

Summary of SC89699, State of Missouri v. Richard D. Davis

Appeal from the Jackson County circuit court, Judge Marco Roldan
Argued and submitted Jan. 27, 2010; opinion issued June 29, 2010

Attorneys: Davis was represented by Deborah B. Wafer of the public defender's office in St. Louis, (314) 340-7662, and the state was represented by Richard A. Starnes 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 was found guilty of first-degree murder and numerous sexual assault charges and, in accordance with the jury's recommendation, the trial court sentenced him to death. In the principal opinion written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the trial court's decision.

The Court unanimously holds that: the man was not denied his right to testify; the trial court did not err in declining to strike a certain juror because that juror did not express a view that would substantially impair the performance of his duties as a juror; the trial court did not abuse its discretion in admitting certain pieces of evidence that the man objected to; the language of the jury instructions did not amount to the trial court commenting on the evidence; the jury instructions as a whole sufficiently advised the jury that its verdicts on each count must be unanimous as to each element, and additional instructions on the requirement of unanimity were not necessary; the trial court was correct in overruling the man's motion to quash his charging document because there was no requirement for the charging document to list the aggravating circumstances pertaining to the man's first-degree murder charge; and because the state does not bear the burden of proving that aggravating circumstances outweigh mitigating circumstances, the trial court did not err in failing to so instruct the jury.

A 5-2 majority of the Court – with Chief Justice William Ray Price Jr. and Judges Mary R. Russell, Patricia Breckenridge and Zel M. Fischer joining in Judge Stith's principal opinion – holds that the defendant knowingly waived his right to represent himself and was not misled as to his right for the state to provide the basic tools of a defense. Judge Richard B. Teitelman, joined by Judge Michael A. Wolff, dissents as to this point. He would reverse the judgment and remand (send back) the case for further proceedings because he would find the trial court's dire assessment of the man's options in representing himself raised a substantial possibility that the man improperly was dissuaded from exercising his constitutional right to self-representation.

In conducting its independent proportionality review, the Court unanimously holds that the sentence imposed on defendant was proportional considering both the crime, the strength of the evidence, and the defendant. As to the process for conducting such proportionality review, a four-judge majority of the Court – with Judges Teitelman, Wolff and Breckenridge joining in Judge Stith's principal opinion – holds that the scope of such review includes similar cases in which the death penalty could have been imposed and the defendant was given either the death penalty or life in prison without the possibility of parole. Judge Zel M. Fischer – joined by Chief Justice Price and Judge Russell – writes separately as to this point. He finds there is nothing in the plain language of the statute or in the Eighth Amendment that requires this Court to consider cases involving life sentences without the

possibility of probation or parole in conducting its proportionality review, noting the statute requires this Court to collect information about cases involving life sentences without the possibility of probation or parole but expressly leaves to the Court's discretion what, if any, use to make of that information.

Facts: Officers discovered the body of Marsha Spicer in a shallow grave and identified Richard Davis as a suspect. After executing a search warrant on Davis' home and workplace, officers discovered homemade videotapes depicting numerous forced sexual acts perpetrated by Davis and his girlfriend and involving either Spicer or a different victim, Michelle Huff Ricci. One scene showed Spicer being suffocated to death by Davis and his girlfriend. When police interviewed Davis, he admitted raping and sodomizing Spicer but claimed she accidentally suffocated to death. Davis was charged with a 26-count amended indictment that included first-degree murder. Before and during his trial, Davis filed numerous motions requesting the court to compel his counsel to conduct their legal strategy in the way he preferred or to permit him to represent himself and provide him various resources. Davis never specifically identified for what he needed the resources or how they might help him. The court held a hearing on these motions and informed Davis there was no absolute right under the law for all the things he wanted. Afterward, Davis withdrew his request to represent himself. During the guilt phase of his trial, Davis said he wanted to testify, but after the trial court informed him that his counsel would select the questions to ask him during the examination, Davis changed his mind. Later, during the penalty phase, Davis requested to testify and asked if he could write down some questions to suggest his counsel to ask. The court agreed, and Davis testified. During jury selection, one of the individuals who eventually served on Davis' jury stated that evidence of childhood experiences was something he would consider but to which he would not give very much weight. Davis moved to strike this individual from the jury pool, but the trial court denied the challenge. During trial, Davis objected to various evidence being admitted and objected to numerous instructions. The jury returned a verdict of guilty for 25 of the 26 counts including for first-degree murder. The jury recommended the death penalty for Davis, which the trial court imposed. Davis appeals.

AFFIRMED.

Court en banc holds: (1) The trial court did not err in its ruling declining to quash Davis' charging document because there is no requirement for charging documents to list statutory aggravators.

(2) The trial court did not err in overruling Davis' motion to strike the juror because the juror's views about the persuasiveness of childhood experience evidence did not constitute a substantial impairment of his ability to perform his duties as a juror. The juror never indicated that he would ignore such evidence; he simply said he was not inclined to give it much credit in the usual case.

(3) The trial court did not abuse its discretion with respect to the evidence it allowed to be admitted. Davis concedes the evidence was logically relevant, and because the prejudicial effect of the evidence did not outweigh its probative value, it was legally relevant. The evidence was not cumulative. The jury was shown a 90-minute edited version of more than seven and one-half hours of incriminating videotape footage. The officers' testimony about the contents of the tapes described footage the jury was not shown. While the still photographs the state used were taken from the videotape footage, their use permitted the state to avoid having to revisit particular segments of footage during opening statement and closing argument. Finally, Davis' statements to the police did not duplicate this

evidence. In those interviews, Davis admitted some culpability but was evasive or misleading as to his responsibility for some of the crimes with which he ultimately was charged.

