Rel: February 7, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-15-1061

Stephon Lindsay

v.

State of Alabama

Appeal from Etowah Circuit Court
(CC-13-652)

On Return to Second Remand

KELLUM, Judge.

Stephon Lindsay appealed his conviction for the murder of his daughter, 21-month-old Maliyah Lindsay, an offense defined as a capital offense by § 13A-5-40(a)(15), Ala. Code 1975, because Maliyah was less than 14 years of age at the time of

her death. This Court affirmed Lindsay's capital-murder conviction but remanded the case for the Etowah Circuit Court to amend its sentencing order to comply with the provisions of former § 13A-5-47(d), Ala. Code 1975, (now codified at § 13A-5-47(b), Ala. Code 1975), by making specific written findings of fact concerning each statutory mitigating circumstance contained in § 13A-5-51, Ala. Code 1975, and each aggravating circumstance contained in § 13A-5-49, Ala. Code 1975. See Lindsay v. State, [Ms. CR-15-1061, March 8, 2019] ___ So. 3d ___ (Ala. Crim. App. 2019). On return to remand, both Lindsay and the State requested that this case be remanded a second time because the circuit court had failed to fully comply with our instructions by making specific findings of fact concerning each statutory mitigating circumstance and each aggravating circumstance. By order dated September 12, 2019, this Court again remanded the case to the circuit court. Lindsay v. State, (CR-15-1061, September 12, 2019). This case is now before this Court on return to second remand.

I.

In this Court's opinion on original submission, we addressed the majority of the issues raised by Lindsay in his

brief to this Court. The only issue that we did not address was Issue XVII -- Lindsay's claim that the circuit court's order contained several errors.[1] Specifically, Lindsay now argues that the circuit court erred in failing to find two statutory mitigating circumstances: (1) that Lindsay committed the offense while he was under the influence of extreme mental or emotional disturbance, § 13A-5-51(2), Ala. Code 1975; and (2) that Lindsay lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, § 13A-5-51(6), Ala. Code 1975.

In an one-paragraph argument in his brief, Lindsay argues that the record is replete with evidence indicating that those two statutory mitigating circumstances were present and should have been applied. He asserts that Dr. Robert Bare, a psychologist, testified that Lindsay suffered from paranoid schizophrenia and that he had exhibited "delusions of grandeur and hallucinations." Lindsay asserts that, based on this

[1]Lindsay argued, as part of that claim, that the circuit court had applied the wrong standard when evaluating the appropriate sentence to impose. We directed the circuit court to correct this discrepancy on remand. The circuit court complied with our instructions. Accordingly, this issue is moot.

Court's holding in Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991), and the holding of the United States Court of Appeals for the Eleventh Circuit in Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986), the circuit court was required to find that Lindsay's mental health was a statutory mitigating circumstance.

In Haney, this Court considered whether a circuit court had erred in declining to find as a nonstatutory mitigating circumstance that Haney suffered from "spouse abuse syndrome" at the time that she hired someone to murder her husband. We stated:

> "[Haney] particularly takes issue with the trial court's failure to find that her alleged suffering from 'spouse abuse syndrome' constituted a mitigating circumstance, which she argues the court should have weighed in sentencing. The fact that the court did not make such a finding does not mean that it did not consider the evidence offered. On the contrary, it indicates that the trial court did not find that the evidence was mitigating. We find no abuse of the trial court's discretion in this regard."

Haney, 603 So. 2d at 389. Haney does not support Lindsay's argument.

However, in Magwood v. Smith, the Eleventh Circuit Court of Appeals considered whether the sentencing court had erred

in failing to find as statutory mitigating circumstances that at the time of the murder Magwood was under the influence of extreme mental or emotional disturbance and lacked the capacity to appreciate the criminality of his conduct. The Magwood court stated:

> "After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution. The three members of the court-appointed lunacy commission reported on August 16, 1979, that Magwood was presently insane and probably was insane on the date of Sheriff [Neil] Grantham's murder. As a result of this report, Magwood was committed to Searcy Hospital for an eight-month course of treatment that required the use of powerful antipsychotic drugs. Dr. [William] Rudder expanded upon the commission's findings in his deposition and repeated his conclusion that Magwood was insane on March 1, 1979. Dr. [Douglas] McKeown, a court-appointed psychologist, concluded that Magwood was not insane on March 1, but that he suffered from paranoid schizophrenia on that date. Dr. [Bancroft] Cooper and Dr. [Donald] Crook both believed that Magwood was not insane at the time of their June 6, 1979, examination, but neither physician expressed an opinion about Magwood's state of mind on the day of the crime. Thus, four experts ascertained that Magwood suffered from some form of serious mental disorder on the date of Sheriff Grantham's murder and none testified that Magwood was free from mental illness on that date."

