

OPINION

This Court granted the interlocutory appeal of John David Terry to address the issue of whether it is permissible to assert new aggravating circumstances in a capital case when the death sentence is set aside and a new sentencing hearing is granted. This Court held that "the state should not be permitted to engage in such a practice indiscriminately and without limitations. The accused must be protected from vindictive as well as piecemeal litigation."¹ This Court concluded:

Before the state can assert a new aggravating circumstance at a resentencing hearing, the state must establish prior to the resentencing hearing that (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. Such a rule recognizes the right of the state to assert new aggravating circumstances while protecting the accused from vindictive or piecemeal litigation.²

On April 15, 1996, the Tennessee Supreme Court released its opinion in State v. Harris.³ The Supreme Court, like this Court, held that the double jeopardy clauses of the United States Constitution and the Tennessee Constitution do not bar the state from utilizing new aggravating circumstances at a second or new sentencing hearing. Also, the Supreme Court, like this Court, held that the provisions of Rule 12.3, Tennessee Rules of Criminal Procedure, do not prohibit the state from asserting new aggravating circumstances at a new sentencing hearing. However, the majority opinion in Harris held that "the State is free, at resentencing to introduce proof of any aggravating circumstance which is otherwise legally valid."⁴ In other words, the state is free to assert new aggravating circumstances at its discretion provided the circumstances are "legally valid." The two dissenting justices espoused the view that the state should be limited to the

¹State v. John David Terry, Davidson County No. 01-C-01-9210-CR-00304 at p. 20 (Tenn. Crim. App., Nashville, June 28, 1995).

²State v. John David Terry, supra at 21 (emphasis supplied).

³919 S.W.2d 323 (Tenn. 1996).

⁴Harris, 919 S.W.2d at 330.

aggravating circumstances "which were presented to and found by the jury at the original sentencing [hearing]."⁵

It is the duty and obligation of this Court to follow the common law rules of law created by our Supreme Court. Consequently, Section IV of this Court's prior opinion is vacated. This Court adopts the rule announced in Harris, namely, "the State is free, at resentencing to introduce proof of any aggravating circumstance which is otherwise legally valid."⁶

The judgment of the trial court is affirmed.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

JERRY SCOTT, SPECIAL JUDGE

⁵Harris, 919 S.W.2d at 332 (White, J., dissenting).

⁶Harris, 919 S.W.2d at 330.