[J-25-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 375 CAP
	:	
Appellee	:	Appeal from the Order entered on April 8,
	:	2002 in the Court of Common Pleas,
v.	:	Criminal Division of Erie County denying
	:	PCRA relief at No. 1325 A & B 1988
DAVID COPENHEFER,	:	
	:	
Appellant	:	SUBMITTED: January 24, 2006

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: December 28, 2007**

In Commonwealth v. Rizzutto, 777 A.2d 1069 (Pa. 2001), this Court held that granting discretion to the jury in a capital case to ignore stipulated mitigating factors would result in arbitrary and capricious death sentences. Because the majority now concludes that this pronouncement was not constitutional in nature, and may not, therefore, serve as a basis for filing a PCRA petition outside of the one-year jurisdictional time limitation, I must respectfully dissent.

Where the jury finds one or more aggravating circumstances and no mitigating circumstance, the death penalty is mandatory. 42 Pa.C.S. § 9711(c)(1)(iv). During the penalty phase of Appellant's trial, the Commonwealth relied on two aggravating factors,[1] while Appellant raised multiple mitigating circumstances, including his lack of a prior criminal record. See 42 Pa.C.S. § 9711(e)(1). The Commonwealth agreed that Appellant

[1] Specifically, that the victim was held for ransom and that the murder was committed during the course of a felony (kidnapping). See 42 Pa.C.S. § 9711(d)(3), (6).

had no prior criminal record, and stipulated to this fact. Notwithstanding this stipulation, however, the trial court declined defense counsel's request to instruct the jury that the stipulation established that Appellant had no prior record and required the jury to find the § 9711(e)(1) mitigating factor. When the jury returned with its penalty phase verdict, it erroneously concluded, notwithstanding the parties' stipulation, that there were no mitigating factors, and, accordingly, imposed an automatic death sentence in accord with 42 Pa.C.S. § 9711(c)(1)(iv). Commonwealth v. Copenhefer, 587 A.2d 1353 (Pa. 1991).

On direct appeal, Appellant argued that the trial court erred in failing to charge the jury that Appellant's lack of a criminal record established the § 9711(e)(1) mitigating factor as a matter of law pursuant to the parties' stipulation. This Court denied relief, finding in a 4-3 decision that there was no error because the jury, while not instructed to find the § 9711(e)(1) factor, had the opportunity to consider it. Copenhefer, 587 A.2d 1353. The dissenting Justices would have ruled that the failure to charge the jury that it must find the stipulated § 9711(e)(1) factor contravened the sentencing statute. The dissent concluded that the result prejudiced Appellant because the jury, having found two aggravating circumstances and no mitigating circumstances, entered a mandatory death verdict without balancing the aggravating factors against the stipulated mitigating factor. See 42 Pa.C.S. § 9711(c)(1)(iv).

In 1999 Appellant filed a federal *habeas* petition in the United States District Court for the Western District of Pennsylvania, arguing that the trial court had failed to instruct the jury properly regarding the stipulated mitigating factor. While this federal petition was pending, this Court decided Commonwealth v. Rizzutto, 777 A.2d 1069 (Pa. 2001), which abrogated Copenhefer and adopted the position advanced by Appellant and the Copenhefer dissent, holding that where a mitigating circumstance is presented to the jury by stipulation, the jury is required to find that mitigating factor and must be instructed accordingly. The Rizzuto court recognized that if it granted the jury discretion to ignore

stipulations of fact, the Court "would be granting the right to arrive at a sentencing verdict in an arbitrary and capricious fashion." Rizzuto, 777 A.2d at 1089. Allowing such arbitrary and capricious sentences would, the Court reasoned, "undercut the very purpose of the death penalty sentencing scheme" in Pennsylvania, which prohibits a death sentence that is "the product of passion, prejudice or any other arbitrary factor." Id., citing 42 Pa.C.S. § 9711(h)(3)(i) (prohibiting affirmance of a death sentences that is "the product of passion, prejudice or any other arbitrary factor.").

