IN THE SUPREME COURT OF FLORIDA

RICHARD WALLACE RHODES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 67,842

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

SUPPI BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

This brief addresses the United States Supreme Court's recent decision in Booth v. Maryland, and the impact it has on the instant case.

The Court in Booth held it unconstitutional for a jury to consider victim impact statements at the sentencing phase of a capital murder trial. Neither the Adduchio tape nor the prosecutor's statements fall within this category.

First, with regard to the Adduchio tape, this tape did not focus on the character and reputation of the victim. The tape was introduced to show the defendant's personal responsibility and moral guilt. The evidence focused on the character of the individual defendant and the circumstances of the crime.

Likewise, the prosecutor's comments described the circumstances of the crime and the character of the defendant not the victim.

Appellant also asserts that his constitutional rights were violated by the state's introduction at the sentencing hearing of VIS made by the aunt and mother of the victim. Initially, your appellee would submit that this claim is procedurally barred as appellant did not object to admission of the testimony of the victim's family.

Additionally, Booth is distinguishable on the merits from the instant case.

In Florida, unlike Maryland, it is not the jury who ultimately imposes the death penalty, and in this case, it was

not the jury who heard the potentially damaging information. For Booth to control this case the Court would have to assume there is no difference in the risk that a jury might act arbitrarily and capriciously and the risk that a judge will act arbitrarily and capriciously. This, according to Florida law, is not an acceptable assumption since the judge is presumed to follow the law and there is no indication this judge deviated from the strictures of the law.

Not only is the judge presumed to follow the law, there is no indication in this case that the trial judge departed from the requirements of law.

Should this Court decide that there was error, this Court may, on the record before it, constitutionally reweigh the aggravating and mitigating circumstances and make a determination in this case that death is the proper sentence.

While Booth does not address the propriety of an harmless error analysis, it clearly does not prevent such analysis. Even if the mere hearing of the VIS testimony by the judge is thought to be unconstitutionally risky, it is well established that even constitutional errors can be harmless. See, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and progeny.

Accordingly, the State suggests that, on the record before it, this Honorable Cour should find that error, if any, was harmless. Tompkins v. State, 502 So.2d 415 (Fla. 1987).

ISSUE XII-A

HOW THE UNITED STATES SUPREME COURT'S DECISION IN BOOTH V. MARYLAND, INFRA, IMPACTS ON THE PENALTY PHASE OF RICHARD RHODES' TRIAL.

Appellant is challenging the admission of the taped statement of Rhodes' previous victim (Ms. Adduchio) and statements made by the prosecutor during argument. He now claims reversible error based on the United States Supreme Court's recent decision in Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. ___ (1987).

While the holding in Booth is discussed at length in Issue XVI of this Supplemental Brief, it is important to note here that the Court held it unconstitutional for a jury to consider victim impact statements at the sentencing phase of a capital murder trial. Neither the Adduchio tape nor the prosecutor's statements fall within this category.

First, with regard to the Adduchio tape, this tape did not focus on the character and reputation of the victim. The tape was introduced to show the defendant's personal responsibility and moral guilt. The evidence focused on the character of the individual defendant and the circumstances of the crime.

Likewise, the prosecutor's comments described the circumstances of the crime and the character of the defendant not the victim.

The Court in Booth allows the admission of this type of evidence. Booth only prohibits the admission of victim impact

statements that attempt to define the culpability of a capital defendant n terms of the good character of his victim or the anguish suffered by the community or next of kin. Neither the tape nor the prosecutor's statements are the type of evidence that Booth prohibits. Booth at 448.

There was no error committed here and reversal is not warranted.

ISSUE XVI

HOW THE UNITED STATES SUPREME COURT'S DECISION IN BOOTH V. MARYLAND, INFRA, IMPACTS ON THE SENTENCING OF RICHARD RHODES.

Richard Rhodes was adjudicated guilty of murdering Karen Nieradka. The penalty phase of the trial was conducted and the jury recommended Rhodes be sentenced to death. After the jury had made their recommendation, members of Ms. Nieradka's family testified before the judge as to the impact of the victim's death on them. The judge subsequently sentenced Rhodes to death.

An appeal was taken to this Court and briefs filed. Prior to argument the United States Supreme Court issued its opinion in Booth v. Maryland, supra.

In Booth v. Maryland, the Court held that is was reversible error to present evidence of the impact of the murder on family members to a sentencing jury. This brief will address any impact of Booth on the case sub judice, including the applicability of harmless error analysis.

The Court in Booth found that the victim impact statement (VIS) was irrelevant to a capital sentencing decision and that its admission created a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. Booth, however, does not require reversal of Rhodes' sentence.

Appellant asserts that his constitutional rights were violated by the state's introduction at the sentencing hearing of VIS made by the aunt and mother of the victim. Initially, your

appellee would submit that this claim is procedurally barred as appellant did not object to admission of the testimony of the victim's family. In Booth, defense counsel objected and the prosecution agreed to limit the evidence to the reading of the statement instead of presenting live testimony. The absence of an objection waives this issue for appellate review. See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982) and Rule 90.104, Fla. Evid. Code.

Appellant attempts to excuse his failure to object to the admission of the statements because 5921.143 (1), Fla. Stat., allows the victim or the next of kin to make a statement at the sentencing hearing. What counsel fails to point out is that the statute limits the content of the statements to facts that relate solely to the facts of the case and the extent of any harm resulting from the crime. §921.143(2). Conversely, under Maryland law, evidence of community status and character of the victim are admissible. Booth v. Maryland, 96 L.Ed.2d at 451 n.9. Nevertheless, counsel in Booth objected. Accordingly, if Rhodes' counsel had felt that the VIS were prejudicial an objection would have been proper under 5921.143 (1). Therefore, as Rhodes failed to make a contemporaneous object he is not entitled to reversal of his sentence on this point.

Additionally, Booth is distinguishable on the merits from the instant case.

In Florida, unlike Maryland, it is not the jury who ultimately imposes the death penalty, and in this case, it was

not the jury who heard the potentially damaging information. For Booth to control this case the Court would have to assume there is no difference in the risk that a jury might act arbitrarily and capriciously and the risk that a judge will act arbitrarily and capriciously. This, according to Florida law, is not an acceptable assumption since the judge is presumed to follow the law and there is no indication this judge deviated from the strictures of the law.

The trial judge is presumed to know and follow the law. Section 921.141, Fla. Stat. exhorts the judge to make his decision, following the jury's recommendation, by weighing the aggravating and mitigating circumstances. It is well established that the trial judge can only consider the statutorily established aggravating circumstances. See, Elledge v. State, 346 So.2d 998 (Fla. 1977), appeal after remand, 408 So.2d 1021, cert. denied, 459 U.S. 981, 103 S.Ct. 316, 74 L.Ed.2d 293, rehearing denied, 459 U.S. 1137, 103 S.Ct. 771, 74 L.Ed.2d 984.

Not only is the judge presumed to follow the law, there is no indication in this case that the trial judge departed from the requirements of law. The fact that she heard the VIS testimony does not require a finding that she relied upon it in her sentencing decision. To the contrary, the judge's colloquy and written order indicate that she weighed only the appropriate factors. The record shows that Judge Hansel announced her decision within minutes of hearing the VIS. (R.2957-59) Judge Hansel's oral pronouncement was detailed, evidencing that she had

reflected on the decision prior to sentencing.

Because there is no evidence that Judge Hansel relied on the victim impact statement, the penalty should not be disturbed on appeal. This Court has in the past refused to assume the judge had relied on non-statutory aggravating factors when she enumerated the aggravating circumstances and the evidence supporting those factors. See, Rose v. State, 472 So.2d 1155 (Fla. 1985), and should do so in this case.

Should this Court decide that there was error, this Court may, on the record before it, constitutionally reweigh the aggravating and mitigating circumstances and make a determination in this case that death is the proper sentence. Although this Court has expressed an unwillingness to engage in an independent evaluation and reweighing of the aggravating and mitigating circumstances, see, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), this Court has in effect done so, and upheld a death sentence upon that basis. Goode v. State, 365 So.2d 381 (Fla. 1978). The United States Supreme Court later sanctioned the independent reweighing of the aggravating and mitigating circumstances by the Florida Supreme Court in Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1985). Even when the VIS information is excised from consideration, death is clearly the required sentence.

While Booth does not address the propriety of an harmless error analysis, it clearly does not prevent such analysis. Even if the mere hearing of the VIS testimony by the judge is thought

to be unconstitutionally risky, it is well established that even constitutional errors can be harmless. See, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and progeny.

The trial court in the instant case found five aggravating factors. In mitigation the court found some evidence of a long term personality disorder, but found that Rhodes had the capacity to appreciate the criminality of his conduct. (R.2960, 2986) There can be no reasonable possibility that the mere hearing of the VIS affected the sentence in this case. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Accordingly, the State suggests that, on the record before it, this Honorable Cour should find that error, if any, was harmless. Tompkins v. State, 502 So.2d 415 (Fla. 1987).

CONCLUSION

Based on the foregoing arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, P. O. Box 1640, Bartow, Florida 33830-3798, this 21 day of September, 1987.

OF COUNSEL FOR APPELLEE