

FILED

January 5, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

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5 STATE OF TENNESSEE, (

6 (

7 Appellee, (

8 (Shelby Criminal

9 (

10 v. (Hon. Joseph B. McCartie,

11 (Judge

12 (

13 MICHAEL JOE BOYD, (No. 02S01-9611-CR-00102

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15 Appellant. (

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DISSENTING OPINION

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22 I dissent from the majority's holding that the jury's

23 consideration of the invalid aggravating circumstance was

24 harmless error. Though "not every imperfection in the

25 deliberative process is sufficient, even in a capital case, to

26 set aside a . . . judgment, the severity of the sentence mandates

27 careful scrutiny in the review of any colorable claim of error."

28 Zant v. Stephens, 462 U.S. 862, 886, 103 S. Ct. 2733, 2747

29 (1983).

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31 The facts of this case show that the victim was on his

32 way to a motel room with the defendant's girlfriend when he was

33 shot by the defendant. The evidence specifically showed that the

34 victim and David Hippen drove in a van into downtown Memphis to

35 find a motel room and solicit female companionship. At Raiford's

36 Lounge, two women, Barbara Lee and Renita Tate, agreed to

37 accompany them and got into the van. Lee had been at the lounge

1 with the defendant who was her boyfriend, and with two other men,
2 Bruce Wright and Terry Yarber. The two women, the victim and
3 Hippen then drove to the parking lot of the Lorraine Motel where
4 the victim "started to give one of the women a \$100 bill to rent
5 two rooms." State v. Boyd, 797 S.W.2d 589, 592 (Tenn. 1990),
6 cert. denied, 498 U.S. 1074, 111 S. Ct. 800 (1991). While it was
7 being discussed who would go in to rent the rooms, Wright,
8 Yarber, and the defendant drove up and parked next to the van.
9 The circumstances of the murder are described in the opinion on
10 the direct appeal of this case as follows:

11
12 Defendant stepped into the van on the
13 passenger side behind the driver's and
14 passenger's seats. He then pointed a pistol
15 toward Hippen's face and said, "I want your
16 money or I'm going to kill you." He snatched
17 the \$100 bill from [the victim's] hand.
18 Hippen gave defendant his wallet, which
19 contained \$30.

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21 As defendant leaned over Hippen, [the
22 victim] grabbed his arm and shoved it onto
23 the console. Defendant fired a shot and the
24 three men began to struggle over the gun. As
25 the victim started the van and tried to drive
26 away, the defendant "emptied" his gun at him.
27 Injured, [the victim] fell from the van ...
28 [and died].

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32 Id. The defendant was charged with felony murder, and a sentence
33 of death was sought based on the aggravating factors of creating
34 a risk of death to persons other than the victim, killing during
35 the perpetration of a felony, and having a prior conviction for a
36 violent felony. The jury rejected the danger of risking death to
37 others as an aggravating factor and based the sentence of death
38 on felony murder and the conviction of a prior violent felony.

1 In State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992),
2 cert. dismissed, 510 U.S. 124, 114 S. Ct. 48 (1993), the Court
3 found the use of felony murder as an aggravator when the
4 conviction is based on felony murder, unconstitutional:
5

