

SUPREME COURT OF NEBRASKA

State v. Hessler

305 Neb. 451 (2020) · No. No. S-19-652 · Decided April 3, 2020

SUMMARY

The Nebraska Supreme Court affirmed the denial of Jeffrey Hessler’s successive motion for postconviction relief without an evidentiary hearing. The court held that *Hurst v. Florida* did not announce a new rule of law and therefore could not trigger the one-year limitations period under Nebraska’s Postconviction Act. The court further explained that, even if timely, Hessler’s constitutional claims lacked merit under *McKinney v. Arizona*.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Stacy, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Funke, J.; Papik, J.
JURISDICTION	Nebraska
DECIDED	April 3, 2020
DOCKET	No. S-19-652
DISPOSITION	affirmed
PROCEDURAL POSTURE	Jeffrey Hessler appealed the denial of a successive motion for postconviction relief, which the district court dismissed as time barred without an evidentiary hearing.
STANDARD OF REVIEW	The court reviews de novo whether a postconviction applicant alleged sufficient facts to demonstrate a constitutional violation or whether the record and files affirmatively show that the applicant is entitled to no relief. Whether a postconviction claim is procedurally barred is a question of law reviewed independently of the lower court’s ruling.
PRECEDENTIAL VALUE	published and precedential
PARTIES	Jeffrey Hessler v. State of Nebraska

TOPICS

state post-conviction relief successive petitions sentencing sixth amendment
cruel and unusual punishment

PRACTICE AREAS

state post-conviction relief

criminal procedure

capital sentencing

appellate procedure

QUESTIONS PRESENTED

1. Whether *Hurst v. Florida* constituted a newly recognized constitutional right that triggered Nebraska's one-year postconviction limitations period under Neb. Rev. Stat. § 29-3001(4)(d).
2. Whether Hessler's successive postconviction claims were time barred.
3. Whether Nebraska's capital sentencing scheme violated the Sixth, Eighth, or Fourteenth Amendments under *Hurst* and related precedent.
4. Whether the district court properly denied postconviction relief without an evidentiary hearing.

HOLDINGS

1. *Hurst* did not announce a new rule of law and therefore could not trigger the one-year statute of limitations under Neb. Rev. Stat. § 29-3001(4)(d).
2. Hessler's postconviction claims were time barred because the only triggering event on which he relied, *Hurst*, did not qualify under § 29-3001(4)(d).
3. Even if Hessler's claims were not time barred, they would not entitle him to postconviction relief because the Sixth Amendment does not require a jury to weigh aggravating and mitigating circumstances or make the ultimate capital sentencing decision within the permissible sentencing range.

KEY QUOTATIONS

“Hurst did not announce a new rule of law, and thus it cannot trigger the 1-year statute of limitations under § 29-3001(4)(d).” (at 455)

“Under Ring and Hurst, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.” (at 456)

FACTUAL BACKGROUND

In 2004, a jury convicted Jeffrey Hessler of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony, and he received a death sentence for murder. After unsuccessful direct and postconviction challenges, Hessler filed a successive motion approximately ten months after the United States Supreme Court decided *Hurst v. Florida*. He argued that *Hurst* constituted a new triggering event under Nebraska's one-year postconviction limitations period and that Nebraska's capital sentencing statutes violated the Sixth, Eighth, and Fourteenth Amendments.

PROCEDURAL HISTORY

Hessler was convicted and sentenced to death in 2004 and unsuccessfully pursued a direct appeal and two prior postconviction proceedings. He filed a successive postconviction motion in 2016 based on *Hurst v. Florida*,

asserting that Nebraska's capital sentencing statutes violated the Sixth, Eighth, and Fourteenth Amendments. The district court, relying on *State v. Lotter*, concluded that the motion was untimely and denied relief without an evidentiary hearing. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016)
- *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018)
- *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007)
- *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011)
- *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014)
- *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)
- *Schiro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)
- *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019)
- *Lotter v. Nebraska*, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019)
- *McKinney v. Arizona*, 140 S. Ct. 702 (2020)

OPINION

PER CURIAM.

