

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDRES ANTONIO TORRES ,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge committed reversible error at sentencing by allowing the State to introduce excessively gruesome and unfairly prejudicial autopsy photographs of the victims in violation of Rule 403, SCRE.

II. The trial judge committed reversible error at sentencing by allowing the State to introduce a video recording of Torres being pepper-sprayed and subdued in the detention center during the “cooling off” period after he was convicted of the murders of the Emerys, as this evidence violated S.C. Code Section 16-3-25 (C) (1) and was unfairly prejudicial under Rule 403, SCRE.

STATEMENT OF THE CASE

On October 13 through 23, 2008, Andres Antonio (“Tony”) Torres stood trial in Spartanburg County, before Judge Roger L. Couch and a jury, on indictments charging him with two counts of murder, two counts of armed robbery, and one count each of first-degree burglary, first-degree criminal sexual conduct and attempt to burn. The victims were Torres’ neighbors, Ray and Ann Emery, who on May 11, 2007, were bludgeoned to death with a hammer in their bedroom just before dawn.

The State sought the death penalty for the murders based on six of the aggravating circumstances found in SC Code Section 16-3-20 (C) (a):

1. Murder and criminal sexual conduct;
2. murder and burglary;
3. murder and robbery while armed with a deadly weapon;
4. murder and larceny with use of a deadly weapon;
5. murder for the purpose of receiving money or a thing of monetary value; and
6. murder of two or more persons pursuant to one’s scheme or course of conduct.

Torres offered no evidence at the guilt phase. The jury found him guilty as charged.

Torres’ prior record, which the State introduced at sentencing, indicated that the 27 year-old had previously exhibited a propensity for property crimes, such as automobile break-ins and larceny. R. p. 2224 line 10- 2241 line 9. The Emerys were good people who did not deserve their fates. The central issue at sentencing, as the defense saw it, was “why Tony Torres did this” and his adaptability to prison if sentenced to life. R. 2220 line 5- 2223 line 3.

Torres is of average intelligence and exhibits no obvious brain damage. R. 2579 lines 23-25. But from an early age it was obvious to his family and others that Tony Torres

was “a little bit different.” R. 2582 lines 8-9. When he was about 14 months old Torres began having what his mother described as “episodes.” R. 2434 lines 2-11. At that time, children like Torres were thought to be merely “hyperactive.” R. 2438 lines 4-6. He was already on psychiatric medications by the time he was 19 months old. R. 2568 lines 2 - 3. By the age of two, it was clear that the electrical impulses of his brain were abnormal. R. 2565, lines 23-25

Torres exhibits a condition known as “Intermittent Explosive Disorder.” R. 2386 lines 3-10; R. 2584 lines 13-14. “It’s different than [temper tantrums],” one expert testified. R. 2568 lines 21- 22. “[T]he rage that they have is far out of proportion to any provocation.” R. 2568 line 23 – 2569 line 2. Once in the grip of these rages, a counselor who had worked with the young Torres testified, “[H]e couldn’t return from an emotional standpoint. Once he crossed that threshold, it was hard to get him to come back.” R. 2395 lines 2-5. The murders of the Emerys are classic examples of overkill.

A forensic psychiatrist testified that Torres “clearly had symptoms of bipolar disorder on and around the time of the offense. ... [H]e was clearly very sick when these crimes happened.” R. 2590 lines 19-24. Polysubstance abuse and four days without sleep only exacerbated his mental illness at the time of the incident. R. 2490 line 21 –.2493 line 15; R. 2593 line 24 - 2594 line 14.

In addition to non-statutory mitigating circumstances, the defense relied on four of the statutory mitigators provided by Section 16-3-20 (C) (b):

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
2. the murder was committed while the defendant was under the influence of mental or emotional disturbance;

3. the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
4. the age or mentality of the defendant at the time of the crime.

In allocution, Tony Torres expressed sorrow for what he had done and pleaded with the jury for forgiveness. R. 2747 line 15- 2748 line 20.

After deliberating for just over two hours, the jury returned with a recommendation of death, having found all six statutory aggravators advanced by the State. The trial judge sentenced Torres to death for the murders and imposed consecutive sentences of imprisonment totaling life plus 95 years on the remaining charges.

Tony Torres now appeals his death sentence to the South Carolina Supreme Court pursuant to SC Code Section 16-3-25.

ARGUMENT

I.

The trial judge committed reversible error at the sentencing phase by allowing the State to introduce excessively gruesome and unfairly prejudicial autopsy photographs of the victims in violation of Rule 403, SCRE.