6 We have determined that in light of the
7 broad definition of felony murder and the
8 duplicating language of the felony murder
9 aggravating circumstance, no narrowing occurs
10 under Tennessee's first-degree murder
11 statute. We hold that, when the defendant is
12 convicted of first-degree murder solely on
13 the basis of felony murder, the aggravating
14 circumstance set out in Tenn. Code Ann. §§
15 39-2-203(i)(7) (1982) and 39-13-204(i)(7)
16 (1991), does not narrow the class of death-
17 eligible murderers sufficiently under the
18 Eighth Amendment to the U.S. Constitution,
19 and Article I, § 16 of the Tennessee
20 Constitution because it duplicates the
21 elements of the offense. As a result, we
22 conclude that Tenn. Code Ann. § 39-2-
23 203(i)(7) is unconstitutionally applied under
24 the Eighth Amendment to the U.S. Constitution
25 and Article I, § 16 of the Tennessee
26 Constitution where the death penalty is
27 imposed for felony murder.
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30 Id. at 346. All agree that in this case, the jury's use of
31 felony murder as an aggravating factor was a violation of the
32 Eighth Amendment to the United States Constitution and Article I,
33 Section 16 of the Tennessee Constitution. Nonetheless, the
34 majority affirms the sentence of death on the finding that
35 "beyond a reasonable doubt that the verdict would have been the
36 same had the jury given no weight to the invalid aggravating
37 factor." Majority Opinion at _____. [Slip op. at 9.]
38

39 The United States Supreme Court has held that "in a

1 weighing State infection of the process with an invalid
2 aggravating factor might require invalidation of the death
3 sentence." Stringer v. Black, 503 U.S. 222, 231, 112 S. Ct.
4 1130, 1136 (1992). It has also held that "under such
5 circumstances a state appellate court could reweigh the
6 aggravating and mitigating circumstances or undertake harmless-
7 error analysis" as long as the death sentence is not affirmed
8 "without a thorough analysis of the role an invalid aggravating
9 factor played in the sentencing process." Id.

10
11 This Court properly applied a harmless error analysis
12 in State v. Howell, 868 S.W.2d 238 (Tenn. 1993), cert. denied,
13 510 U.S. 1215, 114 S. Ct. 1339 (1994). In Howell, the victim was
14 a convenience store clerk who was shot once in the forehead at
15 close range. The jury sentenced the defendant to death based on
16 the aggravators of felony murder and three prior violent felony
17 convictions (armed robbery, first-degree murder, and armed
18 robbery and attempted first-degree murder). The mitigating
19 evidence was that the defendant was brain damaged from four head
20 injuries and grew up in a violent home environment. The Court
21 stated:

22
23 In order to guarantee the precision that
24 individualized sentencing considerations
25 demand and provide a principled explanation
26 for our conclusion in each case, it is
27 important, when conducting harmless error
28 review, to completely examine the record for
29 the presence of factors which potentially
30 influence the sentence ultimately imposed.
31 These include, but are not limited to, the
32 number and strength of remaining valid
33 aggravating circumstances, the prosecutor's
34 argument at sentencing, the evidence admitted

1 to establish the invalid aggravator, and the
2 nature, quality and strength of mitigating
3 evidence.
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6 Id. at 260-61. The Court found that because this was not the
7 defendant's first "cold-blooded execution-style murder", the
8 prosecutor did not emphasize the felony murder aggravator, no
9 additional evidence was introduced for the invalid aggravator,
10 and no mitigating evidence of good character, it could conclude
11 the sentence would have been the same had the jury given no
12 weight to the invalid felony murder aggravating factor. The
13 sentence of death was affirmed.
14

15 The constitutionally mandated purpose of the harmless
16 error analysis set forth in Howell, is to insure that "beyond a
17 reasonable doubt . . . the error complained of did not contribute
18 to the verdict obtained." Chapman v. California, 386 U.S. 18,
19 24, 87 S. Ct. 824, 828 (1967) (Scalia, J., concurring). The
20 Court is "obliged to determine whether there [is] reasonable
21 doubt as to whether the constitutional error contributed to the
22 jury's decision to impose the sentence of death." Tuggle v.
23 Netherland, 516 U.S. 10, ___, 116 S. Ct. 283, 286 (1995) (Scalia,
24 J., concurring).
25

26 My concurrence in Howell was based on the conclusion,
27 after considering the factors, that it was beyond a reasonable
28 doubt that charging the invalid aggravating circumstance did not
29 affect the jury's decision to impose the sentence of death.
30 State v. Howell, 868 S.W.2d at 270-71 (Reid, C.J., concurring).

