Supreme Court of Ohio Clerk of Court - Filed May 19, 2016 - Case No. 2010-0854

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 2010-0854
-vs-	:	
	:	**This is a Death Penalty Case.**
ANTHONY KIRKLAND,	:	
	:	
Defendant-Appellant.	:	

Memorandum in Opposition to State's Motion for Reconsideration

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Memorandum in Support

I. The State's Motion for Reconsideration is improper because it is simply another attempt to argue the case at hand.

The State's motion for reconsideration is an attempt to reargue the case at hand. This is not a proper basis for reconsideration, as stated in Rule 18.02(B) of the Supreme Court Rules of Practice. This Court has been clear: "We will not, however, grant reconsideration when a movant seeks merely to reargue the case at hand. S.Ct.Prac.R. 18.02(B)." *Dublin City Sch. Bd. of Educ. v. Franklin Cty. Bd. of Revision*, 139 Ohio St. 3d 212, 214 (2014).

It is the prosecutor's substantially prejudicial misconduct[1] that has brought this case to this point, and the language in *Hurst v. Florida* makes clear that a new mitigation hearing is the only remedy for the State's error. When a defendant invokes his right to a jury trial and then is deprived his right to a fair penalty phase, the only constitutional remedy is a new, fair, penalty phase at which the jury can decide his fate.

II. The State's Motion for Reconsideration is its attempt to elicit an opinion from this Court on issues never raised, briefed, or argued by Kirkland.

The State is attempting to broaden the meaning of this Court's May 4, 2016 Order in order to goad the Court into reconsidering its decision. Alternatively, in asking for "clarification," the State and the Franklin County Prosecutor's Office as amicus curiae (hereinafter collectively referred to as "the prosecutors") are attempting to elicit an opinion on issues that are outside the scope of the issues in this case. This Court should not take the bait.

Kirkland did not—and does not—argue that Ohio's death penalty statute runs afoul of *Hurst v. Florida*, 136 S. Ct. 616 (2016). Additionally, the State is simply wrong when it claims

[1]The Franklin County Prosecutor's Office, as amicus curiae, tried to minimize the misconduct committed by the Hamilton County Prosecutors. It also apparently requests that this Court sanction the "freebie" argument, which is puzzling to say the least. *See* Memorandum of Amicus Curiae, p. 5-7. Regardless, this Court was unanimous in its recognition of the prosecutorial misconduct—which went way beyond the "freebie" argument referenced—and the substantial prejudice caused by that misconduct.

that Kirkland "makes the broad assertion that appellate court re-weighing in capital cases is no longer constitutionally permissible." State's Motion for Reconsideration, p. 2. In fact, Kirkland specifically stated in his Motion that he "takes no position on whether independent reweighing is appropriate in cases when the errors were not deemed 'substantially prejudicial' like they were in Kirkland's case." Kirkland's Motion for Order or Relief, p. 7.

For the same reason, the alleged conflict between this Court's precedent in *Belton* and *Hoffner* and the Court's May 4, 2016 Order is illusory. *See* State's Motion for Reconsideration, p. 4, 5-6. Both *State v. Belton*, 2016-Ohio-1581, ¶ 55-61 and *State v. Hoffner*, 102 Ohio St. 3d 358, 368-69 (2004) concerned the constitutionality of Ohio's death penalty scheme. Again, Kirkland did not and has not argued that Ohio's death penalty scheme is unconstitutional under *Ring* or *Hurst*. The issue before the Court on Kirkland's motion was what relief is appropriate when the prosecutorial misconduct is substantially prejudicial. Thus, this Court's Order in Kirkland's case is not in conflict with either *Belton* or *Hoffner*. As discussed next, if anything, the analysis in *Belton* supports this Court's Order granting Kirkland's Motion for Order or Relief and remanding for a new sentencing hearing.

III. The combination of Ohio law, *Hurst v. Florida*, and the effect of this Court's original decision compelled this Court's ruling on May 4, 2016.

As this Court explained in *Belton*, one of the factors that makes Ohio's capital-sentencing scheme "unlike the laws at issue in *Ring* and *Hurst*" is Ohio Revised Code 2929.03(D)(2). *Belton*, 2016-Ohio-1581, at ¶ 59. *See also Hoffner*, 102 Ohio St. 3d at 368-69 (noting the distinctions between Arizona and Ohio: in Arizona, "the trial court was solely responsible for making all factual determinations regarding whether a defendant should be sentenced to death," but in Ohio, "R.C. 2929.03 charges the jury with determining, by proof beyond a reasonable doubt, the existence of any statutory aggravating circumstances and whether those aggravating

circumstances are sufficient to outweigh the defendant's mitigating evidence.") R.C. 2929.03(D)(2) instructs that, "if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence." R.C. 2929.03(D)(2). Thus, if a defendant had invoked his right to a jury trial but the judge then sentenced him to death without the required jury determination, that action would violate both the Ohio statute and *Hurst.*

In *Hurst*, the Supreme Court of the United States determined that Hurst's sentence violated the Sixth Amendment because a judge increased Hurst's authorized punishment based on her own factfinding. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). As the Court noted, "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole." *Id.* Similarly, in Ohio, without a unanimous jury verdict for a sentence of death, the maximum punishment a defendant can receive is a life sentence of some variety. R.C. 2929.03(D)(2). Once Kirkland no longer had a unanimous jury verdict for a sentence of death, a judge could not sentence him to death based on his own factfinding. The fact that it was four Justices as opposed to one judge does not render it permissible under the Sixth Amendment.

