

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,702

HORACE WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE
NOV 5 1991
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

AN APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY,
CRIMINAL DIVISION

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Assistant Attorney General
Florida Bar #339067

and JAMES J. CARNEY
Assistant Attorney General
Florida Bar #475246
111 Georgia Avenue
Suite 204
W. Palm Beach, Florida
33401
(407) 837-5062
Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
<u>ISSUE 1</u>	5
WHETHER PETITIONER'S DOUBLE JEOPARDY RIGHTS HAVE BEEN VIOLATED?	
CONCLUSION	12
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

CASES

<u>Arizona v. Rumsey</u> , 467 U.S. 203, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984)	6, 8
<u>Brown v. State</u> , 521 So. 2d 110 (Fla.), <u>cert. denied</u> , 488 U.S. 912, 109 S. Ct. 270, 102 L. Ed. 2d 258 (1988)	10
<u>Bullington v. Missouri</u> , 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 279 (1981)	6, 7, 9
<u>McArthur v. Nourse</u> , 369 So. 2d 578 (Fla. 1979)	6
<u>McCuen v. State</u> , 382 S.E.2d 422 (Ga.App. 1989)	6
<u>Morris v. State</u> , 557 So. 2d 27 (Fla. 1990)	9
<u>People ex rel. Daley v. Strayhorn</u> , 121 Ill. 2d 470, 118 Ill.Dec. 387, 521 N.E.2d 864 (Ill. 1988)	8, 10
<u>People v. Cortez</u> , 737 P.2d 810 (Colo. 1987)	6
<u>Price Wise Buying Group v. Nuzum</u> , 343 So. 2d 115 (Fla. 1st DCA 1977)	5
<u>Serfass</u> (1975), 420 U.S. at 388, 95 S. Ct. at 1062	8
<u>State v. Gellis</u> , 375 So. 2d 885 (Fla. 3d DCA 1979), <u>cert. denied</u> , 386 So. 2d 636 (Fla. 1980)	10
<u>State v. McKenna</u> , 512 A.2d 113 (R.I. 1986)	5
<u>State v. Rolle</u> , 577 So. 2d 948 (Fla. 4th DCA 1991)	10
<u>Tedder v. State</u> , 322 So. 2d 908 (Fla. 1975)	9

MISCELLANEOUS

Section 921.141 <u>Florida Statutes</u> (1987)	9
--	---

PRELIMINARY STATEMENT

Horace Williams was the defendant below and will be referred to as "petitioner" in this brief. The State of Florida will be referred to as "respondent." References to the record will be preceded by "R."

STATEMENT OF THE CASE

Respondent generally agrees with petitioner's statement of the case, with the following additions, exceptions and clarifications.

Respondent does not agree that the trial court ruled "as a matter of law" it could not sentence petitioner to the death penalty. Petitioner never raised his double jeopardy argument until he filed his motion for rehearing.

STATEMENT OF FACTS

Respondent generally agrees with petitioner's statement of the case, with the following additions, exceptions and clarifications.

Respondent does not agree that the State waived its right to a phase two jury trial. The prosecutor objected to the defendant's attempt to waive the jury (R 524):

[The Prosecutor]: Judge, I, for the record, I would like to make an objection to the process of the Defense waiving a jury. I am not so sure they can. I would like to preserve my record on that issue.

After the jury found petitioner guilty, the prosecutor again made it clear he was not willing to waive Phase Two (R 2821, 2822):

[The Prosecutor]: What I am saying, I am not in a position to waive phase two.

* * *

[The Prosecutor]: This case, like I said, Judge, I am not going to stand up here and jump up and down. You know the State Attorney's office. You know my feelings.

Later, the prosecutor stated (R 2831):

[The Prosecutor]: Judge, I am sorry. I do, prior to proceeding, I just want to put on the record and renew my objection to the procedure utilized, whereby the Defense waive the jury trial on phase two.

The trial judge said that he felt if he were to impose the death penalty in this case, he would be reversed (R 2834).

SUMMARY OF THE ARGUMENT

I

The Fourth District properly declined to address petitioner's double jeopardy argument as it was not raised until rehearing and it is not yet ripe for review as the State has not attempted to resentence petitioner.

Assuming that the double jeopardy issue is properly before this Court, petitioner's double jeopardy rights have not been violated. The procedure implemented by the trial judge did not resemble a trial. The State has not been given its one chance to present its case in accordance with the death penalty statute.

POINT I

PETITIONER'S DOUBLE JEOPARDY RIGHTS
HAVE NOT BEEN VIOLATED.

Initially, respondent notes that petitioner's double jeopardy argument was not presented to the Fourth District until he filed a motion for rehearing. The Fourth District opinion properly refused to address that claim, as should this Court. See Price Wise Buying Group v. Nuzum, 343 So.2d 115, 117 (Fla. 1st DCA 1977) (court could not consider matters raised for the first time in motion for rehearing).

