

Summary of SC89895, *State of Missouri v. Terrance Anderson*

Appeal from the Cape Girardeau circuit court, Judge William Syler
Argued and submitted Dec. 2, 2009; opinion issued March 9, 2010

Attorneys: Anderson was represented by Deborah B. Wafer of the public defender's office in St. Louis, (314) 340-7662, and the state was represented by Jamie P. Rasmussen 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 appeals the imposition, following a second penalty-phase trial, of the death sentence. The Supreme Court of Missouri affirms the death sentence in a decision written by Judge Zel M. Fischer and joined by Chief Justice William Ray Price Jr., Judge Mary R. Russell and Judge Patricia Breckenridge except as to its last point – regarding this Court's independent proportionality review – in which Judge Breckenridge concurs in result in a separate opinion. Judge Michael A. Wolff dissents in an opinion joined by Judges Richard B. Teitelman and Laura Denvir Stith.

Four judges agree that: Although the trial court erred in giving a verdict-mechanics instruction patterned after an outdated version of the Missouri approved instruction, no prejudice occurred and, therefore, the error does not require reversal. The state was not required to plead the aggravating circumstances in the instrument charging Anderson with first-degree murder and was not barred by double jeopardy from seeking a death sentence in the penalty-phase retrial. Evidence presented about Stephen Rainwater's autopsy was material, relevant and admissible and did not have a prejudicial effect on the outcome of the trial. Additional instructions given to the jury accurately reflect Missouri law and do not shift the burden of proof impermissibly from the state to the defendant; neither mitigating evidence nor non-statutory aggravators must be proven beyond a reasonable doubt. The trial court properly overruled Anderson's motion, after jury selection was complete, to invalidate the jury panel chosen. No error or prejudice resulted from certain comments the prosecutor made during closing arguments.

Although four judges agree that the death sentence imposed on Anderson was not disproportional or excessive, only three would reach that conclusion by referencing just similar cases that resulted in a death sentence; Judge Breckenridge references similar cases that resulted in either death or life imprisonment.

In his dissent, Judge Wolff notes that, as to the error in giving an outdated verdict-mechanics instruction, the state failed to prove no prejudice resulted and, therefore, he would reverse the judgment and send the case back for a new penalty-phase trial. He further notes that, because he would reverse due to instructional error, he does not reach proportionality review.

Facts: In January 2001, a jury found Terrance Anderson guilty of two counts of first-degree murder for the shooting deaths of Debbie and Stephen Rainwater. Anderson was sentenced to life in prison without the possibility of probation or parole for killing Stephen and to death for killing Debbie. This Court affirmed his convictions and sentences. *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002). He then sought postconviction relief, which the circuit court denied. On

appeal of that judgment, this Court reversed the death sentence for the murder of Debbie Rainwater and remanded (sent back) the case for a retrial of the penalty phase. *Anderson v. State*, 196 S.W.3d 28 (Mo. banc 2006). Following the penalty-phase retrial, Anderson again was sentenced to death. He appeals.

AFFIRMED.

Court en banc holds: (1) Although the trial court erred in giving a verdict-mechanics instruction patterned after an old version of the MAI-CR (Missouri approved instruction – criminal), no prejudice occurred and, therefore, the error does not require reversal. Whenever an MAI-CR applies under the law, that instruction is to be given, and giving an instruction in violation of the MAI-CR’s notes on use constitutes error. Reversal is warranted, however, only when the instructional error is so prejudicial that it deprives the defendant of a fair trial. Here, MAI-CR 3d 313.48A – which summarizes the process the jury should use in considering evidence – is the verdict-mechanics instruction to be given for crimes such as Anderson’s that occurred after Aug. 28, 1993, but before Aug. 28, 2001. The verdict-mechanics instruction used in Anderson’s penalty-phase retrial was patterned after the Sept. 1, 2003, version of MAI-CR 3d 313.48A. Effective Jan. 1, 2004, however, this instruction was modified to include new language telling the jury how to consider evidence in mitigation of punishment. As such, the verdict-mechanics instruction given in Anderson’s retrial erroneously omitted this new language. Nonetheless, this Court repeatedly has held that the prior version of MAI-CR 3d 313.48A properly instructs the jury, even though it does not contain the language about considering mitigating evidence that was added in 2004. The jury in Anderson’s penalty-phase retrial was instructed properly about considering mitigating circumstances in another instruction – based on MAI-CR 3d 313.44A – which instructed the jurors to consider the three listed statutory mitigators and “any other facts or circumstances which [they] find from evidence in mitigation of punishment” and, if they determined the facts or circumstances in mitigation outweigh the evidence in aggravation of punishment, then they must return a verdict fixing Anderson’s punishment at life imprisonment without eligibility for probation or parole. Because this instruction included language telling the jurors how to consider mitigation evidence and what to do if they found the mitigation evidence outweighed the aggravation evidence, the state has met its burden in demonstrating Anderson was not prejudiced from the omission of that language from the verdict-mechanics instruction.

