9-27-1976

Jimmy Keith Self v. Commonwealth of Kentucky

Appellee's Brief 1976-SC-0106

KYSC1976-SC-0106-02
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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-106

JIMMY KEITH SELF — APPELLANT

VS. APPEAL FROM McCRACKEN CIRCUIT COURT
HON. C. WARREN EATON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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I hereby certify that a copy of this Brief for Appellee has been mailed to Hon. C. Warren Eaton, Judge, McCracken Circuit Court, McCracken County Courthouse, Paducah, Kentucky 42001; Hon. Albert Jones, Commonwealth's Attorney, Courthouse, Paducah, Kentucky 42001; Hon. Joseph Freeland, Public Defender, 305 Citizens Bank & Trust Co. Bldg., Paducah, Kentucky 42001; and Hon. Jack Emory Farley, Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, this 27th day of September, 1976.

W. W. Pollard

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE SENTENCE OF DEATH LODGED AGAINST THE APPELLANT MUST BE VACATED.

II. WHETHER IT WAS ERROR FOR THE TRIAL COURT TO REFUSE APPELLANT'S MOTION FOR A CONTINUANCE FOR THE PURPOSE OF SECURING NEW COUNSEL.

III. WHETHER THE CLOSING ARGUMENT BY THE COMMONWEALTH'S ATTORNEY WAS IMPROPER.

COUNTERSTATEMENT OF THE CASE

Appellee accepts appellant's Statement of the Case as substantially correct. Other facts and circumstances relevant to determination of the issues presented on this appeal are as stated in the Argument below.

ARGUMENT

I

THE SENTENCE OF DEATH LODGED AGAINST APPELLANT MUST BE VACATED SO THAT A NEW JURY CAN EXERCISE ENLIGHTENED SENTENCING DISCRETION IN DETERMINING WHETHER APPELLANT'S CRIME IS PUNISHABLE AS A CAPITAL OFFENSE OR AS A CLASS "A" FELONY.

Nothing in the law is so soberingly final as the imposition and execution of the penalty of death for a criminal offense. Much debate surrounds the question of whether the penalty should ever be exacted and, if so, for what offenses and what offenders. The Kentucky General Assembly has authoritatively determined that death should be an available penalty for some particularly repugnant offenses. For example, for offenses like the instant one in which an intentional killing is committed in the course of the commission of first degree robbery, death is an authorized punishment alternative to imprisonment from 20 years to life. KRS 507.020(2)(b). Now, however, it appears that the procedures which Kentucky courts have utilized in implementing the intention of the General Assembly fail to pass constitutional muster as a result of the fact that under those procedures the decision as to whether a particular aggrevated murder or kidnapping should be punished as a capital offense or as a Class "A" felony is withdrawn from the sentencing authority.

In the cases of Woodson v. North Carolina, ____ U.S. ____, 44 U.S.L.W. 5267 (S.Ct. 75-5491, decided July 2, 1976), Roberts v. Louisiana, ____ U.S. ____, 44 U.S.L.W. 5281 (S.Ct. 75-5844, decided July 2, 1976), and Williams v. Oklahoma, ____ U.S. ____, 44 U.S.L.W. 3761 (S.Ct. 75-6639, decided July 6, 1976), the United States Supreme Court held, inter alia, that capital sentencing procedures which leave the sentencing authority with no choice but to impose the penalty of death once a particular kind of offense is found to have been committed result in the infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. All mandatory sentences of death heretofore imposed under KRS 532.030(1) must, therefore, be vacated as a matter of federal constitutional law because under the procedures used to implement that statute juries have been instructed that upon finding that an aggrevated murder or kidnapping has been committed, they have no choice but to punish it as a capital offense.

Nevertheless, it was not the death penalty per se which the Supreme Court invalidated. Rather, it was the procedures under which the sentence had been imposed under mandatory death penalty statutes which the Court struck down. The Court expressly held that death was an available penalty for aggrevated murders if it was imposed by a sentencing authority exercising enlightened sentencing discretion.

