DA 12-2-91

IN THE SUPREME COURT OF FLORIDA

HORACE WILLIAMS,

Petitioner,

vs.

CASE NO. 77,702

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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POINT I

A REMAND FOR A PENALTY PHASE IN THIS CAUSE WOULD VIOLATE PETITIONER'S DOUBLE JEOPARDY RIGHTS

It is clear that Brown v. State, 521 So.2d 110 (Fla. 1988) requires that the Opinion of the Fourth District Court of Appeals which reversed the Defendant's life sentence and remanded the case for further penalty proceedings be quashed.

The facts of Brown v. State, supra, are virtually identical to the facts before this Court.

In Brown v. State, supra, the Trial Court ruled that it could not impose the death penalty and, accordingly, sentenced the Defendant to life imprisonment. The State cross-appealed after the Defendant filed an appeal in that cause. The District Court of Appeals reversed the Defendant's life sentence and remanded for resentencing.

In Brown v. State, supra, this Court accepted conflict jurisdiction. This Court determined that the Trial Court erred in ruling that it was barred from the imposition of the death penalty. However, this Court found that the life sentence imposed by the Trial Court was a lawful one and, therefore, the Trial Court was prohibited from reopening the sentencing phase to expose the Defendant to the possible imposition of the death penalty. See also, Arizona v. Rumsey, 467 U.S. 203 (1984) and Bullington v. Missouri, 451 U.S. 430 (1981).

Respondent argues that the facts in Brown v. State, supra, are distinquishable from the facts of the instant cause in two respects.

Respondent first argues that there was no indication in Brown that the double jeopardy argument was properly raised in the District Court. This is a distinction without

a difference. First, whether or not the double jeopardy argument was properly raised in the District Court in Brown v. State, supra, is totally irrelevant to the facts and the holding of this Court in Brown v. State, supra. Secondly, the Respondent in this case argues in its brief in this case that the Petitioner did not properly raise the double jeopardy argument before the District Court. Petitioner is in exactly the same posture before this Court as was the Petitioner in Brown v. State, supra.

The Petitioner next attempts to distinquish the Brown decision by arguing that there is no indication that the "ripeness" argument was raised before this Court in Brown v. State, supra. As will be shown below, the "ripeness" argument is not a valid argument in this case. In addition, whether or not the "ripeness" argument was raised before this Court in Brown v. State, supra, does not in any way distinquish this case either factually or procedurally from Brown v. State, supra.

The facts and procedural posture of this case are identical to those in Brown v. State, supra. The Petitioner was convicted of first degree murder and armed robbery. (R3016-3017) The Trial Court ruled it could not lawfully impose the death penalty. The Petitioner appealed and the State cross appealed. As in Brown, the District Court reversed the sentence and remanded for a Penalty Phase which could result in the imposition of the death penalty. The Petitioner appealed to this Court for relief as did the Petitioner in Brown. As in Brown v. State, supra, the Trial Court may have been incorrect in ruling. However, as long as the Petitioner's sentence was lawful, a remand for a Penalty Phase which could expose the Petitioner to the possibility of the death penalty would be a violation of the double jeopardy clause of the Florida Constitution and the United States Constitution. See, Brown v. State, supra. See also, Arizona v. Rumsey, supra and

Bullington v. Missouri, supra.

Respondent asks this Court to receed from its decision from Brown v. State, supra, if this Court finds that Brown mandates reversal. Petitioner respectfully suggests that this Court in Mac Ray Wright v. State, _____ So.2d ____ (16 FLW S595 August 29, 1991) recently reaffirmed its ruling in Brown v. State, supra.

Respondent argues in its brief that the procedure below would more closely resemble preliminary proceedings such as Motion practice prior to trial. However, Respondent fails to point out the major difference between Motion practice prior to trial and the sentencing proceedings below. Unlike Motion practice, Petitioner in this cause was sentenced to life in prison with a manditory minimum twenty-five (25) year sentence at the sentencing portion of his trial. (R3019-3023) Under prior decisions of this Court, if a Defendant receives a lawful sentence under Section 921.141, that sentence constitutes jeopardy. See, Brown v. State, supra.