When the Court in this case issued its decision on the merits finding "substantially prejudicial" prosecutorial misconduct but then denied Kirkland relief in form of resentencing, it ran afoul of *Hurst* by failing to adhere to Ohio's sentencing scheme and by sentencing Kirkland to death. Kirkland was tried by a jury, but because of the prejudicial misconduct, the unanimous verdict for a death sentence was nullified. Once Kirkland no longer had a unanimous jury verdict for a sentence of death, a judge could not sentence him to death based on his own factfinding. The fact that it was four Justices as opposed to one judge does not render it

permissible under the Sixth Amendment. This Court originally attempted to cure that by conducting its own deliberations regarding whether the aggravating circumstances outweighed the mitigating factors. *State v. Kirkland*, 140 Ohio St. 3d 73, 98 (2014). But the void of a "unanimous jury verdict for a death sentence" cannot be filled by a judge's determination. R.C. 2929.03(D)(2); *see also Hurst*, 136 S. Ct. at 622.

The prosecutors stress that this Court decided Kirkland without the benefit of *Belton*, as if this Court were unaware of its own case law. This Court released *Belton* a mere two weeks before its decision in Kirkland's case. It is presumed that this Court knows what it wrote.

If the prosecutors' concern is that this Court was without the benefit of the prosecutors' legal analysis of *Belton*'s impact on Kirkland, then the analyses in the prosecutors' briefs demonstrate that is an unfounded concern. To the contrary, the State did nothing to describe how the two cases are somehow inconsistent. Moreover, in its extensive quotations from *Belton*, the State stopped short of the most important language—this Court's holding: "For these reasons, we hold that **when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt**, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial." *Belton*, 2016-Ohio-1581, at ¶ 61 (emphasis added). Kirkland did not waive his right to a jury trial. Thus, the Court's order is consistent with both *Belton* and *Hurst*.

IV. The State's retroactivity argument is inapplicable.

The State raised its retroactivity argument in its Response to Kirkland's Motion for Order or Relief. Again, reconsideration is not for making another attempt at convincing the Court with the arguments previously rejected.

Regardless, Kirkland's case was still pending in this Court until May 4, 2016. This Court did not deny his Application for Reopening until the day that it granted his Motion for Order or

Relief. *See* announcement at 2016-Ohio-2807. The State's arguments regarding retroactivity are inapposite.

V. Kirkland appropriately filed his motion under Rule 4.01 of the Supreme Court Rules of Practice.

The amicus curiae raised an argument about the propriety of Kirkland's Motion for Order or Relief under Rule 4.01. This is, yet again, an attempt to reargue the case at hand and is not a proper basis for reconsideration, as stated in Rule 18.02(B) of the Supreme Court Rules of Practice. It is also a baseless argument.

As an initial matter, Kirkland does not share the amicus curiae's doubts about this Court's ability to ascertain what is an "appropriate" motion. Memorandum of Amicus Curiae, p. 2. Nor does Kirkland doubt this Court's ability to see through a "de facto motion for reconsideration" filed under "general motion practice." *Id.* at 3. A simple review of this Court's rulings on other motions filed under Rule 4.01 provides more than enough evidence that the Court does not blindly accept and grant such motions and, in fact, strikes them when they are deemed inappropriate. *See, e.g.*, *State v. Jackson*, 136 Ohio St.3d 1403 (2013); *Johnson v. Athens Cnty. Court of Common Pleas*, 134 Ohio St.3d 1442 (2013); *State v. Kepler*, 145 Ohio St.3d 1415 (2016); *Bac Home Loans Servicing, L.P. v. Busby*, 136 Ohio St.3d 1488 (2013); *State v. Wilcox*, 141 Ohio St.3d 1486 (2015); *State v. Shalash*, 144 Ohio St.3d 1461 (2016); *State ex rel. T.L.M. v. Judges of First Appellate Dist. Court of Appeals*, 144 Ohio St.3d 1444 (2015); *State ex rel. Hunter v. Cunningham*, 143 Ohio St.3d 1482 (2015).

Additionally, S.Ct.Prac.R. 4.01 has been effective since June 1, 1994. In the almost twenty-two years since its inception, there has not been a landslide of appellants employing this Rule to keep their cases "perpetually open." Memorandum of Amicus Curiae, p. 3. Kirkland is not the first appellant to read the Supreme Court Rules of Practice, and the prosecutors need not

be concerned about this Court's Order "amount[ing] to an invitation to losing litigants" or "cast[ing] significant doubts on the finality of this Court's rulings." *Id.* The sky has not fallen with one motion granted.

Conclusion

Hurst is the Supreme Court of the United States' interpretation of the requirements under the Sixth Amendment—rights that apply to individuals, not to "statutory schemes." Motion to Reconsider, p. 3. The prosecutor's misconduct deprived Kirkland of the jury determination to which he is entitled. Kirkland invoked his right to a jury trial and but was denied his right to a fair penalty phase. The only constitutional remedy is a new, fair, mitigation hearing at which the jury can decide his fate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing **Memorandum in Opposition to State's Motion for Reconsideration** on counsel for the State of Ohio at the address listed below via ordinary U.S. Mail, postage prepaid, on this 19th day of May, 2016:

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