791 F.2d at 1449-50.[2]

Alabama appellate courts have long held that it is within the sentencing court's discretion whether it finds evidence to be mitigating. We have stated:

> "'The United States Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), requires that a circuit court consider all evidence offered in mitigation when determining a capital defendant's sentence. However,
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> > "'"'[M]erely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that fact. Mikenas [v. State, 407 So. 2d 892, 893 (Fla. 1981)]; Smith [v. State, 407 So. 2d 894 (Fla. 1981)].' Harrell v. State, 470 So. 2d 1303, 1308 (Ala. Cr. App. 1984), aff'd, 470 So. 2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985)."
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> "'Perkins v. State, 808 So. 2d 1041[, 1137] (Ala. Crim. App. 1999).

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[2]One federal court has questioned the holding in Magwood v. Smith. In Roberts v. Singletary, 794 F. Supp. 1106, 1137 (S.D. Fla. 1992), a Florida federal district court stated: "[T]he Court notes that the holding of Magwood may have been limited by the Supreme Court's intervening decision in Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606, reh'g denied, 497 U.S. 1050, 111 S.Ct. 14, 111 L.Ed.2d 829 (1990)."

> "'Although the trial court must consider all mitigating circumstances, it has discretion in determining whether a particular mitigating circumstance is proven and the weight it will give that circumstance.'" Simmons v. State, 797 So. 2d 1134, 1182 (Ala. Crim. App. 1999), quoting Wilson v. State, 777 So. 2d 856, 893 (Ala. Crim. App. 1999). "'While Lockett [v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978),] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority.'" Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996), quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989).'"

White v. State, 179 So. 3d 170, 236 (Ala. Crim. App. 2013), quoting Albarran v. State, 96 So. 3d 131, 212-13 (Ala. Crim. App. 2011).

This same analysis has been applied to evidence of a defendant's mental health that is presented in mitigation. The Alabama Supreme Court has stated:

> "The Court of Criminal Appeals affirmed the trial court's findings concerning Ferguson's mental health as a nonstatutory mitigating circumstance on the basis that the trial court had properly considered the mitigating evidence, but placed little weight upon it in light of the other testimony and evidence produced at trial. We conclude that the Court of Criminal Appeals correctly applied the settled law on this issue in finding that the trial court had in fact taken into

> account Ferguson's mental health as a possible nonstatutory mitigating circumstance. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Ex parte Hart, 612 So. 2d 536, 542 (Ala. 1992)('Lockett does not require that all evidence offered as mitigating evidence be found to be mitigating.'), cert. denied, 508 U.S. 953, 113 S.Ct. 2450, 124 L.Ed.2d 666 (1993); and Ex parte Slaton, 680 So. 2d 909, 924 (Ala. 1996) ('"While Lockett and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority."')(quoting Bankhead v. State, 585 So. 2d 97, 108 (Ala. Crim. App. 1989), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997))."

Ex parte Ferguson, 814 So. 2d 970, 976 (Ala. 2001).

Here, in the circuit court's amended sentencing order, the court stated the following concerning the statutory mitigating circumstances:

> "The Court, in determining and weighing circumstances in this case, reviewed all statutory mitigating circumstances, including the testimony from Dr. Robert Bare presented by [Lindsay] in support of their contention that the offense was committed while Lindsay was acting under the influence of extreme mental or emotional disturbance, pursuant to § 13A-5-51(2), Ala. Code 1975, and/or that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, pursuant to § 13A-5-51(6), Ala. Code 1975. Dr. Bare testified that he was unable to give an opinion as to whether [Lindsay's] symptoms at the time of the offense were caused by actual mental illness or extensive polysubstance abuse. The Court finds, therefore, that the evidence presented was