Respondent argues that the State below did not have its one fair chance to present evidence to the Trial Court and, therefore, the double jeopardy clause is not implicated. This reasoning is faulty.

The State had a valid remedy below. This Court, in Brown v. State, supra, confronted with the same argument, indicated the proper procedure for the State to utilize below:

> ...the state might have sought interlocutory review by writ of certiorari after the ruling and prior to the imposition of the sentence on the grounds that the ruling was a departure from the essential requirements of law, (citations omitted), and that imposition of sentence would cause irreparable harm...

Here, as in Brown v. State, supra, the State below failed to avail itself of this Writ.

Furthermore, the State below never attempted to present any evidence to the Trial Court to convince it that the Court was incorrect in its ruling and that there was, in fact, evidence which might pursuade it to impose the Death Penalty. In fact, at the sentencing hearing, despite the fact that the Trial Court had discretion to impose a wide range of sentences on the multiple convictions, the State below presented no evidence whatsoever other than its reliance on the facts at trial. (R2845-2846) The State did have a full and fair opportunity to present such evidence to the Court, but did not avail itself of this opportunity.

As in Brown v. State, supra, the Trial Court heard arguments and made rulings of law, which did not require the presence of a jury. Even though the Trial Court's ruling may ultimately have been incorrect, as Petitioner was sentenced to a legal sentence, the imposition of said sentence bars resentencing based upon double jeopardy principals. See, Brown v. State, supra.

The double jeopardy clause of the Florida Constitution, Article I, Section 9, states that:

> no person shall....be twice put in jeopardy for the same offense.

There is no exception to the double jeopardy clause in the Florida Constitution or the United States Constitution which requires the State to have "one fair opportunity to present its evidence". To the contrary, if Petitioner was sentenced to a legal sentence, as he was in this cause, double jeopardy is implicated and resentencing is barred. See, Brown v. State, supra.

The Respondent argues that the Illinois Supreme Court Opinion in People ex rel Daley v. Strayhorn, 521 N.E. 2d 864 (Ill. 1988) requires a ruling contrary to that in Brown

v. State, supra. First, Brown v. State, supra, is a ruling of this Court on an identical set of facts and is, therefore, controlling in this case. Also in Daley v. Strayhorn, supra, the Trial Court sentenced based on a pre-sentencing Motion filed by the Defendant. Daley v. Strayhorn, supra, at page 868. That is why the Illinois Supreme Court found those proceedings resembled pre-trial motion practice and were unlike a sentencing hearing.

Respondent argues that Petitioner waived his double jeopardy argument before this Court by not presenting this argument to the Fourth District Court of Appeals until he filed a Motion for Rehearing.

While the Fourth District Court of Appeals was arguably correct in not ruling on the Petitioner's double jeopardy argument, there certainly is no waiver of the argument before this Court.

First and foremost, this Court accepted jurisdiction based upon the conflict between the ruling of the Fourth District Court of Appeals in this case, Williams v. State, 573 So.2d 875 (Fla. 4th DCA 1990) and Brown v. State, supra. As this Court accepted jurisdiction pursuant to Article V, Section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), there is no waiver of the double jeopardy argument before this Court.

Additionally, this Court in State v. Johnson, 483 So.2d 420 (Fla. 1986), has determined that the right not to be placed twice in jeopardy is "fundamental". See also, Benton v. Maryland, 395 U.S. 784 (1989), Singleton v. State, 561 So.2d 1296 (Fla. 2nd DCA 1990), Johnson v. State, 535 So.2d 651 (Fla. 3rd DCA 1988). See also, Nova v. State, 439 So.2d 255 (3rd DCA 1983) and Meak v. State, 566 So.2d 1318 (4th DCA 1990).

Moreover, this cause is before this Court in exactly the same posture as the Petitioner

in Brown v. State, supra. This Court did not determine in Brown v. State, supra, that any "waiver" applied.

Respondent argues that this case is not yet "ripe". In effect, Respondent is arguing that this Court should deny Petitioner relief and should remand to the Trial Court pursuant to the Opinion of the Fourth District Court of Appeals below. At that point, Petitioner will file a Motion to Dismiss on double jeopardy grounds before the Trial Court and if denied, Petitioner will then file a Writ of Prohibition before the Appellate Courts.

