



FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
November 7, 2002 (10:03 a.m.)
By: Vicki L. Freeland

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. HOWARD HANTMAN

CASE NO. **CR-28449**

COURT REPORTER: NONE

DATE: November 7, 2002

STATE OF ARIZONA

VS.

JOSEPH RUDOLPH WOOD, III

MINUTE ENTRY

IN CHAMBERS:

The Court has reviewed the defendant's Second Petition for Post Conviction Relief and exhibits filed August 2, 2002, the State's Responses, Defendant's Reply, and all supporting memoranda.

THE COURT FINDS as follows:

1. Petitioner claims that Ring v. Arizona, 122 S. Ct. 2428 (2002), should apply retroactively to this case, which would render the petitioner eligible for the death penalty only after a jury finds the aggravating factors beyond a reasonable doubt. However, this change of law does not apply retroactively to cases that are final, State v. Sepulveda, 201 Ariz. 158, 32 P.3d 1085 (2001). A case is final if the conviction is affirmed upon appellate review and the time for seeking certiorari has expired, State v. Dalglish, 183 Ariz. 188, 901 P.2d 1218 (App. 1995). Since Defendant's conviction was affirmed and his petition for certiorari was denied in 1995, this case is final. As such, Defendant is not entitled to relief on this basis.

2. Petitioner further claims that the prosecution engaged in misconduct by eliciting perjured testimony and using "false" evidence during closing argument. First, Petitioner argues that the prosecution elicited perjured testimony from Officer Sueme since she testified that she "never did open the cylinder," R.T. 2/21/91 at 13. The defendant claims that this contradicts her earlier statement to Mr. Gellman that she *started* to remove the bullets from the gun, Defense Exhibit I. The ambiguity of the word, "started," however, precludes a finding that Officer Sueme tampered with the gun. While the

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defense was entitled to argue this deduction, Officer Sueme's testimony did not constitute false evidence. Secondly, the petitioner contends that the prosecution engaged in misconduct when it argued in closing that the defendant "cocked and uncocked" his gun, thereby illustrating the premeditation element of first degree murder. The prosecution is permitted to make any logical inference from the facts during closing argument, State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. 2002). As this argument is not illogical or unreasonable, the prosecution did not engage in misconduct. Alternatively, as no fundamental error occurred, and the defendant failed to object to the presentation of Officer Sueme's testimony or to the prosecution's statements during closing argument, he has waived these arguments; and they are, thus, precluded under Rule 32.2(3). Because the evidence was available to the defendant at trial, the evidence is not "newly discovered" within the meaning of Rule 32.1

For the foregoing reasons,

IT IS ORDERED that the Petition for Post Conviction Relief is DISMISSED.

IT IS FURTHER ORDERED vacating the EVIDENTIARY HEARING RE: RULE 32

PETITION currently set on November 12, 2002.



HON. HOWARD HANTMAN

cc: Hon. Howard Hantman
Criminal Calendaring
Attorney General - Ferg - Tucson
Attorney General - Tucson
Peter Eckerstrom, Esq.
Clerk of Court - Appeals

B

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: Thomas Creehan MAR 31

AS 24 CASE NO. CR-28449

Court Reporter: Mike Haley

DATE March 23, 1992

State of Arizona ()

Dennis Lusk for
Tom Zawada

vs. ()

Joseph Rudolph Wood III

Barry Baker Sipe

EVENT SUMMARY					
Type:			Result:		
Date:	Time:	Length:	Div:	Req:	
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MINUTE ENTRY

Status Conference and Motion to Withdraw As
Counsel

Defendant not present.

It is Ordered that the Legal Defender's
Office deliver to the Court the file of
deceased, Debra E. Dietz; the Court will make
an en camera inspection. Pursuant to
Mr. Baker Sipe's request, the Court will either
divulge exculpatory or mitigating material
or the file will be sealed and made a part
of the Court's record.

The defendant withdraws the request
for appointment of co-counsel, request

Sharon Coil

Deputy Clerk

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for additional fees with regard to a
lawyer as an expert witness and
funds for photocopying -

cc: County Attorney - Sawada
Barry Baker Lyles Esq.
Appeals (has file)
Court of Appeals, Division Two
Legal Defender
Hon. Thomas Meekins

Suzanne Coil
Deputy Clerk

C

ARGUMENT TWO

THE CONVICTION AND EXECUTION OF DEFENDANT WITHOUT A JURY HEARING DEFENSES BASED UPON DR. BRESLOW'S TESTIMONY VIOLATES DEFENDANT'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS

On July 11, 1991, a month before Defendant was sentenced, defense counsel moved for the appointment of Dr. Breslow, a psychiatrist and a chemical dependency expert, for purposes of evaluation and possible testimony at sentencing (R.O.A., item 136), which motion was granted on July 13, 1991 (R.O.A., item 139).

By letter dated July 20, 1991, defense counsel stated to the prosecutor the circumstances which led defense counsel to seek Dr. Breslow's appointment:

When I attended a death penalty seminar in Phoenix the first part of May, I bacame [sic] aware for the first time of the use of a chemical dependence expert to assist in presenting mitigating evidence at sentencing . . .

(R.O.A., item 141, p.474).

