Capital Defense Journal

Volume 1 | Issue 1 Article 4

Fall 12-1-1988

HYMAN v. ALKEN 824 F.2d 1405 (4th Cir. 1987)

HYMAN v. AIKEN

824 F.2d 1405 (4th Cir. 1987)

FACTS

William Hyman was one of a group of people who, while intoxicated, was involved in an armed robbery which resulted in a death. The triggerman was never identified, and everyone except Hyman and his wife accepted plea bargains. Hyman was charged with murder and pled not guilty.

Hyman was found guilty and sentenced to death in South Carolina. The South Carolina Supreme Court affirmed. *State v. Hyman,* 276 S.C. 559, 281 S.E.2d 209 (1981), cert. denied, *Hyman v. Aiken,* 606 F.Supp. 1046 (D.S.C. 1985); however, the court of appeals overturned and granted resentencing. *Hyman v. Aiken,* 777 F.2d 938 (4th Cir. 1985).

On petition for certiorari to the U.S. Supreme Court, the case was remanded for consideration in light of *Rose v. Clark,* 478 U.S. 570, (1986) (holding that a jury instruction which creates an unconstitutional presumption of malice should be scrutinized under a harmless error test) and *Cabana v. Bullock,* 474 U.S. 376 (1986) (holding that the Eighth Amendment requires that whether a participant in a robbery during which a murder is committed killed, attempted to kill, or intended to kill may be decided by the trial judge, or an appellate court, as well as a jury). *Aiken v. Hyman,* 478 U.S. 1016 (1986).

The court of appeals on remand reversed the judgment of the district court and remanded with instructions to grant a writ of habeas corpus. Judges Russell, Widener and Butzner concurred that Hyman was entitled to a new trial on the merits; however, Senior Circuit Judge Butzner went on to review the punishment phase of the trial.

HOLDING

a) Erroneous malice instructions.

The trial judge instructed the jury that malice is presumed from the intentional doing of an unlawful act or use of a deadly weapon, that the presumption of malice could be rebutted, and that the State must prove malice beyond a reasonable doubt. 824 F.2d at 1409.

Senior Circuit Judge Butzner, joined by Judges Russell and Widener, found that "[u]nder the trial court's presumed malice charges, the jury may reasonably have believed it should convict Hyman even if it were not convinced that he acted with intent to commit murder." *Id.,* at 1410. The court found import in the malice instructions in the state's reliance on them in closing arguments. *Id.,* at 1410. Confusion over the malice instructions may also have led the jury to believe that it should convict Hyman even if it was not convinced that he was capable of acting with intent to commit murder in his intoxicated state. *Id.,* at 1409-10. The court found that the instructions may have led the jury to believe that the state is relieved of its affirmative burden to prove malice. *Id.,* at 1409.

b) *Rose*'s harmless error test.

The court reviewed the question based on *Rose*'s harmless error test. "In deciding whether an erroneous malice instruction was harmless error, *Rose* requires an examination of the record as a whole to determine whether the evidence of intent is so dispositive that the 'reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption' . . ." 824 F.2d at 1409.

Senior Circuit Judge Butzner set forth his separate views and additional comments, also discussing the *Enmund/Cabana* question relative to sentencing. Judge Butzner discussed " . . . the Court's opinion in *Enmund v. Florida,* 458 U.S. 782 (1982) . . . [which] held that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on a participant in a robbery during which a murder is committed unless the participant killed, attempted to kill, or intended to kill . . ." 824 F.2d at 1410. Judge Butzner found that "the charge to the jury and the jury's verdict do not satisfy *Enmund*'s requirements for the imposition of the death sentence." *Id.,* at 1410-11. Judge Butzner rejected the South Carolina Supreme Court's finding that the jury either explicitly or implicity found that Hyman killed, attempted to kill, or intended to kill, and refused to make such a finding itself, noting *Cabana*'s caution "that when the question . . . involves an issue of credibility that cannot be determined accurately on a paper record, there might be no adequate basis for appellate fact finding." *Id.,* at 1411.

c) Ineffective assistance of counsel.

Senior Circuit Judge Butzner also dealt with the claim of ineffective assistance of counsel. He began by noting the law in *Strickland v. Washington,* 466 U.S. 668 (1984), which required evaluation pursuant to a two-part test: First, that "counsel's representation fell below an objective standard of reasonableness," with the presumption that counsel's performance was actually part of a sound trial strategy and within the limits of reasonable professional standards. *Id.,* at 688-689. Second, if the first prong is met, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.,* at 694.

Hyman's counsel, Demetrious Stratos, had not read current Supreme Court or South Carolina court decisions about capital punishment. Stratos met with his client only twice during the trial proceedings. Stratos did not make use of the prosecutor's files, which were open to him and contained, among other things, police statements made by Hyman which were later used to impeach Hyman. Stratos did not do anything to prepare for the sentencing phase. Stratos did not read the South Carolina

death penalty statute, which lists aggravating and mitigating circumstances, before commencement of the sentencing proceedings.

Justice Butzner found that the presumption in favor of counsel "does not overcome the failure of Hyman's attorneys to do basic legal research, to review the testimony of key witnesses—including their own client—and to be familiar with readily available documents necessary to an understanding of their client's case. Counsel's lack of preparation and research cannot be considered the result of deliberate, informed trial strategy. Their performance was based on ignorance rather than on understanding of the facts and the law. We conclude counsel's performance to be below the objective standard or reasonable representation required by *Strickland.*" 824 F.2d at 1416.

Justice Butzner also concluded that "but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the sentencing phase of Hyman's trial would have been different." *Id.,* at 1416. Noting the "greater need for accurate fact finding" in a capital case, the court said "Because Hyman's counsel was ineffective, the trial record is an inadequate basis for the imposition of the death penalty by the jury, appellate, or post-conviction courts." *Id.,* at 1416.

APPLICATION TO VIRGINIA

This case is directly applicable to Virginia. Under the capital trial section of the Virginia Model Jury Instructions on Capital Trials there is no mention of malice at all. No. 34.100. However, the Virginia Model Jury Instructions definition of malice states:

> Malice is that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason. Malice may result from any unlawful or unjustifiable motive including anger, hatred or revenge. **Malice may be inferred from any deliberate willful and cruel act against another,** however sudden. No. 34.220. (Emphasis added).

The Instructions continue with Inference of Malice:

> You may **infer malice** from the deliberate use of a deadly weapon unless, from all the evidence, you have a reasonable doubt as to whether malice existed . . . No. 34.240. (Emphasis added).

The Instructions also contain a definition of "willful, deliberate and premeditated:"

> . . . means a specific intent to kill, adopted at some time before the killing, but which need not exist for any particular length of time . . . No. 34.260.

These instructions appear to have the same problem as the South Carolina instructions given at Hyman's trial. These instructions could be construed by a juror to shift the burden to the defendant. Malice may be inferred and must, in effect, be rebutted by the defendant, in direct violation of *Mullaney v. Wilbur,* 421 U.S. 684 (1975) and *In Re Winship,* 397 U.S. 358 (1970).

The confusion regarding sentence of death without the finding that the defendant was the triggerman will not occur in Virginia because Virginia statutory construction permits imposition of the death penalty only for the triggerman, or actual perpetrator of the homicide. *Va. Code Ann.,* §18.2-31.

Regarding the ineffective assistance of counsel claim, this case is a good example of what not do do. Judge Butzner's comments suggesting that basic legal research, review of testimony of key witnesses, and familiarity with readily available documents should be an absolute minimum standard for all lawyers in capital cases. (Helen Bishop)