IN THE SUPREME COURT OF FLORIDA

VAHTIECE A. KIRKMAN,)
)
Appellant,)
)
vs.) CASE NO. SC16-808
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
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SEVENTH JUDICIAL CIRCUIT

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_____	)	

PRELIMINARY STATEMENT

The original record on appeal comprises sixteen consecutively numbered volumes. The pages of the first seven volumes are numbered consecutively from 1 to 1,076. Volume eight begins renumbering the pages sequentially from page 1 to 214. Volume nine begins renumbering the pages sequentially from page 1 to 1325. Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate pages.

SUMMARY OF ARGUMENTS

Point I: The Supreme Court of the United States held that Florida's capital sentencing scheme violates the Sixth Amendment to the United States Constitution. Hurst v. Florida, 136 S. Ct. 616 (2016) Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is unconstitutional. Hurst at 619, 624 In reaction to the Hurst decision, the Florida Legislature amended the death penalty statute. The appellant responded by filing a Motion to Declare Florida Statute 921.141(2)(C) Unconstitutional. This Court agreed that the current Florida death penalty statute was unconstitutional in Perry v. State, 2016 WL6036982 (Fla. October 14, 2016). Since the appellant was sentenced under an unconstitutional statute, this Court should reverse and remand his death sentence and order a new penalty phase hearing. See Franklin v. State, SC13-1632 (Fla. November 23, 2016)

The appellant also contends that the current Florida death penalty is unconstitutional because it fails to adequately narrow the class of cases eligible for the death penalty. The expansion of the number of aggravating factors by the Florida Legislature has created a statutory scheme where the class of cases eligible for the death penalty includes every first degree murder.

Point II: The state sought to introduce evidence that the appellant was involved in the prior murder of Willie Parker on the grounds that the evidence was inextricably intertwined with the homicide of Darice Knowles. The state claimed that their star witness and co-defendant Christopher Pratt would testify that he was directed/ordered to assist the appellant in murdering Darice Knowles because the appellant thought that Darice Knowles was providing information to the Cocoa Police Department about his involvement in the murder and robbery of Willie Parker.

The trial judge found that informing the jury that the appellant and co-defendant where indicted for the previous unrelated murder of Willie Parker was relevant to bolster the state's claim that the appellant believed that the murder victim Darice Knowles knew about the appellant's involvement in drug trafficking and the murder of Willie Parker. The appellant further believed that Darice Knowles was providing information to the Cocoa Police Department about the appellant's involvement in these criminal activities. The trial judge ruled that this highly prejudicial evidence of unrelated criminal activity was relevant to prove appellant's motive to murder Darice Knowles (witness elimination). This was error.

Point III: It is well settled that a fundamental requirement of the Eighth Amendment of the United States Constitution is that the death penalty must be proportional to the culpability of the defendant. Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). The appellant's co-defendant Christopher Pratt testified that he murdered his girlfriend Darice Knowles on the orders of the appellant. The state argued that the sole motive of her murder was witness elimination.

The penalty phase verdicts make it clear that the jury was not comfortable with Pratt's testimony and uncertain as to what actually occurred in that killing field. Had the jury fully believed the testimony of Christopher Pratt they would have unanimously found the witness elimination aggravating factor. There was no other reason given by the state to explain the motive of the murder of Knowles. On the other hand the jury found the CCP aggravating factor for the appellant which would suggest that the jury believed that the appellant was culpable for the murder of Knowles. Where the culpability of co-defendant's is similar, this Court has long recognized "that the less culpable, non-triggerman defendant cannot receive a death sentence when the more culpable, triggerman defendant receives" a lesser sentence. Therefore, in this case the imposition of the death penalty is disproportionate in violation of the Sixth, Eighth and Fourteenth Amendments to

the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution (fair trial, cruel and unusual punishment, and due process clauses).

