

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 2010-0854
Plaintiff-Appellee : On Appeal from the Hamilton County
Court of Common Pleas Case Nos.
vs. : B-0901629 and B-0904028
ANTHONY KIRKLAND : THIS IS A CAPITAL CASE
Defendant-Appellant :

MEMORANDUM IN OPPOSITION TO
APPELLANT'S MOTION FOR RECONSIDERATION

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On May 13, 2014, this Court released its opinion affirming Appellant Kirkland's conviction and sentence. *State v. Kirkland*, Slip Opinion No. 2014-Ohio-1966. On May 23, 2014, appellant filed a motion to reconsider, and appellee received this document on May 28, 2014.

The appellant's argument centers on this Court's finding upholding the appellant's third proposition of law. The appellant's position is that since this Court found that the prosecutor's closing argument was improper and prejudicial, that this Court was required to follow its holding in *State v. Thompson*, 33 Ohio St.3d 1 (1987), and remand this case to the trial court for a new sentencing hearing. Obviously, this Court did not choose the option used in the *Thompson* case. Instead, this Court relied on

its statutory duty to review the appellant's sentence under R.C. 2929.05(A), and upheld the sentence imposed by the jury and the trial court. Contrary to defendant's contention, this is not the first time the Court has used a R.C. 2929.05(A) review to uphold a sentence of death where error was found in a capital sentencing procedure. This Court cited to several such cases in its opinion. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864; *State v. Sanders*, 92 Ohio St.3d 245, 267, 750 N.E.2d 90 (2001); *State v. Mills*, 62 Ohio St.3d 357, 373-374, 582 N.E.2d 972 (1992).

To support his claims, appellant reargues some of his claims regarding misconduct. Thus, appellant states:

"Specifically, the prosecutor argued a sentence less than death would be meaningless and would not hold Kirkland accountable the deaths of the victims; repeatedly made reference to the subjective experiences of the victims; inserted numerous facts outside the record; and graphically argued the nature and circumstances of the murders as aggravating factors."

The background to this statement is not as defendant would have the Court believe. In fact, it is defense counsel who first raised the concept of a punishment "free" homicide.

At T.p. 2171, during defendant's penalty phase argument, defense counsel stated:

"This isn't a game where we decide, well, okay, were going to give someone a free pass."

The prosecutor was entitled to respond to this, and briefly did so at T.p. 2216. Also, one of the death specifications was a course of conduct specification, so discussions as to all of the victims were proper. In defendant's above-referenced quote he also states the

prosecutor, “graphically argued the nature and circumstances of the murders as aggravating factors.” This is not accurate. In *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995), the syllabus paragraph contains the following:

“Subject to applicable Rules of Evidence, and pursuant to R.C. 2929.03(D)(1) and (2), counsel for the state at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravated circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant...”

It should be apparent that as statutorily defined, the “nature and circumstances of the murder” are virtually identical to the “nature and circumstances of the aggravating circumstances specified in the indictment.” It would be virtually impossible for the prosecutor to carry out his duty to present his argument if he could not discuss the “nature and circumstances of the aggravating circumstances,” which, in fact, is all that the prosecutor did here. The statute and case law make the two concepts indistinct. It is literally impossible to factually distinguish the two. It would seem inconceivable to say the prosecutor cannot argue the facts of the aggravating circumstance to the jury. Finally, defendant’s reference to “subjective experience of the victims” is equally baseless. This is a reference to the supposed *Wogenstahl* error. *State v. Wogenstahl*, 75

Ohio St.3d 344, 662 N.E.2d 311 (1996). *Wogenstahl* banned all speculation about what a victim might have been thinking about at the time of death.

In this case, the prosecutor made the following remarks:

- (A) "She's petrified, she tells him just don't hurt me." (T.p. 2164)
- (B) "She's not struggling, she just pounds her little hands on the ground, and digs in the dirt." (T.p. 2166-2167)
- (C) "At that point she no longer begs Kirkland to let her live . . . she's begging that man to let her die." (T.p. 2167)

None of the remarks were objected to at trial and, in fact, the first two above [(A) and (B)] are taken directly from the defendant's confession. The third [(C)] is an inference based on the horrid abuse the 12 year-old victim is enduring as she dies.

In *State v. Dixon*, 101 Ohio St.3d 328, 805 N.E.2d 1042 (2004), the trial court wrote as follows in its opinion:

“[¶94] ‘When considering the manner in which Christopher A. Hammer was brutally beaten and then buried alive by this defendant; *the fear and torture the victim must have endured before he lapsed into a welcomed state of unconsciousness*, the Court finds that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.’ (Emphasis added.)”

This Court found that this inference was based on the facts of the crime and rejected a defense claim based on *Wogenstahl, supra*. In the present case, facts (A) and (B) are taken directly from defendant's own statement. The inference (C) flows from these self-admitted facts.

None of these misconduct claims support appellant's motion for reconsideration. There is no reason that claims such as these cannot be handled in the Court's required review under R.C. 2929.05(A). The motion for reconsideration should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2014, a copy of the foregoing Memorandum in Opposition to Appellant's Motion for Reconsideration was served by regular U.S. mail upon the Office of the Ohio Public Defender, Rachel Troutman, Counsel of Record, Death Penalty Division Supervisor, and Tyson Fleming and Elizabeth Arrick, Assistant State Public Defenders, at 250 East Broad Street, Suite 1400, Columbus, Ohio 43215-2998.



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