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Appendix A

Florida Supreme Court Opinion affirming the state circuit court denial of postconviction relief. *Overton v. State,* 236 So. 3d 238 (Fla. 2018).

Appendix B

Circuit Court Order Summarily Denying Successive Motion for Postconviction Relief. *Overton v. State*, Case No. 96-CF-30167 (Order dated May 31, 2017).

APPENDIX A

236 So.3d 238
Supreme Court of Florida.

Thomas M. OVERTON, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1435
|
[February 2, 2018]

Synopsis

Background: After affirmance of defendant's murder conviction and death sentence, 801 So.2d 877, defendant filed a motion for collateral relief. The Circuit Court, Monroe County, No. 441996CF030167000APK, Mark H. Jones, C.J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that *Hurst v. State*, 202 So.3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence.

Affirmed.

Pariente, J., filed an opinion concurring in result.

Lewis and Canady, JJ., concurred in result.

West Headnotes (1)

[1] **Courts** ⇐ In general;retroactive or prospective operation

Florida Supreme Court decision in *Hurst v. State*, 202 So.3d 40, in which Court held that a jury to was required to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence; defendant was sentenced to death on two murder counts following a jury's recommendation for death by a vote of nine to three on one count and a vote of eight to four on another count, and his sentence became final approximately 14 years before *Hurst* was issued.

Cases that cite this headnote

An Appeal from the Circuit Court in and for Monroe County, Mark H. Jones, Chief Judge—Case No. 441996CF030167000APK

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Opinion

PER CURIAM.

***239** We have for review Thomas M. Overton's appeal of the circuit court's order denying Overton's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. See art. V, § 3(b)(1), Fla. Const.

Overton's motion sought relief pursuant to the United States Supreme Court's decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and our decision on remand in Hurst v. State (Hurst), 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). This Court stayed Overton's appeal pending the disposition of Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided Hitchcock, Overton responded to this Court's order to show cause arguing why Hitchcock should not be dispositive in this case.

After reviewing Overton's response to the order to show cause, as well as the State's arguments in reply, we conclude that Overton is not entitled to relief. After a jury convicted Overton of two counts of first degree murder, he was sentenced to death on both counts following a jury's recommendation for death by a vote of nine to three on one count and a vote of eight to four on another count. Overton v. State, 801 So.2d 877, 888–89 (Fla. 2001). Overton's sentences of death became final in 2002. Overton v. Florida, 535 U.S. 1062, 122 S.Ct. 1929, 152 L.Ed.2d 835 (2002). Thus, Hurst does not apply retroactively to Overton's sentences of death. See Hitchcock, 226 So.3d at 217. Accordingly, we affirm the denial of Overton's motion.

The Court having carefully considered all arguments raised by Overton, we caution that any rehearing motion containing reargument will be stricken. It is so ordered.

LABARGA, C.J., and QUINCE, POLSTON, and LAWSON, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

LEWIS and CANADY, JJ., concur in result.

PARIENTE, J., concurring in result.
I concur in result because I recognize that this Court's opinion in Hitchcock v. State, 226 So.3d 216 (Fla. 2017), cert. denied, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017), is now final. However, I continue to adhere to the views expressed in my dissenting opinion in Hitchcock.

All Citations

236 So.3d 238, 44 Fla. L. Weekly S78

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APPENDIX B

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs. Case Number 96-CF-30167-A-P

THOMAS MITCHELL OVERTON,
Defendant.
_____________________________/

ORDER DENYING SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

THIS CAUSE came before the court on Defendant's Successive Motion to Vacate Death Sentence filed through counsel on January 11, 2017, under Florida Rule of Criminal Procedure 3.851. The court, having considered the motion, the State's response, pertinent legal authority, and being otherwise fully advised in the premises finds and orders as follows:

The Defendant, Thomas Mitchell Overton, was convicted of first degree murder of Michael MacIvor, first degree murder of Susan Michelle MacIvor, burglary of a dwelling, killing of an unborn child (Susan MacIvor was eight months pregnant), and sexual battery involving serious bodily injury. *Overton v. State*, 801 So. 2d 877, 888 (Fla. 2001). The jury recommended death by a vote of nine to three in regards to Susan MacIvor, and eight to four in regards to Michael MacIvor. *Id.* The trial court sentenced the Defendant to death on February 22, 1999, which was affirmed by the Florida Supreme Court. *Id.* at 881. The Defendant filed a Petition for Writ of Certiorari in the United States Supreme Court which was denied on May 13, 2002, rendering his case final. *Overton v. Florida*, 535 U.S. 1062 (2002).

