

IN THE SUPREME COURT OF FLORIDA

JACK DEMPSEY
FERRELL,

Petitioner,

v.

James v. Crosby, Jr.,
ETC.,

Respondent.

CASE NO. SC03-218

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Respondent, James v. Crosby, Jr., Secretary, Florida Department of Corrections, will be referenced in this brief as Respondent. Petitioner, Jack Dempsey Ferrell, the defendant in the trial court, will be referenced in this brief as Petitioner or Ferrell.

The record on appeal consists of ten consecutively paginated volumes and one volume (Volume 11) of exhibits, which will be referenced by the letter "R," followed by any appropriate page number. "Pet." will designate Petitioner's petition, followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

PROCEDURAL HISTORY

Respondent would make the following addition to the procedural history. This Court recounted the facts of the case as follows:

Ferrell and Williams were live-in lovers whose relationship was marked by verbal and physical confrontations. On April 18, 1992, neighbors overheard the couple arguing and observed Ferrell enter and exit the couple's apartment several times. Upon his final exit and before driving away in his car, Ferrell approached one of the neighbors and stated, "You better call the police, I just killed my old lady upstairs."

Williams was found lying on the apartment floor, having suffered two gun shots to the head. She died ten days later due to brain injury associated with hemorrhaging. When Ferrell was arrested he smelled of alcohol and possessed the gun that was subsequently identified as the murder weapon. At trial, Ferrell testified that the gun accidentally fired when Williams pushed him. This was refuted by the State's expert who testified that accidental firing of the gun was unlikely.

During the trial proceedings, evidence of a collateral crime was admitted when Ferrell's neighbor testified that approximately one week before the murder Ferrell told her that he had "killed one bitch and he will do it again" and "that if he went back to prison he's sure he wouldn't be coming back this time."

The mental health expert opined that Ferrell has an IQ of eighty and suffers from brain and frontal lobe damage. The expert also opined that Ferrell's drinking contributed to his mental incapacities. The jury found Ferrell guilty of first-degree murder and by a vote of ten to two recommended a sentence of death. Judge Daniel P. Dawson accepted the jury's recommendation and sentenced Ferrell to die.

Ferrell v. State, 653 So.2d 367, 369 (Fla. 1995).

ARGUMENT

Jurisdiction

This Court has jurisdiction pursuant to Article V, section 3(b)(9) of the Florida Constitution.

CLAIM I

WHETHER FERRELL CAN USE THE INSTANT HABEAS PETITION TO CHALLENGE THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY STATUTE UNDER APPRENDI/RING?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Argument

Ferrell contends that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 122 S. Ct. 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000). This Court recently rejected this claim in Bottoson v. Moore, 833 So. 2d 693, (Fla.), cert. denied, 123 S. Ct. 662 (2002), and should deny Ferrell's claim as well.

Initially, Respondent would note that Ferrell's reliance on Ring is misplaced, because Ring has no application to cases not on direct review.

Decided in June 2002, Ring, and its holding that a jury, not a judge, must make any factual findings which increase a sentence from imprisonment to death, is not implicated in this case. The Supreme Court did not, and has not, expressly made the ruling in Ring retroactive. See, e.g., Ring, 122 S.Ct. at 2449-50 (O'Connor, J.,

dissenting) (noting that current state death row inmates will not be able to invoke the principles of Ring and citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive. See Tyler v. Cain, 533 U.S. 656, 663, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (holding that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive") (quoting 28 U.S.C. S 2244(b)(2)(A)).

Moore v. Kinney, 320 F.3d 767, 771 n3 (3rd Cir. 2003).

Moreover, the Ring decision is not retroactively applicable under Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980). Under Witt, Ring is not retroactively applicable unless it is a decision of fundamental significance, which so drastically alters the underpinnings of Ferrell's death sentence that "obvious injustice" exists. New v. State, 807 So. 2d 52, 53 (Fla. 2001), *cert. denied*, 122 S.Ct. 2626 (2002). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application.

Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). The First District Court of Appeal recently conducted this analysis and concluded that:

(1) the Apprendi ruling does not operate to prevent any individual miscarriages of justice, (2) the courts have long-enjoyed the freedom to find sentence-enhancing factors beyond a preponderance of the evidence, and (3) retroactive application of the rule would result in an administrative and judicial maelstrom of postconviction litigation, we hold that the decision announced in Apprendi is not of sufficient magnitude to be fundamentally significant, and thus, does not warrant retroactive status.

Hughes v. State, 826 So.2d 1070, 1074-75 (Fla. 1st DCA 2002) (certifying the question "Does the ruling announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), apply retroactively?"); see also Figarola v. State, 2003 WL 1239911 (Mar. 19, 2003).

Next, Respondent would note that Ring, an extension of the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (1999), to death penalty

cases, is not implicated in Florida, because the maximum penalty for a capital felony in Florida is death. See e.g., Porter v. Moore, 27 Fla. L. Weekly S606 (Fla. June 20, 2002)(noting that this Court has repeatedly held that the maximum penalty under the statute is death).

Finally, Respondent would note that Ring, should it ever be applied retroactively, has no application to the facts of this case. Ferrell's death sentence was based in part on his previous conviction for a felony involving the use or threat of violence. Ferrell v. State, 653 So.2d 367 (Fla. 1995). See Jones v. State, Nos. SC01-734 & SC02-605 (Fla. May 8, 2003)(citing Bottoson v. Moore, 833 So.2d 693, 723 (Fla. 2002)(Pariente, J., concurring in result only) (explaining that "in extending Apprendi to capital sentencing, the Court in Ring did not eliminate the 'prior conviction' exception")).

CLAIM II

WHETHER FERRELL'S UNRIPE CLAIM THAT HE MAY BE INSANE TO BE EXECUTED EXHAUSTS ANY ISSUE FOR FEDERAL REVIEW?

Statement of the Issue

Appellee restates the issue because Appellant's formulation is not posed in the form of a neutral question which frames the issue to be decided by this Court.

Argument

Ferrell argues that he may be insane to be executed, and that he is raising the instant unripe claim to preserve it for federal review. (Pet., 27-29). Respondent respectfully disagrees.

Ferrell cites to Provenzano, In re, 215 F.3d 1233 (11th Cir. 2000), which relies on Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998), to support his argument that he must raise this unripe claim to preserve it for review in future proceedings and in federal court. (Pet., 28). However, Martinez-Villareal's "*Ford*"

claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time. Id. at 1622. Here, Ferrell's claim is also premature and not subject to federal review unless and until it is ripe and exhausted in the State courts.

The federal case law relied upon by Ferrell holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. § 2244(b)(2), is clearly not referring to an initial habeas petition in state court. (Pet., 29). The procedural barrier addressed by these cases concerns successive federal petitions.

CONCLUSION

Wherefore, the State, based on the foregoing arguments and authorities, respectfully requests that this Honorable Court deny the Petition for Writ of Habeas Corpus.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: **Robert T. Strain**, Assistant CCRC, and **Carol C. Rodriguez**, Assistant CCRC, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, by MAIL on May __, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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