

Summary of SC76981, *State of Missouri v. Roderick Nunley*

Original proceeding that originated in Jackson County

Argued and submitted January 5, 2011; opinion issued May 31, 2011

Attorneys: Nunley was represented by Michael J. Gorla, a solo practitioner from St. Louis, (314) 621-1617; Jennifer Herndon, a solo practitioner from Florissant, (314) 831-5531; and Susan Hunt of the Law Offices of Susan M. Hunt in Kansas City, (816) 221-4588. The state was represented by Michael J. Spillane of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man who pleaded guilty to killing a teenage girl because he wanted to avoid being sentenced by a jury ultimately was sentenced to death by a judge. He now moves this Court to overrule its mandate (that made final its opinion affirming his conviction and sentence) and vacate his sentence so he can have a jury trial as to his punishment. In a decision written by Chief Justice William Ray Price Jr. and joined by three other judges, the Supreme Court of Missouri overrules the man's motion. Because the man pleaded guilty and waived jury sentencing for the strategic reason of avoiding jury sentencing, his federal and state constitutional rights were not violated. His original plea and waiver remained valid after this Court remanded (sent back) his case for resentencing. Because he pleaded guilty and waived jury sentencing, the later-decided cases of *Ring v. Arizona* and *State v. Whitfield* do not apply. In addition, this Court did not err in its proportionality review of the man's death sentence because the applicable law regarding proportionality review described in *State v. Deck* and *State v. Dorsey* is not retroactive.

In an opinion concurring in part and dissenting in part, Judge Laura Denvir Stith agrees that the man admitted that he knowingly, voluntarily and intelligently relinquished his statutory right to a jury determination of punishment, and that if one validly can waive a constitutional right to a jury determination of punishment before that right even has been recognized, he did so. But Judge Stith believes that under United States Supreme Court precedent, a defendant such as the man here cannot waive a constitutional right that has not yet been recognized, the waiver of which is not implicit in his plea. She also would delineate more clearly that the United States Supreme Court held that even a defendant who pleads guilty has a separate right to a jury trial of punishment unless it is waived.

Facts: Roderick Nunley and a co-conspirator, Michael Taylor, kidnapped a teenage girl in Jackson County in March 1989 and, after Taylor raped her, helped stab her and left her in the trunk of a stolen car, where she died. Nunley pleaded guilty to first-degree murder, armed criminal action, forcible rape and kidnapping. He waived jury sentencing for strategic reasons because he was afraid that a jury might sentence him to death. After a three-day sentencing hearing, the judge sentenced Nunley to death. He subsequently sought post-conviction relief, which was denied. He appealed. This Court vacated the death sentence and remanded the case for a "new penalty hearing, imposition of sentence, and entry of judgment." After the first judge

recused (removed himself from the case), a second judge was assigned. Nunley filed a motion to withdraw his guilty plea; the court overruled the motion. He then filed a motion for reconsideration or, alternatively, jury sentencing, which was overruled following a January 1994 hearing. Following an April 1994 hearing on sentencing, the second judge sentenced Nunley to death for the murder conviction. On appeal, this Court upheld Nunley's guilty plea and sentence. *State v. Nunley*, 923 S.W.2d 911 (Mo. banc 1996). This Court ultimately issued an order setting Nunley's execution date for October 20, 2010. In September 2010, Nunley filed a motion to recall this Court's mandate. This Court overruled the motion on the merits, but two days before the execution date, the federal district court stayed Nunley's execution pending this Court's clarification as to why it overruled the motion to recall the mandate. Both the 8th Circuit court of appeals and the United States Supreme Court upheld the stay. This Court subsequently directed the parties to brief the issues raised in Nunley's motion.

OVERRULED.

