No. 02-C-01-9604-CR-00128

Shelby County

Joseph B. Dailey, Judge

(Interlocutory Appeal)

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OPINION FILED: _____

AFFIRMED IN PART AND REVERSED IN PART

Joe B. Jones, Presiding Judge

OPINION

This Court granted the application of the State of Tennessee (state) for an interlocutory appeal¹ to determine whether the felony murder aggravating circumstance² can be used to enhance a life sentence to a life sentence without the possibility of parole in a felony murder case when the state does not seek a death sentence. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issue presented for review, it is the opinion of this Court the judgment of the trial court denying the motion of Frederick D. Butler to strike the felony murder aggravating circumstance from the state's notice should be affirmed, and the judgment of the trial court granting the motions of Dewayne B. Butler and Eric D. Alexander should be reversed. This cause is remanded to the trial court for further proceedings consistent with this opinion.

On December 15, 1994, the Shelby County Grand Jury returned two indictments charging Frederick D. Butler, Dewayne D. Butler, and Eric D. Alexander (defendants) with criminal offenses. The first indictment charges the defendants with especially aggravated robbery. The second indictment, which contains two counts, charges the defendants with felony murder in one count and premeditated murder in another count. All three offenses arose out of the same criminal conduct.

The state gave the defendants notice it would seek a conviction for first degree murder committed during the perpetration of a felony (felony murder), and, if the defendants are convicted, the state will seek a sentence of life without the possibility of parole. The notice included the aggravating circumstances the state will attempt to prove to enhance the sentence from life to life without the possibility of parole.

I.

When the crimes in question were committed, the offense of first degree murder proscribed the following conduct:

¹Tenn. R. App. P. 9.

²Tenn. Code Ann. § 39-13-204(i)(7).

- (1) An intentional, premeditated and deliberate killing of another;
- (2) A reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy;
- (3) A reckless killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb; or
- (4) A reckless killing of child less than sixteen (16) years of age, if the child's death results from aggravated child abuse, as defined by § 39-15-402, committed by the defendant against the child.³

The supreme court has ruled subsections (a)(2) and (a)(3) pass constitutional muster.⁴

In this case, the state will seek to convict the defendants pursuant to subsection (a)(2) of the statute. The defendants are accused of "unlawfully and recklessly kill[ing] Charles Cantrell during the perpetration of Especially Aggravated Robbery."⁵ Thus, the state will have to establish beyond a reasonable doubt (a) the defendants killed the victim or are criminally responsible for the conduct of the triggerman⁶, (b) the killing was reckless, and (c) the killing occurred while the defendants were committing or attempting to commit one of the enumerated felonies, namely, first degree murder, arson, rape, robbery, burglary, theft, kidnapping, or aircraft piracy.⁷

³Tenn. Code Ann. § 39-13-202(a). This section was amended in 1995. Presently, the commission of felony murder does not require a culpable mental state. Tenn. Code Ann. §§ 39-13-202(a)(Supp. 1996).

⁴State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992), cert. granted, 507 U.S. 1028, 113 S.Ct. 1840, 123 L.Ed.2d 466, cert. dismissed, 510 U.S. 805, 114 S.Ct. 48, 126 L.Ed.2d 19 (1993).

⁵The offense of especially aggravated robbery is proscribed by Tenn. Code Ann. § 39-13-403.

⁶Tenn. Code Ann. § 39-11-401(a).

⁷See Tenn. Code Ann. § 39-13-202(a)(2)(Supp. 1994).

II.

A.

Before the defendants can be sentenced to life without the possibility of parole (a) the defendants must be convicted of an offense proscribed by Tenn. Code Ann. § 39-13-202 (Supp. 1994),⁸ (b) the jury must find the state established one or more of the aggravating circumstances set forth in Tenn. Code Ann. § 39-13-204(i) beyond a reasonable doubt,⁹ and (c) the jury must further find the aggravating circumstance or circumstances proven beyond a reasonable doubt outweigh any mitigating circumstance or circumstances established by the evidence.¹⁰ As can be seen, proof of an aggravating circumstance beyond a reasonable doubt is pivotal to the imposition of life without the possibility of parole. The question which this Court must resolve is whether aggravating circumstance (i)(7)¹¹ can be used to enhance a life sentence to a life sentence without the possibility of parole.

B.

Aggravating circumstance (i)(7)¹² provides:

The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

The state contends this aggravating circumstance may constitutionally be used to enhance a life sentence to a life sentence without the possibility of parole. The defendants contend

⁸Tenn. Code Ann. § 39-13-207(a).

⁹Tenn. Code Ann. § 39-13-207(c).

¹⁰Tenn. Code Ann. § 39-13-207(d).

¹¹Tenn. Code Ann. § 39-13-204(i)(7).

¹²Tenn. Code Ann. § 39-13-204(i)(7)(Supp. 1994).

the use of this aggravating circumstance violates the Tennessee Constitution because this factor is a duplication of the elements of felony murder. The defendants argue the Tennessee General Assembly was aware of the supreme court's decision in State v. Middlebrooks¹³ when it enacted the life without the possibility of parole penalty, and the adoption of the aggravating circumstances set forth in Tenn. Code Ann. § 39-13-204(i) was tantamount to the adoption of the Middlebrooks limitations upon the use of aggravating circumstance (i)(7) in felony murder convictions.

