

SUPREME COURT OF OHIO

State v. Elmore

111 Ohio St. 3d 515 (Ohio 2006) · Decided December 13, 2006

SUMMARY

The Ohio Supreme Court affirmed Phillip E. Elmore’s aggravated-murder convictions and death sentence for the murder of Pamela Annarino. It rejected his challenges concerning probable cause for his warrantless arrest, the sufficiency and weight of the kidnapping evidence, allied offenses, ineffective assistance of counsel, and prosecutorial misconduct. The court remanded for resentencing on the noncapital offenses because one proposition of law was meritorious.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Lundberg Stratton, J.; Moyer, C.J.; Resnick, J.; Pfeifer, J.; O'Connor, J.; O'Donnell, J.; Lanzinger, J.
JURISDICTION	Ohio
DECIDED	December 13, 2006
DISPOSITION	remanded
PROCEDURAL POSTURE	Direct appeal as of right from convictions and a death sentence for aggravated murder and related noncapital offenses.
STANDARD OF REVIEW	Probable cause for a warrantless arrest is reviewed under the totality of the circumstances; sufficiency is reviewed by whether any rational trier of fact could find the elements proven beyond a reasonable doubt; manifest weight is reviewed by whether the jury clearly lost its way and created a manifest miscarriage of justice; ineffective assistance is governed by deficient performance and resulting prejudice under Strickland; prosecutorial misconduct is reviewed for improper remarks and prejudicial effect; refusal to give a voluntary-manslaughter instruction is reviewed for abuse of discretion; plain-error review applies to several unpreserved claims; the death sentence is independently reviewed under R.C. 2929.05(A).
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Ohio
PARTIES	Phillip E. Elmore v. State of Ohio

TOPICS

criminal procedure probable cause search and seizure sentencing appellate procedure

PRACTICE AREAS

criminal law criminal procedure capital punishment sentencing constitutional law appellate procedure
evidence

QUESTIONS PRESENTED

1. Whether Elmore's warrantless public-place arrest was supported by probable cause and whether his statements were therefore fruits of an unlawful arrest.
2. Whether the evidence was sufficient to support the kidnapping conviction and kidnapping death-penalty specification, and whether the kidnapping conviction was against the manifest weight of the evidence.
3. Whether aggravated murder and kidnapping, or aggravated robbery and grand theft, were allied offenses of similar import.
4. Whether trial counsel rendered ineffective assistance by making a legal argument for acquittal on kidnapping while conceding kidnapping during closing argument and by presenting allegedly damaging or incomplete mitigation evidence.
5. Whether the prosecutor committed misconduct during rebuttal closing argument.
6. Whether the jury instructions improperly defined aggravated burglary as a theft offense or shifted the state's burden of proof.
7. Whether the trial court erred by refusing to instruct the jury on voluntary manslaughter.
8. Whether denying jurors smoking breaks during deliberations constituted reversible or plain error.
9. Whether the aggravated-burglary and aggravated-robbery death specifications were required to merge.
10. Whether maximum and consecutive sentences for the noncapital offenses violated Blakely and Ohio's unconstitutional felony-sentencing provisions.
11. Whether cumulative error, the constitutionality of Ohio's death-penalty statutes, and proportionality and weighing challenges required reversal or vacation of the death sentence.

HOLDINGS

1. The police had probable cause to arrest Elmore without a warrant in a public place because the totality of the circumstances connected him to the homicide and Annarino's stolen vehicle.
2. The evidence was sufficient to support the separate kidnapping conviction, and the conviction was not against the manifest weight of the evidence, because Elmore admitted tying Annarino's hands before killing her.
3. Aggravated murder and kidnapping are not allied offenses of similar import under R.C. 2941.25.
4. Elmore could be convicted and sentenced for both aggravated robbery and grand theft because he committed the offenses separately: he took Annarino's purse after the killing and later took her car.

5. Counsel were not ineffective for moving for acquittal on kidnapping while conceding during closing argument that a kidnapping occurred.
6. The prosecutor did not commit misconduct by arguing that Elmore surprised Annarino and strangled her from behind because those arguments were reasonable inferences from the evidence and responded to the defense theory.
7. The trial court properly instructed that aggravated burglary is a theft offense and did not relieve the state of its burden to prove the charged offenses.
8. The trial court did not abuse its discretion by refusing to instruct the jury on voluntary manslaughter because the evidence did not show reasonably sufficient provocation or that Annarino was the aggressor.
9. The trial court's factfinding to impose maximum and consecutive sentences on the noncapital offenses violated the unconstitutional sentencing provisions identified in *State v. Foster*, requiring resentencing.
10. The death sentence was appropriate and proportionate because the aggravating circumstances of murder during aggravated robbery and aggravated burglary outweighed the mitigating factors beyond a reasonable doubt.

KEY QUOTATIONS

"We find one proposition of law to be meritorious and remand the case to the trial court to resentence Elmore on the noncapital offenses for which he was convicted." (515)

"The warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment." (520)

"For a kidnapping conviction to be upheld, 'there must be significant restraint or movement, not just that incident to the killing itself.'" (523)

"The trial court's reliance on unconstitutional sentencing statutes when imposing maximum and consecutive sentences on the noncapital offenses violated Elmore's constitutional rights and must be corrected." (535-536)

FACTUAL BACKGROUND

Elmore broke into Pamela Annarino's Newark home while she was away at her son's wedding and waited for her to return. After she arrived, he argued with her, restrained her, struck her repeatedly in the head with a pipe, and strangled her; he then took her purse and car and fled. Police arrested Elmore in Columbus after locating Annarino's car and receiving information identifying the person who had supplied it. After receiving and waiving Miranda warnings, Elmore gave multiple statements confessing to the killing, and physical and DNA evidence corroborated the prosecution's case.

PROCEDURAL HISTORY

A Licking County grand jury indicted Elmore for aggravated murder with death-penalty specifications, murder, kidnapping, aggravated robbery, aggravated burglary, and grand theft. A jury found him guilty of all charges, and the trial court imposed death for aggravated murder and maximum and consecutive sentences on several

noncapital offenses. The Supreme Court of Ohio affirmed the convictions and death sentence but remanded for resentencing on the noncapital offenses because the trial court relied on sentencing provisions later held unconstitutional in *State v. Foster*.

DISPOSITION

remanded

REMAND INSTRUCTIONS

Affirm the convictions and death sentence, but remand to the trial court for a new sentencing hearing on the noncapital offenses in accordance with *State v. Foster*.

CASES CITED

- *Brown v. Illinois*, 422 U.S. 590, 603-605 (1975)
- *United States v. Watson*, 423 U.S. 411, 423-424 (1976)
- *United States v. Santana*, 427 U.S. 38, 42 (1976)
- *Gerstein v. Pugh*, 420 U.S. 103, 111-112 (1975)
- *Beck v. Ohio*, 379 U.S. 89, 91 (1964)
- *State v. Homan*, 89 Ohio St. 3d 421, 427, 732 N.E.2d 952 (2000)
- *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991)
- *Jackson v. Virginia*, 443 U.S. 307 (1979)
- *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541 (1997)
- *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983)
- *State v. Cook*, 65 Ohio St. 3d 516, 524, 528, 605 N.E.2d 70 (1992)
- *State v. Hartman*, 93 Ohio St. 3d 274, 280-281, 754 N.E.2d 1150 (2001)
- *State v. Adams*, 103 Ohio St. 3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 93
- *State v. Coley*, 93 Ohio St. 3d 253, 265, 754 N.E.2d 1129 (2001)
- *State v. Keenan*, 81 Ohio St. 3d 133, 154, 689 N.E.2d 929 (1998)
- *State v. Jells*, 53 Ohio St. 3d 22, 32-33, 559 N.E.2d 464 (1990)
- *State v. Williams*, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977)
- *State v. Comen*, 50 Ohio St. 3d 206, 211, 553 N.E.2d 640 (1990)
- *State v. Parson*, 6 Ohio St. 3d 442, 446, 453 N.E.2d 689 (1983)
- *State v. Johnson*, 6 Ohio St. 3d 420, 453 N.E.2d 595 (1983)
- *State v. Houseman*, 70 Ohio App. 3d 499, 509, 591 N.E.2d 405 (1990)
- *State v. Reyna*, 24 Ohio App. 3d 79, 82, 493 N.E.2d 555 (1985)
- *Strickland v. Washington*, 466 U.S. 668, 687, 689 (1984)
- *State v. Bradley*, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1989)
- *State v. Scott*, 101 Ohio St. 3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶¶ 60-61

- State v. Smith, 14 Ohio St. 3d 13, 14, 470 N.E.2d 883 (1984)
- State v. Smith, 80 Ohio St. 3d 89, 111, 684 N.E.2d 668 (1997)
- State v. Nelson, Summit App. Nos. 10973, 10975, 10993, and 10999, 1983 WL 4137, at *5 (Ohio Ct. App. June 15, 1983)
- Sandstrom v. Montana, 442 U.S. 510 (1979)
- State v. Bengel, 75 Ohio St. 3d 136, 140, 661 N.E.2d 1019 (1996)
- State v. Shane, 63 Ohio St. 3d 630, 590 N.E.2d 272 (1992)
- State v. Braden, 98 Ohio St. 3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 70
- State v. Carter, 89 Ohio St. 3d 593, 602, 734 N.E.2d 345 (2000)
- State v. Green, 90 Ohio St. 3d 352, 371, 738 N.E.2d 1208 (2000)
- State v. Davis, 63 Ohio St. 3d 44, 48, 584 N.E.2d 1192 (1992)
- State v. Sanders, 92 Ohio St. 3d 245, 249, 750 N.E.2d 90 (2001)
- State v. Keith, 79 Ohio St. 3d 514, 530, 536, 684 N.E.2d 47 (1997)
- State v. Singh, 157 Ohio App. 3d 603, 2004-Ohio-3213, 813 N.E.2d 12, ¶ 43
- United States v. Davenport, 986 F.2d 1047, 1049 (7th Cir. 1993)
- State v. Murphy, 91 Ohio St. 3d 516, 542, 747 N.E.2d 765 (2001)
- State v. Hand, 107 Ohio St. 3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 241
- State v. Twyford, 94 Ohio St. 3d 340, 363, 763 N.E.2d 122 (2002)
- State v. Davie, 80 Ohio St. 3d 311, 322, 686 N.E.2d 245 (1997)
- State v. Monroe, 105 Ohio St. 3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶¶ 65, 68
- State v. Williams, 74 Ohio St. 3d 569, 580, 660 N.E.2d 724 (1996)
- State v. Frazier, 58 Ohio St. 2d 253, 256, 389 N.E.2d 1118 (1979)
- State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470
- State v. Hill, 75 Ohio St. 3d 195, 212, 661 N.E.2d 1068 (1996)
- State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984)
- State v. Williams, 73 Ohio St. 3d 153, 174, 652 N.E.2d 721 (1995)
- State v. Gumm, 73 Ohio St. 3d 413, 432, 653 N.E.2d 253 (1995)
- State v. Tenace, 109 Ohio St. 3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 104
- State v. Bey, 85 Ohio St. 3d 487, 509, 709 N.E.2d 484 (1999)