IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-815
L.T. NO. 1992-CF-3178
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Anthony Mungin was convicted of first-degree murder, attempted first-degree murder, and burglary, and was sentenced to death. State v. Mungin, 689 So. 2d 1026 (Fla. 1995). In the penalty phase, the jury recommended a death sentence by a vote of seven to five. Id. at 1028. The judgment and sentence became final upon denial of certiorari by the United States Supreme Court on October 6, 1997. Mungin v. Florida, 118 S.Ct. 102 (1997); Fla. R. Crim. P. 3.851(d)(1)(B) (A judgment and sentence become final "on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.").

In 2003, Mungin filed an appeal in this Court challenging the trial court's denial of his initial postconviction motion and an accompanying habeas corpus petition. Mungin v. State, 932 So. 2d 986 (Fla. 2006). This Court affirmed the trial court's ruling and denied the habeas corpus petition. Id. Mungin subsequently filed an appeal in this Court challenging the trial court's summary denial of his successive postconviction motion. Mungin v. State, 79 So. 3d 726 (Fla. 2011). After his case was remanded for an evidentiary hearing, the postconviction court again denied relief and this Court affirmed. Mungin v. State, 141 So. 3d 138 (Fla. 2013).

On January 12, 2017, Mungin filed a successive postconviction motion seeking relief pursuant to Hurst v. Florida, 136 S.Ct. 616

(2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). (PCR I:1-70). The trial court did not order the State to respond and ultimately denied Mungin's postconviction motion because he was not entitled to Hurst relief as a matter of law and his motion was untimely. (PCR I:76-80). On March 15, 2017, 15 days after the trial court issued its ruling, Mungin filed a motion for rehearing. (PCR I:81-95). In addition to rearguing the claims in his postconviction motion, Mungin argued that his due process rights were violated when the case was reassigned to Judge Linda McCallum without his knowledge. (PCR I:91-95). He alleged that Judge McCallum was a prosecutor in the same office that prosecuted Mungin's case at the time of his trial and had prosecuted "at least one" capital case during her tenure there. (PCR I:92). Notably, Mungin does not allege that Judge McCallum worked on his prosecution or had personal knowledge of his case, that Judge McCallum has said or done anything to indicate bias, nor that the facts alleged would put a reasonably prudent person in fear of an unfair trial. The trial court denied his motion. (PCR I:100-02).

On May 1, 2017, Mungin filed a notice of appeal with this Court. On June 5, 2017, this Court stayed the appeal pending the resolution of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017). On September 22, 2017, this Court issued an order for Mungin to show cause as to "why this trial court's order should not be affirmed in light of this Court's decision [in] Hitchcock v. State, SC17-

445." On February 22, 2018, this Court ordered additional briefing on non-Hurst issues. On April 26, 2018, Appellant filed his Initial Brief. This is the State's Answer.

SUMMARY OF THE ARGUMENT

The appointment of Judge Linda McCallum to Mungin's case and the failure to afford him a case management hearing do not entitle Mungin to relief. Because Mungin's postconviction motion was untimely and meritless on its face, any error in failing to provide him a case management hearing is harmless. Further, Mungin's due process rights were not violated by the appointment of Judge McCallum to his case because his motion for rehearing failed to allege a sufficient basis to disqualify Judge McCallum.

Mosley does not require that Mungin's previously denied claims be relitigated and he is not entitled to relief. Because Mungin is not entitled to relief under Hurst, his previously denied claims are also not entitled to be relitigated.

Mungin's sentence is not unreliable and does not violate the Eighth Amendment. This Court has previously found Mungin's sentence to be appropriate. This Court affirmed the finding that there was little statutory and non-statutory mitigation in this case. Because Mungin has failed to raise an actionable claim under the law, his appeal should be denied.

ARGUMENT

I. The appointment of Judge Linda McCallum to Mungin's case and the failure to afford him a case management hearing did not violate Mungin's due process rights.

Mungin asserts that his due process rights were violated when the lower court denied his postconviction motion without first holding a case management hearing and Judge McCallum should have granted the motion for rehearing and recused herself. (Initial Brief at 7). Mungin is not entitled to relief on this claim.

