

1 IN THE SUPREME COURT OF TENNESSEE

2
3 AT JACKSON

FILED
April 13, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

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8 STATE OF TENNESSEE,)
9)
10 Appellee,)
11) Shelby County
12)
13 v.) Hon. W. Fred Axley,
14) Judge
15)
16 PERRY A. CRIBBS,) No. 02S01-9703-CR-00014
17)
18 Appellant.)
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23 CONCURRING AND DISSENTING OPINION

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26 I concur with the majority's decision that the conviction
27 of first degree murder be affirmed. However, I dissent from the
28 majority's finding that the jury's improper consideration of the
29 felony-murder aggravating circumstance, Tenn. Code Ann. § 39-13-
30 204(i)(7), was harmless error beyond a reasonable doubt. Also, the
31 sentence of death in this case is, in my view, disproportionate.
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33 The majority again excuses constitutional deficiency with
34 its ubiquitous use of harmless error. As stated in dissent in
35 State v. Boyd, ___ S.W.2d ___ (Tenn. 1998), dissenting slip
36 opinion at 9, the high standard for harmless error analysis
37 announced in State v. Howell, 868 S.W.2d 238 (Tenn. 1993), cert.
38 denied 410 U.S. 1215, 114 S. Ct. 1339 (1994), has been
39 significantly compromised in a number of cases decided since

1 Howell. See State v. Smith, 893 S.W.2d 908 (Tenn. 1994), cert.
2 denied, ____ U.S. ____, 116 S. Ct. 99 (1995); State v. Nichols, 877
3 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S. 1114, 115 S. Ct.
4 909 (1995); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994), cert.
5 denied, 513 U.S. 1086, 115 S. Ct. 743 (1995).

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7 All members of the Court agree that consideration of the
8 felony-murder circumstance was error under State v. Middlebrooks,
9 840 S.W.2d 317 (Tenn. 1992), cert. dismissed 510 U.S. 124, 114 S.
10 Ct. 48 (1993). Consequently, the only valid aggravating
11 circumstance is the defendant's previous convictions of felonies
12 involving the use of or threat of violence to the person, under
13 Tenn. Code Ann. § 39-13-204(i)(2). In support of this aggravating
14 circumstance, the State presented evidence of four previous
15 convictions: two attempted second degree murders, one aggravated
16 robbery, and one second degree burglary. Despite the number of
17 offenses, this is not a strong circumstance because the attempted
18 second degree murder convictions and the aggravated robbery
19 conviction all arose from a single incident occurring on the same
20 date. This aggravating circumstance is further tainted because the
21 State improperly relied upon the second degree burglary conviction,
22 which did not involve the use or threat of violence as required by
23 the statute, and thus, as acknowledged by the majority, was not
24 admissible. The State has not carried the burden of showing that,
25 beyond a reasonable doubt, the Middlebrooks error did not affect
26 the jury's decision to impose a sentence death.

1 In my view, the sentence of death is disproportionate.
2 The victim in this case surprised two burglars in her home. She
3 was killed instantly with a single gunshot wound to the head. Any
4 murder is tragic and destructive in its own right. Nevertheless,
5 under state and federal law the death penalty is reserved for the
6 most culpable offenders. Considering the character of the
7 defendant and the circumstances of the crime, this crime was not
8 "among the worst of the bad" for whom the death penalty is
9 reserved. State v. Nichols, 877 S.W.2d 722, 744 (Tenn. 1994),
10 Reid, J., dissenting. I would hold that the sentence of death
11 under the facts of this case is excessive and disproportionate and
12 reduce the sentence to life imprisonment.

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Reid, J.