The procedure suggested by the Respondent is ludicrous. The issue presented by Petitioner is ripe. Obviously, Respondent is not attempting to reverse the Petitioner's sentence for purposes of victory on appeal. The State is attempting to hold a Penalty Phase before a jury in an attempt to convince the jury and, ultimately, the Trial Court that the Defendant should be sentenced to death. Therefore, any remand to the Trial Court implicates the double jeopardy clause of the Florida Constitution and the United States Constitution.

The Petitioner in Brown v. State, supra, was in the exact same procedural posture as Petitioner in this case. The Third District Court of Appeals in Brown v. State, 501 So.2d 1343 (Fla. 3rd DCA 1987) reversed that Petitioner's life sentence and remanded for resentencing in accordance with Florida Statute 921.141. This Court determined that the remand would violate the double jeopardy clause of the Florida Constitution and the United States Constitution.

Proceeding in the fashion suggested by Respondent would amount to no more than a waste of time and effort and would not in any way contribute to judicial economy.

This Court in Mac Ray Wright v. State, supra, recently determined the double

jeopardy issue in advance of the legal necessity of doing so. In Wright v. State, supra, this Court reversed the Defendant's convictions. This Court also ruled that the Trial Court erred in overriding the jury's life recommendation. This Court, without being required to do so, determined that double jeopardy principles precluded the imposition of the death penalty if that Petitioner was retried and convicted of a capital crime. This Court could have waited until the Petitioner in Wright v. State, supra, was convicted of first degree murder and sentenced to the death penalty to determine the double jeopardy issue. At that time, according to Respondent's logic, the issue would be "ripe". However, in Wright v. State, supra and in this cause, logic dictates that the double jeopard issue should be decided when the issue is properly before this Court.

Respondent additionally cites State v. McKenna, 512 A.2d 113 (R.I. 1986) for the proposition that this case is not yet "ripe" for decision. In that sexual assault case, the victim claimed she was twice sexually assaulted by the Defendant. The Defendant was tried on one count and the specific date of the offense was not proven at trial. On appeal, that Defendant raised the double jeopardy claim. The Rhode Island Court correctly decided that the issue was not yet "ripe" because no second prosecution was pending. That case is clearly distinquishable because in that case, there was no way of determining if a second prosecution would ever take place. Here, Respondent is arguing that this case should be remanded for a resentencing. There is no guess work required to determine if a resentencing will be attempted by the State below in this cause as was required in State v. McKenna, supra.

Respondent further cites McCuen v. State, 382 SE 2d 422 (Ga. App. 1989) for the proposition that a decision by this Court is not yet "ripe". However, in McGuen v. State,

supra, it was merely speculation that the State would attempt to retry the Defendant after a mistrial. Again, in this case there is no speculation as to the State's endeavors in this cause. The State is actively attempting to uphold the remand of the Fourth District Court of Appeals to the Trial Court for a Phase Two sentencing hearing in this cause. Thus, the double jeopardy issue is "ripe" before this Court.

Respondent argues that Arizona v. Rumsey, supra, and Bullington v. Missouri, supra, were before the Supreme Court in a different posture than this cause. While it is true that Arizona v. Rumsey, supra, and Bullington v. Missouri, supra, were before the Supreme Court in a different posture than this cause, their holdings regarding the double jeopardy bar are still applicable in this cause. There is only one case cited by both parties to this cause which is factually and procedurally indistinquishable from Petitioner's position before this Court. That case, Brown v. State, supra, clearly indicates that Petitioner's double jeopardy claim is "ripe" and should be decided by this Court.

Clearly, under the dictates of Brown v. State, supra, and the other cases cited by Petitioner in this cause, a remand for a Penalty Phase in this cause would violate Article I, Section 9, of the Florida Constitution and the Fifth Amendment of the United States Constitution in that a second Penalty Phase would constitute double jeopardy.

As Petitioner received a lawful sentence below, any resentencing or remand for a resentencing hearing would violate the double jeopardy clause of the Florida Constitution and the United States Constitution.

CONCLUSION

Based on the foregoing argument and authority cited herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court of Appeals.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by mail to Joan Fowler, Esquire, and James J. Carney, Esquire, Assistant Attorney Generals, lll Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

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