

Circuit Court for _____
Case # _____

IN THE COURT OF APPEALS OF MARYLAND

No. 38

September Term, 1996

HEATH WILLIAM BURCH

v.

STATE OF MARYLAND

Bell, C. J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Wilner

JJ.

Concurring & Dissenting Opinion by Chasanow, J.

Filed:

I concur with the affirmance of Burch's convictions and the affirmance of the death penalty for the murder of Mr. Davis. I also join in all but parts III (C)(1) and IV(A) of the majority opinion. My reasons for writing separately are 1) to express my concern about the rationale for approving the trial court's failure to give a depraved heart second degree murder instruction, 2) to dissent from this Court striking of one Burch's sentences of death, and 3) to point out why it is inappropriate for this Court to order the imposition of a sentence of life imprisonment for Burch's murder of Ms. Davis.

REFUSAL OF A DEPRAVED HEART INSTRUCTION

The trial judge refused to give a depraved heart second degree murder instruction for the homicide of Ms. Davis. The defendant admitted to the police that he beat and stabbed Ms. Davis; he acknowledged that he did this to keep her from calling the police and because he was high on drugs. He also maintained that he left her alive and did not intend to kill her. In fact, Ms. Davis was alive when the crimes were discovered and lived for a week after her savage beating. It was Burch's contention that, although he did beat and stab Ms. Davis, he had no reason to, or intent to, kill her, and therefore the jury should be instructed on second degree depraved heart murder. The instruction he sought would have been that, if he killed Ms. Davis by creating a very high degree of risk to her life, being conscious of the risk and acting with extreme disregard of the life-endangering consequences, he would be guilty of second degree murder. The reason why this Court approves the failure to give this instruction is that, despite his denial, Burch had to have the intent to commit the intentional form of second degree murder or first degree murder and could not have merely had the lesser intent required for depraved heart murder. The Court justifies the refusal to give the depraved heart instruction because "there was no rational basis for the jury to convict only of that offense." ___ Md. ___, ___, ___ A.2d ___, ___ (1997)(Majority Op. at 27). In an attempt to explain why the

defendant must, as a matter of law, have had the intent to commit a more extreme form of murder than depraved heart murder, the Court states :

“Neither the fact that he could have done even more damage and thus ended her life even quicker nor the fact that the victim was still alive when he left the house detracts, in the least, from the compelling inference that the beating he did administer must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result. Under appellant’s theory, virtually any murder committed by beating or that does not involve instantaneous death could qualify as depraved heart murder. That is not the law.

* * *

It is simply beyond the realm of reasonableness to suppose that any rational jury could find that appellant administered the beating to Mrs. Davis with mere recklessness or indifference as to the result.”

___ Md. at ___, ___ A.2d at ___ (Majority Op. at 28). This is, in effect, a directed verdict that the defendant had the intent to murder and did not merely act recklessly. The Court is saying, as a matter of law, that, even though depraved heart murder is one of the charges at issue, the defendant could not be guilty of depraved heart murder because his acts show that he had the intent to commit a more serious form of murder.

The fallacy in the majority’s reasoning becomes evident upon reviewing the cases it cites as authority for its holding. The cited cases are all cases where an instruction on a lesser included offense was not given because the lesser offense was nolle prossed by the State and the Court is explaining why the lesser offense could permissibly be dismissed by the State. *See Burrell v. State*, 340 Md. 426, 667 A.2d 161 (1995)(upholding State’s decision to nolle pros a simple robbery charge because the only rational inference, in light of evidence that defendant had employed a deadly weapon, was that defendant committed an armed robbery); *Jackson v. State*, 322 Md. 117, 586 A.2d

