Rel: July 13, 2018

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-14-0753

Sherman Collins

v.

State of Alabama

Appeal from Sumter Circuit Court
(CC-12-109)

On Return to Remand

WELCH, Judge.

The appellant, Sherman Collins, was convicted of murdering Detrick Bell for pecuniary gain, an offense defined as capital by § 13A-5-40(a)(7), Ala. Code 1975, and conspiracy to commit murder, see § 13A-4-3, Ala. Code 1975. The jury recommended, by a vote of 10 to 2, that Collins be sentenced

to death. The circuit court sentenced Collins to death for the capital-murder conviction and to 120 months' imprisonment for the conspiracy conviction. (C. 407.) Collins appealed. By opinion issued October 13, 2017, this Court affirmed Collins's convictions and remanded the case to the circuit court for that court to correct its sentencing order to comply with the provisions of former § 13A-5-47(d), Ala. Code 1975, i.e., to enter a sentencing order in which the court makes specific findings of fact concerning the aggravating and mitigating circumstances and summarizing the offense and Collins's involvement in it.[1] See Collins v. State, [Ms. CR-14-0753, October 13, 2017] ___ So. 3d ___ (Ala. Crim. App. 2017). The circuit court has filed its amended sentencing order with this Court. The parties have also filed briefs on return to remand. We consider the issues raised in Collins's brief on return to remand.

Sentencing Order

[1]Section 13A-5-47 was amended effective April 11, 2017; as part of that amendment, subsection (d) was deleted. The amendment does not apply retroactively to Collins. See § 13A-5-47.1, Ala. Code 1975.

In its order on return to remand sentencing Collins to death, the circuit court found one aggravating circumstance -- that the murder was committed for "pecuniary or other valuable consideration or pursuant to a contract or for hire." See § 13A-5-49(6), Ala. Code 1975. The circuit court made the following findings of fact:

> "The evidence revealed that the defendant, Sherman Collins, was from New Orleans, Louisiana, and he came to Sumter County, Alabama with his girlfriend, Angela Jackson, her mother and her children to visit her sister, Keon Jackson, for Father's day. Keon Jackson was the girlfriend of Kelvin Wrenn and she lived with him in the Morning Star Community. Angela Jackson testified that she visited her sister, Keon Jackson, approximately four (4) times in Sumter County, Alabama. The evidence revealed defendant, Sherman Collins, had accompanied Angela Jackson when she came to visit Keon Jackson at Kelvin Wrenn's home at least on one (1) occasion. The evidence further revealed that defendant, Sherman Collins, visited Keon Jackson and Kelvin Wrenn in Sumter County, Alabama. In addition, the evidence further revealed Keon Jackson and Kelvin Wrenn would visit Angela Jackson and defendant, Sherman Collins, in New Orleans, Louisiana.
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> "On the night of the offense, defendant Collins rode to [a] rap concert with Wrenn in Wrenn's car. The testimony revealed Wrenn gave defendant Collins two (2) hand guns, a large Magnum and a small .22 pistol. The big Magnum was used to kill Detrick Bell.
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> "As stated in the factual background, Detrick Bell and Terrod Sturdivant went to the Morning Star Community Center to the same rap concert attended by

> defendant Sherman Collins and Kelvin Wrenn. While defendant Collins, Wrenn, Sturdivant and Bell were in the concert Sturdivant received a phone call and walked outside of the building. Detrick Bell followed Sturdivant outside, along with several other individuals including defendant Sherman Collins and Grant Kimbrough. Kimbrough introduced defendant Collins to Bell and the two shook hands. As Sturdivant walked away four or five steps to answer his phone, without any provocation, defendant Collins shot a big part of Detrick Bell's head off and calmly walked away from the Morning Star Community Center. Under these circumstances, a fact-finder can reasonably conclude this was an intentional killing for pecuniary or other valuable consider or for hire. The evidence supports this conclusion. In addition, the statement of defendant, Sherman Collins, stated: 'Kelvin and I was getting ready to go to a rap concert and he was telling me about a man named Speedy (Detrick Bell) that robbed his brother. Kelvin told me that he would give me two thousand dollars to kill Speedy (Detrick Bell). Therefore, there is no doubt that this was a killing for pecuniary or other valuable consideration or hire.'"

(Return to Remand, C.R. 2-4.)

