LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date July 26, 2019 Case No. 95CR046840

STATE OF OHIO
Plaintiff

A. Cillo, L. Dezort, M. Kern
Plaintiff's Attorney

VS

STANLEY JALOWIEC
Defendant

Richard Cline
Defendant's Attorney

This matter is before the Court on remand from the Ninth District Court of Appeals (Case No. 17CA011166), in an opinion filed May 28, 2019 and Defendant/Petitioner, Stanley Jalowiec's ("Jalowiec"), Motion For Telephone Status Conference, filed July 22, 2019.

Given this Court's disposition of the remand order *infra,* the Motion For Telephone Status Conference is DENIED as moot.

Jalowiec's Motion For Leave To File A Motion For A New Mitigation Trial is well-taken and hereby GRANTED.

Jalowiec's Motion For A New Mitigation Trial is not well-taken and hereby DENIED.

See Judgment Entry.

IT IS SO ORDERED. No Record.

JUDGE D. CHRIS COOK

cc: A. Cillo, Asst. Cty. Pros.
L. Dezort, Asst. Cty. Pros.
M. Kern, Asst. Cty. Pros.
R. Cline, Esq.

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I. INTRODUCTION

This matter is before the Court on remand from the Ninth District Court of Appeals (Case No. 17CA011166), in an opinion filed May 28, 2019 and Defendant/Petitioner, Stanley Jalowiec's ("Jalowiec"), Motion For Telephone Status Conference, filed July 22, 2019.

II. PRELIMINARY STATEMENT

The gravamen of the remand order is that this Court ". . . explicitly disregarded the requirements of Crim. R. 33(B) and instead, partially considered the merits of Jalowiec's attached motion for a new mitigation trial."[1]

The relevant portion of Crim. R. 33(B) reads as follows,

> Application for a new trial shall be made by motion which . . . shall be filed within fourteen days after the verdict was rendered . . . unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

The Ninth District's remand order is accurate to the extent that this Court did not explicitly determine whether leave should be granted or denied and instead,

[1] *State v. Jalowiec*, 9th Dist., Lorain No. 17CA011166, 2019-Ohio-2059 (5/28/2019), at ¶7.

addressed the merits of the motion for a new trial based on the Ohio Supreme Court's decision in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1591, which this Court found dispositive.

Of course, it goes without saying that in reaching the merits of the motion for a new trial, this Court *implicitly* determined that leave was appropriate and was granted.[2] Nevertheless, this Court should have explicitly addressed the predicate question and will do so now.

III. STATEMENT OF PERTINENT FACTS

The pertinent facts relevant to Jalowiec's motion for leave are not in dispute.

On April 11, 1996, this Court sentenced Jalowiec to death for his involvement in the murder of Ronald Lally. Since his conviction, Jalowiec has filed numerous appeals in both state and federal courts, petitions for post conviction relief, and petitions for habeas corpus – all which have been unsuccessful.

On January 12, 2016, the United States Supreme Court released its decision in the matter, *Hurst v. Florida*,[3] which invalided the State of Florida's death penalty scheme finding it unconstitutional.

On January 12, 2017, exactly one-year later, Jalowiec filed his motion for leave to file a motion for a new mitigation trial.

The State filed a brief in opposition arguing, among other things, that the motion for leave was untimely. Jalowiec replied, an oral hearing was had, and this Court issued its decision on June 7, 2017.

IV. ANALYSIS

THIS COURT FINDS, BY CLEAR AND CONVINCING EVIDENCE, THAT JALOWIEC WAS UNAVOIDABLY PREVENTED FROM FILING HIS MOTION FOR A NEW TRIAL WITHIN THE MANDATES OF CRIM. R. 33

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[2] This is particularly so in light of the Ninth District's decision in *State v. Jones*, 9th Dist., Summit No. 28547, 2019-Ohio-1870, a case almost identical to this one where remand was not ordered.

[3] Citations omitted.

As noted by the Ninth District, the State advances two arguments of untimeliness; first, that the motion is untimely since it was filed one-year after *Hurst* was decided; and two, that Jalowiec could have challenged the constitutionality of Ohio's sentencing laws prior to the *Hurst* decision by using existing case law as support since *Hurst* did not present new law.[4]

None of these arguments are convincing.