Gregg v. Georgia, ____ U.S. ____, 44 U.S.L.W. 5230 (S.Ct. 74-6257, decided July 2, 1976), Profitt v. Florida, ____ U.S. ____, 44 U.S.L.W. 5256 (S.Ct. 75-5706, decided July 2, 1976), Jurek v. Texas, ____ U.S. ____, 44 U.S.L.W. 5262 (S.Ct. 75-5394, decided July 2, 1976).

The leading Gregg case upheld the sentence of death imposed for murder committed in the course of armed robbery because Georgia law provided for a 2-stage trial proceeding under which the jury had first found that the defendant was guilty of the charged criminal conduct and then had been obliged to specifically consider the question of whether the defendant should be penalized by life imprisonment or death. Before making the decision to impose death, the Gregg jury was informed of all circumstances surrounding the defendant and his crime which the prosecution and defense deemed important. The jury was then instructed that it could return the ultimate penalty only if it found that the defendant's crime was committed under expressly articulated aggrevated circumstances and further found that all the circumstances tending to mitigate the offense and the degree of the defendant's punishment did not overcome the aggrevating factors. The Supreme Court held that this sentencing procedure adequately served to guide the jury's sentencing discretion, especially in light of Georgia's requirement that the decision to impose death be subjected to scrupulous

appellate review for the purpose of guarding against arbitrary or capricious exactation of the penalty from offenders whose status and crime make the punishment of death appear abberational.

In the instant case the appellant was convicted under a sentencing procedure which left the jury no choice but to convict for a capital offense once it found that the appellant was guilty of an intentional killing committed in the course of a first degree robbery. Accordingly, the sentence imposed on the appellant must be overturned. However, substantive Kentucky law does not require that the appellant's offense be punished as a capital offense. The same conduct may also be punished as a Class "A" felony. KRS 532.030(1). Therefore, a Kentucky jury can be given the discretion of determining whether a particular aggrevated murder or kidnapping should be punished as a capital offense or as a Class "A" felony.

While the appellant's sentence of death must be vacated, there is no reason why his conviction for aggrevated murder should be disturbed. Appellant must be resentenced, but all that is required is a new sentencing hearing to be held before a newly impaneled jury. This new jury can be instructed to consider whether the appellant's act of aggrevated murder, evaluated in light of all the relevant circumstances surrounding the appellant and his crime, is of such a nature that the already specifically found aggrevating circumstance outweighs all mitigatory circumstances so

greatly that his crime must be punished as a capital offense rather than as a Class "A" felony. If the jury convicts for the capital offense, then this Court can review the sentence and determine whether any arbitrary or capricious factor appears to have been involved in the decision to impose the ultimate sanction and whether the penalty is proportionate to the enormity of the crime.

In adopting this sort of sentencing procedure by judicial rule, this Court would simply be performing its traditional function of altering the mode of trial practice to encourage the most efficacious implementation of substantive law. Indeed, it is doubtful whether any body save this Court could adopt the binding new procedural provisions which have been made necessary for the Kentucky Court of Justice by the holdings of the United States Supreme Court in the recent death penalty cases. Kentucky Constitution §116; Lunsford v. Commonwealth, Ky., 436 S.W.2d 512 (1969).

In order to give effect to the General Assembly's express intention to make death an available penalty in a narrow class of aggrevated felonies, this Court must conform Kentucky sentencing procedures in such a fashion as to give the sentencing authority discretion as to whether a particular aggrevated offense is to be punished as a Class "A" felony or a capital offense. A bifurcated procedural format would achieve this goal and appellee urges its adoption. In the

instant case there appears no reason for retrial of the guilt determination stage of appellant's case and all that has to be done is vacate appellant's sentence of death and remand the case for the purpose of holding a sentencing hearing wherein a new jury will determine whether appellant's offense should be punished as a Class "A" felony or capital offense.

II

IT WAS NOT ERROR FOR THE TRIAL COURT TO REFUSE APPELLANT'S MOTION FOR A CONTINUANCE FOR THE PURPOSE OF SECURING NEW COUNSEL.

On the day of trial, appellant Jimmy Keith Self strongly objected to his defense counsel, Public Defender Joseph Freeland, on the ground that the attorney had allegedly conspired with the Honorable Albert Jones, Commonwealth's Attorney, to coerce Ms. Beverly Headley, appellant's co-defendant, into pleading guilty and offering herself as a witness for the prosecution. Both Mr. Freeland and Mr. Jones flatly denied this allegation. Nevertheless, in utmost respect to his client's interests, Mr. Freeland moved on appellant's behalf that a continuance be granted in order for new defense counsel to be obtained. This motion was overruled and trial proceeded with Mr. Freeland continuing as appellant's counsel.

The "conspiracy theory" advanced below as justification for the rejection of the Public Defender as defense counsel is not pursued on this appeal. Instead, a new

theory of conflict of interest is advanced. It is contended that Mr. Freeland's previous representation of Ms. Headley kept him from adequately protecting the appellant's interest when Ms. Headley changed her story and testified that the appellant had planned his crimes in advance. But as appellant recognizes (Brief for Appellant, p. 47), Ms. Headley was quite effectively crossed by Mr. Freeland and the defendant himself. And since Mr. Freeland was no longer representing Ms. Headley by the time of trial, appellant's citation of cases where dual representation continued after conflict emerged is unpersuasive. Thus, here, as in Ware v. Commonwealth, Ky., 537 S.W.2d 174 (1976), . . . the argument on this point is directed entirely at shadows and possibilities that could have materialized but never did." 535 S.W.2d at 178.

It was not an abuse of discretion for the trial judge to deny appellant's motion for continuance because no grounds existed for removing Public Defender Joseph Freeland from the case. Appellant's irrational objections to being represented by Mr. Freeland did not prevent that attorney from being reasonably effective and it was not unreasonable nor in derogation of the appellant's substantial rights for the trial court to require that the proceedings go forward. House v. Commonwealth, Ky., 487 S.W.2d 917 (1972).

III

THE COMMONWEALTH'S CLOSING ARGUMENT WAS NOT IMPROPER.

Though there was no evidence in the record concerning the deterrence value of the death penalty, defense counsel argued in his closing that the penalty does not deter crime (Transcript of Evidence, D - E). In response to this conjecture the Commonwealth's Attorney made the following statement to which the appellant objects on this appeal.

> "Now, Mr. Freeland has said to you that it does not deter. He can cite you things and I can cite you things and it does deter. It is not part of the evidence - that it does not deter like the pickpockets. How many times and are there in which it has happened that a man put a gun to somebody's head and he says, Don't do it or I'll fry. That saved the person. Fear of capital punishment is a deterrent. I say there are plenty of statistics, but I will not argue that with you. One of the reasons why there has not been a deterrent is that we have not had it for a while."
> (Transcript of Evidence "L")

Citing Brown v. Commonwealth, Ky., 357 S.W.2d 681 (1962), appellant contends that the mere mention of the word "statistics" resulted in reversible error. Brown is clearly distinguishable from the instant case. In Brown statistics about the prevalence of crime were actually introduced in the course of argument. Here a simple

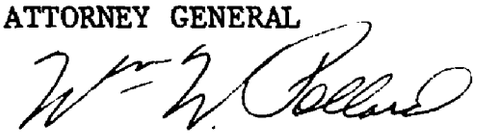
observation was made to the effect that there undoubtedly exists a wealth of statistics on the deterrence issue. No reliance was placed on any such statistics. No objection was raised to the use of the word at the time it was uttered. No possible harm could be even remotely inferred from the Commonwealth Attorney's casual comment.

CONCLUSION

For the above stated reasons appellee respectfully suggests that the appellant's conviction should be affirmed but that the case should be remanded to the McCracken Circuit Court for a new sentencing hearing.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL



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