DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MICHAEL A. TANZI,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

2018 WL 1630749
Only the Westlaw citation
is currently available.

Supreme Court of Florida.

Michael Anthony TANZI, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1640
|
[April 5, 2018]

Synopsis

Background: Defendant moved to vacate murder conviction and death sentence, after defendant's convictions and sentence were affirmed on appeal, 964 So.2d 106, and after the denial of his initial postconviction motion and habeas petition were affirmed on appeal, 94 So.3d 482. The Circuit Court, Monroe County, No. 442000CF000573000AKW, Luis M. Garcia, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court held that error in having judge rather than jury make necessary findings to impose death sentence was harmless.

Affirmed.

Canady and Polston, JJ., concurred in result.

Quince, J., filed dissenting opinion.

An Appeal from the Circuit Court in and for Monroe County, Luis M. Garcia, Judge—Case No. 442000CF000573000AKW

Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, Scott Gavin, Staff Attorney, and Paul Kalil, Assistant Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Scott A. Browne, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

***1** Michael A. Tanzi appeals an order denying a motion to vacate judgments of conviction, including one of first-degree murder, and a sentence of death under Florida Rule of Criminal Procedure 3.851. [1]

The underlying facts of this case were described in this Court's opinion on direct appeal. *Tanzi v. State*, 964 So.2d 106, 110–12 (Fla. 2007). Tanzi pled guilty to the first-degree murder of Janet Acosta. *Id.* at 111. He carjacked, kidnapped, beat, sexually battered, robbed, and strangled Ms. Acosta. *Id.* at 110–11. Following a unanimous jury recommendation for death,

the trial court sentenced Tanzi to death for Ms. Acosta's murder. *Id.* at 111. The trial court found seven aggravating factors [2] and ten mitigating circumstances. [3] We affirmed Tanzi's convictions and sentence of death. *Id.* at 121. We also affirmed the denial of Tanzi's initial postconviction motion and denied relief on his habeas petition. *Tanzi v. State*, 94 So.3d 482, 497 (Fla. 2012).

In this successive postconviction motion, Tanzi argues that he is entitled to relief pursuant to *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). We agree with Tanzi that *Hurst* is applicable in his case. *See Mosley v. State*, 209 So.3d 1248 (Fla. 2016). However, because we find that the *Hurst* error in this case is harmless beyond a reasonable doubt, we affirm the denial of postconviction relief. As we stated in *Davis v. State*, 207 So.3d 142, 175 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2218, 198 L.Ed.2d 663 (2017):

> ***2** [T]he jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations. .... The unanimous recommendations here are precisely what we determined in *Hurst* to be constitutionally necessary to impose a sentence of death.

We reject Tanzi's assertion that the *Hurst* error was not harmless because the jury was not given a mercy instruction. *See Knight v. State*, 225 So.3d 661, 683 (Fla. 2017), *cert. denied*, No. 17–7099, —— U.S. ——, ——S.Ct. ——, —— L.Ed.3d ——, 2018 WL 1369193 (U.S. Mar. 19, 2018).

Additionally, we reject Tanzi's *Hurst*-induced *Caldwell* [4] claim. *See Reynolds v. State*, No. SC17–793, slip op. at 26–36 (Fla. Apr. 5, 2018).

Accordingly, the *Hurst* violation in this case is harmless beyond a reasonable doubt and, as in *Davis*, does not entitle Tanzi to relief. Thus, we affirm the denial of postconviction relief. [5]

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and LAWSON, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

QUINCE, J., dissents with an opinion.

QUINCE, J., dissenting.

