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EVANS v. THOMPSON 881 F.2d 117 (4th Cir. 1989) United States Court of Appeals for the Fourth Circuit

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knew of the scope of the examination before it took place. Unlike Buchanan, petitioner did not know the examination would involve the issue of future dangerousness. Because this evidence was taken in deprivation of petitioner's right to assistance of counsel without a showing of waiver of this right, the Supreme Court ruled that *Smith* and *Satterwhite* control and reversed the judgment of the Court of Criminal Appeals.

In Virginia, a potential problem exists because an evaluation may be performed on the issue of competency to stand trial (V.C.A. §19.2-169.1), sanity at the time of the offense (V.C.A. §19.2-169.5),

or when defendant's mental condition is relevant to capital sentencing (V.C.A. §19.2-264.3:1, see article this issue). In Virginia, future dangerousness is one of the statutory aggravating factors sufficient to support a death sentence. At any of the aforementioned examinations, the defendant could make statements to the mental health expert which could be considered relevant to the issue of future dangerousness. Left unanswered is the question, what are counsel's rights and duties upon notification?

Summary and analysis by: Elizabeth A. Bennett

EVANS v. THOMPSON
881 F.2d 117 (4th Cir. 1989)
United States Court of Appeals for the Fourth Circuit

FACTS

Petitioner Wilbert Lee Evans shot and killed Deputy Sheriff William Truesdale while attempting to escape from state custody. In June 1981, petitioner was convicted of capital murder and sentenced to death in the Circuit Court of Alexandria, Virginia.

On March 28, 1983, Virginia enacted emergency legislation, amending its procedures for trial by jury in capital cases to permit capital resentencing by a newly impaneled jury where a prior death sentence was vacated due to sentencing errors. Va. Code Ann. §19.2-264.3(c). Previously, if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process, it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). On April 12, 1983, the Commonwealth confessed that erroneous evidence of petitioner's prior convictions had been admitted during the sentencing phase of the trial. Petitioner's death sentence was thereafter vacated and a new jury was impaneled for resentencing in accordance with the new statute. After hearing evidence of petitioner's history of violent criminal conduct, the new jury recommended that the death penalty be imposed based upon a finding of petitioner's "future dangerousness." In March 1984, the trial court imposed the death penalty. The Virginia Supreme Court affirmed the sentence.

In May 1986, petitioner filed a petition for a writ of habeas corpus in Alexandria Circuit Court. The Circuit Court dismissed this petition. The Virginia Supreme Court, as well as the United States Supreme Court, denied review.

Petitioner then sought a writ of habeas corpus in the Eastern District of Virginia. Among other things, petitioner claimed that his resentencing was barred by the Ex Post Facto Clause and the protection against prosecutorial misconduct guaranteed by the Due Process Clause. He further claimed that he was denied the effective assistance of counsel at trial and on appeal. The district court rejected his petition and Evans thereafter appealed to the Fourth Circuit Court of Appeals.

HOLDING

a) Ex Post Facto Claim

Petitioner claimed that since his offense and trial occurred before the new statute was promulgated, his resentencing should have been barred by the holding in *Patterson v. Commonwealth*, *supra*. Petitioner, thus alleged, under an ex post facto theory, that he was retroactively deprived of his right to have his death sentence converted to life imprisonment.

In holding that Petitioner was not denied any of his rights, the Fourth Circuit explained that the rationale of the Ex Post Facto Clause is to assure fair notice of the nature and consequences of criminal behavior and to prevent the alteration of pre-existing rules subsequent to the commission of an act. In order for an ex post facto claim to be valid, the law must be retrospective and it must disadvantage the offender affected by it. However, "No ex post facto violation occurs if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Miller v. Florida*, 482 U.S. 423, 433, 107 S. Ct. 2446, 2452-2453 (1987), quoting *Hopt v. Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210 (1884). See also *United States v. Juvenile Male*, 819 F.2d 468, 470-471 (4th Cir. 1987); *United States v. Mest*, 789 F.2d 1069, 1071 (4th Cir. 1986). The Fourth Circuit held that the new statute does no more than change the procedures surrounding the imposition of the death penalty. The nature and consequences of petitioner's criminal behavior were not changed and therefore petitioner had fair warning that the death penalty was a possible punishment and could not have been disadvantaged by the new statute.

b) Prosecutorial Misconduct

Petitioner also argued that the state prosecutors violated his due process rights when they knowingly proffered false conviction records at his original sentencing hearing and then deliberately delayed confessing error until after the 1983 statute was enacted. Petitioner claimed that this type of prosecutorial misconduct barred his resentencing.

