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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2012-2013

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CR-97-1258

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Jerry Jerome Smith

v.

State of Alabama

Appeal from Houston Circuit Court  
(CC-97-270)

On Return to Fifth Remand

WINDOM, Presiding Judge.

Jerry Jerome Smith appeals his sentence of death that resulted from the third penalty-phase proceeding of his capital-murder trial. In 1998, Smith was convicted of capital murder for killing Willie Flournoy, Theresa Helms, and David

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Bennett by one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. At the conclusion of the third penalty-phase proceeding, the jury recommended, by a vote of 12-0, that Smith be sentenced to death. In accordance with the jury's recommendation, the circuit court sentenced Smith to death.

The facts of the Smith's offense are stated in detail in Smith v. State, [Ms. CR-97-1258, December 22, 2000] \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2000), and will not be repeated here except as necessary for an understanding of the issue before this Court. Smith, who was a drug dealer, went to Flournoy's residence to collect \$1,500, which Flournoy owed him for crack cocaine. When Flournoy told Smith that he did not have the money, Smith shot and killed him with a sawed-off .22 caliber rifle. Smith then shot and killed Helms and Bennett, who were also at Flournoy's residence. The jury convicted Smith of capital murder for intentionally killing two or more people pursuant to one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. Smith was sentenced to death; he appealed.

"On appeal, this Court affirmed Smith's capital-murder conviction, but remanded the cause

for the circuit court to correct its sentencing order. See Smith v. State, [Ms. CR-97-1258, December 22, 2000] \_\_\_ So. 3d \_\_\_ (Ala. Crim. App. 2000). After remanding the cause a second time for the circuit court to correct its sentencing order, this Court affirmed Smith's death sentence. See Smith v. State, [Ms. CR-97-1258, August 31, 2001] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2000) (opinion on return to second remand). Thereafter, the Alabama Supreme Court reversed Smith's death sentence and ordered a new penalty-phase hearing. See Ex parte Smith, [Ms. 1010267, March 14, 2003] \_\_\_ So. 3d \_\_\_ (Ala. 2003).

"After a second penalty-phase hearing, the jury recommended by a vote of 10-2 that Smith be sentenced to death. The circuit court followed the jury's recommendation and again sentenced Smith to death. On return to remand, this Court 'concluded that Smith is mentally retarded and, therefore, ... ineligible for the death penalty and directed the trial court to set aside Smith's death sentence and to sentence him to life imprisonment without the possibility of parole.' Ex parte Smith, [Ms. 1080973, October 22, 2010] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2010) (citing Smith v. State, [Ms. CR-97-1258, September 29, 2006] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2003) (opinion on return to third remand)). The Alabama Supreme Court reversed this Court's judgment and remanded the cause for the circuit court to conduct [a hearing pursuant to Atkins v. Virginia, 536 U.S. 304 (2002),] to determine whether Smith is mentally retarded and to make specific findings of fact pursuant to Ex parte Perkins, 851 So. 2d 453 (Ala. 2002). Smith v. State, [Ms. 1060427, May 25, 2007] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2007). After conducting the Atkins hearing, the circuit court concluded that Smith is not mentally retarded. This Court affirmed the circuit court's determination, and the Alabama Supreme Court granted certiorari review.

"On October 22, 2010, the Alabama Supreme Court again reversed Smith's sentence of death and remanded the cause for the circuit court to conduct a new penalty-phase proceeding before a jury. Ex parte Smith, [Ms. 1080973, October 22, 2010] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2010). Specifically, \_\_\_ after detailing why the circuit court correctly determined that Smith is not mentally retarded, the Alabama Supreme Court held that improper, prejudicial contact between the victim's mother and the jury venire entitled Smith to a new penalty-phase proceeding. Id. at \_\_\_."

Smith v. State, [Ms. CR-97-1258, Feb. 4, 2011] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2011). In accordance with the Alabama Supreme Court's opinion in Ex parte Smith, [Ms. 1080973, October 22, 2010] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2010), this Court remanded the cause to the "the circuit court with instructions for that court to conduct a third penalty-phase hearing." Smith, [Ms. CR-97-1258, Feb. 4, 2011] \_\_\_ So. 3d at \_\_\_.

