

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VICKY CHAO,	§	No. 475, 2004
	§	
Defendant Below-	§	
Appellant,	§	
	§	
v.	§	Court Below–Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 88001884DI
Plaintiff Below-	§	
Appellee.	§	

Submitted: May 4, 2007
Decided: June 20, 2007

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**,
Justices, constituting the Court *en Banc*.

Upon appeal from the Superior Court. **REMANDED**.

Bernard J. O'Donnell, Esquire, Office of Public Defender, Wilmington, Delaware, for
Appellant.

Loren C. Meyers, Esquire, Department of Justice, Wilmington, Delaware, for
Appellee.

BERGER, Justice:

In this appeal we consider whether Vicky Chao's three felony murder convictions must be reviewed in light of the recent decision in *Williams v. State*¹. In *Williams*, this Court held that the felony murder statute "not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony."² The *Williams* Court expressly overruled a portion of our earlier decision on Chao's direct appeal, which adopted a contrary interpretation of the "in furtherance of" felony murder statute's language.³ We conclude that in the interest of justice, *Williams* must be applied retroactively, because Chao may have been convicted for acts that do not constitute felony murder. Accordingly, we remand to the Superior Court for further proceedings on Chao's motion for postconviction relief.

Factual and Procedural Background

In 1988, an arson fire killed three members of William Chen's family. In 1989, Chao was convicted of three counts of intentional murder, three counts of felony murder, and other related offenses arising out of that arson fire. At that time, the felony murder statute provided that one is guilty of first degree murder "when ... in

¹ 818 A.2d 906 (Del. 2003).

² 818 A.2d at 913.

³ *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992).

the course of and in furtherance of the commission ... of a felony or immediate flight therefrom, the person recklessly causes the death of another person.”⁴

Chao appealed, arguing that there was insufficient evidence to support her felony murder convictions because the killings were not “in furtherance of” the arson. This Court rejected her argument and affirmed the convictions:

[Chao] claims that ... no rational juror could infer that the killings were caused “in furtherance of the commission” of arson, a felony. Rather, she asserts that the evidence points towards arson as being the instrumentality or means by which the intentional murders were accomplished....[Chao’s] argument is found to be without merit.

* * *

[T]he inclusion of the phrase “in furtherance” as used throughout §§ 636 and 635 was not meant to require that the killing be committed as an incident to an underlying felony. On the contrary, for felony murder liability to attach, a killing need only accompany the commission of an underlying felony. Thus, if the “in furtherance” language has any limiting effect, it is solely to require that the killing be done by the felon him or herself.⁵

In 1995, after concluding that Chen had given perjured testimony at the first trial, the Superior Court granted Chao’s postconviction motion for a new trial. In the

⁴ 11 *Del.C.* § 636(a)(2). The statute has been amended, and now provides that a person is guilty of first degree murder “when ... while engaged in the commission of ... any felony, the person recklessly causes the death of another person.” 2004 *Del. Laws Ch.* 246, §2.

⁵ *Chao v. State*, 604 A.2d at 1363.

second trial, the jury convicted Chao of three counts of felony murder, arson, and second degree conspiracy; and acquitted Chao on the three intentional murder charges. On direct appeal, this Court again affirmed the convictions in 2001.⁶

In 2003, the Court revisited, in *Williams*, the meaning of the “in furtherance of” language in the felony murder statute. We held:

In our view, the statutory language of the Delaware felony murder statute not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony. To the extent that the *Chao* opinion states that the “in furtherance of” language of the statute addresses solely the identity of the person who is committing the actual killing, it is overruled.⁷

In 2004, Chao filed another postconviction motion, asking that her felony murder convictions be vacated under *Williams*. The Superior Court summarily rejected her motion. Chao appealed, and this Court remanded the case for the trial court to consider, in the first instance, whether to apply *Williams* retroactively. On remand, the Superior Court concluded that Chao’s felony murder convictions must be reconsidered because Chao “has been convicted of acts that no longer lawfully constitute a crime under the new law established in *Williams*”⁸

⁶ *Chao v. State*, 780 A.2d 1060 (Del. 2001).

