Commonwealth of Kentucky
Supreme Court
2008 – SC –000383 – MR

Shawn Windsor — Appellant

v.

Appeal from Jefferson Circuit Court
No. 04-CR-000001
Death Penalty Case

Commonwealth of Kentucky — Appellee

Reply Brief for Appellant , Shawn Windsor

Submitted by

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Certificate of Service

I hereby certify that copies of this Brief were delivered or mailed to Mr. R. David Stengel, Commonwealth's Attorney, 514 W. Liberty Street, Louisville, Ky. 40202, and to Hon. Martin McDonald, Judge, Jefferson Circuit Court, Division 6, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202, on April 2, 2009. A copy was mailed to Hon. J. Hays Lawson, Assistant Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, Ky. 40601, on this same date. The record on appeal was not withdrawn by counsel.

J. David Niehaus

Introduction

In this Brief Appellant replies to Arguments I, II, III, and IV made by the Commonwealth.

Appellant believes that the issues in the remaining arguments are adequately addressed in his first brief and that nothing in strict rebuttal is required.

Appellant also addresses an issue as to the nature of this appeal raised by a comment found on page 24 of the Appellee's Brief.

Table of Points and Authorities

(1). Does Appellant's change of heart make a difference to this appeal/review?

On page 24 of the Appellee's Brief, the following paragraph appears:

> "Finally, Appellant, or more precisely, Appellant's counsel argue (sic) that Appellant has changed his mind about the death penalty. That he "no longer desires to be put to death." There's nothing in the record to support this assertion. Moreover, it's impossible to see how this assertion has any relevance to the issues on this appeal, which concern a review of the proceedings below. Avenues other than direct appeal exist for raising arguments concerning events that occur after entry of judgment and final sentence."

"Appellant's counsel" will not interpret the remark made by the attorney for the government as a claim that counsel is acting in any way contrary to the express desires of Mr. Windsor. Appellant agrees with the government that the face of the record on appeal does not reflect any change of heart. That is to be expected in an appeal under §115 of the Constitution. But the government is wrong when it claims that the Court cannot notice Appellant's statement and that change is irrelevant to this appeal.

The government's argument overlooks strong circumstantial proof of Appellant's determination to avoid the penalty of death. Mr. Windsor took action to recover his constitutional right of appeal when it was erroneously taken away on motion of the Commonwealth's Attorney. [Windsor v. Commonwealth, 250 S. W. 3d 306 (Ky., 2008)]. And unlike Marco Chapman, Mr. Windsor has not

papered the record of this case with applications to dismiss his appointed attorney on the ground that he does not want to appeal.[1]

As to the relevancy of Mr. Windsor's change of heart, the Court need only turn to pages 9-10 of the Appellee's Brief. There the government cites to Chapman to argue that "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant" and that courts should respect the defendant's right to accept criminal responsibility.[Chapman v. Commonwealth, 265 S. W. 3d 156, 175 (Ky., 2007)]. If a defendant's desire to pay for a crime with his life is a relevant concern in the Appellee's Brief, Mr. Windsor's change of mind must be equally relevant. The Court of Justice does a criminal defendant no favors by honoring a previously expressed desire to suffer punishment by death when there is any indication from any source that the defendant has changed his mind.

There has always been a logical disconnect in arguments by the government in support of a decision to seek death as criminal punishment. One of the four purposes of government is protection of life. [Constitution, §4]. This purpose finds expression in statutes like KRS 311.710(5) where the legislature announces a policy to "recognize and to protect the lives of all human beings regardless of their degree of biological development. . ." KRS 216.306 creates a

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[1] The Court may take notice of its own records pursuant to KRE 201(b)(2). Thus the Court may take notice that on June 4, 2007, Mr. Chapman filed a three page document which, in numerical paragraph 7, stated that "it is not my desire to continue this appeal, and I intend to waive all future appeals as soon as I am able." [File # 2005-SC-000070-MR].

statutory cause of action for injunction against persons who might be assisting in suicide. KRS 503.100 excuses the use of physical force to prevent a suicide.

Yet when a person says that he wishes to die as punishment for crime, the government, at least the Executive Branch, is all for it. Respectfully, the government's argument here lacks logical weight. The government argues in essence: "Ignore what Mr. Windsor says now. The only thing that matters is what he said in 2006." The Court of Justice should always err on the side of life.

The Attorney General's argument also overlooks an important constitutional principle. Constitution §1(1) declares as "inherent and inalienable" the right of "all men" to defend their lives and liberties. These words mean more than the right to respond to unwarranted physical attack. They also preserve the right to defend life against the state.[2] By definition, an "inherent" right is not vouchsafed to the individual by government. The government cannot take away what it had no power to give in the first place. An "inalienable" right cannot be sold or given away.

Under the plain language of Section 1(1), it is never too late for a citizen to assert the right to defend his life. Some, like Marco Chapman, may refuse to exercise the right. But others, like Appellant, must be heard whenever they assert the right to defend their lives. The government's argument on this point must be rejected.

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[2] The Bill of Rights precludes unwarranted government action.[Cooper v. Commonwealth, 899 S. W. 2d 75, 77-79 (Ky., 1995)].

(2). The government has misconstrued the argument concerning competency. [Appellee's Argument I, page 7].

The Appellee states that "[t]he question raised here is simply whether Appellant's decision to plead guilty and to ask for the death penalty were sufficient facts in and of themselves to require the trial judge to order a second competency hearing."

Appellant has carefully reviewed his Argument (1) and respectfully disagrees with the government's characterization of this issue. After a three page review of proceedings in the Circuit Court, Appellant stated the standard to be applied on appeal. [p. 9]. On pages 10-11 of the Appellant's brief, Appellant referred to the number of examinations conducted in the Marco Chapman case and then reviewed the psychiatric notes bearing on Mr. Windsor's condition. Appellant respectfully maintains that the government has misconstrued the issue presented and has therefore reached a wrong result.

(3). The government has misconstrued Appellant's argument concerning the burden of proof. [Appellee's Argument II].

Appellant respectfully suggests that the Appellee's Brief goes beyond the level of analysis needed to rule on Appellant's claim. Argument (2) in the Appellant's Brief is based on two uncomplicated points. The first is that language in the Judgment creates a clear inference that Judge McDonald believed death to be the "default" penalty unless mitigating evidence could "excuse or justify" Appellant's actions. [p. 12]. The second point, on page 14 of the Appellant's

Brief, is that the Judgment did not state that the judge had found beyond a reasonable doubt that death was the appropriate punishment.

If the judge balanced mitigation and aggravation and required a showing that mitigation justified a penalty less than death, this would be a violation of KRS 532.025. As Mr. Windsor clearly stated at the bottom of page 12 of the Appellant's Brief, KRS 532.025 does not require weighing. The problem in the case, as shown at the top of page 12, was that Judge McDonald's words in the Judgment made it appear that he had applied a standard selecting death as the punishment unless mitigating evidence excused the offense or justified a lesser penalty. A defendant does not have to prove himself fit to live under any reading of KRS 532.025. The sentencing judge may well have misapplied KRS 532.025, resulting in an invalid sentence.

Appellant went on to note that KRS 532.025 has been misread for a number of years. The analysis on pages 13-15 of the Appellant's Brief applies basic rules of statutory interpretation as to enactment of later statutes.

KRS 500.070(1) and KRS 532.025 are parts of the same Penal Code. Both the 1971 and 1974 *Commentaries* to this section agree that KRS 500.070 "is a special definition section to apply generally throughout the code." [*Penal Code, 1971 Final Draft*, § 135, p. 8; West *2009 Criminal Law of Kentucky*, p. 721]. Thus, in the absence of convincing evidence to the contrary, courts must assume that KRS 500.070(1) applies to every aspect of a criminal proceeding, including sentencing under KRS 532.025.

The government's arguments about the 8th Amendment and double jeopardy are, respectfully, irrelevant. Appellant's argument is a simple statutory construction argument in which the Court must determine whether or not the penalty to be imposed is an element of a criminal "case." If so, the sentencer must be satisfied beyond a reasonable doubt that the penalty settled upon is appropriate.

The Court must presume that when it enacted KRS 532.025 the 1976 Extraordinary Session of the legislature anticipated the consequences referred to on pages 14-17 of the Appellee's Brief. The 1976 legislature surely knew that KRS 500.070(1), enacted as part of the Penal Code in 1974, was on the books and likely to affect the interpretation and application of the death penalty scheme. [Osborne v. Commonwealth, 185 S. W. 3d 645, 649 (Ky., 2006)]. The legislature must be presumed willing accept the consequences. The policy judgment as to the acceptability of these consequences in this instance is legislative, not executive or judicial. [Cosby v. Commonwealth, 776 S. W. 2d 367, 369 (Ky., 1989); Wilfong v. Commonwealth, 175 S. W. 3d 84, 92 (Ky. App., 2004)].

(4). The government's Argument III disregards rules of construction.

The government's argument on page 17 of its brief cites two cases in support of its claims that KRS 532.025 authorizes "judge sentencing" and that a defendant can waive jury sentencing. Appellee seems to argue that these

opinions, which do not consider the effect of KRS 532.030(4), can supersede the plain language of that provision.

Although the government correctly refers the Court to Chapter 15 of the Acts of the 1976 Extraordinary Session, its investigation of the statutes does not go far enough. The government's argument fails to perceive that KRS 532.030(4) and KRS 532.025 were not enacted as part of the same bill. Rather, the language of KRS 532.030(4) did not exist until 1984. [1976 Ex. Sess., Ch 15, §3; 1984 Kentucky Acts, Ch. 110, §2(4)]. (App, p. 1).

The legislature is always presumed to know what the existing law says when it enacts an new statute. [Lewis v. Jackson Energy Co-op Corp., 189 S. W. 3d 87, 93 [Ky., 2005]. Surely, the 1984 General Assembly also knew that enactment of KRS 532.030(4) would work a material change in the procedure by which juries and judges determined the penalty in death penalty cases.

Knowing what KRS 532.025 already said, the 1984 legislature chose to add a new subsection to KRS 532.030(4) that requires jury instructions "in all cases." The legislature did not say "all jury cases." It said "all cases." Clearer words of intent are not possible.

Since 1984, every judge in every capital case has been under a duty to instruct a jury as to penalty. [KRS 532.030(4)]. Necessarily, this presupposes that a judge will empanel a jury even in guilty plea cases.There is no way to wiggle around this definite and mandatory language because, as this Court has recently held, sentencing is jurisdictional. [Cummings v. Commonwealth, 226 S.

W. 3d 62, 66 (Ky., 2007)]. Even if there were doubt as to the legislature's intent, the Court is under a duty to resolve such doubt in favor of life and in favor of the person convicted. This is the rule of lenity. [Young v. Commonwealth, 50 S. W. 3d 148, 162, fn. 23 (Ky., 2001)]. Thus, the judge in this case erred by not submitting the question of penalty to a jury. The penalty cannot stand.

(5) The government's Argument IV does not address the issue raised by Appellant.

In its Argument IV, the Commonwealth relies on a claim that the right to trial by jury is personal rather than structural. (Appellee's Brief, p. 18; 19;20). This would, of course, make waiver of jury sentencing possible. The government relies on Section 7 of the Bill of Rights to reach this conclusion.[3] Appellant respectfully disagrees with the contention and with the reliance on Section 7. This case is not about the right to jury trials. It deals only with jury sentencing after entry of an unconditional guilty plea.

Section 7 does not deal with pleas, as reference to its language shows. It reads

> "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

Three matters are involved in Section 7. First, the procedural components of a jury trial at common law cannot be done away with by the legislature or by the courts. This is prohibited by the "ancient mode" language. And the right to jury

[3] Argument premised on the federal constitution is irrelevant. The Article III mandate of jury trial pertains only to trials conducted under the federal jurisdiction established by Article III. The plain language of the 6th Amendment shows that the right to trial by jury is personal to "the accused."

trial "shall" remain inviolate. However, the "inviolate" right is subject to modifications made elsewhere in the Constitution.

Section 7 is therefore correctly read as a mandate to conduct jury trials in all cases in which jury trials were permitted before adoption of the Constitution. [Carson v. Commonwealth, 1 A. K. Marsh. 213, 214, 8 Ky. 290, 291 (1818)]. It has nothing to do with guilty plea cases.

Cornelison v. Commonwealth, 84 Ky. 583, 2 S. W. 235 (1886), the case on which Appellant relies, discusses guilty pleas, noting that such pleas obviate the need for a jury to determine guilt or innocence. [p. 592; p. 236]. But in addition to explaining that guilty pleas were permissible, Cornelison described the procedure that followed entry of the plea:

> "When the plea of guilty has been entered, the Commonwealth to increase, or the defendant to mitigate the punishment, has the right to introduce testimony to enable the jury to render a true verdict when making inquiry as to the extent of punishment." [p. 592; p. 236].

In 1886, at least, juries had to be empanelled for sentencing after the entry of a guilty plea. The reason for the procedure was also stated in Cornelison. Under the "State Constitution" the "extent of punishment" was not entrusted to "the arbitrary will of the judge." Rather, the jury must "fix the punishment." [p. 597; p. 238].

The Appellee's Brief deals with a number of subjects. However, it fails to deal with the one case precedent that mandates jury sentencing even in guilty plea cases. The flaw in the government's argument is its apparent belief that the

issue presented here is one of good social and administrative policy rather than one of applying the language of Section 11 in its appropriate context. One of the strong points of state constitutional analysis is its simplicity. That simplicity is shown in the pattern of analysis that follows.

This Court has decided that the procedures for imposing the death penalty are properly determined by the legislature. [Cosby v. Commonwealth, 776 S. W. 2d 367, 369 (Ky., 1989)]. It has thus disclaimed any right to second guess the policy determinations of the legislative branch. [Constitution, §28]. Under §29 of the Constitution, the General Assembly has power to enact any statute its desires, subject to one limitation only. It cannot enact a statute that conflicts with the Constitution. [Head v. Hughes, 1 A. K. Marsh. 275, 8 Ky. 372 (1818); Holsclaw v. Stephens, 507 S. W. 2d 463, 469 (Ky., 1973)].

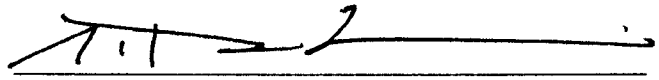
KRS 532.025 makes the jury an advisory panel. The jury can only recommends a sentence. A judge may impose the recommended sentence or, on his or her own motion, impose a more severe sentence. The wisdom or foolhardiness of KRS 532.025 is irrelevant to the issue at hand. The only question before the Court is whether or not Section 11 of the Constitution requires a jury sentence in all cases, including cases in which the defendant pleads guilty. Cornelison says yes. The Commonwealth has been unable to find any cases that say no. Its argument therefore is not well taken. KRS 532.025, to the extent it relegates the jury to an advisory role, is unconstitutional and, is,

therefore, void *ab initio*. [Constitution, §26; Spanish Cove Sanitation, Inc. v. Metropolitan Sewer District, 72 S. W. 3d 918, 921 (Ky., 2002)].

A statute that violates the Bill of Rights is never valid for any purpose because the legislature cannot act contrary to its mandate. As noted in Ely v. Thompson, 3 A. K. Marsh 981, 10 Ky. 70 (1820), the Constitution restricts the power of the legislature. "The powers which they are therein forbidden to exercise, they do not possess, and can not exercise over any man or class of men, be they aliens, free persons of color, or citizens." [p. 985; p. 75]. Ely pointedly cited the language of Section 26 to emphasize this point. KRS 532.025 has never been valid and cannot be used to impose enhanced penalties on Appellant.

Conclusion

The Conclusion to the Appellant's Brief contains a list detailing the specific relief Appellant seeks in this combined appeal of right and statutory review. As shown in the Appellant's Brief and in this Reply, there is substantial doubt as to Appellant's mental state at the time he entered his plea and asked for the death penalty. At the same time, serious errors were made by failing to empanel a jury for a sentencing hearing. But even had a jury been seated, the sentence would have been invalid. KRS 532.025 makes the jury's sentencing decision advisory only in violation of Section 11 of the Constitution. Appellant urges the Court at minimum to vacate the sentence imposed and to remand for jury sentencing pursuant to KRS 532.055.



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