Capital Defense Journal

Volume 3 | Issue 1 Article 17

Fall 11-1-1990

CHENG v. COMMONWEALTH 240 Va. 26,393 S.E.2d 599 (1990)

must approve the jury's sentence in Virginia, the victim impact statement is improper under *Booth v. Maryland*, 482 U.S. 496 (1987), which held that the reading of victim impact statements to sentencing juries creates an unacceptable risk of arbitrary and capricious sentencing. This position was reiterated in *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), which stressed that information concerning the victim not connected to the crime itself is constitutionally irrelevant in that it does not bear on the moral culpability of the defendant. The *Smith* court held it is within the judge's power to view victim impact statements, based on the belief that a judge will be able to lay feelings of passion or emotion aside when deciding whether or not to impose the jury's sentence.

ANALYSIS/APPLICATION IN VIRGINIA

It should be noted that the court's rejection of diminished capacity coexists with cases recognizing intoxication as a defense to first degree murder. *Johnson v. Commonwealth*, 135 Va. 524, 115 S.E.2d 673 (1923) held that someone who was so intoxicated at the time of the murder that he was unable to premeditate (i.e., adopt a specific design or plan to kill the victim), cannot be convicted of first degree murder. *Fitzgerald v. Commonwealth*, 223 Va. 615, 295 S.E.2d 798 (1982), demonstrates this case law is still valid in Virginia. In *Fitzgerald*, a capital murder defendant was permitted to advance the diminished capacity/voluntary intoxication defense and support it with testimony from expert witnesses. The Virginia Supreme Court said his ability to premeditate was "an issue of fact to be resolved by the jury". *Id.* at 632, 295 S.E.2d 807. Smith does not overrule this line of cases, and both interpretations are currently within the body of valid state law. Attorneys should continue to avail themselves of the earlier, more helpful interpretation of premeditation and diminished capacity/voluntary intoxication defense.

Defense counsel raised a number of issues pretrial and preserved others during the trial for appellate review. As to other issues, however, the court found procedural waivers and defaults. Two issues the court found waived or defaulted illustrate the importance of *renewing objections* in some circumstances. An objection to the qualification of a prospective alternate juror was lost for failure to renew at the time the jury was empanelled. Another objection concerning the admissibility of certain testimony of a forensic expert lost because objection was not renewed after prosecution argued the issue and the witness continued to testify.

The *Sandstrom* objection to the court's malice instruction illustrates the importance of raising even issues that are virtually certain to lose in state court, and raising them on federal constitutional grounds. See Avoiding Procedural Default, this issue. In addition, when the Virginia Supreme Court is forced to rule on federal constitutional matters, it must address them in the published the record, and this helps the reported opinions alert other defense counsel to the presence of these issues.

Summary and analysis by:
Peter Hansen

CHENG v. COMMONWEALTH

240 Va. 26, 393 S.E.2d 599 (1990)
Supreme Court of Virginia

FACTS

A Circuit Court jury in Arlington, Virginia, convicted Dung Quang Cheng of capital murder pursuant to Virginia Code § 18.2-31(a) (now 1) and § 18.2-31(d) (now 4), abduction, robbery, conspiracy to commit abduction, robbery or murder; use of a firearm in the commission of robbery, abduction, or murder; and possession of a "sawed-off" shotgun.

On September 3, 1988, Mohamad Amir overheard Dung Cheng tell two other accomplices that he planned to rob a restaurant. One accomplice testified that he saw a shotgun in a brown bag at Cheng's house on September 3rd and had seen Cheng with a pistol the week before.

All three men went to the Grand Garden Restaurant in McLean, Virginia which was co-owned by Hsaing "Freddie" Liu. Cheng handed a note containing his name and telephone number to a receptionist and directed her to deliver the note to Liu. The men waited for approximately one-half hour and then departed without seeing Liu.

The next day Cheng informed his accomplices that he again planned to rob a restaurant. He instructed them to bring a jeep and the shotgun. The men drove to one of the accomplice's house to pick up a jeep and then made a brief stop at Cheng's house to allow him to retrieve a brown bag.

At about 10:00 p.m. that night, Cheng was seen talking to Liu at the Grand Garden Restaurant. Cheng departed after their brief conversation. At 11:30 Liu, taking his briefcase, left the Grand Garden Restaurant in his automobile.

The next morning, the Arlington Police discovered Liu's body between the front and back seat of his car. Liu's hands were tied behind his back, and he had been shot in the head four times. The police could find neither Liu's briefcase nor his wallet at the scene of the crime. The back pocket where Liu usually carried his wallet was untucked.

A police officer testified that the position of the bullet casings led him to believe that two shots were fired from the front seat, and two were fired from a position above Liu and outside the vehicle. An autopsy was performed; however, it was impossible to determine the sequence in which the shots were fired. The report did note that two of the shots to the head region were fatal.

The only pieces of evidence found at the scene were a blood soaked piece of paper containing Cheng's name, address and license plate number, some cigarette butts, and an unidentified partial fingerprint. Two days later, the Arlington Police located Cheng's jeep in Washington, D.C. The police impounded the vehicle, seizing a shotgun, a Marlboro cigarette box, a briefcase and an American Express credit card receipt signed by Liu.

On September 9th, two days after impounding Cheng's vehicle, Arlington County Deputy Sheriff, Suwit Yon Kwan, visited Cheng in jail. Kwan and Cheng had met and become friends six years earlier when they worked at a restaurant. During their conversation, Cheng stated that "he didn't do it." *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d. 599, 603 (1990). On direct examination, Officer Kwan testified that when Cheng later expressed his desire to confess, Kwan advised him to speak with his attorney before making any additional statements. Kwan further testified that despite this warning Cheng stated that they had no choice but to kill Liu because he had a contract out on Cheng. *Id.* 393 S.E.2d at 608. Furthermore, Cheng stated that the police would not find anything at the scene of the crime because the only thing that he left was from his cigarette.

HOLDING

A divided Supreme Court of Virginia held that there was insufficient evidence that Cheng was in fact the triggerman. Excluding murder-for-hire, the Virginia legislature has limited the death eligible class of

defendants to actual perpetrators. Because this was not a murder-for-hire prosecution, the Commonwealth had to prove that Cheng was the triggerman in order to obtain a capital conviction. Va Code Ann. § 18.2-31(2) (1990); *E.g., Johnson v. Commonwealth*, 220 Va. 146, 149, 255 S.E.2d 525, 527, (1979) *cert. denied* 454 U.S. 920 (1981). While the confession and the circumstantial evidence permitted an inference that Cheng was the triggerman, the court noted that a mere probability or suspicion of defendant's guilt is insufficient. Because the evidence was insufficient to maintain a capital conviction, the court reversed the judgement and the death sentence, remanding the case for a new trial on a charge no greater than first degree murder.

The Virginia Supreme Court's opinion stated that several grounds for appeal were not available to the defense because the alleged errors either had not been preserved at trial or had not been properly raised on appeal. The court refused to hear a prosecutorial misconduct challenge, basing its decision on counsel's failure to request cautionary instructions and an untimely delay in moving for a mistrial. Furthermore, the court refused to address Cheng's claim that he was prejudiced by the trial court's refusal to allow certain witnesses to testify because the witnesses' testimony had not been proffered and preserved on the record. The court also refused to consider several assigned errors because they were neither briefed or argued on appeal. Lastly, the court refused to consider an alleged error in the jury instructions because of a failure to assign error until the appeal.

ANALYSIS/APPLICATION IN VIRGINIA

The court handled several issues raised on appeal in a conclusory manner and dismissed them with very little discussion. Other issues turned on facts peculiar to this case, including joinder, admissibility of confession, venue, conspiracy, and seizure of items from the jeep. Consequently, these grounds of appeal are not discussed in this summary.

(A) Sufficiency of the Evidence:

Although several issues addressed in Cheng may have implications for capital defendants in Virginia, the holding regarding sufficiency of evidence to convict a defendant of capital murder is the most significant. This is only the third time the Virginia Supreme Court has reversed a capital sentence imposed under the modern statute. The past reversals include *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986) (reversing for prosecutorial comments which tended to minimize the jury's responsibility in fixing the sentence); and *Justus v. Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980) (reversing the conviction because of an error in the jury selection). The evidence in this case led to a strong presumption that Cheng was involved in the homicide. Cheng expressed an intent to commit robbery. The evidence showed that he masterminded the plan and had access to a shotgun and pistol. However, officer Kwan's testimony only established that Cheng was involved in the criminal activity. On direct examination, Kwan testified that Cheng said that they had to get rid of Liu. However, on cross examination, Kwan read from an earlier transcript of his testimony where he said that Cheng did not say he was directly involved but that "he [Cheng] had to do it." *Cheng*, 393 S.E.2d at 608. On the basis of this evidence and the fact that there were three participants, the court concluded that the jury could not have determined beyond a reasonable doubt that Cheng was the triggerman. The Virginia Supreme Court specifically noted that a suspicion of guilt, no matter how strong, was insufficient to convict Cheng of capital murder.

This standard of proof is not limited to triggerman situations. It is a rule of general applicability. The Commonwealth must introduce evidence that proves all elements of the crime beyond a reasonable doubt. Defense counsel may question prospective jurors concerning their ability to follow this standard of proof as compared to the standards of raising a suspicion or proof by a preponderance of evidence. Also, the strength of the evidence presented against Cheng which did not meet the minimum standard of proof may provide a useful comparison in future cases for motions to strike the Commonwealth's evidence.

(B) Procedural Bars

The Virginia Supreme Court refused to hear or consider several grounds of appeal because of procedural errors. If reversal had not been obtained through the insufficient triggerman evidence, then these grounds of appeal would have become much more important and their subsequent bar could have affected Cheng's defense significantly.

The court refused to hear assignments relating to alleged prosecutorial misconduct during cross examination and closing arguments. The court based its decision on counsel's failure to request cautionary instructions and delay in moving for a mistrial. An appeal will not be considered unless the counsel makes a timely motion for cautionary instructions or for a mistrial. Motions for mistrial must be made before the jury retires. *Id.* 393 S.E.2d at 606.

Secondly, the court would not address the trial court's refusal to allow certain defense witnesses to testify for lack of an adequate record. The court specifically noted that the defense counsel did not attempt to call the witnesses or proffer their testimony.

Third, the court refused to entertain eight alleged errors because they were neither briefed nor argued on appeal. While these errors had been raised at trial and assigned as error for appeal, all eight were barred from consideration because they had not been briefed or argued on appeal.

Conversely, an alleged error in the jury instructions was briefed on appeal; however, the court refused to rule on this question because error was not assigned to the trial court jury instructions. Thus, the fourth procedural bar resulted from a failure to assign error on an issue that was briefed and argued on appeal.

In summary, the strength of the triggerman evidence found insufficient in this case is a benchmark against which the prosecution's case may be measured respecting all elements of the offense. Furthermore, scrupulous attention should be paid to Virginia procedure in order to preserve errors for state and federal appellate review (*See* Powley, *Perfecting the Record of a Capital Case in Virginia,* Capital Defense Digest, this issue).

Summary and analysis by:
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