I cannot agree with the majority's finding that the *Hurst* error was harmless beyond a reasonable doubt. As I have stated previously, "[b]ecause *Hurst* requires 'a jury, not a judge, to find each fact necessary to impose a sentence of death,' the error cannot be harmless where such a factual

determination was not made." *Hall v. State*, 212 So.3d 1001, 1036–37 (Fla. 2017) (Quince, J., concurring in part and dissenting in part) (citation omitted) (quoting *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016)); *see also Truehill v. State*, 211 So.3d 930, 961 (Fla.) (Quince, J., concurring in part and dissenting in part), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (2017). The jury did not make the specific factual findings that *Hurst* requires a jury to find in order to impose some of the most serious aggravators at issue in this case. Therefore, I dissent.

All Citations

--- So.3d ----, 2018 WL 1630749, 43 Fla. L. Weekly S173

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

2 The trial court found the following aggravating factors: (1) that the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation; (2) that the murder was committed during the commission of a kidnapping; (3) that the murder was committed during the commission of two sexual batteries; (4) that the crime was committed for the purpose of avoiding arrest; (5) that the murder was committed for pecuniary gain; (6) that the murder was especially heinous, atrocious, or cruel (HAC); and (7) that the murder was committed in a cold, calculated, and premeditated (CCP) manner. *Tanzi*, 964 So.2d at 111 n.1. "The court gave each aggravator 'great weight' except the HAC aggravator, which the court gave 'utmost weight.' " *Id.*

3 The court found the following mitigating circumstances: (1) that Tanzi suffered from "axis two" personality disorders; (2) that he was institutionalized as a youth; (3) that his behavior benefited from psychotropic drugs; (4) that he lost his father at an early age; (5) that he was sexually abused as a child; (6) that he twice attempted to join the military; (7) that he cooperated with law enforcement; (8) that he assisted inmates by writing letters and that he enjoys reading; (9) that his family has a loving relationship for him; and (10) that he had a history of substance abuse. *Tanzi*, 964 So.2d at 111 n.1.

4 *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

5 We also reject Tanzi's claim that the change in law following *Hurst* and *Perry v. State*, 210 So.3d 630 (Fla. 2016), entitles him to have his previously denied postconviction claims revisited.

APPENDIX B

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA
LOWER KEYS, CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 2000-CF-00573-A-K

MICHAEL A. TANZI,

Defendant.
_____/

ORDER DENYING SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

THIS CAUSE came before the Court on Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentence" filed through counsel on January 12, 2017, under Florida Rule of Criminal Procedure 3.851. The State filed a response to Defendant's motion on March 3, 2017. As required by rule 3.851(f)(5)(B), this Court held a case management conference on March 31, 2017, at 1:30 p.m. to determine whether an evidentiary hearing should be held and hear argument on any purely legal claims.

On May 16, 2000, Michael Tanzi was charged by indictment with the first-degree murder of Janet Acosta. (R1/13-14). He was also charged by amended information with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery and two counts of sexual battery with a deadly weapon.

(R7/1235-37). On January 31, 2003, Tanzi announced that he wanted to plead guilty to first-degree murder, carjacking, kidnapping and armed robbery. (R11/1886). Tanzi submitted a written guilty plea, which indicated that the plea had not been induced by any promises. (R7/1242-44; R11/1886-87).

After considering this evidence and the parties' arguments, the jury returned a unanimous recommendation of death. (R8/1430; R26/1821-22). Following a Spencer hearing, the court followed the jury's recommendation and sentenced Tanzi to death.[1] (R10/1804-32; R12/2197-2213). In doing so, the court found that the State had proven seven aggravating factors: under a sentence of imprisonment--great weight; during the course of a kidnapping--great weight; during the course of sexual batteries--great weight[2]; avoid arrest--great weight; pecuniary gain--great weight; heinous, atrocious or cruel (HAC)--utmost weight; and cold, calculated and premeditated (CCP)--great weight. (R10/1805-17).

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[1] The trial court also sentenced Tanzi to consecutive life sentences for the carjacking, kidnapping and robbery. (R10/1831). (R10/1803).

[2] The course of a felony was counted as two aggravating circumstances because it was based on two separate felonies. That aggravator remains valid; it was error, however, to count it as two separate aggravating circumstances. See Tanzi v. State, 964 So. 2d 106, 117 (Fla. 2007).