6 (1991) (finding decision to nolle pros lesser charge of possession of cocaine valid where there was no rational basis upon which jury could conclude that defendant was guilty of lesser charge, but not guilty of possession with intent to distribute); *Hook v. State*, 315 Md. 25, 553 A.2d 233 (1989) (concluding that rational basis existed for finding defendant guilty of lesser offense such that State's decision to nolle pros lesser offense violated principles of "fundamental fairness"). These cases are not apposite. There is a vast difference between our cases permitting the State to nolle pros a lesser included offense, thus withdrawing the count from the jury, and the instant case where the unilateral act of a trial judge "effectively withdrew from the jury the possibility of convicting of that lesser included offense". ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 27). A trial judge may refuse to instruct on counts where the evidence does not justify a verdict, *Hof v. State*, 337 Md. 581, 655 A.2d 370 (1995)(stating that requested instruction need not be given if not generated by the evidence), but this Court should not hold that the beating in the instant case was so severe that, as a matter of law, the defendant's intent must have been greater than the intent required for depraved heart murder. The same reasoning would allow the trial judge sua sponte to withdraw a manslaughter charge from the jury's consideration because the judge decided the beating was so severe that intent to murder was conclusively established as a matter of law.

I believe the judge was wrong in sua sponte withdrawing the depraved heart second degree murder charge from the jury's consideration, but any error was harmless or rendered moot by the jury's verdicts. Based on the jury's findings in the more severe forms of murder, the depraved heart murder charge would not have been reached. The jury found Burch guilty of, *inter alia*, premeditated and deliberate murder of Ms. Davis, felony first degree murder of Ms. Davis, intentional second degree murder of Ms. Davis, burglary, and attempted robbery of Ms. Davis. Because of these

multiple findings, it is obvious that the jury should not have reached depraved heart second degree murder, and that offense would be subsumed by the several more serious murder convictions. In addition, the jury found Ms. Davis died as a result of a beating administered during the course of the defendant's commission of a burglary and an attempted armed robbery. As a matter of law, administering a beating that results in death during the course of committing a burglary and attempted robbery is first degree felony murder regardless of whether there was any intent to kill. Depraved heart second degree murder is subsumed by the felony murder conviction.

The majority cites no authority, nor do I believe there is any authority, for the proposition that a judge may refuse to instruct on a charge of depraved heart murder because the judge could properly determine, as a matter of law, that it is "beyond the realm of reasonableness to suppose that any rational jury could find that appellant administered the beating to Mrs. Davis with mere recklessness or indifference as to the result." ___ Md. at ___, ___ A.2d at ___ (Majority Op. at 28). Where intent is an element of the charge, the defendant is entitled to have the jury determine intent or absence of intent. If the majority is correct and a judge can refuse to instruct on a viable depraved heart murder count because no rational jury could find mere recklessness, then a fortiori, judges could sua sponte refuse to instruct on viable manslaughter counts in similar circumstances. When the State nolle prosses a count, the situation is different, but absent a nolle pros, trial judges should never hold, as a matter of law, that the nature of the defendant's act conclusively indicates a culpable intent beyond mere recklessness. Nevertheless, because the jury obviously agreed with the judge's assessment of the defendant's intent, any error was harmless.

STRIKING THE SENTENCE OF DEATH

In the instant case, the two aggravating factors alleged by the State were 1) that Burch “had committed more than one offense of murder in the First Degree arising out of the same incident,” and 2) that Burch had also committed murder while committing or attempting to commit robbery. *See* Maryland Code (1957, 1996 Repl. Vol.), Article 27, § 413 (d)(9), (10). Burch was convicted of the premeditated first degree murder of both Mr. and Ms. Davis, as well as the attempted robbery with a deadly weapon of Ms. Davis. The State sought the death penalty for both murders or, if the death penalty was not warranted, life without parole for both murders.

There was discussion between the trial judge and counsel about whether two separate sentencing forms or only one consolidated sentencing form should be sent to the jury. The judge seemed inclined to use two separate forms but asked the State and defense to see if they could come to some agreement.¹ Both sides apparently agreed to a single consolidated sentencing form, and this is what was sent to the jury with the approval of the State and the defense. This was certainly reasonable because, if the jury found both murders “arose out of the same incident,” both sentences would probably be the same, and in addition, if the jury returned a verdict of death and the sentence

¹ “THE COURT: All right. So assuming we don’t have any disagreement with that, that changes the statutory form in the sense that it potentially doubles it, okay, and --

[DEFENSE ATTORNEY]: I think there’s certainly going to be some modifications needed.