With his federal *habeas* petition still pending, Appellant filed the current PCRA petition setting forth a claim for relief based on Rizzuto, arguing that his death sentence violated the Eighth and Fourteenth Amendments to the United States Constitution.[2] Because this petition was filed outside of the jurisdictional one-year time requirement for PCRA petitions, see 42 Pa.C.S. § 9545(b)(1), Appellant asserted the existence of one of the statutory exceptions to the PCRA's one year limitation. Specifically, Appellant argued that the right he was asserting was a constitutional right, recognized by this Court after the one-year time period, which we have held to apply retroactively. 42 Pa.C.S. § 9545(b)(1)(iii).[3] Appellant further asserted that he had filed his PCRA petition within sixty days after Rizzuto was decided, as required by 42 Pa.C.S. § 9545(b)(2).

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[2] Appellant has been vigorous in defending himself. As the majority notes, Appellant filed a first PCRA petition after this Court affirmed his conviction. The trial court denied that petition, and this Court affirmed. Appellant also filed a *pro se* writ of federal *habeas corpus* while his first PCRA petition was pending, which was dismissed without prejudice. Appellant filed a second PCRA petition and a second federal *habeas* corpus petition. He withdrew his second PCRA petition, allowing his second federal *habeas* corpus petition to move forward. When this Court decided Rizzuto, Appellant filed the present PCRA petition, while his second *habeas* petition was still pending. As noted in the body of this opinion, the Third Circuit Court of Appeals has stayed consideration of Appellant's federal *habeas* petition awaiting our ruling in the instant matter.

[3] This provision provides:

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The PCRA court dismissed the petition on April 8, 2002, finding that Appellant had failed to establish the existence of an exception to the PCRA's one-year time bar because Rizzuto neither established a new constitutional right nor applied retroactively. See PCRA Court Notice of Intent to Dismiss, 2/13/02, at 3. On August 16, 2002, a federal magistrate entered a recommendation that Appellant's federal *habeas* claim be granted, concluding that the trial court had failed properly to instruct the jury regarding the stipulated mitigating factor, resulting in a violation of Appellant's Eighth Amendment right to be free from the imposition of an arbitrary death sentence. On December 9, 2002, the district court accepted this recommendation. After both parties appealed, the Third Circuit stayed further consideration of Appellant's *habeas* claim, pending this Court's ruling on the PCRA petition *sub judice*.

The majority now affirms the PCRA court's conclusion that Appellant's PCRA petition does not fall within the exception to the general PCRA one-year jurisdictional time limit, see 42 Pa.C.S. § 9545(b)(1), set forth in § 9545(b)(1)(iii). The gravamen of the majority's holding is that Rizzuto did not recognize an Eighth Amendment constitutional right, but rather merely interpreted the sentencing statute.

I cannot agree with the majority's conclusion in this regard. The Eighth Amendment to the federal constitution mandates individual assessment of the appropriateness of the

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(…continued)

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
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> * * *
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> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. § 9545.

death penalty, and bars the state from preventing the jury from considering and giving effect to mitigating evidence. See Penry v. Lynaugh, 492 U.S. 302, 318 (1989) (holding that the trial court must specifically instruct the jury that it could give effect to the mitigating evidence by declining to impose the death penalty); see also Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentence giver, 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.").

Appellants assertion on direct appeal, rejected by a majority of this Court, posited that the jury was required to find the mitigating circumstance that Appellant had no significant history of prior criminal convictions under § 9711(e)(1) because it was stipulated to by the Commonwealth. The identical argument was raised in Rizzuto. We noted therein that in death penalty cases, the jury is required to find the existence of any mitigating circumstances that have been proven by a preponderance of the evidence. Id.; Commonwealth v. Cox, 728 A.2d 923 (Pa. 1999); Commonwealth v. Williams, 615 A.2d 716 (Pa. 1992). Consequently, we held in Rizzuto that where the absence of a criminal record is not in dispute, the sentencing jury cannot fail to find this mitigator.

In holding in Rizzuto that permitting the jury to disregard a stipulated mitigating factor would lead to an arbitrary and capricious sentence, we invoked constitutional Eighth Amendment jurisprudence finding that an arbitrary sentence is unconstitutional. See Agrave v. Creech, 507 U.S. 463, 470 (1993) ("a capital sentencing scheme must suitably direc[t] and limi[t] the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action."); Parker v. Dugger, 498 U.S. 308 (1991) ("The Constitution prohibits the arbitrary or irrational imposition of the death penalty."); Spaziano v. Florida, 468 U.S. 447, 466-67 (1984). Citing the landmark case of Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court has held that where a jury is afforded discretion on a

matter so grave as the determination of whether a human life should be taken or spared, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153 (1976).