In mitigation, the court found Tanzi's personality disorders--some small weight; his history of substance abuse--some weight; his institutionalization in his youth--some weight; his positive response to treatment with psychotropic medication--some weight; the loss of his father--some weight; sexual abuse as a child--some weight; his attempts to join the military--some weight; his cooperation with the police after his arrest--some weight; his assistance to other inmates and love of reading--some weight; and his family's loving relationship with him--some weight. (R10/1817-30). The court also considered and rejected as mitigation the assertion that Tanzi was under the influence of an extreme mental or emotional disturbance at the time of the crime, the assertion that Tanzi's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R10/1817-30).

The Florida Supreme Court affirmed Tanzi's conviction and sentence of death. Tanzi v. State, 964 So. 2d 106 (Fla. 2007), cert. denied, 552 U.S. 1195 (2008). Tanzi thereafter sought postconviction relief in this Court, and after conducting an evidentiary hearing on his motion, this Court issued an order denying postconviction relief. The Florida Supreme Court

affirmed the denial of postconviction relief on April 19, 2012. Tanzi v. State, 94 So. 3d 482 (Fla. 2012).

On January 12, 2017, Tanzi filed the instant successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. Tanzi raised two related claims in his motion based on Hurst v. Florida, 136 S. Ct. 616 (2016):

> CLAIM 1: MR. TANZI'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF HURST V. FLORIDA AND HURST V. STATE.
>
> CLAIM 2: HURST V. STATE, PERRY V. STATE, AND THE RECENT ENACTMENT OF A REVISED SENTENCING STATUTE REQUIRE THIS COURT TO REVISIT MR. TANZI'S PREVIOUSLY PRESENTED BRADY AND STRICKLAND CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM UNDERMINES CONFIDENCE IN THE OUTCOME OF THE PENALTY PHASE IN LIGHT OF NEW LAW. WHEN THE PROPER ANALYSIS IS CONDUCTED, THERE IS A REASONABLE LIKELIHOOD OF A DIFFERENT OUTCOME. RULE 3.851 RELIEF IS REQUIRED.

The State argued in its response that, although Hurst v. Florida, applies retroactively to Tanzi's case, see Mosley v. State, 209 So. 3d 1248 (Fla. 2016), any Hurst error was harmless beyond a reasonable doubt.

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), and remanded the case to the Florida Supreme Court to

determine whether the error was harmless. On remand, the Florida Supreme Court held that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." Hurst v. State, 202 So. 3d 40, 53 (Fla. 2016). The court recognized, however, that Hurst error is capable of harmless error review. Id. at 67. In order to be harmless, the State must establish that there is no reasonable possibility that the Hurst error contributed to Tanzi's death sentence. Id. at 68; see also Davis v. State, 207 So. 3d 142, 173-75 (Fla. 2016) and King v. State, ___ So. 3d ____, 2017 WL 372081 (Fla. Jan. 26, 2017), reh'g denied, SC14-1949, 2017 WL 961818 (Fla. Mar. 13, 2017).

This Court finds that the Hurst error was harmless beyond a reasonable doubt in this case. First, there is no doubt that any rational jury would have found all of the aggravators utilized by the trial court in sentencing Tanzi this case. Several of the aggravators were based directly on Tanzi's guilty plea. The aggravating factors of in the course of a kidnapping and pecuniary gain were directly based upon Tanzi's guilty plea to first degree murder, carjacking, kidnapping and armed robbery.

(R11/1886). Therefore, these aggravators are established and uncontestable. Further, Tanzi was on felony probation at the time he committed the murder and therefore unquestionably qualified for the under sentence of imprisonment or probation aggravator.[3] The remaining aggravators are uncontrovertable under the facts of this case, which included Tanzi's detailed confession.

