259 So.3d 716
Supreme Court of Florida.

Anthony MUNGIN, Appellant,
v.
STATE of Florida, Appellee.

No. SC17-815
|
November 15, 2018

Synopsis

Background: Following affirmance of conviction of first-degree murder and sentence of death, 689 So.2d 1026, petitioner sought postconviction relief. The Circuit Court, Duval County, No. 161992C003178AXXXMA, Linda McCallum, J., denied motion. Petitioner appealed.

The Supreme Court held that decision in *Hurst v. State*, in which Court ruled that jury must unanimously find aggravating factors in support of sentence of death and must unanimously recommend sentence of death, did not apply retroactively.

Affirmed.

Canady, C.J., concurred in result.

Pariente, J., concurred in result and filed opinion.

An Appeal from the Circuit Court in and for Duval County, Linda McCallum, Judge - Case No. 161992CF003178AXXXMA

Attorneys and Law Firms

Todd G. Scher of Law Office of Todd G. Scher, P.L., Hollywood, Florida, for Appellant

Pamela Jo Bondi, Attorney General, and Lisa Hopkins, Assistant Attorney General, Tallahassee, Florida, for Appellee

Opinion

PER CURIAM.

We have for review **Anthony Mungin's** appeal of the postconviction court's order denying Mungin's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm the postconviction court's order.

FACTS AND BACKGROUND

Mungin was convicted of first-degree murder and sentenced to death following a jury's recommendation for death by a vote of seven to five. *Mungin v. State*, 689 So.2d 1026, 1028 (Fla. 1995). This Court explained the facts underlying his conviction and sentence on direct appeal, stating in part:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The ***717** customer, who found the injured clerk, later identified the man as Mungin.

Id. This Court affirmed Mungin's conviction and sentence of death on direct appeal. *Id.* His sentence of death became final in 1997. *Mungin v. Florida*, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997). In the more than twenty years since, Mungin has engaged in extensive postconviction litigation but has not received any relief from his conviction or death sentence. *See Mungin v. State*, 141 So.3d 138, 140 (Fla. 2013); *Mungin v. State*, 79 So.3d 726 (Fla. 2011); *Mungin v. State*, 932 So.2d 986, 990 (Fla. 2006).

In January 2017, Mungin filed the successive motion for postconviction relief at issue in this case seeking 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). The postconviction court summarily denied Mungin's motion.

This Court stayed Mungin's appeal pending the disposition of *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017). After this Court decided *Hitchcock*, Mungin responded to this Court's order to show cause arguing why it should not be dispositive in this case. After reviewing Mungin's response to the order to show cause, as well as the State's arguments in reply, we ordered full briefing on Mungin's non-*Hurst* claim.

ANALYSIS

As stated above, Mungin's sentence of death became final in 1997. Based on this Court's precedent, *Hurst* does not apply retroactively to his sentence of death. *Id.* at 217; *see Asay v. State* (*Asay V*), 210 So. 3d 1 (Fla. 2016), *cert. denied*, —— U.S. ——, 138 S.Ct. 41, 198 L.Ed.2d 769 (2017). Thus, Mungin is not entitled to the relief he claims, which depends upon the retroactive application of *Hurst* to his sentence of death.

CONCLUSION

For the reasons explained above, we affirm the postconviction court's order denying Mungin's claims seeking *Hurst* relief. [1]

1 We do not address Mungin's motion to disqualify the judge who issued that order because it was untimely.

It is so ordered.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION.

LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

CANADY, C.J., concurs in result.

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

PARIENTE, J., concurring in result.

I write separately because I continue to adhere to the views expressed in my dissenting opinion in *Hitchcock* [2] that *Hurst* [3] ***718** should apply retroactively to cases like Mungin's. *Hitchcock*, 226 So.3d at 220-23 (Pariente, J., dissenting).

2 *Hitchcock v. State*, 226 So.3d 216 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017).

3 *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017).

Applying *Hurst* to Mungin's sentence of death, I would grant a new penalty phase based on the jury's nonunanimous recommendation for death by a vote of seven to five. Per curiam op. at 1. Further, I agree with Justice Anstead's dissenting opinion in Mungin's direct appeal, arguing that Mungin was entitled to a retrial because the evidence was insufficient to sustain a finding of premeditation. *Mungin v. State*, 689 So.2d 1026, 1032 (Fla. 1995) (Anstead, J., dissenting).

All Citations

259 So.3d 716, 43 Fla. L. Weekly S572

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ATTACHMENT B

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1992-CF-03178-AXXX

DIVISION: CR-B

STATE OF FLORIDA

v.

ANTHONY MUNGIN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTIONS AND SENTENCES

This cause is before this Court on Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentences," filed by postconviction counsel on January 12, 2017, pursuant to Florida Rule of Criminal Procedure 3.851.

On September 7, 1995, the Florida Supreme Court issued an order affirming Defendant's conviction for First Degree Murder and sentence of death. Mungin v. State, 689 So. 2d 1026, 1027 (Fla. 1995). On October 6, 1997, the United States Supreme Court issued an order denying Defendant's petition for writ of certiorari. Mungin v. Florida, 522 U.S. 833 (1997).

