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STRICKLER v. COMMONWEALTH 241 Va. 482, 404 S.E.2d 227 (1991)

STRICKLER v. COMMONWEALTH

241 Va. 482, 404 S.E.2d 227 (1991)
Supreme Court of Virginia

FACTS

Thomas David Strickler was convicted of robbery, abduction and capital murder in connection with the death of Leanne Whitlock, a coed at James Madison University. On January 5, 1990 at approximately 6:45 p.m., Whitlock was abducted after she left a friend at the Valley Mall in Harrisonburg, Virginia. As Whitlock's blue 1986 Mercury Lynx was stopped due to traffic, Mrs. Anne Stolzfus witnessed Strickler pound on the passenger window of Whitlock's car and then force himself inside. Once inside, Strickler hit her until she stopped sounding the car horn and stopped the car. At that moment, Ronald Henderson and a blond woman let themselves into the back seat of the car. Mrs. Stolzfus then approached Whitlock's car and asked if she was O.K. Whitlock mouthed the words "help" in response and slowly drove away.

At approximately 7:30 p.m., another witness saw a dirty blue car turn off a local road and onto the cornfield where Whitlock's body was later discovered. He identified the driver as Strickler. Later that night Strickler gave Whitlock's wristwatch to a girl at Dice's Inn in Staunton, Virginia. Strickler then left Dice's Inn with Henderson and Donna Tudor. Once he dropped Henderson off in Harrisonburg, Virginia, Strickler spent the next few days with Tudor. On January 10 or 11 Strickler abandoned Whitlock's car.

On January 13, 1990, the police discovered Whitlock's frozen nude body in the field where Strickler was seen driving onto. There the police also found Henderson's wallet, Whitlock's clothing, hair matching Strickler's, and a sixty-nine pound rock covered with Whitlock's blood and hair. Whitlock died from "four large, crushing, depressed skull fractures with lacerations of the brain." *Strickler v. Commonwealth*, 241 Va. 482, 488, 404 S.E.2d 227, 231 (1991). Whitlock's fatal injuries were caused by repeatedly pounding her head with the rock and with such force that the frozen ground beneath her head was left with depressions.

HOLDING

The Virginia Supreme Court affirmed Strickler's conviction and sentence of death, deciding numerous issues adversely to the claims raised by Strickler. This summary will not discuss those claims dealt with by the court in a summary manner, claims dealing with non-capital issues, claims relating to jury questionnaires and voir dire, claims the court found to be foreclosed by its prior decisions, as well as sentence review for proportionality and for passion and prejudice.

ANALYSIS / APPLICATION IN VIRGINIA

Strickler raised three issues which merit attention. Most important was the application of the "triggerman" rule where the court held that a theory of joint participation was sufficient to convict a defendant of capital murder. Next was what evidence is relevant to proving the aggravating factor of future dangerousness. Finally, Strickler raised the issue of what, if anything, was required to be given to the defense counsel by the prosecution through a motion for a bill of particulars.

A Joint Participant can be a "Triggerman"

The "triggerman rule," Va. Code Ann. § 18.2-18 (1988), states that "except in the case of a killing for hire under the provisions of § 18.2-31 (b) an accessory before the fact or principal in the second degree to capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." Thus, unless a case is one of a killing for hire, "only the actual perpetrator of the killing may be convicted" of capital murder. *Strickler*, 241 Va. at 494, 495. Strickler claimed that he was, at most, an accomplice whereas the commonwealth claimed that both defendants "acted jointly to accomplish the actual killing." *Strickler*, 241 Va. at 494.