Moreover, Pennsylvania's sentencing scheme was adopted in order to comply with Furman and avoid "a substantial risk that it [the death sentence] would be inflicted in an arbitrary and capricious manner." Commonwealth v. Cross, 496 A.2d 1144 (Pa. 1985). The Pennsylvania Legislature, in order to meet the requirements of Furman, Gregg, and Commonwealth v. Moody, 382 A.2d 442 (Pa. 1977), enacted 42 Pa.C.S. § 9711, a sentencing formula "designed to guide and limit the discretion of the sentencing jury as to avoid a totally arbitrary result while retaining with the jury the opportunity to give an individualized sentence where mitigation is found." Cross, 496 A.2d at 1511. See also Commonwealth v. Billa, 555 A.2d 835, 845 (Pa. 1989) ("Our death sentencing procedures were carefully designed by the legislature to channel the discretion of the jury and prevent arbitrary or capricious imposition of the death penalty."). In fact, the review that this Court conducts in capital cases for passion, prejudice, or other arbitrary factors pursuant to § 9711(h)(3)(I) was adopted to satisfy Furman. Commonwealth v. Whitney, 512 A.2d 1152, 1164 (Pa. 1986) (Larson, J., concurring); see Commonwealth v. Zettlemoyer, 454 A.2d 937, 959 (Pa. 1982).

By concluding in Rizzuto that Appellant's sentence was arbitrary and capricious because the jury had the discretion to ignore a stipulated mitigator, we relied on the language employed in Eighth Amendment jurisprudence barring arbitrary and capricious sentences. Thus, our holding in Rizzuto recognized a new constitutional right requiring a jury to accept stipulated-to mitigating factors as a matter of Eighth Amendment

jurisprudence.[4] Without a proper and necessary instruction from the trial court, the jury disregarded the stipulated mitigator and consequently imposed an automatic death sentence, where state and federal law required it to weigh the aggravating factors against the stipulated mitigator.

I turn next to the question of Rizzuto's retroactivity. I note that this Court's opinion in that case did not discuss whether it would be applied retroactively. Significantly, Appellant does not argue that Rizzuto should be applied retroactively in accord with our established test for such application.[5] Instead, Appellant argues that fundamental fairness requires that our Rizzuto discussion apply retroactively to him, citing Commonwealth v. Cruz, 851 A.2d 870 (Pa. 2004). Cruz afforded relief to a PCRA petitioner whose co-defendant had previously been granted relief on an identical claim, accepting the petitioner's argument that this remedy was necessary to serve fundamental fairness. In the scenario before us, Appellant's direct appeal resulted in our holding that no error had occurred. While he languished in jail, we reconsidered that holding and, as explained earlier, reversed ourselves in Rizzuto. Under these circumstances, we agree with Appellant that as a matter

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[4] Although the majority notes Appellant's reliance on the line of cases prohibiting arbitrary and capricious death sentences as violative of the Eighth Amendment, it dismisses this argument by relating the arbitrary and capricious language in Rizzuto to the statutory sentencing scheme, as opposed to the constitutional right involved. By doing so, the majority ignores the fact that, as explained above, the sentencing scheme was created specifically to prevent unconstitutionally arbitrary and capricious sentences, which violate the Eighth Amendment, and, thus, is premised upon this precedent rather than independent from it.

[5] In Kendrick v. District Attorney Of Philadelphia County, 916 A.2d 529, 539 (Pa. 2007), we discussed the major considerations involved in determining whether a holding should be deemed new and/or whether the holding should apply retroactively or prospectively. As Appellant does not raise or argue this contention, it is unnecessary to set forth and analyze the test.

of fundamental fairness he should be granted the relief he originally sought, but did not get, only to see his position vindicated in Rizzuto.

Madame Justice Baldwin and Mr. Justice Fitzgerald join this dissenting opinion.