

Summary of SC89830, *State of Missouri v. Carman L. Deck*

Appeal from the Jefferson County circuit court, Judge Gary P. Kramer
Argued and submitted Oct. 27, 2009; opinion issued Jan. 26, 2010

Attorneys: Deck was represented by Rosemary E. Percival of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Evan J. Buchheim and Kevin Zoellner 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 convicted of two murders challenges his death sentences. The Supreme Court of Missouri unanimously affirms the death sentences in an opinion 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 Laura Denvir Stith concurs in result in a separate opinion joined by Judge Michael A. Wolff. Judge Richard B. Teitelman concurs in the result only.

As to the points in which the Court is unanimous: The man is not entitled to mandatory resentencing to life in prison because of what he claims were trial errors committed during the penalty phase of his previous trial. The trial court did not abuse its discretion in striking two potential jurors for cause based on their statements that they could not sign a verdict form imposing a death sentence. The state's arguments about the man's future dangerousness, based on a prior conviction for aiding an escape, did not violate due process or the applicable statute or rule, and its closing arguments did not constitute reversible error causing manifest injustice. The trial court did not err in admitting certain items seized from the man's vehicle or subsequent statements he made to the police. No prejudice resulted from the trial court's failure to read one instruction, as the information was conveyed in other ways, or in submitting to the jury other instructions patterned after model approved instructions. The state did not fail to give the man notice, before trial, of the statutory aggravating circumstances it intended to prove.

In his plurality opinion as to the man's final point, Judge Fischer finds that the man's sentences are neither disproportionate nor excessive. He notes that, in its proportionality review, this Court for more than 17 years has considered only other similar cases in which a death sentence was imposed. This is because proportionality review is not required constitutionally and is a safeguard against freakish or wanton application of the death penalty. Here, the man's sentences are neither disproportionate nor excessive, and the man's case bears no comparison with the one he alleges shows he should be sentenced to life rather than death.

In her separate opinion, Judge Breckenridge notes that proportionality review under section 565.035 also requires consideration of similar cases in which the jury imposed life imprisonment but does not read the statute as requiring the Court to act as a super-juror by substituting its judgment of the appropriate punishment for that of the jury and trial court. While the language "freakish and wanton" is not found in the statute, the statutory language supports the conclusion

that proportionality review is intended for this Court to identify and correct only the imposition of aberrant death sentences.

In her separate opinion, Judge Stith notes that proportionality review under section 565.035 requires consideration of “other similar cases.” The statute also requires this Court to accumulate all capital cases in which the jury imposed either death or life imprisonment without parole so they would be available for this Court’s consideration in determining proportionality. There would be no point in doing this if cases in which life imprisonment was imposed were not categorically “similar cases,” as the plurality suggests. The Court considered similar cases in which death or life imprisonment was imposed from the statute’s enactment in 1979 until 1993, which did not and would not require the Court to act as a super-juror. The Court should return to a proportionality review based in the language of section 565.035.

Facts: The state charged Carman Deck with two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery and one count of first-degree burglary for the 1996 robbery and shooting deaths of James and Zelma Long. In February 1998, a jury found Deck guilty as charged, and he received two death sentences. This Court affirmed the convictions and sentences on direct appeal, *State v. Deck*, 994 S.W.2d 557 (Mo. banc 1999) (*Deck I*). Deck’s sentences have been reversed twice – first by this Court, during his post-conviction relief appeal, in *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002) (*Deck II*), and then by the United States Supreme Court, which determined in *Deck v. Missouri*, 544 U.S. 622, (2005), that Deck was denied a fair penalty-phase retrial because he appeared in shackles in the jury’s presence. Following the second penalty-phase retrial, the jury again recommended that Deck receive two death sentences. He appeals.

AFFIRMED.

Court en banc holds: (1) Deck is not entitled to mandatory sentencing to life in prison without eligibility for parole under section 565.040.2, RSMo 2000. This statute provides that when a death sentence is held to be unconstitutional, the sentencing court shall resentence the defendant to life in prison without the possibility of parole. This statute, however, only is triggered when entry of the death sentence itself was unconstitutional or imposed under an unconstitutional statutory scheme, but not when – as here – unrelated trial error violates a defendant’s constitutional rights. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003). Here, the reversible error recognized by the United States Supreme Court – Deck’s shackling in front of the jury – was trial error unrelated to the statutes setting out the death penalty procedures.

