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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
The Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,.....RESPONDENT

v.

DAVID VIRON LEWIS GARRETT,.....APPELLANT

FINAL BRIEF OF RESPONDENT
Appellate Case No. 2020-001183

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APPELLANT'S STATEMENT ON APPEAL

Did the sentencing judge abuse his discretion by admitting nearly one hundred and fifty gruesome colored photographs of the decedent's body taken before and during autopsy where the probative value of the photographs was substantially outweighed by the danger of unfair prejudice in violation of Rule 403 SCRE, and only served to inflame the emotions of the trial judge who was resentencing Appellant for murder and first degree burglary pursuant to *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014)?

RESPONDENT'S COUNTERSTATEMENT ON APPEAL

Did the trial judge err in admitting autopsy photographs of the victim during an *Aiken v. Byars* sentencing hearing which the trial court stated on the record it would not cause him to emotionally rule against the Appellant, but the photos were relevant since the Court must determine whether or not the circumstances of the crime warrant the Appellant to receive a sentence of life without parole?

STATEMENT OF THE CASE

On May 30, 2007, the Appellant who was seventeen years of age, entered the home of Ms. Margaret Seay with the intent to rob her. The Appellant lived next door to Ms. Seay. Once inside, the Appellant stole two of Ms. Seay's purses and stabbed her forty-five times about the head, arms and chest area. Once the Appellant committed this crime he fled the scene. Ms. Seay was able to phone 911 and stayed on the line until law enforcement and emergency medical services arrived. Once they arrived all she was able to tell law enforcement was that the person who assaulted her was a black male. She was transported to Spartanburg Medical Center where she later died. While securing the scene an officer was contacted by next door neighbor Pamela Eunice Wray. She informed law enforcement that she found purses in her son's room. Upon giving consent to them to enter the residence, Ms. Wray lifted a bedspread from her son's bed revealing two purses. One of the purses had the victim's identification inside. The Appellant was later captured and charged with the offenses of murder, armed robbery, and burglary in the first degree (burglary 1st). Upon being arrested and given his *Miranda* warnings the Appellant gave law enforcement a full confession.

On February 24, 2009, the Appellant appeared before the Honorable J. Derham Cole to plead guilty to these offenses. Upon the conclusion of his guilty plea the Appellant was sentenced to a term of incarceration for the remainder of his natural life for the offenses of murder and burglary 1st, and thirty years for armed robbery. The court ordered that each of these offenses were to be served concurrently.

On June 25, 2012, the United States Supreme Court decided the case of *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, the United States Supreme Court decided that a juvenile cannot be sentenced to life without the possibility of parole unless the sentencer takes into account how

children are different and how those “differences counsel against irrevocably sentencing them to a lifetime in prison.” *Miller*, 567 U.S. at 480. Due to *Miller* the South Carolina Supreme Court decided to apply this decision to South Carolina juvenile life sentences. In *Aiken v. Byars*, 410 S.C. 534, 765 S.E.2d 572 (2014), the South Carolina Supreme Court decided that prior to a life sentence being imposed on a juvenile, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored. *Byars*, 410 S.C. at 545, 765 S.E.2d at 578. The Supreme Court also ruled that this decision would be retroactive. *Byars*, 410 S.C. at 540, 765 S.E.2d at 575. This allowed the Appellant to receive a hearing pursuant to the *Byars* decision.

This hearing was held on January 8, 2020, before the Honorable R. Keith Kelly.¹ Present for the State was Seventh Circuit Solicitor Barry Barnette, and representing the Appellant was Seventh Circuit Public Defender Clay T. Allen. During this hearing the State offered as evidence the entire police file which included photographs of the victim prior and during the autopsy. The Appellant objected to these photos being allowed into evidence. The Appellant argued that these photos have no probative value and are only being introduced into evidence to appeal to the court’s reactions. (R. p. 20 lines 14-17) In response, the sentencing court stated that he has seen plenty of autopsy photos and “the court finds that it can separate itself from emotion and apply the facts and the law of the case.” (R. p. 24 lines 6-9). The State argued that due to the facts of this case, and the nature in which Ms. Seay was killed, the court should impose a sentence of life without parole. At the conclusion of this hearing the sentencing court decided to take all of the arguments under advisement and decided there would be an issuing of instructions at a later date. (R. p. 145 lines 18-20).

