

Court of Criminal Appeals
September 17, 2014

Turner v. State

No. PD-1354-13

Case Summary written by Justin Nail, Staff Member.

Per Curiam.

Appellant Litrey Demond Turner was convicted of capital murder and sentenced to life in prison without parole. During the pendency of his appeal, *Miller v. Alabama*, a United States Supreme Court case ruling it unconstitutional to allow mandatory sentences of juvenile offenders to life without parole. The Court in *Miller* required individualized sentencing assessment for these minor individuals. On appeal, Turner argued that his life sentence without the possibility of parole was unconstitutional under the Eighth Amendment because he was a minor when he allegedly committed the murder. The State conceded this point, and the court of appeals reversed and remanded for a new sentencing hearing to follow the ruling laid down in the *Miller* decision. Turner filed for discretionary review, arguing that he should be allowed an individualized sentencing assessment from between 5 and 99 years to life.

Issue: Whether Turner, under the rationale of *Miller*, was entitled to an individualized sentencing hearing of between 5 and 99 years to life.

The Court looked to its consolidated opinion of *Lewis v. State* and *Nolley v. State*, in which juvenile offenders were given a mandatory life sentence without parole. Both cases' courts of appeals affirmed the convictions, but adjusted the sentences to allow for the possibility of parole. Upon review, the Court of Criminal Appeals determined that the Supreme Court's opinion in *Miller* only prohibited a mandatory life sentence without parole for juvenile offenders. This meant that juvenile offenders sentenced to life with the possibility of parole were not necessarily entitled to the individualized sentencing assessment.

Using the reasoning of its decision in *Lewis* and *Nolley*, the Court of Criminal Appeals rejected Turner's argument, finding that he was not entitled to an individualized sentencing assessment under the rationale of *Miller*. The Court merely reformed his sentence from life without parole to life with the possibility of parole.

Overton v. State

No. WR-75,804-02

Case Summary written by Tara Parker, Staff Member.

Judge Meyers delivered the opinion of the Court, joined by Judges Price, Womack, Johnson, Hervey, Cochran, and Alcalá. Judge Cochran also filed a concurring

opinion, joined by Judge Johnson and Alcalá. Presiding Judge Keller filed a dissenting opinion, in which Judge Keasler joined.

This is an application for a writ of habeas corpus on Cause no. 06-CR-3624-F in the 214th District Court from Nueces County. The Applicant in this case was convicted of capital murder for the death of A.B., a four year old boy Applicant and her husband were in the course of adopting, and she was sentenced to life without parole by a jury. Applicant's conviction was upheld by the court of appeals and the Court of Criminal Appeals refused her petition for discretionary review. Applicant then filed a writ of habeas corpus alleging: (1) actual innocence, (2) ineffective assistance of counsel, and (3) a *Brady* claim. On order from the Court of Criminal Appeals, the trial court conducted an evidentiary hearing; subsequently, the habeas judge recommended that relief be denied. The Court of Criminal Appeals has ordered the writ application filed and now aims to determine whether: (1) Applicant received ineffective assistance of counsel at trial, and (2) the State failed to disclose exculpatory evidence. Without reaching the second question, the majority grants relief on the ineffective assistance of counsel claim and remands for a new trial.

At trial, Applicant testified about A.B.'s excessive eating habits. At only four years old, A.B. ate more than Applicant's other children at every meal. He was often eating from the floor, from the trash, and even from the cat food bowl. On the morning of A.B.'s death, Applicant testified that she found A.B. in the pantry eating an unknown substance, after she had already fed him breakfast. After Applicant chastised him, A.B. threw a tantrum, defecated in his pants, and threw feces at Applicant. This wasn't the first time this had occurred. Applicant cleaned everything up, then gave A.B. some leftover soup and chili mixture. Later that day, after returning home from some errands, A.B. again complained that he was hungry. Applicant gave A.B. a cup of water with some sprinkles of Zatarain's to give A.B. the taste he was craving.

About twenty minutes after A.B. drank the water mixture, he began to act abnormally. First, he stumbled to the floor; then he told Applicant he was cold and threw up. Applicant called her husband, and A.B. began to shake. Because Applicant was an LVN, she consulted her EMT books and determined A.B. was in some kind of shock. She tried various methods to calm him down, but when A.B. became unresponsive and was having trouble breathing, she began to think something was very wrong. Applicant and her husband took A.B. to an urgent care center, which transferred him to a hospital, which then transferred him to a children's hospital, where he died the next day.