(2) The trial court did not abuse its discretion in sustaining the state’s motion to strike two potential jurors for cause based on their reluctance to serve as the jury’s foreperson. A prospective juror’s qualifications are determined not from a single response but from the entire examination. Because the trial court is in a better position than the reviewing court to evaluate a potential juror’s commitment to follow the law, it has broad discretion to determine the qualifications of prospective jurors, and its determination that prospective jurors’ views would substantially impair their performance as jurors is afforded great deference. When there is ambiguity in a potential juror’s statements, even if the person says he or she can follow the law

and consider the death penalty, the trial court is entitled to resolve the ambiguity in the state's favor. *Uttecht v. Brown*, 551 U.S. 1 (2007). Here, the two prospective jurors were struck for cause after stating they could not sign, if chosen as foreperson, a verdict form imposing a death sentence. Their responses revealed an inability to follow the court's instructions if chosen as foreperson. The trial court was in a better position than this Court to determine, from the record as a whole, that there was a substantial possibility the two potential jurors may not be able to consider both possible punishments fairly despite their assurances to the contrary.

(3) Arguments the state made based on a previous conviction of Deck's did not violate section 565.005.1, RSMo 2000, or Rule 25.03, nor did they violate Deck's due process rights under *Simmons v. South Carolina*, 512 U.S. 154 (1994). Section 565.005.1(1) requires that parties, at a reasonable time before trial, provide each other with a list of all aggravating or mitigating circumstances the party intends to prove during the penalty phase of the trial, and Rule 25.03 requires the state, on written request, to disclose certain materials and information. Neither the statute nor the rule require the state to provide notice of specific arguments it plans to make based on those disclosures. It is clear from the record here – and Deck concedes – that the state provided Deck notice that it intended to make arguments based on his 1985 conviction for aiding an escape. The state was not required to give notice that it would use the conviction to argue Deck's future dangerousness and previous bad prison conduct. While *Simmons* prohibits a person's execution on the basis of information he had no opportunity to explain or deny, there is no evidence here that Deck was prevented from making any mitigating argument. Further, given that the state is permitted to argue reasonable inferences from evidence, the state placed Deck on notice it was likely to argue his future dangerousness based on his prior conviction. *See, e.g., State v. Bucklew*, 973 S.W.2d 83 (Mo. banc 1996) (holding it is reasonable to infer that a person who escaped from jail while awaiting trial on a murder charge would not want to be confined and posed future dangerousness).

(4) The trial court's admission of certain portions of the state's closing argument constituted neither an abuse of discretion nor reversible plain error resulting in manifest injustice to Deck.

(a) Statements in the state's closing argument did not constitute improper personalization, which is established when the state suggests that a defendant poses a personal danger to the jurors or their families. Here, the state did not imply any danger to the jurors or ask jurors to place themselves in the victims' shoes, nor attempt to make an improper appeal to the jurors' sympathy, nor tell the jurors that the victims' families would hold them accountable. Further, this Court has found statements stronger than those made here were not plain error. The trial court did not abuse its discretion in overruling Deck's objection to these statements.

(b) There was no plain error resulting in manifest injustice to Deck from a comment made during the state's closing argument about depravity of mind in killing persons rendered helpless. This case is distinguishable from the two on which Deck relies – *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), and *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999) – because here there was no graphic detailing of the crime as if the jurors were in the victims' place and the jurors were not asked in any manner to place themselves in the victims' shoes.

(c) The state did not commit plain error, resulting in prejudice to Deck, in misstating certain facts during closing argument. In the first, the prosecutor's comment was a simple misstatement, by using the plural "escapes" rather than the singular "escape" in referring to Deck's prior conviction. A review of the entire record shows no prejudice to Deck from this misstatement. In the second, a comment suggested the other inmates whom Deck attempted to help escape were serving life sentences. After review of the entire record, there is no basis to conclude this comment had a decisive effect on the outcome.

(d) No plain error resulting in manifest injustice or prejudice to Deck arose from statements during the state's closing argument that the juror needed to be like a sheepdog to protect guards and other inmates from Deck. It is permissible for the state to ask the jury to consider a defendant's future dangerousness during the penalty phase of a capital trial. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994); *State v. Bucklew*, 973 S.W.2d 83, 96 (Mo. banc 1998). This case is distinguishable from the two on which Deck relies – *Schoels v. State*, 966 P.2d 735 (Nev. 1998), and *Blake v. State*, 121 P.3d 567 (Nev. 2005) – because here, the state permissibly argued Deck's future dangerousness but did not suggest or imply the jurors would be responsible directly or held accountable if Deck harmed anyone in the future.

