Mental Retardation in Capital Defendants

Procedure for Determining Mental Retardation in Death Penalty Cases Upheld

In *State v. Flores*, 93 P.3d 1264 (N. Mex. 2004), the Supreme Court of New Mexico considered the trial court's findings in a capital murder case involving a defendant who claimed mental retardation, which precludes the death penalty. The trial court had found the state's statutory procedure for ascertaining mental retardation in capital defendants to be unconstitutional. On interlocutory appeal, the court of appeals certified the matter to the Supreme Court of New Mexico, which addressed three issues related to the determination of mental retardation: burden of proof, timing, and right to present evidence at sentencing. The court reversed and remanded to the trial court for further proceedings.

Facts of the Case

Ruben Flores was charged with first-degree murder with aggravating circumstances, and the state moved to seek the death penalty. Mr. Flores raised the question of competency to stand trial. The trial court found him incompetent to stand trial, indicated that "defendant may have mental retardation," and committed him to Las Vegas Medical Center for treatment. At another competency hearing a few months later, the trial court found Mr. Flores competent to stand trial.

Mr. Flores filed a pretrial motion to dismiss the death penalty on the basis of his alleged mental retardation, citing New Mexico's statutory provision Section 31-20A-2.1(B), which precludes the death penalty from being imposed on defendants with mental retardation, and Section 31-20A-2.1(C), which states that the presence of mental retardation is to be determined by the trial court at "a hearing, prior to conducting the sentencing proceeding," by a preponderance of the evidence.

The trial court rejected Mr. Flores's motion as premature, interpreting Section 31-20A-2.1(C) to mean that a determination of mental retardation was required only after the guilt-innocence phase of the trial was completed.

Mr. Flores then filed another motion, in which he argued that he was entitled to a jury determination and a pretrial judicial determination on the issue of his mental retardation. In accepting Mr. Flores's reasoning, the trial court found Section 31-20A-2.1(C) to be unconstitutional in two aspects: "the procedure by which mental retardation is determined" and "the timing of the determination of mental retardation."

With regard to the first issue, the trial court determined that Section 31-20A-2.1(C) violated the Sixth Amendment by not allowing a jury to decide on the question of mental retardation. In its reasoning, the trial court cited two U.S. Supreme Court decisions: *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court held that any fact that increases the penalty for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. In *Ring*, the Court held that, for purposes of capital sentencing cases, *Apprendi* applies to aggravating factors that form the basis for the death penalty. Determining the presence of such aggravating factors, therefore, is the province of the jury, not the judge, and must be proved beyond a reasonable doubt. Using these precedents, Mr. Flores argued that an absence of mental retardation is an aggravating factor, a functional equivalent that has to be proved to a jury beyond a reasonable doubt.

The trial court also found Section 31-20A-2.1(C) to be unconstitutional with regard to "the timing of the determination of mental retardation." The trial court interpreted the statutory provision for "a hearing, prior to conducting the sentencing proceeding," as precluding the pretrial determination of a defendant's alleged mental retardation. The trial court held that this violated the provisions of *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Court held that execution of persons with mental retardation violates the prohibition on cruel and unusual punishment, as set forth in the Eighth Amendment. Of note, Section 31-20A-2.1(C) preceded the decision in *Atkins* by 11 years.

The trial court certified the issue for interlocutory appeal, which was accepted by the court of appeals, which then certified the matter to the Supreme Court of New Mexico.

Ruling and Reasoning

The Supreme Court of New Mexico overturned the trial court's finding that the statutory procedure

in 31-20A-2.1(C) was unconstitutional. The court also held that defendants are entitled to present mental retardation to the sentencing jury as conclusive mitigation, that the burden of proof for a jury's finding of mental retardation is by a preponderance of the evidence, and that the jury's finding of mental retardation need not be unanimous.

The court reasoned that, as mental retardation operates to reduce rather than to increase maximum punishment and as mental retardation is not an element of capital murder, the determination of mental retardation under Section 31-20A-2.1(C) does not require a reasonable doubt decision by a jury. The statutory procedure, therefore, does not violate the Sixth Amendment as applied in *Ring* and *Apprendi*. The court noted that its conclusion was consistent with decisions ruling on the same issue from the Georgia Supreme Court, the Texas Court of Appeals, and the United States Court of Appeals for the Fifth Circuit. These three courts all determined that the absence of mental retardation does not qualify as a functional equivalent of an element in a capital murder trial that required such a burden of proof.

Second, the court held that Section 31-20A-2.1(C) was not unconstitutional with regard to the timing for determinations of mental retardation. The court did note that the language of the statute "tends to suggest that the hearing must be held after the guilt-innocence phase is complete." However, the court also observed that the language was sufficiently ambiguous as not to preclude a defendant from raising the question of mental retardation in a pretrial motion. Thus, Section 31-20A-2.1(C) does not violate the Eighth Amendment, nor does it challenge the precedent set by *Atkins*. A defendant's request for a defense of mental retardation is allowed at any time prior to sentencing. The court even suggested that, given the resources consumed by capital trials, it would be in the interest of all parties to resolve the matter of death penalty eligibility early on in the proceedings—particularly when eligibility hinges on the presence of mental retardation, given that mental retardation may jeopardize defendants' abilities at trial.