In the instant Motion, Defendant raises four grounds for relief. All of Defendant's allegations relate to the United States Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016) and the Florida Supreme Court's decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016). In Ground One, Defendant contends his death sentence violates the Sixth Amendment under Hurst v. Florida. In Ground Two, Defendant maintains his death sentence violates the Eighth and Fourteenth Amendments under Hurst v. State and Perry v. State, 41 Fla. L. Weekly S449 (Fla. Oct. 14, 2016). In Ground Three, Defendant avers Asay v. State, 41 Fla. L. Weekly

S646 (Fla. Dec. 22, 2016) and Mosley v. State, 41 Fla. L. Weekly S29 (Fla. Dec. 22, 2016) have arbitrary retroactivity holdings that violate the Eighth Amendment. Finally, in Ground Four, Defendant asserts this Court must readdress all of his prior Rule 3.851 motions in light of the newly amended section 921.141, Florida Statutes (2016), which was implemented in response to Hurst v. Florida.

Initially, this Court notes a successive Rule 3.851 motion must not exceed twenty-five pages, exclusive of attachments. Fla. R. Crim. P. 3.851(e)(2) (2016). The instant Motion is sixty-nine pages, forty-four pages over the mandated page limit. While Defendant simultaneously filed a Motion to Exceed the Page Limitation, this Court does not find the instant issues to be so complex as to warrant forty-four additional pages and finds the excessive pages to be an abuse of process. Nevertheless, this Court declines to strike the instant Motion in consideration of judicial efficiency.

Further, a defendant must file a Rule 3.851 motion within one year of his or her conviction and sentence of death becoming final. Fla. R. Crim. P. 3.851(d)(1). A court may consider a Rule 3.851 motion beyond the one-year time-bar if it alleges "the fundamental constitutional right asserted was not established within the [one-year] period provided for in subsection (d)(1) and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B).

Defendant's conviction and sentence of death became final on October 6, 1997, when the United States Supreme Court issued its order denying Defendant's petition for writ of certiorari. Mungin, 522 U.S. 833 (1997); see Fla. R. Crim. P. 3.851(d)(1)(B). Thus, any postconviction claim asserted more than a year after Defendant's convictions and sentence of death became final must be denied unless Defendant's instant claim falls within the retroactive constitutional right

exception in Rule 3.851(d)(2)(B). Defendant is attempting to circumvent this time bar by alleging his claims fall within the ambit of said exception.

In Hurst v. Florida, the Supreme Court concluded Florida's capital sentencing scheme was unconstitutional in light of Ring v. Arizona, 536 U.S. 584 (2002). The Court explained, "[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.

Upon remand in Hurst v. State, the Florida Supreme Court held, "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, 202 So. 3d at 53. The Court further held the jury's findings and recommendation of death must be unanimous. Id. at 54.

In Asay, the Florida Supreme Court conducted the Witt analysis for retroactivity and concluded the Hurst decisions do not apply to cases that were final before June 24, 2002, the date in which Ring was decided. Asay, 41 Fla. L. Weekly S646. In Mosley, the Florida Supreme Court conducted a Witt analysis and a fundamental fairness analysis in concluding cases finalized *after* Ring do receive retroactive benefit of the Hurst decisions. Mosley, 41 Fla. L. Weekly S29. In conducting the fundamental fairness test, the Court held Mosley was entitled to retroactive application because he raised claims specifically premised on Ring at the trial level. Id. The Court further conducted the Witt analysis to clarify any defendant who fell within the realm of the retroactive period of following Ring would be entitled to relief. Mosley, 41 Fla. L. Weekly S29.

In Gaskin v. State, 42 Fla. L. Weekly S16 (Fla. Jan. 19, 2017), the defendant sought relief in a successive motion for postconviction relief pursuant to the Hurst decisions. Gaskin challenged the constitutionality of Florida's capital sentencing scheme at trial and on direct appeal for the underlying reasons espoused in Ring although Ring was not yet decided. Id. at 2 (Pariente, J, concurring in part and dissenting in part). Nonetheless, the Court, citing Asay, denied the defendant relief under the Hurst decisions because the defendant's sentence was final before Ring. Id.

Taken together, the Asay/Mosley/Gaskin triad creates a categorical bar against the retroactive application of Hurst v. Florida and Hurst v. State to capital cases final before Ring was decided. Defendant's conviction and sentence were final prior to Ring. As such, Defendant's Hurst claims do not fall within the retroactive constitutional right exception in Rule 3.851(d)(2)(B). In turn, any remedial legislation resulting from the Hurst decisions does not apply to Defendant. Thus, this Court declines to reconsider any previous Rule 3.851 motions or claims; particularly, claims that have already been denied and affirmed on appeal. Accordingly, Grounds One, Two, Three, and Four are denied.

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentences," filed by postconviction counsel on January 12, 2017, is **DENIED**. This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Jacksonville, Duval County, Florida on Febry 28, 2017.

LINDA MCCALLUM
Circuit Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to counsel for the State and Defense by United States Mail this 28TH day of FEBRUARY, 2017.

Deputy Clerk

Case No.: 16-1992-CF-03178-AXXX
/jd

ATTACHMENT C

Supreme Court of Florida

TUESDAY, DECEMBER 11, 2018

CASE NO.: SC17-815
Lower Tribunal No(s).:
161992CF003178AXXXMA

ANTHONY MUNGIN vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing/Reconsideration is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

TODD G. SCHER
LISA HOPKINS
HON. LINDA MCCALLUM, JUDGE
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HON. MARK H. MAHON, CHIEF JUDGE