

Digest: People v. Gay

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Opinion by Baxter, J., with Kennard, Acting C. J., Werdegar, J., Chin, J., Moreno, J., Corrigan, J., and Marchiano, J. Concurring Opinion by Werdegar, J., with Kennard, Acting C. J., and Marchiano, J.

Issue

Can a defendant present evidence at a penalty retrial about the circumstances of the offense that is inconsistent with the verdict reached in the guilt phase of the trial pursuant to California Penal Code section 190.3?

Facts

Kenneth Gay (Gay) and Raynard Cummings (Cummings) were charged with the murder of a police officer, Paul Verna (Officer Verna), during a traffic stop.¹ The prosecution suggested that their motive was to avoid prosecution for four “brutal” robberies they had recently committed.² During these robberies, their wives, Pamela Cummings (Pamela) and Robin Gay (Robin), accompanied them, with Pamela as driver.³ Gay, who was of mixed race, would sit in the front passenger seat, and Raynard, who was black, would sit in the back.⁴

Less than two weeks after the latest robbery, Officer Verna pulled over the car containing Cummings and Gay and their wives.⁵ The car had been stolen and its license plates switched.⁶ Pamela exited the car and was unable to produce registration.⁷ As Officer Verna approached the car to talk to the men inside, Cummings shot the Officer in the shoulder.⁸ In total, Officer Verna was shot with six bullets from the same gun.⁹ Testimony from various eyewitnesses conflicted over whether Gay or Cummings fired the additional shots.¹⁰

¹ *People v. Gay*, 178 P.3d 422, 424 (Cal. 2008).

² *Id.* at 424–25.

³ *Id.* at 425.

⁴ *Id.*

⁵ *Id.* at 426.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 430.

¹⁰ *Id.* at 427–29.

Several hours later, the four met to discuss the shooting.¹¹ The wives' testimony conflicted as to whether Gay claimed credit for the shooting.¹² On her way home, Pamela stopped and anonymously called the police to report that a man resembling Cummings shot Officer Verna.¹³ The next day, undercover police officers followed Robin and Pamela to Oceanside, where they met up with their husbands.¹⁴ The police intercepted their car and arrested them, finding Cummings and Gay hidden in the back seat.¹⁵

After her arrest, Pamela admitted that she had lied to the police and agreed to cooperate in exchange for a reduction of the charges against her.¹⁶ Gay and Cummings were tried together.¹⁷ Pamela testified that, after Cummings fired the initial shot, Gay shot Verna in the back and then fired two additional shots standing over Verna.¹⁸ While some eyewitnesses corroborated these facts, others identified Cummings as the shooter.¹⁹

After evidence in aggravation was presented, a jury convicted both men of murder and sentenced them to death.²⁰ Gay filed a writ of habeas corpus claiming ineffective counsel for the penalty phase of the trial.²¹ The California Supreme Court agreed and remanded for a new penalty trial.²²

At the retrial, the trial court excluded four statements Cummings had made bragging that he had fired all six shots at Verna.²³ The court also excluded testimony of an eyewitness identification expert to explain the inconsistencies in the prosecution witnesses' testimony and testimony of witnesses that would show that someone else was the shooter.²⁴ The trial court also instructed the jury to disregard the defense's opening statement, saying that defendant's guilt was conclusively proven and that there would be no evidence presented to the contrary.²⁵ The court denied the defense's motions for a mistrial.²⁶

After the retrial, the jury affirmed the verdict of death, and Gay appealed.²⁷ The Supreme Court of California granted review.²⁸

¹¹ *Id.* at 429.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 430.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 426-27.

¹⁹ *Id.* at 427-29.

²⁰ *Id.* at 424.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 434-35.

²⁴ *Id.* at 435.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 424.

