

IN THE SUPREME COURT OF FLORIDA

MARK A. TWILEGAR,

Appellant,

v.

CASE NO. SC17-839
L.T. No. 03-CF-2151
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Twilegar was charged by indictment on April 3, 2003 with the first-degree murder of attorney David Thomas for whom Twilegar worked as a handyman. (R. 1/12-13).¹ After he was found guilty, Twilegar waived his right to a penalty phase jury and was sentenced to death. (R. 16/1231-81; T. 1/30-43). This Court affirmed the conviction and sentence. Twilegar v. State, 42 So. 3d 177 (Fla. 2010).

On January 11, 2017, Twilegar filed his Successive Motion to Vacate based on Hurst v. Florida, 136 S. Ct. 616 (2016), the enactment of Chapter 2016-13 on March 7, 2016, and the Florida Supreme Court's decisions in Hurst v. State, 202 So. 3d 40 (Fla. 2016), Perry v. State, 210 So. 3d 630 (Fla. 2016) and Mosley v. State, 209 So. 3d 1248 (Fla. 2016). The trial court entered its Final Order denying postconviction relief on March 31, 2017.

Twilegar now appeals to this Court.

¹ Citations to the record on direct appeal will be as follows: R. followed by the appropriate volume and page number; citations to the trial transcript will be as follows: T. followed by the appropriate volume and page number. Citations to the postconviction evidentiary hearing record will be as follows: PCR followed by the appropriate volume and page number.

SUMMARY OF THE ARGUMENT

Issue I: Twilegar's knowing waiver of his penalty phase jury is governed by Mullens v. State, 197 So. 3d 16 (Fla. 2016). There is no evidence to support his present claim that he would not have waived his penalty phase jury had he known he was entitled to unanimity. Moreover, there is nothing unfair about denying him a new penalty phase hearing; the sentence he is now serving is exactly what he asked the trial court to impose. His trial strategy, to secure a death sentence if convicted, was successful.

Issue II: Twilegar is not entitled to reconsideration of earlier, rejected postconviction claims merely because of recent changes in the law.

ARGUMENT

ISSUE I

TWILEGAR IS NOT ENTITLED TO RELIEF UNDER HURST BECAUSE HE KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY SENTENCING RECOMMENDATION

This Court entered an Order June 15, 2017 directing the parties to address the application of Mullens v. State, 197 So. 3d 16 (Fla. 2016). Because the outcome of the instant appeal is dictated by Mullens, the lower court should be affirmed.

Appellant's successive postconviction motion is governed by Rule 3.851, which forbids a grant of relief based on a change in the law absent a showing that a recent, fundamental constitutional right has developed that applies to the movant. Twilegar's motion sought to obtain the benefit of recent changes in Florida law- specifically, the right to a jury's unanimous factual findings in a capital case. Hurst v. State, 202 So. 3d 40 (Fla. 2016). Twilegar, however, waived his penalty phase jury and asked the trial judge to make the requisite factual findings. Appellant's waiver was the determining factor in the lower court's Order denying relief, which the court said was governed by Mullens. This conclusion was indisputably correct.

Twilegar asserts that he is entitled to relief because not only is Mullens distinguishable, evolving standards of decency under the Eighth Amendment as well as a right to a "more

reliable" penalty phase outcome all mandate relief. Appellant's position lacks merit and the lower court should be affirmed.

While the parties agree that recent changes in the law require unanimity of the penalty phase jury recommendation in capital cases, the right to jury fact-finding is waivable. State v. Hernandez, 645 So. 2d 432 (Fla. 1994); Blakely v. Washington, 542 U.S. 296, 309 (2004). The existence of a valid waiver was the foundation of this Court's ruling in Mullens. Once waived, the Mullens court held, further rights to any particular type of jury finding are unavailable; accordingly, a valid waiver of penalty phase jury is also an effective waiver of any right to relief under Hurst v. State.² Twilegar's knowing and voluntary waiver, therefore, is fatal to his present claim.

Twilegar argues, however, that if he had known he had a constitutional right to unanimity, he would not have waived his penalty phase jury- in other words, his waiver was not knowing and voluntary. In examining this question, the lower court found no credible evidence to support this claim. (PCR 241-243). To the contrary, Twilegar declined to follow counsel's penalty phase advice and directed him to present no mitigation case

² Twilegar's case became final after Ring v Arizona, 536 U.S. 584 (2002). The parties do not dispute the effect of this Court's precedent with regard to whether or not Ring applies. See Mosley v. State, 209 So. 3d 1248 (Fla. 2016).

whatsoever. Twilegar told the court that if he was found guilty, he wanted no effort made to secure anything other than a death sentence. Even after multiple colloquies conducted over a four month period,³ Twilegar remained consistent in his view; despite counsel's advice to the contrary (Twilegar, clearly bored with the subject, told the trial court he had discussed the matter "many times" with his attorney (PCR 329)), he wanted no effort made to secure a life sentence. Appellant's waiver of his penalty phase jury, granted over the State's strenuous objection (PCR 314-315), was consistent with his contemporaneous statement that if he were found guilty, the only sentence he wanted was death. These facts conflict with Twilegar's unanimity argument.

The lower court therefore rejected Twilegar's argument that his penalty phase jury waiver was invalid, finding instead that Appellant's waiver was knowing and voluntary, and though the law regarding unanimity did in fact change, Twilegar was "specifically warned during the December 18, 2006 hearing that the law was unsettled and could change" (PCR 243). Given these

³ Twilegar's Affidavit opposing mitigation was signed 9/12/2006. (PCR 266). The record reflects that the trial court discussed the mitigation waiver on 9/25/2006 (PCR 269), did so again on 12/18/2006 (PCR 303), granted Twilegar's motion to waive penalty phase jury after an additional colloquy held 1/16/2007 (PCR 312, 326), and revisited the matter a final time on the day of the penalty phase trial held 2/16/2007. (PCR 328).

factual findings, the lower court correctly denied relief pursuant to Mullens. See Id. at 39.

Twilegar insists that his waiver could not have been intelligent if counsel's advice (which presumably would have included a then-correct statement that unanimity was not required) has since turned out to be wrong. This argument fails, however, for two reasons.

First, Twilegar's claim logically prevails only if his waiver was made in reliance on that aspect of counsel's advice that was later deemed erroneous. The lower court noted, however, that Twilegar filed and then withdrew a motion demanding penalty phase unanimity; this plainly undermines Twilegar's present argument. If all he sought was unanimity, why withdraw a motion requesting that very thing? And while this action conflicts with his present claim, it is wholly consistent with Twilegar's contemporaneous statements to the court in 2007 that he did not want a life sentence if convicted.⁴ Twilegar refused to cooperate with the mitigation specialist, he said he did not want anyone investigating his past, he told the psychologist hired by his attorney to get out. (PCR 273-277). At no time during the many colloquies did he say anything about a unanimous penalty phase.

⁴ Twilegar told the trial judge "I don't want to do 20 years on death row waiting for it. I don't want a life sentence. Let's get it done." (PCR 308).

Twilegar's waiver was clearly made for reasons unrelated to unanimity. No other explanation fits the known facts.

Second, even if we agree that Twilegar acted only because he did not know he was entitled to unanimity, this does not mandate a conclusion that his waiver was invalid. In addition to this Court's rulings, the U.S. Supreme Court has held that a defendant who voluntarily waives his Sixth Amendment right to jury trial is bound by his choice, even where his decision was made in reliance on a procedural rule later found to be unconstitutional.

In Brady v. United States, 397 U.S. 742 (1970) the defendant was charged under a federal law (18 U.S.C. § 1201(a)) that authorized a death sentence if the jury recommended it. Because § 1201(a) gave the judge no authority to impose death in the absence of a jury's specific findings, it naturally encouraged defendants to waive jury trial, and Brady did exactly that- he waived his Sixth Amendment right to a jury and entered a plea. One year later, after the Supreme Court struck down § 1201(a) as unconstitutional, Brady sought to withdraw his plea and argued that his waiver could not have been voluntary under the circumstances. The Supreme Court disagreed- the record showed that Brady might have had other, unrelated reasons for entering a waiver, and Brady's voluntary waiver of a

constitutional right was consistent with the law in effect at the time. Such a plea, the Court held, "does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Id. at 757. Clearly, even if Twilegar did waive his jury only because he could not get penalty phase unanimity, his waiver was based on the correct law at the time of his decision. As this Court held in Mullens, he is not entitled to be resentenced merely because the court later decided that unanimity is constitutionally required.

Twilegar's next claim, that he deserves relief as a matter of fundamental fairness, is absurd. Twilegar should be considering the fundamental *unfairness* of requiring the State to expend additional resources merely because he now regrets a counseled and strategic decision he made in pursuit of a specific sentence ten years ago. An unnecessary re-sentencing proceeding would be tragically unfair to the innocent victims of Twilegar's crimes. The emotional toll inflicted upon victim's family members, witnesses, and others who would be personally impacted by another sentencing proceeding simply cannot be calculated.

Moreover, there is nothing unfair about the process employed in Twilegar's case, nor is there any clear evidence that resentencing him with a unanimous jury would be any better.

The State agrees that a unanimous jury would render a reliable decision. However, Twilegar advances nothing to suggest that the findings made by the trial judge at *Twilegar's* request are necessarily less reliable. Proffitt v. Florida, 428 U.S. 242, 252 (1976). It is not a foregone conclusion, therefore, that Appellant's sentence was unreliable merely because Twilegar asked the trial judge to make certain findings of fact. He certainly has not established that his proceedings were so unreliable that he was punished for conduct the law does not reach, which is the measure of error under Schriro v. Summerlin, 542 U.S. 348, 355 (2004).

Twilegar next contends that his death sentence violates the Eighth Amendment because his sentence is contrary to evolving standards of decency (IB: 17). There are several reasons to reject this assertion.

