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

Date June 5, 2017 Case No. 95CR046840

STATE OF OHIO
Plaintiff

Anthony Cillo & Laura Dezort
Plaintiff's Attorney

VS

STANLEY JALOWIEC
Defendant

Richard Cline
Defendant's Attorney

This matter is before the Court on Defendant's Motion For Leave to File a Motion For a New Mitigation Trial.

The Motion is not well-taken and is DENIED. See Judgment Entry.

IT IS SO ORDERED. No Record.

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JUDGE D. Chris Cook

cc: A. Cillo, Chief APA
L. Dezort, APA
R. Cline, Esq.

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STANLEY JALOWIEC
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Richard Cline
Defendant's Attorney

This matter is before the Court on Defendant's Motion For Leave to File a Motion For a New Mitigation Trial, filed January 12, 2017; the State's response in opposition, filed February 13, 2017; and, Defendant's Reply to State's Response to Defendant's Motion For Leave to File Motion For New Mitigation Trial, filed March 16, 2017.

Oral argument had on May 18, 2017.

The burden prerequisite to granting a Motion For a New Trial is upon the Defendant. A motion for new trial pursuant to Crim. R. 33 is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St. 3d 71.

In the case at bar, the Defendant seeks leave to file a motion for a new mitigation trial based primarily upon a relatively recent United States Supreme Court case finding Florida's death penalty sentencing scheme unconstitutional. See: *Hurst v. Florida* (2016), 136 S.Ct. 616. Defendant opines that as Ohio's sentencing scheme in death penalty cases is similar to Florida's, he should be granted leave to move for a new mitigation trial.

In its response brief, the State posits four main objections to Defendant's Motion for Leave, to wit: 1) this court lacks jurisdiction to even consider the Motion For Leave as the Defendant's previously filed Motion For New Trial is currently pending on appeal for certiorari in the Ohio Supreme Court; 2) the motion is untimely filed and barred by *res judicata;* 3) as *Hurst, supra,* was decided in January, 2016, and Defendant's Motion For Leave was filed one-year later, in January, 2017, Defendant's delay in filing the Motion For Leave is "unreasonable," and; 4) the Ohio Supreme Court has upheld the propriety of Ohio's sentencing scheme in death penalty cases in light of *Hurst* when it decided the

matter of *State v. Belton,* 2016-Ohio-1581, which found Florida's death penalty scheme inapposite to Ohio's.

The Court will address the issues *seriatim.*

1) THE TRIAL COURT LACKS JURISDICTION TO CONSIDER THE MOTION AS THIS CASE IS ON APPEAL TO THE OHIO SUPREME COURT

On May 17, 2017, the day before the oral argument in this matter, the Ohio Supreme Court declined to accept jurisdiction of Defendant's appeal on Case No. 14CA010548. As such, this issue is moot and the matter may proceed to decision on the merits.

2) THE MOTION IS UNTIMELY FILED AND BARRED BY *RES JUDICTA*

Because this matter can be resolved based upon the analysis in Item "4" below, the Court need not address this argument.

3) AS *HURST*[1] WAS DECIDED IN JANUARY, 2016 AND DEFENDANT'S MOTION FOR LEAVE WAS FILED ONE-YEAR LATER, IN JANUARY, 2017 THE DELAY IN FILING IS "UNREASONABLE"

Because this matter can be resolved based upon the analysis in Item "4" below, the Court need not address this argument.

4) THE OHIO SUPREME COURT HAS UPHELD THE PROPRIETY OF OHIO'S SENTENCING SCHEME IN DEATH PENALTY CASES IN LIGHT OF *HURST* WHEN IT DECIDED *BELTON*[2]

On January 12, 2016, the United States Supreme Court found the State of Florida's sentencing scheme unconstitutional in death penalty cases holding, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Hurst* at ¶619.

Florida's death penalty sentencing scheme failed constitutional muster because it provided that a judge could impose death even where the jury did not find the aggravating circumstances to exist prior to judicial consideration. Put another way, a judge in Florida could *increase* the defendant's sentence to death even where a jury did not make such a finding.

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[1] 136 S. Ct. 616 (2016)
[2] 2016-Ohio-1581

Ohio's death penalty sentencing scheme, however, is different. In Ohio, *the jury* must find the requisite aggravating circumstances to exist beyond a reasonable doubt before a judge may impose death. The judge may then accept the recommendation and impose death or reduce the penalty to a term in prison (with or without) the possibility of parole. As such, in Ohio, the trial judge is unable to increase the penalty recommended by the jury, but may only reduce it.

In relying on *Hurst* to move for a new mitigation trial, the Defendant fails to explain why the Ohio Supreme Court's decision in *State v. Belton,* 2016-Ohio-1581, which was decided on April 20, 2016, three months after *Hurst,* is not dispositive.

In *Belton,* the Ohio Supreme Court distinguished Ohio's death penalty sentencing scheme from Florida's. In analyzing *Apprendi*[3], *Ring*[4] and their progeny, the Ohio Supreme Court 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." *Belton,* at ¶59.

The *Belton* court further distinguished Ohio's sentencing scheme from Florida's holding, "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 . . . 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." *Belton* at ¶59.

Ohio's approach, unlike Florida's (and Arizona's) has been directly commented on favorably by the United States Supreme Court. In *Ring, supra,* the high-court stated, ". . . the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." *Ring* at ¶608. See also: *Ring* at Footnote 6, to wit: "Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries." Ohio is included in this reference.

This Court would further note, parenthetically, that if the Motion for a new mitigation trial was granted, very little, if anything would change procedurally between the mitigation trial held over 21 years ago and the trial that would be held today. Ohio's death penalty sentencing statute remains constitutionally sound and practically unchanged. As the

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[3] *Apprendi v. New Jersey* (2000), 530 U.S. 466.
[4] *Ring v. Arizona* (2002), 536 U.S. 584

process and procedure mandated for a mitigation trial is essentially identical today to what occurred in 1996, the effort by Defendant to seek a new mitigation trial is, for all practicable purposes, an attempt to re-litigate that which has already been decided and upheld on review by multiple courts.

This Court has reviewed the Motion, Response, Reply, the applicable case law and has considered the oral arguments of the parties. Given the foregoing, and in particular that the Ohio Supreme Court in *Belton* found Ohio's death penalty sentencing scheme constitutionally sound in light of *Hurst,* this Court can find no reason advanced by *Hurst* or otherwise that would justify granting the Defendant a new mitigation hearing.

Accordingly, Defendant's Motion For Leave to File a Motion For a New Mitigation Trial is not well-taken and is hereby DENIED.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook