

Summary of SC90649, *State of Missouri v. Donald R. Nash*

Appeal from the Crawford County circuit court, Judge Douglas E. Long
Argued and submitted January 4, 2011; opinion issued May 17, 2011

Attorneys: Nash was represented by Frank K. Carlson, Sarah K. Tupper and Michael P. Bastian of The Carlson Law Firm in Union, (636) 583-8300, and the state was represented by Theodore A. Bruce 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 a 1982 murder after the investigation, reopened in 2007, connected his DNA with that found under the victim's fingernails, appeals his conviction. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the conviction. The trial court did not err in allowing the prosecution to proceed under the statute in effect at the time of the murder, even though it later was repealed. The elements of the crime are the same now as they were in 1982. The DNA and other evidence was sufficient to support the jury's conclusion that the man killed the victim. The trial court did not commit reversible error when it refused to give the circumstantial evidence instruction the man offered. This instruction essentially states the same standard as the reasonable doubt instruction, which the court used and which the man did not challenge, and there is no statutory requirement that the court use the 1982 version of the instructions. The trial court also did not abuse its discretion in refusing to allow the man to introduce evidence that a third person killed the victim; the court's conclusion that this evidence did not meet the requirements of Missouri's "direct connection rule" was not clearly against the logic of the circumstances or so unreasonable as to indicate a lack of careful consideration.

Facts: Donald Nash killed his girlfriend, Judy Spencer, in March 1982 in a rural area near Salem. She had been strangled with a shoelace from her shoe and, after she died, she was shot in the neck with a shotgun. The day before her death, Spencer spent the afternoon and evening drinking and driving around with friends, including Janet Jones. She lied to Nash about drinking, telling him she was out of town; instead, she was drinking at Jones' apartment. Spencer subsequently went to the home she shared with Nash for a while and argued with him about drinking, then returned to Jones' apartment. Later in the evening, Spencer drove off angry and upset, saying she was going to Houston (Missouri). Nash called Jones three times during the evening, saying he was worried about Spencer. He then asked her to call him the next morning to wake him so he would not be late for work. When she called the next morning, Nash reiterated he was worried and looking for Spencer. He also called Spencer's mother, saying he was calling from work and asking whether Spencer was there. That afternoon, Nash and Jones left Salem to look for Spencer in Houston. After they returned to Salem later that day, they learned that Spencer had died. During the initial investigation in 1982, no blood or tissue was found under Spencer's fingernails, and no physical evidence linked Nash to the crime scene. He was fingerprinted and swabbed for gunshot residue, but none was found. He also did not have scratches or marks that would have been consistent with being involved in a physical altercation. At the request of law enforcement, Jones recorded a conversation with Nash about Spencer's death; he admitted he had been angry with Spencer and said he did not have an alibi for the night

she was killed, but he also said he was innocent. The case was dormant until 2007, when the investigation was reopened at the request of Spencer's sister. Nash then voluntarily provided a DNA sample, and testing revealed that his DNA under the fingernails of Spencer's left hand. No DNA other than that belonging to Nash and Spencer was detected. The state charged Nash with capital murder pursuant to the 1978 statutes that were in effect at the time Spencer was killed. Following a trial, the jury found Nash guilty, and the court sentenced him to life in prison with no chance for probation or parole for 50 years. Nash appeals.

AFFIRMED.

Court en banc holds: (1) Nash's conviction was proper under section 565.001, RSMo 1978, the statute that criminalized premeditated murder when Spencer was killed in March 1982. This section was repealed in 1983 along with other criminal statutes, and a new chapter 565 was enacted. The new chapter 565 applied to crimes committed after October 1, 1984. The new section 565.001.2 stated in part: "the provisions of section 1.160, RSMo, notwithstanding." Section 1.160, called the "saving statute," provides that no prosecution commenced or pending before a statute is repealed or amended shall be affected by such a repeal or amendment. The "notwithstanding" phrase of the new section 565.001.2, however, cannot be read to decriminalize a subset of murders simply because the perpetrators avoided prosecution before October 1, 1984. The apparent purpose of the 1983 version of section 565.001 was to make clear than an offense committed in 1982 should be charged and prosecuted according to the laws existing in 1982, not the law as it existed after the new chapter 565 changes took effect. As such, Nash was not entitled to dismissal of the charges against him, and the trial court did not err in allowing Nash's prosecution to proceed under section 565.001, RSMo 1978.

(2) The evidence was sufficient to allow a reasonable trier of fact to find Nash guilty beyond a reasonable doubt of Spencer's murder. The elements of the crime that the state was required to prove beyond a reasonable doubt did not change from 1982 to the present. As such, using the present standards for sufficiency of the evidence to review Nash's case does not violate his constitutional rights. It is not this Court's role to reweigh the evidence or second-guess the jury's conclusion.

There was sufficient evidence to support the jury's conclusion that Nash's DNA, rather than a third person's DNA, was present under Spencer's fingernails because he was the last person to have contact with her before she was killed. The state argued that because Spencer had washed her hair the night before her death, Nash's DNA would not have been under her fingernails unless he had recent contact with her. Further, the investigator who requested that Nash submit to DNA testing testified that he appeared to be very nervous at the time; Nash "stepped back and stared" when the investigator told him the DNA profile was that of a male; and his hands began shaking when he was told that his DNA was found under Spencer's fingernails. In addition, Nash had told Spencer the night before she died that it was the last time she would lie to him; he was seen driving around Jones' apartment complex after he told police he had gone home for the night; he asked Jones for a wake-up call the next morning even though he lived with Spencer; and he was involved with another woman shortly after Spencer's murder.

(3) Nash cannot show that reversal of his conviction is warranted by the trial court's refusal to give the jury his proffered circumstantial evidence instruction that would have been applicable in 1982. Reversal only is warranted when instructional error is so prejudicial that it deprived the defendant of a fair trial. Here, however, the elements of the crime the state was required to prove beyond a reasonable doubt have not changed between 1982 and now. Instead of using the circumstantial evidence instruction, the court used a reasonable doubt instruction, which Nash did not challenge and which essentially is a different rule stating the same standard. *State v. Grim*, 854 S.W.2d 403, 408 (Mo. banc 1993). Offering both instructions, then, would have been confusing and redundant. As such, it was not reversible error for the trial court to refuse to offer the circumstantial evidence instruction along with the reasonable doubt instruction. Further, there is no statutory requirement that the court offer 1982 instructions in Nash's case.

(4) The trial court did not abuse its discretion in refusing to allow Nash to introduce evidence that a third person killed Spencer. To be admissible, evidence that another person had an opportunity or motive to commit the crime for which the defendant is being tried must tend to prove that the other person committed some act directly connecting that other person with the crime and must tend to point clearly to someone other than the accused as the guilty person. In light of United States Supreme Court precedent, this "direct connection rule" is constitutional because it prevents confusion of the issues and reduces the potential to mislead the jury. It is not arbitrary to exclude evidence that does not connect a third person directly with a crime. A trial court has broad discretion in evidentiary rulings. The trial court's conclusion that the requirements of Missouri's "direct connection rule" were not met by the evidence Nash sought to introduce – including that another man's fingerprints had been found on Spencer's car, that this man falsely denied to police that he had met Spencer or been to Salem, that the man had been arrested in Iowa for stalking a woman with the intent to assault her sexually, and that the man was known to carry a shotgun in his vehicle and had killed himself in 2008 with a shotgun – was not clearly against the logic of the circumstances or so unreasonable as to indicate a lack of careful consideration.