Regarding the timeliness of the motion for leave, it does not appear that either the Supreme Court or Ninth District have addressed the issue on point. The State directs this Court to the matter of *State v. Griffith,* 11th Dist., Trumbull No. 2005-T-0038, 2006-Ohio-2935 that stands for the proposition that ". . . case law has adopted a reasonableness standard . . ." and that ". . . a trial court may require a party to file his Crim. R. 33 motion within a reasonable time . . ." *Griffith, Id.*

The question then becomes, is a motion for a new trial based upon the holding of a Supreme Court case filed one-year after the case is decided unreasonable? To answer this question, Jalowiec relies upon a Tenth District Court of Appeals case, *State v. Burke,* 10th Dist., Franklin No. 03AP-1241, 2005-Ohio-891, where that court determined that a 17-month delay in filing for a new trial was not unreasonable.[5] *Id.* at ¶12.

On the other hand, there are cases that hold that a one-year delay in filing a *Hurst* motion for leave is excessive: *State v. Hale,* 8th Dist., Cuyahoga No. 107782, 2019-Ohio-1890, accord, *State v. Bryan,* 8th Dist., Cuyahoga No. 105774, 2018-Ohio-1190; *State v. Mundt,* 7th Dist., Noble No. 17 NO 0446, 2017-Ohio-7771.

Given the conflicting authority and no direct guidance from the Ninth District, this Court finds that the answer depends on the nature of the case and the reasons for the delay.

Here, Jalowiec cites no reasons for the delay in his motion or reply brief but at oral argument explained that *Hurst* represented ". . . a sea change in the understanding of jury's roles in sentencing."[6] Moreover, Jalowiec urged that he was awaiting a decision from the Ohio Supreme Court in the matter of *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, which would significantly influence him on how to proceed herein.[7]

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[4] In addition, the State also argues *res judicata.*

[5] Like this case, *Burke* is a death penalty case.

[6] Transcript of proceedings from oral hearing had 5/18/2017, Page 8, Lines 14-15.

[7] Transcript of proceedings from oral hearing had 5/18/2017, Pages 9-11.

Both of these arguments have merit.

More importantly, however, is the fact that this is a death penalty case. Everything moves more slowly in a death penalty case and the stakes, obviously, are high. Given the complexity of the *Hurst* decision and its possible impact on Ohio's death penalty scheme and the fact that Jalowiec wanted to know how *Kirkland* was decided, all mitigate the delay in filing for a new trial.

The State also urges *res judicata* in that Jalowiec has already argued ". . . various claims related to the penalty phase of his trial during his direct appeal . . ." and that Jalowiec ". . . could have raised these same issues in a motion for a new trial within the timeframe allotted by Crim. R. 33(B) since he raised them in his direct appeal."

Neither of these arguments are compelling.

Jalowiec seeks leave to file a motion for a new mitigation trial based upon a United States Supreme Court decision that struck down the State of Florida's death penalty statute – a statute eerily similar to Ohio's.[8] Jalowiec could not have possibly used *Hurst* to bolster his previous arguments as it was not in existence until January, 2016.

Accordingly, this Court finds, as a matter of law, that the one-year delay between the release of the *Hurst* decision and Jalowiec's filing of his motion for leave is not unreasonable and as such, leave must be granted.

Given that this Court has granted Jalowiec leave to file his motion for a new mitigation trial, the Court will now address the motion on the merits.

> FOR THE REASONS STATED IN THIS COURT'S ORDER AND JUDGMENT ENTRY FILED JUNE 7, 2017, WHICH ORDER IS HEREBY INCORPORATED HEREIN, AND THE SUPPLEMENTAL ANALYSIS AND AUTHORITY *INFRA*, JALOWIEC'S MOTION FOR A NEW MITIGATION TRIAL LACKS MERIT AND IS DENIED

Given that this Court has incorporated its previous analysis regarding the application of *Belton* to this case, it will not be reiterated herein. Suffice to say that *Belton* is controlling, Ohio's death penalty scheme is different from Florida's, and Ohio's death penalty statute, while perhaps immoral, highly impractical, incredibly expensive, arguably disproportionate in application to minorities and the poor[9], and rarely

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[8] See: *State v. Rogers,* 28 Ohio St.3d 427, 430 (1986).