¹ Since he received a sentence of thirty years for armed robbery that offense was not included in the hearing. Only offenses receiving a life sentence qualified for this hearing.

On July 30, 2020, the sentencing court decided that due to the *Graham, Miller, and Byars* decisions, the United States Supreme Court is marching towards abolishing life without the possibility of parole for juvenile homicide offenders. (R. p. 153 lines 2-6) Due to these decisions the sentencing court decided to deny the State's request for the court to impose a sentence of life without the possibility of parole. (R. p. 153, lines 7-9) Instead, the sentencing court decided to impose a sentence of forty-five years. (R. p. 153, lines 13-14). The Appellant filed a motion to reconsider. The sentencing judge also forgot to impose a sentence for the burglary 1st conviction; therefore, everyone decided to reappear on August 20, 2020. At the conclusion of this motion to reconsider the court decided to deny the Appellant's motion for reconsideration. The court did however, impose a sentence of twenty years incarceration for the offense of burglary 1st, and ordered this offense would be served concurrently with all other offenses. The Appellant was also awarded credit for all the time previously served. (R. p. 162 lines 13-19)

Upon the conclusion of this hearing the Appellant filed a notice of appeal before this Court. Within this appeal the Appellant alleges that the sentencing court erred in allowing pre-autopsy and autopsy photos of the victim into evidence. The Appellant argues that these photos were not relevant, and were only introduced to enflame the emotions of the sentencing judge. The Appellant believes that the introduction of these photos into evidence violates Rule 403 of the rules of evidence.

The Respondent will argue that due to this being a sentencing, these photos were not presented to a jury but to a circuit court judge. There exist no prejudice in the introduction of these photographs. The Respondent believes that these photos were relevant in revealing the seriousness of this offense an element that the court must consider pursuant to *Aiken v. Byars*. So the introduction of these photographs did not violate rule 403. The Respondent will also argue that the

Appellant was not prejudice by the introduction of these photographs. The Appellant was originally sentenced to a life sentence without the possibility of parole. Upon the conclusion of the *Aiken v. Byars* hearing the court could have continued that sentence; however, he decided to reduce the sentence to forty-five years. Since there exists no prejudice the Appellant is not entitled to a reversal. The brief of the Respondent follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The trial court has considerable discretion on the admissibility of evidence. *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585 (2001). The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court. *State v. Nance*, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996). “A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances.” *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 226, 229 (2010).

ARGUMENTS

The sentencing judge did not abuse his discretion in admitting autopsy photographs of the murdered victim for his review during the *Aiken v. Byars* sentencing hearing. The sentencing judge correctly found that he would not be swayed by these photographs, that the probative value substantially outweighed the risk of any possible unfair prejudice. These photos also reveal the circumstances of the crime which must be considered pursuant to *Byars*.

Relevance

The Appellant was previously sentenced to life without the possibility of parole for the offenses of murder and burglary 1st. Due to the *Aiken v. Byars* decision the South Carolina Supreme Court ruled that this cannot occur to a juvenile defendant unless a hearing is held where the sentencing court considers certain criteria. In *Byars* the South Carolina Supreme Court decided

that the United States Supreme Court in *Miller v. Alabama* established a specific framework that must be considered at the *Byars* hearing. During this hearing the Court must consider:

(1) the chronological age of the offender and the hallmark features of youth, including “immaturity impetuosity, and failure to appreciate the risks and consequence”; (2) the “family and home environment” that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender’s participation in the conduct and how familial and peer pressures may have affected him; (4) the “incompetencies associated with youth – for example, [the offender’s] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender’s] incapacity to assist his own attorney’s; and, (5) the “possibility of rehabilitation”

Byars, 410 S.C. at 543, 765 S.E.2d at 577.