⁷ *Williams v. State*, 818 A.2d at 913.

⁸ *State v. Chao*, 2006 WL 2788180 at *8 (Del. Super.) The Superior Court also decided, at this Court’s request, that the State is not estopped from arguing against the retroactive application

Discussion

In *Flamer v. State*,⁹ this Court addressed the legal principles that govern our analysis in this case:

Under Rule 61(i)(4), any ground for relief which has already been adjudicated is barred unless reconsideration of the claim is warranted in the interest of justice In order to invoke the “interest of justice” provision ... a movant must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.¹⁰

Following the United States Supreme Court’s analysis in *Teague v. Lane*¹¹, this Court adopted a “general rule of non-retroactivity” for postconviction changes to rules of criminal procedure.¹² But, the *Flamer* Court also relied on *Davis v. United States*,¹³ where the United States Supreme Court held that new substantive decisions will be applied retroactively when a defendant has been convicted for acts that are not criminal:

In this case, the petitioner’s contention is that the decision in *Gutknecht v. United States* ... establishes that his induction order

of *Williams*.

⁹ 585 A.2d 736 (Del. 1990).

¹⁰ 585 A.2d at 746.

¹¹ 489 U.S. 288(1989), *reh’g denied*, 490 U.S. 1031 (1989).

¹² 585 A.2d at 749.

¹³ 417 U.S. 333 (1974).

was invalid ... and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present(s) exceptional circumstances' that justify collateral relief under § 2255 [the federal postconviction relief statute].¹⁴

The Superior Court carefully and correctly applied this principle, finding that *Williams* must be applied retroactively and that Chao's conduct did not constitute the crime of felony murder under *Williams*.

In arguing against this result, the State urged this Court to consider the impact its decision will have on others who were convicted of felony murder. The State points out that, "[r]egardless of whether such defendants committed felony murder under *Williams*, they are hardly 'innocent' in the usual sense of the word."¹⁵ Although this Court is not unmindful of the State's concern, we will not withhold justice because of the possible repercussions from a correct application of the law. The Court asked the State to provide a complete list of all inmates who might be affected by the retroactive application of *Williams*. The list, a copy of which is attached and entitled "APPENDIX", reveals that almost all prisoners who were

¹⁴ *Id.* at 346-347.

¹⁵ *Supplemental Memorandum for the State of Delaware*, at 4.

convicted of felony murder were also convicted of other crimes and will continue to serve significant sentences, even if this decision impacts them.

Finally, we note that several issues remain to be decided. Although Chao's felony murder convictions must be vacated under *Williams*, the Superior Court may determine that Chao should be resentenced on the lesser-included charges of manslaughter.¹⁶ In addition, "[a]fter a related sentence has been vacated on appeal, a trial judge may resentence a defendant up to the combined duration of the original sentences without violating the constitutional provision against double jeopardy."¹⁷ These are issues for the Superior Court to address in resolving Chao's postconviction motion.

Conclusion

Based on the foregoing, this matter is remanded to the Superior Court for further action in accordance with this decision. Jurisdiction is not retained.

¹⁶ See: *Kirk v. State*, 889 A.2d 283 (Del. 2005).

¹⁷ *White v. State*, 576 A.2d 1322, 1328 (Del. 1990).

RIDGELY, Justice, concurring:

I agree that Chao is entitled to post-conviction relief under *Williams*. I write separately, however, because among the issues to be determined after remand is whether the State elects to prosecute Chao for felony murder at a new trial consistent with *Williams*.

Typically, when a defendant succeeds on a post conviction relief motion, the matter is set for a new trial.¹ In some situations, however, such as when the State stipulates or otherwise agrees to sentencing for a lesser-included crime, a new trial is not necessary. While that ultimately may be the case here, there is no indication in the present record, as there was in *Kirk*² and *Rivera*,³ that the State has elected not to prosecute the defendant for felony murder under the retroactive rule of *Williams*. This is an issue for the Superior Court to determine in this case and in others where

¹ Chao, for example, obtained post-conviction relief of her first conviction because of perjured testimony. A new trial followed.

