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BUCHANAN v. COMMONWEALTH 1989 WL 109169 (Va.) Supreme Court of Virginia No. 890107, 890108 September 22, 1989

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e) Unadjudicated acts of misconduct:

The Virginia Supreme Court has held that unadjudicated acts of prior criminal conduct could be used to prove the "future dangerousness" prong in the penalty phase of a capital trial. *O'Dell v. Commonwealth*, 234 Va. 672, 699-700, 363 S.E.2d 491, 506-507 (1988). On appeal, however, Watkins claimed that the use of prior unadjudicated criminal conduct to prove "future dangerousness" is unconstitutional unless the court specifies the standard of proof governing the establishment of such conduct. Because Watkins failed to preserve this issue at trial, the court would not consider it on appeal.

ANALYSIS

a) Challenges to the array:

The Supreme Court of Virginia, in addressing Watkins' challenge to the jury array, correctly stated the principle that a defendant must make a showing that a distinctive group has been consistently under-represented on juries in the community over a period of time in order to sustain a Fourteenth Amendment Equal Protection violation. However, the court made no mention of a defendant's Sixth Amendment right to a fair and impartial jury based on a fair cross section of the community. Although the court was correct in its assertion that a defendant has no right to have a petit jury mirror the community, the defendant is entitled to a fair opportunity to have such a jury by being afforded an array from which no "cognizable" group has been excluded. Under-representation is *prima facie* evidence of systematic exclusion. Under-representation over a period of time is not a necessary component of this Sixth Amendment claim. Watkins made a showing that there was an under-representation of blacks on the jury array, and alleged that this under-representation was due to a systematic exclusion brought about by the jury commissioner's reliance on voter registration lists to form the jury array. This evidence constituted *prima facie* proof that a Sixth Amendment violation occurred. At this point, the prosecution was under a duty to rebut this claim by proving that a significant governmental interest justified the imbalance. The court, rather than the prosecution provided a rebuttal to the claim.

b) Sentence based on racial prejudice:

In *McCleskey v. Kemp*, *supra*, the court recognized that there could be a constitutionally unacceptable risk of racial bias in sentencing. It found however, that even assuming validity of a *statewide* study indicating that blacks who killed whites were significantly more likely to be sentenced to death, McCleskey had not

presented evidence of the possibility of racism in *his* trial.

Watkins undertook to demonstrate that risk in his trial by proffer of the recent actions of Danville juries in capital cases. The Supreme Court of Virginia found his showing insufficient. The court invites, however, defense counsel to make more detailed showings. Counsel should, in a proper case, request the time and resources necessary to make the showing suggested by the Court. A proper case might be one, like *Watkins*, with a black defendant and a white victim, which arises in a venue with a history of racial discrimination.

c) Corroboration of confession:

The correctness of determination of this issue depends on the interpretation of *In re Winship*, 397 U.S. 358, 90 S. Ct 1068, 25 L. Ed. 2d 368 (1970), in which the United States Supreme Court held that the prosecution has the burden of proving each and every element of the crime with which the defendant is charged. In this case, the court's holding, that it is a question of law for the court to decide whether a confession has been sufficiently corroborated by the prosecution, takes away from the jury the responsibility to find every element of the offense.

d) Parole eligibility:

Evidence of defendant's parole eligibility is clearly relevant to the mitigation of his penalty. Not only could this information weaken the evidence of his future dangerousness to the community, but it is also non-statutory mitigation evidence itself. This type of claim may eventually win the approval of the courts, and should continue to be asserted through proposed jury instructions.

e) Unadjudicated acts of misconduct:

Finally, it is once again necessary to remind all attorneys of the importance of preserving for appeal their objections to the rulings of the trial court, and thereafter to raise those issues on appeal. The constitutionality of using future dangerousness as an aggravating factor has been specifically upheld by the United States Supreme Court. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090, 1097 (1983). Unanswered questions remain, however, about the procedures for establishing that factor in a given case. Those claims not properly preserved at trial or raised on appeal may have been the ones which would have turned a death sentence into a term of life imprisonment.