POINT I

IN REPLY THAT APPELLANT IS NOT ENTITLED TO A NEW PENALTY PHASE HEARING BECAUSE ANY HURST ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The appellant concedes that this Court has determined that a Hurst[1] error is subject to the harmless error test as articulated in Chapman v. California, 386 US 18 (1967) and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) The appellee argues in her Answer Brief that the Hurst error in this case was harmless beyond a reasonable doubt, because a rational jury, properly instructed, would have determined that death was the appropriate sentence based on the extensive aggravation presented. The appellee correctly observed that in the present case, no substantial evidence of mitigation was presented by appellant during the penalty phase. Also, the jury was given a special verdict form, and the jury unanimously found that the State proved five aggravating factors beyond a reasonable doubt.

The state correctly conceded that this Court in Dubose v. State, 2017 WL 526506 (Fla. Feb. 9, 2017), stated that "in cases where the jury makes a non-unanimous recommendation, the Hurst error is not harmless." Id. The jury in the

[1] Hurst v. State, 202 So.3rd 40 (Fla. 2016)

present case had a non-unanimous penalty phase recommendation of 10-2. Rather than Dubose, this Court's recent decision of Williams v. State, 2017 WL 224529 (January 19, 2017) is far more useful in evaluating the state's claims in the Answer Brief. In Williams, there was a special verdict form where the jury found that four out of five aggravating factors were found unanimously, and the jury in Williams made a nine to three recommendation for death. In holding that a new penalty phase trial was required this Court held:

> It is clear that three jurors voted for Williams to receive a life sentence. We cannot speculate why these three jurors did not find that sufficient aggravating factors existed to impose death or that those aggravating factors outweighed the mitigation, or whether the three jurors, in fact, made those findings but were following the trial court's instructions that they were not required to recommend death. See Hurst, 202 So.3d at 58 (quoting Fla. Std. Jury Instr. (Crim.) 7.11 Penalty Proceedings—Capital Cases).

Williams at 19. Likewise, this Court can not speculate as to why two jurors did not find that sufficient aggravating factors existed to impose death or that those aggravating factors outweighed the mitigation. More importantly, this Court in Williams held in dicta that where there is significant evidence of aggravation versus no evidence of mitigation, this Court is not equipped to second guess why some jurors believed that the aggravation was not sufficient to support the death penalty:

> Furthermore, even if not a single juror found that any mitigation was established, there is still no way to ascertain whether the jury unanimously concluded that sufficient aggravation existed to warrant a death sentence. Based on the jury vote of nine to three, we cannot conclude that the Hurst error in this case was harmless beyond a reasonable doubt. For these reasons, we grant Williams relief based on Hurst. Accordingly, we reverse the sentence of death and remand for a new penalty phase.

Williams at 19.

Based upon the foregoing, the Hurst error is not harmless and the appellant should be provided a new penalty phase trial.

POINT II

IN REPLY THAT THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TESTIMONY THAT APPELLANT HAD BEEN INDICTED FOR THE MURDER OF WILLIE PARKER BECAUSE THE EVIDENCE WAS RELEVANT TO ESTABLISH THE MOTIVE FOR THE MURDER OF MS. KNOWLES AND WAS ALSO INEXTRICABLY INTERTWINED WITH THE EVENTS IN THIS CASE.

The appellant relies upon the initial brief in reply to the appellee.

POINT III

IN REPLY THAT THE ENMUND/TISON CULPABILITY REQUIREMENT DOES NOT APPLY BECAUSE COURTS HAVE LONG HELD THAT THE REQUIREMENT DOES NOT APPLY IN CASES LIKE THE INSTANT CASE, WHERE THE EVIDENCE WAS SUFFICIENT TO SUPPORT A PREMEDITATION MURDER THEORY.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death and remand with directions that the appellant receive a new penalty phase trial or life sentence as to Issue I; the appellant received a new trial as to Issue II; and vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Issue III.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, capapp@myfloridalegal.com and mailed to Appellant on this 23rd day of March, 2017.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

/s/ George D.E. Burden
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER