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OK. COURT OF CRIMINAL APPEALS

Court hears multiple mental retardation death penalty cases with varying results

In 2002, the United States Supreme Court held in the case of *Atkins v. Virginia* that execution of mentally retarded persons was unconstitutional. In that decision, the U.S. Supreme Court left it up to the States to determine the standard by which mental retardation would be established for capital punishment purposes. Since that time, the state courts have struggled with that task.

In 2002, in the case of *Murphy v. State,* the Oklahoma Court of Criminal Appeals held that a person was "mentally retarded" for purposes of determining whether they could be executed for a capital crime by showing that the defendant had an IQ test result at or below the score of 70 and by proving by a preponderance of the

evidence three things :

(1) (s)he functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reaction of others;

(2) the mental retardation manifested itself before the age of eighteen; and

(3) the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self care; social/interpersonal skills; home living; self-direction, academics; health and safety; use of community resources; and work.

The Court of Criminal Appeals recently decided no less than six cases involving defendants given the death penalty, but claiming they could not be executed pursuant to the *Atkins* and *Murphy* decisions because they were mentally retarded. A review of these cases, the reasoning used by the Court in each of them, and the final results reveals that the Court continues to struggle with properly determining whether a capital defendant is mentally retarded for capital punishment purposes.

Hooks v. State, 2005 OK CR 23, Decided 12/07/2005

Victor Wayne Hooks was convicted of First Degree Murder, and was sentenced to death. Hooks petitioned for and was granted post-conviction relief in the form of a jury hearing to determine the issue of mental retardation. That jury hearing was held in June, 2004. The jury concluded unanimously that the defendant was not mentally retarded.

Hooks appealed that decision. The Court of Criminal Appeals had previously held that it would not overturn the jury verdict in such matters if there is any competent evidence reasonably tending to support it. The Court reviews the evidence in the light most favorable to the State to determine if any rational trier of fact could have reached the same conclusion.

In reviewing the jury decision, the Court noted the evidence showed that Hooks had IQ tests scores ranging from 80 to 53. The experts at trial all agreed that the score of 53 (taken specifically for the jury hearing) probably did not reflect his true intellectual ability. The experts agreed that the range of scores put the defendant in the "gray area" of mental retardation and that the most reliable scores were those showing results of 72 and 76. The Court stated in Hooks' case that he must first demonstrate to the court that he had an IQ test with a score at or under 70. Though he did that, given the testimony heard by the jury, the Court found that it was not unreasonable for jurors to determine that the most reliable IQ evidence offered did not fall within the first test of the *Murphy* definition of mental retardation, functioning at a significantly sub-average intellectual level. The Court also noted that there was substantial conflicting evidence regarding the third prong of the *Murphy* test, significant limitations in adaptive functioning in at least two of the nine skill areas.

Consequently, the Court held that a rational trier of fact could have found that the defendant failed to meet his burden of proving by a preponderance of the evidence that he was mentally retarded. His death sentence was affirmed by the Court of Criminal Appeals.

Myers v. State, 2005 OK CR 22, Decided 11/17/05 as corrected 12/07/05

The Court of Criminal Appeals likewise affirmed the death sentence of Karl Lee Myers. During his jury hearing on the issue of mental retardation, there was substantial evidence presented that he did not meet the standards set forth in *Murphy.*

Myers' IQ scores ranged from a low of 66 to a high of 77. The only full-scale IQ tests he had with a score below 70 occurred once in 1957 and twice in preparation for the litigation on his mental retardation claim. The evidence also indicated that he had a regular job as a truck driver, passed the test for a commercial driver's license. He had a number of jobs requiring critical reasoning, classroom training, proficiency training, and passing of written tests. He lived by himself and

was able to maintain his home and take care of himself and his animals. He assisted with the care of his wife as she was dying of cancer. In doing so, he was able to follow directions and retrieve and provide needed medication and supplies. He handled his own financial affairs including refinancing his property. Myers was able to effectively communicate with others.