The course of a felony aggravator was supported by both kidnapping and two sexual batteries. The sexual batteries were established by Tanzi's confession to forcing the victim to perform oral sex on him, and DNA from semen found in the van matched to Tanzi along with DNA of Tanzi found on the inside pocket of the victim's jeans. (R10/1808-09). The medical examiner testified that a laceration to the lower part of the victim's labia as well as bruising to the tissue under the skin surrounding the victim's vagina were sustained while the victim was alive and were consistent with a sexual battery. (T. 879-82). That the murder occurred during the course of a sexual

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[3] As the trial court noted in the sentencing order, "On February 1, 1999, the Defendant, who was represented by counsel, entered a plea of guilty to the felony offense of breaking and entering in the nighttime with intent to commit a felony. He was sentenced to an 18-month term of imprisonment to be followed by two years of probation. Six months of the incarcerative portion of his sentence were suspended." (R10/1806).

battery is simply uncontestable based upon the physical evidence and Tanzi's confession.

The avoiding arrest aggravator was based upon Tanzi's detailed confession in which he acknowledged, among other things, that he would be caught if he let her go and that he could not leave any "witnesses." See R10/1810-11.

The heinous, atrocious and cruel aggravator was based upon powerful and uncontroverted evidence. Under any view of the facts, Janet Acosta's murder was heinous, atrocious and cruel. The medical examiner testified that the victim suffered multiple blows to her face and head which caused swelling of the brain. The victim was bound and gagged, sexually violated, and threatened by Tanzi to cut her ear from ear if she failed to cooperate. Ultimately, Tanzi strangled the victim to death over the course of more than twenty minutes. These circumstances led the court to conclude in its sentencing order, "it is obvious that in the moments before her death, the victim must have suffered great terror as well as pain." See R10/1812-14. Under any conceivable view of the facts, the murder of Janet Acosta was heinous, atrocious, and cruel.

Finally, as to the cold, calculated and premeditated aggravator, the court reviewed the overwhelming evidence supporting this aggravator in the sentencing order:

Ms. Acosta's murder was the product of cool and calm reflection and was not prompted by emotional frenzy, rage or uncontrollable impulse.

Photographs of the abduction site showed the victim's quiet place. The area was adjacent to the Japanese Gardens Park located just off the MacArthur Causeway. The Defendant could have just taken the victim's van and fled. By the time the victim could have gotten help, the Defendant and the vehicle would have been long gone. Therefore, the decision to kidnap the victim as well as steal her van showed a deliberate act prompted by the Defendant's desire to possess more than the van. The motive for kidnapping the victim became apparent very soon thereafter.

Rather than expelling his [sic] bound the victim along the way, 40 miles later in Florida City, the Defendant forced the victim to perform oral sex on him. He told her that he needed a sexual favor and she was the only person there; she was the perfect person. Significantly, he also said, "No one is going to find out." Obviously, this statement showed very early in the crime that the Defendant had already decided to kill the victim.

The Defendant's full intentions were made manifest after he drove an additional 30 miles to Tavernier. In an Ace Hardware store there, he purchased a package of razor blades and a roll of duct tape. The purchases were for the sole purpose of facilitating the murder of the victim.

The razor blades were needed to cut the ropes from the victim's body rather than taking the time to untie her. The Defendant could then dispose of the body more quickly. The duct tape was not needed to restrain the victim since she was already effectively restrained by the ropes and tied to the back seat. In fact, the Defendant was able to leave the van three times without being concerned about her. He got out to use the ATM and make the purchases in Tavernier and to use the ATM in Marathon. The sole purpose of the duct tape was to muffle the victim's screams.

The Defendant drove south another 50 miles to carry out his true intentions. He turned off U.S. Highway 1 onto Crane Boulevard on Sugarloaf Key and looked for a remote thickly wooded area. When he did not find a site that provided enough cover, he returned to U.S. 1 and drove back to the north a few miles to Blimp Road on Cudjoe Key. The Defendant drove west 1.9 miles until he came to a secluded boat ramp. There he found a place where the mangroves grew thickly enough to enable him to carry out the murder of the victim without being seen or heard.

