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G&S Vol. 11, No. 25, June 30, 2003

Case Name: Jedidiah Issac Murphy v. The State of Texas

- OFFENSE: Capital Murder - Death Sentence
- COUNTY: Dallas
- C.C.A. CASE No. 74,145
- DATE OF OPINION: June 25, 2003
- JUDGE: Holcomb, J.
- DISPOSITION: Conviction and Sentence Affirmed
- LAWYERS: Adam Seidel (Defense); Bill Hill (State)

Ed. Note: Besides the points discussed below, Appellant raised issues which have been raised and rejected in other cases, or which the Court found error had not been preserved. Because they offer no insight into existing law and aren't new law, they aren't discussed here.

G/S 231.02 Jury Selection / Limitation on Voir Dire (Commitment Questions): In his first point of error, Appellant claimed that the trial court violated his rights under the Sixth Amendment by limiting his voir dire questioning pertaining to the State's burden of proving beyond a reasonable doubt that Appellant posed a future danger. Appellant sought permission from the trial court to ask prospective jurors the following two questions: (1) "Would victim character testimony cause you to reduce the State's burden of proof on Special Issue Number 1?;" and (2) Do you promise the Court that you would not do so? The State objected on the ground that the questions sought commitments from the jurors. The trial court sustained the State's objection. On appeal, Appellant argued that his questions simply inquired whether prospective jurors would hold the State to its burden of proof notwithstanding the presence of evidence of the victim's character.

Holding: The trial court did not abuse its discretion in disallowing the questions. Appellant did not state how "victim character testimony" would be defined nor did he state whether or not venirepersons would be informed of this area of law before being asked such questions. A proper explanation of the law is essential before asking a question upon which a challenge for cause due to bias against the law might be based. Prospective jurors would need to be informed that the standard of proof by which the State must prove its case remains constant; it may not be increased or reduced depending upon the presentation of a certain type of evidence. In addition, because the standard of proof by which the State must prove its case is not affected by the presentation of any certain type of evidence, the trial court could reasonably have concluded that the questions would be confusing or misleading.

G/S 233.03 Jury Selection / Challenges for Cause / Bias Against the Law: In points of error five through eight, Appellant claimed the trial court erred by denying his challenges for cause against four venirepersons, and that the particular venirepersons were all biased against the law and therefore his challenges for cause should have been granted.

Point of Error Five (5): During the voir dire of venireperson Phillip Mays, defense counsel asked him about times when "the laws of man conflict with the laws of God, specifically the Ten Commandments." Pointing

to Mays' statement that he was not sure where the two would conflict, but if they did, he would side with his religious beliefs, Appellant concludes that Mays was therefore challengeable for cause on the ground that he would be impaired in his ability to follow the law.

Holding: Appellant failed to demonstrate that Mays was first informed that he would be required to take an oath that in the case of any conflict between the tenets of Mays' religion and the law on which Mays would be instructed, Mays would be required to follow the law. In the absence of a showing that Mays was fully informed as to the applicable law, Appellant has failed to show that Mays was biased or prejudiced against the law.

Point of Error Six (6): Appellant also claimed that venireperson John Robuck was challengeable for cause because he could not consider the full range of punishment. Appellant claimed Robuck could not consider five years as a punishment for an intentional murder.

Holding: . . . a review of the record reflects that when the trial court asked Robuck to consider some hypothetical scenarios in which five years might be an appropriate punishment, Robuck agreed that he could consider five years and stated that it "completely depends on the circumstance[s]." Appellant has not shown that Robuck could not consider the full range of punishment for murder.

Points of Error Seven (7) and Eight (8): Appellant claims veniremembers Thomas Brooks and Kimberly Williams each equated the term "probability" of future dangerousness with "possibility." During the State's voir dire, Brooks explained his understanding of the term "probability" as meaning "not definite." During questioning by defense counsel, Brooks explained that it meant "[i]t's not a definite thing." He stated that it was something that was "possible in the future" but that he could not "put a number on it." He stated it was "a chance." During Williams' voir dire by the State, Williams stated that "probability" meant "it's possible it could, or could have not." Upon further questioning, she agreed that it would have to be more than fifty percent chance on a scale of zero to one hundred. When questioned by defense counsel Williams reiterated that she would define probability as a possibility. When questioned about percentages by the trial court, Williams could not say. She continued to reiterate that she believed probability and possibility mean the same thing.

Holding: Appellant relies on Hughes v. State, 878 S.W.2d 142 (Tex.Cr.App. 1992), in which the Court reversed a conviction based upon an erroneous denial of a challenge for cause against a venireperson who equated the term "probability" with "possibility." Assuming Brooks' and Williams' understandings of the term probability was erroneous, appellant has not shown that he was entitled to strike them for cause. Although we have held that the term "probability" need not be defined, we have also held that the terms means "more than a mere possibility." Further, it must be explained to the veniremember that the law requires him to see and accept the distinction between the terms as set forth in Hughes. Once explained the law, if the prospective jurors continue to insist upon an definition or understanding of the term that is inconsistent with Hughes, then they may be challengeable for cause. In these circumstances, where the law was not carefully or adequately explained to Williams and Brooks, the trial court did not abuse its discretion in denying appellant's challenges for cause.