(1)

Historically, the Tennessee Supreme Court permitted the use of aggravating circumstance (i)(7) to enhance a life sentence to a death sentence in felony murder cases.¹⁴ The court rejected arguments that the use of this factor in felony murder cases constituted double jeopardy,¹⁵ constituted cruel and unusual punishment,¹⁶ failed to narrow the class of death eligible defendants,¹⁷ or was simply improper.¹⁸ The supreme court addressed this issue in different ways.¹⁹

In State v. Middlebrooks,²⁰ the supreme court reversed its previous position regarding the use of aggravating circumstance (i)(7) to support a death sentence in felony

¹³840 S.W.2d 317 (Tenn. 1992).

¹⁴See State v. Smith, 755 S.W.2d 757 (Tenn. 1988); State v. Barnes, 703 S.W.2d 611 (Tenn. 1985), cert. denied 476 U.S. 1153, 106 S.Ct. 2260, 90 L.Ed.2d 705 (1986); State v. Smith, 695 S.W.2d 954 (Tenn. 1985); State v. King, 694 S.W.2d 941 (Tenn. 1985); State v. Sheffield, 676 S.W.2d 542 (Tenn. 1984); State v. Laney, 654 S.W.2d 383 (Tenn. 1983); State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981).

¹⁵Barnes, 703 S.W.2d at 618; Laney, 654 S.W.2d at 387.

¹⁶Smith, 755 S.W.2d at 768.

¹⁷Smith, 755 S.W.2d at 768.

¹⁸King, 694 S.W.2d at 946; Laney, 654 S.W.2d at 387.

¹⁹See, for example, Barnes, 703 S.W.2d at 618 ("[The defendant] insists that having been convicted of felony murder at the guilt phase, double jeopardy precludes the use of the felony as an aggravating circumstances. We have heretofore considered and rejected this identical issue.")

²⁰840 S.W.2d 317 (Tenn. 1992).

murder cases. The court held (i)(7) cannot be used to support a death sentence in felony murder cases because this aggravating circumstance does not narrow the death eligible class of defendants who are convicted of felony murder. In ruling, the court said:

We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravated circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn. Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense. As a result, we conclude that Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder. Accordingly, we expressly overrule State v. Smith, 755 S.W.2d 757 (Tenn. 1988) and its progeny on this issue.²¹

The supreme court subsequently held its holding in Middlebrooks was predicated exclusively upon the Tennessee Constitution.²² In State v. Howell, the supreme court said it held in Middlebrooks that "it is unconstitutional under the Tennessee Constitution Article I, Section 16, to use the felony murder aggravating circumstances . . . to support imposition of the death penalty for a conviction of felony murder, although it can be used to support imposition of the death penalty for premeditated murder."²³ (emphasis in original).

(2)

In subsequent cases, the supreme court has discussed Middlebrooks in the context of narrowing the class of death eligible defendants.²⁴ The supreme court has not

²¹840 S.W.2d at 346.

²²State v. Howell, 868 S.W.2d 238, 259 (Tenn. 1993), cert. denied, 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994).

²³868 S.W.2d at 259.

²⁴State v. Cazes, 875 S.W.2d 253, 269-270 (Tenn. 1994), cert. denied, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995)(the use of (i)(7) in a felony murder conviction to support a death sentence held to be harmless error in view of the other aggravating circumstances found by the jury); State v. Howell, 868 S.W.2d 238, 265-271 (Tenn. 1993) (Reid, C.J., concurring)(the use of (i)(7) in a felony murder conviction to support a death sentence held

determined the application of aggravating circumstance (i)(7) when the defendant is convicted of felony murder and the jury sentences the defendant to life without the possibility of parole.

III.

The underpinning of Middlebrooks is the narrowing of death eligible defendants by preventing the use of aggravating circumstance (i)(7) to support a death sentence when the accused is convicted of first degree felony murder. In this case, the state does not seek the imposition of a death sentence if the defendants are convicted of first degree felony murder. The notice given to the defendants relates the state will seek a life sentence without the possibility of parole if the defendants are convicted of first degree murder.

This case is distinguishable from Middlebrooks. Here, there is no United States or Tennessee constitutional provision, statute, rule, or common law decision which requires the class of defendants eligible for a life sentence without the possibility of parole to be narrowed.²⁵ Contrary to the defendants' argument, the General Assembly cannot be said to have adopted Middlebrooks when creating the penalty of death without the possibility of parole. Middlebrooks addressed instances where the death penalty is imposed after the defendant has been convicted of first degree felony murder. Thus, Middlebrooks is limited in scope to capital cases. Because the penalty sought in the case sub judice is life without the possibility of parole, the holding in Middlebrooks does not bar the use of aggravating circumstance (i)(7) to enhance a life sentence to life without the possibility of parole following a conviction for felony murder.

to be harmless error in view of the other aggravating circumstances found by the jury); State v. Bane, 853 S.W.2d 483, 489 (Tenn. 1993), cert. denied 510 U.S. 1040, 114 S.Ct. 682, 126 L.Ed.2d 650 (1994)(the use of (i)(7) in a felony murder conviction to support a death sentence held to be reversible error, and case was remanded for a new sentencing hearing); see State v. Stephenson, 878 S.W.2d 530, 557 (Tenn. 1994); State v. Smith, 868 S.W.2d 561, 583 (Tenn. 1993), cert. denied 115 S.Ct. 417, 130 L.Ed.2d 333 (1994); State v. Van Tran, 864 S.W.2d 465, 481-82 (Tenn. 1993), cert. denied 114 S.Ct. 1577, 128 L.Ed.2d 220 (1994).

²⁵See McArthur v. State, 309 Ark. 196, 830 S.W.2d 842, 846-47 (1992); State v. Travis, 568 A.2d 316, 324 (R.I. 1990).

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JERRY L. SMITH, JUDGE