In order for the State to reveal the third criteria found in *Byars*, the trial court needed to see these autopsy photos. These photos assist him in understanding, “circumstances of the homicide offense.” The release of these photos did have a greater probative value than any prejudice that might have occurred. This is due to the fact this was during sentencing thereby these photos were never revealed to a jury, but to a judge, who explained to counsel on the record that he was familiar with autopsy photos and these photos would not sway his decision one way or another.

The Appellant argues that the introduction of these photographs was to arouse the emotions of the sentencing judge. The victim was stabbed 45 times so photographs would be gruesome. In a majority of murder cases the photos are gruesome. The test is not if these photos are gruesome but are these photographs more probative than prejudicial. “To constitute *unfair* prejudice, the photographs must create a ‘tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.’” *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995), quoting, *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991)(emphasis added)

In discussing similar evidentiary rulings in their cases Pennsylvania courts have often quoted:

A criminal homicide trial is, by its very nature, unpleasant and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry. To permit the disturbing nature of the images of the victim to rule the question of admissibility would result in the exclusion of all photographs of the homicide victim, and would defeat one of the essential functions of a criminal trial, inquiry into the intent of the actor. There is no need to overextend an attempt to sanitize the evidence of the condition of the body as to deprive the Commonwealth of opportunities of proof in support of the onerous burden of proof beyond a reasonable doubt. Further the condition of the victim's body provides evidence of the assailant's intent, and, even where the body condition can be described through testimony from a medical examiner, such testimony does not obviate the admissibility of photographs.

Com v. Robinson, 864 A.2d 460, 502 (Pa. 2004), quoting, *Com. v. Rush*, 646 A.2d 557, 560 (Pa. 1994).

One of the elements that the court must consider is "the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him." *Byars*, 410 S.C. at 544, 765 S.E.2d at 577. It is the obligation of the Solicitor to reveal to the sentencing court the nature of this murder and its brutality. The sentencing court is attempting to make a decision on whether or not the factors of this case and his background warrant him to impose a sentence of life without the possibility of parole. The judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances. *Byars*, 410 S.C. at 545, 765 S.E.2d at 578.

The fact these photographs may be gruesome is not a determining factor as it relates to its relevance. It has long been established that "[a] trial judge is not required to exclude relevant evidence merely because it is unpleasant or offensive." *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008). So it has been largely held that the determining factor of the introduction of photographs are not how they look but if the photographs are relevant in order for the court to make an informed decision. See, *Farris v. State*, 328 So.2d 640, 641 (Ala.Crim.App.

1976)(The colored photograph in question is clearly ghastly; but, gruesomeness is not grounds for excluding this type of evidence, if relevant. . . This photograph was properly admitted into evidence notwithstanding the unpleasant subject matter. We cannot and should not, gloss over the fact that violent death is itself loathsome.”) Simply, gruesomeness alone does not render the photograph inadmissible. *Collins*, 409 S.C. at 535-36, 763 S.E.2d at 28. Courts and juries cannot be too squeamish about looking at unpleasant things, objects or circumstances in proceedings to enforce the law and especially if truth is on trial. The mere fact that an item of evidence is gruesome or revolting, if it sheds light on, strengthens or gives character to other evidence sustaining the issues in the case, the court should not exclude it. *Nichols v. State*, 267 Ala. 217, 100 So.2d 750, 756 (1958). Although the photos were graphic, the facts in this case were graphic, and there is no suggestion that their admission had an undue tendency to suggest a decision on an improper basis. *State v. Holder*, 382 S.C. 278, 290-91, 676 S.E.2d 690, 697 (2009). It is obvious these photographs were gruesome; however, they were never presented to a jury, and the court has had plenty of experience in viewing graphic autopsy photos. The sentencing court made its decision based on the *Byars* factors. The basic reason for the *Byars* hearing is for the court to fully explore the mitigating hallmark features of youth. *Byars*, 410 S.C. at 545, 765 S.E.2d at 578. The violence of this offense is displayed in these autopsy photographs. They are admissible, because its probative value outweighs any prejudicial effect they may have. There exists no violation of Rule 403 of the South Carolina Rules of Evidence.²

² Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403 SCRE.