On January 23, 2012, the circuit court began Smith's third penalty-phase proceeding before a jury. At the conclusion of the presentation of evidence, the circuit court instructed the jury on the law. During its jury charge regarding aggravating circumstances, the circuit court instructed the jury that it could consider four aggravating circumstances. Specifically, the circuit court instructed the jury that it could consider the following aggravating

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circumstances: 1) "[t]he defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person," § 13A-5-49(2), Ala. Code 1975; 2) "[t]he defendant knowingly created a great risk of death to many persons," § 13A-5-49(3), Ala. Code 1975; 3) "[t]he capital offense was especially heinous, atrocious, or cruel compared to other capital offenses," § 13A-5-49(3), Ala. Code 1975; and 4) "the defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct." (R. 948-49.) See § 13A-5-49(9), Ala. Code 1975. At the conclusion of the circuit court's instructions, Smith raised the following objection:

"Judge, I do not believe the aggravating circumstance of causing the death of more than one person by a common plan or scheme or course of conduct -- I don't even believe that aggravating circumstance even applied at the time that these crimes were committed. I don't even think that aggravating circumstance was Alabama law at that time."

(R. 951-52.)

After the circuit court charged the jury, it returned a unanimous recommendation that Smith be sentenced to death. On April 18, 2012, the circuit court conducted a judicial sentencing hearing. At the conclusion of the sentencing

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hearing, the circuit court accepted the jury's recommendation and sentenced Smith to death.

On appeal, Smith argues, and the State concedes, that his sentence of death must be reversed and the cause be remanded for a fourth penalty-phase proceeding because the circuit court improperly instructed the jury that it could consider an aggravating circumstance that was inapplicable. Specifically, the parties agree that the circuit court incorrectly instructed the jury that it could consider the aggravating circumstance that Smith "intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct," § 13A-5-49(9), Ala. Code 1975, because that aggravating circumstance did not exist when Smith committed his capital offense. According to the parties, by allowing the jury to consider an aggravating circumstance that did not exist at the time Smith committed his offense, the circuit court violated his statutory right to an advisory verdict by a jury. This Court agrees.

Smith committed the capital offense for which he has been sentenced to death on October 19, 1996. At that point, the murder of "two or more persons by one act or pursuant to one

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scheme or course of conduct," § 13A-5-49(9), Ala. Code 1975, was not an aggravating circumstance. Rather, the amendment to § 13A-5-49, Ala. Code 1975, to include the murder of "two or more persons by one act or pursuant to one scheme or course of conduct," § 13A-5-49(9), Ala. Code 1975, as an aggravating circumstance became effective on September 1, 1999, almost three years after Smith committed his offense.

As the State explains in its brief, "[i]n Ex parte Stephens, 982 So. 2d 1148 (Ala. 2006), the Supreme Court of Alabama was presented with the same issue that warrants the reversal of Smith's death sentence." (State's brief, at 12.) In Ex parte Stephens, the circuit court instructed the jury that it could consider three aggravating circumstances, one of which was "that Stephens 'intentionally caused the death of two or more persons by one act.'" Ex parte Stephens, 982 So. 2d at 1150. Like Smith, however, Stephens had committed his capital offense before § 13A-5-49, Ala. Code 1975, was amended to include "intentionally caus[ing] the death of two or more persons by one act" as an aggravating circumstance. Id. at 1150. The Alabama Supreme Court then held that "[i]t was error for the trial court to instruct Stephens's jury to

consider as a statutory aggravating circumstance a circumstance that was not listed in the statute at the time of the offense." Id. at 1153. Similarly, the circuit court in this case erroneously instructed the jury that it could consider an aggravating circumstance that did not exist when Smith committed his offense.

Having determined that it was error to instruct the jury that it could consider an inapplicable aggravating circumstance, however, does not end this Court's analysis. Rather, as the Alabama Supreme Court explained in Stephens:

"An error in a penalty-phase jury instruction is subject to harmless-error review. Ex parte Broadnax, 825 So. 2d 233, 236 (Ala. 2001). However, '[t]he harmless error rule is to be applied with extreme caution in capital cases.' Ex parte Whisenant, 482 So. 2d 1247, 1249 (Ala. 1984). To find the error in this capital case harmless, we must be able to state 'beyond a reasonable doubt' that a properly instructed jury would nevertheless have recommended a sentence of death. 482 So. 2d at 1248.

Ex parte Stephens, 982 So. 2d at 1153-54.

After explaining that the erroneous penalty-phase jury instructions are subject to harmless-error review, the Alabama Supreme Court held:

"After reviewing the evidence presented of the aggravating circumstances and the mitigating



circumstances, we cannot say with the necessary certainty that the error did not affect the jury's recommendation.