As this Court has held, the failure to hold a case management hearing on a postconviction motion that is facially insufficient is harmless error. Marek v. State, 14 So. 3d 985 (Fla. 2009); Groover v. State, 703 So. 2d 1035, 1038 (Fla. 1997).

Here, Mungin filed a successive postconviction motion seeking Hurst relief. As discussed at length in the State's Reply to Response Brief filed February 5, 2018, Mungin's claim for Hurst relief is legally meritless, and such a claim could not benefit from factual development. Further, because Hurst is not retroactive to Mungin's case, his postconviction motion was untimely under Rule 3.851(d)(2)(B), Florida Rules of Criminal Procedure.[1] The trial court ultimately denied Mungin's postconviction motion because he was not entitled to Hurst relief

[1] Postconviction claims must be filed within one year after the judgment and sentence become final. Any claim filed after one year that is predicated on the change of a fundamental constitutional right may be timely if the constitutional right is held to apply retroactively. Rule 3.851(d), Fla. R. Crim. P. (emphasis added).

as a matter of law and his motion was untimely. (PCR I:76-80). As Mungin's motion was facially insufficient, any error caused by the trial court's failure to hold a case management hearing is harmless.

Mungin also claims his due process rights were violated when a potentially biased judge was assigned to his case without his knowledge. (Initial Brief at 7). As Mungin failed to follow the proper procedure in the trial court for seeking the removal of a judge, and as his motion for rehearing failed to allege a sufficient basis to disqualify Judge McCallum, this claim is meritless.

Rule 2.330, Florida Rules of Judicial Administration, allows a party to seek disqualification of a judge if the party submits a sworn motion that is certified in good faith and filed within 10 days of discovering the facts underlying the motion. The denial of a motion to disqualify for legal insufficiency is reviewed de novo. Barnhill v. State, 834 So. 2d 836, 842-43 (Fla. 2002). A motion to disqualify is legally sufficient when the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. Id. at 843 (citing MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332 (Fla. 1990)). A bias sufficient to disqualify a judge requires Mungin to show that a reasonable person would fear that the trial court has a personal bias or prejudice against him. Subjective fears are insufficient. Arbelaez v. State,

775 So. 2d 909, 916 (Fla. 2000) (judge's "tough-on-crime" stance during her election campaign and her former employment as a prosecutor during appellant's trial did not require her disqualification from ruling on motion for postconviction relief).

Mungin's motion was untimely under Rule 2.330 because it was filed more than 10 days after he became aware that Judge McCallum was presiding over his case. (PCR I:92). See Willacy v. State, 696 So. 2d 693 (Fla. 1997). Mungin's Initial Brief admits that he received the order signed by Judge McCallum on March 3, 2017, and he did not file a motion for rehearing until 12 days later. (Initial Brief at 8). This is beyond the 10-day limit as required by statute.

Furthermore, Mungin failed to allege facts that would show that a reasonable person would fear that he would receive an unfair trial or that the trial court has a personal bias against him. Mungin has not asserted that Judge McCallum had a role in his case or had personal involvement or knowledge in his case during her time as a prosecutor. Further, there is no allegation that the results of the postconviction proceedings were unfair, nor was his pleading verified by oath or affidavit. The facts that Mungin alleged, taken as true, are insufficient to warrant disqualification. See Dendy v. State, 954 So. 2d 1221 (Fla. 4th DCA 2007) (holding defendants' motion to disqualify judge in murder trial, alleging that judge, in her former role as federal

prosecutor, had served in a prosecutorial capacity in the case prior to indictment, did not allege a sufficient connection between the judge's role and prosecution of defendants for the motion to be legally sufficient). As such, this claim is meritless and the trial court's order denying Mungin's motion for rehearing should be upheld.

Mungin also relies on Williams v. Pennsylvania, 136 S.Ct. 1899 (2016), for the proposition that because Judge McCallum worked for the State Attorney's Office for the Fourth Judicial Circuit at the time this case was pending, that Judge McCallum should have excused herself from the case.