The murders of Ray and Ann Emery exhibit all the indicia of rage-fueled overkill. Their killer bludgeoned them beyond recognition with a hammer and then doused the bodies in gasoline in a failed attempt to burn down the house. The attack on Ann Emery was especially savage. R. 2362 lines 3 and 4. Mrs. Emery's daughter, Crystal, demanded to view the bodies prior to the closed-casket funeral. R. 2345 line 5-7. Her last look at her mother was nightmarish:

One of her eyes was this way and her nose was all on the side of her face... and the mouth didn't even look — none of it looked real. It just looked like a kid had used Play-Doh and sort of arranged a face. But they did the best they could with what they had to work with, which was nothing. She didn't have a face. So they tried to build her one just so that I could see her. Like I say, they did the best they could.

R. 2345 line 25 - 2346 line 7.

The defense objected at sentencing under Rule 403, SCRE, when the State sought to introduce photographs of the victims at their autopsy. “[T]hey are definitely much more prejudicial than probative,” counsel argued. R. 2351 line 8 – 2352 line 9. The Solicitor responded, “There’s nothing unfair about whatever prejudice is headed his way.” R. 2352 lines 12-22. The judge excluded three photographs (State’s Exhibits 480, 495 and 551) and allowed the State to introduce eight photographs of Ray Emery (State’s Exhibits 483, 484,

488, 489, 491, 493, 549 and 550) and five of Ann Emery (State's Exhibits 485, 486, 492, 552 and 553) during the testimony of the forensic pathologist who had performed the autopsies. R. 2355 line 20- 2356 line 16. These photographs were in addition to those (State's Exhibits 448, 449, 451, 545, 455, 458, 459, 464, 465, 476 and 478) depicting the victims as they were left at the crime scene. R. 2368 line 19 - 2369 line 18.

Prior to the pathologist's testimony, the judge cautioned the spectators in the court room:

[S]ome of the photographs will be very graphic. If you do not wish to view those, now would be the appropriate time for you to leave the courtroom.

R. 2353 line 22- 2354 line 1. A forensic psychologist subsequently testified, "[I]n my 20 years in doing this work, those are the most violent crime scene pictures I've seen." R. 2593 lines 22 and 23. The photos were displayed to the jury enlarged on a screen in the darkened courtroom. R. 2356 lines 18-23; R. 2739 lines 16-21.

Rule 403, SCRE, states in part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." See, also, State v. Alexander, 303 S.C. 377, 401 S. E.2d 146 (1991). As to autopsy photos:

In determining whether to recommend a sentence of death, the jury may be permitted to see photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them. . . . The trial judge is still required to balance the prejudicial affect of the photographs against their probative value. However, in the sentencing phase, the scope of the probative value is much broader.

State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180, 186 (1986). "[N]otwithstanding the sometimes gory nature of autopsy photographs they are nonetheless admissible where they

reveal the true nature of the attack and allow the jury to determine the existence of physical torture.” State v. Haselden, 353 S.C. 190, 577 S.E.2d 445, 450 (2003), citing State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); see, also, State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003).

On the other hand, the Court has also noted that “the evaluation of the consequences of an error in the sentencing phase of capital case are more difficult because of the discretion that is given to the sentencing jury.” State v. McClure, 342 S.C. 403, 537 S.E.2d 273, 275 (2000). Autopsy photographs are unfairly prejudicial if they create “a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Franklin, 318 S.C. 47, 456 S.E.2d 357, 361 (1995).

The horrific autopsy photographs in this case were not relevant to prove any of the statutory aggravators advanced by the State. The only purpose served by the autopsy photos was to enflame the emotions of the jury.

For this reason, the Court should reverse Tony Torres’ death sentence and remand for resentencing.

II.

The trial judge committed reversible error at sentencing by allowing the State to introduce a video recording of Torres being pepper-sprayed and subdued during the “cooling off” period after he was convicted of the murders of the Emerys, as this evidence violated SC Code Section 16-3-25 (C) (1) and was unfairly prejudicial under Rule 403, SCRE.

After the jury found Torres guilty of murdering the Emerys, the defense exercised its option to wait 24 hours before the start of the sentencing phase. See SC Code Section 16-3-20 (B). Torres awaited sentencing in the Spartanburg County Detention Center. That night, officers decided to move Torres from one cell to another and instructed him to put his hands on the wall, spread his legs and step back so that they could pat him down. R. 2287 line 22 – 2288 line 13.]

