IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

GARY W. SUTTON v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-14433

No. E2017-01394-CCA-R28-PD

ORDER

On July 10, 2017, the petitioner, Gary W. Sutton, through counsel, filed an application for permission to appeal from the June 12, 2017 order of the Blount County Circuit Court denying his "Motion to Reopen Post-Conviction Proceedings." *See* Tenn. Code Ann. § 40-30-117(c); *see also* Tenn. S. Ct. R. 28, § 10(B). The State filed a response to the application on August 14, 2017.

The petitioner and a codefendant, James Henderson Dellinger, were convicted of the February 1992 first degree murder of Tommy Mayford Griffin. At sentencing, the jury found one aggravating circumstance: (1) "[t]he defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn. Code Ann. § 39-13-204(i)(2) (1995) (repealed). The jury further found that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt and imposed a sentence of death. The petitioner's conviction and sentence were affirmed on direct appeal. *State v. Dellinger*, 79 S.W.3d 458 (Tenn.), *cert. denied*, 123 S. Ct. 695 (2002). The petitioner unsuccessfully sought post-conviction relief, the denial of which was affirmed on appeal to this court. *Gary W. Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 WL 1472542 (Tenn. Crim. App., at Knoxville, May 30, 2006), *perm. app. denied* (Tenn. Oct. 2, 2006). The petitioner also unsuccessfully pursued a motion to reopen post-conviction proceedings alleging that the prior violent felony aggravating circumstance was unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). This court denied the petitioner's application for permission to appeal from the post-conviction court's denial of the motion to reopen. *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD (Tenn. Crim. App., at Knoxville, Jan. 23, 2017) (Order), *perm. app. denied* (Tenn. May 18, 2017).

On January 6, 2017, the petitioner filed in the trial court a motion to reopen post-conviction proceedings, claiming that the Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016), announced a new constitutional rule requiring retrospective application precluding the death penalty in his case. As *Hurst* relates to his case, the petitioner argued that the trial court made two factual findings relative to his death sentence, rendering it unconstitutional. First, the trial court determined that certain prior offenses qualified as prior violent felonies for the jury's consideration of the prior violent felony aggravating circumstance. Also, the petitioner contends that the trial court's exercising its authority as thirteenth juror to approve the jury's sentencing verdict amounts to unconstitutional fact-finding by the judge, rather than the jury. On January 30, 2017, the State filed a response to the motion, arguing that *Hurst* did not announce a new constitutional rule requiring retrospective application because it derives from the Supreme Court's decisions in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) and *Ring v. Arizona*, 122 S. Ct. 2428 (2002). Furthermore, the State argued that Tennessee's death penalty sentencing scheme did not violate *Apprendi* and its progeny; therefore, even if retrospective application were required, *Hurst* would avail the petitioner no relief. The post-conviction court denied the motion to reopen without a hearing, ruling that *Hurst* did not announce a new constitutional rule requiring retrospective application.

The Post-Conviction Procedure Act of 1995 provides that a motion to reopen a prior post-conviction proceeding may raise a claim "based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). "The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]" *Id.* "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122.

This court must first determine whether, as the petitioner contends, *Hurst* "established a constitutional right that was not recognized at the time of trial" and whether "retrospective application of that right is required." Tenn. Code Ann. § 40-30-117(a)(1). In *Hurst*, the Supreme Court held unconstitutional Florida's capital sentencing scheme ruling that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S.Ct. at 619. In reaching this decision, the *Hurst* Court applied the Court's holding in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 120 S. Ct. at 2362-63. Just as the Court had applied *Apprendi* to overturn Arizona's capital sentencing scheme in *Ring*, the *Hurst* Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies

equally to Florida's [because l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Hurst*, 136 S. Ct. at 621-22. The application of *Apprendi* and *Ring* to Florida's capital sentencing scheme should have come as no surprise. *Ring*, 122 U.S. at 608 n.6 (noting that of the thirty-eight capital punishment states, twenty-nine states "commit sentencing decisions to juries," while five "commit both capital sentencing fact-finding and the ultimate sentencing decision entirely to judges" and four permit a hybrid determination, as Florida, with a jury recommendation to the trial judge who makes the ultimate decision). As the *Hurst* Court observed

> Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."

Id. (quoting *Walton v. Arizona*, 110 S. Ct. 3047, 3054 (1990)).

Hurst is clearly derivative of *Apprendi* and *Ring*. As noted in *Hurst*, "[i]n the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), sentencing guildelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. -- , 132 S. Ct. 2344, 183 L. Ed.2d 318 (2012), mandatory minimums, *Alleyne [v. United States]*, 570 U.S. --, 133 S. Ct. [2151], 2166, 147 L. Ed.2d 314 (2013) and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed.2d 556, capital punishment." *Id*. That said, the Supreme Court has held that the decision in *Ring* "announced a new procedural rule that does not apply retroactively to cases already final under direct review." *Schriro v. Summerlin*, 124 S. Ct. 2519, 2526 (2012). Therefore, it follows that *Hurst* did not announce a new constitutional rule requiring retrospective application to permit reopening of the post-conviction petition in this petitioner's case.

We also observe that an application of *Hurst* to the petitioner's case would not result in relief. First, the Supreme Court excluded its holding in *Ring* from the twenty-nine states, one of which is Tennessee, whose capital sentencing schemes "commit sentencing decisions to juries." *Ring*, 122 U.S. at 608 n.6.[1] Also, the Tennessee Supreme

[1] We also note that the petitioner previously and unsuccessfully raised an *Apprendi* issue on direct appeal concerning the application of the prior violent felony aggravating circumstance. *See Dellinger*, 79 S.W.3d at 466-67.

Court has specifically held that the legal determination of a trial judge concerning qualifying prior violent felonies for the (i)(2) aggravating circumstance "does not transgress the dictates of *Apprendi* and its progeny." *State v. Cole*, 155 S.W.3d 885, 902 (Tenn.), *cert denied*, 126 S. Ct. 47 (2005). We also find unpersuasive the petitioner's argument that the trial court's exercising its duty as thirteenth juror results in unconstitutional judicial fact-finding because the trial judge's assessment as thirteenth juror is a legal determination concerning the weight of the evidence, not a factual determination. *See*, *generally*, *State v. Dankworth*, 919 S.W.2d 52 (Tenn. Crim. App. 1995).

Because the Supreme Court's decision in *Hurst v. Florida* did not announce a new constitutional rule requiring retrospective application, we conclude that the post-conviction court properly denied the appellant's motion to reopen post-conviction proceedings. The petitioner's application for permission to appeal from the order of the Circuit Court for Blount County dismissing the petitioner's "Motion to Reopen Post-Conviction Proceedings" is hereby DENIED. It appearing that the petitioner is indigent, the costs of this proceeding are taxed to the State of Tennessee.

PER CURIAM
(Montgomery, Witt, Easter, JJ.)