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**STOCKTON v. COMMONWEALTH 241 Va. 192, 402 S.E.2d 196
(1991)**

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STOCKTON v. COMMONWEALTH

241 Va. 192, 402 S.E.2d 196 (1991)
Supreme Court of Virginia

FACTS

In 1983, Dennis Waldon Stockton was convicted of murder for hire pursuant to Virginia Code Section 18.2-31(2). Stockton was sentenced to death. The Virginia Supreme Court affirmed the conviction. However, a prejudicial remark was made by a third party in the presence of jurors during the sentencing phase of the trial. Because of the remark, the district court judge granted a writ of habeas corpus and ordered that Stockton either be sentenced to life or granted a new sentencing hearing. Grant of the writ was affirmed on appeal. *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988). A new sentencing hearing in a different venue resulted in a re-imposition of the death penalty for Stockton. This opinion is on direct appeal from the death sentence imposed at the new sentencing hearing ordered by the federal court.

HOLDING

Stockton raised many issues and grounds for relief. Some of these the court treated in a summary fashion, did not involve capital penalty law, or revolved around facts peculiar to the case and are unlikely to arise often. Among the issues raised in the case which will not be discussed here are the shackling of a defendant at trial, refusal to exclude a pro-death juror, the right to represent oneself, use of the guilt-phase transcript at the sentencing hearing and prosecutorial misconduct.

The Virginia Supreme Court held that Stockton's resentencing hearing appropriately fixed punishment at death. Although a number of errors were assigned by the defendant, the court found none of them to be valid claims. The court asserted that Stockton was not denied a fair trial based on several factors. First, the Commonwealth's attorney used three of its four peremptory strikes to exclude blacks from the venire. Challenge by the defense required the prosecution to explain its reasons for exercising those peremptory challenges against black jurors. The court found those reasons sufficient to be considered racially neutral. Second, the Commonwealth's attorney used evidence of unadjudicated misconduct by the defendant in establishing the future dangerousness of the defendant. The court found that evidence of unadjudicated crimes was admissible to establish future dangerousness. Finally, the Commonwealth's attorney submitted evidence to demonstrate the vileness of the crime committed. The court held the evidence sufficient to support findings of the aggravated factor of vileness in the imposition of the death penalty.

ANALYSIS / APPLICATION IN VIRGINIA

A. *Batson* Claim

The first error which Stockton asserted was a *Batson* claim. The law imposes upon the prosecution the burden of presenting racially neutral explanations for its peremptory strikes. *Batson* holds that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Upon a prima facie showing that the peremptory challenges have been exercised with regard to a cognizable group, the burden shifts to the Commonwealth to present a neutral explanation for challenging the black jurors. In this case, the judge overruled

Stockton's charge that the challenges were racially motivated. The judge was satisfied that the prosecutor had stricken the jurors because of age, education, employment, physical problems and personal demeanor.

An important tool for practicing attorneys is the use of the *Batson* privilege. It is permissible and desirable for a defendant to make the prosecutor explain to the judge exactly why and how he was exercising his right to peremptory challenges. This is especially true because no definitive standard has been established as to what constitutes a racially neutral explanation. See, e.g., *Hernandez v. New York*, 111 S. Ct. 1859 (1991) (holding that the exclusion of hispanic jurors survives a *Batson* claim when excused because of first-hand knowledge of the Spanish language which is likely to preclude reliance on official translation of Spanish language testimony). Defense attorneys also should remember that they may exercise the *Batson* privilege when representing white defendants. The race of the defendant is irrelevant when a cognizable group has been excused from the venire by the prosecution. See *Powers v. Ohio*, 111 S. Ct. 1364 (1991) (holding that white defendants may also raise and prevail upon the matter as to the exclusion of black jurors).

B. Unadjudicated Misconduct for Future Dangerousness

The Virginia Supreme Court allows a sentencing jury to consider evidence of unadjudicated misconduct in determining the future dangerousness of the defendant; that is, whether he "would commit criminal acts of violence that would constitute a continuing serious threat to society." *Spencer v. Commonwealth*, 238 Va. 295, 317, 384 S.E.2d 785, 798-799 (1989). On the authority of *Spencer*, this court rejected Stockton's claim that the use of unadjudicated misconduct is not permitted to demonstrate future dangerousness.

Stockton also claimed that such evidence (of unadjudicated misconduct) was unreliable and prejudicial because it failed to require proof of the conduct beyond a reasonable doubt. Although the use of unadjudicated misconduct is allowed, this opinion does not make clear what proof standard is required. It is important for defense attorneys to continue to litigate this issue and continue to argue for a standard of proof through proposed jury instructions. For additional treatment of this topic, see case summary of *Saunders v. Commonwealth*, Capital Defense Digest, this issue.

C. Lingering Doubt

The United States Supreme Court has determined that a defendant has no constitutional right to an instruction permitting a sentencing jury to consider residual doubt as to the guilt of the defendant. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). The Virginia Supreme Court, in accordance with the *Franklin* decision, held that there is no right to an instruction on lingering doubt in the Commonwealth based on state law either. Although attorneys might no longer submit such an instruction, lingering doubt is in fact a powerful mitigating factor and, where appropriate, should be emphasized in presentation of evidence at both phases of trial.

