IN THE SUPREME COURT OF FLORIDA

JAMES DELANO WINKLES,

Appellant,

v. CASE NO. SC03-935

STATE OF FLORIDA,

Appellee.

___________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Winkles pled guilty to two counts of first degree murder on April 3, 2002 (V3/514-533).[1] The first count charged Winkles with the murder of Elizabeth Graham, who was abducted in Pinellas County when she arrived at a business appointment on Sept. 9, 1980 (V1/3-4; V3/523-24). The second count charged Winkles with the murder of Margaret Delimon, who was abducted in Pinellas County from a business appointment on Oct. 3, 1981 (V1/3-4; V3/526). The factual basis outlined at the plea hearing and Winkles' statements reveal that both women were held captive over a period of several days and subjected to repeated sexual abuse before being killed (V3/523-529; V4/612-637; V5/722-763).

Winkles' acknowledgment of guilt came after he had been in state prison for nearly twenty years following convictions obtained after Winkles abducted a woman from a business appointment in Seminole County in 1982 (V4/590). Winkles contacted authorities in February, 1998, wanting to discuss his involvement in the Graham and Delimon unsolved cases in exchange for a list of requests, including the State's waiver of the death penalty for the crimes (V3/431-436; V4/581, 599). The

[1]A duplicate transcript of the change of plea hearing is included in the record with a date of April 8, 2002 (V3/535-554).

State refused to waive the death penalty, but Winkles decided to speak with investigators anyway (V3/437; V4/600). Winkles met with Pinellas County Sheriff officials on a number of occasions, detailing his actions in selecting, meeting, kidnaping, raping, and ultimately killing Graham and Delimon (V3/441-442; V4/601, 612-637; V5/722-763). He rode with officials to various locations around Pinellas County, pointing out places relevant to the crimes, as well as where Delimon's body and the skulls of both victims were found in Citrus County and Hernando County (V4/602, 714; V5/764).[2] Winkles also gave several interviews to the media describing his crimes against Graham and Delimon (V4/646-649, 682-713).

Winkles waived a penalty phase jury, and a sentencing hearing was held before Judge Luce on February 17, 2003 (V4/556). The State presented testimony from Sgt. Det. Michael Madden and from Donna Maltby, the victim of Winkles' 1982 abduction who managed to escape from his car, leading to his arrest (V4/579-719; V5/721-767, 768-796). Victim impact statements were offered to the court (V5/813-833). For the defense, Winkles addressed the court and apologized for his actions, indicating he had grown morally while in prison (V5/839-842). The defense also relied on a memorandum outlining

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[2]Graham's body was never recovered (V4/591).

the mitigation that had been submitted (V2/325-332).[3]

On April 14, 2003, Judge Luce imposed a death sentence on each murder count (V2/378-391). The court applied the aggravating factors of 1) prior violent felony convictions; 2) murder committed during the course of a kidnaping; 3) avoid arrest; and 4) cold, calculated and premeditated to each murder (V/379-383). The court rejected the State's arguments that both murders were also committed for pecuniary gain and were heinous, atrocious or cruel (V2/383-385). In mitigation, the court gave considerable weight to Winkles' cooperation with law enforcement; little weight to the fact Winkles would die in prison if sentenced to consecutive life sentences; no weight to the suggestion that life sentences would be less expensive for taxpayers; very little weight to the fact that Winkles pled guilty, thereby waiving several appellate issues; no weight to the assertion that Winkles had spared the victims' families and the State by declining a trial; little weight to the finality and closure provided by Winkles' confessions; no weight to the claim that Winkles had made positive use of the twenty years he had been in prison; no weight to the allegation that Winkles' mother died when he was young; and no weight to Winkles' brief military service (V2/385-390).

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[3]A duplicate of this memo is included at V2/333-340.

This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Winkles' motion to declare Florida Statute 921.141 unconstitutional. As this Court has repeatedly recognized, Ring v. Arizona, 536 U.S. 584 (2002), did not invalidate Florida's capital sentencing procedures. The Ring argument presented in this case is particularly unpersuasive, as Winkles waived his right to a jury trial and the trial court properly found and applied the "prior violent felony conviction" aggravating factor. The indictment was not deficient in failing to identify the aggravating factors upon which the State would rely to support the death sentence as Florida law does not require capital aggravating factors to be identified in the charging document. As no reasonable basis for disturbing Winkles' death sentences has been presented, this Court must affirm the convictions and sentences imposed in this case.

ARGUMENT

ISSUE I

WHETHER THE FLORIDA DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO HAVE AGGRAVATING CIRCUMSTANCES FOUND BY A JURY.