The circuit court found that no statutory mitigating circumstances contained in § 13A-5-51(1), Ala. Code 1975, applied in Collins's case. The court then stated:

> "The Court will now address the evidence presented by [Collins] as mitigation evidence that is nonstatutory evidence. The defendant, Sherman Collins, was born to a single parent on June 26, 1976. The evidence indicated there was never a father in the house; however, his brother, Elvin Collins, practically raised [Collins].

> "The evidence revealed defendant Collins was a smart child, who was funny and wanted to learn. Defendant Collins did well in school because his brother, Elvin, encouraged him and rewarded him for doing well. The evidence further indicated Elvin taught defendant Collins how to write his name at age two, ride a bike and throw a football. Defendant Collins played high school football and basketball. After graduation, Elvin Collins moved to California for approximately a year and a half. Elvin Collins indicated when he returned, he never got back in touch with Defendant, Sherman Collins. The testimony presented showed that defendant Collins, after graduation, started with 'bad friends and made bad decisions.'
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> "The defense counsel provided mitigation evidence that defendant Collins grew up in a really poor environment called the Melpomene Housing Project. Yet, [Collins] was able to make it through high school as an honor student and a two-sport athlete. [Collins] received assistance from his friend and cousin, Fred Stemley, who testified, that defendant Collins should receive a life sentence without parole because 'everybody changes.'
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> "Finally, it appears the gist of the nonstatutory mitigation circumstances of defendant, Sherman Collins, was poor environment and lack of a father figure in the home. However, based upon the evidence presented, in my humble opinion, these facts do not convert into mitigating circumstances that outweigh the aggravating circumstance of this case. The facts reflect a certain pathos, but they do little to mitigate."

(Return to remand, C.R. 5-7.)

I.

Collins first argues that the circuit court failed to give meaningful consideration to undisputed mitigating evidence; therefore, Collins argues, the court violated Lockett v. Ohio, 438 U.S. 586 (1978). Specifically, Collins argues that the circuit court failed to give adequate consideration to Collins's upbringing, his family background, his academic record, his athletic achievements, and his lack of a father figure.

The United State Supreme Court in Lockett held

> "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

438 U.S. at 604. The Lockett court did not hold that a court is required to find all evidence presented in mitigation is, in fact, mitigation. "The circuit court must consider evidence offered in mitigation, but it is not obliged to find that the evidence constitutes a mitigating circumstance." Calhoun v. State, 932 So. 2d 923, 975 (Ala. Crim. App. 2005). See also Ex parte Ferguson, 814 So. 2d 970, 976 (Ala. 2001).

> "A sentencer in a capital case may not refuse to consider or be 'precluded from considering'

> mitigating factors. Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978)). The defendant in a capital case generally must be allowed to introduce any relevant mitigating evidence regarding the defendant's character or record and any of the circumstances of the offense, and consideration of that evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987); Ex parte Henderson, 616 So. 2d 348 (Ala. 1992); Haney v. State, 603 So. 2d 368 (Ala. Cr. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993). Although the trial court is required to consider all mitigating circumstances, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. Carroll v. State, 599 So. 2d 1253 (Ala. Cr. App. 1992), aff'd, 627 So. 2d 874 (Ala.1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994). See also Ex parte Harrell, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985)."

Williams v. State, 710 So. 2d 1276, 1347 (Ala. Crim. App. 1996).

> "It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer ... although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer...."

Haney v. State, 603 So. 2d 368, 389 (Ala. Crim. App. 1991). See also Scott v. State, 163 So. 3d 389 (Ala. Crim. App. 2012). Therefore, Collins is due no relief on this claim.

II.

Collins next argues that the circuit court erred in not properly weighing the jury's recommendation of 10 to 2 for the death penalty. He cites Ex parte Carroll, 852 So. 2d 833 (Ala. 2002), in support of his argument.[2] Collins also argues that the circuit court improperly stated in its order that the jury's recommendation was unanimous, when in fact the jury returned with a recommendation of death by a vote of 10 to 2. In the circuit court's order, the court stated: "The jury heard evidence of aggravating and mitigating circumstances,

[2]In Carroll, the Alabama Supreme Court held that the circuit court must consider a jury's recommendation of life imprisonment without the possibility of parole as a mitigating circumstance. Previous to the holding in Carroll, the Supreme Court in Ex parte Taylor, 808 So. 2d 1215 (Ala. 2001), had held that when a court chooses to override a jury's recommendation of life imprisonment without parole the court must set out specific reasons for giving the jury's recommendation the consideration that it did. However, in this case the court did not override the jury's recommendation of death.

and the jury returned a unanimous verdict, recommending the defendant be sentenced to death." (Return to remand, p. 3.) Collins also asserts that the court further compounded its error by stating the following:

> "When the court weighs the aggravating circumstance against the mitigating circumstance in the manner required by the law, there is absolutely no question and can be no question in the mind of any reasonable human being that the aggravating circumstance far outweighs the mitigating circumstances."

(Return to remand, p. 9-10.) Collins asserts that two jurors did recommend that he be sentenced to life imprisonment without parole; therefore, he contends that the court's comment about "any reasonable human being" was not appropriate and was factually erroneous.

The State argues that the Carroll line of cases do not apply in this case because the circuit court did not override the jury's recommendation.[3] In the alternative, the State

[3]Though not applicable here, we note that Alabama's capital statute was recently amended to remove the judicial-override provision. Act No. 2017-131, Ala. Acts 2017. Section 13A-5-47, Ala. Code 1975, now reads: "Where the jury has returned a verdict of death, the court shall sentence the defendant to death. Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole." Section 13A-5-46, Ala. Code 1975, provides: "The decision of the jury to recommend a

asserts that this Court should again remand this case to the circuit court for that court to correct the factual errors -- that the jury returned a unanimous verdict and that there could be no question in the mind of any reasonable human being that the aggravating circumstance far outweighs the mitigating circumstances -- contained in its amended sentencing order.

This Court has held that minor misstatements of fact in a sentencing order may constitute harmless error. In Luong v. State, 199 So. 3d 173 (Ala. Crim. App. 2015), we stated:

> "The purpose of a written sentencing order in a death case is to aid the appellate court in reviewing the propriety of the lower court's sentence of death. Ex parte Kyzer, 399 So. 2d 330, 338 (Ala. 1981). This Court has recognized that some errors in a sentencing order require remand and that other errors are 'technical errors' that result in no injury to the appellant and are harmless. See Spencer v. State, 58 So. 3d 215 (Ala. Crim. App. 2008) (remanding case for the court to set out its reasons for overriding the jury's recommendation of life imprisonment without parole); Apicella v. State, 809 So. 2d 841 (Ala. Crim. App. 2000) (remanding case for court to make specific findings of facts as to each aggravating circumstance and each mitigating circumstance set out in § 13A-5-49, Ala. Code 1975, and § 13A-5-51, Ala. Code 1975); Ex parte Tomlin, 443 So. 2d 47 (Ala. Crim. App. 1979) (remanding case after trial court improperly considered an aggravating circumstance that was not

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sentence of death must be based on a vote of at least 10 jurors."

> a statutory aggravating circumstance). See also Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003) (holding that trial court's failure to enter specific findings as to all aggravating circumstances when it specifically found and made findings concerning the existence of three aggravating circumstances was not plain error); Sockwell v. State, 675 So. 2d 4, 30 (Ala. Crim. App. 1993) ('While some of the factual matters in the trial court's sentencing order were not based upon evidence contained in the record, we hold that error in the trial court's sentencing order is not so egregious as to require a new sentencing order.')."

199 So. 3d at 219. See Johnson v. State, 820 So. 2d 842 (Ala. Crim. App. 2000) ("[W]e view the misstatement as to the amount stolen in the robbery to be an immaterial matter that had no effect on the trial court's decision and the imposition of the death penalty.").

While we have held that a minor factual error in a sentencing order is harmless, we agree with the State that the factual errors in this case should be corrected. Accordingly, this case is again remanded to the Sumter Circuit Court for that Court to correct the factual errors in its sentencing order. In light of the factual errors and their significance, the circuit court is further directed to reweigh the aggravating circumstances and the mitigating circumstances after considering the correct recommendation made by the jury,

i.e., 10 votes for death and 2 votes for life imprisonment without the possibility of parole, rather than, as reflected in its current sentencing order, an unanimous vote in favor of the death penalty. Due return should be filed in this Court within 42 days from the date of this opinion.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum and Burke, JJ., concur. Joiner, J., dissents, without opinion.