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MACKALL v. COMMONWEALTH ____Va. _ , __ S.E.2d -, (1988)

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September 23, 1988

FACTS

Tony Albert Mackall was indicted and tried for capital murder in the commission of a robbery while armed with a deadly weaspon, § 18.2-31 (d), and for robbery and the display of a firearm in a threatening manner. Va. Code Ann. § 18.2-31 (d) (1988). Mackall was accused of shooting Mary Dahn who was a cashier at the Riverview Shell Service Station, while robbing the cash drawer of $515.00. Mrs. Dahn's husband, Stephen Dahn, was hanging Christmas lights at the front of the station when the robbery occurred. Their daughters April and Julie, ages five and six, were also present at the station. April testified that she saw a masked black man shoot her mother in the head, then run away. A jury convicted Mackall of all three crimes. His punishment was fixed at life imprisonment on the robbery charge and two years' confinement on the firearm charge. In the second phase of the bifurcated trial on the capital murder charge, the jury heard evidence of aggravating and mitigating circumstances and fixed Mackall's sentence at death, based on his future dangerousness. (see Va. Code Ann. § 19.2-264.4 (1983). After a sentencing hearing, the trial court confirmed the death sentence fixed by the jury on the capital murder charge.

The Supreme Court of Virginia's review of the record disclosed no reversible error, accordingly, the court affirmed the judgments of the trial court.

ANALYSIS

The court considered and rejected a number of claims raised by Mackall including:

a) A claim that a weapon was illegally seized;

b) Denial of motion to withdraw by one of his defense counsel on the ground that the attorney had represented a prosecution witness in another matter;

c) Objection to the competence of 6 year old witness, April Dahn, to testify;

d) Objection to admission of autopsy photographs and medical examiner's use of a knitting needle and a styrofoam head to demonstrate the trajectory of the bullet.

Interesting holdings raising federal questions included:

1. *Limitations on Voir Dire:*

Mackall alleged violations of his constitutional right to trial by a fair and impartial jury, and violations of the provisions of Code § 8.01-358, which requires the trial court to permit a defendant to question prospective jurors as to bias or prejudice. (see Va. Code Ann § 8.01-358 (1984) and Rule 3A:14 Rules of the Supreme Ct. of Va.). Mackall complained that the trial court improperly limited him to asking prospective jurors whether their opinion of the death penalty would affect their ability to consider life imprisonment or death as an appropriate punishment. The trial court permitted Mackall to ask whether any jurors had views as to the death penalty; it did not let Mackall ask what those views were. The court found no holding to support Mackall's proposition that a party may inquire what prospective jurors' views of the death penalty might be.

The court's conclusion, citing *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L. Ed.2d 581 (1980), that the trial court properly limited Mackall's voir dire examination raises an intriguing question. How may an attorney conduct voir dire efficiently, to determine whether or not a juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (Id. at 45), if a party may not inquire what a prospective juror's views of the death penalty might be? The well known case of *Witherspoon v. Illinois,* as well as *Patterson v. Commonwealth,* necessarily assume that the juror's views of the death penalty have been disclosed. (*See Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (Removal of jurors merely because of general scruples against capital punishment denies due process right to impartial jury; juror may be excluded for cause only if he makes it "unmistakably clear" that he would automatically vote against the death penalty or that he could not be impartial as to guilt); *See also Patterson v. Commonwealth,* 222 Va. 653, 283 S.E.2d 212 (1981) (Death sentence invalidated where trial court failed to preserve fully defendant's right to a fair and impartial jury as to the penalty phase, since the process of selection did not permit elimination for cause of those veniremen who were biased in favor of the death penalty under all circumstances as well as those who were biased against its imposition under all circumstances).

2. *Mitigation Evidence:*

Mackall proffered the testimony of Patricia Hollingsworth, his former probation officer, that following a previous conviction but before his incarceration, Mackall had told her that "because he had too many friends from the wrong group" at Lorton, his proposed place of incarceration, he wanted to be sent to another prison. The Commonwealth objected on the grounds of relevance. The trial court excluded the testimony of Hollingsworth as collateral and the Supreme Court found no abuse of discretion.

The court's decision raises two interesting questions. First, whether testimony regarding a desire not to be sent to a particular prison and associate with the "wrong group" is relevant to mitigation in view of *Lockett. Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed.2d 973 (1978) (Death penalty schemes must allow consideration "as a mitigating factor, of any aspect of the defendant's character, record or circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

Second, whether such mitigating testimony is in fact "collateral" in light of such decisions as *Payne v. Commonwealth,* that "the choice between death and life imprisonment is the ultimate issue for the jury" in a capital murder case. *Payne v. Commonwealth,* 233 Va. 460, 470, 357 S.E.2d 500, 506, cert. denied, _____ U.S. _____, 108 S.Ct. 309 (1987). If the choice between life and death is in fact an ultimate issue for the jury, then mitigation evidence as defined broadly in *Lockett* is relevant and simply not collateral. (Cecilia A. McGlew)