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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-10-1606

Bart Wayne Johnson

v.

State of Alabama

Appeal from Shelby Circuit Court
(CC-09-1450; CC-09-1451)

On Remand from the United States Supreme Court

BURKE, Judge.

Bart Wayne Johnson was convicted of two counts of murder made capital because the victim was an on-duty police officer, see § 13A-5-40(a)(5), Ala. Code 1975, and because the murder was committed by or through the use of a deadly weapon fired

within or from a vehicle, see § 13A-5-40(a)(18), Ala. Code 1975. The jury, by a vote of 10 to 2, recommended that Johnson be sentenced to death. The trial court followed the jury's recommendation and sentenced Johnson to death. This Court affirmed Johnson's convictions but remanded the case with instructions that the trial court amend its sentencing order and "'enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A-5-49, [Ala. Code 1975,] each mitigating circumstance enumerated in Section 13A-5-51, [Ala. Code 1975,] and any additional mitigating circumstances offered pursuant to Section 13A-5-52[, Ala. Code 1975].'" Johnson v. State, [Ms. CR-10-1606, May 20, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014), quoting § 13A-5-47(d), Ala. Code 1975.[1] The trial court complied with those instructions and

[1]Section 13A-5-47(d), Ala. Code 1975, was amended effective April 11, 2017, to remove language allowing a trial court to override a jury's verdict as to sentencing in a capital-murder case. However, that amendment does not affect Johnson's case. See Act No. 2017-131, § 2, Ala. Acts 2017 ("This act shall apply to any defendant who is charged with capital murder after the effective date of this act and shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this act.") Additionally, the amendment is inapplicable to Johnson because the trial court

again sentenced Johnson to death. This Court affirmed that decision in Johnson v. State, [Ms. CR-10-1606, February 6, 2015] ___ So. 3d ___ (Ala. Crim. App. 2014)(opinion on return to remand). The Alabama Supreme Court denied certiorari review, without an opinion, on August 21, 2015.

On May 2, 2016, the United States Supreme Court granted Johnson's petition for a writ of certiorari, vacated this Court's judgment, and remanded the case "for further consideration in light of Hurst v. Florida, 577 U.S. ____, 136 S. Ct. 616, 193 L. Ed.2d 504 (2016)." Johnson v. Alabama, ___ U.S. ___, 136 S. Ct. 1837, 194 L. Ed. 2d 828 (2016). Both Johnson and the State filed supplemental briefs addressing this issue.

Discussion

In Hurst, the United States Supreme Court held Florida's capital-sentencing scheme unconstitutional because, as it then existed,[2] Florida law allowed a trial judge alone to make the findings necessary to render a defendant eligible for the death penalty. In Ex parte Bohannon, 222 So. 3d 525, 531

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did not override the jury's sentencing recommendation.

[2]Florida amended its capital-sentencing scheme after Hurst was decided.

(Ala. 2016), the Alabama Supreme Court analyzed Hurst and explained that "the [United States Supreme] Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death-eligible. The Court emphasized that the Sixth Amendment requires that the specific findings authorizing a sentence of death must be made by a jury ...."

In his supplemental brief, Johnson argues that his death sentences are unconstitutional under Hurst, Ring v. Arizona, 536 U.S. 584 (2002), and State v. Billups, [Ms. CR-15-0619, June 17, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016). Specifically, Johnson claims that he was sentenced to death based on the findings of the trial court, and not the jury, regarding the existence of aggravating circumstances; that the jury's advisory verdict did not satisfy the requirements of the Sixth Amendment; and that the trial court's determination that the aggravating circumstances outweighed the mitigating circumstances was a finding of fact that, he says, had to be made by a unanimous jury.

