

SUPREME COURT OF OREGON

State v. Agee

358 Or. 325 (2015) · No. SC S059530; CC 09C41224 · Decided December 3, 2015

SUMMARY

The Oregon Supreme Court affirmed Isacc Creed Agee’s aggravated-murder conviction but vacated his death sentence and remanded for further proceedings. The court held that the trial court improperly permitted extensive pretrial questioning of a key defense witness, although that error was harmless, and identified additional reversible errors concerning intellectual-disability eligibility and penalty-phase evidence. The case arose from the killing of an inmate at the Oregon State Penitentiary.

CASE DETAILS

COURT	Supreme Court of Oregon
WRITING FOR THE COURT	Balmer, C. J.
JURISDICTION	Oregon
DECIDED	December 3, 2015
DOCKET	SC S059530; CC 09C41224
DISPOSITION	vacated
PROCEDURAL POSTURE	Automatic and direct review of a judgment convicting defendant of aggravated murder and imposing a sentence of death.
STANDARD OF REVIEW	The court reviewed legal and constitutional questions de novo, reviewed trial-court control over the presentation of evidence for abuse of discretion, and applied harmless-error standards requiring reversal when an error was likely to have affected the verdict or, for federal constitutional error, was not harmless beyond a reasonable doubt.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Isacc Creed Agee v. State of Oregon

TOPICS

- sentencing
- cruel and unusual punishment
- criminal procedure
- evidence
- appellate procedure

PRACTICE AREAS

- criminal law
- capital sentencing
- criminal procedure
- evidence
- constitutional law

QUESTIONS PRESENTED

1. Whether the trial court improperly permitted the prosecutor to conduct an extensive pretrial examination of codefendant Davenport concerning the murder outside the jury's presence.
2. Whether the trial court applied an improper standard in determining that defendant had failed to prove intellectual disability and consequent ineligibility for the death penalty.
3. Whether the penalty-phase court improperly excluded expert testimony that defendant had been diagnosed as intellectually disabled.
4. Whether the Sixth or Eighth Amendment required the jury to determine whether defendant was intellectually disabled.
5. Whether the penalty-phase court improperly excluded evidence that codefendant Davenport received a life sentence for his role in the murder.

HOLDINGS

1. The trial court exceeded its discretion by permitting the prosecutor to question Davenport extensively about the events of the murder, effectively conducting an unlawful pretrial deposition of a defense witness; however, the error was harmless.
2. The trial court applied an inappropriate standard in determining that defendant had not proved intellectual disability and therefore was eligible for execution. A new Atkins hearing was required under current medical standards reflected in the DSM-5 and Hall v. Florida.
3. The trial court erred by excluding defense experts' testimony that they had diagnosed defendant as intellectually disabled, and the error was not harmless.
4. Neither the Sixth nor the Eighth Amendment requires the trial court to instruct the jury that it must determine whether defendant is intellectually disabled.
5. Evidence that Davenport received a life sentence for his role in the murder was relevant mitigating evidence under ORS 163.150 and should have been admitted during the penalty phase.

KEY QUOTATIONS

“The prosecutor’s continued questioning of Davenport constituted, in essence, a pretrial deposition—the sort of discovery that is not permitted under the statutes governing pretrial discovery in criminal matters and that is prohibited by the requirement in ORS 136.420 that all testimony “shall be given orally in the presence of the court and jury.”” (334-35)

“Allowing the trial court’s ruling to stand would “create[] an unacceptable risk that [a] person[] with intellectual disability will be executed.”” (354)

“Evidence that defendant’s experts had diagnosed him as intellectually disabled was relevant to the fourth question—whether the defendant should receive a sentence of death—and defendant was entitled under ORS 163.150 and the Eighth Amendment to present that testimony to the jury during the penalty phase of his death penalty trial as mitigating evidence.” (360)

“Whether the Eighth Amendment prohibits a defendant’s execution is a legal determination, and not a factual one.” (365)

FACTUAL BACKGROUND

In February 2008, while incarcerated at the Oregon State Penitentiary, defendant and his cellmate Davenport entered a third inmate's cell armed with a shank and a concrete block. Davenport repeatedly struck the victim's head with the concrete block, while defendant stabbed the victim numerous times and punched and kicked him. The victim died from the head injuries, and defendant and Davenport were jointly charged with aggravated murder; Davenport later pleaded guilty and received life without parole after the state conceded his intellectual disability.

PROCEDURAL HISTORY

Defendant was convicted by a Marion County Circuit Court jury of aggravated murder for participating in the killing of a fellow Oregon State Penitentiary inmate. The trial court denied defendant's pretrial claim that he was intellectually disabled and therefore ineligible for execution, imposed a death sentence after the penalty phase, excluded expert testimony concerning intellectual-disability diagnoses, and excluded evidence that the codefendant received a life sentence. The Oregon Supreme Court affirmed the conviction, vacated the death sentence, and remanded for a new Atkins hearing and, if necessary, a new penalty-phase proceeding.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The conviction is affirmed. The sentence of death is vacated. The case is remanded for a new Atkins hearing under the standards reflected in the DSM-5 and *Hall v. Florida*. If the trial court again determines that defendant is eligible for the death penalty, a new penalty-phase proceeding is required; in that proceeding, expert testimony concerning intellectual-disability diagnoses and evidence of Davenport's sentence must be admitted if introduced.

CASES CITED

- State v. Washington, 355 Or. 612, 614, 330 P.3d 596 (2014)
- State ex rel O’Leary v. Lowe, 307 Or. 395, 401-02, 769 P.2d 188 (1989)
- State v. Mains, 295 Or. 640, 656, 669 P.2d 1112 (1983)
- State v. Cox, 337 Or. 477, 493, 495, 98 P.3d 1103 (2004)
- State v. Rogers, 330 Or. 282, 302, 4 P.3d 1261 (2000)
- State v. Lamphere, 233 Or. 330, 332-33, 378 P.2d 706 (1963)
- State v. Walton, 53 Or. 557, 565, 99 P. 431 (1909)
- State ex rel Gladden v. Lonergan, 201 Or. 163, 181, 269 P.2d 491 (1954)
- State v. Rogers, 352 Or. 510, 543, 288 P.3d 544 (2012)

- *Atkins v. Virginia*, 536 U.S. 304, 306, 317-18, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)
- *State v. Wagner*, 305 Or. 115, 153-54, 752 P.2d 1136 (1988), vacated and remanded on other grounds, *Wagner v. Oregon*, 492 U.S. 914 (1989)
- *State v. Lawson/James*, 352 Or. 724, 291 P.3d 673 (2012)
- *Hall v. Florida*, *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)
- *State v. Guzek*, 322 Or. 245, 264, 906 P.2d 272 (1995)
- *Penry v. Lynaugh*, 492 U.S. 302, 324, 328, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)
- *Payne v. Tennessee*, 501 U.S. 808, 822, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)
- *State v. Stevens*, 319 Or. 573, 580, 582-85, 879 P.2d 162 (1994)
- *State v. Gibson*, 338 Or. 560, 569, 113 P.3d 423 (2005)
- *Bobby v. Bies*, 556 U.S. 825, 829, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009)
- *Apprendi v. New Jersey*, 530 U.S. 466, 490-91 n.16, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)
- *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)
- *State v. Sarich*, 352 Or. 601, 617, 291 P.3d 647 (2012)
- *Rico-Villalobos v. Giusto*, 339 Or. 197, 205, 118 P.3d 246 (2005)
- *State v. Barone*, 328 Or. 68, 97, 969 P.2d 1013 (1998)
- *State v. Longo*, 341 Or. 580, 606-09, 148 P.3d 892 (2006)
- *McKoy v. North Carolina*, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990)
- *Tennard v. Dretke*, 542 U.S. 274, 285-86, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004)
- *State v. Davis*, 351 Or. 35, 48, 261 P.3d 1197 (2011)
- *State v. Wagner*, 309 Or. 5, 13, 19, 786 P.2d 93 (1990)
- *State v. Casey*, 108 Or. 386, 423, 213 P. 771 (1923), motion to recall mandate denied, 108 Or. 418, 217 P. 632 (1923)