

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, : Case No. 11-0857
-vs- : Appeal taken from Cuyahoga County
Court of Common Pleas
Denny Obermiller, : Case No. CR 10-542119- A
Appellant. : **Capital Case**

Appellant Denny Obermiller's Motion for Reconsideration

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Appellant Denny Obermiller, pursuant to S.Ct.Prac.R. 18.02, moves this Court for reconsideration of its April 20, 2016, opinion and decision affirming his convictions and death sentence. *State v. Obermiller*, __ Ohio St.3d __, 2016-Ohio-1594. 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

Appellant requests that this Court revisit its April 20, 2016 opinion, with respect to Propositions of Law Nos. 2 and 3. The Court should grant reconsideration to correct those portions of its opinion which “were made in error.” *Dublin City Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.2d 222, ¶ 9. The Court did not fully consider the issues raised herein. *State v. Gillispie*, 2nd Dist. No. 24456, 2012-Ohio-2942, ¶ 9.

PROPOSITION OF LAW NO. 2

A capital defendant’s right to a reliable sentence is violated when the three judge panel fails to properly weigh aggravating circumstances and mitigating factors in imposing a sentence of death. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I §§ 9, 16.

A. This Court Incorrectly Concluded that the Panel Did Not Consider Nonstatutory Aggravating Circumstances.

Appellant asserted that because the panel questioned Gina Mikluscak about the manner in which Appellant had beaten her, his fits of anger, and that he was in good physical shape (as opposed to the victim), the trial court relied on nonstatutory aggravating circumstances. (Appellant’s Merit’s Brief, pp. 21-29). However, this Court held that because the trial court had not identified any improper aggravating circumstances in its sentencing opinion, Appellant’s assertion was not well taken. Opinion at ¶ 119. This Court reasoned that “[w]hen a court correctly identifies the aggravating circumstances in its sentencing opinion, we will presume that the court relied only on those circumstances and not on nonstatutory aggravating circumstances.” *Id.* at ¶ 119; citing *State v. Clemons*, 82 Ohio St.3d 438, 447, 696 N.E.2d 1009 (1998) (citing *State v. Hill*, 73 Ohio St.3d 433, 441, 653 N.E.2d 271 (1995)).

However, earlier in its opinion this Court had found that the panel had indeed relied on an improper aggravating circumstance:

Obermiller argues that in its sentencing opinion, the three-judge panel improperly weighed the specification for felony murder predicated on rape that was applicable only to Candace's murder when it sentenced him for Donald's murder....

Thus, Obermiller is correct that this part of the sentencing opinion identifies all three remaining specifications as applicable to both murders.

Opinion at ¶¶ 113, 114.

Thus, this Court erred when it incorrectly applied the presumption in question and therefore its resulting conclusion that the panel only considered the appropriate aggravating circumstances is flawed.

B. This Court Applied Conflicting Standards as to the Absence of Aggravating Circumstances and Mitigating Factors in the Panel's Sentencing Opinion.

Appellant asserted that the trial court had considered improper nonstatutory aggravating circumstances. (Appellant's Merit Brief, pp. 21-30). He premised his argument on the panel's cross examination of Gina Mikluscak concerning several irrelevant, highly prejudicial issues. (*Id.*). This Court rejected this argument because the panel did not mention any of those nonstatutory aggravating circumstances in its sentencing opinion. Opinion at ¶ 119.

Appellant also asserted that the trial court had failed to consider in mitigation Appellant's psychological issues and youth. (Appellant's Merit Brief, pp. 20-21). He premised this argument on the panel's failure to mention youth and mental health issues in its sentencing opinion. (*Id.*).

This Court found that Appellant was "correct that [his] sentencing opinion does not specifically mention his age or mental illness as mitigating factors." Opinion at ¶ 125. However, this Court held that "a trial court's failure to discuss each mitigating factor in its sentencing opinion does not give rise to an automatic inference that the factors absent from the opinion were not

considered.” *Id.*, citing *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, 998 N.E.2d 1100, ¶ 54.

This Court erred when it drew diametrically opposing conclusions from the same fact. The absence of the panel’s mention of nonstatutory aggravating circumstances in its sentencing opinion leads to the inference that the panel had not considered the same. However, the panel’s absence of reference to valid mitigating factors does not lead to the inference that the panel had not considered the same. The panel’s silence should lead to the same inference regardless of whether it is a nonstatutory aggravating circumstance(s) or a recognized mitigating factor(s).

This Court should grant rehearing on Proposition of Law No. 2.

PROPOSITION OF LAW NO. 3

The defendant’s rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court elicits and allows the pervasive introduction of evidence which is irrelevant, inadmissible and unfairly prejudicial. U.S. Const. amends. IV, V, VI, VIII and Ohio Const. art. I, §§ 2, 5, 9, 16. Ohio R. Evid. 401, 403, 404. O.R.C. §§ 2945.03, 2945.06.

A substantial proportion of this Court’s opinion dealt with Proposition of Law No. 3 and the three judge panel’s admission of testimony in the trial phase. Opinion at ¶¶ 58-76. This Court therein addressed the trial court’s admission of testimony involving: a) Appellant’s juvenile record (*Id.* at ¶¶ 63-65), b) Appellant’s silence after his arrest (*Id.* at ¶¶ 66-69); c) hearsay (*Id.* at ¶¶ 70-72), and d) pornographic images that on computer in the victims’ residence (*Id.* at ¶¶ 73-76). However, the Court did not address the portion of Appellant’s Proposition Law No. 3, which concerned the panel’s elicitation of the testimony in question, “when the trial court elicits...evidence which is irrelevant and inadmissible and unfairly prejudicial.” (Appellant’s Brief, p. 32).

A. This Court Failed To Address the Applicability of R.C. 2945.06.

This Court did not resolve Appellant's and the State's fundamental disagreement over the interpretation of R.C. 2945.06. That statute is a single block paragraph without subdivisions that provides:

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner *as if the cause were being tried before a jury*....

R.C. 2945.06 (emphasis added).

The State argued that this portion of the statute was inapplicable to Appellant's case, because he had pled guilty. (Appellee's Brief, p. 75). Instead, the State argues that only the following section of the statute is applicable:

If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death.

(*Id.* at p. 76).

The State's argument ignores the fact that the initial section of the statute by its plain terms applies “[i]n any case in which a defendant waives his right to trial by jury and elects to be tried by the court.” R.C. 2945.06 (emphasis added). Appellant's case certainly fit within the parameter of “any case” and he clearly waived his right to trial by jury and elect[ed] to be tried by the court.

The first sentence of R.C. 2945.06 is not incompatible with the latter sentence quoted by the State, especially considering that R.C. 2945.06 is written as one continuous block paragraph without subsections. In “any case” involving a bench trial, the court would necessarily proceed

“in accordance with the rules and in like manner as if the cause were being tried before a jury.” R.C. 2945.06. This means only that the court should follow the rules of evidence and procedure that are applicable to any other criminal trial or hearing. The State’s quoted passage only provides further *clarification* of that procedure, stating that the court in an aggravated murder plea would be composed of three judges who shall examine the witnesses. The rules of evidence and procedure would not be thrown out just because a three-judge panel is convened for a plea hearing. But that is exactly what the State believes by saying the first sentence of R.C. 2945.06 does not apply in Obermiller’s case.

B. The Plain Error Standard of Review is Not Applicable.

The Court acknowledged that its review of the admission of the testimony in question would be guided by the following presumption:

Moreover, a “three-judge panel is presumed to have ‘considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.’” *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, P 199, 23 N.E.3d 1023, quoting *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968)

Opinion at ¶ 61.

This Court erred when after recognizing this presumption, it applied the plain error standard. The plain error standard is applicable when a party fails to raise the appropriate objection. The standard is premised on the rationale that a trial court should be afforded an opportunity to correct any perceived error at a point in the proceedings when the court can either preclude the error or at least mitigate any prejudice that may flow from the error. For instance, in the case of improper testimony, a trial court may sustain the objection prior to the witness answering the question or instruct the jury to not consider the inappropriate answer.

However, the rationale in support of the plain error rule ceases to exist when the issue involves misconduct by the tribunal. Since, as this Court noted that there is a presumption that

the tribunal knows the law (Opinion at ¶ 61), then it should be aware, without objection from a party, when its actions violate the law. This is especially true when the actions of the tribunal constitute a clear violation of established law as was the situation in this case.

It is clearly established law that a tribunal should not inject itself in a trial in such a matter as to usurp the role of the parties. The role of the tribunal is to act as a “neutral umpire” and to leave to the parties the responsibility of presenting their respective cases. *State v. Brown*, 2nd Dist. 25285, 2013-Ohio-1570, ¶¶ 18, 19 (“trial court crossed the line into partisanship” when its “interrogation lasted seven and a half minutes and took up eight pages of transcript as compared to eleven pages for the State’s cross examination”). Given the presumption that the panel was aware of the applicable law, the panel was certainly aware that its role was limited.

Much of the improper questioning of witnesses that is the factual basis for Proposition of Law No. 3 was conducted by the panel. At times the panel’s questioning of witnesses constituted the only questioning of the witnesses. During the lengthy testimony of Gina Mikluscak, defense counsel did not ask any questions and the State asked only four questions. Tr. 1278-80. The panel also literally conducted the entire direct examination of Stacey Muzic, Obermiller’s stepmother. The State briefly questioned Muzic, but only *after* the panel completed its direct examination. Tr. 1345-50, 1351. With respect to the examination of Natasha Branam, a computer forensic specialist with the Ohio Bureau of Criminal Identification and Investigation, the panel controlled the substance of her testimony, and eventually Judge McGinty took over the direct examination of the witness. Tr. 1293-98.

Given that it was the panel’s own conduct that constituted much of the error and the panel was presumed to know the law and that its conduct violated that law, this Court should not have applied the plain error standard as to Proposition of Law No. 3. Given the presumption, it should

have been “plain” to the panel that its actions of calling and questioning witnesses violated established law. While a bright line does not exist as to the extent the judge or panel may be involved in the questioning of witnesses, regardless of where that line is drawn, the panel clearly crossed that line by a wide margin in this case. Therefore, given the facts unique to this case (the panel spent almost an entire day calling and interrogating witnesses), the Court should not have applied the plain error standard. The panel either was plainly aware or should have been plainly aware of its misconduct.

C. Alternatively, Plain Error Exists as to Proposition of Law No. 3.

Even if the plain error standard is applied, this Court should have found that the panel calling and questioning witnesses constituted plain error. This Court in its opinion defined plain error as:

Further, when a defendant has not raised an objection at trial, plain-error review applies. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240 (2002). Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” To prevail under the plain-error standard, a defendant must show that an error occurred, that it was obvious, and that it affected his substantial rights. *Barnes at 27* (also stating that an error affects substantial rights under Crim.R. 52(B) only if it affects the outcome of the trial).

Opinion at ¶ 62.

The panel’s calling and questioning the witnesses involved a substantial right. The Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal. A fair trial subsumes the right to an unbiased tribunal with no interest in the outcome of the case. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749 (1927). A judicial figure ceases to be neutral when he becomes involved in the investigation of the individual whose case is pending before him. *Lo-Ji Sales, Inc., v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979). Here, the panel

ceased to act as a neutral judicial body and instead acted as an adjunct prosecutor when it called and questioned witnesses.

Second, the panel's improper adducing of testimony and evidence subsequent to the commencement of its deliberations clearly affected the outcome. The panel's interruption of its own deliberations can only be explained by it having concluded that the prosecution had failed to produce sufficient evidence of Appellant's guilt to meet the burden of proof beyond a reasonable doubt. Thus, if the panel had not improperly become engaged in the fact gathering process, the outcome would have been different.

This Court should grant rehearing on Proposition of Law No. 3.

CONCLUSION

For the foregoing reasons, this Court should reconsider its decision and remand Obermiller's case for a new trial or resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Appellant Denny Obermiller's Motion for Reconsideration** was forwarded by first-class, postage prepaid U.S. Mail to Richard S. Kasay, Assistant Prosecuting Attorney, Appellate Division, Summit County Prosecutor's Office, 53 University Avenue, 6th Floor, Akron, OH 44308, on May 2, 2016.

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