The Defendant told police officers that he had been curious about Blimp Road and what it looked like down the road. In the past, he had seen a blimp there. Now, on his way to kill the victim, the Defendant was wondering about the appearance of things further out on Blimp Road. Clearly, the Defendant was unconcerned about the life of another human being that he was about to end.

The cold and calculated nature of the murder is shown by the Defendant's purchase in Tavernier of the specific tools needed to carry out his already formed intention. And it is further demonstrated by the Defendant's time-consuming search for the right place to put his plan into action. He rejected Sugarloaf Key because he could not find a place that provided enough cover and was distant enough from residential areas and people who might interfere with his plans. And obviously, it is made clear by the act itself. The Defendant had to continue to strangle the victim for 25 minutes before she quit shaking.

From the Japanese Gardens Park up to and including the doing of the murder itself, the Defendant had a great deal of time to reflect upon the act he was contemplating. He could have changed his course of conduct at any time, yet he continued until Janet Acosta was dead.

(R10/1814-17).

Again, under any conceivable view of the facts in this case, the CCP aggravator was proven beyond and to the exclusion of any reasonable doubt.

Tanzi notably failed to challenge any of the facts upon which these aggravators were based either in his successive motion for postconviction relief, or in argument before this Court during the case management hearing. See King, 2017 WL 372081 (affirming as harmless any Hurst error where "the evidence of the HAC, CCP, and avoid arrest aggravating circumstances-which King did not contest on direct appeal-was overwhelming and essentially uncontroverted."). Notably, Tanzi also did not challenge the sufficiency of the evidence supporting these aggravators on direct appeal.[4]

Had the jury been instructed, this Court is convinced the jury would have found each of the aggravating factors relied upon by the court to impose a death sentence in this case. In addition, the jury was repeatedly told by the trial court to weigh the aggravators proven against the mitigation presented before making its recommendation. See T. 1811 ("Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances."; (T. 1813) ("You

[4] Tanzi did challenge the trial court's assessment of the course of a felony aggravator twice in the sentencing order.

should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations."). The jury's unanimous recommendation leaves no doubt that it viewed the aggravation as outweighing the mitigation presented.

The Court notes that the Florida Supreme Court has repeatedly found Hurst errors harmless in cases like this one with unanimous jury recommendations. See e.g. Truehill v. State, ___ So. 3d ____, 2017 WL 727167, at *19 (Fla. Feb. 23, 2017); King v. State, 2017 WL 372081, at *19 (Fla. Jan. 26, 2017); Knight v. State, ___ So. 3d ____, 2017 WL 411329 (Fla. Jan. 31, 2017); Kaczmar v. State, ___ So. 3d ____, 2017 WL 410214 (Fla. Jan. 31, 2017); Hall v. State, ___ so. 3d ____, 2017 WL 526509, at *23 (Fla. Feb. 9, 2017). The jury's unanimous recommendation is "precisely what [the Florida Supreme Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis, 207 So. 3d at 175. Thus, given the jury's recommendation and the powerful evidence establishing the aggravators, the Court finds the Hurst error is harmless beyond a reasonable doubt in this case.[5]

[5] The Hurst error does not resurrect Tanzi's previously denied Brady or Strickland claims. Hurst represents a trial error that should be viewed and balanced against the evidence presented in the penalty phase.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence is hereby **DENIED.**

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED to promptly serve a copy of this order, along with a certificate of service, upon the parties listed at the end of this order as required by Florida Rule of Criminal Procedure 3.851(f)(5)(F).

DEFENDANT IS HEREBY NOTIFIED that he has 30 days from the date of this order in which to file an appeal, should he choose to do so.

DONE AND ORDERED in Tavernier, Monroe County, Florida, this 24th day of April, 2017. A true and correct copy of this order has been furnished to the parties listed below.

LUIS M. GARCIA
Circuit Judge

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