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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-97-1258

Jerry Jerome Smith

v.

State of Alabama

Appeal from Houston Circuit Court
(CC-97-270)

On Return to Sixth Remand

WINDOM, Presiding Judge.

Jerry Jerome Smith appeals his sentence of death that resulted from the fourth penalty-phase proceeding of his capital-murder trial. In 1998, Smith was convicted of capital murder for killing Willie Flournoy, Theresa Helms, and David

Bennett by one act or pursuant to one scheme or course of conduct. See § 13A-5-40(a)(10), Ala. Code 1975. At the conclusion of the 4th penalty-phase proceeding, the jury recommended, by a vote of 10 to 2, that Smith be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Smith to death.

The facts of Smith's offense are stated in detail in Smith v. State, [Ms. CR-97-1258, Dec. 22, 2000] ___ So. 3d ___ (Ala. Crim. App. 2000), and will not be repeated except as necessary for an understanding of the issue presently before this Court. Briefly, Smith, a drug dealer, went to Flournoy's residence to collect $1,500, which Flournoy owed Smith for crack cocaine. When Flournoy told Smith that he did not have the money, Smith shot and killed him with a sawed-off .22 caliber rifle. Smith then shot and killed Helms and Bennett, who were also at Flournoy's residence. The jury convicted Smith of capital murder for intentionally killing two or more people pursuant to one act or pursuant to one scheme or course of conduct, see § 13A-5-40(a)(10), Ala. Code 1975. The circuit court sentenced Smith to death, and he appealed his conviction and sentence.

"On appeal, this Court affirmed Smith's capital-murder conviction, but remanded the cause for the circuit court to correct its sentencing order. See Smith v. State, [Ms. CR-97-1258, December 22, 2000] ___ So. 3d ___ (Ala. Crim. App. 2000). After remanding the cause a second time for the circuit court to correct its sentencing order, this Court affirmed Smith's death sentence. See Smith v. State, [Ms. CR-97-1258, August 31, 2001] ___ So. 3d ___, ___ (Ala. Crim. App. 2000) (opinion on return to second remand). Thereafter, the Alabama Supreme Court reversed Smith's death sentence and ordered a new penalty-phase hearing. See Ex parte Smith, [Ms. 1010267, March 14, 2003] ___ So. 3d ___ (Ala. 2003).

"After a second penalty-phase hearing, the jury recommended by a vote of 10-2 that Smith be sentenced to death. The circuit court followed the jury's recommendation and again sentenced Smith to death. On return to remand, this Court 'concluded that Smith is mentally retarded and, therefore, ... ineligible for the death penalty and directed the trial court to set aside Smith's death sentence and to sentence him to life imprisonment without the possibility of parole.' Ex parte Smith, [Ms. 1080973, October 22, 2010] ___ So. 3d ___, ___ (Ala. 2010) (citing Smith v. State, [Ms. CR-97-1258, September 29, 2006] ___ So. 3d ___, ___ (Ala. Crim. App. 2003) (opinion on return to third remand)). The Alabama Supreme Court reversed this Court's judgment and remanded the cause for the circuit court to conduct [a hearing pursuant to Atkins v. Virginia, 536 U.S. 304 (2002),] to determine whether Smith is mentally retarded and to make specific findings of fact pursuant to Ex parte Perkins, 851 So. 2d 453 (Ala. 2002). Smith v. State, [Ms. 1060427, May 25, 2007] ___ So. 3d ___, ___ (Ala. 2007). After conducting the Atkins hearing, the circuit court concluded that Smith is not mentally retarded. This Court affirmed the circuit court's determination,

> and the Alabama Supreme Court granted certiorari review.
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> > "On October 22, 2010, the Alabama Supreme Court again reversed Smith's sentence of death and remanded the cause for the circuit court to conduct a new penalty-phase proceeding before a jury. Ex parte Smith, [Ms. 1080973, October 22, 2010] ___ So. 3d ___, ___ (Ala. 2010). Specifically, after detailing why the circuit court correctly determined that Smith is not mentally retarded, the Alabama Supreme Court held that improper, prejudicial contact between the victim's mother and the jury venire entitled Smith to a new penalty-phase proceeding. Id. at ___."

Smith v. State, [Ms. CR-97-1258, Feb. 4, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011). In accordance with the Alabama Supreme Court's opinion in Ex parte Smith, [Ms. 1080973, Oct. 22, 2010] ___ So. 3d ___, ___ (Ala. 2010), this Court remanded the cause to "the circuit court with instructions for that court to conduct a third penalty-phase hearing." Smith, [Ms. CR-97-1258, Feb. 4, 2011] ___ So. 3d at ___.