This appeal challenges the trial court's denial of Winkles' motion to declare Florida's statute to be facially unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

This Court has repeatedly rejected Winkles' claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator (HAC) case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Winkles criticizes this Court's reluctance to overrule United States Supreme Court precedent upholding the

constitutionality of Florida's capital sentencing procedures, asserting that, by overruling Walton v. Arizona, 497 U.S. 639 (1990), the Ring opinion necessarily overruled Hildwin v. Florida, 490 U.S. 638 (1989), because Walton was premised on Hildwin. This oversimplification fails to acknowledge fundamental differences between the Arizona and Florida sentencing procedures. This Court has consistently maintained that, unlike the situation in Arizona, the statutory maximum sentence for first degree murder in Florida is death. See Mills v. Moore, 786 So. 2d 532, 536-538 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001); Porter, 840 So. 2d at 986; Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) ("This Court has defined a capital felony to be one where the maximum possible punishment is death"). Because Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury, and because death is the statutory maximum for first degree murder in Florida, Ring does not establish Sixth Amendment error under Florida's statutory scheme. As Winkles' argument has been consistently rejected, there is no error presented in the trial court's denial of his motion to declare Florida's capital sentencing statute to be unconstitutional.

Even if some deficiency in the statute could be discerned, Winkles has no legitimate claim of any Sixth Amendment error on

the facts of this case. Winkles claims initially that the Sixth Amendment violation created by adherence to the statute constitutes structural error which cannot be harmless under Sullivan v. Louisiana, 508 U.S. 275 (1993). He also posits that a constitutional harmless error analysis demonstrates the alleged jury defect in this case was harmful because, accepting the fact that the prior violent felony conviction does not have to be found by a jury, that factor alone would not support the death sentences in this case due to the mitigation present. Both of these arguments are without merit.

Clearly, a Sixth Amendment violation can be harmless. Any claim to the contrary ignores the plain result of Ring itself, which was remanded so that the state court could conduct a harmless error analysis. Ring, 536 U.S. at 609, n.7. This result is consistent with a number of other United States Supreme Court decisions. See United States v. Cotton, 535 U.S. 625 (2002) (failure to recite amount of drugs for enhanced sentence in indictment did not require conviction to be vacated); Neder v. United States, 527 U.S. 1, 8-9 (1999) (failure to submit an element to the jury did not constitute structural error); DeStefano v. Woods, 392 U.S. 631 (1968) (declining to provide retroactive application to right to jury trial).

Moreover, Winkles' harmless error analysis is flawed. Winkles' attempt to demonstrate harmful error in this case confuses the distinction between the right to a jury trial on a capital offense with the jury participation required for imposition of sentence. According to Winkles, since Florida is a weighing state, a judge cannot consider any aggravating factor that was not expressly found by a unanimous jury. He concedes that the judge below could properly rely on the aggravating factor of his prior violent felony convictions, but asserts that, because other weighty aggravating factors were found and applied by the court, the lack of jury findings on these other factors cannot be harmless. However, Ring does not create a right to jury sentencing or prohibit judicial sentencing; it only interprets the jury's role in finding a defendant death-eligible. See Ring, 536 U.S. at 612 ("What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so.") (Scalia, J., concurring). Winkles' claim that more than one aggravating factor must be found by a jury because, given the existence of mitigation, a single factor is insufficient to support a death sentence, is an assertion premised on this Court's requirements for a proportional sentence, rather than

the findings necessary to convict a defendant of a capital offense.

In the instant case, Winkles' waived his rights to a jury trial and to a jury sentencing recommendation. Clearly, he had no desire for his case to be considered by a jury of his peers. He asserted that Ring provided him jury rights beyond that codified in Florida law, but thereafter waived even those allegedly insufficient rights granted by statute. Under such circumstances, no reasonable Sixth Amendment claim can be presented. See generally, Guzman v. State, 28 Fla. L. Weekly S829 (Fla. Nov. 20, 2003) (Ring did not invalidate defendant's waiver of penalty phase jury since "Ring did not expand Guzman's jury rights beyond what he knew when he waived those rights"). In addition, Winkles' death sentence is supported by the aggravating factor of prior violent felony convictions, a traditional sentencing factor which may be used by a judge to apply a sentencing exceeding the statutory maximum for an offense. Almendarez-Torres v. United States, 523 U.S. 224 (1998); Duest, 855 So. 2d at 49.

The Sixth Amendment, as interpreted in Ring, provides no basis for condemning Florida's capital sentencing statute or disturbing the convictions and sentences obtained against Winkles. This Court must affirm the death sentences imposed in

this case.

ISSUE II

WHETHER APPELLANT'S RIGHT TO NOTICE OF THE NATURE AND CAUSE OF THE ACCUSATION WAS VIOLATED BY FAILURE TO ALLEGE THE AGGRAVATING CIRCUMSTANCES IN THE INDICTMENT.

