

IN THE SUPREME COURT OF FLORIDA

SHAWN ROGERS, :

Appellant, :

v. :

CASE NO.: SC18-150

STATE OF FLORIDA, :

Appellee. :

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APPELLANT'S MOTION FOR REHEARING

Introduction

In its recent decision affirming Shawn Rogers' death sentence, this Court failed to appreciate the proper legal analysis for a crucial aspect of one claim. This Court also failed to appreciate the source of law on which that claim was founded. As to a second claim, this Court failed to appreciate the purpose underlying the applicable legal standard. Those failures were pivotal to this Court's decision.

On September 5, 2019, this Court affirmed Rogers' death sentence.¹ In reaching that decision, this Court concluded that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be made beyond a reasonable doubt. In addition, this Court essentially

¹On September 13, 2019, this Court allowed Rogers to, and including, October 10, 2019, in which to file a motion for rehearing.

concluded that, to satisfy the requirements of *Campbell v. State*, 571 So.2d 415 (Fla. 1990), and its progeny, a trial court simply has to follow a certain prescribed format when addressing the proposed mitigating circumstances.

But this Court should grant rehearing, withdraw its opinion of September 5, 2019, and issue a revised opinion. First, in concluding that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be made beyond a reasonable doubt, this Court overlooked or misapprehended two critical points of law: (1) the appropriate analysis concerns not the formal characterization of the determinations in question, but rather the operation and effect of the statutory scheme in question; and (2) even if this Court recedes in part from *Perry v. State*, 210 So.3d 630 (Fla. 2016), the Sixth and Fourteenth Amendments to the United States Constitution still require that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances be made beyond a reasonable doubt.

Second, in concluding that, to satisfy the requirements of *Campbell* and its progeny, a trial court simply has to follow a certain prescribed format when addressing the proposed mitigating circumstances, this Court overlooked or misapprehended a critical point of law: the purpose of those requirements is to ensure individualized sentencing and meaningful appellate review.

Third, if the overlooked or misapprehended points of law are properly

considered, Rogers' death sentence should be reversed and this case should be remanded for a new second-phase trial. Finally, at a minimum, if those points are properly considered, Rogers' death sentence should be reversed and this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order.

Relevant Procedural Background

I. Rogers' arguments in this Court.

Among other arguments, Rogers contended reversible error occurred when the trial court failed to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances. *See* Initial Brief pp. 42-60; Reply Brief pp. 3-23. In the process, Rogers referenced this Court's decision in *Perry*. More specifically, Rogers noted that, in *Perry*, this Court indicated the determinations at issue must be made beyond a reasonable doubt. *See* Initial Brief pp. 54-55; Reply Brief pp. 12-13, 22.

But Rogers essentially argued the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances violated his rights to trial by jury and due process under the Sixth and Fourteenth Amendments. More specifically, under the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), line of cases, the determinations at issue were the functional equivalents of elements because they increased the

maximum penalty for first-degree murder in Florida. As a result, they had to be made beyond a reasonable doubt. *See* Initial Brief pp. 42-53; Reply Brief pp. 4-5, 17-22.

On appeal, Rogers also contended reversible error occurred when the trial court considered the mitigating circumstances. *See* Initial Brief pp. 80-87; Reply Brief pp. 29-34. In the process, he referenced the general standard laid down by this Court in *Campbell*. *See* Initial Brief pp. 81, 84-86; Reply Brief pp. 30-31, 34.

But Rogers essentially argued that, to satisfy the requirements of *Campbell* and its progeny, a trial court must thoughtfully and comprehensively analyze the proposed mitigating circumstances. In particular, the court must provide reasons for its judgment. *See* Initial Brief pp. 81-87; Reply Brief pp. 30-31.

II. This Court's decision.

This Court affirmed Rogers' sentence. *Rogers v. State*, SC18-150, 2019 WL 4197021 (Fla. Sep. 5, 2019). In its opinion, this Court concluded that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be made beyond a reasonable doubt. *Id.* at *6-*7.

In support of that conclusion, this Court reasoned:

“the *Hurst* penalty phase findings are not elements of the capital felony of first degree murder. Rather, they are findings required by a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred.”

Id. at *7 (quoting *Foster v. State*, 258 So.3d 1248, 1252 (Fla. 2018)).

This Court also justified its conclusion by “explicitly” receding from *Perry*’s “mischaracterization” of *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *Rogers*, 2019 WL 4197021, at *7. More specifically, this Court declared:

To the extent that in *Perry* . . . , we suggested that *Hurst v. State* held that the sufficiency and weight of the aggravating factors and the final recommendation of death are elements that must be determined by the jury beyond a reasonable doubt, we mischaracterized *Hurst v. State*, which did not require that these determinations be made beyond a reasonable doubt.