Summary and analysis by: Catherine M. Hobart

BUCHANAN v. COMMONWEALTH
 1989 WL 109169 (Va.)
 Supreme Court of Virginia
 No. 890107, 890108
 September 22, 1989

FACTS

Douglas McArthur Buchanan was convicted of capital murder under Va. Code Ann. §18.2-31(7) for the murder of his father in the same transaction in which he murdered his two half-brothers and his step-mother. The Commonwealth had charged Buchanan with 5 different combinations of these murders in three different indictments. Buchanan also was convicted of first degree murder for all four murders, Va. Code Ann. §18.2-32, and of use of a firearm in the commission of a felony for each murder under Va. Code Ann. §18.2-53.1. Buchanan was sentenced to death for the capital murder conviction, four terms of life imprisonment for the first degree

murder convictions and a total of 14 years for the firearms convictions.

All the murders took place within a two-hour time frame in the family's home. Buchanan killed his father first by shooting him with a .22-calibre rifle. Fifteen minutes later, his brothers arrived. Buchanan shot the first brother as the boy came in the door. He shot the second brother in the yard, but the boy did not die. Buchanan helped the brother to the house, but then stabbed him once inside. Buchanan waited inside the house for his step-mother and killed her with the knife once she arrived.

Buchanan raised several issues on appeal. First, Buchanan complained that the capital murder indictments failed to inform him

of the charges against him. Specifically, he claimed that the prosecution obtained multiple alternative indictments alleging that various murders were part of the same act or transaction and, therefore, Buchanan never knew which of the murders the prosecution was alleging happened in the "same act or transaction." Buchanan also asserted that the trial court erred in refusing to allow defense counsel to describe the specifics of all the indictments against him. Second, Buchanan alleged error in several aspects of jury selection. In particular, Buchanan alleged that the trial court erred in (1) denying Buchanan's request for individual sequestered voir dire, (2) disallowing two specific questions Buchanan's attorneys sought to ask jurors during voir dire, (3) showing partiality toward the commonwealth during voir dire, and (4) denying Buchanan's request for additional peremptory challenges.

HOLDING

I. The Indictments

The Supreme Court held that "the Commonwealth is free to indict an individual for as many separate crimes as the Commonwealth, in good faith, thinks it can prove. Further, the Commonwealth is free to charge the commission of a single offense in several different ways in order to meet the contingencies of proof." *Buchanan*, ___ Va. at ___, ___ S.E. at ___. Accordingly, the Commonwealth was free to shuffle the murders around in several different indictments depending upon which murders could be shown to be part of the "same act or transaction." The key, according to the Supreme Court, is how many "transactions" occurred. "Here, four people were killed; thus, there was the theoretical possibility that Buchanan could be convicted of two capital murders....If all four were killed in one act or transaction, *Buchanan could only be convicted of one capital murder.*" *Buchanan*, ___ Va. at ___, ___ S.E.2d at ___ (emphasis added).

The Supreme Court also held that the trial court had discretion to order counsel not to mention the specific indictments in opening statements. Accordingly, the Supreme Court affirmed the trial court's decision on this point as well.

II. Jury Selection Issues

A. Individual Sequestered Voir Dire - The Supreme Court stated that, because a criminal defendant has no right to individual voir dire, it follows that there is no right to individual sequestered voir dire. Accordingly, the Court held that the trial court did not err in refusing Buchanan's request.

B. Restrictions of Questions Asked by Defense Counsel - Buchanan's counsel sought to ask prospective jurors the following questions:

- (1) From what you have read or heard about this case in the newspapers, what impression do you have about this case?
- (2) Do you believe that a death sentence is the only appropriate punishment for capital murder?

