

IN THE SUPREME COURT OF FLORIDA

TERENCE OLIVER,

Appellant,

vs.

CASE NO. SC12-1350

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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REPLY TO APPELLEE'S BRIEF

Disclaimer

Appellee's counsel misread the holding in Perry v. State, 2016WL 6036982 (Oct, 14, 2016) while drafting Appellant's Supplemental Brief. The argument contained on pp. 13-18, is withdrawn insofar as it erroneously refers to this Court construing the most current version of Sec. 921.141, Fla. Stat. to require a 12-0 unanimous verdict.

Argument

The sentences imposed in this case were unconstitutional.

Mr. Oliver was sentenced in violation of his right to trial by jury as guaranteed by the Sixth Amendment of the United States Constitution and Art. I, Sec. 22, of the Florida Constitution. The version of Sec. 921.141, Fla. Stat. (2009) in effect at the time of the homicides in this case was declared unconstitutional in Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The legislature amended the statute in an effort to comply with the Hurst decision and this Court declared that version of the statute unconstitutional in Hurst v. State, 2016 WL 6036978 (Oct. 14, 2016). Accordingly, there is no death penalty statute in effect in Florida that provides for the Constitutionally required procedure to be used before a death sentence can be imposed. Since Florida does not presently have a statute on which

a penalty phase trial can travel, the death penalty is simply not available in Florida at this time. See Anderson v. State, 267 So.2d 8 (Fla. 1972); State v. Whalen, 269 So.2d 678(Fla. 1972). A person cannot be convicted and sentenced under an unconstitutional statute. Pass v. State, 922 So.2d 279 (Fla. 2d DCA 2006); Mills v. State, 714 So.2d 1198 (Fla. 4th DCA 1998).

Proportionality Review.

This Court generally conducts a qualitative assessment of capital cases to ensure that the death penalty is imposed in the most aggravated and least mitigated first-degree murder cases. Wade v. State, 41 So. 3d 857, 879 (Fla. 2010) (citing Lebron v. State, 982 So. 2d 649, 668 (Fla.2008)). The State claims the death penalty is the “appropriate” sentence in this case. But is it? The Court should not place a lot of weight on cases involving a 12-0 jury recommendation without carefully reviewing the facts of the case. Many of the most weighty aggravating circumstances are subjective in nature and can be viewed differently by different juries. In this case, which involves two shooting deaths which occurred almost simultaneously, the jury recommended death by a 12-0 verdict. Yet, recently, in Phillips v. State, 2016WL6804901 (Nov. 17, 2016), which also involved the shooting of two victims during a burglary, the jury recommended death by a vote of only 8-4. In that case, the Court found the death sentence to be disproportionate. In Franklin v. State,

2016WL6901498 (Nov. 23, 2016), the defendant, while serving a life sentence, stalked and brutally stabbed a prison guard to death and likely would have caused other corrections officers serious harm except for their training and experience. The jury recommended death by only a vote of 9-3. Both Phillips and Franklin received new penalty phase trials. Is a 12-0 vote so weighty when compared to the facts in Phillips and Franklin? Why is Mr. Oliver's case one of the worst of the worst?

Harmless error as applied to this case.

In this case, no interrogatories were included on the verdict forms, so the trial court, and this Court, cannot know, and will never know, if the jury found any of these aggravating circumstances unanimously or if any of them were found by even a majority of the jury. Hurst v. State, 2016 WL 6036978 (Oct. 14, 2016). See Aguirre-Jarquin v. State, 9 So.3d 593, 611-612 (Fla. 2009) (Pariente, J., concurring). No one will know what the effect the error had on the jury in this case. It is the State's heavy burden of proof to show the error was harmless. However, the State has not pointed to any *evidence* in the record that proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict." The state merely argues the facts could justify a finding of CCP, HAC, and Avoiding Arrest without applying the proper test. Argument that is not based on evidence is unpersuasive.