Id.

In its opinion, this Court also essentially concluded that, to satisfy the requirements of *Campbell* and its progeny, a trial court simply has to follow a certain prescribed format when addressing the proposed mitigating circumstances. *Id.* at *9-*10. In reaching that conclusion, this Court first observed:

We have summarized the requirements for a capital sentencing order under *Campbell* and its progeny as follows:

“A trial judge must (1) expressly evaluate in his or her written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature; (2) assign a weight to each aggravating factor and mitigating factor properly established; (3) weigh the established aggravating circumstances against the established mitigating circumstances; and (4) provide a detailed explanation of the result of the weighing process.”

Id. at *10 (quoting *Orme v. State*, 25 So.3d 536, 547-48 (Fla. 2009)).

With that in mind, this Court reasoned:

Contrary to *Rogers*’ argument, the sentencing order here does expressly evaluate each proposed mitigator (including finding twenty-

five mitigators that were not found by the jury). It also decides whether the nonstatutory mitigators were truly mitigating, assigns a weight to each aggravator and mitigator properly established, and weighs the aggravators against the mitigators.

Id.

Argument

I. In its opinion of September 5, 2019, this Court overlooked or misapprehended multiple critical points of law.

“A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its . . . decision.” Fla. R. App. P. 9.330(a)(2)(A) (2019). Here, this Court overlooked or misapprehended three critical points of law.

A. In concluding that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be made beyond a reasonable doubt, this Court overlooked or misapprehended that the appropriate analysis concerns not the formal characterization of the determinations, but rather the operation and effect of the statutory scheme.

In support of its conclusion that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be made beyond a reasonable doubt, this Court reasoned:

“the *Hurst* penalty phase findings are not elements of the capital felony of first degree murder. Rather, they are findings required by a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred.”

Rogers, 2019 WL 4197021, at *7 (quoting *Foster*, 258 So.3d at 1252).

But “[t]aken together,” the Due Process Clause requirement of proof beyond a reasonable doubt and the Sixth Amendment right to jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77. And any circumstance that gives rise to “an increase beyond the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” *Id.* at 494 n.19.

With that in mind, in ascertaining which determinations increase the authorized statutory sentence for a crime, “the characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not determinative.” *Ring v. Arizona*, 536 U.S. 584, 605 (2002). Instead, the appropriate analysis “looks to the operation and effect of the law as applied and enforced by the state.” *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). Thus, “the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” *Apprendi* 530 U.S. at 494.

B. In concluding that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be made beyond a reasonable doubt, this Court overlooked or misapprehended that, even if this Court recedes in part from *Perry*, the Sixth and Fourteenth Amendments still require that those determinations be made beyond a reasonable doubt.

In support of its conclusion that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not have to be

made beyond a reasonable doubt, this Court receded from *Perry* to the extent it suggested those determinations had to be made beyond a reasonable doubt. *Rogers*, 2019 WL 4197021, at *7.

But assume *Perry* had never even suggested the determinations at issue had to be made beyond a reasonable doubt. Even then, “[t]aken together,” the Due Process Clause requirement of proof beyond a reasonable doubt and the Sixth Amendment right to jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77.

And any circumstance that gives rise to “an increase beyond the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” *Id.* at 494 n.19. Further, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the maximum penalty for first-degree murder in Florida. *See* Initial Brief pp. 48-51; Reply Brief pp. 4-5.

C. In essentially concluding that, to satisfy the requirements of *Campbell* and its progeny, a trial court simply has to follow a certain prescribed format when addressing the mitigating circumstances, this Court overlooked or misapprehended that the purpose of those requirements is to ensure individualized sentencing and meaningful appellate review.

In support of its essential conclusion that, to satisfy the requirements of

Campbell and its progeny, a trial court simply has to follow a certain prescribed format when addressing the proposed mitigating circumstances, this Court observed:

We have summarized the requirements for a capital sentencing order under *Campbell* and its progeny as follows:

“A trial judge must (1) expressly evaluate in his or her written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature; (2) assign a weight to each aggravating factor and mitigating factor properly established; (3) weigh the established aggravating circumstances against the established mitigating circumstances; and (4) provide a detailed explanation of the result of the weighing process.”

Id. at *10 (quoting *Orme*, 25 So.3d at 547-48).