"Stephens's defense counsel presented significant mitigating evidence during the sentencing phase of trial. Catherine Lee Boyer, a forensic psychologist, testified that Stephens has a verbal IQ of 73 and a performance IQ of 86, and a combined full-scale IQ score of 77. She described this score as 'borderline.' Boyer also testified that the circumstances of the murders were consistent with rage or 'extreme emotional state,' as opposed to a calculated or planned killing, and that Stephens's behavior in the hours following the murder indicated remorse. Stephens's mother testified that Stephens loved his children, including Nicholas, that he had been a caring and responsible father, and that he 'could not have been in his "right mind"' when he committed the murders.

"Despite evidence of the heinous, atrocious, and cruel nature of the offense, and despite Stephens's 1992 attack on Annie, two jurors voted for a sentence of life imprisonment without parole. The jury might have voted for the death penalty if it had been instructed on only the two valid statutory aggravating circumstances. However, we are unable to conclude, beyond a reasonable doubt, that it would have done so.

"A recommendation of death must be based on a vote of at least 10 jurors. § 13A-5-49(f), Ala. Code 1975. In this case, a change in only one juror's vote would have prevented the jury from recommending a death sentence. At that point, one of several things might have happened -- the trial court might have instructed the jury to deliberate further, resulting in a vote for either life imprisonment or death, or the court might have declared a mistrial and empaneled a new sentencing jury. § 13A-5-46(g), Ala. Code 1975. This

uncertainty requires us to reverse Stephens's sentence and remand the case for resentencing."

Ex parte Stephens, 982 So. 2d at 1154.

Here, as in Ex parte Stephens, the circuit court's erroneous jury instruction regarding an inapplicable aggravating circumstance cannot be deemed harmless. See Rule 45, Ala. R. App. P. Smith's "defense counsel presented significant mitigating evidence during the sentencing phase of trial," Ex parte Stephens, 982 So. 2d at 1154, including evidence of Smith's mental deficiencies, of his dysfunctional upbringing, of his drug and alcohol abuse, and of the sexual abuse he suffered. In its sentencing order, the circuit court found that Smith's counsel presented mitigating evidence indicating the following: 1) Smith has the learning capacity of a third grader, was in special-education classes all his life, and quit school in the eighth grade; 2) Smith has a low IQ, has a low frustration tolerance, and has poor impulse control; 3) Smith cannot read or write; 4) Smith has a history of excessive alcohol and drug abuse, and first consumed alcohol at the age of eight; 5) Smith was on drugs and alcohol when he committed his capital offense and did not resist arrest; 6) Smith grew up in a dysfunctional home with an

alcoholic mother; 7) Smith did not develop a relationship with his natural father; 8) Smith's mother, father, and all of his siblings had criminal histories; 9) Smith witnessed his sister being raped; and 10) Smith was sexually abused by his cousin. (C. 480-82.) See Ex parte Stephens, 982 So. 2d at 1154 (placing great significance on mitigating evidence relating to Stephen's mental deficiencies in finding that the erroneous jury instruction was not harmless).

Further, although the jury was properly instructed on three aggravating circumstances, the circuit court, like the court in Stephens, found only two aggravating circumstances. See Ex parte Stephens, 982 So. 2d at 1151 (recognizing that "only two of those aggravating circumstances were actually available as statutory aggravating circumstances in this case"). Specifically, the circuit court found Smith "knowingly created a great risk of death to many persons," see § 13A-5-19(3), Ala. Code 1975; and that he "was previously convicted of ... a felony involving the use or threat of violence to the person," see § 13A-5-19(2), Ala. Code 1975.

After reviewing the evidence presented in mitigation and the aggravating circumstances, this Court cannot "state

'beyond a reasonable doubt' that a properly instructed jury would nevertheless have recommended a sentence of death." Ex parte Stephens, 982 So. 2d at 1153-54. As the State concedes in its brief, "just as in Stephens, the court's erroneous instruction cannot be deemed harmless because Smith's counsel presented ... considerable mitigation evidence regarding, among other things, his low intellectual functioning, [dysfunctional upbringing, drug and alcohol abuse, and sexual abuse]." (State's brief, at 17) (quoting Ex parte Stephens, 982 So. 2d at 1154). When Smith's mitigating evidence is balanced against the aggravating circumstances, this Court "cannot say with the necessary certainty that the error did not affect the jury's recommendation." Ex parte Stephens, 982 So. 2d at 1154.

Accordingly, Smith's sentence of death is reversed, and this cause is remanded to the circuit court with instructions for that court to conduct a fourth jury penalty-phase proceeding. On remand, the circuit court shall take all necessary action to see that the circuit clerk makes due return to this Court at the earliest possible time and within 180 days from the date of this opinion.

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REVERSED AND REMANDED.

Welch, Kellum, Burke, and Joiner, JJ., concur.