Test for Proof of Harmless Error

The penalty phase of a capital case is different from any other court proceeding known to American law. It is guided by constitutional limitations, procedural restrictions, and special verdict requirements. The jury is required to make unanimous findings of fact as to the existence of aggravating circumstances, the weight to be given to them balanced against the mitigation presented, the appropriateness of the death penalty, and whether the defendant should be sentenced to death. Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); Hurst v. State, 2016WL6036978 (Oct. 14, 2016); Perry v. State, 2016 WL 6036982 (Oct. 14, 2016). Unfortunately, the United States Supreme Court left the question of “harmless error” to this court without explanation as to how the concept of “harmless error” was to be applied in death cases. Fortunately, there is other guidance available.

In Johnson v. State, 2016WL7013856 (Dec. 1, 2016) the Court repeated the rule that

The harmless error test, as set forth in Chapman v. California, 386 U.S. 18 (1967), and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

In penalty phase litigation, the error always involves the death sentence. When

considering a sentencing error to be harmless, the relevant question is whether “there is a reasonable possibility that the error contributed to the sentence?” Zack v. State, 753 So.2d 9 (Fla. 2000). Importantly, the test does not require the error to be the cause of the harm, *but only to have contributed to it*.

Does satisfying the burden of proving there is no reasonable possibility that the error contributed to the sentence require the State to point to *evidence* in the record to prove it? Or can the burden be satisfied by “lawyer argument” claiming that because a case is gruesome or has bad facts, an appellate court should be allowed to speculate as to what a jury would have done had it been properly instructed in accordance with the requirements of the Sixth Amendment to the United States Constitution? If *evidence* is needed to satisfy this burden of proof, where can it be found in this record?

What is the test used to determine if the State has carried its burden of proof?

This court has clearly explained what the test is not:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986); Hurst v. State, 2016WL6036978

(Oct. 14, 2016). [(I)n the context of a Hurst v. Florida error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury unanimously found all of the facts necessary for the imposition of the death penalty.

It is tempting to look at the record and assume a case that has horrendous facts “calls for the death penalty,” but that is exactly what an appellate court may not do. The Court may not consider the sufficiency of the evidence and it may not substitute its view of the evidence for the view found by the jury. Instead, the Court must determine what effect the error had on the jury. That means the Court must look to the jury itself for the answer. If the Court cannot consider the evidence or substitute its view of it, there is no other place to look. The results of the deliberations that took place in the jury room are required to be reflected in the verdict in a death penalty case. If the verdict is silent, the jury’s view of the evidence jury will be forever unknown.

Sometimes, the jury’s verdict plainly shows an error has been made. For instance, the jury may find an aggravating circumstance unsupported by the record. Harris v. State, 843 So.2d 856 (Fla. 2003). Other times the error must be raised based upon the recommended sentence itself, such as when racial prejudice permeates the penalty phase proceedings, State v. Davis, 872 So.2d 250 (Fla. 2004), or when improperly admitted evidence requires a new trial, Stoll v. State, 762 So.2d 870 (Fla.

2000). But the harmless error inquiry involving sentencing errors in death penalty cases must always begin with the jury's verdict because the jury is constitutionally required to make unanimous findings of fact in order to justify a death sentence. Otherwise there is no starting place to determine what effect an error that occurred during the penalty phase trial had on the jury.

Certainly, in Mr. Oliver's case, evidence of harmless error cannot be found in the verdict of the jury. The jury made no findings whatsoever. If the jury made no findings on the verdict form, evidence of harmless error cannot be found there because it must have been left in the jury room. It is the jury's view of the evidence that is crucial in determining harmless error. The jury's view of the penalty phase evidence must be reflected in its verdict in order to satisfy the requirements of Hurst and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). If the findings of the jury are supported by the evidence, the error is harmless. The error is harmful if the jury fails to satisfy the constitutional requirements necessary before the death penalty can be imposed. *It is the communication made by the jury verdict that initially provides evidence of proof that there is no reasonable possibility that the error contributed to the sentence.* Failure of the jury to communicate findings of fact required by the Constitution equates to a lack of evidence and a lack of evidence raises a reasonable doubt. Simmons v. State, 156 Fla. 353, 22 So.2d 803

(Fla. 1945); Fla. Standard Jur. Instr. 3.7. It is too late to search for evidence of harmless error after the jury has been discharged because the jury room is off limits after the verdict is received, absent some form of jury misconduct. Tapanes v. State, 43 So.3d 159 (Fla. 4th DCA 2010); Rule 3.575, Fla. R. Crim. P.