1 Based on the Middlebrooks decision, the Court has
2 required a remand for sentencing in 6 subsequent cases involving
3 the invalid use of the felony murder aggravator.¹ In
4 Middlebrooks, where a 14 year old boy was beaten while his
5 hands were tied behind his back with a knife, brass knuckles and
6 a stick, was urinated on and in his mouth, burned with a lighter,
7 and among other brutal acts, had an "X" cut into his chest while
8 he was alive, the Court found that even though the other
9 aggravating circumstance of torture was amply proved, it could
10 not conclude that the elimination of the aggravating circumstance
11 of felony murder was harmless error beyond a reasonable doubt.
12 State v. Middlebrooks, 840 S.W.2d at 317. In State v. Evans, 838
13 S.W.2d 185 (Tenn. 1992), cert. denied, 510 U.S. 1064, 114 S. Ct.
14 740 (1994), where the defendant was convicted of killing a
15 grocery store clerk who he knew with a single gun shot to the
16 back of the head, the opinion notes only that the jury found
17 "aggravating circumstances" and that under Middlebrooks the
18 sentence is set aside and the case is remanded. In Sparks v.
19 State, 1993 Tenn. Lexis 187, No. 03S01-9212-CR-00105 (Tenn. May
20 10, 1993)(not published), where the defendant was convicted of
21 armed robbery of a liquor store during which he shot and killed a
22 delivery man, the Court remanded the case for resentencing,
23 stating,

¹See also State v. Branam, 855 S.W.2d 563 (Tenn. 1993)(there were no valid aggravators and consequently, the sentence was set at life imprisonment); State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994)(The Court did not consider whether the error was harmless because the case was remanded for resentencing on an unrelated error); State v. Keen, 926 S.W.2d 727 (Tenn. 1994)(though error under Middlebrooks was found, it was not necessary to conduct a harmless error analysis because remand for resentencing was required on other grounds).

1 In prior cases, however, we have found
2 harmless error analysis difficult to sustain
3 in the absence of written findings by the
4 jury concerning mitigating circumstances.
5 See, e.g., State v. Terry, 813 S.W.2d 420,
6 424-25 (Tenn. 1991). Considering the
7 "heightened need for reliability in death
8 cases," we refused in Terry to predict what
9 the outcome of the case would have been in
10 the absence of one of the aggravating
11 circumstances. Similarly, in State v.
12 Pritchett, 621 S.W.2d 127, 129 (Tenn. 1981),
13 we declined to "speculate" on what the jury's
14 sentence would be when one of two aggravating
15 circumstances was removed from consideration.

16
17 The current sentencing statute, T.C.A. §
18 39-13-204(g), like its predecessor, T.C.A. §
19 39-2-203(g), requires the jury to engage in a
20 careful weighing process, balancing specified
21 aggravating circumstances against any
22 mitigating circumstances in the record. But,
23 also like its predecessor, it does not
24 require the jury to report in its verdict
25 what mitigating factors were considered.
26 Without a sufficient basis for reweighing the
27 evidence in the record, we are disinclined to
28 speculate in this instance about what verdict
29 the jury might have returned based on proof
30 of a single aggravating circumstance.
31 Certainly, we cannot say that in the absence
32 of the felony-murder aggravating
33 circumstance, there is proof beyond a
34 reasonable doubt that the defendant should be
35 sentenced to execution.