² See *Kirk v. State*, 889 A.2d 283 (Del. 2005) (TABLE) (“[T]he State argued that Kirk should be re-sentenced on the lesser-included charges of manslaughter and second-degree assault.”).

³ See *Rivera v. State*, 351 A.2d 561, 563 (Del. 1976) (“But here . . . justice does not require a new trial. The thrust of the defendant’s appeal in this regard is not that she was deprived of a complete defense to the charge of murder, but that she was deprived of a defense of mitigation which would have afforded her the opportunity of a manslaughter verdict. Thus, judgment of manslaughter, a lesser offense included within murder in the second degree under 11 *Del.C.* § 206(b)(3), and sentence thereon, will resolve this issue in the defendant’s favor. *With the concurrence of both the State and the Defendant, we so hold.*”) (citing *Fuentes v. State*, 349 A.2d 1, 7 (Del. 1975)). (emphasis added).

post conviction relief is sought based upon the retroactive application of that case.

APPENDIX

COMPARISON OF SENTENCES

Notes:

1. The following abbreviations are used.

LWOP	life imprisonment without parole
LWP	parolable life sentence

2. Inmates who are subject to the Truth in Sentencing Act are designated by "TIS" after their name.

3. Column 3 in the table reflects the defendant's sentence if the defendant's felony murder conviction is reduced under *Williams* to manslaughter. See *Kirk v. State*, 2005 WL 3526325 (Del. Dec. 23, 2005). The identical information was presented under the heading "*Williams* Sentence" in the chart submitted by the State on April 16, 2007.

4. Before the Truth in Sentencing Act took effect on June 30, 1990, manslaughter was classified as a Class B felony, punishable by a prison term of 3 to 30 years. Del. Code Ann. tit. 11, §§632, 4205(b)(2) (Repl. 1987). Upon the Truth in Sentencing Act taking effect on June 30, 1990, manslaughter was classified as a Class C felony, punishable by a prison term of 0 to 10 years. Del. Code Ann. tit. 11, §§632, 4205(b)(2) (Repl. 1995). (The current classification of manslaughter as a class B felony, punishable by 2 to 25 years imprisonment, became effective June 30, 2003. 74 Del. Laws ch. 106, §§2, 9-10.) The sentence information in Column 3 assumes that a defendant whose felony murder conviction is reduced to manslaughter is sentenced to the maximum term.

5. Column 4 in the table reflects the defendant's remaining sentence if the defendant's felony murder is vacated under *Williams*. This information was not contained in the chart submitted by the State on April 16, 2007.

Inmate	Current Sentence	Manslaughter Sentence	Remaining Sentence
James W. Riley	LWOP plus 25 years	55 years	25 years
Ralph Hawkins (TIS)	LWOP	10 years	0 years
Miles Brice (TIS)	2 LWOP plus 5 years	25 years	5 years
Robert Garvey (TIS)	LWOP plus 30 years	40 years	30 years
Carmelo Claudio	LWOP, LWP plus 45 years	LWP plus 75 years	LWP plus 45 years
Robert Golson	LWOP plus 37 years (murder sentence later commuted to parolable life)	67 years	37 years

