

Summary of SC88497, *State of Missouri v. Kenneth Baumruk*

Appeal from the St. Charles County circuit court, Judge Lucy D. Rauch

Attorneys: Baumruk was represented by Rosemary E. Percival of the public defender's office in Kansas City, (816) 889-7699, and the state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man challenges, on direct appeal, his conviction for first-degree murder and his death sentence for killing his wife during a 1992 hearing in a dissolution proceeding. In a 6-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the man's conviction and sentence. Substantial evidence supports the trial court's findings that the man was competent to stand trial but not able to represent himself. The trial court did not abuse its discretion in using jurors from the county where the case was transferred after a change of venue or in preventing defense counsel from telling potential jurors the specific number of individuals at whom the defendant shot. The trial court did not commit plain error in failing to strike, on its own motion, a certain juror; in allowing a psychiatric expert to rely on a particular conversation as one basis for his conclusion; or in failing to intervene, on its own motion, during the penalty phase closing arguments when the prosecutor made certain statements. Further, the evidence shows the imposition of the death sentence here did not result from passion, prejudice or other arbitrary factor; supports the jury's findings of 10 statutory factors in aggravation of punishment; and that the sentence is not excessive or disproportionate to the penalty imposed in similar cases.

Facts: In May 1992, Kenneth Baumruk carried two .38-caliber handguns in his briefcase into the St. Louis County courtroom where he and his wife were scheduled for a hearing in a proceeding to dissolve their marriage. Before the hearing, the wife's attorney discovered he had represented Baumruk around 1975. After being notified of the conflict by both parties' attorneys, the judge determined the case would proceed only if both parties waived the conflict on the record in open court. After his wife testified she still wanted to retain her attorney despite the conflict, Baumruk reached into his briefcase, pulled out the two guns, stood and shot his wife in the neck. Subsequently, he put his gun to his wife's head and shot her again, killing her. Baumruk fled, shooting at others. Eventually, he was shot nine times, including twice in the head.

Baumruk initially was found incompetent to stand trial. After a June 2005 competency hearing, the trial court found Baumruk competent to stand trial and subsequently summoned more than 280 people from St. Charles County to assure access to an unbiased jury. Following trial, which concluded in February 2007, the jury found Baumruk guilty and, finding the presence of 10 statutory aggravating factors, recommended the death penalty. The court entered judgment accordingly, and Baumruk appeals.

AFFIRMED.

Court en banc holds: (1) Substantial evidence supports the trial court's finding that Baumruk was competent. Under section 552.020.8, RSMo 2000, a defendant is presumed competent and bears the burden of proving incompetence by a preponderance of the evidence. Baumruk's sole

ground for claiming he was incompetent to stand trial was that he could not remember his thoughts and emotions immediately before and during the shooting, that these thoughts and emotions are vital to a defense of diminished capacity or mental disease or defect, and, therefore, that his memory loss makes him not competent to stand trial. A lack of memory of the events surrounding the commission of a crime, however, does not make an individual incompetent to stand trial for the crime. As this Court held in Baumruk's previous direct appeal, amnesia does not bar prosecution of an otherwise competent defendant. *State v. Baumruk*, 85 S.W.3d 644, 648 (Mo. banc 2002). This Court defers to the trial court's factual findings, which here are based on evidence presented to it, evidence presented at a prior competency hearing, its determination of which of the disagreeing experts was more credible and persuasive, and its observations of Baumruk's interaction with his lawyers during the competency hearing.

(2) The evidence supports the trial court's decision to deny Baumruk the right to represent himself. In *Indiana v. Edwards*, 128 S.Ct 2379 (2008), the United States Supreme Court emphasizes that a defendant's ability to consult with his lawyer, as required to establish competence to stand trial, differs significantly from the capacity necessary for a defendant to represent himself. In *Edwards*, the Supreme Court noted that the standard for establishing competency to stand trial is a lower standard than that required for a defendant to represent himself and held that the constitution permits states to insist on representation by counsel by those competent enough to stand trial but who still suffer from mental illness to the point where they are not competent enough to conduct trial proceedings by themselves. Here, the evidence supported the trial court's finding that, while competent to stand trial, Baumruk lacked the ability to choose voluntarily and intelligently to represent himself. Medical evidence showed the brain damage Baumruk suffered from the gunshot wounds and subsequent surgeries, outbursts at a pre-trial conference at which he also interrupted his counsel, and the desire to endorse witnesses who lacked any relevance to the trial. The trial court must be certain that an individual who suffers from a mental incapacity does not represent himself, and Baumruk established that he does have various mental incapacities. Baumruk cannot complain now about the evidence he brought into court that the court used to conclude he could not represent himself.