Winkles also asserts that his death sentence must be vacated due to the State's failure to allege the applicable aggravating circumstances in the charging indictment. Again, this Court has repeatedly rejected this claim, and Winkles offers no reasonable basis for reconsideration of this issue.

Clearly, the suggestion that aggravating factors are elements of capital murder which must be charged in the indictment has no basis in law. See Kormondy, 845 So. 2d at 54; Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff'd., 490 U.S. 638 (1989); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating circumstances do not need to be charged in indictment). Notably, the United States Supreme Court has refused to apply the indictment clause of the Sixth Amendment to state prosecutions. Hurtado v. California, 110 U.S. 516 (1884) (holding there is no requirement for an indictment in state capital cases).

Furthermore, any possible constitutional deficiency in the indictment would necessarily be harmless under United States v.

Cotton, 535 U.S. 625 (2002), since the fairness of Winkles' convictions and sentences is not implicated by his claim. Once again, the trial court did not err in denying Winkles' motion to declare Florida's capital procedures unconstitutional, and no reasonable basis for relief has been presented in this issue.

Although Winkles does not challenge the validity of his plea or the proportionality of his death sentences, this Court will independently review these issues. Ocha v. State, 826 So. 2d 956, 965 (Fla. 2002) ("When a defendant pleads guilty to first-degree murder and is subsequently sentenced to death, the focus of our customary review of the conviction shifts. In this situation, we must examine 'the propriety of [the] plea, since it is the plea which formed the basis for [the] conviction.' Koenig v. State, 597 So. 2d 256, 257 n.2 (Fla. 1992). Proper review requires this Court to scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily."); Jennings v. State, 718 So. 2d 144, 154 (Fla. 1998) (Court will independently review the sufficiency of the evidence and the proportionality of the sentence). The following is offered to assist the Court with these issues.

The record clearly demonstrates the validity of Winkles' guilty pleas. At the colloquy below, Winkles' expressly

acknowledged the consequences of his pleas, the understanding of the various constitutional rights being waived, and the voluntariness of his actions (V3/518-530). Thus, the propriety of the resulting convictions is well established.

Winkles' death sentences are also proportional. Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

Winkles' sentences are supported by the aggravating factors of prior violent felony convictions; during the course of a kidnaping; avoid arrest; and cold, calculated and premeditated. Winkles' prior convictions were weighty, including not only the other capital murder charged in the indictment, but the kidnaping, armed robbery, and aggravated assault convictions obtained on the Donna Maltby incident, as well as convictions from 1963 for attempted robbery and assault with intent to commit robbery (V2/379). The strongest mitigation was Winkles' cooperation with law enforcement, although some weight was given to other nonstatutory mitigation relating to Winkles' confession

and the fact that Winkles would die in prison even if life sentences were imposed (V2/385-390). No evidence was offered as to any mental health, substance abuse, or childhood difficulties in mitigation.[4] When compared to factually similar cases, the proportionality of Winkles' sentences is evident. Winkles is a cold-blooded serial killer, and this Court has affirmed many death sentences in cases with less aggravation and more mitigation than presented in the instant case.

In Lawrence v. State, 846 So. 2d 440 (Fla. 2003), this Court affirmed a death sentence based on the defendant's prior convictions and the cold, calculated and premeditated manner in which the murder was committed. Like Winkles, Lawrence cooperated with law enforcement and confessed to his crime. In addition, Lawrence had a wealth of mitigation, including both statutory mental mitigating factors, a disturbed childhood, and the fact that his codefendant was the actual killer. See also Smithers v. State, 826 So. 2d 916, 931 (Fla. 2002) (two murder victims, CCP on one and HAC on both; both statutory mental mitigators, childhood abuse, and positive character traits weighed in mitigation); Zakrzewski v. State, 717 So. 2d 488, 494

[4]Although the defense sentencing memorandum indicated that Winkles was raised by relatives due to the untimely death of this mother, there was no evidence offered as to when the mother died or what effect her death had on Winkles, and therefore the court properly rejected this proposed mitigator as unproven.

(Fla. 1998) (three murder victims, CCP, and HAC on some victims weighed against substantial mitigation); Long v. State, 610 So. 2d 1268 (Fla. 1992), cert. denied, 510 U.S. 832 (1993) (prior convictions, during kidnaping, CCP and HAC, weighed against both statutory mental mitigators). On the facts of this case, the proportionality of Winkles' death sentences cannot seriously be contested.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the convictions and sentences imposed in this case must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Paul C. Helm, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, Florida 33831, this ______ day of February, 2004.

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).

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