(5) The trial court did not err in overruling Deck's motion to suppress items seized from Deck's car and subsequent statements he made to the police on the ground, Deck claims, that the police did not have reasonable suspicion to stop him after he drove into a private parking lot without using his headlights. Deck unsuccessfully raised this same issue in his first direct appeal, *see Deck I*, 994 S.W.2d at 534-35, and the law-of-the-case doctrine precludes reexamination of this issue, *State v. Johnson*, 244 S.W.3d 144, 163 (Mo. banc 2008). Under this doctrine, a court's previous holding becomes the "law of the case," precluding relitigation of issues on remand and subsequent appeal. Here, this Court previously determined that Deck was not "seized" for purposes of the Fourth Amendment until the officer ordered Deck – who had leaned over the passenger seat after the officer approached him – to sit up and show his hands. This Court further held that, under *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, the officer's search of Deck, the subsequent seizure of items found in the car and Deck's confessions were admissible. This Court will not decline to apply the law-of-the-case doctrine here. The slight factual differences in the officer's testimony of an event that happened more than a decade ago does not establish manifest injustice or constitute facts substantially different from the first adjudication.

(6) The trial court did not commit plain error in failing to read MAI-CR 3d 300.03A before determining, during jury questioning, whether the potential jurors were able to follow the law and consider both death and life imprisonment. At trial, Deck did not object to the failure to read this mandatory instruction. He did not suffer any manifest injustice, however, because the information the instruction would have provided the jury was conveyed in other ways. Potential jurors were informed that they would be questioned about their views regarding the death penalty and life imprisonment. At various points during the process of selecting the jury, all the potential jurors were told that, before the jury could consider the death penalty, the jury must agree unanimously that the state proved at least one statutory aggravating circumstance beyond a reasonable doubt; determine whether the aggravating circumstances as a whole justified a death

sentence; and conclude the aggravating circumstances outweigh any mitigating circumstances. All the potential jurors were told a juror never is required to vote for death and that the failure to make the required findings unanimously automatically would result in a sentence of life in prison without the possibility of parole. The only circumstance addressed by MAI-CR 3d 300.03A that was not discussed with the jurors involved mental retardation, which was not an issue in Deck's case. Because the jury otherwise was given the information, the court's failure to read the mandatory instruction was not plain error.

(7) No prejudice resulted in the court's submission to the jury of certain instructions.

(a) Two of these instructions, which Deck argues impermissibly shifted the burden of proof to him with respect to mitigating evidence, were patterned after model approved instructions. Deck concedes this Court previously has addressed – and rejected – this argument. Further, in *Deck III*, 136 S.W.3d at 486, Deck challenged the mitigating evidence instructions, and this Court rejected his claim. His claim now is barred by the law-of-the-case doctrine.

(b) All the instructions Deck challenges – for allegedly failing to instruct jurors that the state bore the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted a death sentence and that evidence in mitigation was insufficient to outweigh evidence in aggravation – were patterned after model approved instructions, and Deck concedes this Court previously has addressed this argument and has rejected it.

(8) Deck's claim that the state failed to plead statutory aggravating circumstances in the information is rejected. Before trial, pursuant to section 565.005.1, the state provided Deck with written notice of the statutory aggravating circumstances it would attempt to prove at trial. Deck raised an identical challenge previously, which this Court rejected in *Deck III*, 136 S.W.3d at 490, and Deck's current claim is barred by the law-of-the-case doctrine. Furthermore, this Court consistently has rejected this argument in other cases.

(9) After conducting its independent review under section 565.035, RSMo 2000, this Court concludes that nothing in the record suggests Deck's death sentences were not influenced by prejudice, passion or other improper factor; that the evidence supports the jury's finding of statutory aggravating factors; and that Deck's death sentences were neither excessive nor disproportionate. Three separate juries – 36 jurors in all – viewing essentially the same evidence unanimously have concluded that death is the appropriate sentence for Deck, and all have found the same six statutory aggravating factors. In both previous direct appeals, this Court has held that the evidence in the record “amply supports” the aggravators the juries have found. *Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 489-90.

The legislature designed this Court's proportionality review “as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and consistent imposition of death sentences.” *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993). This Court's role in proportionality review is to act as a safeguard against freakish or wanton application of the death penalty. In determining whether the sentence is disproportional as a matter of law, this Court considers only cases in which death was imposed instead of all factually

similar cases. *See, e.g., State v. Johnson*, 207 S.W.3d 24, 50-51 (Mo. banc 2006); *State v. Smith*, 32 S.W.3d 532, 559 (Mo. banc 2000); *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998). The holding in *Ramsey* has not been questioned in any principal, concurring or dissenting opinion for 17 years, and Deck offers no meritorious reason why this Court should reconsider its holding.