Concurring / Dissenting Opinions: Judge Johnson delivered a concurring opinion in which she was joined by Judges Womack and Cochran. She argued that, Under Hughes, both Brooks and Williams were properly challengeable, and the trial court abused its discretion in denying Appellant's challenges to them. She found, however, that Appellant failed to demonstrate how he was harmed by the error.

G/S 124 Right to Counsel / Ineffective Assistance (Making Unnecessary Peremptory Challenges): In point of error nine, Appellant claimed that during voir dire, trial counsel used peremptory strikes against two venirepersons whom counsel erroneously believed he had unsuccessfully challenged for cause. Stating that his challenge for cause against venireperson Mark Colditz had been denied, defense counsel utilized a peremptory strike against him. But the record reflects that Colditz was not submitted for cause by Appellant. Also erroneously stating his challenge for cause against venireperson John Wilson was denied, defense counsel exercised a peremptory strike against him.

Holding: We have repeatedly stated that "[i]f counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." Despite Appellant's

counsel's mistaken belief about the challenges for cause, he may have ultimately utilized peremptory challenges against [A review of the record demonstrates that] "there is at least the possibility" that counsel's use of peremptory strikes on Wilson and Colditz was reasonable trial strategy and accordingly, we defer to counsel's decision. Point of error nine is overruled.

Comments: (Roy Greenwood) This case is yet another one reinforcing the Court's many other cases that (more than) suggest that ineffective assistance claims should not be raised on direct appeal when there has been no evidentiary hearing at which defense counsel's strategy for doing something can be examined. That having been said, I'm not sure how we can find that it could be a sound strategy to exercise a peremptory challenge when you haven't first challenged the venireperson for cause - when there is basis for a challenge for cause. In this case, we aren't told whether there was any basis to challenge either of these veniremembers for cause, so we have to fall back to the strategy issue, which will almost always be lost on direct appeal.

G/S 126 Right to Counsel / Attorney-Client Privilege: In his eleventh point of error, Appellant claimed his rights pursuant to the Sixth Amendment were violated when the prosecutors examined letters and notes written by Appellant to his trial attorneys which were protected by attorney-client privilege. Before trial, written materials, notes and letters, including three pages of handwritten notes to Appellant's attorneys, were seized from Appellant's jail cell by jail personnel after Appellant attempted a suicide. The documents were viewed by prosecutors before trial. Appellant claimed the seizure amounted to a knowing and unlawful intrusion of the attorney-client privilege by the State, and he is therefore entitled to a reversal. During trial, the court held a hearing outside the presence of the jury. An employee of the Dallas County Sheriff's Department testified that pursuant to the customary practice of the Dallas County Jail in the case of an attempted suicide in jail, the cell is considered a crime scene and all evidence is confiscated. Both prosecutors in Appellant's case testified that they reviewed the seized papers, but only one of the prosecutors testified that he reviewed portions of the three pages purportedly written to Appellant's attorneys. At the top of Defense Exhibit 6A, is written, "Michael & Jane (Sorry if I've offended you by using your 1st names)." It was signed on the back, "Sincerely, Jim Ed." The prosecutor agreed that he knew Appellant's attorneys were Michael Byck and Jane Little, and that Jim Ed was a name Appellant was known to go by. Defense Exhibit 6B, began "Questions for my lawyers" and was followed by six numbered paragraphs, and signed at the bottom by "Jim." Defense Exhibit 6C, stated on the back: "To my lawyers! Please help me with the problems I'm having, the staff sees me only as a monster." The other side began its narrative writing, "Michael . . .." Substantively, they pertain almost exclusively to Appellant's desire to contact a psychiatrist to prescribe medication to stop his hallucinations and prevent him from "losing his mind." The prosecutor who reviewed the papers testified that he did not use any information contained in them in his prosecution of Appellant. The trial court concluded that if there was any error, it was harmless beyond a reasonable doubt. The court did find, however, that Defense Exhibits 6A, 6B and 6C were attorney-client privileged, but questioned whether they were located "in a secure and confidential place."

Holding: The State's intrusion into the attorney-client relationship violates a defendant's constitutional right to counsel when the defendant is prejudiced by the violation. The federal circuit courts of appeals are split on the issue of whether prejudice is presumed or must be proven. In our view, calling for a showing of prejudice is the better rule in light of the wide variety of circumstances under which the privilege might be breached. [In this case] The evidence reflects no prejudice to Appellant. The prosecutor who reviewed the privileged documents testified that he did not use any of the information in the three pages of material in preparing the case. Because the proceedings were not adversely tainted by the intrusion into the attorney-client privilege, Appellant is not entitled to a reversal. Point of error eleven is overruled.

Comments: (Roy Greenwood) I disagree. I believe that, when the State uses "jail security" to obtain documents that are intended to be confidential communications between an incarcerated defendant and his or her lawyers, harm should be presumed. If the Courts put the burden on the defendant to show that he has been harmed by the violation, deputy sheriffs all over the State will be encouraged to start rummaging through every document in every cell to see what they can find.