

ORIGINAL

In The Supreme Court of Ohio

State Of Ohio, :
 Appellee, :
 -Vs- : Case No.: 05-2364
 Kerry Perez, :
 Appellant. : **This Is A Capital Case.**

On Appeal From the Court of
 Common Pleas of Clark County
 Case No. 03-CR-1010

Appellant's Motion for Reconsideration

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Appellant's Motion for Reconsideration

Appellant, Kerry Perez, requests that this Court reconsider its merits ruling of December 2, 2009 affirming both his convictions and death sentence. This request is made under Sup. Ct. Prac. R. XI § 2(A)(4). The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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Memorandum In Support

Proposition Of Law No. 1

The trial court's failure to give the required narrowing construction to a course of conduct specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. amends. VIII and XIV.

The Ohio Supreme Court rejected Perez's arguments that the State did not introduce sufficient evidence to prove the existence of the course of conduct specification. In rejecting this claim, this Court determined that there was a factual link between the aggravated murder of Johnson and the attempted aggravated murder of Conley sufficient to establish that both crimes are part of the same course of conduct for purposes of R.C. 2929.04(A)(5). State v. Perez, ___ Ohio St. 3d ___, 2009-Ohio-6179, slip op. at 18 (2009). However, in order to reach this decision, this Court vaguely interpreted and ultimately expanded the O.R.C. §2929.04(A)(5) course of conduct specification. This Court's ruling negates the purpose of capital aggravators which is to narrow the class of murderers who are eligible for the death penalty. See McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Perez's case, the second murder occurred eight months after the first shooting at the Beverage Oasis. Although both incidents involved the use of firearms, they were not similar in any substantial respect. The distinctions between the Doo Drop Inn and Beverage Oasis are numerous as detailed by Justice Pfeifer:

"In this case, the murder of Ronald Johnson occurred several months after the shooting at the Beverage Oasis. Although both incidents involved a robbery and the use of masks and guns to effect the robbery, little else binds them. One establishment was a retail store, the other a bar; one shooting was at an owner, the other of a customer; one involved Perez chasing employees, the other did not; one involved an armed victim who shot first, the other did not; even the guns used in the two crimes were different. Although crimes were committed at night, one was as employees were closing, and the other involved an open-for-business bar. In

short, there are no particularized facts that suggest that the first and second incidents were part of a course of conduct, especially when the eight-month gap is considered.”

Perez, ___ Ohio St. 3d ___, 2009-Ohio-6179, slip op. at 56 (Pfeifer, J., dissenting).

The course-of-conduct specification in this case is inappropriate in this case because the specification is not supported by the evidence presented by the state.

Moreover, the trial court erred in letting the State introduce evidence of separate nonfatal robberies. Contrary to this Court’s ruling, the evidence supports the notion that the jury considered the nonfatal robberies as course-of-conduct evidence. During the penalty phase deliberations the jury asked for the date of the nonfatal robbery at Sugarbaker’s and the time of the confession tape despite the fact that it had been instructed not to consider the robberies within its penalty phase deliberation. (Tr. 1785). The juror’s question demonstrates that the jury did not follow the trial court’s instruction and were considering the nonfatal robberies in the penalty phase deliberations for the course-of-conduct specification. It is fair to infer that the jury also considered the nonfatal robberies during the trial phase deliberations. This Court’s finding to the contrary is not supported by the record.

The jury was misled and Perez was prejudiced by the introduction of the improper evidence. Perez’s death sentence on the basis of this improperly broadened specification is invalid. The Court’s ruling failed to properly narrow crimes eligible for the course of conduct specification. Perez respectfully requests that this Court vacate its opinion and reverse his conviction and sentence.

Proposition Of Law No. II

Where evidence of other crimes lacks a distinct behavioral fingerprint, such evidence is inadmissible. Even where such evidence may be admissible, undue emphasis on it may prejudice a capital defendant's right to a fair trial and reliable death sentence. U.S. Const. amends. V, VI, VIII and XIV.

In rejecting Perez's Second Proposition of Law, this Court found that the trial court did not abuse its discretion in permitting the nonfatal robberies under Evid. R. 404(B). State v. Perez, ___ Ohio St. 3d ___, 2009-Ohio-6179, slip op. at 18-22 (2009). This Court found and held that "the jury was instructed not to use the nonfatal robberies 'for any other purpose' than to show motive, intent, purpose, or plan and rejected Perez's argument the jury actually considered the nonfatal robberies as part of the course of conduct." State v. Perez, ___ Ohio St. 3d ___, 2009-Ohio-6179, slip op. at 15-23 (2009). However, the evidence in the record demonstrates otherwise. Moreover, the prejudiced caused by the introduction of the other acts evidence far outweighed any probative value of the evidence. Perez therefore respectfully requests that this Court reconsider the merits of this issue.

The State introduced evidence that Perez had been involved in five bar robberies and one drive-thru robbery between March and December of 2002. (Tr. 997, 1011, 1017, 1023, 1031-32, 1058). This testimony was offered to establish that Perez was involved in a series of robberies targeting bars and that if faced with resistance, he would kill. (Tr. 775). According to the witnesses, Perez would gain access and tell the employees and patrons to get on the floor and not move. (See e.g. 998, 1017, 1033). The State of Ohio initially only wanted these robberies introduced to prove the course-of-conduct specification. However, the trial court did not permit the nonfatal robberies as course-of-conduct evidence but instead permitted the aggravated robberies as evidence to prove a "unique identifiable plan of criminal activity which are

probative as to motive, intent, purpose or plan to commit the offense charged. Despite this ruling and any limiting instructions, the prosecutor improperly used the other acts evidence to argue in support of a death sentence, and the jury clearly considered the other acts evidence as part of the course of conduct specification.