Nebraska Supreme Court Online Library www.nebraska.gov/apps-courts-epub/ 05/01/2020 08:07 AM CDT - 451 - Nebraska Supreme Court Advance Sheets 305 Nebraska Reports *STATE v. HESSLER* Cite as 305 Neb. 451 State of Nebraska, appellee, v. Jeffrey Hessler, appellant. ____ N.W.2d ____ Filed April 3, 2020. No. S-19-652. 1. Postconviction: Constitutional Law: Appeal and Error.

In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. 2. Postconviction: Judgments: Appeal and Error. Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Affirmed. Jerry M. Hug for appellant. Douglas J. Peterson, Attorney General, and James D. Smith, Solicitor General, for appellee. Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ. Stacy, J. In October 2016, Jeffrey Hessler filed this motion for post-conviction relief.

The motion relies on the U.S. Supreme Court's decision in *Hurst v. Florida*¹ and alleges Hessler's death sentence is invalid because Nebraska's capital sentencing statutes violate Hessler's rights under the 6th, 8th, and 14th Amendments. *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). - 452 - Nebraska Supreme Court Advance Sheets 305 Nebraska Reports *STATE v. HESSLER* Cite as 305 Neb. 451 14th Amendments to the U.S. Constitution.

We addressed an identical argument in *State v. Lotter*² and held *Hurst* was not a proper triggering event for the 1-year limitations period of the Nebraska Postconviction Act.³ Citing *Lotter*, the district court found Hessler's motion was time barred and denied it without conducting an evidentiary hearing. Hessler appeals, and we affirm. FACTS In 2004, Hessler was convicted by a jury of first degree murder, kidnapping, first degree sexual assault, and use of a firearm to commit a felony.

He was sentenced to death on the murder conviction. He unsuccessfully challenged his convictions and sentences on direct appeal⁴ and in two prior postconviction proceedings.⁵ On January 12, 2016, the U.S. Supreme Court decided *Hurst*.⁶ *Hurst* found that Florida's capital sentencing scheme was unconstitutional, because it required the trial court alone to find both that sufficient aggravating circumstances existed to justify imposition of the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances.

Roughly 10 months after *Hurst* was decided, Hessler filed this successive motion for postconviction relief. The motion asserts: Jurisdiction is proper in this Court as the decision in *Hurst v. Florida*... was issued by the United States Supreme Court on January 12, 2016 and... Hessler is asserting that *Hurst* is applicable in his case and therefore has one year from the date of that decision to file this motion pursuant to... § 29-3001....

² *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018). ³ Neb. Rev. Stat. § 29-3001(4) (Reissue 2016). ⁴ *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). ⁵ *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014). ⁶ *Hurst*, supra note 1. - 453 - Nebraska Supreme Court Advance Sheets 305 Nebraska Reports *STATE v. HESSLER* Cite as 305 Neb. 451 Hessler's motion relies on *Hurst* and alleges that Nebraska's capital sentencing statutes⁷ violate the 6th, 8th, and 14th Amendments.

It specifically alleges the Sixth amendment is violated because the Nebraska statutes allow a panel of judges, and not a jury, to "make factual findings in imposing a death sentence." The motion further alleges "to the extent that Nebraska's death-penalty statutes do not require a unanimous recommendation from a jury regarding whether a sentence of death should be imposed, [the statutes] violate[] the 8th and 14th Amendments." Identical 6th, 8th, and 14th Amendment claims based on *Hurst* were raised in a successive motion for postconviction relief in *Lotter*,⁸ and we rejected them in an opinion released September 28, 2018.

We reasoned that the Nebraska Postconviction Act contains a 1-year limitations period for filing a verified motion for postconviction relief, which runs from one of four triggering events or from August 27, 2011, whichever is later. 9 The triggering events under § 29-3001(4) are: (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal; (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence; (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action; (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the 7 See Neb. Rev. Stat. §§ 29-2521 to 29-2522 (Cum.

