

IN THE COURT OF APPEALS OF MARYLAND

No. 121

September Term, 1997

KEVIN WIGGINS

v.

STATE OF MARYLAND

Bell, C.J.,
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell,

JJ.

Dissenting opinion by Eldridge, J.,
in which Bell, C.J., joins.

Filed: February 10, 1999

Eldridge, J., dissenting.

Under the Maryland death penalty statute, with one exception not pertinent to this case, “only a principal in the first degree” to murder in the first degree is eligible for a death sentence. The State, at the sentencing stage of the trial, must prove beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. *See* Maryland Code (1957, 1996 Repl. Vol.), Art. 27, § 413(e)(1); Maryland Rule 4-343(g); *Wiggins v. State*, 324 Md. 551, 570-571, 597 A.2d 1359, 1368 (1991), *cert. denied*, 503 U.S. 1007, 112 S.Ct. 1765, 118 L.Ed.2d 427 (1992); *Johnson v. State*, 303 Md. 487, 510, 495 A.2d 1, 12 (1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 868, 88 L.Ed.2d 907 (1986); *Stebbing v. State*, 299 Md. 331, 371, 473 A.2d 903, 923, *cert. denied*, 469 U.S. 900, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984).

When this case was before us on direct appeal, Judge Cole and I dissented from the affirmance of the death penalty on the ground that the evidence at the sentencing hearing was insufficient, under the due process standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560, 573 (1979), for the jury to find, beyond a reasonable doubt, that Kevin Wiggins was a principal in the first degree to the murder of Florence Lacs. *Wiggins v. State, supra*, 324 Md. at 583-588, 597 A.2d at 1374-1377 (Judges Eldridge and Cole dissenting). While observing that the State’s evidence “may have been sufficient to establish that Wiggins was involved in the robbery of Ms. Lacs, it was not

sufficient to show, beyond a reasonable doubt, that Wiggins was the actual perpetrator of the murder.” 324 Md. at 585, 597 A.2d at 1375. The dissenting opinion on direct appeal reviewed the State’s extremely weak circumstantial evidence, the lack of evidence showing that the victim died at about the time Wiggins was seen in the vicinity of the victim’s apartment, the time sequence problem with the State’s case, the evidence conflicting with the State’s theory of the case, the lack of any evidence that Wiggins had been in the victim’s apartment, and the evidence suggesting that someone else had been in the apartment at the critical time and had been involved in the robbery/murder.

As the evidence and the weakness in the State’s case were extensively reviewed in the dissenting opinion on direct appeal, I shall not repeat that review today. For the reasons set forth in that dissenting opinion, I adhere to the view that the evidence was utterly insufficient to show that Wiggins was the actual perpetrator of the murder. Consequently, as a matter of Maryland law, he is not eligible for the death penalty. The maximum punishment which may legally be imposed upon Wiggins is life imprisonment. Code (1957, 1996 Rep. Vol.), Art. 27, § 412(b).

The majority today does not discuss this issue, presumably because it was litigated on direct appeal and because the Maryland Post Conviction Procedure Act, Code (1957, 1996 Repl. Vol.), Art. 27, § 645 A(a), ordinarily is not a vehicle for relief based on an issue which has “been previously and finally litigated”

Nevertheless, this issue directly concerns the legality of Wiggins’s sentence. An issue concerning the legality of the sentence imposed is not “finally” litigated when decided on

direct appeal because, under Maryland law, a “court may correct an illegal sentence at any time.” Maryland Rule 4-345(a). As stated by the Court in *State v. Griffiths*, 338 Md. 485, 496, 659 A.2d 876, 882 (1995), “[t]his Rule creates a limited exception to the general rule of finality, and sanctions a method of opening a judgment otherwise final and beyond the reach of the court.” The Court in *Griffiths* went on to point out that “Rule 4-345(a) does not preclude action by the trial court on its own initiative, and we have in the past *ex mero motu* directed the trial court to correct an illegal sentence upon remand.” *Ibid.*

Since Wiggins was not shown to be a principal in the first degree, the death sentence is an illegal sentence under Maryland law. Furthermore, the imposition of a death sentence, in light of the evidence, is a denial of due process under *Jackson v. Virginia, supra*. I would remand this case to the circuit court with directions to impose a sentence of life imprisonment.

Chief Judge Bell concurs in this dissenting opinion.