To be legally sufficient, the facts as alleged in the motion to disqualify must create a well-founded fear that he or she will not receive a fair trial. This fear of judicial bias must be objectively reasonable. Wall v. State, 238 So. 3d 127 (Fla. 2018). A motion to disqualify is governed substantively by section 38.10, Florida Statutes, and procedurally by Florida Rule of Judicial Administration 2.330. Peterson v. State, 221 So. 3d 571, 581 (Fla. 2017) (citing Gore v. State, 964 So. 2d 1257, 1268 (Fla. 2017)). A motion to disqualify must show "that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Fla. R. Jud. Admin. 2.330(d)(1). As this Court explained in Parker v. State, 3 So. 3d 974, 982 (Fla. 2009), the standard is "whether the

facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge." The fear of judicial bias "must be objectively reasonable"; a "subjective fear" is "not sufficient." Id. The "fact and reasons given for the disqualification of a judge must tend to show the judge's undue bias, prejudice, or sympathy." Id.

The motion to disqualify was based on the fact the judge was a former prosecutor many years ago. Judge McCallum became a county judge circa 1995 and a circuit judge circa 2002. She had been involved with other capital cases but not with this particular case.[2] She was a prosecutor with the State Attorney's Office at the same time this case was being tried. She was a prosecutor for over 20 years and was never a prosecutor in this case.[3]

The motion to disqualify was legally insufficient. As the trial court properly ruled, a judge being a former prosecutor does not give rise to a reasonable fear of not receiving a fair and impartial postconviction proceeding. The judge being a former prosecutor does not give rise to an objectively reasonable fear that the judge is biased. And this is especially true of a judge that was a prosecutor over two decades ago. Unless this Court is

[2] From reading through the record, there is no mention of Judge McCallum ever appearing in court on this case or filing any motions on behalf of this case.
[3] The prosecutor who presented this case to the grand jury, Bernardo De La Rionda, was the prosecutor of record on this case until his retirement at the end of March of this year.

willing to disqualify every former prosecutor who becomes a judge, from ever presiding at any postconviction proceeding of all criminal and capital cases that were prosecuted during the time that the judge was with the prosecutor's office, even though the judge was not involved in the particular prosecution (and every former public defender as well), the motion is legally insufficient.

In Quince v. State, 732 So. 2d 1059, 1061-62 (Fla. 1999), this Court held that the trial court did not abuse its discretion in denying a motion to disqualify. The successor postconviction judge was a former assistant public defender who had worked at the public defender's office at the same time as the defendant was being represented by the office. The judge was the appellate coordinator in the public defender's office at the time of the prosecution of Quince. The postconviction judge was also a colleague of the assistant public defender who represented Quince whose effectiveness and conflict of interest was at issue in the postconviction litigation. This Court noted that the judge "may have an administrative responsibility" involving the appeal, but concluded that such facts do not support an allegation of bias. This Court concluded there was no error in the denial of the motion to disqualify the judge.

Opposing counsel's reliance on Williams is misplaced. The United States Supreme Court in Williams held that the Due Process

Clause required the disqualification of any judge who previously had "significant, personal involvement" in a "critical" decision in the defendant's case. The chief justice of a state supreme court had, years earlier when he was the elected district attorney, personally approved the decision to seek the death penalty in Williams' case. Decades later, when the postconviction appeal was pending in the Supreme Court of Pennsylvania, Williams filed a motion to disqualify the chief justice based on his prior role in the case of approving of seeking the death penalty. The chief justice denied the motion to disqualify and participated in the postconviction appeal, despite his prior role in the case.

The United States Supreme Court reversed, explaining that due process requires the disqualification of a judge who previously had "significant, personal involvement in a critical trial decision" because it creates an "unacceptable risk of actual bias." Williams, 136 S.Ct. at 1907-08. The Williams Court concluded that making the decision to seek the death penalty was a critical decision in the case and amounted to significant, personal involvement in the case requiring disqualification of the Chief Justice. The High Court concluded that the error in not granting the motion to disqualify was not subject to harmless error analysis, explaining that it does not matter whether the disqualified judge's vote was not necessary to the disposition of the case and then remanded the case for a new postconviction

appeal. See also Matiru v. Sessions, 705 Fed. Appx. 476, 477 (8th Cir. 2017) (holding that Williams did not require the immigration judge, who previously worked as an attorney for the Department of Homeland Security to recuse herself because "she had no previous knowledge or involvement" in the particular case).