One manifestation of Torres’ mental illness is that “[h]e doesn’t like people touching him, especially without permission.” R. 2578 lines 22- 24. Torres refused to follow the officers’ instructions. R. 2298 lines 6- 2299 line 2; R. 2307 line 15- 2308 line 4. An officer with a video camera was summoned to record the event. R. 2289 line 9-24. Officers then pepper-sprayed Torres in the face and placed him in handcuffs. R. 2302 lines 5-7; R. 2305 lines 15-20.

The State sought to introduce the video recording (State’s Exhibit 544) at sentencing. R. 2205 lines 8-15. The defense moved to exclude it pursuant to SC Code Section 16-3-25 (C) (1) and Rule 403, SCRE. R. 2205 line 21- 2206 line 16; R. 2275 line 17- 2276 line 3; R. 2294 line 23- 2296 line 21. “[T]hey are clearly creating evidence for use against him in court,” counsel argued. R. 2293 lines 11-15. The judge overruled counsel’s

objections and the Solicitor played the video recording for the jury. R. 2297 line 24- 2299 line 2. The detention center officer through whom it was introduced added that, in his one year on the job, this was the only time he had been forced to pepper-spray an inmate. R. 2299 lines 3-8. The Solicitor later exploited this evidence in his closing argument:

[T]he night your verdicts are rendered, the night that he begins to serve whichever of the two sentences you impose on him, you saw on videotape his character. It was a very simple request. That guard was polite. He wasn't just professional. He was polite. Tried to talk him into complying. You got to get patted down. It's the rule. And you saw Torres' reaction and this is ... the middle of this trial.

R. 2731 lines 14-21.

SC Code 16-3-25 (C) (1) prohibits death sentences “imposed under the influence of passion, prejudice, or any other arbitrary factor.” Again, Rule 403, SCRE states in part, “Although relevant, evidence may be excluded if its probative value substantially outweighed by the danger of unfair prejudice.”

Section 16-3-25 (C) (1) does not limit reversal to death sentences that are “produced by” or imposed “because of” passion or prejudice. It requires the Court to determine only whether the sentence was imposed “under the influence of” such improper factors. See, also, State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000) (previously quoted).

A capital defendant's future dangerousness and his adaptability to life in prison are always critical issues at capital sentencing. See, generally, Skipper v. South Carolina, 476 U.S. 1 (1986), and State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). This was especially the case here, where the question of Torres' culpability was for all practical purposes resolved once the judge excluded the evidence of third-party guilt. R. 1579 lines 21-24.

More importantly, the State introduced no other evidence that Torres had been dangerous or a disciplinary problem previously. As the forensic psychiatrist who had examined him explained:

[H]e'd been found guilty that night... [T]hat was a pretty significant event. He was probably more agitated than he would be on any other night.

R. 2618 lines 16-22. Even the Solicitor conceded, "That's fair. He may have been." R. 2618 lines 23-25.

Whether or not the detention center officers followed proper procedures is irrelevant. See, for example, State v. Burkhart (even accurate evidence regarding general prison conditions violates Section 16-3-25 (C) (1) when injected into a capital jury's considerations). Neither is it especially significant that the video recording (unlike the autopsy photos previously discussed) might not be viewed as unduly prejudicial when viewed in isolation. "[T]he determination of prejudice [under Rule 403] must be based on the entire record, and the result will generally turn on the facts of each case. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434, 441 (2009).

Foremost, the introduction of the video recording of the detention center incident gave that isolated occurrence undue emphasis. See State v. Gullede , 277 S.C. 368, 287 S.E.2d 488 (1982). In his closing argument, the Solicitor explicitly linked the video to the likelihood of Torres' future dangerousness and inability to adapt to prison. Viewed in context, this evidence violated S.C. Code Section 16-3-25 (C) (1) and was unfairly prejudicial under Rule 403, SCRE.

For this reason, the Court should reverse Tony Torres' death sentence and remand for resentencing.

CONCLUSION

The State's overreliance on unduly prejudicial photographs and an out-of-context video recording compromised the reliability of the death sentence returned by this jury. Pursuant to SC Code 16-3-25 (E) (2), the State has left the Court with no option other than to reverse Tony Torres' death sentence and remand for resentencing.

Respectfully submitted,

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Senior Appellate Defender

ATTORNEY FOR APPELLANT

May 20, 2010

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled “Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”

May 20, 2010

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J. McDonald, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 20th day of May, 2010.

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of May, 2010.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