THE COURT: I don’t want to get into the, to be the referee in a battle that perhaps doesn’t need to take place. I’m asking that counsel sit down, and we’re obviously not going to need the form today, and come up with — take the form, the statutory form, and work through it and present me with a proposal if you can agree. If you can’t agree, then so be it. I would ask each side to present me with their proposed verdict sheets. Obviously, I’m going to deviate from the prescribed form except to the extent that I’m obviously going to have to take that form and perhaps in effect just repeat it as to each victim.”

was affirmed, the death sentence would be the only sentence actually carried out; it would precede, not follow, any life sentence. Apparently, both sides recognized that it would be highly unlikely under the circumstances that the jury would return inconsistent sentences for such closely related murders committed by the same person and that, if a single death sentence were imposed, it would be for all intents and purposes the only sentence, because any life sentences would be merged into the death penalty.

With both sides in agreement, a single sentencing form was submitted to the jury asking it to choose either death, life without parole, or life imprisonment. If Burch were validly sentenced to death, he would be executed, and it would not matter if it were for one or both murders; if Burch were not sentenced to death, but were sentenced to life without parole, he would serve life without parole. Both sides were satisfied with a single verdict sheet and agreed to have the jury render a single sentence. The only issue that was not resolved was whether the single sentence was to be a single, merged sentence or whether, in formally entering the sentences, the judge should enter a separate sentence for each murder in accord with the jury's verdict.

When the jury returned a sentence of death, defense counsel began to have second thoughts about the agreed-to procedure. He stated, "I contend that only one death penalty can be imposed and that it has to be imposed as to one or the other and not both....." The judge, however, held that "the intent of the jury was that he receive the [death penalty] for both, and it was made clear to them throughout [the sentencing proceeding] that they were considering two murders." The judge then entered the death penalty sentences for both murders.² If the judge erred, it was in entering two

²The majority states that "had there been any prospect of either an aggravating or a mitigating factor peculiar to one victim but not the other or anything that could reasonably have caused the jury to reach a different balance in the weighing process, from one victim to another, it would

separate death sentences instead of one death sentence with the sentence for the other murder merged.

The legal effect of the verdict sheet agreed to by the parties for these two murders arising out of the same incident was that a single, merged sentence would be returned by the jury. The defendant's agreement to a single sentence was sound both in theory as well as in its practical effect, and this Court should not hold the consolidated verdict sheet constituted reversible error, especially because it was agreed to by the defendant. The defendant may not have wanted two sentencing forms for fear that any jurors who were reluctant to impose the death sentence might compromise and impose the death penalty for one murder and a life sentence for the other. This compromise, although not very rational and of no practical effect, might make reluctant jurors more likely to impose at least one death penalty. By requiring a merged sentence and not giving jurors any way to avoid recognition of the practical effect of a single sentence of death, defense counsel, as a matter of trial tactics, may have avoided any compromise verdict that would in no way benefit the defendant. Further indication of the defense preference to submit a single, merged sentencing determination in death penalty cases involving more than one first degree murder arising out of the same incident can be found in *Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985), and *Grandison v. State*, 305 Md. 685, 506 A.2d 580 (1986), where the defense strenuously argued that "the Legislature intended that only one death sentence could be imposed where more than one person was murdered." *Evans*, 304

have required that we vacate both death sentences and remand for resentencing." ___ Md. ___, ___, ___ A.2d ___, ___ (1997)(Majority Op. at 41). Although I do not necessarily agree with this conclusion and it may be an invitation to post conviction relief by merely establishing any difference in the two murders, it is an acknowledgment that the majority recognizes "beyond any reasonable doubt" that the jury intended the sentence for both murders to be the same, *i.e.*, the death penalty.

Md. at 538, 499 A.2d at 1288; *see also Grandison*, 305 A.2d at 766, 506 A.2d at 621.

If the parties and the judge all agree, this Court should permit a merged sentence for two similar murders committed with the same aggravating factor, that both murders were committed “arising out of the same incident.” A single, merged sentence form might not be preferable, but it should be permissible under the circumstances in the instant case, especially where it is agreed to by the parties. This Court has taken a very flexible approach to merger of sentences, and it seems particularly appropriate in the instant case because only one merged death penalty sentence can be carried out.