Here, as in Matiru, but unlike Williams, the judge had no involvement in this particular case. There is no allegation that Judge McCallum had "significant, personal involvement in a critical trial decision" in Mungin's case. The judge here certainly was not the elected state attorney who approved of seeking the death penalty in Mungin's case, unlike the situation in Williams. Due process does not require the disqualification of Judge McCallum.

Opposing counsel's reliance on Cave v. State, 660 So. 2d 705 (Fla. 1995), is equally misplaced. (Initial Brief at 12). The actual holding in Cave was that the judge erred by looking beyond the sufficiency of defendant's motion for disqualification. Id. at 707-08. The trial court in Cave "conducted a hearing in which he allowed the State to present several witnesses in rebuttal to the factual allegations contained in Cave's motion." Id. at 708. The trial court in this case did not conduct a hearing on the motion to disqualify, unlike the judge in Cave. Here, in contrast to Cave, the trial court did not look beyond the sufficiency of the motion.

Instead, the trial court ruled the motion was legally insufficient. Therefore, Cave does not apply.

Additionally, this Court in Cave ordered a different judge to preside at the resentencing citing Duest v. Goldstein, 654 So. 2d 1004 (Fla. 4th DCA 1995). Cave, 660 So. 2d at 708, n.5. In Duest, the district court of appeals prohibited a judge from presiding over a capital resentencing where the judge, who was a former assistant state attorney, had participated in the proceeding by delivering documents to the prosecutor during the trial and was a supervisor of the division that prosecuted the defendant. Here, there is no allegation that the judge handled any documents or participated in any manner in this particular case or was head of the division that prosecuted Mungin. Florida law does not require the disqualification of Judge McCallum.

The trial court properly summarily denied the motion to disqualify.[4]

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[4] Opposing counsel complains that the trial court did not hold a case management conference, commonly referred to as a Huff hearing, before summarily denying the successive postconviction motion. Huff v. State, 622 So. 2d 982 (Fla. 1993); Fla. R. Crim. P. 3.851(f)(5)(B) (stating: "Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference."). The purpose of a Huff hearing is to determine which issues need additional factual development at an evidentiary hearing. Mordenti v. State, 711 So. 2d 30, 32 (Fla. 1998) (stating that the purpose of a Huff hearing "is to allow the trial judge to determine whether an evidentiary hearing is required and to hear legal argument relating to the motion"). But when the issue is purely a legal issue which does not require any factual development or the motion is a successive motion, the failure to hold a Huff hearing is harmless error. Groover, 703 So. 2d 1035 (failure to hold a Huff hearing in a successive postconviction proceeding, as opposed to an initial postconviction proceeding, was harmless); Marek, 14 So. 3d at 999 (concluding the failure to hold a Huff hearing on a successive postconviction motion that was "legally insufficient" and "without merit" was harmless); Archer v. State,

II. Mosley v. State does not give Mungin relief for a new sentencing phase.

Mungin, relying on Mosley v. State, 209 So. 3d 1248 (Fla. 2016), asserts that this Court must reexamine his previously rejected claims under the doctrines of fundamental fairness and manifest injustice. (Response at 13-23). This claim is procedurally barred by the law-of-the-case doctrine. This Court has rejected Mungin's previously raised claims of newly discovered evidence and Brady v. Maryland, 373 U.S. 83 (1963), claims. This claim was properly denied by the postconviction court.

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151 So. 3d 1223 (Fla. 2014) (failure to conduct a Huff hearing on a successive motion that was "insufficiently pleaded, facially insufficient, and untimely" was harmless).