At the penalty phase, the prosecutor urged the jury to consider the robbery specification as one with “tremendous weight” because the victims are vulnerable. (Tr. 1745-47). During the jury’s deliberations, the jury asked the date of the Sugarbaker’s robbery and the time of the confession tape. (Tr. 1785). The trial court stated that it would provide the following answer: “For purposes of this phase of the trial, you may only consider the aggravated circumstances that the Court has previously instructed you on. You may not consider evidence of any other acts, period.” *Id.* This demonstrates that the jury was discussing that evidence although instructed otherwise.

This Court noted that the trial court repeated its instruction to the jury to only consider the evidence for motive, intent, purpose or plan to commit the offense charged and noted that he jury is presumed to follow the trial court’s instructions. Perez, ___ Ohio St. 3d ___, 2009-Ohio-6179, slip op. at 22. However, as demonstrated in this case, this instruction was not enough. Once information is instilled in the juror’s minds, it “cannot be wiped from the brains.” See State v. Zuern, 32 Ohio St. 3d 56, 68, 512 N.E.2d 585, 597 (1987) (Wright, J., dissenting) (“nonadmissible declaration cannot be wiped from the brains of the jurors”) (citing Bruton v. United States, 391 U.S. 123, 129 (1968)). And in some cases, a trial court’s instructions to the jury to disregard evidence can be insufficient to overcome the prejudicial effect. State v. Breedlove, 26 Ohio St. 2d 178, 184, 271 N.E.2d 238, 241-42 (1971). In this case, the evidence demonstrates that the limiting instruction was not enough to prevent the jury from using the

“other act” evidence impermissibly during the penalty phase as course-of-conduct evidence as repeatedly argued by the prosecutor.

Details of these unrelated robberies improperly influenced the jury and had a very profound impact on the capital murder count. The presentation of this testimony was only introduced to influence the jury to sentence Perez to death. This is demonstrated by the fact that he was never convicted or sentenced on those individual robberies. Moreover, since Perez admitted to shooting Johnson, the probative value of presenting this other act evidence is greatly outweighed by the danger of unfair prejudice under Evid. R. 403(A).

The trial court erred by permitting the introduction of the aggravated robbery evidence under Evid. R. 404(B). Therefore, Perez respectfully requests that this Court vacate its opinion and reverse the death sentence.

Proposition Of Law No. III

The admission of taped statements of communications made between Perez and his wife without Perez's waiver of the marital privilege constituted a violation of Perez's right to exclude spousal testimony under Ohio law as well as his rights under the Due Process Clause of the United States Constitution. O.R.C. § 2945.42; U.S. Const. amend. VIII and XIV.

In rejecting Perez's Third Proposition of Law, this Court found that there was no violation of the spousal privilege because Debra Perez did not "testify" as to communications with Perez. State v. Perez, ___ Ohio St. 3d ___, 2009-Ohio-6179, slip op. at 23-28 (2009). This ruling ignores the purpose of the spousal privilege and draws an improper distinction between testimony and tape recorded conversation. Perez therefore respectfully requests that this Court reconsider the merits of this issue.

The police confronted Debra and recruited her to meet with her husband and have that spousal conversation recorded. Debra agreed and met Perez while he was in jail on unrelated charges on October 24, 2003 and November 12, 2003. The conversations from each of those visits were recorded and played to the jury over defense objection. (Tr. 59; State's Exs. 83 and 84). Playing the tapes to the jury and presenting them as evidence was the equivalent of having Debra testify. These taped statements became spousal testimony which were played for the sole purpose of introducing evidence of the privileged communication. What makes this even more fundamentally unfair is that once these tapes were played, Perez had no opportunity to cross Debra regarding the content of the communications.

The spousal privilege belongs to the nontestifying spouse. O.R.C. § 2945.42; State v. Savage, 30 Ohio St. 3d 1, 2, 506 N.E.2d 196, 197 (1987). At no time did Perez waive his

privilege regarding these communications. In fact, these recordings were made without his knowledge and made with the intent that the communications remain confidential.

This Court's ruling circumvents Ohio's privilege law and renders it meaningless by allowing a privileged communication to be recorded and played during the testimony of another person. As other states have recognized, there is no distinction between live testimony and the playing of a taped recorded communication when it comes to privileged communications. See e.g. Hicks v. Hicks, 271 N.C. 204, 206-07, 155 S.E.2d 799 (1967); People v. Dubanowski, 75 Ill.App.3d 809, 812, 394 N.E.2d 605 (1979).

Furthermore, basic Due Process fairness required the taped communications to be suppressed. The State of Ohio created the spousal privileged. This Court's ruling destroys all meaning behind it and creates a slippery slope. This ruling would permit state officers to record other protected privileged communications and play them as "nontestimonial statements" under this Court's ruling. "What an insidious distinction." Perez, __ Ohio St. 3d __, 2009-Ohio-6179, slip op. at 57 (Pfeifer, J. concurring in part and dissenting in part).

For the foregoing reasons, Perez respectfully requests that this Court vacate its opinion, find that the spousal privileged was violated and reverse Perez's conviction and vacate his death sentence.

Conclusion

For each of the forgoing reasons, Appellant Kerry Perez requests that this Court reconsider its decision on the merits issued on December 2, 2009.

Respectfully submitted,

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Certificate Of Service

I hereby certify that a true copy of the foregoing Appellant's Motion For Reconsideration was delivered by regular U.S. Mail to: Stephen A. Schumaker, Clark County Prosecutor, 50 E. Columbia Street, Springfield, Ohio 45502, this 14th day of December, 2009.


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