Strickler is only the second defendant convicted under Va. Code § 18.2-31 (b), now Va. Code Ann. § 18.2-31 (2) (1991), where the Virginia Supreme Court upheld a finding of capital murder based upon a theory of joint participation. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980), was the first capital murder conviction upheld where the petitioner "'jointly participated in [a] fatal beating'" of the victim. *Strickler*, 241 Va. at 495 (quoting *Coppola*, 220 Va. at 256-57). In *Coppola*, Frank Coppola, and another defendant, Joseph Elliott Miltier, repeatedly assaulted the victim, causing her death. Coppola and Miltier beat the victim, especially about her head. Each defendant was found to be an "immediate perpetrator," and Coppola's "conduct appears . . . to have been more violent and vicious than that of Miltier, and thus distinguishable." *Coppola*, 220 Va. at 257-58. In *Strickler*, the Virginia Supreme Court codified the joint participation theory and held, "where two or more persons take a direct participation in inflicting fatal injuries, each joint participant is an 'immediate perpetrator' for the purpose of the capital murder statutes." *Strickler*, 241 Va. at 495 (quoting *Coppola*, 220 Va. at 256-57).

Strickler's claim that accomplice liability was insufficient to convict him of capital murder was based on *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990) and Va. Code Ann. § 18.2-18 (1988), the "triggerman rule." *See* case summary of *Cheng v. Commonwealth*, Capital Defense Digest, Vol. 3, No. 1, p. 20 (1990). Cheng's capital murder conviction was reversed under the "triggerman rule" because "'[t]he evidence was insufficient . . . to support the inference that the defendant had fired the fatal shots.'" *Strickler*, 241 Va. at 495 (quoting *Cheng*, 240 Va. at 43). The Virginia Supreme Court found that "*Cheng* is inapposite" to Strickler's case. *Id.* at 495. According to a theory of joint participation, the court held that it was immaterial whether Strickler held Whitlock or pummeled her with the rock because the evidence showed that Whitlock's death was caused by one indivisible act perpetrated by two individuals.

Sufficiency of Evidence of Future Dangerousness

Strickler challenged the sufficiency of the evidence of future dangerousness. The court held, "the evidence was more than sufficient to support the jury's finding of 'future dangerousness.'" *Id.* at 497. Presented as evidence of Stickler's future dangerousness were eight felony convictions and twelve misdemeanor convictions. This included convictions for petit larceny, tampering with a vending machine, violating federal probation, receipt of a firearm while a felon, and a federal conviction for counterfeiting money. "Most significantly," there was additional evidence of Strickler's "violent behavior before and during the commission of the present crime, his boastful manner in describing it, his contemptuous references to the victim, his threat to kill Henderson, his violent behavior when angered by Donna Tudor," his lack of remorse, and his attempt to use the victim's bank card. *Id.* Thus, the court shows that it is willing to admit as evidence of future dangerousness all conduct of the defendant

before, during and after the commission of a murder until the actual trial, including anything which is debatably of a criminal nature. It is also worth noting that Strickler challenged the sufficiency of the evidence in the aggregate and not the relevance of the arguably non-violent acts.

Bill of Particulars

The Virginia Supreme Court upheld the circuit court's denial of Strickler's motion for a bill of particulars. The bill asked:

A. To identify the grounds, and all of them, on which [the Commonwealth] contends that defendant is guilty of capital murder under Virginia Code Sect. 18.2-31, as amended, 1950.

B. To identify the evidence, and all of it, upon which it intends to rely in seeking a conviction of defendant upon the charge of capital murder.

D. To identify the evidence, and all of it, on which it intends to rely in support of the aggravating factors identified, and all other evidence which it intends to introduce in support of its contention that death is the appropriate punishment for this defendant.

241 Va. at 490. The court stated that the motion was properly denied because:

> [t]o be sufficient, an indictment must give the accused "notice of the nature and character of the offense charged so he can make his defense." When an indictment meets that standard, as the indictments here do, a bill of particulars is not required.

Id. (quoting *Wilder v. Commonwealth*, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976))(citing *Ward v. Commonwealth*, 205 Va. 564, 569, 138 S.E.2d 293, 296-97 (1964); *Tasker v. Commonwealth*, 202 Va. 1019, 1024, 121 S.E.2d 459, 462, 463 (1961)). The court also held that anything sought by the petitioner's motion for a bill of particulars above and beyond the "'notice of the nature and character of the offense charged'" was a discovery request which must be made pursuant to the rules of the court. *Id. See generally* case summary of *Quesinberry v. Commonwealth*, Capital Defense Digest, this issue.