A.B.'s blood was tested at both the hospitals and was found to have an incredibly high level of sodium. It was determined that A.B. died of hypernatremia, or sodium intoxication. The medical examiner determined A.B.'s death was a homicide. The indictment alleged that Applicant caused the death of A.B. by either giving him an acute toxic level of sodium or by failing to provide him with timely medical care. After the jury was polled, it was determined that they convicted her based on her omission to act, rather than on the theory that she forced A.B. to eat the salt.

The prosecution used Dr. Rotta, the pediatric critical-care specialist who treated A.B. at the children's hospital, as an expert witness. Dr. Rotta testified about the symptoms of sodium intoxication and the treatment given to A.B. Further, Dr. Rotta concluded in her testimony that A.B. could have survived if he had been taken to the hospital sooner.

Applicant's defense team consisted of five different lawyers, all with separate assignments relating to the case. The Overtons' civil lawyer for a child custody case, Brad Condit, conducted the deposition of Dr. Moritz, the leading expert of hypernatremia. Two of the Overtons' criminal lawyer, David Stith and Chris Pinedo, watched only a portion of the deposition video. Pinedo told the lead trial counsel, John Gilmore, the deposition should not be used because there were so many interruptions and invalid objections, rendering it essentially useless. Dr. Moritz was also unable to testify at the trial because he could not travel on the Sabbath; defense counsel made no motion for continuance to assure Dr. Moritz's presence. Thus, neither Dr. Moritz's deposition nor other testimony was offered at trial to rebut the testimony of Dr. Rotta, even though most of Dr. Moritz's testimony was favorable to the defense and went directly to the claims.

For an ineffective assistance of counsel claim to be established, the applicant must prove by a preponderance of the evidence that: (1) "trial counsel's performance fell below an objective standard of reasonableness, and (2) there was a reasonable probability that the result of the proceedings would have been different but for trial counsel's deficient performance." *Strickland v. Washington*, 466 U.S. 668 (1984) (internal citations omitted). The *Strickland* test is highly deferential to attorneys and takes into account that many options taken by counsel are strategic.

At the habeas hearing, Applicant's trial attorneys testified about their decision not to use Dr. Moritz's testimony or deposition. David Jones, who did not view the tape, said the decision not to use Dr. Moritz was completely ineffective. John Gilmore agreed. Chris Pinedo admitted there was no strategy in not requesting a continuance to accommodate Dr. Moritz. Because of the testimony of these attorneys, the Court of Criminal Appeals determined that it was objectively unreasonable for Applicant's counsel to not attempt to present Dr. Moritz's testimony. This satisfies the first prong of the *Strickland* test. The court then noted that Dr. Moritz's testimony would have been credible and could have had a strong impact on the jury, creating a reasonable probability that the outcome of Applicant's trial would have been different. Because both prongs of the *Strickland* test were satisfied, the majority remanded Applicant's case for a new trial.

Judge Cochran also filed a concurring opinion, joined by Judge Johnson and Alcalá.

Judge Cochran wrote a concurrence to explain other problems with the proceedings in Applicant's case. The concurrence goes into detail about Applicant's *Brady* claim and the kinds of exculpatory evidence withheld by the prosecution; further, the concurrence describes the prosecutor as an alcoholic, who was taking prescription pills that affected her memory and was later fired for unrelated ethical violations. The concurrence makes clear that both defense counsel's

miscommunications and the prosecutor's ethical problems contributed to the harm at Applicant's trial.

The concurrence also goes into more detail about A.B.'s pre-existing developmental problems, which could have explained his odd eating habits as a contributing factor to his death. The concurrence suggests that this evidence may have been intentionally hid by the prosecution. The concurrence concludes that Applicant's five lawyers should have communicated better with each other, with the doctors and experts, with the prosecution, and with Applicant. These miscommunications led to the loss of various kinds of exculpatory evidence and to the failure of including the possibility of lesser offenses in the jury charge.

Presiding Judge Keller filed a dissenting opinion, in which Judge Keasler joined.

The dissenting opinion thinks that more deference should be given to the habeas judge's findings and the strategic choices of the attorneys. Specifically, the dissent sees the choice of not offering Dr. Melinek's testimony as a strategic one to avoid opening the door to evidence that would have damaged the defense's case. This evidence included the interviews of Applicant's children, stating that they often were given spicy food as punishment. The dissent does not find an adequate justification in Pinedo's articulated belief at the habeas hearing that the deposition was useless because of editing difficulties. Rather, the dissent suggests that the real justification was a carefully thought out trial strategy to keep out damaging evidence.