Dr. Breslow's testimony at the sentencing hearing is contained in that transcript. (R.T. 7/12/91, pp.5-23).

Dr. Breslow's diagnosis of Defendant as having Narcissistic Personality Disorder leads one to the DSM - III - R of the American Psychiatric Association (1987). The features of this personality disorder, impairment, complications and criteria are discussed. Id., §301.81, at 349-351. The trial testimonies of the deceaseds'

family and their remarks in the presentence report should be compared with the following, side by side, in judging Defendant:

* * * *

The essential feature of this disorder is a pervasive pattern of grandiosity (in fantasy or behavior), hypersensitivity to the evaluation of others, and lack of empathy that begins by early adulthood and is present in a variety of contexts.

* * * *

Self-esteem is almost invariably very fragile; the person may be preoccupied with how well he or she is doing and how well he or she is regarded by others. This often takes the form of an almost exhibitionistic need for constant attention and admiration. The person may constantly fish for compliments often with great charm. In response to criticism, he or she may react with rage, shame, or humiliation, but mask these feelings with an aura of cool indifference.

Interpersonal relationships are invariably disturbed. A lack of empathy (inability to recognize and experience how others feel) is common . . . A sense of entitlement, an unreasonable expectation of especially favorable treatment, is usually present. . . Interpersonal exploitativeness, in which others are taken advantage of in order to achieve one's ends, or for self-aggrandizement, is common. Friendships are often made only after the person considers how he or she can profit from them. In romantic relationships, the partner is often treated as an object to be used to bolster the person's self-esteem.

* * * *

Depressed mood is extremely common . . .

* * * *

Impairment. Some impairment in interpersonal relations is inevitable. Occupational functioning may be impeded by depressed mood, interpersonal difficulties, or the pursuit of unrealistic goals . . .

* * * *

Complications. Dysthymia and psychotic disorders such as Brief Reactive Psychosis are possible complications. Major Depression can occur as the person approaches middle age and becomes distressed by awareness of the physical and occupational limitations that become apparent at this stage of life.

Prevalence. This disorder appears to be more common recently than in the past, but this may be due only to more professional interest in it.

* * * *

Discussion of the referenced psychotic disorder of Brief Reactive Psychosis appears at \$298.80, pp. 205-207. "Psychotic" behavior, insane behavior, may result. Id., pp. 205, 404. People with a personality disorder may, under stress, develop Brief Reactive Psychosis, in which case, both diagnoses should be made. Id., p. 206. In rendering a verdict as to Defendant's behavior on the charges in the indictment, the trial testimonies of the witnesses, civilian and law enforcement, should be compared, side by side, with the following:

* * * *

The essential feature of this disorder is sudden onset of psychotic symptoms of at least a few hours', but no more than one month's, duration, with eventual full return to premorbid level of functioning. The psychotic symptoms appear shortly after one or more events that, singly or together, would be

markedly stressful to almost anyone in similar circumstances in that person's culture. The precipitating event(s) may be any major stress, such as the loss of a loved one or the psychological trauma of combat. Invariably there is emotional turmoil, manifested by rapid shifts from one intense affect to another, or overwhelming perplexity or confusion, which the person may acknowledge or which can be judged from the way he or she responds to questions and requests.

To avoid misdiagnosis when a more pervasive disorder is actually involved, Brief Reactive Psychosis should not be diagnosed if any of the prodromal symptoms of Schizophrenia were present before onset of the disturbance or if the person had Schizotypal Personality Disorder. In addition, the diagnosis is not made if the disturbance is due to a psychotic Mood Disorder or if an organic factor initiated and maintained the disturbance.

Associated features. Behavior may be bizarre and may include peculiar postures, outlandish dress, screaming, or muteness. Suicidal or aggressive behavior may also be present. Speech may include inarticulate gibberish or repetition of nonsensical phrases. Affect is often inappropriate. Transient hallucinations or delusions are common. Silly or obviously confabulated answers may be given to factual questions. Disorientation and impairment in recent memory often occur.

* * * *

Impairment. Supervision may be required to ensure that nutritional and hygienic needs are met and that the person is protected from the consequences of poor judgment, cognitive impairment, or acting on the basis of delusions.

Predisposing factors. Preexisting psychopathology may predispose to the development of this disorder. People with Paranoid, Histrionic, Narcissistic, Schizotypal, or Borderline Personality Disorder are thought to be particularly vulnerable to its development. By definition,

situations involving major stress predispose to development of this disorder.

* * * *

The record in this case indicates Defendant had a viable insanity defense, which he should be permitted to present to a jury.

Defense counsel should have made such a motion. Why did he not do so?

Is this not, by definition, fundamental error?

Is this not, by definition, a denial of fundamental due process, whenever discovered? See, Mooney v. Holohan, 294 U.S. 103 (1935).

Defendant should be granted a new trial.

Defendant should receive a jury determination of his defenses of insanity, impulsivity, involuntary intoxication and voluntary intoxication based upon Dr. Breslow's testimony and findings.

See, People v. Frierson, 39 Cal.3d 803, 218 Cal.Rptr. 73, 705 P.2d 396 (1985) (defense counsel's failure to raise a diminished capacity defense at trial, although he did present it without success at sentencing, constitutes ineffective assistance of counsel in capital case).