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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2013-2014

CR-10-1343

Anthony Lane

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-09-3202)

On Return To Remand

BURKE, Judge.

Anthony Lane was convicted of murder made capital because it was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975. The jury, by a

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vote of 10-2, recommended that Lane be sentenced to death. The trial court accepted the jury's recommendation and sentenced Lane to death.

On November 8, 2013, this Court affirmed Lane's conviction but remanded the case for the trial court to amend its sentencing order because the initial order improperly found a statutory aggravating circumstance to exist and improperly negated a statutory mitigating circumstance. Lane v. State, [Ms. CR-10-1343, November 8, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013). Specifically, the trial court found and considered the aggravating circumstance of murder for pecuniary gain, see § 13A-5-49(6), Ala. Code 1975, despite the fact that it also considered the aggravating circumstance that the murder was committed during a robbery, see § 13A-5-49(4), Ala. Code 1975. This was error under Hodges v. State, 856 So. 2d 875, 891 (Ala. Crim. App. 2001) ("[W]hen a trial court evaluates the aggravating circumstances applicable to a defendant convicted of robbery-murder, a court may not consider the fact that money was taken from the victim as constituting the aggravating circumstance that the murder was committed for pecuniary gain."). Additionally, the trial

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court improperly negated the mitigating circumstance that Lane had no significant history of prior criminal activity, see § 13A-5-51(1), Ala. Code 1975, by considering Lane's juvenile record. This was error under Ex parte Burgess, 811 So. 2d 617, 624 (Ala. 2000) ("Alabama law explicitly precludes a trial court from using juvenile adjudications to negate the mitigating circumstance of no significant history of prior criminal activity."). However, in Burgess, the Alabama Supreme Court held "that a trial court may consider a defendant's juvenile adjudications to be a relevant consideration in deciding what weight to assign to the statutory mitigating circumstances of a defendant's lack of a significant prior criminal history and a defendant's age at the time of the offense." Id.

On return to remand, the trial court has filed an amended sentencing order in which it found the existence of only one aggravating circumstance, i.e., that the murder was committed during the course of a robbery in the first degree. The trial court specifically found that none of the other statutory aggravating circumstances enumerated in § 13A-5-49, Ala. Code 1975, had been proven. The trial court also found the

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existence of two statutory mitigating circumstances: the defendant's age at the time the crime was committed, see §13A-5-51(7), Ala. Code 1975, and that the defendant had no significant criminal history, see §13A-5-51(1), Ala. Code 1975.

The trial court stated that it assigned "a great amount of weight" to the aggravating circumstance of robbery-murder. (R3. 19.)¹ As to the two statutory mitigating circumstances, the trial court stated:

"Based upon Burgess, the Court hereby assigns a medium amount of weight to the statutory mitigating circumstances found in 13A-5-51(1), 'The Defendant has no significant history of prior criminal activity', and (7), 'the age of the Defendant at the time of the crime.'"

(R3. 17.) The trial court then specifically found that the statutory mitigating circumstances enumerated in §13A-5-51(2)-(6), Ala. Code 1975, were not proven and did not exist. However, the trial court did note the testimony regarding Lane's IQ and whether or not Lane was borderline mentally retarded. The remainder of the sentencing order is substantially similar to the trial court's original order.

¹"R3" denotes the record on return to remand.

In the amended sentencing order, the trial court reweighed the statutory aggravating circumstance against both the statutory and nonstatutory mitigating circumstances and determined that the mitigating circumstances were "sufficiently outweighed" by the aggravating circumstance. (R3. 19.) Accordingly, the trial court again sentenced Lane to death. Lane filed a brief on return to remand and raised several issues regarding the trial court's amended sentencing order.

I.

Lane contends that the "trial court diminished Mr. Lane's mitigating circumstances by incorrectly and improperly relying on Mr. Lane's juvenile record." (Lane's brief on return to remand, at 5.) According to Lane, the amended sentencing order "continues to make Mr. Lane's juvenile record 'a conspicuous and dominating factor in the trial court's weighing process'...." (Lane's brief on return to remand, at 6), citing Burgess, 811 So. 2d at 624.