This is especially true where petitioner's double jeopardy claim is not yet ripe. The State has not attempted to hold the second phase of the trial. Even assuming this Court found the issue was somehow preserved, it should decline to address this issue as not yet ripe for review. Certainly, this Court cannot find that the Fourth District erred by failing to consider an unripe issue raised for the first time on rehearing.

In State v. McKenna, 512 A.2d 113 (R.I. 1986), the defendant claimed that retrial for theft charges would violate his double jeopardy rights. In declining to address the issue, the Rhode Island Supreme Court held:

Our reasoning on this issue parallels the rule enunciated by the United States Supreme Court in Thorpe v. Housing Authority of Durham, 393 U.S. 268, 284, 89 S.Ct. 518, 527, 21 L.Ed.2d 474, 485 (1969), wherein the Court noted that it does not sit "to decide abstract, hypothetical or contingent questions * * * or to decide any constitutional question in advance of the necessity for its decision * * *." Unless or until a second prosecution is commenced, defendant's double-jeopardy challenge is speculative and not ripe for consideration by this Court.

Id. at 115. See also People v. Cortez, 737 P.2d 810, 814 (Colo. 1987), n.4, (declining to decide whether retrial on theft charge would violate double jeopardy -- where further proceedings had not been instituted, issue was not ripe for review); McCuen v. State, 382 S.E.2d 422 (Ga.App. 1989) (double jeopardy claim not ripe for review until State attempts to retry defendant and his double jeopardy claim is rejected by trial court).

Respondent notes that both Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) and Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 279 (1981), presented much different procedural postures than this case. In Rumsey, the defendant appealed after a second sentencing hearing had been held. 467 U.S. at 207-08, 81 L.Ed.2d at 169-70. In Bullington, after the first penalty proceeding, the State filed a formal notice that it intended to again seek the death penalty. The defendant filed a motion to strike the notice in the trial court, claiming that the double jeopardy clause barred the imposition of the death penalty. The trial court announced that it would not allow the State to seek the death penalty. 451 U.S. at 436, 68 L.Ed.2d at 277.

In the present case, there has been no attempt by the State to impose the death penalty and no double jeopardy claim made to the trial court. The Fourth District correctly declined to address the double jeopardy claim raised on rehearing. Cf. McArthur v. Nourse, 369 So.2d 578 (Fla.

1979) (where appellate court ordered new trial and state moved for new trial, defendant permitted to file motion to dismiss on double jeopardy grounds with trial court and if denied, file writ of prohibition with appellate court).

Assuming that this Court wishes to address the double jeopardy claim, the State should not be prevented from holding a proper sentencing hearing. Bullington and Rumsey do not require a different result. Bullington held that double jeopardy principles were applicable to the sentencing proceeding because the sentencing hearing "resembled, and indeed in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence." 451 U.S. at 438, 68 L.Ed.2d at 279. The Court noted that as statutorily prescribed, counsel made opening statements, testimony was taken, the jury was instructed, and final arguments were made. Id. at n. 10. The Court found that the State could not complain because it has been given one fair opportunity to offer whatever proof it could assemble. 451 U.S. at 442, 68 L.Ed.2d at 281. The Court held that having received "one fair opportunity to offer whatever proof it could assemble," . . . the State is not entitled to another." 451 U.S. 430, 68 L.Ed.2d 283.

Similarly, in Rumsey, a sentencing hearing was conducted in full compliance with the controlling statute. The State presented everything it wished to present to the sole factfinder.

In the present case, the hearing conducted did not

resemble a trial. The jury, which is one of the decision makers under Florida's death penalty statute, was not part of the process. It was not permitted to hear evidence or the argument of the attorneys. It was not permitted to make findings and issue an advisory sentence. Unlike Bullington and Rumsey, this was not an "acquittal on the merits by the sole decision maker in the proceeding. . ." Rumsey, 467 U.S. at 211, 81 L.Ed.2d at 171.

People ex rel. Daley v. Strayhorn, 121 Ill.2d 470, 118 Ill.Dec. 387, 521 N.E.2d 864 (Ill. 1988) is on point. In that case the trial judge failed to hold a capital sentencing hearing in accordance with the Illinois statute. Instead the trial judge stated that he felt that because of the sequence of the defendants' murder convictions, the defendant was ineligible for the death sentence under the death penalty statute. Id. at 865. The trial judge sentenced the defendant to 40 years after hearing limited testimony. Id. at 866. The state appealed. In analyzing Rumsey and Bullington the Illinois Supreme Court found no double jeopardy violation:

The interests which the double jeopardy clause seeks to protect are not implicated unless a defendant is put in jeopardy. In nonjury trials, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. The defendant must be "'put to trial before the trier of facts, whether the trier be a jury or judge.'" Serfass (1975), 420 U.S. at 388, 95 S.Ct. at 1062. 43 L.Ed.2d at 274. . . . (some citations omitted).

