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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-15-0747

Dennis Morgan Hicks

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-12-4687)

On Return to Second Remand

McCOOL, Judge.

Dennis Morgan Hicks was convicted of capital murder, see § 13A-5-40(a)(6), Ala. Code 1975, for intentionally killing Joshua Duncan

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while Hicks was under a sentence of life imprisonment. Hicks was also convicted of theft of property in the second degree, see § 13A-8-4, Ala. Code 1975, for exerting unauthorized control over Dorothy Hudson's utility trailer, valued at \$1,500, with the intent to deprive her of the trailer. Following a jury trial, the jury, by a vote of 11 to 1, recommended a sentence of death as to the capital-murder conviction, and Hicks was subsequently sentenced to death. Hicks was sentenced to time served for his theft-of-property conviction. Hicks appealed.

On July 12, 2019, this Court affirmed Hicks's convictions for capital murder and second-degree theft of property. However, we remanded the case for the trial court to "clarify its sentencing order in the capital-murder case concerning its application of the definition of the 'heinous, atrocious, or cruel' aggravating circumstance." Further, we stated: "If the court improperly applied the definition, it must reconsider that aggravating circumstance under the proper definition. If the court applied the proper definition, it must clarify its order." Hicks v. State, [Ms. CR-15-0747, July 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019).

On remand, in a revised sentencing order, the trial court addressed the "heinous, atrocious, or cruel" aggravating circumstance by omitting certain language from its discussion of that aggravating circumstance. However, the revised sentencing order also omitted the discussion of two nonstatutory mitigating circumstances the court had explicitly considered in its original sentencing order. Specifically, the trial court's revised sentencing order omitted the discussion of the "mercy" and "capacity-for-love-and-care" nonstatutory mitigating circumstances that were included in the original sentencing order. It was unclear whether that omission was intentional, but, if it was intentional, the trial court went beyond the scope of our remand order, which instructed the court to clarify its order concerning its application of the "heinous, atrocious, or cruel" aggravating circumstance only. See Anderson v. State, 796 So. 2d 1151, 1156 (Ala. Crim. App. 2000) (holding that "any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction"). Accordingly, on June 24, 2020, by unpublished order, we remanded the case to the trial court with instructions to correct its revised sentencing order to include the nonstatutory mitigating circumstances that were

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omitted, and, if the trial court failed to consider those nonstatutory mitigating circumstances on remand, to consider them on second remand.

On second remand, the trial court issued a corrected sentencing order that included a discussion of the "mercy" and "capacity-for-love-and-care" nonstatutory mitigating circumstances, and the trial court stated that it "considered all of these nonstatutory mitigating circumstances at the previous sentencing hearing" and that "[t]he omission of any of these mitigating circumstances in the prior sentencing order was unintentional." Thus, the trial court complied with our instructions.

However, on second remand, the trial court also made slight alterations to its discussion of the "heinous, atrocious, or cruel" aggravating circumstance. On initial remand, the trial court's revised sentencing order stated:

"In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and then chopped his head and hands off and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment. This is heinous, atrocious, or cruel compared to other capital offenses."

On second remand, the trial court's revised sentencing order stated:

"In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and cut off his head and hands off and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment, so this question of fact was left to the jury. The Court agrees with the jury's finding that this is heinous, atrocious, or cruel compared to other capital offenses."

(Altered portion emphasized.)

Initially, we note that this added language in the order on second remand is not a new finding by the trial court or a substantive change. The added language states no more than what was implicit in the trial court's finding in its order on initial remand, i.e., that the trial court agreed with the jury's finding that this offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Nevertheless, on second remand, this Court remanded the case solely for the trial court to correct its new sentencing order to include the nonstatutory mitigating circumstances that were omitted on remand and to consider those mitigating circumstances if the trial court had failed to do so. Thus, on

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second remand, the trial court's revisions to its discussion of the "heinous, atrocious, or cruel" aggravating circumstance were beyond the scope of remand. This Court has held that "any act by a trial court beyond the scope of an appellate court's remand order is void for lack of jurisdiction" and "is a nullity." Anderson, 796 So. 2d at 1156. Therefore, the language that the trial court added to its discussion of the "heinous, atrocious, or cruel" aggravating circumstance on second remand is void, and it will not be considered in our review of Hicks's death sentence.

Next, we must review the trial court's actions on initial remand. Originally, we remanded the case for the trial court to "clarify its sentencing order in the capital-murder case concerning its application of the definition of the 'heinous, atrocious, or cruel' aggravating circumstance." Further, we stated: "If the court improperly applied the definition, it must reconsider that aggravating circumstance under the proper definition. If the court applied the proper definition, it must clarify its order." Hicks, ___ So. 3d at ___.