This is the Defendant's third successive motion for post-conviction relief. This motion was filed well beyond the one-year time limitation after the Defendant's judgment and sentence

became final. *See* Fla. R. Crim. P. 3.851(d)(1). Therefore, the Defendant's motion is untimely and subject to summary denial unless a fundamental constitutional right has been established, and the constitutional right has been held to apply retroactively. *See* Fla. R. Crim. P. 3.851 (d)(2)(B).

The Defendant seeks to set aside his death sentence and receive a new penalty phase, or, in the alternative, a life sentence pursuant to the United States Supreme Court's opinion in *Hurst v. Florida*, and the Florida Supreme Court's opinion in *Hurst v. State*. In *Hurst v. Florida*, 136 S.Ct. 616 (2016), the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of *Ring v. Arizona*, 536 U.S. 584 (2002). On remand, the Florida Supreme Court held that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. *Hurst* v. *State*, 202 So. 3d 40, 44 (Fla. 2016). The Defendant's motion is timely as it was filed within one year of these legal developments.

With regards to retroactive application of these rights, the Florida Supreme Court has held that *Hurst v. Florida* cannot be applied to any case in which the death sentence was final when *Ring* was decided. *Asay v. State,* 210 So. 3d 1, 39 (Fla. 2016). The Defendant's sentence became final on May 13, 2002, and the *Ring* opinion was issued on June 24, 2002. Because the Defendant's sentence became final before the United States Supreme Court issued its opinion in *Ring*, he is not entitled to relief.

The Defendant concedes that he is not entitled to relief under *Asay*, but argues that the court should extend the *Hurst* decisions to apply to this case under the doctrine of fundamental fairness. He argues that any legal line drawn to exclude him from a remedy would be arbitrary and capricious. The Defendant is asking this court to find the Florida Supreme Court erred in

setting June 24, 2002 as the bright-line date for retroactivity, but this court is bound by precedent. The Defendant also argues that he is entitled to retroactive application of both *Hurst* decisions under the *Witt* test which is used to apply holdings favorable to criminal defendants retroactively if certain factors are met. *Witt v. State*, 387 So. 2d 922 (Fla. 1980). However, in *Asay*, the Florida Supreme Court applied the *Witt* test for retroactivity and determined that *Hurst* should not be applied to cases that became final before *Ring*. 210 So. 3d at 39.

The Florida Supreme Court has rejected arguments calling for *Hurst* to be retroactively applied to all cases. The court is bound by this precedent, and since this case became final before the issuance of *Ring*, the Defendant's request for an evidentiary hearing and further relief is summarily denied. Since *Hurst* is not applicable to this case, it is unnecessary for the court to address the issue of harmless error or Defendant's other claims.

Wherefore, it is hereby **ORDERED AND ADJUDGED:**

1. That the Defendant's Successive Motion to Vacate Death Sentence is **DENIED**.
2. The Defendant has the **RIGHT TO APPEAL** this order within 30 days after it is rendered. The failure to file an appeal within that 30-day period will act as a waiver of the right to appeal. The Clerk of this Court is directed promptly to forward a copy of this order to the parties listed at the end of this order. Further, the Clerk shall docket the actual mailing date so that the date of mailing will be readily and accurately ascertainable in the event of any future inquiry.

DONE AND ORDERED this 31st day of May, 2017, in Key West, Monroe County, Florida.

Mark H. Jones
Chief Circuit Court Judge

Copies furnished to:

Leslie Campbell, Assistant Attorney General
Mark Wilson, Assistant State Attorney
Marie-Louise Samuels Parmer, Assistant CCRC-South
Scott Gavin, Assistant CCRC-South