Wilbur Johnson	LWOP plus 37 years	67 years	37 years
Sterling Hobbs (Amir Fatir)	LWOP plus 67 years	97 years	67 years
Maurice Giles	LWOP	30 years	0 years
Enrique Maymi	LWOP, LWP plus 45 years	LWP plus 75 years	LWP plus 45 years
Darrel Page (TIS)	4 LWOP plus 113 years	3 LWOP plus 123 years	3 LWOP plus 113 years
Michael Jones (TIS)	2 LWOP plus 44 years	LWOP plus 54 years	LWOP plus 44 years
Justin Burrell (TIS)	LWOP plus 50 years	60 years	50 years
Jermaine Barnett (TIS)	LWOP plus 90 1/2 years	100 1/2 years	90 1/2 years
Hector Barrow (TIS)	LWOP plus 86 years	96 years	86 years
Kevin Hill (TIS)	LWOP plus 50 years	60 years	50 years
Arthur Govan (TIS)	4 LWOP plus 115 years	2 LWOP plus 135 years	2 LWOP plus 115 years
Donald Flagg (TIS)	3 LWOP plus 43 years	2 LWOP plus 53 years	2 LWOP plus 43 years
William Gaines	2 LWOP	LWOP plus 30 years	LWOP
Richard Massey	LWOP plus 41 years	71 years	41 years
Frank Whalen	LWOP, LWP plus 30 years	LWP plus 60 years	LWP plus 30 years
Alan Brooks	LWOP plus 52 years	82 years	52 years
Shane Deshields (TIS)	LWOP plus 102 years	112 years	102 years
Tyrone Baxter	LWOP	30 years	0 years
Richard Roth, Sr. (TIS)	LWOP plus 166 years	176 years	166 years
Paul Robertson (TIS)	2 LWOP plus 95 years	115 years	95 years
Micheal R. Smith (TIS)	LWOP plus 140 years	150 years	140 years
Vicky Chao	3 LWOP plus 6 years	96 years	6 years
Lawrence Collingwood	LWOP plus 10 years	40 years	10 years

Ernest Parsons	4 LWOP plus 127 years	2 LWOP plus 187 years	2 LWOP plus 127 years
John Watson (TIS)	2 LWOP plus 40 years	LWOP plus 50 years	LWOP plus 40 years
James Blount	2 LWOP plus 45 years	LWOP plus 75 years	LWOP plus 45 years
Randolph Graham	2 LWOP plus 60 years	LWOP plus 90 years	LWOP plus 60 years
Richard Thompson	2 LWOP plus 25 years	LWOP plus 55 years	LWOP plus 25 years
Christopher Long (TIS)	4 LWOP plus 120 years	2 LWOP plus 140 years	2 LWOP plus 120 years
Joyce Greenwood (Lynch)	4 LWOP plus 77 years	2 LWOP plus 137 years	2 LWOP plus 77 years
Richard Roth, Jr. (TIS)	2 LWOP plus 188 years	LWOP plus 198 years	LWOP plus 188 years
James Llewellyn (TIS)	4 LWOP plus 125 years	2 LWOP plus 145 years	2 LWOP plus 125 years
Kenneth Rodgers (TIS)	4 LWOP plus 105 years	2 LWOP plus 125 years	2 LWOP plus 105 years
Tze-Poong Liu	6 LWOP plus 22 years	3 LWOP plus 112 years	3 LWOP plus 22 years
Antonio Taylor (TIS)	2 LWOP plus 33 years	LWOP plus 43 years	LWOP plus 33 years
David Rush	2 LWOP, 3 LWP plus 8 years	LWOP, 3 LWP plus 38 years	LWOP, 3 LWP plus 8 years
James Perez (TIS)	2 LWOP plus 38 years	LWOP plus 48 years	LWOP plus 38 years
Luis Cabrera (TIS)	2 LWOP plus 9 years	LWOP plus 19 years	LWOP plus 9 years
Steven Shelton (TIS)	2 Death plus 45 years	1 Death plus 55 years	1 Death plus 45 years
Robert Jackson (TIS)	2 Death plus 46 years	1 Death plus 56 years	1 Death plus 46 years

Adam Norcross (TIS)	3 Death plus 130 years	1 Death plus 150 years	1 Death plus 130 years
Craig Zebroski (TIS)	2 Death plus 61 years	1 Death plus 71 years	1 Death plus 61 years
Jermaine Wright (TIS)	2 Death plus 50 years	1 Death plus 60 years	1 Death plus 50 years
Ralph Swan (TIS)	3 Death plus 132 years	1 Death plus 152 years	1 Death plus 132 years