Court en banc holds: (1) Because Nunley pleaded guilty and waived jury sentencing, his federal and state constitutional rights were not violated. In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the United States Supreme Court held that a defendant in a capital murder case has the right to have a jury determine the statutory aggravating circumstances necessary to impose the death penalty. This Court subsequently held that *Ring* applies retroactively to defendants who did not waive jury trials and whose cases became final before the Supreme Court's ruling. *State v. Whitfield*, 107 S.W.3d 253, 268-69 (Mo. banc 2003). As noted in *State ex rel. Taylor v. Steele*, also decided this day, *Whitfield's* retroactivity holding is limited to cases in which a judge imposed the death sentence after the jury was convened but was unable to reach a verdict as to punishment. Since *Whitfield*, *Ring* has been applied retroactively in nine Missouri cases, none of which involved a situation in which a defendant strategically pleaded guilty and waived jury sentencing because he was afraid that a jury would sentence him to death, as Nunley did in this case. During Nunley's original guilty plea hearing, the first judge explained that by pleading guilty, Nunley was waiving several constitutional rights, including his right to jury sentencing. Nunley testified that he understood this waiver. In Missouri, a guilty plea generally waives all nonjurisdictional defects, including statutory and constitutional guarantees. As such, *Ring* does not apply to defendants such as Nunley who pleaded guilty and validly waived his right to jury sentencing.

(a) Nunley's original guilty plea and waiver of jury sentencing remained valid after his case was remanded for resentencing. *Nunley*, 923 S.W.2d at 919, 922; *see also State v. Taylor*, 929 S.W.2d 209, 215-16 (Mo. banc 1996). Nunley also had no substantial or legitimate expectation or independent federal right to be sentenced by the same judge to whom he pleaded guilty. *See, e.g., Taylor v. Bowersox*, 329 F.3d 963, 968-69 (8th Cir. 2003).

(b) Section 565.006.2, RSMo, is constitutional as applied to Nunley. This statute provided that a defendant who pleaded guilty to a homicide offense would not be permitted a jury trial as to the punishment to be imposed. *Whitfield* does not apply to this case; it applied to a different statute that permitted a judge to make the necessary findings required for the death penalty when a jury deadlocked as to punishment. Nunley could

have gone to trial and been sentenced by a jury had he wanted, but he pleaded guilty to avoid jury sentencing. As such, he cannot claim now that the state deprived him of a jury.

(c) Nunley provides no support for his claim that his state constitutional rights were violated. Although he makes mention of certain constitutional provisions he says were violated, he offers no argument in his brief to support his claims. Accordingly, these claims are deemed abandoned.

(2) This Court did not violate Nunley's federal or state constitutional rights by limiting its proportionality review to similar cases in which the death sentence was imposed. In *State v. Deck*, 303 S.W.3d 527, 555 (Mo. banc 2010) (J. Stith concurring), and *State v. Anderson*, 306 S.W.3d 529, 544-45 (Mo. banc 2010) (J. Breckenridge concurring), a majority of this Court held that its proportionality review mandated by section 565.035.3, RSMo, requires consideration of all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life in prison without the possibility of probation or parole. In *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. banc 2010), this Court clarified that *Deck* and *Anderson* state the applicable law with regard to its proportionality review. A state supreme court is not required to make retroactive its new construction of a state statute. *Wainwright v. Stone*, 414 U.S. 21, 23-24 (1973). A defendant is entitled to the proportionality review in the manner provided by law at the time of that review, and the proportionality review as provided by *Deck*, *Anderson* and *Dorsey* is not to be applied retrospectively. *State v. Clay*, No. SC78373 (order entered December 9, 2010); *Clay v. Bowersox*, No. 11-1016 (8th Cir. January 6, 2011).

(3) Because Nunley did not raise any issues related to whether the sentencing court violated *United States v. Blakely*, 542 U.S. 296 (2004), or whether he could waive his constitutional right to jury sentencing that was not established until later in *Ring*, he waived these issues, and they are not subject to this Court's review. But because the dissent addresses both, and the federal district court raised the latter, this Court will discuss them only in gratis (as a favor, with no precedential value attached).