Indeed, when the issue raised is a purely legal issue with controlling precedent, it is not error at all to summarily deny a postconviction motion without conducting a Huff hearing, because, regardless of any argument defense counsel presents, the trial court must follow the controlling Florida Supreme Court precedent. A Huff hearing in the face of controlling precedent would be a useless exercise. The trial court did not commit error by not conducting a Huff hearing due to the controlling precedent, or alternatively, the error was harmless.

In addition to making an argument based on the applicable rule of court, opposing counsel raises a due process opportunity-to-be-heard challenge to the trial court's failure to hold a Huff hearing. But the due process right to be heard does not extend to oral presentations if written submissions are permitted instead. Appellate courts often decide the case based on the parties' written briefs alone and do not conduct an oral argument. David R. Cleveland & Steven Wisotsky, The Decline of Oral Argument in the Federal Courts of Appeals A Modest Proposal for Reform, 13 J. App. Prac. & Process 119 (2012) (noting, that in 2011, only one quarter of all federal appeals were orally argued). This Court does not automatically hold oral arguments in non-capital criminal cases or in successive postconviction appeals or in warrant cases. The common practice of court to decide matters based on written submissions alone does not violate due process. The failure of the trial court to conduct a Huff hearing which is, in effect, an oral argument, does not violate due process.

Opposing counsel was given his due process opportunity to be heard in the successive motion itself. Indeed, he was heard for 69 pages. Opposing counsel's massive successive motion was almost three times the pages permitted by the applicable rule of court and was, in the trial court's words, an abuse of process. He was given more process than he was due. The trial court's not conducting a Huff hearing did not violate due process.

Opposing counsel asserts that Hurst and Mosley somehow resurrect Mungin's previously denied postconviction claims. Hurst v. State, which is a right-to-jury-trial and an Eighth Amendment unanimity case, does not operate to breathe new life into previously denied claims. Mungin's postconviction motion in this appeal is from the denial of relief under Hurst. There has not been a change on the law regarding his previously denied claims. Hurst entitles a defendant to litigate a Hurst claim, not other types of claims.

Under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. Fla. Dept. of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001). Opposing counsel's claim that Mosley, under Hurst, means that his previously denied claims should be reexamined is procedurally barred by the law-of-the-case doctrine.

Opposing counsel, relying on Mosley, and the manifest injustice exeption to the doctrine, asserts that this Court should revisit the postconviction claim. But opposing counsel is really asserting that this Court should recede from Asay v. State, 210 So. 3d 1 (Fla. 2016), and Hitchcock, 226 So. 3d 216 , and rely on Mosley instead. He is asserting that this Court should adopt Justice Lewis' concurring opinion regarding the retroactivity of Hurst. Asay, 210 So. 3d at 30 (Lewis, J., concurring) (relying on the logic of James v. State, 615 So. 2d 668 (Fla. 1993)). But, if

a case is not retroactive, then the defendant is entitled to NO relief, which includes no new postconviction proceedings. Non-retroactivity is not an exception to the law-of-the-case doctrine.

This claim is procedurally barred and this Court should not revisit the previously denied postconviction claims.

III. Mungin's death sentence is not unreliable and does not violate the Eighth Amendment.

Mungin argues that the 7-5 recommendation is unreliable under Johnson v. Mississippi, 486 U.S. 578 (1988).

Opposing counsel's reliance on Johnson is misplaced. Johnson involved a prior conviction that was used as the basis for an aggravating circumstance used to impose a death sentence that was later vacated. Johnson's death sentence rested in part on a conviction that no longer existed. There is no real analogy between vacated convictions and retroactivity analysis.

In Johnson, the United States Supreme Court was concerned that the jury had relied on evidence that was "materially inaccurate." Johnson, 486 U.S. at 590. In this case, this Court has never found the evidence relied on by the jury to be "materially inaccurate" and has upheld the denials of the previous postconviction motions. See Mungin, 141 So. 3d at 141, 147. A jury recommendation for death cannot be materially inaccurate because it is not evidence. As such, Mungin's claim fails as a matter of law.

CONCLUSION

WHEREFORE, Appellee prays this Court affirm the lower court's ruling and deny Mungin's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 11th day of May, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Todd Scher, Attorney for Appellant, at tscher@msn.com.

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Lisa A. Hopkins
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