On January 23, 2012, the circuit court began Smith's third penalty-phase proceeding before a jury. At the conclusion of the 3rd penalty phase, the jury, by a vote of 12 to 0, recommended that Smith be sentenced to death. The circuit court followed the jury's recommendation and sentenced Smith to death. On return to remand, this Court determined

that the circuit court erroneously allowed the jury to consider an aggravating circumstance that did not exist at the time of Smith's offense. Smith v. State, [Ms. CR-97-1258, June 7, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2011). Thus, this Court reversed Smith's sentence of death and remanded the cause with instructions for the circuit court to conduct a fourth penalty-phase proceeding. Id.

On September 8, 2014, the circuit court began Smith's fourth penalty phase. Before beginning the jury-selection process, the circuit court completely excluded the public and the press from its general qualification of the veniremembers. Smith objected to the circuit court's excluding the public from the proceeding. In response to Smith's objection, the circuit court stated:

> "I don't see that it has any bearing on the general qualifications. You have counsel and the defendant is present for qualifications. It's a general rule. And the general public is not in the general qualification or voir dire. But your objection is noted."

(R. on 6th remand, 10.) After conducting voir dire to determine the general qualifications of the veniremembers, the circuit court informed the parties that the public would be excluded from the remainder of the jury-selection process.

The circuit court explained that it did not want any improper contact between veniremembers and the public. At that point, defense counsel objected to the public being excluded from the proceedings. Counsel informed the court that Smith's family, a member of the media, and one of Smith's appellate attorneys, "an attorney from the Equal Justice Initiative," were there to observe the proceedings. (R. on 6th remand 43.) The circuit court ruled that "[e]veryone is excluded during voir dire until we get ready to try the case." Id. The circuit court noted "that the physical capacity of [its] courtroom [was] inadequate to have [the public and the venire] in the courtroom" and that it was excluding the public from voir dire "to minimize any contact with any juror during this process." (Id., at 44-45.)

After the parties selected a jury, the circuit court allowed the public to enter the courtroom to observe the remainder of the penalty-phase proceeding. At the conclusion of the 4th penalty-phase proceeding, the jury recommended, by a vote of 10 to 2, that Smith be sentenced to death. The circuit court followed the jury's recommendation and sentenced Smith to death.

On appeal, Smith argues, among other things, that the circuit court violated his right to a public trial under the Sixth Amendment to the Constitution of the United States. According to Smith, the circuit court infringed upon his right to a public trial because it lacked sufficient grounds to completely exclude the public from the voir-dire proceedings and because it failed to consider alternatives to closing the proceedings. He further argues that the circuit court's infringement upon his right to a public trial constituted a structural error requiring reversal without any showing of prejudice.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a public ... trial." Likewise, Article I, § 6, of the Alabama Constitution of 1901, guarantees that "in all criminal prosecutions, the accused has a right to ... a speedy, public trial." The Alabama Supreme Court has recognized that "[a] public trial ensures that the judge, prosecutor, and jury carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury." Ex parte Easterwood,

980 So. 2d 367, 372 (Ala. 2007) (citing Waller v. Georgia, 467 U.S. 39 (1984)).

Although the right to an open and public trial serves important interests, that right is not absolute. See Ex parte Easterwood, 980 So. 2d at 372; Waller, 467 U.S. at 45. In Waller, the Supreme Court of the United States explained: "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." 467 U.S. at 45. Instances that require the complete closure of part or all of a trial "will be rare, however, and the balance of interests must be struck with special care." Waller, 467 U.S. at 45. The Court then explained that a trial court may completely exclude the public from part of a criminal trial only if:

> "'[1] [T]he party seeking to close the hearing ... advance[s] an overriding interest that is likely to be prejudiced, [2] the closure [is] no broader than necessary to protect that interest, [3] the trial court ... consider[s] reasonable alternatives to closing the proceeding, and

> [4] [the trial court] make[s] findings adequate to support the closure.'"[1]

Ex parte Easterwood, 980 So. 2d at 373 (quoting Waller, 467 U.S. at 48).