The trial court's original sentencing order stated the following regarding the "heinous, atrocious, or cruel" aggravating circumstance:

"In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and then cut off his head and hands and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment. The court further notes that the defendant murdered Joshua Duncan in or around Regina Norris's residence where three very young children were present. The evidence showed that two of the three young children were present when the defendant brutally murdered Joshua Duncan and then chopped Joshua Duncan's head and hands off and disemboweled him. Subjecting these very young children to such a horrendous act is heinous, atrocious, or cruel. This is heinous, atrocious, or cruel compared to other capital offenses."

(C. 85-86.)

Concerning the portion of that order discussing the presence of children during the murder, this Court stated:

"Under the proper definition of the 'heinous, atrocious, or cruel' aggravating circumstance, the circumstance includes only those 'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.' Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981). Hicks correctly asserts that, under the proper definition, the homicide must have been unnecessarily torturous to the victim -- Duncan -- not to the children. However, in addition to being unnecessarily torturous to the victim, the homicide must be 'conscienceless or pitiless.' We hold that the presence of the children could be one circumstance the trial court could consider in determining whether the homicide was 'conscienceless or pitiless.' See

Clark v. State, 896 So. 2d 584, 648-49 (Ala. Crim. App. 2000) (holding that the fact that the victim was mentally and physically handicapped was 'of no consequence in determining whether the crime was unnecessarily torturous to the victim[;] [h]owever, it is relevant and probative of whether the crime was conscienceless or pitiless'). Thus, contrary to Hicks's argument, the trial court did not necessarily broaden the definition of this aggravating circumstance when it considered the presence of the children in determining that this aggravating circumstance existed. However, it is unclear from the trial court's order whether the court properly considered the presence of the children under the 'conscienceless or pitiless' element of the 'heinous, atrocious, or cruel' definition or whether the court improperly considered the presence of the children because the homicide was unnecessarily torturous to them, rather than Duncan. Therefore, we remand the case to the trial court for it to clarify its order concerning this issue."

Hicks, ___ So. 3d at ___.

On initial remand, the trial court revised its order and read it into the record with Hicks present. Concerning the "heinous, atrocious, or cruel" aggravating circumstance, the revised order stated:

"In regard to the aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, the evidence shows that the defendant murdered Joshua Duncan and then chopped his head and hands off and disemboweled him. The State's pathologist could not confirm whether Joshua Duncan was dead when the defendant began the dismemberment and disembowelment. This is heinous, atrocious, or cruel compared to other capital offenses."

Thus, the trial court removed the language concerning the presence of the children during the murder. Therefore, it appears that the trial court had improperly applied the definition as it concerned the presence of the children and removed that circumstance from its consideration. Then, in compliance with our instructions, the trial court reconsidered the "heinous, atrocious, or cruel" aggravating circumstance, and, after that reconsideration, the court again followed the jury's recommendation and sentenced Hicks to death.

On return to remand, Hicks attempted to argue that, after removing the language concerning the presence of the children, the trial court's remaining discussion concerning its application of the "heinous, atrocious, or cruel" aggravating circumstance was insufficient. However, on original submission, this Court addressed Hicks's argument that the trial court's reasoning was insufficient because, Hicks said, the trial court relied on speculation and "an unlawfully broad definition" of the aggravating circumstance. Specifically, this Court stated:

"Furthermore, concerning Hicks's argument that the trial court erroneously found that the murder was especially heinous, atrocious, or cruel because, according to Hicks, the

trial court improperly considered that Duncan might have been alive when he was dismembered and disemboweled, any error was harmless beyond a reasonable doubt. As set forth in Part VII.A., supra, Duncan, who had mental disabilities, either died as a result of having been brutally beaten beginning in the mobile home and culminating in the backyard, or he remained alive throughout the entire beating and through at least part of his ensuing dismemberment. Under either scenario, the evidence established that his death was especially heinous, atrocious, or cruel. Thus, Duncan's violent homicide was especially heinous, atrocious, or cruel -- whether he died after being savagely beaten or remained alive when being hung, decapitated, and dismembered. Hicks is entitled to no relief in regard to this claim."

Hicks, ___ So. 3d at ___.

Therefore, to the extent that Hicks attempted to raise this claim again in his brief on return to remand, it has already been decided by this Court on original submission. Again, this Court has decided that Hicks is entitled to no relief regarding this claim.

Finally, pursuant to § 13A-5-53, Ala. Code 1975, this Court is required to address the propriety of Hicks's capital-murder conviction and sentence of death.

Hicks was convicted of one count of capital murder for intentionally killing Joshua Duncan by stabbing him with a bladed instrument and/or

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by decapitating him with a bladed instrument and/or by disemboweling him with a bladed instrument and/or by homicidal violence, while Hicks was under a sentence of life imprisonment, a violation of § 13A-5-40(a)(6), Ala. Code 1975. The jury, after deliberating for less than an hour, recommended by a vote of 11 to 1 that Hicks be sentenced to death. After receiving a presentence-investigation report and conducting a judicial sentencing hearing, the trial court followed the jury's recommendation and sentenced Hicks to death.