D. The "Vileness" Factor

The sentencing jury in *Stockton* based its imposition of the death penalty not only upon the future dangerousness of the defendant, but also on the aggravated battery component of the "vileness" factor

based on the evidence that the victim's hands had been cut off. Vileness is characterized as conduct which was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *Stockton*, 241 Va. at 212, 402 S.E.2d at 207. Aggravated battery has been defined as "qualitatively and quantitatively 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).

Aggravated battery in Virginia "ordinarily connote[s] conduct preceding death of the victim." *Jones v. Commonwealth*, 228 Va. 427, 448, 323 S.E.2d 554, 565 (1984). *Stockton* claimed that the finding was unwarranted in his case because there was no evidence to suggest that the victim's hands were removed prior to his being shot. However, the court found that even if the wounds were inflicted after the gunshot, the victim would have become immediately unconscious and death may not have been instantaneous. Either the gunshot or the dismemberment could have caused death and the Commonwealth is not required to prove the order of the infliction of multiple wounds. *Barnes v. Commonwealth*, 234 Va. 130, 139-140, 360 S.E.2d 196, 203 (1987). Further, the court has stated that it is immaterial for the purposes of the vileness determination whether the decedent remains conscious during the course of several assaults. *Boggs v. Commonwealth*, 229 Va. 501, 521, 331 S.E.2d 407, 421 (1985). This determination allows the court to find aggravated battery and vileness even if the victim is immediately unconscious though death may not be instantaneous.

The cases cited by the court, however, deal with series of wounds inflicted upon victims so that absolute order could not be established conclusively and therefore, the particular wound ultimately causing death could not be determined. The cases may be applied inappropriately by the Supreme Court of Virginia because the only circumstance constitutionally reliable to support a death sentence is battery which either by the quantity of the blows inflicted or by the manner in which the crime was committed is indicative of an increased degree of culpability in the defendant. Therefore, the victim's state of consciousness is not truly immaterial in the consideration of vileness as

the court asserts in this case. For additional treatment of this topic, see Lago, *Litigating the "Vileness" Factor*, Capital Defense Digest, this issue.

With regard to the "vileness" factor, the United States Supreme Court has established that the statutory language of the factor alone is insufficient to guide the jury in a constitutionally acceptable manner and that a constitutionally sufficient narrowing construction or definition of the factor must be communicated to the sentencer or applied on appellate review. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988). In *Stockton*, the court stated that "a murder-for-hire case imports its own special heinousness." This does not meet the *Godfrey* standard. Murder-for-hire should not be considered as part of the statutory aggravating factors as it is already part of the death-eligible offense. The court, instead, equates the offense itself with vileness and offers no discussion of the increased culpability of the defendant based on a qualitatively more culpable battery.

It is important for Virginia attorneys to seek, pretrial, the narrowing construction of vileness to which they are entitled under *Godfrey*.

E. Federal Issues

The court also noted that *Stockton* had requested waiver of the 50-page limit on briefs imposed by Virginia Supreme Court Rule 5:26.

Defense counsel should keep in mind that any federal issues which are not raised on appeal will not be heard on review. If the 50-page limit on briefs imposed by the Rules of the Supreme Court of Virginia is insufficient to cover all issues, a waiver of that page limit should be requested. Even if the request is denied, a federal court may be less inclined to find that issues not briefed due to page limitations are defaulted.

Summary and analysis by:
Laura J. Fenn

SAUNDERS v. COMMONWEALTH

242 Va. 107, 406 S.E.2d 39 (1991)
Supreme Court of Virginia

FACTS

On July 17, 1989, Saunders killed and robbed a man. Saunders was indicted for capital murder pursuant to Virginia Code §18.2-31(4) (murder "in the commission of robbery, while armed with a deadly weapon"). An eyewitness to the crime testified at the trial that Saunders shot the victim and immediately began counting the victim's money. A while later, at a friend's apartment, Saunders went to the bathroom to wash the victim's blood off his hands. Another witness testified that on the day after the crime, she told Saunders that she was so upset over the crime that she could not sleep; Saunders replied, "Don't let that bother y'all. I slept like a baby..."

The testimony at trial also revealed that Saunders, while awaiting trial in jail, admitted to shooting the victim in the back of the head because "he wouldn't give him the money." Yet Saunders presented evidence that he killed the victim because he was white, thereby attempting to show that the murder was motivated by race rather than by robbery. Saunders attempted to show that the taking of the victim's money was an afterthought.

At the penalty phase of Saunders' trial, two expert witnesses testified as to whether Saunders "would commit criminal acts of

violence that would constitute a continuing serious threat to society." Va. Code Ann. §19.2-264.4(C). Saunders' expert witness testified that Saunders' conduct and comments following the crime did not necessarily show that Saunders would commit future crimes, while an expert for the Commonwealth testified that there was a chance that he would pose a future danger to society. Also during the penalty phase, three witnesses testified that they had knowledge of Saunders having committed an unadjudicated murder in the District of Columbia.

The court, sitting without a jury, sentenced Saunders to death pursuant to the "future dangerousness" predicate. Va. Code Ann. §19.2-264.4(C).

HOLDING

The Supreme Court of Virginia held that there was sufficient evidence to support the conclusion that robbery was Saunders' motive in committing the murder.

The court also held that the fact finder is free to disregard conflicting expert testimony as to the "future dangerousness" of the defendant. The court reasoned that future dangerousness is a factual issue and that the fact finder must determine the weight to be given to