Finally, applying *Penry v. Lynaugh*, 492 U.S. 302 (1989), the court held that evidence of mental retardation may be presented as a conclusive mitigating factor at the time of sentencing. The sentencing jury must apply a specific burden of proof (preponderance of the evidence) when considering mental retardation, because this issue must be "determined conclusively" as a special verdict, in contrast with considerations of aggravating and mitigating factors, which involve a balancing analysis rather than a conclusive determination. For a finding that mental retardation is not present in a defendant in a capital case, the sentencing jury must be unanimous because the defendant then becomes eligible for the death sentence, which requires unanimous agreement among the jury. However, a finding that mental retardation is present does not require a unanimous jury.

Discussion

This case represents a logical extension of the U.S. Supreme Court's holding in *Atkins*. Since *Atkins* prohibited the imposition of the death penalty on defendants found to have mental retardation, a natural application of *Atkins* is to examine the process by which the determination of mental retardation is made.

By encouraging the determination of mental retardation early on in capital sentencing cases, the court appears to follow in the tradition of *Atkins* by acknowledging the rights of, and the unique issues surrounding, persons with mental retardation. Just as the U.S. Supreme Court held in *Atkins* that the death penalty would constitute cruel and unusual punishment in persons with mental retardation, the Supreme Court of New Mexico held in this case that failing to identify mental retardation during the trial process hinders defendants from being ensured as fair a trial as possible. Also, the court appears to protect the rights of persons who may have mental retardation by finding that, when statutory language is ambiguous, the right to argue mental retardation at trial favors the defendant.

Ultimately, the court demonstrated a fine balancing act between following the tradition of *Atkins* and respecting the pragmatic concerns that, given the investment of time, emotion, energy, and expense in prosecuting a capital-sentencing case, it would be wise to determine as early as possible in a trial whether a defendant is eligible for the death penalty.

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Sexually Violent Predators

Miranda *Warnings Not Required Prior to Psychological Evaluations to Determine Whether a Sexually Violent Person Petition Should Be Filed*

In re Lombard, 684 N.W.2d 103 (Wisc. 2004), addresses the question of whether Fifth Amendment rights were violated when, at a jury trial to determine civil commitment proceedings based on a petition filed under a Sexually Violent Persons law, the state of Wisconsin introduced statements made during a pre-petition psychological evaluation. The Supreme Court of Wisconsin affirmed a lower appellate court's finding that, under Wisconsin's Sexually Violent Person (SVP) law, *Miranda* warnings are not required prior to a pre-petition psychological evaluation. At the time of trial to determine whether civil commitment under the Wisconsin SVP law should proceed, a person is entitled to the same rights available to a defendant in a criminal proceeding. However, these rights do not apply to encounters that take place before an SVP petition has been filed.

Facts of the Case

After serving about one-fourth of a 40-year prison sentence for multiple sexual assault convictions, Joseph Lombard was paroled in March 1992. Two and half years later, Mr. Lombard's parole was revoked, and he was returned to prison. Five years later, in 1999, Mr. Lombard's mandatory release date was approaching. The state sent Anthony Jurek, PhD, a psychologist from the Department of Corrections, to interview Mr. Lombard to determine whether a petition should be filed for a hearing under Chapter 980 of the Wisconsin State Statutes, concerning the commitment of sexually violent persons.

On December 1, 1999, the first of the three-day interview, Dr. Jurek presented Mr. Lombard a disclosure form, part of which stated the following: "You have the right not to participate in the examination or to answer any of the questions posed to you, but this refusal to answer will be used as part of the evaluation." Mr. Lombard signed and dated the form. Dr. Jurek proceeded to examine Mr. Lombard. Based on the examination, Dr. Jurek recommended that Chapter 980 proceedings be pursued. Dr. Jurek assessed Mr. Lombard as a sexually violent person who met the diagnostic criteria for sexual sadism and who also had antisocial personality disorder.

The jury trial to determine whether Lombard should be committed as a sexually violent person began on October 16, 2000. Three expert witnesses testified for Mr. Lombard. Dr. Jurek was the only expert witness for the state and the only witness to conclude that Mr. Lombard was substantially likely to reoffend. On October 20, 2000, the jury found Mr. Lombard to be a sexually violent person, and he was committed to an institution.

Mr. Lombard filed a series of motions and appeals. The first set of motions claimed, among other things, that Mr. Lombard did not give informed consent to be interviewed by Dr. Jurek during the pre-petition evaluation. The court denied these motions. Mr. Lombard appealed the denial of his motions, the finding that he was a sexually violent person, and the subsequent commitment. The court of appeals remanded to the circuit court to determine whether Mr. Lombard received ineffective counsel at trial. Mr. Lombard filed a motion for a new trial on the basis of ineffective counsel at trial, because his counsel had not objected to the admission of Mr. Lombard's statements to Dr. Jurek. Mr. Lombard also asked for an evidentiary hearing.

Once again, Mr. Lombard's requests were denied. The circuit court held that Mr. Lombard's Fifth Amendment rights were not violated, because he had signed the advisement form prior to his interview with Dr. Jurek. The court noted that, as part of the form, Mr. Lombard was informed that Dr. Jurek would consider a refusal to participate when reviewing the evaluation.

Again, Mr. Lombard appealed the determination that he was a sexually violent person and the subsequent commitment under Chapter 980. Mr. Lombard asserted that his Fifth Amendment rights were violated because his statements to Dr. Jurek during the pre-petition psychological evaluation were used at trial. The Court of Appeals held that Mr. Lombard was not entitled to a *Miranda* warning during Dr. Jurek's evaluation. In its decision, the court referred to its previous holding in *State v. Zanelli* (*Zanelli II*), 589 N.W.2d 687 (Wisc. Ct. App. 1998) that Chapter 980 "is a civil commitment proceeding, not a