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38 Id. at 3-4. In State v. Bane, 853 S.W.2d 483 (Tenn. 1993), the
39 defendant was found guilty of premeditated murder and felony
40 murder. The evidence showed a premeditated murder and robbery in
41 which the victim was beaten, cut, strangled, gagged, and placed
42 in a tub with a plastic bag over his head. The jury sentenced
43 the defendant to death finding the aggravators of torture and
44 felony murder. The Court held that Middlebrooks required that a
45 jury reconsider the evidence "even though the evidence amply
46 supports the aggravating circumstance of the murder to be

1 especially heinous, atrocious, or cruel in that it involved
2 torture or depravity of mind." Id. at 490. In State v. Smith,
3 857 S.W.2d 1 (Tenn. 1993), the defendant and an accomplice during
4 the robbery of a store operated by an elderly couple, knocked
5 down the man and fatally shot the woman when she resisted the
6 robbery. Though other error also required resentencing, the
7 Court stated, "The Middlebrooks rule establishes that elimination
8 of the [felony murder aggravator] requires the jury to reconsider
9 the evidence to determine if the sentence of death is appropriate
10 in this case." Id. at 25. In Hartman v. State, 896 S.W.2d 94
11 (Tenn. 1995), the victim was sixteen years old when she was
12 kidnapped, raped, killed by four blows to the head, and raped
13 again. In doing the harmless error analysis, the Court stated
14 that though no additional evidence was introduced in support of
15 the invalid aggravator, the prosecutor did not emphasize the
16 invalid aggravator, and there was only minimal proof of
17 mitigating circumstances, because the remaining aggravator of the
18 heinous, atrocious or cruel nature of the offense was supported
19 by testimony which was contested, the Court was "unable to
20 conclude that the sentence would have been the same had the jury
21 given no weight to the invalid aggravator." Id. at 104. In
22 State v. Walker, 910 S.W.2d 381 (Tenn. 1995), cert. denied, ____
23 U.S. ____, 117 S. Ct. 88 (1996), the victim was shot several
24 times while sitting in her car in her driveway; she bled to death
25 at the hospital. The defendant thought the victim would be
26 carrying a lot of money. The jury found the defendant not guilty
27 of premeditated murder, but guilty of felony murder and sentenced
28 the defendant to death based on the aggravators of felony murder,

1 and the existence of a previous conviction of a violent felony
2 (voluntary manslaughter). The Court found that the mitigating
3 evidence was "inadequate" to overturn the sentence, but that the
4 "prior violent felony aggravator was not nearly as positive" as
5 that of armed robbery, first degree murder, and attempted first
6 degree murder, found in Howell. Id. at 398. The Court remanded
7 the case for resentencing.

8
9 On the other hand, the high standard for harmless error
10 analysis set forth in Howell has been significantly compromised
11 in some cases. For instance, in State v. Cazes, 875 S.W.2d 253
12 (Tenn. 1994), cert. denied, 513 U.S. 1086, 115 S. Ct. 743 (1995),
13 the victim, a sixty-eight year old woman, was killed by blows to
14 the head, raped and bitten. The evidence was inconclusive as to
15 whether the victim lost consciousness immediately or not. The
16 victim and the defendant knew each other, though the relationship
17 between the defendant and the victim was not shown in the record.
18 The jury sentenced the defendant to death based on the
19 aggravators of felony murder, previous convictions of violent
20 felonies (assault and aggravated rape), and an especially
21 heinous, atrocious, or cruel murder in that it involved torture
22 or depravity of mind. The Court affirmed the sentence stating
23 that the other two aggravators were strongly supported by the
24 evidence, no additional evidence was introduced in support of the
25 invalid aggravator, the prosecutor did not emphasize the invalid
26 aggravator, and the mitigation evidence of the defendant's
27 childhood and work history did not outweigh the valid aggravating
28 circumstances. In State v. Nichols, 877 S.W.2d 722 (Tenn. 1994),

1 cert. denied, 513 U.S. 1114, 115 S. Ct. 909 (1995), this Court
2 found a Middlebrooks error to be harmless stating that the
3 defendant had committed five similar rapes in the months before
4 the murder, no inadmissible evidence was introduced to establish
5 the invalid felony-murder aggravator, the State did not put a
6 great emphasis on the fact of the felony, and the mitigating
7 proof was contested by the State. In Nichols, the defendant
8 confessed and testified to raping the victim. The death resulted
9 from the defendant's hitting the victim with a two-by-four during
10 the struggle; the victim died two days later. The defendant
11 expressed remorse. I dissented from the Court's conclusion that
12 the allowance of the jury to use the felony murder aggravator was
13 harmless error because the State failed to prove beyond a
14 reasonable doubt that the jury was not influenced by the invalid
15 aggravating circumstance. Indeed, the record suggested the
16 opposite conclusion:

17
18 The State relied on two aggravating
19 circumstances to support the death penalty -
20 previous convictions for aggravated rape, and
21 the fact that the murder occurred during the
22 commission of a violent felony. The jury was
23 instructed to decide whether the aggravating
24 circumstances were supported by the evidence,
25 and whether they outweighed the mitigating
26 evidence. At the sentencing hearing,
27 evidence of the aggravating circumstances was
28 offered, which included substantial emphasis
29 on the circumstances of the crime itself.
30 Evidence of mitigating circumstances was
31 offered from the defendant, his family, co-
32 workers, and friends as to his character,
33 work background and attitude, and family
34 history. He also submitted the testimony of
35 a clinical psychologist who had diagnosed the
36 defendant as having intermittent explosive
37 disorder. The State's closing argument
38 emphasized the felony murder aggravating
39 circumstance at least as much as the

1 aggravating circumstance of prior
2 convictions. . . . [The] initial return of
3 the juror death penalty verdict form . . .
4 [did not cite] aggravating circumstances
5 concerning the defendant's record of
6 convictions.
7

8 . . . There is at the very least a
9 reasonable possibility that the injection of
10 the invalid felony murder aggravating
11 circumstance into the weighing process by the
12 jury contributed to the death sentence
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17 Id. at 743-44 (Reid, C.J., dissenting). In State v. Smith, 893
18 S.W.2d 908 (Tenn. 1994), cert. denied, ____ U.S. ____, 116 S. Ct.
19 99 (1995), the victim was an elderly woman who had been beaten,
20 raped, her throat had been cut, and she had been drowned in the
21 bathtub. The jury sentenced the defendant to death based on the
22 aggravators of felony murder, previous convictions of violent
23 felonies (robbery with a deadly weapon, assault with intent to
24 commit first-degree murder, and aggravated rape), and the nature
25 of the murder as especially heinous, atrocious, or cruel. The
26 mitigating evidence was that the Defendant was mentally retarded.
27 Because the evidence supported the remaining aggravators, no
28 additional evidence was introduced in support of the invalid
29 aggravator, and little emphasis was placed on the robbery by the
30 prosecutor, the Court affirmed the sentence of death. In Smith,
31 I dissented, stating,
32

33 In this case, although the two remaining
34 aggravating circumstances were proven, and no
35 additional evidence was admitted in support
36 of the invalid aggravating circumstance, the
37 evidence of mental retardation is a strong
38 mitigating factor whose weight could well be
39 more persuasive against two aggravating
40 circumstances than three. Because the

1 existence of substantial mitigating evidence
2 forces the jury in this case to make a very
3 subjective decision as to weight, the State,
4 which has the burden of proof, cannot show
5 beyond a reasonable doubt that the ultimate
6 decision to execute the defendant was not
7 influenced by the submission of the invalid
8 aggravating circumstance; therefore, the
9 submission of this circumstance was not
10 harmless error, and resentencing is required.
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13 Id. at 932 (Reid, J. concurring in part & dissenting in part).
14

