IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 26, 2006 Session

STATE OF TENNESSEE v. RICKY THOMPSON

Direct Appeal from the Circuit Court for McMinn County
Nos. 89-705, -06, -07 Jon Kerry Blackwood, Senior Judge

No. E2005-01790-CCA-R3-DD - Filed April 25, 2007

PART II

DAVID G. HAYES, J., delivered the opinion of the court as to Part II, in a separate opinion, joined by J.C. MCLIN, J.

This separate opinion addresses issues relative to the sentencing phase of the trial. Expressed herein are the views of the majority, consisting of Judge Hayes and Judge McLin. The minority view of Judge Wedemeyer is expressed in his dissent as to Part II.

SENTENCING PHASE
Mandatory Review

By statute, this court is required to review a sentence of death to determine: (a) whether the sentence was imposed in an arbitrary fashion; (b) whether the evidence supports the jury's finding of statutory aggravating circumstances; (c) whether the evidence supports the jury's finding of the absence of any mitigating circumstance or circumstances sufficiently substantial to outweigh the aggravating circumstances so found; and (d) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the Defendant. T.C.A. § 39-2-205(c) (1982).[1]

a. Imposition of Sentence in an Arbitrary Fashion

Initially, the Defendant contends that "the sentence was imposed in an arbitrary fashion in that the numerous instructional errors previously alleged improperly informed the jury with regard to . . . what constitutes a reasonable doubt; the nature of an act done with premeditation; the burden of proving insanity; and the meaning of 'depravity.'" However, as previously determined, the jury was properly instructed with regard to these issues. Accordingly, because the trial court followed

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[1]Because this crime was committed on October 26, 1989, prior to the adoption of our 1989 Criminal Code, this case is governed by the prior law.

the statutory sentencing scheme, we conclude that the Defendant's sentence was not imposed in an arbitrary manner.

b. Presence of Statutory Aggravating Circumstances

As previously addressed, the Defendant contends that the statutory aggravating circumstances found by the jury in this case were not supported by sufficient evidence. However, as determined in Part I, the proof was sufficient to establish that the Defendant knowingly created a great risk of death to two or more persons other than the victim during the murder, as well as that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. *See* T.C.A. § 39-2-203(i)(3), (5) (1982).

c. Weight of Aggravating Circumstances versus Mitigating Circumstances

1. Mitigating Circumstances

After review, we conclude that the evidence at the guilt and sentencing phases of the trial established the following mitigating circumstances: (1) the Defendant has no significant history of prior criminal activity; (2) the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (3) the victim was a participant in the Defendant's conduct; and (4) the capacity of the Defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the Defendant's judgment. T.C.A. § 39-2-203(j)(1), (2), (3), (8).

It is rare that a capital case contains the volume of documented history of mental disease or defects found in this case.[2] We cannot take issue with the Defendant's assertion that he "has been mentally ill since childhood." In 1968, at the age of seventeen, the Defendant was treated for a psychiatric disorder. He was again hospitalized the following year for continuing treatment of this disorder. He was hospitalized at age nineteen with a diagnosis of borderline schizophrenia and depression. In 1972, he was hospitalized with a diagnosis of substance abuse, personality disorder, and a provisional diagnosis of schizophrenia. In 1974, he was hospitalized as a result of suicide attempts. In 1975, he was hospitalized and remained a patient for approximately one year with the diagnosis of schizophrenia and was treated with anti-psychotic medication. In 1977, he remained under mental health care and, in later 1977, was hospitalized after an attempted suicide with a diagnosis of "chronic undifferentiated schizophrenia." Months later, he was hospitalized for "bizarre behavior." In 1979, he was hospitalized and diagnosed with "schizo-affective schizophrenia." He was again hospitalized in 1980. In 1981, he was diagnosed with paranoid schizophrenia. In 1983, he was hospitalized and diagnosed with substance abuse and paranoid schizophrenia. In June 1998,

[2]Following his second jury trial, which resulted in a jury verdict of guilty and a sentence of death, the trial court, at the motion for new trial, entered an order modifying the jury's verdict to that of not guilty by reason of inanity, which was subsequently reversed by our supreme court. *State v. Thompson*, 151 S.W.3d 434 (Tenn. 2004).

the McMinn County Circuit Court found the Defendant incompetent to stand trial following evaluations by two state mental health experts. Assessment testing revealed indicators of depression, anxiety, a dependant schizotypal disorder, and a borderline personality disorder.