Supp. 2018). 8 *Lotter*, supra note 2. 9 § 29-3001(4). - 454 - Nebraska Supreme Court Advance Sheets 305 Nebraska Reports *STATE v. HESSLER* Cite as 305 Neb. 451 newly recognized right has been made applicable retroactively to cases on postconviction collateral review[.] Like *Hessler's* postconviction claims, the claims alleged in *Lotter* regarding the 6th, 8th, and 14th Amendments were all based on *Hurst*, and the defendant in *Lotter* relied on the triggering event in § 29-3001(4)(d) to contend the claims were timely.

We rejected this contention. We held in *Lotter* that *Hurst* could not trigger the 1-year statute of limitations under § 29-3001(4)(d), because *Hurst* did not announce a new rule of law and merely applied the constitutional rule from the 2002 case of *Ring v. Arizona*. 10 *Lotter* also held that the “plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances.” 11 Finally, *Lotter* reasoned that even if *Hurst* announced a new rule of law, it would not apply retroactively to cases on collateral review, because it was based on *Ring* and the U.S. Supreme Court has held that *Ring* announced a procedural rule that does not apply retroactively.

12 Having concluded in *Lotter* that *Hurst* did not announce a new rule of law, we rejected the defendant's contention that *Hurst* could trigger the 1-year statute of limitations under § 29-3001(4)(d), and we found the defendant's postconviction claims were time barred. 13 The defendant's petition for a writ of certiorari was denied by the U.S. Supreme Court on June 17, 2019.

14 Citing to our analysis and holding in *Lotter*, the district court here found that *Hessler's* motion was time barred, and it dismissed the motion without an evidentiary hearing. *Hessler* timely appealed. 10 *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). 11 *Lotter*, supra note 2, 301 Neb. at 144, 917 N.W.2d at 864. 12 *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct.

2519, 159 L. Ed. 2d 442 (2004). 13 *Accord State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019).

14 *Lotter v. Nebraska*, ___ U.S. ___, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019). - 455 - Nebraska

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ASSIGNMENT OF ERROR Hessler assigns, restated, that the district court erred in denying his postconviction motion without an evidentiary hearing, because Nebraska's capital sentencing scheme violates Hurst and the 6th, 8th, and 14th Amendments to the U.S. Constitution.

STANDARD OF REVIEW [1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. 15 [2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law which is reviewed independently of the lower court's ruling.

16 ANALYSIS At oral argument before this court, Hessler conceded the claims made in his successive motion for postconviction relief are identical to those raised and rejected by this court in *Lotter*. Hessler further conceded there was no factual distinction between his postconviction claims and those asserted in *Lotter*, and he pointed to no change in the relevant law since our decision in *Lotter*.

Our decision in *Lotter* is dispositive of the issues presented in this appeal, and Hessler does not contend otherwise. Hurst did not announce a new rule of law, and thus it cannot trigger the 1-year statute of limitations under § 29-3001(4)(d).

Because this is the only triggering event relied upon by Hessler in contending that his postconviction claims are timely, we agree with the district court that Hessler's postconviction claims are time barred. For the sake of completeness, we note that even if Hessler's claims were not time barred, they would not entitle him to 15 *Mata*, supra note 13. 16 *Id.* - 456 - Nebraska Supreme Court Advance Sheets 305 Nebraska Reports STATE v. HESSLER Cite as 305 Neb. 451 postconviction relief.

After oral arguments in this case, the U.S. Supreme Court decided *McKinney v. Arizona*. 17 *McKinney* explained: Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.

18 As such, *McKinney* makes clear there is no merit to the underlying premise of Hessler's postconviction claims. We thus affirm the district court's order denying postconviction relief without an evidentiary hearing. Affirmed. Freudenberg, J., not participating. 17 *McKinney v. Arizona*, ___ U.S. ___, 140 S. Ct. 702, ___ L. Ed. 2d ___ (2020). 18 *Id.*, 140 S. Ct. at 707.