> insufficient to support a finding that the offense was committed while [Lindsay] was under the influence of extreme mental or emotional disturbance, § 13A-5-51(6). However, the Court does find that Dr. Bare's testimony was relevant and significant as to the mental condition of [Lindsay] at the time of the offense. Accordingly, this Court considered and weighed that testimony, as a nonstatutory mitigating factor in this case.
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> "The Court considered each of the remaining statutory mitigating circumstances, to determine if any were applicable in this case. The Court finds specifically that § 13A-5-51(1) is not applicable, in that [Lindsay] did in fact have a significant prior criminal history, including six counts of robbery in the first degree, as noted in the section of this order related to aggravating circumstances. Further, there was no evidence to support a finding that the victim participated in [Lindsay's] conduct or consented to it, § 13A-5-51(3), that [Lindsay] was an accomplice in the capital offense committed by another person and his participation was relatively minor, § 13A-5-51(4), or that [Lindsay] acted under extreme duress or under the substantial domination of another person, § 13A-5-51(5). Finally, the Court finds that [Lindsay's] age of 35 years at the time of the crime is not a statutory mitigating circumstance in this cause pursuant to § 13A-5-51(7), Ala. Code 1975."

(C. 27, on return to second remand.)

Clearly, the circuit court found that Lindsay's mental health was a nonstatutory mitigating circumstance. The court complied with the United States Supreme Court's holding in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973

(1978), and the Alabama Supreme Court's decision in Ex parte Ferguson, supra.

Moreover, even if we applied the Magwood v. Smith holding, the evidence in this case concerning Lindsay's mental condition was far less compelling than the evidence presented to the federal court in Magwood. Dr. Bare testified that, based on his conversations with Lindsay and Lindsay's family members, he could not determine that Lindsay had exhibited any "bizarre or overtly psychotic behavior" before he killed his daughter. (R. 1901.) Dr. Bare also testified that he could not say that Lindsay's hallucinations were caused by his mental problems or his substance abuse. Unlike in Magwood, four doctors did not testify that Lindsay was mentally ill or insane at the time that he murdered his daughter. The circuit court's findings are supported by the record; thus, we cannot say that the circuit court abused its discretion. Lindsay is due no relief on this claim.

II.

Last, as required by § 13A-5-53, Ala. Code 1975, this Court must review the propriety of Lindsay's capital-murder conviction and his sentence of death. Lindsay was indicted

and convicted of murdering his 21-month-old daughter, an offense defined as capital by § 13A-5-40(a)(15), Ala. Code 1975, and punishable by death. The jury unanimously recommended that Lindsay be sentenced to death. Our review of the record shows that Lindsay's sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala. Code 1975.

The circuit court found as aggravating circumstances that Lindsay had previously been convicted of a felony involving the use or threat or violence to another person, see § 13A-5-49(6), Ala. Code 1975, and that the murder was especially heinous, atrocious, or cruel as compared to other capital murders, see § 13A-5-49(8), Ala. Code 1975. In regard to the aggravating circumstance set out in § 13A-5-49(6), the circuit court stated:

> "Circuit Clerk Cassandra 'Sam' Johnson testified concerning Lindsay's prior felony convictions involving violent crimes. Certified copies of the judgment orders were admitted into evidence from CC-1999-296.01 through .06 showing that [Lindsay] was convicted of six (6) counts of robbery in the first degree, which is a crime of violence under Alabama law."

(C. 25, on return to second remand.) In regard to the aggravating circumstance set out in § 13A-5-49(8), the circuit court stated:

> "There was specific testimony from ... Dr. Valerie Green during the guilt phase of the trial, about the bruising to the child's face, where [Lindsay] put his hand over her mouth to prevent her from crying out while he repeatedly attempted to cut her head from her body. Green also testified about defensive wounds to the child's hands, where she tried to shield herself from the blows. The evidence indicated that when at least some of the wounds ... were inflicted, Maliyah was still alive, being held down by her father, with his hand over her mouth, as he continued to strike her with the knife or hatchet. Testimony at trial indicated that the victim's head was very nearly severed, due to multiple horrendous and gruesome injuries inflicted by [Lindsay]. After her death, [Lindsay] wrapped his daughter's body in a trash bag, placed it inside a duffel bag, and dumped her on the side of the road, in an area where garbage was commonly known to be discarded. The Court findings that this evidence supported the jury's verdict and this Court's conclusion that the capital offense was especially heinous, atrocious, or cruel, as compared to other capital offenses."

(C. 25-26, on return to second remand.)