At the Defendant's trial in 2000, two mental health experts testified that the Defendant suffered from an impairment to the frontal lobe of his brain which would have affected his reasoning and judgment. One of the experts, Dr. Bernet, testified that the Defendant suffered from a chronic psychiatric disorder called schizo-affective schizophrenia which causes a loss of touch with reality. At the sentencing phase of the trial, a third expert witness testified that the Defendant was mentally impaired, resulting in "incredibly poor reasoning ability" and being "out of touch with reality." No expert testimony has ever been offered to contradict these findings, and none was presented by the State at the Defendant's trial. We conclude these facts permit application of the mitigating circumstance (j)(8). *See Id*. at (j)(8).

At trial, Dr. Tramontana testified that the Defendant's impairment to the frontal lobe would have affected the Defendant's ability to focus, concentrate, plan, and organize. Such conditions could be aggravated by stress or intoxication. Dr. Tramontana opined that the Defendant's mental impairment could have interfered with his exercise of proper delay in judgment when provoked by circumstances such as were alleged to have occurred on the day of the crime. *See Id*. at (j)(2).

Testimony at trial established that in October of 1989, the victim had threatened to leave the Defendant and that the marital relationship "was really getting bad." The victim's niece confirmed that the victim and the Defendant were "splitting up and fighting" over who would have custody of "little Ricky." On October 25th, the victim left her place of employment with her niece instead of waiting for a ride home with the Defendant, which was customary. The Defendant routinely babysat the parties' eight-month-old child and the victim's five-year-old daughter while the victim was at work. The manager of the convenience store where the victim was employed described the Defendant as "polite" and "courteous" and said he "took care of the kids." However, she also noted that he was "obsessive" about his family. The Defendant became irritated when he learned that his wife had left work with an unknown person. Attempts to locate her were unsuccessful. At 3:00 a.m., the Defendant returned to the victim's place of employment and was led to believe, by an employee of the convenience store, that his wife had left with another man.[3] At 4:00 a.m., the Defendant, still searching for his wife, drove to his mother-in-law's residence with the minor child. The Defendant told the victim's mother, "There ain't no damn son-of-a-bitch going to get [my] baby." The Defendant, unable to locate the victim, returned home with the infant child. Around 11:00 a.m., witnesses heard loud shouting and yelling in the front yard of the parties' residence, with gunshots following. Testimony established that the victim had entered the residence, and an argument immediately ensued. The Defendant repeatedly told the victim not to take the child, but

[3]Testimony at trial established that the twenty-one-year-old victim had threatened to leave the thirty-nine-year-old Defendant for a younger man because the Defendant "couldn't take care of her [sexually]."

the victim grabbed the child and ran out the door.[4] The Defendant immediately seized an assault rifle, gave pursuit, and, moments later, the victim was fatally shot. *See id*. at (j)(3).

The proof also established that the Defendant has no significant history of prior criminal activity. *See id*. at (j)(1).

2. Balancing

Based upon the foregoing facts, our review leads us to the conclusion that the evidence at trial does not support the jury's finding "of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating . . . circumstances so found." T.C.A. § 39-2-205(c)(3). In sum, we are unable to conclude that the two aggravating circumstances are outweighed by the mitigating circumstances. *See id*. at (g).

d. Proportionality Review

When a death sentence is imposed, a comparative proportionality analysis must be conducted. *See* T.C.A. § 39-2-205(c)(4). The analysis identifies aberrant, arbitrary, or capricious sentencing by determining whether a death sentence is "'disproportionate to the punishment imposed on others convicted of the same crime.'" *State v. Bland*, 958 S.W.2d 651, 662 (Tenn. 1997) (quoting *Pulley v. Harris*, 465 U.S. 37, 42-43, 104 S. Ct. 871 (1984)).

In using a precedent-seeking method of comparative proportionality review, we compare a case with other cases involving similar defendants and similar crimes. *See Bland*, 958 S.W.2d at 665-67; *see also State v. Ivy*, 188 S.W.3d 132, 156 (Tenn. 2006). While no defendants or crimes are alike, a death sentence is disproportionate if a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed." *Id*. at 668.

The pool of cases considered by this court in its comparative proportionality review includes those first degree murder cases in which the State seeks the death penalty, a capital sentencing hearing is held, and the sentencing jury determines whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death.[5] *See, e.g.*, *State v. Godsey*, 60 S.W.3d 759, 783 (Tenn. 2001). The pool does not include first degree murder cases in which a plea bargain is reached with respect to the punishment or in which the State does not seek the death penalty. *Id*. at 784.

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[4]In the initial appeal of the Defendant's homicide conviction to this court, one member of the panel found the evidence failed to establish the requisite elements of premeditation and deliberation, concluding: "It is difficult to envision a set of circumstances more likely to engender passion in a parent's mind than the snatching of a child by one parent from the other during the emotional turmoil of separation." *State v. Ricky Thompson*, C.C.A. No. 03C01-9406-CR-00198 (Tenn. Crim. App. at Knoxville, Jan. 24, 1996) (Turnbull, J., concurring and dissenting).