The Court found that Myers had failed to prove by a preponderance of the evidence that he operated at a significantly sub-intellectual level or that he had any problems with any of the nine adaptive skills. Consequently, his death sentence was affirmed.

Pikens v. State, 2005 OK CR 27, Decided 12/07/05

Darrin Lynn Pickens was convicted of First Degree Murder, while in the commission of a Robbery with a Dangerous Weapon. He was sentenced to death for that crime. Through various appeals and Petitions for Post-Conviction Relief, he was given a jury hearing on the issue of his claimed mental retardation

Pickens had been administered four intelligence tests between 1973 and 1990 with scores ranging from 70 to 79. Other evidence was present on behalf of Pickens alleged mental retardation. Evidence from school teachers, administrators, and staff reflected that he was enrolled in the "educable mentally handicapped" classes throughout school and consistently functioned at a below average intellectual level of about third to fifth grade level in verbal skills and sixth to eighth grade level in math skills. Evidence was presented that he had trouble learning how to tie his shoes, dress himself, brush his teeth, and otherwise take care of his other hygiene needs well beyond the age such actions are normally learned. The defendant's attorneys also presented evidence that he suffered deficits in the area of social judgement and planning ability, social skills, and social judgment.

In addition to the IQ scores from 70 to 79, the State presented evidence to contradict Pickens' claim of mental retardation: his developmental age on certain tests were within average limits; he showed signs of marked improvement in literacy and math when taught; he could fill out medical services forms detailing his medical needs; he wrote letters which used advanced words and language and demonstrated the ability to articulate numerous arcane and complicated ideas, memories, and feelings; he was able to plan out detailed lies, witnesses spoke with him and found him to be intelligent and capable; he dressed neatly, and other evidence.

Despite the conflicting evidence, the Court of Criminal Appeals held that no rational trier of fact could have found that Pickens was not mentally retarded. It held that the evidence so clearly established his mental retardation that remanding for a new jury trial on mental retardation would be a waste of time and resources. The court vacated Pickens' death sentence and modified it to life imprisonment without the possibility of parol.

Vice Presiding Judge Lumpkin questioned the Court's decision in an angry dissent. He noted that four different juries (when he was originally tried for first-degree murder and sentenced to death in a different case, in his first murder conviction on the case before the Court, on a retrial of the case, and as a result of his Petition for Post-Conviction Relief) had heard his claims of mental retardation and had all found them lacking in merit. Despite that fact, the Court of Criminal Appeals had found that no rational trier of fact could have decided that Perkins did not show by a preponderance of the evidence that he was mentally retarded.

After again detailing the evidence against a finding of mental retardation, he stated, "The crucial point is this: the evidence of mental retardation was sharply conflicting. As such, the jury's decision must stand. This Court has no business substituting what 'we would do' for what twelve competent jurors did." In a final parting shot in his notes, he wrote 'According to Webster's dictionary a "rational trier of fact" [the standard the Court was to use in reviewing the jury's decision] would mean a juror who has the ability to reason. I see nothing in the record to indicate the jurors in question here were even more mentally

retarded than Appellant claims to be."

Lambert v. State, 2005 OK CR 26, Decided 12/07/2005

Robert Wayne Lambert was tried by jury, convicted of two counts of first degree murder, and received two death sentences. As a result of a Petition for Post-conviction Relief, he was granted a new jury hearing on the issue of his alleged mental retardation. The jury heard the evidence and found that he was not mentally retarded.

In one of his previous trials, Lambert claimed he was mentally retarded. The State did not contest his claim at that time. In fact, the State argued that his mental retardation supported a death sentence because he was unable to learn from his crimes and would continue to pose a danger to society.

Evidence presented at trial revealed all six tests he had taken in his life reflected a score under 70. The expert for the state testified that his scores were all as a result of malingering and that he been malingering since his childhood in an effort to be thought mentally retarded.

Cellmates, former teachers, jailers, and family members testified about their difficulty in dealing and communicating with the defendant. Some of the same witnesses testified to a lack of impulse control and apparent inability to understand thought processes or feelings along with an inability to learn from experience or understand logical consequences. Finally, Lambert presented evidence of significant limitations in adaptive functioning in four skill areas: health and safety, academics, communication, and social and interpersonal skills.

Prosecutors representing the state admitted his limitations in academics, health and safety, and social and interpersonal skills, but offered alternative explanations for the cause of these limitations. The Court held that an alternative cause (other than mental retardation) of the agreed conditions did not alter or negate the fact that the conditions existed and was not directly relevant to whether the defendant was mentally retarded for purposes of determining whether he could be given the death penalty.

In addition to challenging the validity of the IQ tests, the State also presented evidence that he could understand and process information, communicate, learn from experiences, engage in logical reasoning, control impulses and understand the reactions of others.

Again, despite the conflicting evidence regarding the mental retardation of the defendant, the Court of Criminal Appeals again held that no rational trier of facts could have found that Pickens did not meet the standard for mental retardation set forth in the *Murphy* case. They overturned the death penalty sentence and modified it to life without possibility of parole.

Judge Lumpkin again dissented, arguing that in cases where the evidence is conflicting on the various parts of the *Murphy* standards, the jury's decision should stand.

Salazar v. State, 2005 OK Cr 24, Decided 12/07/04

In what had become a familiar refrain, the Court of Criminal Appeals overturned a death sentence and modified it to a sentence of life without possibility of parole. The basis and cause of this sentence modification, however, was different.

Maximo Lee Salazar was convicted of First Degree Murder and the punishment was set at death. As a result of a Petition for Post-Conviction Relief, he received a jury hearing on the issue of his claim of mental retardation. It was held, and the jury found him not mentally retarded.

The Court of Criminal Appeals held that the expert for the prosecution provided misleading testimony about his own testing and that of a defense expert. At the hearing, the expert for the prosecution testified that all the test results of IQ obtained by the psychologists testifying for the defendant were invalid or unreliable. He testified that they were unreliable because they utilized non-standardized tests to determine whether the defendant was malingering. He stated that he (the state expert) would not have administered a non-standardized test.

The attorneys for the defendant claimed they discovered new evidence after the hearing that

proved the state expert had, in fact, used a non-standardized malingering test in his evaluation of the defendant. During his evaluation of Salazar, the expert for the prosecution used an otherwise standard malingering test, but named it after his secretary in an attempt to disguise the nature of the test. The trial judge found that this use of an "administrative pseudonym" was not newly discovered evidence, was acceptable, and would have had little or no effect on the experts overall testimony and credibility.

The Court of Criminal Appeals disagreed. It held that this evidence of the state expert renaming the otherwise standardized test would have greatly affected his credibility and the statements he made which discredited the defense experts. The Court decided not to remand the case for a new hearing with a new jury in order to determine the actual effect of that allegedly misleading testimony. The Court instead, reversed the jury's verdict on mental retardation, vacated the death sentence and modified it to life imprisonment without the possibility of parole.

In his dissent, Judge Lumpkin called this reasoning a "red herring". He argued that the use of the "administrative pseudonym" did not render the test non-standard, that such action was appropriate, that the evidence was admissible, and that the decision finding no mental retardation should be upheld.

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One twelfth of mineral interest doesn't equal "Indian country" for criminal jurisdiction

Murphy v. State, 2005 OK CR 25, Decided 12/07/2005

Patrick Dwayne Murphy was convicted of First Degree Murder in McIntosh County and sentenced to death. Murphy raised a jurisdictional issue for the first time in a Petition for Post-Conviction Relief. He claimed that the crime occurred in Indian country. Since both he and the victim were Indians, jurisdiction would be exclusively federal under 18 U.S.C. §1153 and the state court proceedings would be void if he was correct.

18 U.S.C. §1151 has three categories of Indian country: Indian reservations; dependent Indian communities and Indian allotments, Murphy claimed that the property was primarily an Indian allotment, although he also argued that the area was part of a Creek reservation and a dependent Indian community.

The State argued the crime occurred on a county road owned by the State of Oklahoma, a road that was never made a part of an Indian allotment and that is currently maintained by McIntosh County. Alternatively, the State argued that if the title to the road was part of a former Creek Nation allotment, the Indian title had been extinguished by conveyances from Creek allottees to non-Indians.

The defendant, however, claimed the county road was an easement or right-of-way and that title to the land was owned by a Creek allottee, not the state. The surface rights had been conveyed away to non-Indians (thereby extinguishing any status as an Indian allotment), but the original allottee's heirs maintained a small (1/12) mineral interest. Murphy therefore claimed the Indian title to the property had not been completely extinguished as required by federal statute, and for that reason the whole tract remained Indian country.

After reviewing the record of the trial court hearing, witness testimony, treaty language, and relevant cases, the Court of Criminal Appeals found that the land in question where the murder occurred was in the nature of an easement or right-of way. Thus the Court determined that the land was, in fact, part of the original allotment to the Creek Indian Nation. Once this was determined, the question before the court became whether the one twelfth of the mineral interest that remained with the Indian heirs of the original Indian allottee was sufficient to qualify the property as an Indian allotment, the Indian title to which has not been extinguished. If it did, proper jurisdiction was with Federal authorities. If it did not, the original conviction was decided in the proper jurisdiction.

The Court of Criminal Appeals held that a fractional interest in an unobservable mineral interest was insufficient contact with the site of the crime in question to deprive the State of Oklahoma of criminal jurisdiction. The Court stated that to allow this unobservable fractional interest to control the enforcement of laws on the surface of the landwould create a checkerboard of alternating state and federal jurisdiction that would unduly burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches. It also noted that common sense tells us that the issue of criminal jurisdiction has more to do with surface rights than underground minerals, since it is virtually impossible to commit a crime against a person within a mineral interest sub-surface strata.

Consequently, the Court rejected the defendant's jurisdictional claim. The Court did, however, remand Murphy's case back to the District Court of McIntosh County for a jury trial on his mental retardation claim.

Defendant can't force "all or nothing" strategy on Court

McHam v. State, 2005 OK CR 28, Decided 12/14/05

Ray Dean McHam was charged with First Degree Murder for killing Johnny McElwee. The prosecutor argued that the defendant had killed the victim because he believed that the McElwee had stolen his wallet earlier in the evening. McHam made a claim of self defense. He claimed that he killed the victim with while attempting to get away after the victim made sexual advance on him and followed up by attacking him with a knife. The victim suffered thirteen stab wounds, some of which were not life-threatening. Toxicology reports showed a high degree of alcohol, and a detectable amount of methamphetamine in the victim's body. The furniture where the stabbing occurred was in disarray, and there were traces of blood throughout the apartment.

At the close of the evidence, the trial court indicated that it also intended to instruct the jury on the lesser related offense of First Degree "Heat of Passion" Manslaughter. This instruction was not requested by the prosecution and the defendant objected to its inclusion because he wanted to proceed with an "all or nothing" strategy wherein lesser included offenses would not be available for the jury to consider. The additional jury instructions were given, and the defendant was convicted of the lesser included offense. He appealed based upon the trial court not allowing him to proceed with his "all or nothing" strategy.

The Court of Criminal Appeals held that the trial court was not bound by any "all or nothing" strategy that a defendant might adopt and could order, on its own initiative, jury instructions on any lesser related offense it believed to be supported by the evidence without regard to any request from the prosecution and over any objection of the defense as long as it did not unfairly surprise the defendant.