

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
IN THE MIDDLE DIVISION AT NASHVILLE**

STATE OF TENNESSEE) Circuit Court for Williamson County
) Case No. S83428
Appellee,)
v.)
)
RICHARD C. TAYLOR) C.C.A. No. M2005-01941-CCA-R3-DD
)
Appellant.) CAPITAL CASE
)

BRIEF OF APPELLANT RICHARD C. TAYLOR

ORAL ARGUMENT REQUESTED

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ARGUMENT

**This argument, the third assigned error in the direct appeal brief filed in Richard Taylor's case, is an excerpt from the full brief.*

3. JUDGE HELDMAN ERRED BY FAILING TO QUESTION TAYLOR REGARDING HIS PURPORTED DECISION TO WAIVE THE PRESENTATION OF MITIGATION EVIDENCE AS REQUIRED BY THE TENNESSEE SUPREME COURT'S DECISION IN ZAGORSKI V. STATE, 983 S.W.2D 654 (TENN. 1999), AND BY FAILING TO DETERMINE WHETHER TAYLOR'S WAIVER WAS KNOWING, VOLUNTARY AND INTELLIGENT.

Despite the clear mandate of the Tennessee Supreme Court that trial courts engage in a searching inquiry before finding that a capital defendant has knowingly, voluntarily and intelligently waived his right to present mitigation, Judge Heldman failed to ask Taylor a single question about his purported decision to waive the presentation of mitigation evidence. Judge Heldman's decision to permit Taylor to waive mitigation without engaging in the required colloquy violated Taylor's rights under the Tennessee Supreme Court's decision in Zagorski v. State, 983 S.W.2d 654, 660 (Tenn. 1998), as well as under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution. Accordingly, Taylor's sentence must be vacated and his case remanded for another penalty trial.

A. RELEVANT FACTS

Immediately after Judge Heldman read and imposed the jury's verdict of first-degree murder, he proceeded to the sentencing phase of the trial. (Vol. 20, 370). Without asking Taylor if he wanted a short break, Judge Heldman offered a brief instruction to the jury. (Vol. 20, 371). Judge Heldman then asked the state to give an opening statement. (Vol. 20, 371). After the state's opening statement, Judge Heldman asked Taylor if he wanted to give an opening statement:

The Court: Thank you, General. All right, Mr. Taylor, would you like to make an opening statement at this phase?
Mr. Taylor: No, I waive my statement, Your Honor.
The Court: Are you sure about that, Mr. Taylor?
Mr. Taylor: Yes, sir, Your Honor.
The Court: All right, you may be seated. General?

(Vol. 20, 374-375). With no further discussion, the state proceeded to call three witnesses, none of whom were cross-examined by Taylor (Vol. 20, 377, 379, 378). The state rested, at which point the court dismissed the jury. (Vol. 20, 388). Out of the presence of the jury, Judge Heldman asked Taylor if he intended to call any witnesses or testify:

The Court: All right, Mr. Taylor, do you intend to call any witnesses at this time?
Mr. Taylor: No, Your Honor.
The Court: Mr. Taylor, do you wish to testify at this time?
Mr. Taylor: No, sir.
The Court: Let me advise you of this, Mr. Taylor. You do have the right not to testify. And if you do not testify, the jury may not draw any inferences from your failure to testify. But you also have the right to testify and if you wish to exercise that right no one can prevent you from testifying. Did you hear everything I said?
Mr. Taylor: Yes, Sir.
The Court: Did you understand everything I said?
Mr. Taylor: I have the right to testify.
The Court: You have the right to testify if you want to but—
Mr. Taylor: I don't desire to, Your Honor.
The Court: I didn't hear you.
Mr. Taylor: I don't desire to.
The Court: Did you understand what I said?
Mr. Taylor: Yes, sir, Your Honor.
The Court: All right. Are you electing not to testify, is that correct?
Mr. Taylor: Yes sir, Your Honor.
The Court: All right, now let me ask you this, Mr. Taylor. I've asked you several times and I just want to make sure I'm absolutely crystal clear from where you're coming from at this point in time. If you would like, I could ask a member of the Williamson County Bar to sit with you as advisory or elbow counsel at this time —
Mr. Taylor: No, Your Honor.
The Court: You do not wish that?
Mr. Taylor: No, sir, Your Honor.
The Court: All right. Thank you, Mr. Taylor.