[5]The sentencing option of life imprisonment without parole was added in July 1993, thus, the Defendant is ineligible for that sentencing option.

We begin with the presumption that the sentence of death is proportionate with the crime of first-degree murder. *Terry v. State*, 46 S.W.3d 147, 163 (Tenn. 2001) (citing *State v. Hall*, 958 S.W.2d 679, 699 (Tenn. 1997)). This presumption applies only if the sentencing procedures focus discretion on the "'particularized nature of the crime and the particularized characteristics of the individual Defendant."' *Id*. at 163. In completing our review, we are aware that "no two cases involve identical circumstances." *See generally id.* at 164.

In comparing this case to other cases in which a defendant was convicted of the same or similar crimes, we look at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved. Our comparative proportionality review of the applicable cases considers the following factors regarding the offense: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims. *Bland*, 958 S.W.2d at 667. We also consider factors about the defendant including: (1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation. *Id*.; *see also State v. Reid*, 164 S.W.3d 286, 316 (Tenn. 2005).

1. "Particularized Nature of the Crime"

As required by statute, we begin our analysis by reviewing the nature of the offense. T.C.A. § 39-2-205(c)(4). There is no dispute that this case stems from an act of domestic violence motivated by the issue of custody of the minor child. It is clear the Defendant and the victim were experiencing marital difficulties during the period preceding the homicide. However, the record does not establish any prior threats or acts of violence by the Defendant toward the victim prior to October 25th. Indeed, the proof revealed that the years the Defendant and victim were married were the most stable and best years of his life. When the victim failed to return home from work on October 25th, the Defendant unsuccessfully searched for her, going both to the victim's place of employment and her mother's home. Witnesses at both places testified that the Defendant became enraged at his inability to find his wife, and, at this point, made threats to kill anyone who tried to take his child from him. On the morning of the murder, the victim returned to the Defendant's trailer, and an argument between the two ensued. At some point, the victim grabbed the minor child, ran from the trailer, and entered her niece's car. The Defendant, carrying an assault rifle, followed and demanded that the victim return the child to him. After the Defendant shot the victim's niece in the leg, the victim exited the car with "little Ricky" in her arms. The victim, refusing to surrender the child to the Defendant, began to run, and the Defendant shot her in the back. As she fell to the ground, the Defendant began talking to the victim as he repeatedly shot her. He then proceeded to set the trailer on fire. Afterwards, he calmly walked past the victim's body and remarked "See you later," before proceeding across the street with his child to a local business to wait for the police.

2. "Particularized Characteristics of the Individual Defendant"

We next consider the evidence regarding the Defendant and his background. The record before us establishes that the Defendant was thirty-nine years old and had no significant criminal history other than misdemeanor driving offenses and a juvenile record of truancy adjudications. Both his parents were abusive alcoholics who severely neglected and mistreated the Defendant and his brother, who ultimately committed suicide. Moreover, the record is replete with the Defendant's extensive history of mental and emotional illness, which included a history of suicide attempts, as well as drug and alcohol abuse. Expert testimony established that the Defendant was of below-average intelligence and had generally poor reasoning abilities and a lack of good judgment. Following the shooting, the Defendant made no attempt to flee from the scene or to deny responsibility for his actions. He cooperated with the police and gave a detailed statement regarding his involvement in the homicide, which mirrored that of other eyewitnesses' accounts. Moreover, at trial, the Defendant told the jurors that if they believed he had committed first-degree murder in killing his wife then he deserved the death penalty. He stated that he loved the victim and his children and was remorseful for his actions.

3. Comparative Proportionality Review

We next review cases sharing similarities with the present case in which a sentence of death was imposed and upheld. Our review includes capital cases in which the defendant's victim was his wife or girlfriend and the murder occurred in the context of a domestic dispute. *See e.g., Ivy,* 188 S.W.3d at 132 (imposing a sentence of death for murder of girlfriend based upon evidence of history of physical abuse of the victim and the defendant's prior convictions for second degree murder, especially aggravated robbery, three aggravated assaults, and his parole status on date of homicide); *State v. Faulkner*, 154 S.W.3d 48 (Tenn. 2005) (imposing a sentence of death when defendant brutally killed his wife by hitting her in the head and face with a skillet and completely crushing her face; that four days prior to the murder, defendant had assaulted victim with his fist and threatened to kill her; and defendant had an extensive criminal history, which included convictions for second degree murder, assault with intent to commit first degree murder, and robbery); *State v. Keough*, 18 S.W.3d 175 (Tenn. 2000) (affirming a sentence of death when defendant stabbed his wife with bayonet with sufficient force to produce a wound nearly six inches deep into the chest cavity; defendant had pursued and repeatedly stabbed another man during the same episode; and defendant had previously been convicted of assault with intent to commit voluntary manslaughter and manslaughter); *State v. Hall*, 8 S.W.3d 593 (Tenn. 1999) (affirming a death penalty for murder of estranged wife when evidence showed that defendant beat her in her children's presence and threatened to kill the children if they went for help, with the wife sustaining at least eighty-three separate wounds before her death through combination of strangulation and drowning); *Hall*, 958 S.W.2d at 679 (affirming death penalty when defendant, angry that his girlfriend had left him, relentlessly pursued her, threw gasoline on her, and set fire to her car with her inside after she refused his commands to exit the vehicle; the defendant was suspected in prior instances of setting the victim's car on fire, had previously threatened to kill her, and had tried to force her off the road); *State v. Smith*, 868 S.W.2d 561 (Tenn. 1993) (affirming death penalty when defendant fatally shot,