[9] Since July 14, 2009 (the last 10 years), Ohio has executed 27 men. 10, or 37%, were minorities yet minorities make up approximately 15% of Ohio's population.

imposed,[10] it is not unconstitutional based upon the United States Supreme Court's ruling in *Hurst.*

Moreover, multiple courts including the federal courts, the Ohio Supreme Court, numerous courts of appeal in Ohio, and the Ninth District Court of Appeals have all opined on this issue and have all rejected *Hurst* challenges to Ohio's death penalty statutes.

THE FEDERAL COURTS

In the matter of *Dunlap v. Paskett, Warden,* U.S. Dist. Ct., S.D. Ohio, Eastern Division, Case No. 1:99-cv-559, 2019 WL 1274862, 3/20/2019, the District Court held, "Petitioner's *Hurst*-based motions are DENIED. The Court analyzed Dunlap's *Hurst* claims and in reliance on *Belton* and its progeny determined that ". . . Petitioner's proposed *Hurst* claim is plainly without merit." *Id.* at *6.

THE OHIO SUPREME COURT

In addition to *Belton,* the Ohio Supreme Court decided *State v. Mason,* 153 Ohio St.3d 476, 2018-Ohio-1462, which in reliance on *Belton* against a *Hurst* challenge held,

1. State death-penalty scheme did not violate Sixth Amendment;
2. Weighing process contained in death-penalty statutes did not constitute fact-finding subject to Sixth Amendment right to jury trial;
3. Death-penalty scheme adequately afforded right to trial by jury during penalty phase; and
4. Statutes governing role of trial judge in death-penalty scheme did not violate Sixth Amendment right to jury trial.

And, in *State ex rel. O'Malley v. Collier-Williams,* 153 Ohio St.3d 553, 2018-Ohio-3154, the Ohio Supreme Court held relative to a *Hurst* challenge of the constitutionality of Ohio's death penalty statute that ". . . we have already rejected this interpretation of *Hurst.*" *Id.* at ¶20.

THE NINTH DISTRICT COURT OF APPEALS

The Ninth District has also addressed a *Hurst* challenge in a very recent, almost identical case, to wit: *State v. Jones,* 9th Dist., Summit No. 28547, 2019-Ohio-1870.

[10] The last execution in Ohio was July 18, 2018 (more than one-year ago), when Robert Van Hook was executed for the aggravated murder of David Self.

With great respect to the Ninth District, it is somewhat difficult for this Court to reconcile the decision in *Jones* with the Ninth's decision in *Jalowiec.*

The trial court in *Jones*, like this Court's original decision, failed to clearly enunciate the basis upon which it denied Jones leave to file his motion for a new trial. In *Jones,* the appellate court notes,

> Nonetheless, the trial court did not clarify whether it denied the motion for leave upon finding that Jones could not have been unavoidably delayed because the basis for his proposed motion was meritless, or whether, as Jones contends, the trial court disregarded Jones' unavoidable delay argument in support of his motion for leave and instead considered the merits of his proposed motion for a new trial. We determine, however, **that remand for clarification is unnecessary** since in the case of the former, the trial court would not have abused its discretion, and in the case of the latter, the trial court's error would be harmless.

Id. at ¶14. (Emphasis added.)

Ultimately, the trial court in *Jones* determined that based upon *Belton* and its progeny, Jones' *Hurst* claim lacked merit thus his motion for a new trial should be denied. In its review of the *Jones* decision, the Ninth District concluded,

> Accordingly, *assuming*[11] that the court denied the motion for leave on the basis that Jones did not present a meritorious basis for claiming unavoidable delay, we would not be able to say that the trial court abused its discretion. **Likewise, if we assume the trial court only considered the merits of his proposed motion, we would also not be able to say that the trial court abused its discretion, as that denial would be dispositive of the unavoidable delay issue.**

Id. at ¶16. (Emphasis added.)

Again, with great respect, this Court reached the identical conclusion as the trial court in *Jones* did, to wit: because Jalowiec's motion for a new trial lacked merit due to *Belton* and its progeny, whether or not the motion for leave was timely is irrelevant.

Regardless, the holding by the Ninth District in its *Jones* decision is highly instructive for this case. Whether this Court were to grant leave to file the motion for a new mitigation trial (which I have now done) or deny it is of no real consequence. Ultimately, *Belton*

[11] With respect, it is unclear why this same "assumption" was not accorded to this Court in its original *Jalowiec* decision.

and its progeny are dispositive and Jalowiec is not entitled to a new mitigation trial based upon his *Hurst* argument.

SISTER APPELLATE DISTRICTS

In addition to the compelling case law cited above, a number of the Ninth District's sister appellate courts have also addressed *Hurst* challenges to Ohio's death penalty scheme – all have reached the same result.

THE FIRST DISTRICT – HAMILTON COUNTY

In *State v. Carter,* 1st Dist., Hamilton No. C-170231, 2018-Ohio-645, the First District, relying on *Belton* held,

> Post–Hurst, the Ohio Supreme Court recognized that, unlike the Florida statute, under Ohio law "the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence," and therefore "it is not possible to make a factual finding during sentencing phase that will expose a defendant to greater punishment."

Id. at ¶8.

THE FOURTH DISTRICT – ROSS COUNTY

In *State v. Landrum,* 4th Dist., Ross No. 17CA3607, 2018-Ohio-1280, the Fourth District, relying on *Belton* (and other issues) held,

> Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst.* In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); **337 *State v. Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

Id. at ¶19.

THE EIGHTH DISTRICT – CUYAHOGA COUNTY

In *State v. Hale,* 8th Dist., Cuyahoga No. 107782, 2019-Ohio-1890, the Eight District, relying on *Belton* and *State v. Bryan,* 8th Dist. Cuyahoga No. 105774, 2018-Ohio-1190, held,

> With regard to the substantive merit of the *Hurst* argument, we note that in *Bryan*, this court rejected a *Hurst* challenge to Ohio's death penalty scheme and stated:
>
> Post-*Hurst*, the Ohio Supreme Court recognized that, unlike the Florida statute, under Ohio law "the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence," and therefore "it is not possible to make a factual finding during sentencing phase that will expose a defendant to greater punishment." *State v. Belton* [citation omitted.]
>
> In other words, in Ohio a jury must first find a defendant guilty of an aggravating factor before the death penalty becomes a possibility.

Bryan, at ¶13.

THE TWELFTH DISTRICT – BUTLER COUNTY

In *State v. Williams,* 12th Dist., Butler No. CA2017-07-105, 2018-Ohio-1358, the Twelfth District held,

> Finally, every Ohio court of appeals that has addressed the effect of *Hurst* on Ohio's capital sentencing scheme as it existed when the court sentenced Williams has concluded that it is constitutional. *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400, ¶ 29, appeal accepted, 149 Ohio St.3d 1462, 2017-Ohio-5699, 77 N.E.3d 987; *State v. Jackson*, 8th Dist. Cuyahoga No. 105530, 2018-Ohio-276, ¶ 16; *State v. Carter*, 1st Dist. Hamilton No. C-170231, 2018-Ohio-645, ¶ 4–8; *see also State v. Mundt*, 7th Dist. Noble No. 17 NO 0446, 2017-Ohio-7771, ¶ 9–10. Accordingly, this court overrules Williams' sole assignment of error.

Id. at ¶17.

To this Court's knowledge, every court in the State of Ohio, including the United States District Court for the Southern District of Ohio – Eastern Division that has addressed a *Hurst* challenge to the constitutionality of Ohio's death penalty statutes has found the argument unpersuasive.

So do I.

JALOWIEC'S ALTERNATE ARGUMENT THAT OHIO'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE

The gravamen of Jalowiec's argument that the facts of his case worsen the implications of *Hurst* turns on the premise that the court and attorneys at his trial emphasized that the role of the jury was ". . . only to recommend punishment, nothing more."[12]

This argument also lacks merit.

First, this issue is barred by the doctrine of *res judicata.*

As far back as Jalowiec's direct appeal in1998, he raised this very issue in his twelfth assignment of error. The Ninth District made short-shrift of this argument then and I do so now.

