No. 62490-B

IN THE DISTRICT COURT OF

JEFFERSON COUNTY, TEXAS

EX PARTE

MARVIN LEE WILSON

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The defendant is not mentally retarded.

History Of The Case

On April 28, 1994, the defendant was convicted of capital murder and sentenced to death. That sentence was reversed and the case remanded for retrial by the Court of Criminal Appeals by mandate issued February 21, 1997. (Opinion Attached and expressly made a part hereof).

On February 28, 1998, the defendant was again convicted of capital murder and sentenced to death. The conviction was affirmed by mandate issued by the Court of Criminal Appeals on January 3, 2000. See **Wilson v. State**, 7 SW3d 136 (1999).

On December 27, 1999, the defendant filed his first application for habeas corpus relief, designated as No. 63490-A. The Court of Criminal Appeals denied relief by per curiam order issued October 11, 2000. (Order Attached and expressly made a part hereof).

On June 19, 2003, the defendant filed the current application for habeas corpus relief, alleging that his death sentence should be reformed to a sentence of life due to the fact that he is mentally retarded. This application was filed almost 1 year to the day after the United States Supreme Court issued its opinion in **Atkins v. Virginia**, 536 US 304; 122 S. Ct. 2242 on June 20, 2002.

On May 18, 2004, a hearing was held on the application before Judge Layne Walker. After the hearing, Judge Walker became aware that he had previously represented the defendant, and transferred the case to this Court.

This Court conducted an evidentiary hearing on July 15, 2004. The parties agreed that this Court could consider all of the evidence produced before Judge Walker. (Vol. 2, Pages 1-7). Both parties have filed proposed findings and conclusions.

Initial Claim Of Mental Retardation

It should be initially noted that the defendant never urged as mitigating evidence that he was mentally retarded in either of his capital murder trials nor in his first application for habeas corpus relief. The claim is only first made after the United States Supreme Court held that mental retardation would bar execution in **Atkins v. Virginia**, supra. (See also **Ring v. Arizona**, 536 US 584; 122 S.Ct. 2428; 153 L.Ed.2d 556 (2002).

History of Legal Authorities

The issue of mental retardation as a bar to execution originated in **Atkins v. Virginia**, 536 U.S. 304 (2002). The Court did not publish a bright line definition of mental retardation.

The Court of Criminal Appeals first addressed this issue in **Ex Parte Briseno**, 135 SW3d 1 (2004). In an extensive analysis of the issue, the Court established 3 requirements that must be proven to establish mental retardation:

1. Significantly subaverage general intellectual functioning.

2. Accompanied by related limitations in adaptive functioning

3. The onset of which occurs prior to the age of 18.

The Court further held that "when an inmate sentenced to death files a habeas corpus application raising a cognizable Atkins claim, the factual merit of that claim should be determined by the judge of the convicting court. His findings of fact and conclusions of law shall be reviewed by this Court in accordance with article 11.071, Section 11."

A number of other factors can influence the ultimate determination of mental retardation:

1. Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and if so, act in accordance with that determination?

2. Has the person formulated plans and carried them through or is his conduct impulsive?

3. Does his conduct show leadership or does it show that he is led around by others?

4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

5. Does he respond coherently, rationally and on point to oral or written questions or do his responses wander from subject to subject?

6. Can the person hide facts or lie effectively in his own or others' interest?

7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Finally, the Court held that "although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determination of credibility."

In **Ex Parte Modden**, ___ SW3d ___, (Tex. Crim. App. No. 74,715, April 21, 2004), the Court reaffirmed the **Briseno** holdings. The Court explained that, pursuant to **Atkins**, mental retardation is defined as:

1. Significant subaverage general intellectual functioning (IQ of 70 or below)

2. Concurrent with deficits in adaptive functioning, and

3. Occuring before age 18.

The Court held that the trial court was in the best position to evaluate conflicting evidence.

And in **Hall v. State**, ___ SW3d ___, (Tex. Crim. App. No. 948342, 2004) the Court reaffirmed that "we afford almost total deference to the trial judge's findings of fact, especially when those findings of fact are based upon credibility and demeanor."

And as was noted in **Briseno**, the defendant bears the burden of proof, by a preponderance of the evidence, to establish that he is mentally retarded.

Thus, these guiding legal principles applied to the evidence shown result in the following Findings of Fact & Conclusions of Law.