then stabbed his estranged wife, slit her throat and killed his two stepsons in anger over the couple's separation; defendant publicly plotted to kill his wife in the months before the murders); *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987)[6] (affirming death penalty when defendant suffocated his wife by forcing a plastic bag down her throat and then attempted to hide her body; the couple's relationship had a history of difficulties, including extramarital affairs by defendant, and the victim had threatened to leave the defendant; the defendant had previous convictions for armed robbery and aggravated assault); *State v. Cooper*, 718 S.W.2d 256 (Tenn. 1986), *cert. denied*, 479 U.S. 1101 (1987) (affirming death penalty when, following their separation, defendant shot his estranged wife four times with a pump shotgun at her place of employment in the presence of numerous witnesses; the defendant was apprehended only after a dangerous and high- speed pursuit; he had caused a disturbance at her mother's home and became involved in a fight with the man the victim was dating; and he had harassed, threatened, and intimidated her to the point of distraction for several weeks prior to the murder); *State v. Miller*, 674 S.W.2d 279 (Tenn. 1984), *on remand*, 771 S.W.2d 401 (Tenn. 1989) (affirming death penalty when defendant beat girlfriend to death with fists and fire poker, then stabbed her numerous times; some wounds were caused by using a hammer to drive the sharp instrument into the body; the defendant subsequently hid the body and left town).

Based upon our review of all cases "involving similar defendants and similar crimes," we conclude that the death penalty imposed in the present case is excessive and disproportionate to the penalty imposed in the other cases.[7] With regard to "similar crimes," all of the cases reviewed are "plainly lacking" in circumstances consistent with this case. This crime, in contrast to most domestic homicides, did not involve pre-existing animus, threats of violence, or actual physical violence between the Defendant and the victim prior to October 25, 1989. Here, the threats against the victim were made only after the victim disappeared and after she had convinced a co-worker to inform the Defendant that she had left with another man. *Cf Hall*, 8 S.W.3d at 593. With regard to "similar defendants," none of the domestic homicide cases reviewed involved a defendant who possessed a long and documented history of mental illness spanning his adult life, who possessed no significant criminal history, and whose act was preceded by the actions of the victim in this case. Thus, we conclude that the punishment of death in this case is disproportionate to the penalty imposed, considering both the nature of the crime and the Defendant. *See* T.C.A. § 39-2-205(c)(4).

Our decision in this case is not meant to minimize the brutality of the Defendant's crime or to justify his conduct. Rather, it represents the legislative expression that the sentence of death requires consideration, not only of the aggravating circumstances, but also the mitigating evidence,

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[6]Defendant Cooper's death sentence was later vacated on post-conviction review based on a claim of ineffective assistance of counsel. *See Cooper v. State*, 847 S.W.2d 521 (Tenn. Crim. App. 1992).

[7]We acknowledge the Defendant's reliance upon *State v. J.R. (Junior) King*, No. 4 (Tenn. Crim. App. at Jackson, Feb. 10, 1988), *perm. app. denied* (Tenn. May 31, 1988) (affirming first degree murder, but rejecting death penalty from proof which established a history of physical abuse of victim, including previous fracture of both jaws of victim, with defendant making repeated threats to others that he intended to kill victim; purchasing, shortly before victim's death, gun and grave marker with both their names; and pursuing victim in his truck pushing victim's car off highway into a ditch at which time he shot the victim four times in the head at close range).

to accomplish the genuine narrowing required by state and federal constitutions. The statutory mitigating circumstances are engrafted into our capital sentencing scheme in order to ensure that the deterrent and retributive functions of the ultimate sanction will be served by its imposition.

For the foregoing reasons, we modify the Defendant's sentence of death to reflect a sentence of life imprisonment. *See* T.C.A 39-13-206(d)(2) (2006).

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DAVID G. HAYES, JUDGE