The law requires the jury to unanimously find each aggravating circumstance to exist. In Mr. Oliver's case, did at least one of the jurors conclude that the murder of Krystal Pinson was not cold, calculated and premeditated? Could one juror in twelve have believed the murder to have been a premeditated killing involving a boyfriend-girlfriend relationship, but the killing did not rise to the level of being CCP? This court has viewed similar evidence in the past and concluded it did not justify the death penalty. Blakely v. State, 561 So.2d 560 (Fla. 1990) (murder resulted from a heated ongoing domestic confrontation); receded from by implication in Evans v. State, 838 So.2d 1090 (Fla. 2003). This court cannot know the views of the jurors in this case because they were not asked to express them. However, in this case, the record reflects the jury probably resolved the penalty issue without serious deliberation since the jury only deliberated for 34 minutes.¹ Vol. 5, R-860. The State cannot establish beyond a reasonable doubt that all twelve jurors in this case agreed

¹For a discussion of the inherent problems with jury deliberations involving less than unanimous verdicts see pp. 4-5 of Mr. Oliver's Supplemental Brief.

to each and every aggravating circumstance. Proof there is no *possibility* the error *contributed* to the sentence must be established by more than mere guesswork and speculation.

In Davis, this court opined,

“With regard to Davis’s sentences, we emphasize the unanimous jury recommendations of death. *These recommendations allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravations to outweigh the mitigating factors.*” (Emphasis supplied.)

But that is not the test required by Perry and Hurst. The jurors must not only find there were sufficient aggravating circumstances, they must find each of them unanimously. What evidence *from the jury* (or for that matter, anywhere in the record) allowed the Court in Davis to come to the conclusion that each aggravating circumstance was found to exist by a unanimous vote? There was no such evidence. Did the court “substitute itself for the trier-of-fact by simply re-weighing the evidence?” How did the State satisfy the burden to prove there was no reasonable possibility the jury did not find each aggravating circumstance unanimously? In Davis, the Court did not explain where it found the evidence to justify its conclusion and the jury did not disclose it either. The inquiry as to whether error is harmless or not in the penalty phase of a capital case must originate with the findings of fact made by the jury. Only then may the court inquire as to the sufficiency of the evidence in

the record to support the findings.

The Court can conclude the errors in this case were not harmless for two other reasons:

First, in Mr. Oliver's case, the jury was asked to consider two aggravating circumstances that were clearly not proven. There is no evidence in the record that would justify a finding of CCP for the murder of Andrea Richardson. There is no evidence of a plan to kill him. Nor does the evidence support that the dominant motive for the murder of Andrea Richardson was to avoid arrest. The timing of the killing simply does not provide a "sole and dominant motive."

Second, when two homicides are involved, and improper aggravating circumstances are allowed to be considered in one of them, how does that error affect the verdict in the other homicide? Could the one have tainted the other? Since the jury made no findings of fact, no one will ever know how that may have played out in the jury room. If the jury had rejected these two aggravators, in the count naming Richardson as the victim, the error clearly would have been harmless. Given the question of whether the improper instructions given on CCP and avoid arrest may have affected the decision of the jury, where is the proof beyond a reasonable doubt that the instructions had no effect?

Conclusion

For the reasons stated herein, this Court is urged to consider this direct appeal on its merits and, if the Court determines it must affirm the judgment of guilt, this Court is urged to reverse the sentences of death imposed upon Terence Oliver and remand the case to the trial court for imposition of a life sentence on each of the murder counts. If the Court remands this case for a new penalty phase proceeding, the Court is requested to instruct the trial court on which statute to travel and which jury instructions to follow.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Second Supplemental Initial Brief has been electronically delivered to Assistant Attorney General Stacey Kircher, at capapp@myfloridalegal.com, and mailed to the Appellant on this 12th day of December, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

s/ O.H. Eaton, Jr.

By: O.H. EATON, JR.