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

Additionally, the trial court correctly found that the aggravating circumstances outweighed the mitigating circumstances. The trial court, in its sentencing order, found three aggravating circumstance to exist -- that Hicks committed the capital offense while he was under a sentence of imprisonment, see § 13A-5-49(1), Ala. Code 1975, specifically two sentences of life imprisonment for two murder convictions in Mississippi in 1981, that Hicks had been previously convicted of a felony involving the

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use of violence to a person, specifically two counts of murder in 1981, see § 13A-5-49(2), Ala. Code 1975, and that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A-5-49(8), Ala. Code 1975. The court found these aggravating circumstances to exist beyond a reasonable doubt. The trial court then considered each of the statutory mitigating circumstances and found one to exist -- that the capital offense was committed while Hicks was under the influence of extreme mental or emotional disturbance, see § 13A-5-51(2), Ala. Code 1975 -- and gave that statutory mitigating circumstance "some weight." In its final sentencing order, the trial court also considered the nonstatutory mitigating evidence presented by Hicks, finding as follows:

"As outlined below, this court has considered each of these nonstatutory mitigating circumstances. To the extent that some piece of evidence, theory, or testimony concerning a nonstatutory mitigating circumstance is not specifically articulated below, this should not be taken as an indication it was not considered. This Court avers that it did consider all relevant evidence produced by Hicks at the guilt phase, penalty phase, and sentencing hearing as reflected in the entire record of the case, and gave such evidence all due consideration.

"This Court also specifically notes the following nonstatutory mitigating circumstances:¹

"1. Childhood Problems

"The defendant's mitigation expert, Dr. Mary Ann Rozensweig, testified that Hicks was born into a dysfunctional family and that, as a child, the defendant witnessed abuse in the family and experienced difficulties related to his father's behavior. The defendant testified, however, that he had a good childhood and good stepparents. The court finds that this mitigating circumstance was sufficiently interjected by Hicks and not disproved by the State. After consideration, this court gives this mitigating circumstance some, but relatively little, weight.

"2. Mercy

"Hicks's attorneys pleaded for the jury to show mercy to Hicks. While it is impossible to quantify a plea for mercy, this court finds that Hicks sufficiently raised the issue and it was not (and cannot be) disproved by the State. As a result, this court gives Hicks's plea for mercy some weight as a nonstatutory mitigating circumstance.

"3. Capacity for Love and Care

"There was some testimony from the mitigation expert and Hicks's sister regarding this mitigating circumstance. The testimony consisted of Hicks caring for and taking care of his mother and his involvement at church, as well as doing odd jobs for various people. The State did not disprove this testimony, and, accordingly, the court gives it some weight.

"

"¹The Court considered all these nonstatutory mitigating circumstances at the previous sentencing hearing. The omission of any of these mitigating circumstances in the prior sentencing order was unintentional."

The trial court explicitly stated that it did not consider the jury's verdict to be an aggravating circumstance, but the court did give the verdict "due weight" and "great deference."

Thereafter, the trial court weighed the statutory aggravating circumstances and the statutory and nonstatutory mitigating circumstances and concluded that the aggravating circumstances in this case outweighed the mitigating circumstances. The record supports the trial court's findings and the imposition of the sentence of death.

Additionally, § 13A-5-53(b)(2), Ala. Code 1975, requires this Court to independently weigh the aggravating and mitigating circumstances to determine whether Hicks's sentence of death is appropriate. We have independently weighed the aggravating and the mitigating circumstances, and we are convinced, as was the trial court, that death is the appropriate sentence for the murder Hicks committed.

Pursuant to § 13A-5-53(b)(3), Ala. Code 1975, we determine that Hicks's sentence is neither disproportionate nor excessive to the penalty imposed in similar cases. In this case, Hicks was convicted of capital murder for causing the death of Joshua Duncan, who was mentally disabled, by stabbing him, by decapitating him, by disemboweling him, or by some other homicidal violence, while Hicks was under a sentence of life imprisonment. Sentences of death have been imposed for similar crimes throughout this state. See Peraita v. State, 897 So. 2d 1161 (Ala. Crim. App. 2003); Jones v. State, 450 So. 2d 165 (Ala. Crim. App. 1983).

Lastly, as required by Rule 45A, Ala. R. App. P., we have searched the record for any error that has or probably has adversely affected Hicks's substantial rights and have found no plain error or defect in the proceedings under review.

After careful review and consideration, this Court concludes that Dennis Morgan Hicks received a fair trial and that the sentence of death is proper. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.