First of all, regardless of whether or not unanimity is the new standard of decency, this claim is completely unrelated to Twilegar's decision to waive his penalty phase jury which, as the lower court determined, was knowing and voluntary. Twilegar is not entitled to any particular standard if he deliberately chooses to waive it as a matter of strategy.

Secondly, even if he were entitled to the benefit of a standard he deliberately waived, there is no effective Eighth

Amendment component to Florida's decision to incorporate unanimity as part of its sentencing procedure. The United States Supreme Court's decision in Hurst v. Florida was decided entirely on Sixth Amendment grounds. While this Court included dicta regarding the Eighth Amendment in Hurst v. State, 202 So. 3d 40 (Fla. 2016), the Florida Constitution requires this Court to interpret the Eighth Amendment in conformity with the decisions of the United States Supreme Court.⁵ Any interpretation of the Eighth Amendment in Hurst v. State is necessarily limited in effect. The United States Supreme Court held in Spaziano v. Florida, 468 U.S. 447 (1984) that jury sentencing is not required in capital cases; this Court could not overrule that holding on Eighth Amendment grounds without violating the Florida Constitution. Appellant's Eighth Amendment argument is therefore without merit.

In sum, Twilegar has failed to establish that Mullens does not apply here. This Court has repeatedly held that Hurst v.

⁵ See Art. I, § 17, Fla. Const. ("[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution"); Henry v. State, 134 So. 3d 938, 947 (Fla. 2014) (noting that under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims).

State relief is not available to defendants who waive penalty phase jury findings. In addition to Mullens, this Court has denied relief in Brant v. State, 197 So. 3d 1051 (Fla. 2017) (defendant waived trial and penalty phase juries), Davis v. State, 207 So. 3d 177 (Fla. 2016) (defendant waived penalty phase jury after guilt phase jury convicted him), Wright v. State, 213 So. 3d 881 (Fla. 2017) (same), and Robertson v. State, ___ So. 3d ___, 2016 WL 7043020 (Fla. December 1, 2016) (same). There is no significant distinction between those cases and Twilegar's. This Court should therefore affirm.

ISSUE II

NEW LAW THAT WOULD GOVERN AT A RESENTENCING IS INAPPLICABLE TO TWILEGAR'S POSTCONVICTION MOTION

In his second claim, Twilegar contends that the lower court erred by declining to reconsider his previously raised ineffectiveness claims and assess whether he is entitled to relief because of recent penalty phase unanimity requirements. In his view, consideration of recent changes in the law is a necessary part of the cumulative analysis required under Hildwin v. State, 141 So. 3d 1178 (Fla. 2014) and Swafford v. State, 125 So. 3d 760 (Fla. 2013). The trial court correctly denied relief as to this claim because it found that the rule relied upon by Twilegar applies only to cases alleging newly discovered

evidence. See, e.g., Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). A change in the law does not entitle the movant to cumulative analysis outlined in Jones because it is not a new fact. See, e.g., Regan v. State, 787 So. 2d 265 (Fla. 1st DCA 2001) (Statutory or decisional changes in the law are not newly discovered “facts;” treating them as such “will remove any need to perform a Witt⁶ analysis.” Id. at 267). Moreover, neither a statutory change nor decisional law are “facts” for the purpose of assessing timeliness in a postconviction motion. See e.g., Coppola v. State, 938 So. 2d 507, 510 (Fla. 2006).

It is significant that Appellant cites to no law or rule of procedure in support of his assertion that a change in the law requires reconsideration of previous postconviction claims. This Court’s rejection of Twilegar’s postconviction appeal is final and law of the case; there is no procedural rule authorizing review of decisions rendered in a previous term merely because the law has changed since then. The trial court correctly found this argument lacking in merit.

Twilegar also contends that earlier rejected postconviction claims must be revisited because of this Court’s recent decision in Bevel v. State, ___ So. 3d ___, 2017 WL 2590702 (Fla. June 15, 2017). Bevel is distinguishable from Twilegar’s case,

⁶ Witt v. State, 387 So. 2d 922 (Fla. 1980).

however. This Court granted Bevel a new penalty phase partly because the jury's recommendation was not unanimous (as to victim Stringfield) and partly because counsel's penalty phase presentation was lacking (as to victim Sims). There was no Sixth Amendment waiver of any kind in Bevel. Twilegar's waiver of a penalty phase jury takes him outside the class of defendants entitled to the benefit of Hurst v. State and distinguishes him from a defendant who might be entitled to the postconviction analysis indicated in Bevel. Given this Court's clear statement in Mullens that a voluntary jury waiver precludes a defendant from relief under Hurst v State, the balance of Twilegar's argument fails. Accordingly, the lower court should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July, 2017, I electronically filed the foregoing with the Clerk of the Court by using the e-portal system which will send a notice of electronic filing to the following: Suzanne Myers Keffer, Chief Assistant CCRC-S and Scott Gavin, Staff Attorney, Capital Collateral Regional Counsel-South, One East Broward Boulevard, Suite 444, Ft. Lauderdale, Florida 33301, **keffers@ccsr.state.fl.us** [and] **gavins@ccsr.state.fl.us**.

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