When considering the application of this aggravating circumstance, this Court has stated:

> "The aggravating circumstance that the murder was especially heinous, atrocious, or cruel 'appl[ies] to only those conscienceless or pitiless homicides which are unnecessarily torturous to the

> victim.' Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981), abrogated on other grounds by Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006). In Norris v. State, 793 So. 2d 847, 854-62 (Ala. Crim. App. 1999), this Court recognized three factors that are particularly indicative that a capital offense was especially heinous, atrocious, or cruel: (1) the infliction on the victim of physical violence beyond that necessary or sufficient to cause death; (2) appreciable suffering by the victim after the assault that ultimately resulted in death; and (3) the infliction of psychological torture on the victim. This Court noted that under all three factors, 'the critical inquiry' is whether the victim was 'conscious or aware' for 'an appreciable lapse of time, sufficient enough to cause prolonged suffering.' Norris, 793 So. 2d at 854-61."

Floyd v. State, 284 So. 3d 250, 350 (Ala. Crim. App. 2017). Certainly, the murder in this case met the definition of especially heinous, atrocious, or cruel as discussed in Floyd. Indeed, by any definition the murder in this case was heinous.

The circuit court found no statutory mitigating circumstances and made the following findings concerning the nonstatutory mitigating circumstances:

> "The Court has also considered all of the evidence presented by [Lindsay] during the penalty/sentencing phase of the trial regarding nonstatutory mitigators. Testimony from Jeffrey Miller, who was married to Lindsay's mother from 1986-1991 indicated that Lindsay had issues when he first married into the family due to an accident wherein he was playing with a lighter, and caught his aunt's bed on fire; the aunt died in the fire. Miller stated that he tried to help [Lindsay] while

he was married to his mother, and that he re-established a relationship with [Lindsay] after he was released from prison. [Lindsay's] sister, Tippany Tolbert, testified about their mother's history of severe alcohol abuse, multiple stepfathers, abusive and unstable situations during their childhoods.

"The Court also considered the testimony of the mitigation specialist Taitha Powers Bailey, who stated that she was unable to review many of the school and medical records of [Lindsay] because they had been lost or destroyed. She testified that Lindsay spent most of his life believing that Leroy Lindsay was his father, only to later learn that he was not his biological father, and that the father's true name was unknown. There were multiple investigations of the household while [Lindsay] was a child due to allegations of abuse and neglect, and clearly [Lindsay] faced many obstacles growing up in his mother's household. During this time, Lindsay began having problems with behavior at school, and began counseling. On separate occasions, he was treated for injuries due to his mother's abusive boyfriend, and locked out of the family home. Bailey also testified that she contacted as many of Lindsay's relatives and friends as she could reach, to get more information.

"The Court finds that Lindsay's stepfather and sister expressed deep love and concern for him. The Court considered and carefully weighed that testimony as well as the testimony of [Lindsay's] mitigation specialist. The Court finds that there was evidence of serious abuse and neglect of [Lindsay] as a child, a significant absence of parental stability and nurturance (an alcoholic mother, and multiple stepfathers, some of whom were physically abusive to [Lindsay]), and the absence of a stable home environment until he was placed in the custody of his maternal grandmother at around 13 years of age. The Court notes that [Lindsay's]

> sister and his former stepfather appear to have loved and cared for him, both as a child and as an adult. The Court finds and considers as a nonstatutory mitigating factor that [Lindsay's] family loved [Lindsay], that they felt the love that [Lindsay] had for them, that they believe he has good and admirable qualities, and that they urged this Court to spare [Lindsay's] life so that he could have an opportunity to continue to be a loved and valued member of their friendship or family circles. The Court further finds and considers as mitigating evidence on [Lindsay's] behalf all relevant evidence of [Lindsay's] life, background, family and education history, and accords it the weight to which it is due."

(C. 27-28, on return to second remand.)

According to § 13A-5-53(b)(2), Ala. Code 1975, this Court must independently weigh the aggravating circumstances and the mitigating circumstances to determine the propriety of Lindsay's sentence of death. After independently weighing the circumstances presented in this case, this Court is convinced, as was the circuit court, that death is the appropriate sentence for Lindsay's brutal murder of his 21-month-old daughter.

As further required by § 13A-5-53(b)(3), Ala. Code 1975, this Court must determine whether Lindsay's death sentence was disproportionate or excessive to the sentences imposed in similar cases. Lindsay's sentence was neither. See Blackmon

v. State, 7 So. 3d 397 (Ala. Crim. App. 2005); Minor v. State, 914 So. 2d 372 (Ala. Crim. App. 2004); Broadnax v. State, 825 So. 2d 134 (Ala. Crim. App. 2000); Ward v. State, 814 So. 2d 899 (Ala. Crim. App. 2000).

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

For the foregoing reasons, we affirm Lindsay's sentence of death.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., recuses himself.