Bullington and Rumsey are inapplicable to the present cause because the defendant was never placed in jeopardy. In the present action, the trial judge did

not hold a capital sentencing proceeding in accord with the requirements of section 9-1(d). Our State's death penalty statute provides for a bifurcated sentencing hearing.

* * *

Our review of the record reveals that in the present cause, the trial judge failed to hold the requested first phase of the statutory bifurcated capital sentencing hearing. Instead, the proceedings more closely resemble preliminary proceedings often heard on motions before trials, which do not constitute jeopardy. (citation omitted). The trial judge was acting in response to the defendant's motion to preclude the imposition of the death penalty and the prosecutor was responding to that motion. Although the State had the burden of establishing, beyond a reasonable doubt, the existence of an aggravating factor, the State was precluded from introducing [evidence and witnesses] due to the trial judge's abrupt ruling. . . . It is clear that the State in this situation was not provided "one fair opportunity to offer whatever proof it could assemble" at a full-scale sentencing hearing. (Bullington, 451 U.S. at 446, 101 S.Ct. at 1862, 68 L.Ed.2d 283.) Because we believe that the first phase of a death penalty sentencing hearing was never conducted, we find that a capital sentencing hearing is not barred by double jeopardy.

Id. at 867-868.

The present case is similar to Strayhorn. Section 921.141 Florida Statutes (1987) provides that a jury be empaneled for capital sentencing and that evidence shall be presented to the jury regarding any statutory aggravating or mitigating circumstances. The jury then deliberates and recommends a sentence. See section 921.141(2). The trial judge is required to give that recommendation great weight. See Morris v. State, 557 So.2d 27, 30 (Fla. 1990). See also Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (trial court must follow jury's recommendation of life unless virtually no reasonable person could differ on that sentence).

Here, as in Strayhorn, no sentencing proceeding resembling a trial was ever held. The trial judge did not assemble the jury for sentencing. He did not take any testimony or allow the presentation of evidence to the jury. He simply decided that he was not going to impose the death penalty because he thought he would be reversed (R 2824, 2829, 2834). The State was not given its one fair opportunity to present its evidence in accordance with Section 921.141. The course followed by the trial judge resembled preliminary proceedings often heard on motions before trials, which do not constitute jeopardy. See Strayhorn, 521 N.E.2d at 868. Cf. State v. Gellis, 375 So.2d 885, 885 (Fla. 3d DCA 1979), cert. denied, 386 So.2d 636 (Fla. 1980) (double jeopardy principles not implicated when state refiles information dismissed on grounds that material facts were not in dispute and facts as a matter of law do not establish a prima facie case) and State v. Rolle, 577 So.2d 948 (Fla. 4th DCA 1991) (reversing for further proceedings trial court's order dismissing case after finding that facts as a matter of law did not establish a prima facie case). Double jeopardy principles have not been implicated.

Respondent acknowledges this Court's decision in Brown v. State, 521 So.2d 110 (Fla.), cert. denied, 488 U.S. 912, 109 S.Ct. 270, 102 L.Ed.2d 258 (1988), but submits the case is distinguishable. There is no indication in Brown that the double jeopardy was properly raised in the district court. There is also no indication that the "ripeness" argument was

presented to this Court.

Additionally, in that case the trial judge erroneously ruled that as a matter of law that under a United States Supreme Court opinion the death penalty was precluded because appellant was not the triggerman. The State argued that the sentence was illegal because the trial judge did not hold a hearing. Here, the State is arguing that double jeopardy principles were not implicated because there was no trial-type hearing.

If this Court finds Brown mandates reversal, respondent requests that this Court recede from Brown based on the above arguments.

CONCLUSION

Based on the preceding argument and authorities, this Court should affirm or dismiss this appeal as not yet ripe.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



JOAN FOWLER
Assistant Attorney General
Florida Bar #339067
and

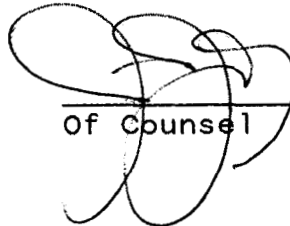


JAMES J. CARNEY
Assistant Attorney General
Florida Bar #475246
111 Georgia Avenue, Suite 204
W. Palm Beach, Florida 33401

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by "fax" and mail to Michael Dubiner, Counsel for Appellant, 1101 North Congress Avenue, Boynton Beach, Florida, 33426, this 4 day of November, 1991.



Of Counsel

williams.flo