Deck's death sentences are not excessive or disproportionate. The retrial of the penalty phase in this case involves virtually the same evidence as the prior two penalty-phase trials, and in those previous trials, this Court held the previous death sentences were not disproportionate or excessive. *Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 490. In numerous previous Missouri cases, the death penalty was imposed when, as here, the defendant murdered multiple victims, acted for pecuniary gain or sought to eliminate possible witnesses to avoid lawful arrest. The mitigating evidence Deck presented at trial does not provide sufficient grounds to set aside his death sentences. A bad or difficult childhood does not provide sufficient grounds to set aside a death penalty, and the experts here testified that Deck knew right from wrong and chose to commit the crimes. This case also is distinguishable from *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982), in which this Court set aside McIlvoy's death sentence after finding, through its proportionality review, that the sentence was excessive and disproportionate considering the crime and the defendant. The mastermind of the crime in McIlvoy's case was sentenced only to life in prison; McIlvoy had a low IQ, a ninth-grade education and a minimum juvenile record and was only a follower in the crime; at the time of the murder, McIlvoy was under the influence of large amounts of drugs and alcohol; and McIlvoy turned himself in and waited dutifully for police officers to pick him up. There is no comparison here: Deck was apprehended while trying to hide evidence and gave two false alibis before confessing; and he was the mastermind of the crime – planning the robbery, robbing the victims at gunpoint, and deliberating for 10 minutes before shooting them at point-blank range.

Opinion concurring in result by Judge Stith: The author agrees the principal opinion reaches the correct result but writes separately to note that by interpreting section 565.035.3 as requiring this Court to review only other cases in which the death penalty was imposed under similar facts, the principal opinion falls short in its required proportionality review. Instead, the author suggests section 565.035 requires consideration of all “other similar cases” – including those in which a life sentence resulted – in determining whether the sentence of death is excessive or disproportionate in light of the crime, the defendant and the strength of the evidence. To the extent that this Court's cases decided between 1994 and the present suggest otherwise, they are contrary to the statute and to cases decided under it from 1979 until 1993. In *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981), the first capital murder case in which this Court applied the proportionality analysis required by section 565.035, the Court was clear that the duty imposed on it to review similar cases in deciding proportionality meant reviewing all cases in which the death penalty was submitted, regardless of whether the sentence actually imposed was life imprisonment or death. This decision was followed until *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), which did not reject prior cases but merely failed to analyze section 565.035 adequately. The cases that followed also failed to analyze section 565.035 adequately and instead cited to a statement in *Ramsey* that the purpose of proportionality review is to protect against the freakish or wanton imposition of a death sentence. The *Ramsey* language does not come from the statute, however, which expressly requires this Court to “accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed.” For

these reasons, the author suggests that, while in this specific instance death is warranted by a review of cases where sentences of both death and life imprisonment have been imposed, this Court should return to a proportionality review based in the language of the section 565.035 and used by this Court prior to its decision in *Ramsey*.

Opinion concurring in part and concurring in result by Judge Breckenridge: The author agrees with the principal opinion's conclusion that the imposition of the death penalty on Deck was neither excessive nor disproportionate. She does not agree, however, that the proportionality review under section 565.035 requires review of only factually similar cases resulting in a death sentence or that the Court has the discretion to eliminate from its review all cases in which the jury imposed life imprisonment. Although this Court was unanimous in *State v. Ramsey*, 836 S.W.2d 320 (Mo. banc 1993), it is noteworthy that it silently overturned prior case law and adopted its new standard of proportionality review without any analysis or discussion of the statutory language. When the issue addressed is life and death, it is important that this Court correct a prior erroneous decision and undertake the proportionality review as intended by the legislature. The author writes separately from Judge Stith because the author believes the principal opinion is correct in finding the statutory language supports the conclusion that proportionality review is intended for this Court to identify and correct only the imposition of aberrant death sentences. The principal opinion's use of the language "freakish and wanton" does not indicate the Court is applying an incorrect standard or not undertaking the review required by the statute. Although the principal opinion should have reviewed similar cases in which life imprisonment was imposed, Judge Stith's opinion demonstrates that the Court is correct in concluding that Deck is not entitled to relief.