

[Cite as *State v. Mundt*, 2017-Ohio-7771.]

STATE OF OHIO, NOBLE COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 17 NO 0446
VS.	)	
	)	OPINION
FREDERICK MUNDT	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas, Noble County, Ohio  
Case No. 204-2002

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee

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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Carol Ann Robb

Dated: September 21, 2017

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DeGENARO, J.

{¶1} Defendant-Appellant, Frederick Mundt, appeals the trial court's judgment denying him leave to file a motion for a new mitigation trial. Mundt's arguments are meritless because the motion was untimely. Further, the Ohio Supreme Court rejected Mundt's argument in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319. Accordingly the trial court's judgment is affirmed.

{¶2} After a jury trial, Mundt was found guilty of four counts of aggravated murder and the attendant death specifications, two counts of rape, and one count of kidnapping. Before the penalty phase, the trial court merged the four aggravated-murder counts into one count of aggravated murder of a child under 13, and the four specifications into two: murder to escape detection, apprehension, trial, or punishment for another offense and murder committed during a kidnapping. The jury recommended a death sentence which the trial court imposed. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828 (*Mundt I*). In his direct appeal Mundt presented 11 propositions of law, all of which were found meritless by the Ohio Supreme Court. *Id.* ¶ 46. The Court independently reviewed Mundt's sentence concluding the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, and the death sentence was proportionate with others they reviewed. Mundt's convictions and death sentence were affirmed. *Id.*

{¶3} Mundt filed a post-conviction petition that was dismissed by the trial court; we affirmed concluding Mundt's eleven claims were barred by res judicata. *State v. Mundt*, 7th Dist. No. 13 NO 0406, 2016-Ohio-4802 (*Mundt II*). At issue in this appeal is Mundt's motion for leave to file a motion for new mitigation trial that the State opposed and the trial court denied.

{¶4} In his first of two assignments of error, Mundt asserts:

The trial court erred in denying Mundt's Motion for Leave to File a Motion for New Mitigation Trial without making any determination as to whether Mundt was unavoidably prevented to Crim.R. 33(B) from filing his Motion within 14 days after the verdict was rendered.

{¶5} We review a motion for leave to file a motion for new trial under an abuse of discretion standard of review. *State v. Pinkerman*, 88 Ohio App.3d 158, 160, 623 N.E.643 (4th Dist.1993). An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal. See *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013-Ohio-2951, ¶ 21.

{¶6} Mundt concedes that his motion was filed well outside the time requirements set forth in Crim.R.33. As such, he was required to obtain leave of court to file his motion for new trial. *State v. Lordi*, 149 Ohio App.3d 627, 2002–Ohio–5517, 778 N.E.2d 605, ¶ 25 (7th Dist.). Thus, the narrow issue before the trial court was whether Mundt "was unavoidably prevented in filing a timely motion for new trial." *State v. Dawson*, 7th Dist. No. 09 MA 209, 2011-Ohio-2773, ¶ 21.

{¶7} "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden*, 19 Ohio App.3d 141, 145–146, 483 N.E.2d 859 (10th Dist.1984).

{¶8} Mundt claims that he was unavoidably prevented from filing a motion because the basis for his motion, *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), was decided by the United States Supreme Court over 11 years after he was sentenced to death.

{¶9} First, Mundt was capable of raising the same argument prior to *Hurst* using other cases as support. The Ohio Supreme Court held in *State v. Roberts*, 150 Ohio St.3d 47, 2017-Ohio-2998, 78 N.E.3d 851:

\* \* \* Roberts argued that the sentencing procedure employed on remand violated *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), which held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a jury trial because it "[did] not require the jury to make the critical findings necessary to

impose the death penalty” but instead allowed the trial judge to increase the defendant’s “authorized punishment based on her own factfinding.” *Id.* at —, 136 S.Ct. at 622. We recognize that the United States Supreme Court decided *Hurst* after the submission of briefs in this case, but Roberts could have made essentially the same Sixth Amendment argument by relying on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

*Roberts*, ¶ 84.

{¶10} Prior to *Roberts*, the Ohio Supreme Court recognized Ohio's death penalty statute is fundamentally different from that in *Ring* and *Hurst*, undermining Mundt's reliance on *Hurst*.

In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. See R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, 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).

Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because “[t]hese

determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.” *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., *State v. Fry*, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303–305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to “a complex moral judgment” about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon*, 707 F.3d 475, 515–516 (4th Cir.2013) (citing cases from other federal appeals courts).

*State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶59-60.

{¶11} Mundt file his motion for leave over eight months after *Belton* and a year after *Hurst*. Contrary to the assertions in counsel's affidavit, this was not a reasonable time after *Hurst* was decided to evaluate it's import and seek relief pursuant to that holding. Additionally, contrary to Mundt's argument on appeal, the trial court was not required to issue findings of fact or conclusions of law when it denied Mundt's motion for leave. *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 26 (8th Dist.). Accordingly, Mundt's first assignment of error is meritless.

{¶12} In his second of two assignments of error, Mundt asserts:

The trial court erred when it denied Mundt's Motion for a New Mitigation Trial when Mundt proved that he was sentenced to death under a statutory scheme that violates the Sixth and Fourteenth Amendments to the United States Constitution. *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016).

{¶13} As we have determined Mundt's motion was untimely, this renders his second assignment of error moot; as such we decline to reach the merits. App.R. 12(A)(1)(c).

{¶14} As Mundt's motion for leave was untimely, his arguments are meritless

and the judgment of the trial court is affirmed.

Donorio, J., concurs.

Robb, P. J., concurs.