The Appellant argues that the autopsy photographs in this case should not have been allowed to be introduced, due to the fact the State only introduced them to arouse the emotions of the sentencing court. In the South Carolina Supreme Case of *State v. Collins*, 409 S.C. 524, 763 S.E.2d 22 (2014), the South Carolina Supreme Court decided that the introduction of autopsy photographs during trial was lawful. In *Collins*, a ten year old boy was brutally murdered by a gang of pit bulls. The forensic pathologist stated that he had massive injuries. During his testimony he stated:

The victim suffered a “tremendous number” of bite marks on his legs and had “extensive” loss of skin and soft tissue on his upper body and his face, including his ears and nose, which were “completely eaten away” by the dogs. Areas of the boy’s jugular vein on the left side was torn in half, causing significant blood loss leading to his death.

Collins, 409 S.C. at 529, 763 S.E.2d at 25

The owner of the dogs was eventually charged with the offenses of involuntary manslaughter, and three counts of owning a dangerous animal. During trial, the Solicitor decided to enter into evidence the pre-autopsy photos of the victim. They did this in order to support the assertions about the dangerous propensities of the dogs. *Id.*, 409 S.C. at 532, 763 S.E.2d at 27. *Collins* were ultimately convicted on all counts. This Court decided to reverse the conviction due to the introduction of the pre-autopsy photos. The Supreme Court decided to reverse, this Court deciding:

“The evidence was highly probative, corroborative, and material in establishing the elements of the offenses charged; its probative value outweighed its potential prejudice; and, the appellate court should not have invaded the trial court’s discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented.” *Id.*

This was a situation that the Supreme Court found it proper for the admission of gruesome photographs during the trial of a person charged with only involuntary manslaughter, not murder

as the Appellant. The Supreme Court found it proper for these photographs to be submitted to a jury of regular ordinary citizens. If the Supreme Court found this proper, then the submission of these autopsy photographs during a sentencing hearing of a person, already convicted of murder to a very experienced member of the Circuit Court who has admitted to viewing multiple autopsy photographs, then should be allowed. In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation, or aggravation. *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185.

Victim Impact

The Appellant argues that the photographs being introduced were introduced in order to raise the emotions of the sentencing judge. The Appellant argues that these photographs were irrelevant since there was other evidence revealing the victim's injuries. The State argues that this was not a jury trial to determine the Appellant innocence or guilt, this was a sentencing hearing to make a determination if the Appellant should remain in prison for the rest of his natural life. When making a determination of sentencing, victim impact becomes very relevant. During the hearing the Solicitor mentioned the United States Supreme Court case of *Payne v. Tennessee*. In *Payne* the Supreme Court decided:

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it as the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Payne v. Tennessee, 501 U.S. 808, 825 (1991).

The impact that the murder had on the family because of the method that it was done is definitely admissible in a sentencing procedure. Victim impact is designed to show each victim's uniqueness as an individual human being. *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160, 167 (2002). Victim impact is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. *Payne*, 501 U.S. at 825. These photographs being also allowed into evidence would reveal the violence of this crime and how it impacted the victim's family. Some of which had a chance to address the court on how much the murder of Ms. Seay effected them.³ This impact must be made known to the court pursuant to the South Carolina victims bill or rights.⁴

Prejudice

The Appellant is seeking a reversal of the decision of the sentencing court who sentenced the Appellant to forty-five year period of incarceration. The Respondent argues that the Appellant was not prejudiced due to the fact he was initially given a life sentence without the possibility of parole. The sentencing judge on the record stated his consideration of all of the *Byars* factors prior to sentencing. On the record during sentencing the court stated:

“This Court has given considerable thought to the issue before the court, and considering the violent and extreme circumstances under – under the – the Court now considers Mr. Garrett as one of the rarest of juvenile homicide offenders whose crime reflects irreparable corruption.”

