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IN THE SUPREME COURT OF FLORIDA

FILED
JUN 8 1994

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 STEPHEN HERNANDEZ,)
)
 Respondent.)
 _____)

CASE NO. 83,548

DISCRETIONARY REVIEW OF
CERTIFIED QUESTION BY THE
FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the government's Statement of the Case and Facts with the following exceptions:

1. The government describes the waiver at issue as a "waiver of a sentencing proceeding" (Initial Brief "IB" at 2). The trial judge here accepted a defendant's waiver of an advisory sentencing recommendation, but the waiver did not affect the state's ability to present evidence or argument to the judge in the sentencing proceeding and, prior to accepting the waiver, the judge expressly informed the state, the defendant and defense counsel that no sentencing determination had yet been made.

SUMMARY OF ARGUMENT

The state has neither a constitutional nor statutory right to jury sentencing. A defendant convicted of a capital crime is entitled to an advisory sentencing recommendation from a jury pursuant to § 921.141, Florida Statutes, but that statute allows a defendant who has pled guilty to waive that entitlement if he or she so decides and the sentencer agrees. Even if a defendant wishes to waive an advisory recommendation, the sentencer/trial judge may none-the-less exercise his or her discretion and obtain a jury sentencing recommendation to assist in the sentencing decision. Neither § 921.141, Florida Statutes, nor Fla.R.Crim.P. 3.260 empowers the state to require a judge to impanel a jury and obtain an advisory sentencing recommendation in the face of a valid waiver by the defendant.

Fla.R.Crim.P. 3.260 specifies how the substantive right to a trial by jury found in the state and federal constitutions can effectively be waived by a defendant - it does not give the state a separate substantive right to a jury recommendation in a capital case. The decision of the trial judge and the reasoning of the Fifth District Court of Appeal in this case should be upheld.

ARGUMENT

BECAUSE THE STATE HAS NO ENTITLEMENT TO JURY SENTENCING IN A CAPITAL CASE, THE STATE CANNOT PREVENT A TRIAL JUDGE FROM ACCEPTING A DEFENDANT'S KNOWING AND VOLUNTARY WAIVER OF A JURY SENTENCING RECOMMENDATION.

Fla.R.Crim.P. 3.260 states, "A defendant may in writing waive a jury trial with the consent of the state." The state urges¹ that Rule 3.260 "requires the trial court to employ the assistance of an advisory jury during the penalty phase of a capital case if the State is unwilling to waive its right to that jury." (IB at 5). The state's logic is strained and specious. Rule 3.260 does not provide entitlement to a jury, but instead specifies what is required for a defendant to effectively waive the right to a jury trial provided under Article I, Section 16 of the Florida Constitution and the sixth and fourteenth amendments to the United States Constitution. See Chapter 913, Florida Statutes. The waiver of a jury trial is a procedural matter governed by rules adopted by the supreme court. State v. Garcia, 229 So.2d 236 (Fla. 1969). That said, however, rules governing what is needed to waive a jury trial do not provide the state with an independent, substantive right to jury sentencing.

¹ If the state's construction of Fla.R.Crim.P. 3.260 is accepted, a trial judge would have to *dispense with* a jury's advice if both the defendant and the state waive a sentencing recommendation. See Dumas v. State, 439 So.2d 246, 250 fn. 5 (Fla. 3d DCA 1983), *rev. denied*, 462 So.2d 1105 (Fla. 1984) (noting that, under the revised Fla.R.Crim.P. 3.260, trial by the court is mandatory when the defendant and the state agree); See also committee note to Rule 3.260.

The constitutional right to jury trial encompasses jury determinations of guilt or innocence:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge.

Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). It is settled that the sixth amendment does not encompass jury sentencing, even in the context of the death penalty. Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). If a defendant does not have sixth amendment entitlement to jury participation in the capital sentencing determination, neither does the state.

The right of a defendant to jury participation in the sentencing determination in a capital case is conferred by statute. In pertinent part, the statute provides:

Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. * * * If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant.

Section 921.141(1), Florida Statutes (1987).

Section 921.141(1) does not give the state the ability to prevent a defendant who has pled guilty to a capital crime from waiving a sentencing recommendation from a jury that would have to be specially impaneled for that purpose. As the law now stands, it is discretionary for a trial judge to accept a defendant's waiver of a jury recommendation as to what sentence should be imposed:

The law is clear that a trial judge "upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation or may proceed to sentence the defendant without such advisory jury recommendation." *State v. Carr*, 336 So.2d 358, 359 (Fla.1976). See also *Palmes v. State*, 397 So.2d 648, 656 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).

Sireci v. State, 587 So.2d 450, 452 (Fla. 1991), cert. denied, 503 U.S. ___, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). If the judge in the sound exercise of discretion declines the advice of a sentencing jury and the defendant who has pled guilty otherwise validly waives the statutory entitlement to a jury sentencing recommendation, the state cannot be heard to complain because it has no entitlement under the statute(s), constitution(s) or rule(s) of criminal procedure to require a jury sentencing recommendation. The state's ability to present evidence and argument to the sentencer prior to a sentencing decision being made, pursuant to Fla.R.Crim.P. 3.780, is in no way affected by the trial judge accepting a defendant's valid waiver of a jury sentencing recommendation.

Further, the state's reliance on State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990), rev. denied, 564 So.2d 1085 (Fla. 1990) is misplaced, for the court in Ferguson expressly noted:

In this case, the trial jury was not waived. The defendant did not plead guilty. *It is not even clear that the defendant waived the jury for the penalty phase.*

State v. Ferguson, 556 So.2d at 464 (emphasis added). Thus, the reasoning of the district court as to whether a trial court "must also employ the assistance of an advisory jury if the state is unwilling to waive its right to that jury" Ferguson, 556 So.2d at 463, is dicta since the trial court had no discretion to dispense with a sentencing recommendation in the absence of an unequivocal waiver by the defendant.

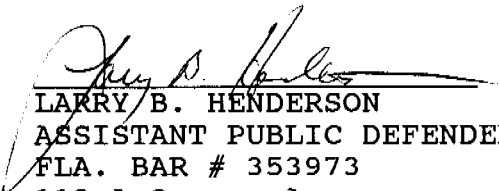
A sentencing hearing is not a trial. Unanimity between jurors is not required. The rules of evidence are relaxed. The jurors are not sequestered between the verdict and a sentencing recommendation. Waiver of a jury recommendation is not required to be in writing, as is waiver of a jury trial. Dispensing with a jury sentencing recommendation is not only fiscally sound, but as importantly it avoids serious constitutional issues concerning composition of "death-qualified" juries, sufficiency/adequacy of subjective jury instructions, and possible errors/unreliability caused by unfairly prejudicial evidence and/or improper state argument. The decisions of the trial judge and reasoning of the Fifth District Court of Appeal are correct and should accordingly be affirmed.

CONCLUSION

The certified question should be answered in the affirmative because the state is not entitled to an advisory sentence from the jury. A jury recommendation is to assist the sentencer and the trial court is in the best position to determine whether a defendant's waiver of a jury for a penalty hearing should be honored.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32114, in his basket at the Fifth District Court of Appeal and mailed to Mr. Stephen Hernandez, John E. Polk C.I., 211 Bush Blvd. (Pod C4), Sanford, FL 32773, this 6th day of June, 1994.


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