(Vol. 20, 388-90). Judge Heldman then took a short recess to get the draft jury instructions. (Vol. 20, 390). After the state and Taylor declined to propose changes to the instructions, the prosecutor gave closing argument. (Vol. 20, 391-398). The court asked Taylor if he wished to give a closing argument and Taylor waived his closing argument. (Vol. 20, 398).

At no point did Judge Heldman question Taylor about whether he understood the purpose of the penalty phase or whether he was aware of his right to present mitigating evidence and its importance. Judge Heldman instructed the jury and, in less than forty minutes, the jury returned with a sentence of death. (Vol. 11, 1502).

B. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY FAILING TO ENSURE THAT TAYLOR KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO PRESENT MITIGATING EVIDENCE AS REQUIRED BY ZAGORSKI V. STATE, 983 S.W.2D 654, 660 (TENN. 1999)

A defendant in a capital case has a constitutional right to present mitigating evidence. See, e.g., Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Lockett v. Ohio, 438 U.S. 586, 604 (1978). A defendant's decision to waive mitigation must be knowing, voluntary and intelligent. See State v. Ashworth, 706 N.E.2d 1231, 1237 (Ohio 1999); Wilkins v. Bowersox, 145 F.3d 1006, 1015-1016 (8th Cir. 1998). In Zagorski v. State, 983 S.W.2d 654 (Tenn. 1998), the Tennessee Supreme Court adopted mandatory procedures for capital trials where the defendant seeks to waive mitigation to ensure that the waiver is knowing, voluntary and intelligent. Id. at 660.¹ Under Zagorski, before a defendant may waive his right to present mitigating evidence, the trial court must take the following steps "to protect the defendant's interests":

¹ Numerous other state courts are in accord. See, e.g., Koon v. Dugger, 619 So.2d 246, 249-250 (Fla. 1993); Wallace v. Oklahoma, 893 P.2d 504, 512 (Ct. Crim. App. Okla. 1995); Tilley v. State, 963 P.2d 607, 617 (Ct. Crim. App. Okla. 1998) (reversing death sentence because of failure to comply with Wallace guidelines); Commonwealth v. Wilson, 861 A.2d 919, 935 n.20 (Pa. 2004).

(1) Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial; (2) Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of forgoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and (3) After being assured the defendant understand the importance of mitigation, inquire of the defendant whether he or she desires to forgo the presentation of mitigating evidence.

Id. at 660. The Tennessee Supreme Court noted that following this "procedure will insure that the accused has intelligently and voluntarily made a decision to forgo mitigating evidence." Id. at 660.²

In the seven years since Zagorski was decided, Tennessee appellate courts have consistently enforced its holdings. In State v. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 WL 567960 (Tenn. Crim. App. May 25, 2001), this Court considered the appellant's claim that the trial court's procedure was inadequate to ensure that he knowingly and intelligently waived his right to present mitigating evidence. Id. at *7. This Court noted that Zagorski requires the

² In Zagorski the defendant alleged that his trial counsel was ineffective for permitting him to waive mitigation. 983 S.W.2d at 659. Although the Tennessee Supreme Court adopted the required inquiry for waiver of mitigation in that context, courts which have adopted similar precautionary inquiry measures have applied the inquiry to cases of *pro se* representation. See, e.g., State v. Jordan, 804 N.E.2d 1, 13-14 (Ohio 2004) (*pro se* "[a]ppellant was advised of the possible consequences of his decision to waive mitigation" as required by State v. Ashworth, 706 N.E.2d 1231, 1237 (Ohio 1999)); Lamarca v. State, 931 So.2d 838 (Fla. 2006) (upholding the *pro se* defendant's waiver of mitigation as knowing and intelligent where the court followed the procedures adopted in Koon v. Dugger, 619 So.2d 246, 249-250 (Fla. 1993)); Fitzgerald v. State, 972 P.2d 1157, 1172-73 (Ct. Crim. App. Okla. 1998) (applying Wallace v. Oklahoma, 893 P.2d 504, 512 (Ct. Crim. App. Okla. 1995), guidelines to *pro se* defendant and holding that "[w]e need not decide whether this murky record [regarding waiver of mitigation] would, standing alone, require reversal since in combination with other errors, it necessitates reversal and remand for resentencing on the capital murder charge"); Commonwealth v. Randolph, 873 A.2d 1277, 1282 (Pa. 2005) (applying Commonwealth v. Wilson, 861 A.2d 919, 935 n.20 (Pa. 2004), to *pro se* defendant).

court to engage in the three-part inquiry about the defendant's knowledge of the right to mitigation and the importance of mitigation, the defendant's understanding of the risks of waiving mitigation, and whether the defendant continues to desire to waive mitigation in light of this knowledge. Id. After citing the factors, this Court found that the defendant was placed under oath and thoroughly questioned about his decision to waive mitigation as required by Zagorski. Id. The defendant affirmed that he understood the risks of waiving mitigation and still wished to waive mitigation. Id. at *7. In light of this compliance with Zagorski, this Court affirmed the sentence. Id. at *8.

Similarly, in State v. Smith, 993 S.W.2d 6 (Tenn. 1999), the defendant challenged the sufficiency of his waiver of mitigation. Id. at 13. The Tennessee Supreme Court found that Zagorski requirements were satisfied because the defendant was informed of the risks of waiving mitigation, including a warning by the trial court that if the defendant waived mitigation, he would almost certainly be sentenced to death by the jury, and because the trial court inquired into the defendant's competency. Id. at *15; see also State v. Holton, No. M2000-00766-CCA-R3-DD, 2002 WL 1574995, * 26 (Tenn. Crim. App. July 12, 2002) (holding that the trial court appropriately questioned the defendant to ensure that his waiver of mitigation evidence was knowing and voluntary in compliance with Zagorski), affirmed State v. Holton, 126 S.W.3d 845, 862 (Tenn. 2004).³

³ Smith also held that a defendant may knowingly, voluntarily and intelligently waive mitigation consistently with the constitution. Notwithstanding the decision in Smith, however, a trial court's failure to require the presentation of mitigation evidence at the penalty phase violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because the heightened reliability constitutionally demanded in capital cases requires that a jury consider mitigation evidence even over a defendant's objection. See, e.g., State v. Koedatich, 548 A.2d 939, 997 (N.J. 1988).

In this case, Taylor presented no mitigating evidence. Nevertheless, in clear contravention of Zagorski, and in stark contrast to the detailed inquiries approved in Smith and Rimmer, Judge Heldman failed to make any inquiry whatsoever regarding whether Taylor knew of his right to present mitigation, whether he understood the benefit of presenting mitigating evidence, whether he understood the risk of waiving mitigation, and, indeed, whether Taylor even intended to waive mitigation. In other words, Judge Heldman did not (1) “[i]nform the [Taylor] of his right to present mitigating evidence and make a determination on the record whether the defendant underst[ood] this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial; (2) [i]nquire of ... [Taylor] ...whether [he understood] the importance of mitigating evidence, the risks of forgoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and (3) [a]fter being assured [Taylor] underst[ood] the importance of mitigation, inquire of [Taylor] whether he . . . desire[d] to forgo the presentation of mitigating evidence.” Zagorski, 983 S.W. 2d at 660.

Judge Heldman knew that this case contained a wealth of compelling mitigation evidence. He knew, for example, that even the state physicians diagnosed Taylor as schizophrenic, a profoundly mitigating fact that the jurors never learned before deciding to impose a death sentence. The jurors also did not learn anything about Taylor’s “family history of mental problems, a difficult upbringing, and a long history of diagnosed mental problems.” (Vol. 3, 167) (July 21, 1999, Opinion of this Court, affirming trial court’s vacatur of conviction and sentence).

This Court is statutorily required to determine whether the sentence of death was imposed "in any arbitrary fashion." T.C.A. § 39-13-206. Judge Heldman's complete abdication of his

duty to ensure that Taylor competently, knowingly, intelligently and voluntarily waived his right to mitigation requires reversal under this statutory provision, under the Tennessee Supreme Court's decision in Zagorski v. State, 983 S.W.2d 654, 660 (Tenn. 1998), and under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution.