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MU'MIN v. COMMONWEALTH 239 Va. 433,389 S.E.2d 886 (1990)

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Savino. *Savino*, 239 Va. at 544, 391 S.E.2d at 281.

As to Savino's contention that the Commonwealth failed to tell him that its evaluation of him could result in testimony regarding his future dangerousness, the Virginia Supreme Court held that he was adequately notified of the purpose. The court relied on *Woomer v. Aiken*, 856 F.2d 677, 681 (4th Cir. 1988), *cert denied*, 109 S.Ct. 1560, (1989), which it declared identical. However, in that case, the Fourth Circuit held only that *specific* notification of the defendant is not required. *Woomer*, 856 F.2d at 682. *Powell*, which was decided after *Woomer*, made it very clear that notification is necessary. Not only did Savino not get notice of the Commonwealth's intention to make an evaluation of his mental status for the purpose of producing evidence against him (see discussion above), but also the statute clearly restricts the scope of his evaluation and any testimony regarding that evaluation to his mental status at the time of the offense. Apparently, because the Code conceivably allows the State to use its evaluation of Savino against him for some purposes, Savino is adequately notified by the existence of the Code authorizing such use.

The issues above raise additional questions not addressed by the court. If the defendant must submit to an evaluation by the Commonwealth, which might result in an affirmative case in aggravation against him, as a condition to even exploring the plausibility of presenting evidence in mitigation, the defendant is put in the precarious position of choosing between his fifth amendment privilege against self-incrimination and sixth amendment rights to put on evidence and of assistance of counsel. What should defense counsel do once notified of the Commonwealth's intentions?

There are a number of options available to capital defense counsel when considering the issues raised by use of mental health experts in mitigation. Ultimately, each is a tactical decision which rests on the unique aspects of a particular case. A threshold determination is whether a mental health expert will be helpful at all. For an expert to be useful, or for the defense to be able to deal with the consequences, counsel must be willing to engage in an extensive investigation into the defendant's background before the evaluation and a followup investigation afterward.

If an expert's evaluation is used, and the Commonwealth responds with a request for its own examination, counsel may either instruct the client to say nothing or to cooperate short of making any incriminating statements or commenting on the crime. If this option is used, a finding under the statute could be made that the defendant refused to participate and that any evidence from his own expert's evaluation will be precluded. Va. Code Ann. § 19.2-264.3:1 (F) (Repl. Vol. 1990). However, there is a substantial constitutional question raised by preclusion of evidence which is basic to an effective defense, particularly in the context of mitigation evidence at a capital trial. (*See* Bennett, *Is Preclusion Under Va. Code Ann. 19.2-264.3:1 Unconstitutional?*, Capital Defense Digest, Vol. 2, No. 1, p. 24, (1989)). Another option is that counsel could insist on being present at any evaluation conducted by the State, on the basis of the sixth amendment right to counsel as established in *Powell*. Another option is to cooperate fully with the Commonwealth as provided in 3:1 while objecting vigorously and preserving the constitutional arguments identified above.

Whenever the Commonwealth files a motion for an evaluation pursuant to 3:1(F), defense counsel should file and argue a motion in limine to ensure that scope of the Commonwealth's evaluation does not exceed that authorized by 3:1. The motion in limine should also seek an order that the expert's subsequent testimony may not be used to establish aggravating evidence at the penalty trial.

The instant case also spotlights the nightmarish possible effects of a voluntary guilty plea in Virginia. In non-capital cases, entry of a guilty plea may be a sound tactical choice. However, many, if not most, such non-capital cases are not appealed in the federal or state system. Quite the opposite is true in capital cases. Especially considering the scope of the waiver doctrine announced by the Virginia Supreme Court, guilty pleas should not be entered to a charge of capital murder absent formal or very strong informal agreements that a life sentence will be imposed.

Summary and analysis by:
Anne E. McInerney

MU'MIN v. COMMONWEALTH

239 Va. 433, 389 S.E.2d 886 (1990)
Supreme Court of Virginia

FACTS

Dawud Majid Mu'Min was an inmate serving a sentence for first degree murder. While assigned to a work detail for the Virginia Department of Transportation, he eluded supervision. After walking a mile along Interstate 95, he entered a retail carpet store and, according to his testimony, asked the operator about oriental rugs. A violent episode occurred. He removed several dollars from the scene and returned to the work crew.

The store operator, near death, was found with her blouse and brassiere pulled up above her breasts. She was also naked below the waist. The autopsy report indicated numerous bruises and lacerations as well as a deep puncture wound to the the left lung and the neck. The victim's genital area was undisturbed.

Mu'Min was found guilty of capital murder in the commission of a robbery while armed with a deadly weapon, and of capital murder while the accused was a prisoner confined in a State or local correctional facility. Va. Code Ann. §§ 18.2-31(4), 18.2-31(3) (1990). He was acquitted on a third charge of capital murder in the commission of or subsequent to rape. Va. Code Ann. § 18.2-31(5) (1990).

HOLDING

Some claims and holdings of this case are not discussed in this summary because they are either too fact specific or are treated in too conclusory a fashion to lend guidance to the bar. The holdings of the Virginia Supreme Court which merit discussion in this summary because of their potential value to practitioners include the following: (1) refusing to allow defendant to ask "content questions" to determine what pretrial publicity prospective jurors had been exposed to is not a denial of due process of law or a violation of the right to trial by an impartial jury; (2) it is immaterial to the validity of the death sentence that the Commonwealth's bill of particulars did not contain the word "torture" when the aggravating factor of vileness can otherwise be established; (3) multiple grievous wounds are sufficient to prove torture; and (4) a prospective juror expressing work related concerns over jury duty need not be excused unless such concerns involve a personal hardship.

ANALYSIS/APPLICATION IN VIRGINIA

1. Voir Dire and Publicity

The most controversial issue in the case is the effect of pre-trial publicity upon the jury selection process. This issue was discussed at length in a dissent and was recently granted certiorari by the U.S. Supreme Court. *Mu'Min v. Virginia, cert. granted*, 59 U.S.L.W. 3275 (U.S. Oct. 9, 1990)(No. 90-5193). The majority held that, while counsel may ask a prospective juror *whether* he or she has acquired information before trial, it does not follow that litigants have a constitutional right to know *what* that information is. The court stated that a party may not "extend voir dire questioning ad infinitum." *Mu'Min v. Commonwealth*, 239 Va. 433, 442 n.5, 389 S.E.2d 886, 892 n.5 (1990) (quoting *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983)).

The dissenting opinion in *Mu'Min* found "'manifest error' in the refusal to permit any of the questions necessary to establish a factual and objective basis for assessing juror impartiality." *Mu'Min*, 239 Va. at 453, 389 S.E.2d at 899. Justice Whiting took note of the unusual amount of pretrial publicity regarding Mu'Min and the community concern that might arise once local residents discover that prisoners convicted of violent crimes were permitted to work in such close contact with the public.

The dissent began its analysis with the Virginia Code which provides that "counsel for either party shall have the right to examine under oath any person who is called as a juror . . . and shall have the right to ask such person . . . directly any relevant question to ascertain whether he . . . is sensible of any bias or prejudice." Va. Code Ann. § 8.01-358 (1984). Jusice Whiting questioned the majority's use of *LeVasseur* for the proposition that counsel may not extend voir dire ad infinitum with a quote from the same case which specifies that "[t]he court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause.'" *Mu'Min*, 239 Va. at 455, 389 S.E.2d at 900, (quoting *LeVasseur*, 225 Va. at 581, 304 S.E.2d at 653).

The dissent asserted that a juror's assurance of impartiality is insufficient, particularly where "the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice." *Mu'Min* 239 Va. 457, 389 S.E.2d at 901. Justice Whiting provided considerable case support for the position that counsel should be permitted to conduct an examination to elicit answers permitting an *objective basis* for the court's evaluation. His argument included the Virginia Supreme Court's observation that "however willing the juror might be to trust himself, the law will not trust him" *Breeden v. Commonwealth*, 217 Va. 297, 298, 227 S.E.2d 734, 735 (1976), and "[t]he issue of who is, or is not, a competent juror is one for the trial court to decide." *Justus v. Commonwealth*, 220 Va. 971, 976, 266 S.E.2d 87, 91 (1980)(quoting *Slade v. Commonwealth*, 155 Va. 1099, 156 S.E. 388 (1931)).

The majority referred to *United States v. Haldeman* for the proposition that asking prospective jurors "content questions" is not a matter of right. 559 F.2d 31, 67-8 (D.C. Cir. 1976)(en banc), *cert. denied*, 97 S.Ct. 2641 (1977)(affirming trial court's rejection of "content questions" on voir dire related to pretrial publicity). This is the first time that *Haldeman* has been cited by the Virginia Supreme Court.

In the dissent's view, the majority misconstrued the holding in *Haldeman* because that opinion also recognized a distinction between the sources and intensity of a venireman's exposure to pretrial publicity and his recollection of the content of that publicity. Indeed, the *Haldeman* court went so far as to state that "it would have been reversible error for the [lower] court to accept jurors simply because they said they would be fair . . . . however, the [lower] court . . . acted on not only the jurors' subjective assurances but also objective information relating how closely they had followed Watergate and their sources of information." 559 F.2d at 67 n.51 (D.C. Cir. 1976). Justice Whiting concluded that:

> [T]he trial court's conduct of voir dire was constitutionally inadequate, even under *Haldeman*, in its blanket refusal to permit any questions aimed at determining the *sources and intensity* of exposure to pretrial publicity (e.g., where did you hear about this case; how many times did you hear it; and when did you hear about it.)

Mu'Min 239 Va. at 458-59, 389 S.E.2d at 902 (emphasis in original).

The dissent's support for questioning jurors regarding sources and extent of exposure to pretrial publicity should have a fair chance of prevailing on federal sixth amendment grounds. Even if Justice Whiting's dissent does not signal an approaching change in Virginia, counsel should take extra measures of care to preserve this matter on *federal* grounds when the entire panel has been exposed to prejudicial media coverage. Such measures include objecting to jurors individually and to the seating of the entire panel at the close of voir dire.

2. Notice and Opportunity to Defend Against Aggravating Factors

The court's action in rejecing Mu'Min's claim that he was not informed that a death sentence could be based on torture and in sustaining the application of the "vileness" aggravating factor should be viewed in light of federal constitutional requirements.

The Supreme Court of Virginia has held that a death sentence may be supported by proof of any of the three components of the vileness factor, i.e., torture, depravity of mind, or aggravated battery. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. den.* 464 U.S. 977, *reh. den.* 464 U.S. 1064 (1983); *see also*, Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest Vol. 2, No. 1, p. 19 (Nov. 1989).

In turning aside the claim that Mu'Min was prejudiced by the absence of torture on the Commonwealth's bill of particulars, the court misses the essence of the claim, that is, denial of notice and opportunity to controvert the evidence on which a sentence of death may be based. Counsel should insist *pretrial* that the Commonwealth be required to disclose the basis on which it will seek the death penalty *and* that the Commonwealth be confined to that which it discloses. (*See* summary of *Lewis v. Jeffers*, Capital Defense Digest, this issue.)

3. Definition of "Torture" and Instructions on "Vileness"

With respect to state supreme court affirmance of a death sentence based on vileness, the United States Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), has established that: (a) the statutory language of the factor alone is insufficient to guide the jury in a constitutionally acceptable manner; and (b) a constitutionally sufficient narrowing construction or definition of the factor must be communicated to the sentencer or applied on appellate review.

In Virginia, a narrowing construction has not been given to the torture component of vileness. In the instant case, the Virginia Supreme Court, without defining torture, found that the evidence of multiple grievous wounds to the victim was sufficient to prove torture. *Mu'Min*, 239 Va. at 450, 389 S.E.2d at 897. Such wounds are plausibly indicative of aggravated battery, but a characterization of torture is suspect. There is no evidence that defendant had a desire to prolong the victim's suffering or was even aware of it. The net effect of the holding in Mu'Min is that aggravated battery equals torture.

There is a narrowing construction in Virginia for aggravated battery. "[W]e construe the words 'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978); *but cf. Stout v. Commonwealth*, 237 Va. 126, 376 S.E.2d 288, *cert. den.* 109 S.Ct. 3263 (1989) (single knife wound constituted aggravated battery). The sufficiency of this construction has not been tested in federal court.

The *Mu'Min* opinion does not indicate whether the narrowing construction of aggravated battery was ever given to the jury, but the

Virginia Supreme Court has taken the position that the vileness factor contains terms of common understanding that need no definition. *Clark v. Commonwealth*, 220 Va. 211 (1979); *see also* Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest Vol. 2, No. 1, p. 19 (1989).

By motion, objection, and proposed jury instruction, defense counsel must oppose imposition of the death penalty based on the vileness factor as currently construed and applied in Virginia.

4. Juror Qualification

Lastly, the court acknowledged that a prospective juror's duty to serve may be deferred or limited "if serving on a jury . . . would cause such a person a particular occupational inconvenience." Va. Code Ann. § 8.01-341.2 (1990). In the instant case the court found no error in seating the prospective juror because he did not express personal financial hardship, but instead felt his services were of timely concern to his employer. Service as a juror is a duty and excuse from jury duty is a privilege. "The privilege, one the statute makes available at the discretion of the trial court, is purely personal to the prospective juror and altogether unrelated to the inconvenience suffered by the person's employer." *Mu'Min*, 239 Va. at 444-45, 389 S.E.2d at 894.

In a related claim by defendant, the Virginia Supreme Court found that a juror who knew the victim casually could sit as a member of the jury because she affirmed under oath that she could stand indifferent in the cause.

Summary and analysis by:
Christopher J. Lonsbury

SMITH v. COMMONWEALTH

239 Va. 243, 389 S.E.2d 871 (1990)
Supreme Court of Virginia

FACTS

On July 24, 1988, Roy Bruce Smith engaged in a gun battle with the police outside his home in Manassas, Virginia. During the shootout, one police officer was killed. Smith claimed that he did not discharge his weapon until after he had been shot in the foot by an unknown gunman. He further claimed that he did not know the victim was a police officer, or that he had killed anyone during the shooting. Smith said he thought the police were intruders.

Smith was drunk on the night of the shooting and was reported to have said he would kill a police officer. In order to attract the police, Smith began firing a rifle from his front porch. The police arrived and Smith fled to the back of his home. In the ensuing gunfight, the victim received multiple wounds, one apparently self-inflicted, and a mortal gunshot wound to the head fired at very close range. Smith made statements while struggling with the police that were used to show he knew the victim was a police officer. The trial court found Smith guilty of capital murder in the willful, deliberate and premeditated killing of a law enforcement officer for the purpose of interfering with the performance of the officer's official duties. Va. Code Ann. 1950 § 18.2-31(6) (1990). Smith was sentenced to death.

HOLDING

The court held that Virginia's capital murder statute, both as written and applied, is not unconstitutional. Smith had challenged the capital murder statute on the grounds that it does not provide an in-depth analysis in determining whether a sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. Several claims were raised on appeal which were dependent on the particular facts of the case or were dealt with in a conclusory manner by the Virginia Supreme Court. These claims are not discussed in this case summary.

A. Exclusion of Diminished Capacity Evidence

The court decided that the testimony of Smith's psychiatrist was rightfully excluded. The testimony was in support of a diminished capacity defense. The court affirmed the trial court's rejection of this testimony on the ground that it would interfere with the jury's right to find specific intent. The court relied on *Stamper v. Commonwealth*, 228 Va. 707 at 717, 324 S.E.2d 682 at 688 (1985), which held "[u]nless an accused contends that he was beyond (the borderline of insanity) when he acted, his mental state is immaterial to the issue of specific intent." *Smith v. Commonwealth*, 239 Va. 243 at 259, 389 S.E.2d 871 at 879 (1990). Apparently, in order to establish diminished capacity, a defendant must be prepared to demonstrate that at the time of the crime his condition was tantamount to that of a clinically insane person.

B. Jury Instructions - Second Degree Murder

Smith argued that an instruction allowing the jury to infer malice from his deliberate use of a deadly weapon was erroneous. Smith said this instruction violated *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Sandstrom* forbids jury instructions from which a reasonable juror could derive a mandatory presumption against the defendant for an element of the offense, or instructions which would allow a juror to presume that the burden of proof shifts to the defendant. The *Smith* court, however, applied the rule in *Warlitner v. Commonwealth*, 217 Va. 348, 228 S.E.2d 698 (1976), which allows a jury to imply malice from the deliberate use of a deadly weapon. The court reasoned that *Warlitner*-type instructions do not constitute a shift of proof or a mandatory presumption against the defendant that is significant enough to allow a reasonable juror to place an incorrect burden on the defendant in violation of *Sandstrom*.

C. Jury Instructions - Premeditation

The court held that an instruction defining premeditation as "specific intent to kill" was not improper. *Smith*, 239 Va. at 263, 389 S.E.2d at 882. Smith had offered an instruction equating premeditation with the "design to kill". The court approved the former instruction but cited with approval the definition "*adopt* a specific intent to kill". *Id.* at 263, 389 S.E.2d 882 (emphasis added). This holding allows the thought process necessary for premeditated murder to occur simultaneously with the forming of specific intent, but still describes a process and not simply a mental state.

D. Victim Impact Statement

The court decided that the submission of a victim impact statement prepared by the slain officer's widow was not improperly considered by the trial judge. The victim impact statement was never shown to the jury, nor did they know of its existence. Smith claimed that because the judge