(4) The trial court did not deny Davis' right to testify, the court fully apprised Davis of his right to testify, and Davis knowingly and voluntarily waived the right when the court informed him that, as a matter of attorney-client strategy, defense counsel would decide precisely what questions counsel would ask Mr. Davis.

(5) The trial court did not err in informing Davis of his rights to the basic tools of an adequate defense and did not mislead him into waiving his right to represent himself, thereby violating Davis' right to self-representation. First, *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) – on which Davis relies on for the proposition that the state was required to fund all the requests for resources Davis made – requires only that states must supply a psychiatric expert for a represented but indigent defendant who has shown that his mental condition was seriously in question and that his sanity at the time of the offense will be a significant factor at trial. Second, to the extent Davis was requesting a psychology expert to support a defense, the state already had provided Davis with such an expert who eventually testified in the penalty phase of the trial; Davis made no showing that another psychology expert was necessary; and at no time did Davis make a particularized showing that these requests were necessary to prepare to present substantive issues at trial that were significant to his defense. Third, to the extent that Davis sought state provision of an investigator and tools other than experts (such as photocopies, transcripts, extended law library access, telephone access and DVDs), Davis cited no federal or Missouri law that extends the principles of *Ake* to such materials. Fourth, to establish an entitlement under *Ake* for state provision of a basic defense tool, the defendant must show the trial court that there exists a reasonable probability both that the tool would be of assistance to the defense and that denial of the tool would result in a fundamentally unfair trial. Here, Davis never made such a particularized showing. His requests were more in the nature of requesting a personal assistant to conduct a fishing expedition in the hope that some good evidence might be found somewhere. Fifth, Davis has cited no relevant authority providing that a pro se defendant may request that he personally be provided with the type of assistance *Ake* mandates when the state has chosen to tie provision of the basic tools of an adequate defense discussed in *Ake* (expert witnesses and the like) to provision of counsel.

(6) The references in the verdict-directing instructions to events that allegedly took place on the videotapes (for example, “as depicted in Tape B”) did not amount to the trial court commenting about the evidence. The references were attempts to comply with MAI-CR 3d 304.02's suggestion to differentiate the numerous offenses submitted. Further, the evidence of Davis' guilt was so overwhelming that the verdict directors' references to the specific videotapes on which the crimes were recorded could not have had a decisive effect on the jury's determination of guilt.

(7) The instructions adequately informed the jury that it had to find unanimously that the state proved each element of each crime submitted before they could find against Davis as to that crime. The jury instructions as a whole sufficiently advised the jury that its verdicts on each count must be unanimous as to each element, and additional instructions about the requirement of unanimity were not necessary.

(8) The trial court did not err in failing to instruct the jury that the state must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. There is no requirement that juries in capital cases be so instructed because, in fact, there is no requirement

that the state bears the burden of proving beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. This Court reaffirms its prior holding in *State v. Johnson*, 284 S.W.3d. 561, 587-89 (Mo. banc 2009), that there is no such requirement.

(9) In conducting proportionality review, the scope of this Court's review includes similar cases in which the death penalty could have been imposed and the defendant was given *either* the death penalty *or* life in prison without the possibility of parole.

(10) The Court finds that the death sentence imposed on Davis is proportional considering the crime, the strength of the evidence and the defendant.

Concurring opinion by Judge Fischer: As to this Court's proportionality review (Part III(I) of the principal opinion and Paragraph 9 of the summary above), the author agrees that Davis' death sentence is proportional to his crimes but notes this is the first time in more than 17 years that a principal opinion of this Court requires proportionality review also to include consideration of cases that resulted in a sentence of life imprisonment without the possibility of probation or parole. Such consideration is an inaccurate interpretation of the plain language of section 565.035, RSMo 2000, which requires this Court to *collect* information about such cases but leaves to this Court's discretion what, if any, *use* to make of that information. Neither section 565.035 nor the Eighth Amendment *require* this Court to consider life sentences without the possibility of probation or parole in conducting its proportionality review. The legislature should readdress this issue to make clear what type of statutory proportionality review, if any, should be required.

Opinion concurring in part and dissenting in part by Judge Teitelman: As to whether Davis knowingly and voluntarily waived his Sixth Amendment right to self-representation (Part III.A of the principal opinion and Paragraph 5 above), the author would reverse the trial court's judgment and remand (send back) the case to give Davis the full opportunity to exercise his Sixth Amendment right to self-representation. Although a trial court's explanation of the potential pitfalls of self-representation should be thorough and complete, it should not serve as a means of dissuading a defendant from knowingly and voluntarily exercising his right to represent himself. Here, the trial court's dire assessment of Davis' options in self-representation may have been in Davis' best interests, but it also raises a substantial possibility that Davis improperly was dissuaded from exercising his constitutional right to self-representation. The United States Supreme Court's silence in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), as to the state's obligation to provide funding for a self-represented defendant – which was not at issue in that case – does not imply that a defendant who exercises his Sixth Amendment right to self-representation thereby forfeits the due process requirements established in *Ake*, courts in other states have held that depriving a self-represented defendant of the means of presenting a defense violates the right of self-representation. To the extent Davis did not state with particularity what facts or information an investigator might uncover that could be significant at his trial, it would be impossible for him to do so at the outset of an investigation, which presupposes a lack of knowledge as to what potential witnesses know.