DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,
Petitioner,

v.

FIDEL LOPEZ,
Respondent.

No. 4D17-425

[May 31, 2017]

Petition for writ of prohibition to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona M. Holmes, Judge; L.T. Case No. 15-012208 CF10A.

Pamela Jo Bondi, Attorney General, Tallahassee, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, for petitioner.

Howard Finkelstein, Public Defender, and Diane M. Cuddihy, Chief Assistant Public Defender, Fort Lauderdale; and Carey Haughwout, Public Defender, and Gary Lee Caldwell, Assistant Public Defender, West Palm Beach, for respondent.

PER CURIAM.

The State petitions for a writ of prohibition from the trial court's order granting the defendant's Motion to Prohibit Death as a Penalty in a pending first-degree murder prosecution. We have jurisdiction. *State v. Jones*, 209 So. 3d 6, 9 (Fla. 2d DCA 2016). We grant the petition and quash the trial court's order.

The trial court precluded the State from death-qualifying a jury and from seeking the death penalty for two reasons: (1) the death penalty statute then in effect was found partially unconstitutional in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), so there was no constitutional procedure in place for imposing the death penalty; and (2) the grand jury's indictment did not allege the "aggravating factors" that the State intended to prove at sentencing.

As to the trial court's first reason, the Florida Supreme Court has since held that the death penalty statute could be constitutionally applied in pending prosecutions if the jury is unanimous in recommending death. *Evans v. State*, 42 Fla. L. Weekly S200 (Fla. Feb. 20, 2017). The Florida Legislature enacted Chapter 2017-1, Laws of Florida (effective March 13, 2017), which amends the portion of the statute found problematic in *Perry* to require a unanimous jury recommendation to impose a death sentence. Thus, on this point, the State has established a basis for relief.

As to the second reason, a long line of precedent from the Florida Supreme Court holds that aggravating factors need not be charged in an indictment. *See, e.g.*, *Miller v. State*, 42 So. 3d 204, 215 (Fla. 2010); *Smith v. State*, 151 So. 3d 1177, 1182-83 (Fla. 2014); *Tai A. Pham v. State*, 70 So. 3d 485, 496 (Fla. 2011); *Rogers v. State*, 957 So. 2d 538, 554 (Fla. 2007); *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006); *Porter v. Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003); *Sireci v. State*, 399 So. 2d 964, 970 (Fla. 1981). Regardless, our review of the indictment in this case finds that it adequately alleged the aggravating factors necessary to support the death penalty. Accordingly, the State has established a basis for relief on this point as well.

We grant the petition and quash the trial court's order. This decision does not preclude defendant from raising claims relating to these issues on appeal if necessary.

Petition granted. Order quashed.

CIKLIN, C.J., and KLINGENSMITH, J., concur.
WARNER, J., concurs specially with opinion.

WARNER, J., concurring specially.

I concur in the majority opinion, because the Florida Supreme Court has not overruled its prior precedent that aggravating factors do not have to be alleged in the indictment.

The trial court reasoned that *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), recognized that "aggravating factors," which must be proven at sentencing in order to impose a death sentence, are "elements" of a "capital murder" offense. *See Hurst*, 202 So. 3d at 53-54 ("[J]ust as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the

jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury."). Therefore, the court concluded that, like other elements, these facts must be charged in the grand jury's indictment.

Although *Hurst's* reference to aggravating factors as elements may call into question the court's prior rationale for its position that aggravating circumstances do not need to be pled in an indictment, the Florida Supreme Court has said that it does not silently overrule itself. *Puryear v. State*, 810 So. 2d 901, 905-06 (Fla. 2002). Absent a clear statement from the Florida Supreme Court receding from its prior holdings, its precedent must be followed.

* * *

Not final until disposition of timely filed motion for rehearing.