

NO. 2001-0253

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

-vs-

QUISI BRYAN,

Defendant-Appellant

APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR RELIEF

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MEMORANDUM IN OPPOSITION

Now comes Appellee the State of Ohio, by and through Cuyahoga County Prosecuting Attorney Michael C. O'Malley and his undersigned assistant, and respectfully asks this Honorable Court to deny Defendant-Appellant Quisi Bryan's Motion for Order or Relief, filed January 11, 2017.

1. Introduction and summary.

This is another in a series of motions filed by death row inmates across Ohio seeking to reopen their cases based on the Supreme Court of the United States' decision in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016). With but one exception, this Court has denied every other *Hurst* claim to have come before it in a similar motion. *See State v. Sheppard*, Case No. 1997-1474 (motion for order or relief denied); *State v. Fears*, Case No. 1998-0019 (motion for stay of execution denied); *State v. Myers*, Case No. 1999-0395 (motion for order or relief denied); *State v. Gapen*, Case No. 2001-1518 (motion for order or relief denied); *State v. Otte*, Case No. 1994-2622 (motion for stay of execution denied); *State v. Belton*, Case No. 2012-0902 (motion for reconsideration based on *Hurst* denied); *State v. Bonnell*, Case No. 1989-2136 (motion for order or relief denied); *State v. Tibbets*, Case No. 1998-1970 (motion for stay of execution denied). This Court should do the same in this case.

2. The facts of Bryan's case.

On June 25, 2000, Quisi Bryan murdered 32-year old Cleveland Police Officer Wayne Leon at a gas station in Cleveland. Officer Leon had stopped Bryan's car for a traffic violation. Officer Leon was unaware at the time that Bryan was a serial rapist, and that multiple untested rape kits in the possession of law enforcement contained his DNA. When Officer

Leon used his radio to check on Bryan's fictitious license plate, Bryan pulled a gun from his coat and shot Officer Leon in the face, killing him instantly. Bryan then drove away.

A motorist named Kenneth Niedhammer witnessed Bryan's shooting of Officer Leon and began to follow Bryan's car. Bryan stopped his vehicle on two occasions and shot at Mr. Niedhammer. Bryan testified at trial and admitted that he killed Officer Leon, but claimed that he did so only to prevent him from discovering Bryan's parole violation for an attempted robbery conviction. Bryan was also convicted of the attempted murder of Mr. Neidhammer.

3. This Court did not find any prejudicial errors during the sentencing phase of Bryan's 2000 trial.

This Court unanimously affirmed Bryan's convictions and death sentence on direct appeal. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433. This Court found that "overwhelming evidence properly admitted during the penalty phase supports the jury's finding that the aggravating circumstances outweigh the mitigating factors." *Id.*, ¶ 208. In its opinion, this Court rejected most of Bryan's claims of prosecutorial misconduct in his twelfth proposition of law. *Id.*, ¶¶ 175-187. This Court did, however, find some instances of misconduct during closing arguments during the sentencing phase. *Id.*, ¶¶ 181-182. But this Court found any error in this regard did not rise to the level of plain error "in view of the proven aggravating circumstances and the lack of significant mitigating evidence." *Id.*, ¶ 182. As an alternative, this Court further noted that "our independent assessment of the sentence has cured any lingering impact from the prosecutor's comments." *Id.*

4. This Court did not rely upon its independent sentence evaluation to cure any prejudicial errors.

Bryan's motion misstates what this Court said in his direct appeal. Bryan claims that "[w]hen this Court was presented with errors committed by the prosecutor during the

penalty phase of trial, rather than remand for a new jury sentencing proceeding, this Court conducted an independent evaluation and reweighing of the penalty phase evidence.” Motion for Relief, p. 1. In reality, this Court found isolated instances of error that it held so insignificant as to be harmless, or that did not rise to the level of plain error, in light of the overwhelming evidence of Bryan’s guilt and the heavy weight afforded to each of the aggravating circumstances. *Bryan*, ¶ 182.

Although this Court mentioned its independent reweighing once in a single sentence in its disposition of Bryan’s twelfth proposition of law, this Court’s opinion in context makes clear that the Court found any error harmless without resorting to its independent reweighing. The Court mentioned its statutorily-mandated independent sentence evaluation as an additional level of protection for Bryan against the erroneous imposition of the death penalty. But this Court did not rely, nor did it need to rely, on its independent reweighing to cure any errors in the sentencing phase. To the contrary, this Court found that “overwhelming evidence properly admitted during the penalty phase supports the jury’s finding that the aggravating circumstances outweigh the mitigating factors.” *Id.*, ¶ 208.

To say that something is harmless beyond a reasonable doubt, or does not rise to the level of plain error, is not the same thing as relying upon this Court’s independent reweighing to cure an error so egregious that it prejudiced the jury’s verdict. Bryan is asking this Court to adopt a perfect, zero-tolerance standard whereby any error, no matter how insignificant, automatically mandates a new sentencing phase. His motion in essence argues that *Hurst v. Florida* precludes this Court from not only conducting its statutory-mandated independent sentence evaluation, but also from even applying harmless or plain error analysis to capital cases. *Hurst* simply does not say that. *Hurst* requires the jury to find the existence of any

aggravating circumstances in the case. The jury here did so. There is no evidence, and Bryan presents none, that the minor errors this Court found to be harmless so tainted the jury's verdict that they somehow invalidated any of the aggravating circumstances of which Bryan was indisputably guilty.

5. Unlike in *State v. Kirkland*, this Court did not find any errors during the sentencing phase so serious that they resulted in prejudice to the defendant.

Bryan relies heavily on this Court's decision to grant a new sentencing hearing to the defendant in *State v. Anthony Kirkland*, Case No. 2010-0854. But the facts of *Kirkland* demonstrate the distinction between this case and that one that is fatal to Bryan's claim. In *Kirkland*, this Court found prosecutorial misconduct during closing arguments in the mitigation phase so egregious that it substantially prejudiced the defendant's rights. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶¶ 78-96. This Court initially held that its independent sentence evaluation – under which this Court found that the aggravating circumstances did in fact outweigh the mitigating factors, without considering any improper argument – would cure any prejudice the prosecutor's argument had caused. *Id.*, ¶¶ 97-98.

After the Supreme Court of the United States issued its decision in *Hurst v. Florida* on January 12, 2016, however, this Court remanded *Kirkland* for a new sentencing hearing. *State v. Kirkland*, 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. This Court did not issue a published opinion in doing so, and so the parties do not know the precise basis for this Court's ruling. Nevertheless, relying upon *Kirkland*, Bryan claims that this Court has "evidently concluded that appellate reweighing is no longer permissible in light of *Hurst*." Motion for Order or Relief, p. 6.

Bryan’s motion dramatically overstates what this Court did in *Kirkland*. This Court did not say or imply that its statutorily-mandated independent sentence evaluation was now unconstitutional. See R.C. 2929.05(A). This is evident from the fact that this Court has continued to utilize its independent weighing to cure errors in a series of death penalty direct appeals following *Hurst*. See *State v. Cepec*, Slip Opinion No. 2016-Ohio-8076, ¶ 93 (“even if the judge had erred, our independent weighing provides a procedural safeguard against the arbitrary imposition of the death penalty”) (internal quotations omitted); *State v. Jackson*, Slip Opinion No. 2016-Ohio-5488, ¶ 87 (“we decline to remand this case for a new sentencing opinion. Instead, we shall cure any error in the sentencing opinion during our independent evaluation of Jackson’s capital sentence”); *State v. Montgomery*, Slip Opinion No. 2016-Ohio-5487, ¶ 155 (“[e]ven if we were to find the panel’s sentencing opinion erroneous under *Cooley*, we have previously held that serious deficiencies in the trial panel’s death penalty written opinion can be rectified by this court’s careful independent reweighing”) (internal quotations omitted); *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 127 (“[e]ven assuming that the panel erred * * * our independent sentence evaluation and reweighing can cure the effect of errors in previous death-penalty sentencing decisions”).

Even if this Court had somehow invalidated its own statutorily-mandated independent reweighing in an unpublished opinion, this Court did not rely on that independent reweighing to cure any prejudicial errors here. In *Kirkland*, this Court found what it considered to be prosecutorial misconduct so serious that it prejudiced the defendant during the sentencing phase. This Court evidently believed that in that unique case – where the error was prejudicial – reliance upon this Court’s independent reweighing to affirm the

death sentence would impermissibly substitute this Court's factual findings for the jury's tainted findings so as to sustain the sentence.

The State disagrees with this reading of *Hurst*, but that disagreement is not relevant to this case because that is simply not what happened here. No court that has reviewed Bryan's case has ever found the existence of an error so serious that it prejudiced the jury's sentencing verdict. To say that an error was harmless beyond a reasonable doubt, and then to note that the harmless nature of such an error is further confirmed by this Court's independent reweighing, is not the same thing as relying upon independent reweighing to cure an invalid aggravating circumstance. Whether *Hurst* had any application to the facts of *Kirkland* or not, it certainly has no application here.

6. *Hurst v. Florida* has no impact on Ohio's death penalty statute or on this Court's opinion in this case.

Bryan also errs in his expansive reading of *Hurst* itself. *Hurst* requires "only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty[.]" *State v. Mason*, 3d Dist. Marion No. 9-16-34, 2016-Ohio-8400, ¶ 42, quoting *In re Bohannon*, 2016 Ala. LEXIS 114, 2016 WL 5817692, *5 (Ala.2016). *Hurst*, like the cases on which it is based, "only prevents courts from using judicially found aggravating factors in its weighing process." *Id.*, quoting Bentsen, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 Va.L.Rev. 645, 677 (2004). "Because Ohio's death-penalty statute requires the jury, not the judge, to determine that an aggravating circumstance exists beyond a reasonable doubt, Ohio's death penalty statute does not violate the Sixth Amendment." *Id.* *Hurst* has no impact on this case or anything this Court said in its opinion.

7. Conclusion.

Based on all of the foregoing, the State respectfully asks this Honorable Court to deny Bryan's Motion for Order or Relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Response to Appellant's Motion for Relief was served by email this 23rd day of January, 2017 to Kathryn L. Sandford (kathryn.sandford@opd.ohio.gov), Alan C. Rossman (alan_rossman@fd.org), and Lori Riga (lori_riga@fd.org), counsel for Defendant-Appellant Quisi Bryan.

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