With that in mind, this Court then reasoned:

Contrary to Rogers’ argument, the sentencing order here does expressly evaluate each proposed mitigator (including finding twenty-five mitigators that were not found by the jury). It also decides whether the nonstatutory mitigators were truly mitigating, assigns a weight to each aggravator and mitigator properly established, and weighs the aggravators against the mitigators.

Id.

But here, in summarizing the requirements of *Campbell* and its progeny, this Court quoted *Orme*, 25 So.3d at 547-48. And the relevant summary in *Orme* was itself a direct quote from *Fennie v. State*, 855 So.2d 597, 608 (Fla. 2003).

Most critically, in *Fennie*, immediately after summarizing the requirements of *Campbell* and its progeny, this Court declared:

[T]he constitutional requirement for individualized sentencing . . . compelled this Court to provide the *Campbell* guidelines in the first

instance. The process . . . will engender an analytical discipline at the trial court level that will, in turn, enhance the trial court's consideration of the unique circumstances surrounding each capital case and each defendant. This process will also facilitate a meaningful appellate review of capital cases by ensuring that sentencing orders accurately and fully reflect the trial court's sentencing determination. The importance of a complete understanding of the trial court's reasoning and determination cannot be understated, as it is the responsibility of this Court to conduct a proportionality review of each capital case for the purpose of fostering uniformity in our death penalty jurisprudence.

Id. (internal citations omitted).

Further, the declaration in *Fennie* was not an anomaly. Instead, it fell squarely within the *Campbell* lines of cases. For instance, this Court had previously explained:

Clearly then, the [sentencing order] can only satisfy Campbell and its progeny if it truly comprises *a thoughtful and comprehensive analysis* of any evidence that mitigates against the imposition of the death penalty. . . . If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Walker v. State, 707 So.2d 300, 319 (Fla. 1997) (emphasis added); *see also Jackson v. State*, 704 So.2d 500, 507 (Fla. 1997).

II. If the overlooked or misapprehended points of law are properly considered, Rogers' death sentence should be reversed and this case should be remanded for a new second-phase trial.

This Court decided to affirm Rogers' death sentence. That decision necessarily depended on this Court's conclusion that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not

have to be made beyond a reasonable doubt.

But the appropriate analysis concerns the operation and effect of the statutory scheme in question, as opposed to the formal characterization of the determinations in question. That being the case, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances may be findings required as part of the sentencing process, rather than elements of first degree murder. Even so, they are the functional equivalents of elements because they increase the maximum penalty for first-degree murder in Florida. As a result, those determinations have to be made beyond a reasonable doubt.

Further, even if this Court recedes in part from *Perry*, the Sixth and Fourteenth Amendments still require that the determinations at issue be made beyond a reasonable doubt. Again, those determinations are the functional equivalents of elements because they increase the maximum penalty for first-degree murder.

With all that in mind, the trial court here failed to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and whether those factors outweighed the mitigating circumstances. As a result, Rogers' death sentence should be reversed and this case should be remanded for a new second-phase trial.

III. At a minimum, if the overlooked or misapprehended points of law are properly considered, Rogers' death sentence should be reversed and this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order.

This Court's decision to affirm Rogers' death sentence also necessarily depended on this Court's essential conclusion that, to satisfy the requirements of *Campbell* and its progeny, a trial court simply has to follow a certain prescribed format when addressing the proposed mitigating circumstances. But the purpose of those requirements is to ensure individualized sentencing and meaningful appellate review. And to ensure such sentencing and review, a trial court must thoughtfully and comprehensively analyze the proposed mitigating circumstances.

With all that in mind, the trial court here may have followed the format prescribed by *Campbell* and its progeny when addressing the proposed mitigating circumstances. Even so, the court failed to thoughtfully and comprehensively analyze those circumstances. As a result, Rogers' death sentence should be reversed and this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order.

Conclusion

This Court overlooked or misapprehended that the appropriate analysis concerns not the formal characterization of the determinations in question, but rather the operation and effect of the statutory scheme in question. This Court also overlooked or misapprehended that even if this Court recedes in part from *Perry*, the Sixth and Fourteenth Amendments still require that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances be made

beyond a reasonable doubt. Finally, this Court overlooked or misapprehended that the purpose of the requirements of *Campbell* and its progeny is to ensure individualized sentencing and meaningful appellate review.

This Court should grant rehearing, withdraw its opinion of September 5, 2019, and issue a revised opinion reversing Rogers' death sentence and remanding this case for a new second-phase trial, or at least for a new *Spencer* hearing followed by the issuance of a revised sentencing order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer A. Donahue, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Shawn Rogers, #166626, Union C.I., P.O. Box 1000, Raiford, FL 32083, on this 10th day of October, 2019.

Respectfully submitted,

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