²⁸ *Id.*

Analysis

Gay argued that the evidence suggesting he was not the shooter was admissible as relevant under several subdivisions of Section 190.3 of the California Penal Code.²⁹ The Court stated that its decision in *People v. Terry* recognized that a defendant may provide evidence in a penalty retrial of his version of the circumstances surrounding the crime to support a defense of lingering doubt.³⁰ The *Terry* court explained that, if a different jury decides the guilt and penalty phases, it should hear the defendant's version of the facts and decide whether it has any lingering doubt as to the defendant's guilt.³¹ The *In re Gay* Court also found that other states allowed the presentation of evidence of the circumstances of the offense to support a lingering doubt defense in the penalty phase.³²

The Court stated that error in excluding evidence presented at the penalty phase is reversible if there is a "reasonable possibility" that the exclusion of the evidence affected the verdict.³³ The Court observed that the identity of the shooter was central to Gay's defense.³⁴ The Court also noted that only four of the defendant's witnesses were permitted to testify, and only one of them actually saw the shooting.³⁵ The four witnesses who saw the shooting and would have supported the defense's theory of lingering doubt were not permitted to testify.³⁶ The Court also noted that, although Gay was permitted to show that Pamela attempted to shift blame for the murder to Cummings, Gay was prevented from showing that Cummings himself claimed that he was the shooter.³⁷

The Court found that the trial court's instructions to the jury and exclusion of evidence were prejudicial.³⁸ The Court reasoned that, while the trial court instructed the jury at the close of the evidence on lingering doubt, the court did not withdraw its earlier, inconsistent instruction.³⁹ The Court stated that the jury was left confused as to whether it should consider the earlier instruction in determining lingering doubt.⁴⁰ Thus, the Court

²⁹ *Id.* at 436–37 (citing CAL. PEN. CODE §§ 190.3, 190.3(a), 190.3(j), 190.3(k)). This Section provides that, if a defendant has been found guilty of first-degree murder, the trier of fact, in the penalty phase, may consider "any matter relevant to . . . mitigation and sentence," such as "the nature and circumstances of the present offense," CAL. PEN. CODE § 190.3, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding," § 190.3(a), "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor," § 190.3(j), or "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," § 190.3(k).

³⁰ *Id.* at 437 (citing *People v. Terry*, 390 P.2d 381 (Cal. 1964)).

³¹ *Id.* (citing *People v. Terry*, 390 P.2d 381 (Cal. 1964)).

³² *Id.* at 439–40 (citing *In re Gay*, P.2d 476 (Cal. 1998)).

³³ *Id.* at 441.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 441–42.

³⁸ *Id.* at 442.

³⁹ *Id.*

⁴⁰ *Id.*

stated, it was impossible to know which of the instructions the jury applied in reaching its verdict.⁴¹

The Court concluded that, despite the aggravating evidence presented, there was a reasonable possibility that the jury could have selected the lesser penalty by finding lingering doubt.⁴² The Court reasoned that the evidence indicating that defendant was not the shooter would have been important in determining what penalty to impose.⁴³

Holding

The Court held that the trial court's exclusion of evidence that defendant was not the shooter during the penalty phase, in support of a defense of lingering doubt, was reversible error.⁴⁴ Thus, the Court reversed the judgment of death and ordered a third sentencing trial.⁴⁵

Concurrence

Justice Werdegar clarified that the majority's holding reversed in part the previous ruling in *In re Gay*, in which the Court held that lingering doubt evidence is not relevant to the circumstances of the crime.⁴⁶ He noted that the majority simply ignored the inconsistent holding in *In re Gay* because the previous decision involved a unitary trial, whereas, in the present case, the sentencing trial was separate.⁴⁷

Legal Significance

This decision reaffirms the long-standing rule that a defendant can use lingering doubt as a mitigating factor to introduce evidence that he was innocent of the crime. The ruling essentially overrules the earlier ruling in *In re Gay*, in which the Court implied that a defendant's introduction of evidence of innocence was a retrial of guilt.

In practice, the decision will not affect cases where the same jury returns both a guilt and sentence verdict. In those cases, the evidence used for the guilt phase will not be introduced for the sentencing phase because it is already before the jury. But this holding does provide more guidance to trial courts when the sentencing phase is separated from the guilt phase of a trial. While a defendant will not be able to question the conviction at sentencing, he can provide evidence inconsistent with the conviction to persuade the jury that there is still lingering doubt as to his guilt.

⁴¹ *Id.* at 442–43.

⁴² *Id.* at 443.

⁴³ *Id.* at 444.

⁴⁴ *Id.* at 441.

⁴⁵ *Id.* at 444.

⁴⁶ *Id.* (citing *In re Gay*, 968 P.2d 476 (1998)).

⁴⁷ *Id.* at 445.