The Ninth held,

Twelfth Assignment of Error

> The argument to the jury that their decision is a mere recommendation is unacceptable as it diminishes the responsibility of the jury.
>
> In his twelfth assignment of error, Jalowiec contends that the trial court erred by referring to the jury's decision in the penalty phase of the trial as a "recommendation" during voir dire of the potential jurors, the guilt phase of the trial, the penalty phase, and in the court's instructions to the jury during the penalty phase. We disagree. "[T]he term 'recommendation' accurately reflects Ohio law and does not diminish the jury's sense of responsibility. There is no error, plain or otherwise." *State v. Moore* (1998), 81 Ohio St.3d 22, 37, 689 N.E.2d 1. (Citation omitted.) Jalowiec's twelfth assignment of error is overruled.

State v. Jalowiec, 9th Dist., Lorain No. 96CA006445, 1998 WL 178554, 4/15/1998.

Without reviewing all of the numerous appeals, petitions, and motions Jalowiec has filed over the years, it would come as no surprise if he unsuccessfully raised this issue subsequent to his initial appeal.

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[12] Jalowiec's motion for new trial, Page 14, ¶F.

Regardless, there is nothing in the *Hurst* or *Belton* decisions that suggest that it is constitutionally problematic to inform potential jurors that the decision to impose death is a "recommendation" to the court. This was the law at the time Jalowiec was tried and convicted and remains the law today.

Moreover, the Ohio Supreme Court has repeatedly held that references by the court or attorneys to death penalty "recommendations" is not constitutionally cognizable.

For instance, in *State v. Stallings,* 89 Ohio St.3d 280, 2000-Ohio-164, the Supreme Court noted,

> In proposition of law VIII, defendant complains that the court erred by referring to the jury's penalty verdict as a recommendation. However, use of that term, while not preferred, accurately reflects Ohio law, does not diminish the jury's overall sense of responsibility, and does not constitute reversible error. (Citations omitted.)

Id. at ¶35.

Further, the Ohio Supreme Court more recently addressed this exact issue in the matter of *State v. Mason,* 153 Ohio St.3d 476, 2018-Ohio-1462, a case entirely on point (on this issue),

> While we uphold our conclusion in *Belton* that weighing is not a fact-finding process subject to the Sixth Amendment, we further conclude that even if the weighing process were to involve fact-finding under the Sixth Amendment, Ohio adequately affords the right to trial by jury during the penalty phase. Mason contends that it does not, because the process permits a jury only to *recommend* a death sentence. *See* R.C. 2929.03(D)(2). Here, he emphasizes the statement in *Hurst* that "[a] jury's mere recommendation is not enough," —— U.S. ——, 136 S.Ct. at 619, 193 L.Ed.2d 504. But he fails to appreciate the material difference between the process by which an Ohio jury reaches its death recommendation and the Florida process at issue in *Hurst.*

Mason, at ¶30.

And,

> Ohio law, in contrast, requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury an recommend a

death sentence. Ohio's scheme differs from Florida's because Ohio requires the jury to make this specific and critical finding.

Id. at ¶32.

Because there is nothing unique or novel about the manner in which Jalowiec was tried and convicted, and since his arguments herein have been repeatedly and thoroughly addressed, he suffered no constitutional infirmity at his sentencing and he is not entitled to a new mitigation trial.

V. CONCLUSION

This Court finds as a matter of law that Jalowiec's motion for leave to file a motion for a new mitigation trial is timely, that he has posited by clear and convincing evidence that he was unavoidably prevented from filing his motion for a new trial within the parameters of Crim. R. 33, and that the motion for leave is well-taken and hereby GRANTED.

As for the motion for a new trial, this Court finds that based upon *Belton* and its progeny, Jalowiec's *Hurst* argument lacks merit.

Finally, Jalowiec's alternative motion is *res judicata* and as there is nothing in the *Hurst* or *Belton* decisions that suggest that it is constitutionally problematic to inform potential jurors that the decision to impose death is a "recommendation," the motion for a new mitigation trial lacks merit on that basis as well.

Accordingly, Jalowiec's motion for a new mitigation trial is not well-taken and hereby DENIED.

IT IS SO ORDERED. No Record.

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JUDGE D. CHRIS COOK