Before analyzing Johnson's specific arguments, we note that the Alabama Supreme Court recently held that Alabama's capital-sentencing scheme is not unconstitutional in light of Hurst. In Bohannon, supra, the Court held:

> "Our reading of Apprendi[v. New Jersey, 530 U.S. 466 (2000)], Ring[v. Arizona, 536 U.S. 584 (2002)], and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585, 122 S. Ct. 2428. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment."

222 So. 3d at 532. Accordingly, Bohannon forecloses any argument that Alabama's capital-sentencing scheme is facially unconstitutional under Hurst. See also Billups, ___ So. 3d at ___("Alabama's capital-sentencing scheme is constitutional

under Apprendi, Ring, and Hurst, and the circuit court erred in holding otherwise ....")

I.

Johnson first argues that, in violation of Hurst, Ring, and Billups, he was sentenced to death based on the findings of the trial court, not the jury, regarding the existence of aggravating circumstances. Johnson correctly asserts that a trial court may not impose a death sentence unless the jury unanimously finds the existence of at least one aggravating circumstance beyond a reasonable doubt. He also points out that the jury's verdicts in the guilt phase of his trial did not establish either of the aggravating circumstances the State sought to prove in the penalty phase because, he says, the aggravating circumstances did not overlap with an element of either capital offense Johnson was convicted of. As this Court explained in Billups:

> "'Many capital offenses listed in Ala. Code 1975, § 13A-5-40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A-5-49.' Ex parte Waldrop, 859 So. 2d [1181] at 1188 [(Ala. 2002)]. As noted above, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.' § 13A-5-45(e).

> When the capital offense itself includes as an element one of the aggravating circumstances in § 13A-5-49 (often referred to as 'overlap'), the jury will make the finding that an aggravating circumstance necessary for imposition of the death penalty exists during the guilt phase of the trial. In those cases, the maximum sentence a defendant convicted of a capital offense may receive based on the jury's guilty verdict alone is death, and Apprendi, Ring, and Hurst are satisfied because the jury's guilt-phase verdict necessarily includes the finding of an aggravating circumstance necessary for imposition of the death penalty.
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> "When the capital offense does not include as an element one of the aggravating circumstances in § 13A-5-49, the maximum sentence a defendant may receive based on the jury's guilty verdict alone is life imprisonment without the possibility of parole. In those cases (referred to here as 'non-overlap' cases), the jury must make the finding that an aggravating circumstance necessary for imposition of the death penalty exists during the penalty phase of the trial."

___ So. 3d at ___.

As noted, Johnson was convicted of murder made capital because the victim was a police officer who was on duty and because the murder was committed by or through the use of a deadly weapon fired within or from a vehicle. During the penalty phase, the State sought to prove the following aggravating circumstances: that "[t]he capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody," § 13A-5-49(5),

Ala. Code 1975, and that "[t]he capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." § 13A-5-49(7), Ala. Code 1975. In McNabb v. State, 887 So. 2d 929, 995 (Ala. Crim. App. 2001), this Court held that "the capital murder of a police officer under § 13A-5-40(a)(5) does not necessarily include conduct that corresponds with the aggravating circumstances in § 13A-5-49(5) and (7)." Similarly, murder made capital because it was committed by or through the use of a deadly weapon fired within or from a vehicle does not correspond to either aggravating circumstance the State sought to prove in Johnson's case. Johnson is correct that the guilty verdicts alone do not establish that the jury unanimously found the existence of one or more aggravating circumstances beyond a reasonable doubt. Johnson claims that, because the jury did not specifically indicate which, if any, aggravating circumstances it found in the penalty phase, his death sentence was premised on the trial court's separate findings regarding the existence of both aggravating circumstances. This argument is without merit.

In Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004), the Alabama Supreme Court addressed a non-overlap case in which the defendant was convicted of capital murder committed by shooting the victim from a vehicle. At the penalty phase, the State sought to prove a single aggravating circumstance: that the defendant "'knowingly created a great risk of death to many persons.'" 908 So. 2d at 1026, quoting § 13A-5-49(3), Ala. Code 1975. The Court explained:

> "The vote of the jury in its sentencing phase verdict in McGriff's case now before us was ten in favor of death and two in favor of life. The jury did not expressly reveal the number who found the existence of the proffered aggravating circumstance. Ex parte McNabb[, 887 So. 2d 998 (Ala. 2004),] held that even a non-unanimous death recommendation by the jury proved that the jury, including the jurors who voted against the death recommendation, had unanimously found a proffered aggravating circumstance, even though it was not included within the § 13A-5-40(a) definition of the particular capital murder offense charged in the indictment, because the trial court had expressly instructed the jury that they could not proceed to a vote on a death recommendation unless they had already unanimously agreed that the aggravating circumstance existed. Ex parte McNabb, 887 So. 2d at 1005."

908 So. 2d at 1038-39.

In the present case, the trial court instructed the jury on multiple occasions that it could not consider recommending a death sentence unless it unanimously found the existence of

an aggravating circumstance beyond a reasonable doubt. See, e.g. R. 2212-13("[B]efore you can even consider recommending the defendant's punishment be death in a particular case, each and every one of you must be convinced beyond a reasonable doubt based upon the evidence that an aggravating circumstance exists in that case."); R. 2214("If you should find that no aggravating circumstance has been proven beyond a reasonable doubt in one or both cases, you must return a verdict recommending the defendant's punishment be life imprisonment without the possibility of parole in that particular case or cases."); and R. 2217("In order to consider an aggravating circumstance in each case it is necessary that the jury unanimously agree upon its existence in that case or cases. All twelve of you must be convinced beyond a reasonable doubt that an aggravating circumstance exists in order for any of you to consider that aggravating circumstance in determining what the sentence should be."). Thus, the jury was well aware that, in order to proceed to the process of weighing the aggravating and mitigating circumstances, it must first unanimously determine that at least one aggravating circumstance existed.

However, Johnson's case is somewhat distinguishable from McGriff because, in Johnson's case, the State sought to prove two aggravating circumstances. Thus, the fact that the jury proceeded to weigh the aggravating and mitigating circumstances and returned a recommendation in favor of the death penalty does not necessarily imply that the jury unanimously found the same aggravating circumstance to exist. In Ex parte McNabb, 887 So. 2d 998, 1005 (Ala. 2004), the Alabama Supreme Court addressed a similar situation:

> "McNabb contends -- correctly -- that, despite his conviction for capital murder, he could not have been sentenced to death unless at least one of the aggravating circumstances set forth in § 13A-5-49 was found by the jury to exist beyond a reasonable doubt. See Ala. Code 1975, §§ 13A-5-45(f) and 13A-5-45(e). McNabb concedes that the jury was instructed to make a unanimous finding as to whether any of the three aggravating circumstances ultimately found to exist by the trial judge existed. He insists, however, that the trial court committed plain error in failing to instruct the jury expressly that it must unanimously find the existence of the same aggravating circumstance. This failure, he contends, created the danger that less than all of the jurors found the existence of any one aggravating circumstance. If that occurred, he argues, then his death sentence is based on factors never found by the jury, and violates the rule set forth in Ring. We find no merit in this argument. The instructions contained a number of premises that, when considered as a whole, apprised the jury of the proper unanimity requirement."

(Footnotes omitted.)

This Court has examined the entirety of the trial court's penalty-phase instructions in the present case. As was the jury in McNabb, Johnson's jury was similarly apprised that it must unanimously find the existence of the same aggravating circumstance in order to even consider recommending the death penalty. In addition to the instructions referenced above, the trial court instructed the jury that "[t]here must be a unanimous agreement on the existence of a particular aggravating circumstance in a particular case before it can be considered by any juror in that particular case." (R. 2217-18(Emphasis added.)) It is well settled that "'[j]urors are presumed to follow the trial court's instructions.'" Brownlee v. State, 197 So. 2d 1024, 1037 (Ala. Crim. App. 2015), quoting Lewis v. State, 24 So. 3d 480, 508 (Ala. Crim. App. 2006), aff'd, 24 So. 3d 540 (Ala. 2009). In light of the trial court's instructions, the fact that the jury returned a verdict recommending the death penalty by a vote of 10 to 2 indicates that it unanimously found the existence of at least one particular aggravating circumstance beyond a reasonable doubt.

Johnson attempts to distinguish his case from Ex parte McNabb by quoting a short excerpt from the trial court's jury instructions. He concedes that the trial court instructed the jury that it must find at least one aggravating circumstance in order to recommend a sentence of death but then asserts that the judge "also instructed the jury that it could recommend death based on 'one or fewer aggravating circumstances." (Johnson's supplemental brief, at 10, quoting R. 2219, 2244.)[3] Therefore, he says, the trial court "directed the jury to recommend death even if it did not find the existence of an aggravating circumstance." (Johnson's supplemental brief, at 10.)

However, the quoted excerpt Johnson uses to support his argument is taken out of context and presented in a way that is misleading. A review of the entirety of the jury instructions reveals that the quoted passage appeared after the trial court clearly explained to the jurors that they must unanimously find the existence of an aggravating circumstance before considering whether to recommend death. The trial

[3]The jury asked to be recharged on certain parts of the trial court's instructions. Therefore, the quoted language appears twice in the record.

court then proceeded to explain that, if the jury found that one or more aggravating circumstances existed, it was to then proceed to weigh those circumstances against any mitigating factors it found. In explaining the weighing process, the trial court stated:

> "The process of weighing aggravating and mitigating circumstances against each other in each case in order to determine the proper punishment in each case is not a mechanical process. Your weighing all the circumstances against each other should not consist of merely adding up the number of aggravating circumstances or mitigating circumstances [and] comparing that number to the total number of mitigating circumstances or aggravating circumstances. That would be improper.
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> "The law in this state recognizes that's possible in at least some situations that one or fewer aggravating circumstances might outweigh a large number of mitigating circumstances. The law of this state also recognizes as possible, at least in some situations, that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances."

(R. 2219.) Contrary to Johnson's argument, this instruction did not suggest that the jury could recommend death even if it did not find any aggravating circumstances to exist. Rather, it explained that the weighing process was not a mere tallying system and that various aggravating or mitigating circumstances might have different weights.

Because the trial court instructed the jury that it could not proceed to consider recommending the death penalty unless it first found a particular aggravating circumstance to exist, the fact that the jury proceeded to the weighing process and voted on whether to impose the death penalty or a sentence of life imprisonment without parole demonstrates that it found at least one particular aggravating circumstance to exist in each case. Accordingly, Hurst was satisfied because the jury made the finding necessary to make Johnson eligible for the death penalty. See Ex parte Bohannon, 222 So. 3d at 533 ("Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.").

We note that the Alabama Supreme Court has authorized the use of verdict forms with special interrogatories during the penalty-phase deliberations in capital-murder trials. See Ex parte McGriff, 908 So. 2d at 1039. Such forms would instruct jurors to record which, if any, aggravating circumstances were

unanimously found to exist. The Court gave the following example of a special verdict form in McGriff:

> "'State of Alabama v. Dennis Demetrius McGriff
>
> "'The first question before the jury is whether the State has proven beyond a reasonable doubt that, in committing the capital offense charged in the indictment, the defendant knowingly created a great risk of death to many persons.
>
> "'The number of jurors who answer and vote 'yes' to the first question is ____
>
> "'The number of jurors who answer and vote 'no' to the first question is ____
>
> "'_____
>
> "'Foreperson's signature.'"

908 So. 2d at 1039. The use of such forms in the future would remove any ambiguity regarding a jury's penalty-phase findings. However, as explained above, the trial court properly and clearly instructed Johnson's jury as to its responsibilities during the penalty-phase deliberations. Accordingly, there was no ambiguity in the present case. The jury, not the trial court, made the findings that were necessary to make Johnson eligible for the death penalty.