In Presley v. Georgia, 558 U.S. 209, 213 (2010), the Supreme Court of the United States held that "the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors" and that, before the public may be excluded from voir dire, a trial court must first comply with the test established in Waller. The Court explained that, before a trial court may exclude the public from voir dire, it must have an overriding interest that will be served by closing the proceedings. Presley, 558 U.S. at 214. Further, a trial court must consider alternatives to closing the proceedings from the public. Presley, 558 U.S. at 215. In fact, "trial courts are required to consider alternatives to closure even when they are not offered by the parties." Presley, 558 U.S. at 214. Thus, when deciding whether to

[1]The test for a partial closure is not as stringent. For a partial closure, the moving party need advance only a "substantial reason" for the closure, as opposed to the overriding interest necessary for a total closure. Easterwood, 980 So. 2d at 375.

exclude the public from voir dire because of the size of the courtroom or concerns about improper communication, a trial court must consider alternatives to total closure such as, "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." Presley, 558 U.S. at 215. This is because "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley, 558 U.S. at 215.

Here, the circuit court totally closed jury qualification and voir dire to the public. Although the circuit court noted generic concerns regarding the small size of its courtroom and the need to prevent communication between veniremembers and the public, the circuit court did not point to any specific harm or threat that needed to be addressed. Rejecting the notion that a similar need was sufficient to exclude the public from voir dire, the Supreme Court explained:

> "The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant's constitutional

> right to a public trial, a court could exclude the public from jury selection almost as a matter of course. [Allowing trial court's to exclude the public from voir dire to prevent improper contact between the public and the jury would] permit[] the closure of voir dire in every criminal case conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators.' [Presley v. State, 675 S.E.2d 909, 913 (2009)] (opinion of Sears, C.J.).
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> "There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire. But in those cases, the particular interest, and threat to that interest, must 'be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' Press-Enterprise [Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)]; see also Press-Enterprise Co. v. Superior Court of Cal., County of Riverside, 478 U.S. 1, 15, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) ('The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]')."

Presley, 558 U.S. at 215-16.

The circuit court did not identify a particular risk or threat. Rather, it relied on the "generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident," 558 U.S. at 215-16, to totally exclude the public from voir dire. The circuit court's

reliance on that "generic risk," is insufficient to justify totally excluding the public from Smith's voir-dire proceedings.

More importantly, it does not appear that the circuit court considered any alternatives to total closure of the voir-dire proceedings. Before voir dire, the circuit court mentioned another courtroom in the building that was available to hold any spectators until a jury was chosen and, at a later time, defense counsel argued that that courtroom was larger and would have been a sufficient alternative to total closure of the proceedings. (R. on 6th remand 44, 511.) However, it does not appear that the circuit court considered conducting voir dire in the larger courtroom. Further, there is no indication in the record that the circuit court was unable to provide a limited area for the public and to conduct voir dire in smaller panels of veniremembers. Further, this Court notes that the circuit court did not exclude the public from Smith's third penalty-phase proceedings. Instead, during those proceedings, the circuit court used members of the circuit clerk's office to prevent any improper contact between the public and the veniremembers.

Because the circuit court did not properly consider and use available alternatives to total exclusion of the public from voir dire, the circuit court violated Smith's Sixth Amendment right to a public trial.[2] Presley, 558 U.S. at 215. As a result, Smith's fourth penalty-phase proceeding must be reversed. Ex parte Easterwood, 980 So. 2d at 374 (noting that a violation of a defendant's right to a public trial is a structural error that does not require a showing of prejudice); Waller, 467 U.S. at 49-50; Ex parte McCombs, 24 So. 3d 1175, 1178 (Ala. Crim. App. 2009); P.M.M. v. State, 762 So. 2d 384, 388 (Ala. Crim. App. 1999). Consequently, this Court reverses Smith's sentence of death, and this cause is remanded to the circuit court with instructions for that court to conduct a fifth jury penalty-phase proceeding.

REVERSED AND REMANDED.

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[2]The State concedes that the record is insufficient to establish that the circuit court complied with the Waller test before excluding the public from voir dire, but asks this Court to remand this cause to give the circuit court the opportunity to make specific findings of fact in compliance with Waller. Although an appellate court may, in some circumstances, remand a cause to the circuit court to supplement the record with specific findings in compliance with Waller, such a remand is not necessary in this case. Rather, the availability of alternatives to total closure of voir dire is apparent from the record.

Welch, Burke, and Joiner, JJ., concur. Kellum, J., concurs in part and dissents in part, with opinion.

KELLUM, Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion that Jerry Jerome Smith was denied his constitutional right to a public trial during his fourth penalty-phase proceeding for his 1998 conviction for capital murder and that, therefore, his sentence of death must be reversed. However, I must respectfully dissent from this Court's specific order that the trial court conduct a fifth penalty-phase trial without this Court's first addressing the impact, if any, of the United States Supreme Court's recent opinion in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016), on Alabama's capital-sentencing scheme.