“The facts in this case support a life-without-the-possibility-of-parole sentence taking into account the factors of the chronological

³ Mr. Howard Seay the victims son addressed the court twice, once during the *Aiken v. Byars* hearing (R. p. 38 lines 4-10), and once during the motion for reconsideration (reconsideration hearing R. p. 161 line 11 – p. 162 line 9).

⁴ (A) To preserve and protect victims' right to justice and due process regardless of race, sex, age, religion, or economic status, victims of crime have the right to: (5) be heard at any proceeding involving a post-arrest release decision, a plea or sentencing. SC CONST. Art. I §24(A)(5)

age of the offender and his hallmark features of youth, including immaturity and failure to appreciate risks and consequences of his conduct, his family and home life environment, which was good, the circumstances of the homicide offense, actor – and his role the inconsistencies associated with youth such as his inability to deal with police officers or prosecutors or assist his lawyers – and he was able to do those things – and the possibility of rehabilitation.”

“Nonetheless, this court has read and reread the *Louisiana v. Montgomery*, which can be found at 136 Supreme Court. An especially the descent by Justice Scalia, also adjoined by Justice Thomas and Justice Alito.”

“This Court believes that since *Graham* in 2010, *Miller* in 2012, and *Byars* 2014, and *Montgomery* in 2016 that the United States Supreme Court is marching towards abolishing life without the possibility of parole in juvenile homicide offenders.”

“Therefore, this Court denies the state’s request to impose a life-without-the-possibility-of-parole sentence on the defendant, Mr. Garrett.” (R. p. 152 line 5 – p. 153 line 9)

Upon giving his reasoning as to why he feels he should not impose a sentence of life without the possibility of parole, the sentencing court decided to impose a sentence of forty-five years.⁵ (R. p. 153 line 14) The trial court gave the Appellant the benefit of not imposing the life without parole sentence. There was ample evidence provided that the sentencing court could impose a life sentence without the possibility of parole. Pursuant to *Byars* the South Carolina Supreme Court never outlawed a life without parole sentence for juveniles. In *Byars*, the Supreme Court specifically stated, “Our general assembly has made the decision that juvenile offenders may be sentenced to life without parole, and we honor that decision.” *Byars*, 410 S.C. at 545, 765 S.E.2d at 578. The Appellant was honored with a hearing and in reading the above referenced passage the sentencing court did find that the Appellant could be given a life sentence; however, he decided

⁵ At a later hearing the sentencing court impose a twenty year sentence for burglary 1st that he ordered to be served concurrently.

not to due to the fact in the courts opinion the United States Supreme Court are leaning away from allowing a life without parole sentence for juveniles. So the Appellant benefitted from this hearing in which he was once sentenced to life without parole and is now serving a forty-five year sentence ten years of which he has already served. Instead of a guarantee of spending the remainder of his natural life remaining incarcerated, the Appellant will serve a maximum of thirty-five additional years in prison. There exists no prejudice in the sentencing courts decision; therefore, he is not entitled to a reversal. To warrant reversal, the Appellant must show both the error of the ruling and the resulting prejudice. *Burroughs v. Worsham*, 352 S.C. 382, 391, 574 S.E.2d 215, 219 (2002).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction and sentence of the lower court be affirmed.

Respectfully submitted,


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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Spartanburg County
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2020-001183

THE STATE,

Respondent,

vs.

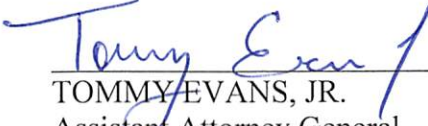
DAVID VIRON LEWIS GARRETT,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 21st day of July, 2021.



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