

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 15, 2017

[Cite as *03/15/2017 Case Announcements #2, 2017-Ohio-906.*]

MOTION AND PROCEDURAL RULINGS

1989-0846. State v. Lott.

Cuyahoga App. No. 54537. On motion for order or relief pursuant to S.Ct.Prac.R. 4.01. Motion denied.

O'NEILL, J., concurring.

{¶ 1} I concur in the court's decision to deny the motion of appellant, Gregory Lott, to vacate his death sentence and remand the matter to the trial court for a new sentencing hearing on the authority of *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). I write separately to explain my vote and to reconcile it with my position that the death penalty is a cruel and unusual penalty and thus unconstitutional under the Eighth Amendment to the United States Constitution, *State v. Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900 (O'Neill, J., dissenting).

{¶ 2} Nearly 30 years ago, Lott waived his right to a jury trial both in writing and by verbal agreement before the trial court. *Lott v. Bagley*, N.D. Ohio No. 1:04 CV 822, 2007 WL 2891272, *1 (Sept. 28, 2007). He was represented by counsel at the time and he did not challenge the validity of his waiver on appeal. *State v. Lott*, 51 Ohio St.3d 160, 162, 555 N.E.2d 293 (1990). In a petition for postconviction relief, Lott claimed that he was improperly induced to waive his right to a jury trial, but that issue was rejected because it was or could have been raised on direct appeal and thus was barred by res judicata. *State v. Lott*, 8th Dist. Cuyahoga

Nos. 66388, 66389, and 66390, 1994 WL 615012, *8 (Nov. 3, 1994). Lott was represented at trial, on direct appeal, and during postconviction proceedings by different attorneys. *Lott v. Bagley* at *2, fn. 2 and 3; *see generally State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982), syllabus (when a defendant represented by new counsel on appeal fails to raise a claim that trial counsel was incompetent, the issue is properly dismissed based on res judicata on a motion for postconviction relief). Any question regarding the validity of Lott’s jury waiver has been conclusively settled for decades.

{¶ 3} “Waiver is the intentional relinquishment or abandonment of a right * * *.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23. Lott consciously chose to be tried by a three-judge panel. Electing to be tried before such a panel is widely regarded as a reasonable trial strategy, particularly when the case is complex. *E.g., State v. Young*, 4th Dist. Scioto No. 07CA3195, 2008-Ohio-4752, ¶ 50-51.

{¶ 4} The ruling in *Hurst* invalidated Florida’s capital-sentencing scheme based on the right to a jury trial under the Sixth Amendment to the United States Constitution. *Hurst*, ___ U.S. ___, 136 S.Ct. at 621-622, 193 L.Ed.2d 504. In the future, this court may have to consider whether Ohio’s capital-sentencing scheme is constitutional after *Hurst*. However, it is unlikely that Lott’s case will provide the fact pattern that will clarify that issue. Simply stated, Lott waived the right upon which *Hurst* is based. Lott placed his future in the hands of a three-judge panel decades ago, and his motion relying upon *Hurst* presents inadequate grounds to support ordering a new capital-sentencing hearing before a jury.

{¶ 5} Based upon recent cases that have come before this court and before federal courts, I remain convinced that capital punishment is inherently cruel and unusual and is barbaric in the way that it has been carried out. *Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900 (O’Neill, J. dissenting); *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 92 (O’Neill, J. dissenting); *see also In re Ohio Execution Protocol Litigation*, S.D. Ohio No. 2:11-cv-1016, 2017 WL 378690 (Jan. 26, 2017). But because Lott has not asked for relief under the Eighth Amendment to the United States Constitution, and because the ruling today does not advance the date of Lott’s execution or affirm the validity of his death sentence, I respectfully join the court’s decision.

{¶ 6} For the foregoing reasons, I concur.

APPEALS NOT ACCEPTED FOR REVIEW

2016-0423. State v. Wogenstahl.

Hamilton App. No. C-140683, 2015-Ohio-5346.

Fischer and DeWine, JJ., not participating.

O'NEILL, J., concurring.

{¶ 1} I concur in the court's decision not to exercise jurisdiction over Jeffrey A. Wogenstahl's appeal from the court of appeals' judgment affirming the trial court's refusal to grant him a new trial. I write separately to explain why.

{¶ 2} Amici Curiae National Association of Criminal Defense Lawyers and The Innocence Network claim that Wogenstahl was one of several hundred individuals nationwide against whom a Federal Bureau of Investigation expert offered scientifically invalid microscopic-hair-comparison evidence. Wogenstahl claims that the Department of Justice reviewed the expert's testimony in his trial and declared in a letter that based upon a new understanding about what this methodology can actually prove, the expert testified "beyond the bounds of science."

{¶ 3} Based on this new evidence, Wogenstahl filed a motion for leave to file a motion for a new trial and a motion for a new trial. The trial court denied his motion for leave. On appeal, the court of appeals held that the trial court had erred in not granting him leave to file his motion for a new trial but that Wogenstahl had not been prejudiced by the denial of leave, because "the record does not disclose a strong probability that the newly discovered evidence would change the outcome if a new trial were granted." 2015-Ohio-5346 at ¶ 36. Wogenstahl now appeals that ruling to this court, asserting both that the court of appeals applied a higher standard than it should have in reviewing his motion and that the new evidence satisfies even the standard applied by the court of appeals.

{¶ 4} Wogenstahl's appeal was filed in this court in March 2016, and according to Wogenstahl, less than two months later, the Harrison Police Department released to him its full investigatory file on his case. Asserting that some of the information in the file calls into question his convictions and death sentence and that the prosecution had failed to provide the

information to his counsel at the time of trial, Wogenstahl asks this court to remand the matter to the trial court so that he can file a new motion for new trial that is based on both the new evidence from the Department of Justice and the newly discovered information in the police file. Although Wogenstahl filed an appendix to his motion to remand containing documents allegedly from the police file that he asserts support his motion for a new trial, I will not comment on those documents, which are not part of the record in his present appeal.

{¶ 5} These circumstances present a dilemma. Accepting the present appeal would be premature in the sense that we are limited to an incomplete picture of the evidence Wogenstahl has recently discovered. And whatever decision we might come to would be inconsequential if Wogenstahl were eventually granted a new trial based on the evidence in the investigatory file.

{¶ 6} Presuming that this court's decision not to exercise jurisdiction over this appeal will immediately end this litigation and allow Wogenstahl to start over with a new motion in the trial court, I respectfully concur.