(2) The trial court did not err in overruling Anderson’s motion to dismiss and to quash the information. Missouri law is well-settled that there is only one crime of first-degree murder, and the state is not required to plead aggravating circumstances in the information or indictment as long as it gives the defendant notice, before trial, of the alleged aggravating factors. Here, the state charged Anderson with first-degree murder and gave him notice of the aggravating circumstances it intended to prove when it filed its “notice of aggravating circumstances.” The jury in Anderson’s first trial found each of these aggravators beyond a reasonable doubt.

Further, the state was not prohibited from seeking the death penalty on retrial; the penalty-phase retrial was not barred by double jeopardy. For purposes of double jeopardy, the relevant inquiry is whether a first life sentence was an “acquittal” based on findings that the government failed to prove the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. Here, there was no acquittal. The jury in Anderson’s first trial found beyond a reasonable doubt each of the three statutory aggravators submitted to it. Double-jeopardy protections, therefore, did not attach.

(3) The trial court did not err in overruling Anderson's objections to evidence about Stephen Rainwater's autopsy or abuse its discretion in admitting this evidence, as this evidence was material, relevant and admissible. Here, the jury had to determine whether the murder of Debbie Rainwater was committed while Anderson was engaged in the commission or attempted commission of another homicide, and because the state had to prove aggravating circumstances beyond a reasonable doubt, it should not be limited unduly in its quantum of proof. The pathologist who examined Stephen Rainwater's body described the injuries Stephen sustained, including the location and extent of the gunshot wound, which was material to demonstrate the cause of Stephen's death and to corroborate testimony that Stephen was found lying motionless on the ground. Further, the precision of the wound and its location in Stephen's head supported the state's evidence that Debbie's murder was part of a plan. The jury heard testimony from several witnesses about the events the night of the murders, including the shooting of Stephen, and Anderson himself testified about shooting Stephen and about his anger toward the Rainwaters that motivated the murders. Anderson does not point to any facts, nor is there anything in the record, suggesting that the pathologist's testimony prejudicially affected the outcome in favor of a finding for the death penalty.

(4) The trial court did not err in overruling Anderson's objections to certain jury instructions that are patterned after the MAI-CRs and that accurately reflect Missouri law. It is well-settled that only facts that increase the penalty for a crime beyond the prescribed statutory maximum are required to be found by a jury beyond reasonable doubt. As such, neither the constitution nor the statutory scheme require the state to prove the mitigating factors or non-statutory aggravators beyond a reasonable doubt. Recent Missouri cases – holding that section 565.030.4(3), RSMo Supp. 2008, does not shift impermissibly the burden of proving that evidence in mitigation outweighs evidence in aggravation from the state to the defendant – do not conflict with United States Supreme Court precedent. As long as the state is required to prove at least one statutory aggravator beyond a reasonable doubt, rendering the defendant eligible for the death penalty, the legislature has discretion in allocating the burden of proof guiding the remainder of the jury's determination. Missouri complies with that mandate. The statutory scheme requires the state to prove the existence of at least one statutory aggravator before the jury may consider imposing the death penalty. After that, the legislature has imposed a balancing procedure that is reflected in the MAI-CRs.

Here, in requiring Anderson to prove mitigating circumstances, the instructions did not shift the burden of proof impermissibly. Instructions 3, 7 and 10 properly instructed the jury that statutory aggravating factors must be proven beyond a reasonable doubt. Instruction 6 properly told the jury it had to find at least one statutory aggravator beyond a reasonable doubt and, if it did so, then it could proceed. Instruction 8 properly told the jury to consider all mitigating circumstances and to impose a life sentence if the jury found that the mitigating evidence outweighed the evidence in aggravation. Instruction 9 told the jury it could fix a sentence of life even if it had made all the appropriate findings to support a death sentence. This procedure assured that the jurors made the constitutionally required findings beyond a reasonable doubt and gave them the opportunity to consider mitigating circumstances.

Further, the trial court did not err in excluding from the jury instructions the burden of proof about Anderson's prior unadjudicated bad acts, which pertained to orders of protection that Debbie Rainwater and her daughter Abbey obtained against Anderson and to Abbey's allegation

that he abused her. Section 557.036.3, RSMo Supp. 2008, governing the admission of evidence at the punishment phase of trial, is silent about the burden of proof for this type of character evidence, and there is no basis for holding the state was required to prove it by a preponderance of the evidence. Further, the reasoning in *State v. Clark*, 197 S.W.3d 598 (Mo. banc 2006), and *State v. Fassero*, 256 S.W.3d 109 (Mo. banc 2008) – which dealt specifically with evidence of prior adjudicated crimes, not all non-statutory aggravating evidence – does not apply here. This Court repeatedly has rejected the argument that non-statutory aggravators must be proven beyond a reasonable doubt.

(5) The trial court did not err in overruling Anderson’s motion, after jury selection was complete, to quash the jury panel because no black jurors were on the panel. Anderson did not plead or prove a violation of the statutory procedure for jury selection prior to trial, nor did he offer any evidence that the statutes were violated or that the jury selection procedure systematically excluded potential jurors who were black. Further, there is nothing about section 494.430, RSMo Supp. 2008 – which allows a judge, without consulting the parties, to excuse jurors – that suggests it would tend to lead to a systematic exclusion of certain jurors, absent an allegation of racial discrimination on the part of the judge, which Anderson does not make.

(6) The trial court did not err in allowing the prosecutor to discuss mercy in his closing argument. This discussion did not misstate the law but rather was rhetoric designed to emphasize the state’s position that mercy was inappropriate in this case, after Anderson had argued for mercy in his closing argument. This Court repeatedly has held that prosecutors may discuss mercy during their closing arguments. Additionally, the prosecutor’s use of a particular quote by Edmund Burke was permissible. Finally, it was not plain error for the trial court to allow the prosecutor to speak about “two ultimate crimes” in his closing arguments. Anderson presented no evidence indicating the prosecutor’s statement had a decisive effect on the outcome of the case. Further, whether the murder of Debbie Rainwater occurred during the commission of another unlawful homicide was an aggravating factor submitted to the jury.

(7) In conducting its proportionality review, this Court determines that Anderson’s death sentence was not imposed under the influence of passion, prejudice or other arbitrary factor; was supported by evidence of at least one statutory aggravating circumstance; and was not excessive or disproportionate to the penalty imposed in similar cases. The evidence supports the jury’s finding, beyond a reasonable doubt, of two statutory aggravating circumstances: that Anderson murdered Debbie Rainwater while engaged in the commission of another unlawful homicide – that of her husband, Stephen – and that Debbie Rainwater’s murder was outrageously or wantonly vile, horrible or inhuman because Anderson killed Debbie as part of a plan to kill more than one person, exhibiting a callous disregard for the sanctity of human life. Anderson shot Debbie Rainwater while she was begging for her life and holding Anderson’s infant child; he then shot her husband, Stephen Rainwater. Considering the crime, the strength of the evidence and the defendant, the death sentence imposed here was neither excessive nor disproportionate to the death penalty imposed in similar cases. This Court has upheld death sentences in cases in which the defendant murdered more than one person, in which the murder involved depravity of mind showing a callous disregard for the sanctity of human life, and in which a defendant murders someone who is helpless and defenseless, as Debbie Rainwater was when Anderson shot her.

Opinion concurring in part and concurring in result by Judge Breckenridge: While the author agrees with the principal opinion’s conclusion that imposition of the death penalty on Anderson was neither excessive nor disproportionate, she would find it incorrectly applied section 565.035.3, RSMo 2000, in its proportionality review by considering only factually similar cases resulting in a death sentence. This statute requires this Court to compile records and consider all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life in prison without the possibility of probation or parole. Although Anderson failed to claim that or cite any cases demonstrating that his death sentence was excessive or disproportionate, section 565.035.3 requires this Court to consider cases in which multiple murders were committed with depravity of mind and in which the jury nevertheless decided to impose a sentence of life in prison. In most of such cases, more than one person was implicated in the crime, and there was conflicting evidence as to who actually committed the murders. Here, Anderson clearly was the sole perpetrator of the crime, as clear evidence demonstrated he alone committed the murders. It is also important to consider that Anderson killed Debbie Rainwater as part of a killing spree endangering five other lives, including that of his three-month-old son. Accordingly, the author concurs in result of the principal opinion’s proportionality review and concurs in the remainder of the opinion.

Dissenting opinion by Judge Wolff: The author would reverse the judgment and send the case back for a new penalty-phase trial because the trial court clearly erred in using an outdated version of MAI-CR 313.48A, the verdict-mechanics instruction, and the state did not show prejudice did not occur. The purpose of a verdict-mechanics instruction – rarely used outside death penalty cases, in which it is required – is to summarize the process the jury is to follow, putting into a single instruction each possible alternative the jury could find and specifying what punishment should be assigned for each particular alternative. Where, as here, this Court has approved a pattern MAI-CR verdict-mechanics instruction that contains explicit language as to the alternatives the jury should consider – and, as here, defense counsel correctly objects to the omission of required language – the trial court’s refusal to include each of the relevant alternatives is prejudicial error. By leaving out the alternatives relating to mitigation, the instruction essentially amounted to leaving out one of Anderson’s defenses during the punishment phase, which this Court has held to be prejudicial error in a verdict-directing instruction. Anderson presented substantial mitigating evidence, which is especially strong in contrast to this Court’s previous decisions finding no prejudice in giving the former version of the MAI-CR verdict-mechanics instruction.

Further, although the author would reverse the judgment because of this instructional error and, therefore, would not reach the issue of proportionality review here, he notes that he would agree with Judge Breckenridge’s opinion that it is this Court’s responsibility under section 565.035.3 to look at cases in which life imprisonment was imposed as well as at cases in which the death penalty was imposed.