Accordingly, his sentences do not violate Hurst, Ring, or Billups.

II.

Next, Johnson argues that the jury's "'advisory only'" role during the penalty phase did not satisfy the requirements of the Sixth Amendment. (Johnson's supplemental brief, at 11.) Johnson contends that, because the jury's sentencing recommendation is not binding on the trial court, the judge, as opposed to the jury, "must make all of the penalty-phase findings necessary for" a death sentence to be imposed. (Johnson's supplemental brief, at 12.) However, the Alabama Supreme Court addressed this issue in Bohannon and decided it adversely to Johnson. In Bohannon, the Alabama Supreme Court held:

> "Bohannon contends that an instruction to the jury that its sentence is merely advisory conflicts with Hurst because, he says, Hurst establishes that an 'advisory recommendation' by the jury is insufficient as the 'necessary factual finding that Ring requires.' Hurst, --- U.S. ----, 136 S. Ct. at 622 (holding that the 'advisory' recommendation by the jury in Florida's capital-sentencing scheme was inadequate as the 'necessary factual finding that Ring requires'). Bohannon ignores the fact that the finding required by Hurst to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by

> the jury, not the judge, in Alabama. Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst."

Bohannon, 222 So. 3d at 534.

Thus, contrary to Johnson's assertion, the jury, and not the trial court, made the only penalty-phase finding necessary to expose Johnson to the death penalty, i.e., that at least one aggravating circumstance existed beyond a reasonable doubt. The fact that the jury's sentencing recommendation was not binding on the trial court is of no consequence. Accordingly, Johnson is not entitled to relief on this claim.

III.

Finally, Johnson contends that the result of the process of weighing the aggravating circumstances against the mitigating circumstances is a "fact" that must be made by a jury, not a judge. Johnson argues that, because the jury's sentencing recommendation in his case was not unanimous, the

trial court made the findings necessary to impose the death penalty, i.e., that certain aggravating circumstances existed and that those circumstances outweighed any mitigating circumstances that may have existed. Therefore, Johnson says, his death sentence violates Ring and Hurst. However, this argument was rejected in Ex parte Bohannon, 222 So. 3d at532-33, in which the Alabama Supreme Court held:

> "Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.' 859 So. 2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may 'exercise discretion — taking into consideration various factors relating

> both to offense and offender -- in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481, 120 S. Ct. 2348. Hurst does not disturb this holding."

Johnson further argues that "regardless of whether the weighing process is deemed 'a moral or legal judgment' or an 'element of an offense,' it results in a finding that is required for imposition of the death penalty, and therefore must be made by a jury." (Johnson's supplemental brief, at 17; internal citations omitted). However, this argument misses the distinction between a defendant's eligibility for the death penalty and the appropriateness of the death penalty for that particular defendant. A trial court's independent weighing of aggravating and mitigating circumstances and its resulting determination does not increase the authorized punishment for a capital defendant. Thus, under Ring, that determination does not have to be made by a jury.

In Johnson's case, the jury made the determination that at least one aggravating circumstance existed as evidenced by the fact that it considered and subsequently recommended the death penalty. That is all Hurst requires. The fact that the trial court also found the existence of aggravating

circumstances and independently weighed the aggravating and mitigating circumstances did run afoul of Hurst.

For the foregoing reasons, Johnson's death sentences do not violate Hurst. Johnson's convictions and sentences are also affirmed for the reasons set forth in Johnson v. State, [Ms. CR-10-1606, May 20, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014), aff'd on return to remand [Ms. CR-10-1606, February 6, 2015] ___ So. 3d ___ (Ala. Crim. App. 2014).

AFFIRMED.

Windom, P.J., and Welch and Kellum, JJ., concur. Joiner, J., recuses.