In Burgess, the Alabama Supreme Court held that a trial court may use a defendant's juvenile adjudications when assigning weight to the mitigating circumstances relating to

age and lack of a significant criminal history. However, under the specific facts of Burgess, in which the trial court overrode the jury's recommendation of life imprisonment without parole and sentenced the defendant to death, the Alabama Supreme Court held:

"The statements contained in the trial court's painstaking written order in this very difficult case reflect that the trial court relied upon Burgess's juvenile adjudications to give nominal weight not only to the two statutory mitigating circumstances, but also to other mitigating circumstances, including the jury's recommendation. The trial court's use of Burgess's juvenile record -- use indicated by the court's numerous references to that record -- to discount to inconsequentiality the numerous mitigating circumstances, in favor of the one aggravating circumstance, was an abuse of discretion."

811 So. 2d at 628. According to Lane, the same error exists in the amended sentencing order here.

First, Lane claims that the trial court provided no other reasons for diminishing the weight of the two statutory mitigating circumstances other than Lane's juvenile record. Therefore, he says, the trial court "essentially and erroneously [found] that the mitigating factor under Alabama Code section 13A-5-51(1) does not exist." (Lane's brief on return to remand, at 8.) However, this statement is directly

contradicted by the amended sentencing order, which specifically provides that the trial court found two statutory mitigating circumstances "regarding (1) No significant criminal history and (2) The Defendant's age at the time he committed the crime." (Lane's brief on return to remand, at 8.)

Lane concedes that the amended order "is going as far as allowable under Burgess to reduce the weight of the existing mitigating circumstances in this case." (Lane's brief on return to remand, at 9.) Yet Lane still claims that the amended order makes Lane's juvenile history a conspicuous and dominating factor in the trial court's weighing process that is prohibited by Burgess. Again, this is contradicted by the sentencing order, which stated that the trial court assigned a "medium" amount of weight to both mitigating circumstances. (R3. 17.) Therefore, the trial court did not, as did the court in Burgess, use Lane's juvenile record "to give nominal weight" to the mitigating circumstances. 811 So. 2d at 628.

Second, Lane argues that the trial court, in its amended sentencing order, "improperly altered the weight given to the mitigating circumstance of Mr. Lane's age." (Lane's brief on

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return to remand, at 9.) However, in its original sentencing order, the trial court did not specify the weight it assigned to that mitigating circumstance. Thus, there is no evidence indicating that the trial court diminished the weight it assigned to that particular mitigating circumstance in its amended order.

Third, Lane asserts that the "trial court again incorrectly stated that Mr. Lane had eight juvenile adjudications." (Lane's brief on return to remand, at 9.) According to Lane, the presentence report indicates that Lane had five arrests that resulted in probation, while the remainder of his charges were dismissed or had an unknown disposition. Therefore, Lane argues that the trial court erred by using eight adjudications as opposed to five when it discounted the mitigating circumstances. However, the sentencing order provides that Lane had "eight (8) separate juvenile cases, some involving multiple offenses." (R3. 16) (emphasis added). Thus, the amended order in no way indicates that the trial court considered eight separate adjudications. Accordingly, Lane's assertion is refuted by the record.

Finally, Lane argues that "the trial court's refusal to accord great weight to Mr. Lane's age and lack of significant criminal history was error and cannot be reconciled with the constitutionally significant considerations relevant to Mr. Lane's young age." (Lane's brief on return to remand, at 10.) Specifically, Lane cites Miller v. Alabama, 132 S. Ct. 2455 (2012), Graham v. Florida, 560 U.S. 48 (2010), and Roper v. Simmons, 543 U.S. 551 (2005), in support of his argument that 19-year-olds like Lane are "more susceptible to negative influences and have characters that are not as well formed as those of adults." (Lane's brief on return to remand, at 11.)

In Riley v. State, [Ms. CR-10-0988, August 30, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013), the appellant similarly argued that, although the trial court found his young age to be a mitigating circumstance, the court did not give his age the appropriate weight. This Court held:

""[i]n keeping with the dictates of the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that

specific weights be assigned to different aggravating and mitigating circumstances. Murry v. State, 455 So. 2d 53 (Ala. Crim. App. 1983), rev'd on other grounds, 455 So. 2d 72 (Ala. 1984). Therefore, the trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. Moore v. Balkcom, 716 F. 2d 1511 (11th Cir. 1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation."

"Ex parte Clisby, 456 So. 2d 105, 108-09 (Ala. 1984), cert. denied, Clisby v. Alabama, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 391 (1985)."