(a) This case is distinguishable from *Blakely*, which extended *Ring* by declaring that the Sixth Amendment right to jury sentencing applies even when a defendant pleads guilty. 542 U.S. at 305-06. Unlike the defendant in *Blakely*, Nunley was not surprised by the judge's sentence. Nunley knew the judge would consider whether to sentence him to death. Nunley admitted to all the facts of the crime as well as the statutory aggravators required by section 565.030.4(1), and he wanted a judge, not a jury, to make all further determinations in reaching his sentence. These determinations included whether the circumstances to which he had admitted warranted imposing the death sentence and whether the evidence in mitigation of the sentence was sufficient to outweigh the evidence in aggravation. As such, Nunley received the process and decisionmaker he requested; he just did not get the result he desired. As noted in *Taylor*, also decided today, *Blakely* does not extend Sixth Amendment protections to defendants who strategically plead guilty and purposefully waive jury sentencing.

(b) Nunley's waiver of his statutory and constitutional rights to jury sentencing when he pleaded guilty remained valid even though it was made before *Ring*. When Nunley

pleaded guilty in 1991, state statutes gave him the right to be sentenced by a jury if he desired. The record supports that Nunley knew he had a right and an opportunity to be sentenced by a jury, that the judge described this right to him in constitutional terms, that he waived this right to avoid jury sentencing, and that his waiver was what he wanted rather than an adverse consequence of pleading guilty. Neither *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring* nor *Blakely* created a right to be sentenced by a jury that Nunley did not already have or understand; rather, these cases provided the United States Constitution as an additional source of this right. This does not make Nunley's waiver "unknowing," and the record shows that Nunley testified he was giving up "constitutional rights" by pleading guilty. Further, Nunley's case is distinguishable from *Halbert v. Michigan*, 545 U.S. 605 (2005), which held that Michigan's practice of denying counsel to defendants who pleaded guilty or no contest violated due process and equal protection. The trial court explicitly told Nunley, "simply and directly" and in constitutional terms, that he would not be sentenced by a jury if he pleaded guilty. Whereas the defendant in *Halbert* waived a right to his detriment, Nunley waived his rights because he wanted to avoid jury sentencing. He cannot now claim his constitutional rights were violated when he received exactly what he requested.

Opinion concurring in part and dissenting in part by Judge Stith: The author would hold that Nunley is entitled to habeas relief because under *Halbert v. Michigan*, 545 U.S. 605 (2005), a defendant cannot waive a constitutional right that was not yet recognized at the time of the plea and the assertion of which is not inherently inconsistent with the plea. *Halbert* held that the defendant could not have waived his *constitutional* right to counsel on appeal because, at the time he entered his plea, the defendant – along with other defendants convicted on their pleas – had no recognized right to appointed appellate counsel that he could choose to waive. Here, Nunley did not know that he had, and therefore could not waive, his Sixth Amendment right to jury sentencing, for that right had not yet been recognized at the time of his plea.

The author agrees with the principal opinion's recognition that *Blakely v. Washington*, 542 U.S. 296 (2004), clarified what was implicit in the holdings of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), that even those who plead guilty have a separate right to jury trial on punishment – unless, of course, as discussed in detail above, that right is waived knowingly, voluntarily and intelligently. As such, pleading guilty in itself does not waive one's right to a jury trial. But the author suggests that the principal opinion causes confusion by nonetheless citing to various non-Missouri cases that were decided either before *Blakely* or so soon after *Blakely* was decided that they did not take account of *Blakely*'s holding. The one cited exception, *State v. Piper*, 709 N.W.2d 783 (S.D. 2006), actually held that, in light of *Blakely*, it would violate the Sixth Amendment not to give a defendant the opportunity to try the issue of punishment to the jury, even when the defendant has chosen to plead guilty, unless defendant knowingly chooses to waive that right.