15 Sometimes, like in Howell, the finding of harmless
16 error is justified. For instance, in Barber v. State, 889 S.W.2d
17 185 (Tenn. 1994), cert. denied, 513 U.S. 1184, 115 S. Ct. 1177
18 (1995), the victim who was seventy-five years old and in bad
19 health, was killed by multiple blows to the head. She had
20 bruises on her hands which were caused when the victim attempted
21 to protect herself from the blows, and the evidence showed that
22 the victim was alive and conscious during the beating. The
23 defendant also made comments to others regarding the killing
24 indicating the willfulness of his actions. The jury based it's
25 sentence of death on the felony murder aggravator and on the fact
26 that the murder was especially heinous, atrocious or cruel in
27 that it involved torture or depravity of mind. Because the
28 prosecutor mentioned the felony murder aggravator only once, no
29 additional evidence was introduced to support the invalid
30 aggravator, and no strong mitigating evidence was introduced, the
31 Court found the error harmless. Though noting my disagreement
32 with the analysis of the majority opinion, I concurred in the
33 judgment that the sentence be affirmed. And in State v. Hines,

1 919 S.W.2d 573 (Tenn. 1995), cert. denied, ____ U.S. ____, 117
2 S. Ct. 133 (1996), the victim was stabbed multiple times and at
3 the time of death the victim was sexually brutalized. The jury
4 sentenced the defendant to death based on the aggravators of
5 felony murder, prior convictions (assault in the first degree)
6 and the murder was especially heinous, atrocious, or cruel. In
7 mitigation, the defendant introduced evidence of a bad childhood
8 home environment, psychological problems, and his good behavior
9 while in prison. The Court noted that the defendant was "found
10 guilty of felony murder solely on the basis of armed robbery" and
11 that "two felonies, larceny and rape, in addition to robbery,
12 were used to support the felony murder circumstance." Id. at
13 583. The Court concluded that the felony murder aggravators,
14 therefore, did perform the narrowing function required under the
15 constitution. Doing a harmless error analysis for the portion of
16 the felony murder aggravator attributable to the robbery, the
17 Court found the error harmless because the remaining aggravating
18 circumstances were strongly supported, the prosecutor did not
19 emphasize the invalid aggravator and the evidence of mitigation
20 did not outweigh the aggravators. Though I dissented on the
21 basis of other significant errors, including the trial court's
22 rejection of the plea agreement reached between the defendant and
23 the District Attorney General's office, I would agree that the
24 use of the invalid aggravator was harmless error under the record
25 in that case.

26
27 However, comparison of the facts and circumstances of
28 Howell and those in this case indicate a further lessening of the

1 standard. The murder in this case resulted from an altercation
2 based on jealousy. There was an argument followed by a fight and
3 then a shooting. The only valid aggravator relied on by the jury
4 is the prior conviction for second degree murder. The mitigating
5 circumstances offered by the defendant are that he was sorry the
6 victim had been killed, he did not intend to rob or shoot the
7 victim, and the killing had happened because the victim pulled a
8 gun on him. The evidence in the record is simply not persuasive
9 enough to assume that without the consideration of the felony
10 murder aggravator, the jury would have reached the same
11 conclusion. In my view, the admission of the invalid
12 circumstance was not harmless error under the Howell analysis.

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15 The issue is not the extent to which the
16 aggravating and mitigating circumstances were
17 supported by the evidence or whether the
18 aggravating circumstances outweighed the
19 mitigating circumstances. A finding that the
20 evidence in support of the valid aggravating
21 circumstance was overwhelming and the
22 evidence in mitigation was meager may, . . .
23 support the jury's finding that beyond a
24 reasonable doubt the aggravating circumstance
25 outweighed the mitigating circumstances, but
26 it does not necessarily follow that the jury
27 was not influenced by the invalid aggravating
28 circumstance.

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32 State v. Howell, 868 S.W.2d 238, 269 (Tenn. 1993) (Reid, C.J.
33 concurring). "[I]n all cases where the Court must make a
34 subjective decision regarding the effect of the aggravating
35 circumstance," a finding of harmless error is inappropriate. Id.
36 at 268. In my view, the finding of harmless error cannot be
37 based on objective facts in this case and, therefore, must be a
38 subjective conclusion.

1 I would remand the case for resentencing.

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Reid, J.