

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,549

DUANE EUGENE OWEN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

FILED
APR 27 1999
CLERK OF THE COURT
RC

SUPPLEMENTAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the Appellant will be referred to as he appears before this Honorable Court, and Appellee will be referred to as the State.

The symbol "R" will be used to designate the record on appeal followed by the page number. The symbol "SR" will be used to designate the supplemental record on appeal followed by the page number.

QUESTION PRESENTED

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN RELYING UPON A CONVICTION FOR A PREVIOUS CAPITAL OFFENSE WHICH HAS SUBSEQUENTLY BEEN REVERSED.

STATEMENT OF THE CASE AND FACTS

Appellant, DUANE EUGENE OWEN, relies upon the Statement of the Case and Facts as stated in his initial brief and in the argument section of this brief.

SUMMARY OF ARGUMENT

The Eighth Amendment, United States Constitution, prohibition against cruel and unusual punishment requires reliability in determining whether death is the appropriate sentence. The use of a prior capital conviction which was later vacated at a sentencing hearing is error that requires a new hearing because the capital conviction may have been "decisive" in the jury's recommendation.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN RELYING UPON A CONVICTION FOR A PREVIOUS CAPITAL OFFENSE WHICH HAS SUBSEQUENTLY BEEN REVERSED.

At the Phase II hearing the State of Florida presented evidence of a prior conviction for a capital offense. The State relied upon a certified copy of the judgment which was admitted through the testimony of a Deputy Clerk of Court (R-4058-4076) and a fingerprint expert (R-4077-4086) in Fifteenth Judicial Circuit Case No. 84-4014 CF A02. The convictions in that case were for first degree murder, sexual battery, and armed burglary of a dwelling. R-4072.

The State then presented the testimony of Richard Helm (R-4090-4096) and Caroline Helm (R-4096-4101), the couple who first found the body of Karen Slattery. Mr. and Mrs. Helm described the scene at their home when they found their babysitter Karen Slattery. The State presented the testimony of associate medical examiner Dr. Frederick Hobin. R-4102-4111. Dr. Hobin testified regarding his observations of pools of blood at the Helm residence. R-4105-4106. He testified regarding the body being found partially disrobed and that he had found semen in the victim's vagina. R-4108. He testified that Karen Slattery was stabbed fourteen times and cut four times in the throat area. R-4111. Dr. Hobin also testified that the victim may have been conscious during the stabbings. R-4110-4111.

The State also presented the testimony of Detective Richard Lincoln of the Delray Beach Police Department who presented a detailed account of Duane Owen's videotaped confession to the

Slattery murder. R-4122-4134. It should be noted that this confession was illegally obtained and the sole reason for the reversal of Owen's conviction for the Slattery crimes.

On March 1, 1990 this Court issued an opinion in Duane Eugene Owen v. State, 15 F.L.W. 107 (March 9, 1990), Supreme Court Case No. 68,559, in which Mr. Owen's conviction for the Slattery homicide, sexual battery, and armed burglary of a dwelling was reversed and his confession suppressed.

An aggravating factor found by the trial court was that "[t]he defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person." Section 921.141(5)(b), Florida Statutes.

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) involved the use of a prior violent felony at the sentencing hearing that was subsequently reversed. Johnson's prior conviction arose out of New York in 1963. The jury had found the existence of three aggravating circumstances including that he had been previously convicted of a felony involving the use or threat of violence to the person of another. After his appeal to the Mississippi Supreme Court failed, his lawyers were able to have the New York conviction vacated.

The United States Supreme Court in a unanimous judgment reversed Johnson's death sentence. The Court stated:

The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special " 'need for reliability in the determination that death is the appropriate punishment' " in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S.Ct.

1197, 1207-1208, 51 L.Ed.2d 393 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976)) (WHITE, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,' " we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983). The question in this case is whether allowing petitioner's death sentence to stand although based in part on a vacated conviction violates this principle.

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, at 1986, 100 L.Ed.2d 575, at 584.

Later in the opinion the Court went on to state:

It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." Gardner v. Florida, 430 U.S., at 359, 97 S.Ct., at 1205 (plurality opinion). [Appellate record references omitted].

Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, at 1986-1987, 100 L.Ed.2d 575, at 585.

In the case at bar, substantial evidence, including six witnesses, was presented to the jury regarding the convictions for capital murder, sexual battery, and armed burglary; all convictions which this court has declared invalid. In addition, the sentencing hearing also included a presentation of the illegally obtained confession of Duane Owen to the Slattery crimes.

The extreme emotional impact upon a jury learning that a defendant it just convicted of first degree murder has a previous first degree murder conviction cannot be measured lightly. It is arguably the most aggravating of all aggravating circumstances. Any attempt to classify the effect of a prior capital murder on jurors as insignificant is pointless.

Under Eighth Amendment analysis, the mere possibility that Owen's prior capital murder conviction was "decisive" in the jury's choice between penalties requires a new sentencing hearing. Johnson, supra.

The role of a jury in Florida's trifurcated sentencing scheme is central to a reliable sentence. In the case at bar, as in Johnson, the error extends "beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate."

F.S. §921.141(5)(b) is really two aggravating factors combined into one. Although a prior violent felony conviction satisfies this factor there is no doubt that a prior capital felony is far more aggravating and could easily be the primary difference between a recommendation of death or life imprisonment. It would be impossible to determine beyond a reasonable doubt that, absent this vacated capital conviction, the jury's recommendation would have been the same.

Evidence in mitigation of sentence was presented to the jury and the trial court recognized that in its sentencing order. R-

4951-4954. The sentencing court stated that "...it is the determination of this court that the aggravating circumstances clearly and convincingly outweigh any mitigating factors." R-4954. Thus, the trial court found the existence of mitigating factors although it gave little weight to them. In Elledge v. State, 346 So.2d 998 (Fla. 1977), this Court stated:

In order to have weighed the aggravating circumstances against the mitigating, the court must have found some of the latter.

* * *

Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been presented? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial.

Id., at 1003.

CONCLUSION

For the reasons set forth above and in his initial brief, the Appellant, DUANE EUGENE OWEN, respectfully prays this Honorable court to reverse the judgment and sentence entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this pleading was served, by U.S. Mail upon **Attorney General Robert Butterworth [Attention: John Tiedeman, Esquire]**, Office of the Attorney General, Palm Beach County Regional Service Center, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 26th day of April, 1990.

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