____ So. 3d at _____, quoting Morris v. State, 60 So. 3d 326, 351 (Ala. Crim. App. 2010).

Lane failed to show how the trial court abused its discretion by assigning a medium amount of weight to the mitigating circumstances it found to exist in his case. Under Burgess, the trial court's assignment of weight to the mitigating circumstances was proper and was supported by the record. Accordingly, Lane's arguments are without merit.

II.

Lane also raises the following arguments in his brief on return to remand: that the trial court ignored significant

mitigation evidence regarding Lane's mental and intellectual deficits, (Lane's brief on return to remand, at 11); that the trial court erred by considering lack of remorse in the weighing process, (Lane's brief on return to remand, at 13); that "the trial court's inconsistent finding on the existence of the 'heinous, atrocious, or cruel' aggravator precludes its use in the weighing process," (Lane's brief on return to remand, at 15); and that Lane's death sentence violates Ring v. Arizona, 536 U.S. 584 (2002), (Lane's brief on return to remand, at 18). These arguments were raised in Lane's initial brief and were addressed by this Court in the main opinion. Nothing in Lane's brief on return to remand substantially differs from what was raised in his initial brief. Accordingly, we need not address those arguments again.

III.

Pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Lane's conviction and sentence of death. Lane was indicted for and convicted of one count of murder made capital because it was committed during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975.

The record does not reflect that Lane's sentence of death was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

The trial court correctly found that the aggravating circumstance outweighed the mitigating circumstances. In its sentencing order, the trial court stated that it found one aggravating circumstance, i.e., that Lane committed the capital offense while he was engaged in the commission of a robbery, see § 13A-5-49(4), Ala. Code 1975. The trial court then considered each of the statutory mitigating circumstances and found that two statutory mitigating circumstances were applicable: 1) that the defendant lacked a significant criminal history and 2) the age of the defendant at the time of the crime. As described above, the trial court found that each of those mitigating circumstances was entitled to a "medium" amount of weight. (R3. 17.) The trial court also found and considered nonstatutory mitigating circumstances "including [Lane's] IQ of seventy (70)." (R3. 19.) The trial court's sentencing order shows that it properly weighed the aggravating and mitigating circumstances and correctly

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sentenced Lane to death. The record supports the trial court's findings.

Section 13A-5-53(b)(2), Ala. Code 1975, requires this Court to reweigh the aggravating and mitigating circumstances in order to determine whether Lane's death sentence is proper. After independently weighing the aggravating and mitigating circumstances, this Court finds that Lane's sentence of death is appropriate.

As required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must now determine whether Lane's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. In this case, Lane was convicted of one count of murder made capital because it was committed during a robbery. Sentences of death have been imposed for similar crimes throughout the State. See Byrd v. State, 78 So. 3d 445 (Ala. Crim. App. 2009); Melson v. State, 775 So. 2d 857, 863 (Ala. Crim. App. 1999); Washington v. State, 922 So. 2d 145 (Ala. Crim. App. 2005); and Robitaille v. State, 971 So. 2d 43 (Ala. Crim. App. 2005). "'In fact, two-thirds of the death sentences imposed in Alabama involve cases of robbery/murder.'" Doster v. State, 72 So. 3d 50, 122 (Ala.

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Crim. App. 2010), quoting McWhorter v. State, 781 So. 2d 257, 330 (Ala. Crim. App. 1999). Therefore, this Court finds that Lane's death sentence is neither excessive nor disproportionate.

Finally, this Court has searched the entire record for any error that may have adversely affected Lane's substantial rights and has found none. See Rule 45A, Ala. R. App. P.

Accordingly, Lane's conviction and sentence of death are due to be affirmed.

AFFIRMED.

Windom, P.J., and Kellum and Joiner, JJ., concur. Welch, J., dissents, with opinion.

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WELCH, Judge, dissenting.

I continue to adhere to my belief that Anthony Lane's death sentence was not imposed following a correct consideration of the evidence regarding mental retardation. For the reasons I set forth in my dissent to this Court's original opinion, I believe that Lane established adaptive deficiencies in more than two skill areas of adaptive functioning and, thus, that Lane is exempt from the imposition of a death sentence. See Lane v. State, [Ms. CR-10-1343, November 8, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013) (Welch, J., dissenting). Moreover, I continue to believe, as I asserted in my dissent, that Lane's journal containing his drawings and rap lyrics was inadmissible evidence of Lane's guilt, and its admission constituted reversible error. Accordingly, I respectfully dissent.