(3) The trial court did not abuse its discretion in using a pool of potential jurors from St. Charles County. The issue of whether a different jury pool might have been preferable is not before this Court. Because there is no requirement that jurors be ignorant of facts and issues the media report, the question is not whether potential jurors remember the case but whether they have fixed opinions that would prevent them from impartially judging whether the defendant is guilty. Of the 283 potential jurors summoned here, all those who said they were aware of the case from outside sources were questioned individually, and the court automatically excluded those who said they were aware that Baumruk had been sentenced to death for the crime in a previous trial, regardless of whether they said they could set aside this knowledge and judge the case solely on the evidence presented at the new trial. Of the five ultimate jurors who received individual questioning, Baumruk did not seek to strike (remove from the jury pool) any for cause. None of the jurors who served had fixed opinions preventing them from judging Baumruk's case impartially, and there is no indication in the record that Baumruk did not receive a fair trial.

(4) The trial court did not abuse its discretion in preventing defense counsel from telling potential jurors, during questioning, the specific number of individuals at whom Baumruk shot. The inability of defense counsel to articulate this specific number did not infringe on his right to an impartial jury, as the specific number is not a critical fact. Further, Baumruk fails to

demonstrate any real probability of prejudice, as nothing in the record supports a finding that potential jurors would have responded differently had they known the specific number.

(5) The trial court did not commit plain error in failing to strike, on its own motion, a juror who said that he was aware of the case due to media coverage and that he believed Baumruk previously had been convicted. After extensive individual questioning, this juror said he could keep an open mind and listen to all the evidence and conceded he could vote for a death sentence under the right circumstances. Baumruk's counsel did not challenge this juror, either for cause or using one of his peremptory strikes (optional strikes that do not require a reason), waiving Baumruk's right to review of this issue. Further, it could have been defense strategy to ensure the man could be a viable juror, given that he initially had great trepidation over voting for a death sentence. The trial court was under no obligation to interfere with a possible defense strategy or to strike the juror on its own motion, and no prejudice occurred.

(6) The court did not commit plain error in allowing a psychiatric expert for the state to rely on the statement of an officer who had a discussion with Baumruk while he was incarcerated in forming and presenting his expert opinion that Baumruk was competent to stand trial. The state did not present evidence of Baumruk's statement to the officer during its primary case, and defense counsel did not object to the reliance of the state's expert, during rebuttal, on Baumruk's statement to the officer. The statement was not used as evidence of Baumruk's guilt but, instead, was used only as evidence that Baumruk remembered the shooting. The expert did not reveal to the jury the statement in detail and, instead, only said Baumruk's discussion with the officer demonstrated memory of the event. In addition, Baumruk's conversation with the officer was merely duplicative of other admitted evidence, as the officer was only one of four people who provided support for the expert's conclusion that Baumruk did not suffer from amnesia. As such, Baumruk cannot demonstrate that any manifest injustice or miscarriage of justice resulted.

(7) As this Court repeatedly has held, the document charging a defendant with first-degree murder is not required to include the statutory aggravators supporting the death penalty, and Baumruk presents no authority for a holding to the contrary.

(8) The trial court did not commit plain error in failing to intervene, on its own motion, during the penalty phase closing arguments when the prosecutor made certain statements. Defense counsel did not object to these statements, and the jury already had heard evidence during the guilt phase regarding the issues the comments raised. To the extent the prosecutor urged the jury to "send a message," such arguments are permissible and do not constitute plain error. Given the limited nature of the comments within the context of the trial as a whole, none had a decisive impact on the sentencing outcome, and no manifest injustice occurred.

(9) Considering all the factors in the Court's independent proportionality review under section 565.035.3, RSMo 2000, imposition of the death penalty for Baumruk's murder conviction was neither wanton nor freakish. There is nothing in the record to indicate the death sentence imposed here was the product of passion, prejudice or any other arbitrary factor. The evidence supported the jury's unanimous findings of 10 statutory aggravating circumstances as a basis for considering the death sentence. The evidence further showed that the imposition of the death penalty in Baumruk's case was not excessive or disproportionate to the penalty imposed in similar cases.