It is important to note that part (C) of Strickler's motion for a bill of particulars was granted by the circuit court. This is significant because the indictment did not give the "nature and character" of the aggravating factors that the commonwealth sought to prove and part (C) only asked the commonwealth to **identify** the aggravating factors. This motion should be granted so that the defendant can receive his due process right to be heard and to present evidence which will allow him to defend against evidence of aggravating factors. Defense counsel may contact the Virginia Capital Case Clearinghouse for a new model bill of particulars and supporting memorandum. Finally, is arguable that merely asking the commonwealth to identify the **type** of evidence it will seek to introduce is not the same as discovery. In addition, in light of the courts' willingness to allow a variety of conduct to prove future dangerousness, motions in limine on future dangerousness should be considered to exclude evidence which is not probative of defendant's propensity to commit acts of violence in the future.

Summary and analysis by:
Marcus E. Garcia

QUESINBERRY v. COMMONWEALTH

241 Va. 364, 402 S.E.2d 218 (1991)
Supreme Court of Virginia

FACTS

A Virginia jury convicted George Adrian Quesinberry of capital murder in the commission of a robbery. Virginia Code § 18.2-31(d) (now 4). Quesinberry and two friends were in the process of robbing an office building when they were interrupted by the owner, Thomas L. Haynes. Quesinberry shot Haynes twice in the back as the store owner attempted to flee. As the three thieves were leaving, Haynes tried to push himself up. Quesinberry hit him in the head at least twice with his pistol, and Haynes died later that morning.

Quesinberry filed a pre-trial motion for a bill of particulars requesting that the court direct the Commonwealth to identify: (1) the grounds, and all of them, on which the Commonwealth contended that the defendant was guilty of capital murder; (2) the evidence, and all of it, upon which the Commonwealth intended to rely in seeking a conviction of the defendant upon the charge of capital murder; (3) the aggravating factors, if any, upon which the Commonwealth intended to rely in seeking the death penalty, should the defendant be convicted of capital murder; and (4) the evidence, and all of it, on which the Commonwealth intended to rely in support of the aggravating factors identified, and all other evidence which the Commonwealth intended to introduce in support of its contention that death was the appropriate punishment for this defendant. The trial court granted the motion with respect to sections (1) and (3), but denied the motion with respect to sections (2) and (4). *Quesinberry v. Commonwealth*, 241 Va. 364, 372, 402 S.E.2d 218, 223 (1991).

During the penalty stage, Quesinberry's attorney objected to the introduction of evidence that the defendant possessed a stolen gun and that the defendant was a user of marijuana and cocaine. The court admitted the evidence over defendant's objection. *Id.* at 380, 402 S.E.2d 227. In contrast, the court refused to instruct the jury that a life sentence meant that Quesinberry would be ineligible for parole for thirty years. *Id.* at 371, 402 S.E.2d 223. After hearing the instructions, the jury retired to deliberate and fix punishment. The jury returned and requested definitions of several words appearing in the instructions: "culpable," "moral turpitude," "quantitatively," and "qualitatively." The court gave definitions without objection from counsel. *Id.* at 380, 402 S.E.2d 228. Immediately after the jury left the courtroom to resume deliberation, Quesinberry's attorney objected to the definitions given by the court. The court overruled the objection as untimely. The jury fixed Quesinberry's punishment at death.

Quesinberry appealed to the Virginia Supreme Court, claiming, *inter alia*, that the trial court erred in not ordering a bill of particulars in accordance with paragraphs (2) and (4) of his motion; that the court erred in admitting evidence that he had possessed stolen property and used marijuana and cocaine; that the court erred in refusing to instruct the jury as to the practical consequences of a life sentence; and that the trial court erred in its definitions of the terms for which the jury sought clarification.

HOLDING

Quesinberry assigned numerous errors. Some of these the court treated in a conclusory fashion. Others did not involve death penalty law or are unlikely to arise often because they revolved around facts peculiar to the case. These issues, which will not be discussed in this summary, include: the constitutionality of the death penalty; the constitutionality of