The Supreme Court held that "to be relevant, a question to a prospective juror must necessarily disclose or clearly lead to the disclosure of opinion or prejudice." *Buchanan*, ___ Va. at ___, ___ S.E.2d at ___. The Court held that the first question was vague and unfocused and, therefore, did not meet the above standard. The Court held that the second question was properly rejected because it was virtually identical to a question rejected in a previous opinion, *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E. 2d 212 (1981). The court held that the question was "vague, argumentative, and non-

C. Partiality Toward Commonwealth During Voir Dire - The Supreme Court summarily rejected Buchanan's claim of partiality, stating that "The trial court conducted proper voir dire, which has been subject to unfounded attack by Buchanan in this appeal. We hold that the trial court did not display bias or partiality towards the Commonwealth." *Id.*, ___ Va. at ___, ___ S.E.2d at ___.

D. Motion for Additional Peremptory Strikes - The Supreme Court held that no basis exists in Virginia law for granting the defendant additional peremptory challenges. Accordingly, the Supreme Court held that the trial court correctly rejected the defendant's request for such challenges.

ANALYSIS

I. The Indictments

The Supreme Court of Virginia cleared up one unanswered question in this case by defining the number of capital murder convictions that can be derived from one transaction under Va. Code Ann. § 18.2-31(7). Regardless of the number of victims, if a multiple murder can be defined as *one transaction*, the defendant can be convicted of only one count of capital murder. Accordingly, if there is no question about the number of transactions, then the number of capital murder convictions possible is also fixed.

If, however, there is a good faith dispute about the number of transactions involved, the prosecution can allege as many different combinations of murders that it can in good faith think it can prove. Accordingly, the Commonwealth is not required to make an election as to the transaction or transactions it intends to prove.

II. Jury Selection Issues

The Supreme Court of Virginia historically has afforded a great deal of deference to the discretion of the trial court. The Court's holdings on Buchanan's jury issues reflect that deference. For example, the Supreme Court of Virginia has only granted relief based on voir dire restrictions once. In *Patterson v. Commonwealth*, *supra*, the trial judge asked questions of the venire which would disqualify persons who *opposed* the death penalty, but refused defense counsel's request that two questions be asked which would reveal persons whose *support* of the death penalty might disqualify them. The Supreme Court of Virginia found reversible error in the trial judge's refusal to ask:

"If you sat as a juror in this case, and if the jury should happen to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death?" *Id.* at 657.

The Court, however, held that another question complained of was "vague, argumentative and non-specific." *Id.* at 657, 659. That question resembles the question which the trial court in *Buchanan* refused to permit:

"Do you believe that the death penalty is ordinarily the proper punishment for the crime of capital murder?" *Id.*

Defense counsel should continue to proffer this question or the form used in *Buchanan*. Even though the Supreme Court of Virginia has held that the trial court has discretion to disallow the question, a trial judge may decide to allow it. Furthermore, neither question is "vague, argumentative and non-specific," even under the Court's own

juror to answer the questions "yes," the juror might be disqualified. The life/death qualification of a juror to sit in a capital case is a federal constitutional question.

Counsel for capital defendants also should continue to ask questions similar to Buchanan's first question regarding pretrial publicity. Trial courts routinely ask jurors if they can set aside any impressions or opinions received of the case formed before trial. This question, however, leaves out a logical step: determining whether the juror has any specific impressions to set aside and what they are. The right to a fair and impartial jury is also a federal constitutional question.

Defense counsel also should continue to request individual sequestered voir dire, additional peremptory challenges, and meaningful, non-leading voir dire. Many trial judges will and have exercised their discretion to grant these requests. Counsel should continue to tie these requests to the Sixth Amendment to the United States Constitution's guarantee of the right to a fair and impartial jury and to *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), as did *Buchanan*. *Woodson* held that due process requires a greater degree of reliability in a process that can determine death as an appropriate punishment. This has been termed "super due process." The United States Supreme Court has acknowledged this principle recently by suggesting that special capital procedures are available only at trial and on direct appeal. *Murray v. Giarratano*, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (see discussion of *Giarratano*, this issue). Since the

trial jury is the life/death decision maker, more Sixth Amendment procedures are arguably required to ensure reliability.