In *Biggus v. State*, 323 Md. 339, 593 A.2d 1060 (1991), where a single act of digital anal penetration formed the basis for multiple convictions, this Court noted:

“Nevertheless, when the same act or acts of the defendant constitute different criminal offenses or different degrees of the same offense, Maryland common law principles will often require that one offense be merged into the other for sentencing purposes, so that separate sentences are not imposed for the same act or acts.”

323 Md. at 350, 593 A.2d at 1065. Multiple death sentences are not precluded, but they differ from prison sentences because only one death sentence can be carried out. Where two first degree murders arise out of the same incident and are sentenced together, obviously there cannot be consecutive death sentences, and it may not even be accurate to say a defendant is to be executed for two murders concurrently. The practical effect of multiple death sentences is that they are merged into a single execution, and that ought to be a permissible sentencing option when agreed to in advance by all parties.

Instead of entering the jury’s verdict as a merged death sentence for both murders, the trial judge recorded separate death sentences for each murder. These docket entries may have been

inaccurate, but the remedy for the inaccurate docket entries should not be to reverse one sentence of death. The majority apparently concludes the practical effect of reversing one of the death sentences will be trivial, but that does not justify this Court trivializing the resentencing process. The Court holds one sentence of death is valid and the other sentence of death is invalid. The Court then, without benefit of argument of the parties or without soliciting the views of the trial judge, sua sponte reverses the death sentence for the murder of Ms. Davis. We are not told how the Court arrived at its determination that the murder of Ms. Davis should not be punished by death; indeed, according to the majority, this killing was so heinous that the defendant must have had the intent to murder as a matter of law. From what I can glean from the Court's opinion, the choice as to which murder should not be punished by death was entirely arbitrary, conceivably arrived at by something as illogical as the flip of a coin. *Cf. Johnson v. State*, 292 Md. 405, 439 A.2d 542 (1982)(referring to unconstitutionality of imposing death penalty in an arbitrary and capricious manner).

What is even more distressing than the Court's striking the sentence of death for the murder of Ms. Davis is the Court's adopting the role of sentencing court and ordering the trial judge to enter a sentence of life imprisonment. We do not know whether Burch's convictions and sentences will withstand all future federal challenges and post conviction challenges, but we do know that if a retrial or resentencing is ever required, this Court's order will forever bar the State from seeking death or even life without parole for the murder of Ms. Davis. The State ought to have the option to continue to seek death or life without parole for this especially heinous murder. There have been many cases in which this Court has found that error in a death penalty sentencing invalidated the death penalty, but in these cases, the Court has remanded for a new sentencing proceeding. *See, e.g., Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983); *Harris v. State*, 295 Md. 329, 455 A.2d 979 (1983); *Tichnell*

v. State, 287 Md. 695, 415 A.2d 830 (1980). This Court does not have the authority to impose any sentence, but if we are going to order the imposition of a sentence, the State's Attorney, defense counsel, and the defendant should be present and should be given an opportunity to be heard before we preclude a sentence of death, life without parole, life, or even a life sentence with a portion suspended as a sentencing option.

The State may not want to prosecute another death penalty sentencing for the murder of Ms. Davis, but the decision whether to seek the death penalty again or a life sentence is the State's decision, not this Court's decision. *See* Md. Code (1957, 1996 Repl. Vol.), Art. 27, § 412(b),(c). The State should have that option, to seek a back-up death penalty, as well as the option to seek at least life without parole for the murder of Ms. Davis. There is no assurance that the single, remaining death sentence for the murder of Mr. Davis will withstand all the challenges yet to be made on the verdict and sentence. That death sentence also may be left more vulnerable to challenge because of this Court's decision to enter a life sentence for an equally vicious murder, with the same aggravating factors, committed under the same circumstances. I dissent from this Court's order requiring Burch to be sentenced to life imprisonment (with a possibility of parole) for the murder of Ms. Davis.