The Fourth Circuit rejected this argument, relying on the state court's finding that the government acted in good faith. A state court finding that the government acted in good faith where defendant alleges he has been the victim of intentional or purposeful government misconduct, is entitled to a presumption of correctness. *Sanderson v. Rice*, 777 F.2d 902, 909 (4th Cir. 1985). In concluding that the state court's findings did not lack fair support in the record, the Fourth Circuit determined that the prosecutors were only guilty of unintentional errors and that these errors were remedied when petitioner received a new sentencing proceeding free of false or misleading evidence.

c) Ineffective Assistance of Counsel

Petitioner further alleged that he received ineffective assistance of counsel at trial and on direct appeal. First, petitioner claimed that his trial counsel improperly failed to object to the prosecution's assertion, in his closing argument, that petitioner was a multiple murderer. Second, petitioner argued that on direct appeal his counsel failed to discover and inform the court that his death sentence was based on false evidence.

The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to the effective assistance of counsel at trial and on appeal. In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 397 (1984), the Supreme Court announced the standard for determining whether any criminal defendant has been effectively represented. *Strickland*, was a capital case, but no higher standard was found to be required. Under *Strickland*, petitioner must show that counsel's performance fell outside the "wide range of reasonable professional assistance," *Id.* at 689, and "that the deficient performance prejudiced the defense" to an extent "so serious as to deprive the defendant of a fair trial." *Id.* at 687. Implicit in the test is a strong presumption that counsel's performance was reasonable.

Although the trial counsel did not object to the prosecutor's erroneous assertion that petitioner was a multiple murderer, the state habeas court had found that petitioner's counsel chose not to object to the prosecutor's argument for tactical reasons. The Fourth Circuit held that this was a judgment which trial attorneys must make routinely and that it did not give rise to a claim under *Strickland*.

Petitioner also claimed that he was denied his right to effective assistance of counsel on direct appeal from his 1981 conviction because his counsel failed to discover and inform the court that his death sentence was based on erroneous evidence of his prior convictions. The Fourth Circuit held that petitioner failed to overcome the strong presumption that counsel's performance was reasonable. The court found that petitioner's counsel did object to some of the records when they were introduced at trial and that some of the erroneous convictions admitted at trial could have only been shown by going outside the trial record. The Fourth Circuit held that on appeal, counsel was under no duty to go beyond the trial record because nothing beyond that record would have been cognizable on appeal.

Further, the Fourth Circuit emphasized that on appeal counsel does not have to raise all claims. "Following the trial, counsel determined what he believed to be petitioner's most viable arguments and raised them on appeal. Doing so was sound trial strategy." *Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir. 1989).

The court also found that petitioner failed to demonstrate he had been prejudiced by counsel's alleged error on appeal. The Fourth Circuit stated that petitioner could not show a "reasonable probability" that the result of the proceeding would have been different but for his counsel's alleged errors. *Strickland v. Washington*, 466 U.S. at 694. Rather, the court found that by vacating his original sentence and affording him resentencing free of error, the circuit court mooted any claims of prejudice to petitioner.

ANALYSIS

In light of the Fourth Circuit's holding that the prosecutors at the trial stage made an unintentional error when they proffered false conviction records at petitioner's first sentencing procedure, it is important for trial attorneys to investigate prior conviction records before the trial begins. If investigation into past records leads to confusion as to the true status of a defendant's criminal record, the trial attorney must sort out the discrepancies so that a proper objection can be made should the prosecution try to admit false or objectionable records. See *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981 (1988) (invalid prior conviction required setting aside death sentence).

Second, it is clear from this opinion that the *Strickland* standard of ineffective assistance of counsel is difficult to prove. The first IAC claim was based on the trial counsel's failure to object to the

prosecution's reference to petitioner as a multiple murderer in closing argument. The Fourth Circuit characterized this as a tactical decision. In a non-capital case, it may be sound trial strategy to refrain from objecting to evidence which is damaging to a client in order to avoid highlighting that evidence again. However, in a capital case, failure to object to every improper argument may mean the difference between life and death to the defendant. Therefore, a defense attorney may be obliged to violate the tradition of not interrupting counsel during their closing argument. See case summaries in this digest on *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989), and *Dugger v. Adams*, 109 S. Ct. 1211 (1989).

Likewise, on appeal of a death sentence, it is necessary to preserve every non-frivolous claim for review. The majority view, in this case, was that counsel had followed sound trial strategy when he determined what he believed to be the most viable arguments and only raised those arguments on appeal. This may indeed be sound trial strategy in a non-capital case, where counsel may choose not to divert the attention of the appellate judges by requesting review of every non-frivolous claim. However, in a capital case, there is no way to determine which claims on appeal will be recognized as trial court errors, and therefore, it is not enough to just raise the ones that appear to be most persuasive on appeal. Dicta to the contrary in this case is bad advice for capital defense attorneys.

Summary and analysis by: Catherine M. Hobart