Findings Of Fact

1. Evaluation of the factors designated by **Briseno** show:

    a. Did those who knew the defendant best during the developmental stage - his family, friends teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?

Giving the most liberal consideration to the evidence shown by the defendant at trial and upon hearings, those closest to the defendant at best described him as "slow". There is no testimony anywhere indicating that those closest to the defendant during his developmental stage believed the defendant to be mentally retarded. (See Trahan testimony and report citing affidavits; RRII, D2, p 4-5: Trial testimony of Armstrong, RR.XXIII, p 82 & Kelly, RR.XXIII, p. 90). The defendant worked at a number of jobs. (See Trahan report, Hearing Vol. II,

p.2.) He also held a drivers license. (See Trahan's report, Hearing Vol. II, p. 3.) And he was married with a child. (See Walters testimony, Hearing Vol. II, p. 74; and Trahan report, Hearing Vol II, p. 5.)

b. Has the person formulated plans and carried them through or is his conduct impulsive?

There is no evidence the defendant ever acted impulsively. All of the trial evidence indicated the defendant formulated a plan to kill the victim because the defendant believed the victim had informed on him to the police. See **Wilson v. State, 7 SW 3d 136** (Tex. Crim. App. 1999). All of the evidence in the record indicates the defendant, although clearly not brilliant, had the mental ability and did in fact formulate plans for his normal activities.

c. Does his conduct show leadership or does it show that he is led around by others?

There is no evidence in the record that the defendant was ever considered a follower. His actions were all deliberate, although sometimes unwise. (See **Wilson**, supra; RR, XXIII, p. 76, Armstrong testimony.)

d. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

All of the evidence in the record reflects that the defendant's conduct was rational and appropriate, although often illegal. (See **Wilson**, supra; Hearing Vol. 1, p. 9; Report, Hearing Vol. II, p. 6, Exhibit D2)

e. Does he respond coherently, rationally and on point to oral or written questions or do his responses wander from subject to subject?

The record does not reflect that the defendant's normal responses wandered. The record does show that in most instances, the defendant's responses were coherent, rational and on point. (See **Wilson**, supra; Hearing Vol. 1, p. 9; Report, Hearing Vol. II, p. 6, Exhibit D2.)

f. Can the person hide facts or lie effectively in his own or other's interests?

The trial record clearly reflects that the defendant was capable of lying and hiding facts when he felt that was in his best interest. (See **Wilson**, supra; RR XXIV, p. 9, testimony of Dr. Gripon, M. D.)

g. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning and complex execution of purpose?

As the trial record and appellate decisions so clearly reflect, the defendant's conduct surrounding this crime show deliberate forethought, planning and execution of purpose. (See **Wilson**, supra.)

2. **Atkins** & **Briseno** established 3 requirements that must be proven by the defendant by a preponderance of the evidence.

a. **Significantly subaverage general intellectual functioning.**

The Court of Criminal Appeals most recent outline of required facts is to be found in ***Ex Parte* Simpson**, 136 SW 3d 660 (Tex. Crim. App. 2004). The evidence in this case is strikingly similar to the facts outlined in **Simpson**.

The defendant had I.Q. tests administered several times during his life. With the exception of his most recent score of **61**, all of his scores were all above 70, considered the border below which a person is mildly mentally retarded. (See Trahan testimony, Hearing Vol. 2, and Report, D2.)

The only test on which the defendant scored lower than 70 was administered shortly before this hearing and Dr. Trahan's testing. Although in his report he notes that the test was administered by the highly respected Dr. Curt Wills (D2, p. 8), Dr. Trahan's testimony reflected it was actually administered by one of Dr. Wills students: (See Hearing Vol. II, p 28 and following:)

A. Dr. Wills is a very well-respected and well-trained psychologist. He's been doing this for many years and I know him personally and trust his ability to conduct those kinds of procedures in a valid fashion.

Q. So, based on the fact that Dr. Wills gave this test, you give it validity. Do you know anything about where the test was given?

A. That information is not available to me right now.

Q. Did you look at the test?

A. Yes, I did. I looked at some of the scores and face sheet. I don't have actually the items from the tests.

Q. Isn't that very important, on a test regarding I.Q. to - for the tester to make notes about the motivation, the surrounding, the attentiveness, cooperativeness of the person being tested?

A. I normally do those things in each test.

Q. Isn't that very important to the validity of the test?

A. I would consider that to be which is why I addressed those in my report.

Q. Did you look at the notes on this particular Wechsler Test?

A. I don't have Dr. Wills personal notes on that.

Q. Okay. Would it surprise you and would it make a difference to you that Dr. Wills didn't give that test?

A. He may have actually had someone in his office assist with the admission of that. I don't have - I haven't spoken personally with Dr. Wills.

Q. But would it surprise you?

A. Those things are done fairly regularly.

Q. But I thought you just told us that the validity of the test, you gave it because Dr. Wills is a well-known, respected psychologist who's been doing it for a long time?

A. In each of those cases they're individually supervised by Dr. Wills even when he doesn't personally administer every item on the test.

Q. Do you know who August Wehner is?

A. No, I don't. I don't know the person personally.

Q. Would it surprise you to know that he gave the test - a student?

A. No. I don't know. I haven't spoken with Dr. Wills personally about it.

Q. Would it surprise you to know that there's not a single note about motivations, the surroundings, the circumstances of the test?

A. Again, I have not been provided individual notes with regard to the observations that were made during the testing session.

Q. The Wechsler Test, would you agree with me, that it is subjectively graded?

A. It's not suppose to be subjectively graded. It's suppose to be objectively graded in accordance with the criteria listed in the test manual.

The following answers reflect that in many instances, the grading does have a subjective basis of evaluating the answers given. Dr. Trahan then testified:

A. The testing itself is not subjective. The testing is subject to error depending on whose administering it and scoring it, but the criteria for scoring it are actually fairly objective.

Getting to specific I.Q. scores, Dr. Trahan testified:

Q. Going back in time to '71, '72 school year, we have an I.Q. test of 73.

A. That's correct.

Q. Coming forward to TDC where he was - gone through diagnostic, we have a test score of 75?

A. That's correct.

Q. When we go to your office - and I believe Mr. Wilson actually came to your office and you interviewed him there, is that correct?

A. That's correct.

Q. We have a test score of 75 and 79?

A. That's correct.

Q. And when Mr. Wilson was tested in jail by a psychology student, we have a test score of 61?

A. That's correct.

b. Accompanied by related limitations in adaptive functioning and

c. The onset of which occurs prior to the age of 18.

As noted previously, all of the testimony, affidavits, reports and all other forms of evidence reflect that the defendant functioned sufficiently in his younger years to hold jobs, get a drivers license, marry and have a child. Although he did poorly in school, the record reflects that he seldom went to class. He was considered "slow" by most, yet **there is nothing in the record to reflect that anyone diagnosed or considered the defendant mentally retarded prior to his becoming 18 years old.**

Writings Of The Defendant

One of the additional factors that can be considered according to **Simpson**, supra, is the writings of the defendant:

> "Applicant's jail letters are clear, coherent and clever." **Simpson**, p. 666.

Attached hereto and expressly made a part hereof are letters and motions written by the defendant and found in the file of this case. A review of these writings reflect that they are "clear, coherent and clever."

Conclusions of Law

In **Ex Parte Modden**, ___ SW 3d ___ (No. 74,715, Tex. Crim. App., 4/21/04), the Court held that the trial judge was in the best position to evaluate the evidence of mental retardation.

And as noted in **Simpson**, supra:

> "The trial judge entered findings of fact based on his review of the trial and writ evidence, that applicant failed to present a cognizable claim of mental retardation because he failed to show facts that prove he is mentally retarded.
>
> In sum, although there was some evidence in the trial and writ record suggesting the possibility of mild mental retardation, there was also ample evidence In the record supporting the trial court's finding that applicant is not mentally retarded."

That is exactly what this record reflects. The defendant has the duty and burden to demonstrate by a preponderance of the evidence that he is mentally retarded. While there is some evidence to support that conclusion, the overwhelming weight of the credible evidence indicates that he is not.

This court finds that the defendant is not mentally retarded and that the death sentence imposed in this case should be enforced. It is respectfully recommended that the relief sought be denied.

Copies of these findings and conclusions are to be served upon all counsel of record, and the original forwarded to the Texas Court of Criminal Appeals.

Signed and entered August 31, 2004.

Larry Gist, Judge Presiding