Individually, none of the objections based on jury selection procedures is particularly strong in the constitutional sense. The combined effect of all the things Buchanan complained about, however, could amount to a denial of due process. For instance, if the trial court denies defense counsel's motions for individual sequestered voir dire, meaningful, non-leading voir dire, additional peremptory challenges, change of venue, and others, the combined effect might well be that the defendant is not tried by a lawfully constituted, impartial jury in violation of the Sixth Amendment. Accordingly, defense counsel should object to the jury selection process as a whole, and tie this larger objection to federal law as described above. While individual jury selection problems may not result in an eventual reversal, a combined objection may.

It should also be remembered that objections to the qualifications of prospective jurors or limitations on examination of a particular prospective juror must be restated at the time the juror is about to be seated. Valid objections which counsel made during voir dire are lost if not renewed when the jury is seated. In addition, counsel should note which jurors counsel would challenge if additional peremptory challenges were granted. Only in this way will questionable jury selection procedures be preserved for appeal.

Summary and analysis by: Diane U. Montgomery

HOKE v. COMMONWEALTH
237 Va. 303, 377 S.E.2d 595 (1989)
Supreme Court of Virginia

FACTS

Ronald Lee Hoke, Sr., was convicted of capital murder in the commission of rape, robbery, and abduction. On October 7, 1985 the police found Virginia C. Stell's body in her apartment. Stell had been stabbed twice. A medical examiner expressed belief that Stell "had some period of time of survival, at least several minutes." Her arms bore severe bruises. Stell was tightly bound with electrical cords. Evidence indicated Stell had been penetrated vaginally and anally. Semen matching Hoke's blood type was found on sheets and a bedspread in Stell's bedroom.

On October 15, 1985, Hoke surrendered to police in Hagerstown, Maryland confessing to Stell's murder. He stated that they had engaged in consensual sex. They then argued. Stell's murder ensued. Hoke stated that Stell had taken unfair advantage of him in a drug deal, so he ransacked her apartment looking to recoup his loss. He also stated that he had previously pondered killing someone, not attributable to any provocation.

In addition to having been murdered, the jury found that Stell had been raped, robbed, and abducted. The jury found that each of these offenses occurred as an interdependent part of a common criminal design (murder and rape, murder and robbery, and murder and abduction). Each of these offenses gave rise to separate capital murder counts against the defendant. *See*, Va. Code Ann. § 18.2-31(1)(4)(5) (1988).

The defendant's appeal raised three issues concerning which no objection was raised at trial: that the court clerk struck the wrong venireman pursuant to the defense's fourth peremptory strike, that the trial court failed to rule on a defense motion for change of venue, and that Virginia's standard verdict form is constitutionally deficient.

HOLDING

On automatic appeal, the Virginia Supreme Court held that the findings of fact regarding the three capital murder counts were supported by the evidence. The rape charge was supported by the bruised and bound condition of the corpse in addition to the evidence of sexual activity. The robbery charge was supported by the ransacking of Stell's apartment at or about the time of the murder. The abduction was supported by Stell's period of survival after the stabbing and the excessive force involved in binding Stell's body. The court found that more force was involved in binding Stell than was necessary to affect a rape.

The court also held that Hoke waived his appeal to the mistakes in voir dire and change of venue because defense counsel failed to object to the former and failed to renew its motion for the latter. Also defense counsel presented no evidence in support of its motion for change of venue, making harmless any error in failing to rule on the motion.

Despite defense counsel's failure to object at trial, the court ruled that the use of Virginia's standard verdict form did not violate Hoke's constitutional right to a unanimous verdict. The jury's verdict incorporated the statutory language of the verdict form. The trial judge polled the jury. The opinion is silent concerning the scope of the questions used in polling the jury. Polling could entail at least three different levels of inquiry. The polling could have inquired whether each individual juryperson found that the defendant deserved the death penalty. Polling questions could have asked whether the juryperson agreed with the verdict as worded in the verdict form. More precise polling could have inquired into which aggravating predicate the juryperson found. Nevertheless, the Virginia Supreme