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GEORGE v. COMMONWEALTH 242 Va. 264, 411 S.E.2d 12 (1991)

ANALYSIS / APPLICATION IN VIRGINIA

Under the Virginia "triggerman rule," when the offenses constituting the charge of capital murder are the willful, deliberate, and premeditated killing of a person in the commission of robbery armed with a deadly weapon, or while in the commission of, or subsequent to, rape, a defendant may not be convicted of capital murder unless the Commonwealth proves beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. *See Johnson v. Commonwealth*, 220 Va. 146, 149, 255 S.E.2d 525, 527 (1979), *cert. denied* 454 U.S. 920 (1981). Contrary to normal rules of accomplice liability, neither an accessory before the fact nor a principal in the second degree may be so convicted. *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990).

In *Cheng*, three individuals participated in the robbery and fatal shooting of the victim. The evidence did not suggest, however, that more than one person shot the victim. The supreme court reversed the trial court's conviction of Cheng for capital murder because it held that the jury could not have determined beyond a reasonable doubt that Cheng was the triggerman.

Like Cheng, Rogers was admittedly a participant in the incident, but as the court points out, "[t]he significant weakness in the Commonwealth's case is the lack of any evidence, direct or circumstantial, which places the murder weapon in defendant's hands." *Rogers*, 242 Va. at 319, 410 S.E.2d at 628. Accordingly, the jury could not have determined beyond a reasonable doubt that Rogers was the triggerman.

While a defendant may be found to be the triggerman based entirely upon circumstantial evidence, such circumstantial evidence only may be used "provided it is of such convincing character as to exclude every reasonable hypothesis other than that the accused is guilty." *Dukes v. Commonwealth*, 227 Va. 119, 313 S.E.2d 382 (1984). Thus, "[s]uspicion of guilt, however strong, or even a probability of guilt, is insufficient to support a conviction." *Cheng*, 240 Va. at 42, 393 S.E.2d at 608.

In the instant case, the court acknowledged that there is indeed, a "**probability** that the defendant was the criminal agent in the victim's death." *Rogers*, 242 Va. at 320, 410 S.E.2d at 629 (emphasis added). However, "all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable hypothesis of innocence. [. . .] Because the circumstances of defendant's conduct do not exclude the reasonable hypothesis that Troy Malcolm killed the victim, the capital murder prosecution fails." *Id.*

Where the evidence suggests the possibility of joint perpetration of acts causing death, the Virginia Supreme Court has departed from a strict interpretation of the triggerman rule. In *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991), and in *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980), the court upheld capital murder convictions based upon theories of joint participation. In *Coppola*, the co-defendants each repeatedly assaulted the victim, causing her death. In *Strickler*, the co-defendants killed the victim by crushing her skull with a sixty-nine pound rock. Partly because of the very specific circumstances which made it feasible to believe that two people would have been needed to hold the victim and drop the rock, the Virginia Supreme Court held that it was immaterial whether Strickler held the victim down or pummeled her with the rock because the evidence showed that the victim's death was caused by one indivisible act perpetrated by two individuals. *See* case summary of *Strickler v. Commonwealth*, Capital Defense Digest, Vol. 4, No. 1, p.22 (1991).

Cheng, *Strickler*, and *Rogers* indicate that except in murder for hire cases, where the evidence does not suggest joint participation in acts causing death, both co-defendants may not be convicted of capital murder. In cases where the evidence is arguably less than *prima facie* that a particular defendant caused death, the issue may be raised pretrial by a motion to dismiss the capital indictment. If the issue is determined to be a jury question, care should be taken to preserve it clearly on the record.

Summary and analysis by:
Anne E. McInerney

GEORGE v. COMMONWEALTH

242 Va. 264, 411 S.E.2d 12 (1991)
Supreme Court of Virginia

FACTS

Michael Carl George was convicted of capital murder in the commission of robbery while armed with a deadly weapon. Va. Code Ann. § 18.2-31(4). Upon a finding of "future dangerousness" and "vileness," the jury set George's penalty at death, which was accepted by the trial court.

On June 16, 1990 at approximately 2:00 p.m., fifteen-year-old Alexander Eugene Sztanko was last seen alive by his parents when he rode his motorcycle away from his family's house to nearby woods. Approximately one hour to half an hour later, Alex's father heard two gunshots which originated from the woods. The next day, Corporal Joseph Dillon of the Prince William County Police Department noticed a blue Ford Bronco in the woods near Alex's house. Aware that Alex had been reported missing and that he had seen the same vehicle at the same location the day before, Corporal Dillon ran a license check of the Bronco and found that it was registered to George. Shortly thereafter, Corporal Dillon observed a camouflaged person who "appear[ed] . . . that he did not want to be seen." *George v. Commonwealth*, 242 Va. 264, 269 (1991). This person identified himself as George and stated that he was in the area to find a hunting ground. In a conversation with Dillon, George admitted that he had been in the same area the day before. Once another police unit arrived, officer Dillon arrested George for trespassing.

Once George was in custody and transferred away, "Dillon walked to the spot where George had knelt down." *Id.* at 269. There, officer Dillon found Alex's tennis shoes. After a more thorough search of the area, the police discovered Alex's shoeless body. The police also recovered Alex's motorcycle and helmet and determined that they were found approximately five-tenths of mile from where the body had lain.

Alex died instantaneously of a single gunshot wound to the head. In addition, the autopsy revealed abrasions of Alex's penis which were consistent with an "electrical burning." *Id.* at 269-270. The autopsy also revealed "the presence of seminal fluid." *Id.* at 270. "Fibers found on Alex's T-shirt were consistent with the material from . . . George's camouflage jacket." *Id.* An examination of George's clothing revealed blood "inconsistent with his blood type but consistent with Alex's." *Id.*

Police searches of George, his vehicle, and his parents' home led to the discovery of a topographical map marking where the victim's body and motorcycle plus helmet were found, a stun gun, and a fully loaded nine millimeter pistol determined to be the murder weapon.

HOLDING

The Virginia Supreme Court upheld George's conviction of capital murder in the commission of robbery while armed with a deadly weapon, and affirmed his sentence at death. George assigned numerous

errors. Some of these the court treated conclusively. Others did not involve death penalty law or are unlikely to arise often because they revolve around facts peculiar to the case. Issues which will not be discussed in this summary include: the denial of motions to suppress a statement made to a police officer and evidence seized pursuant to a search warrant, change of venue, juror exclusion, evidence relating to a stun gun, an amendment of indictment for abduction, adequacy of discovery and bill of particulars, jury instructions, and a sentence review for excessiveness and disproportionality. Many issues were properly preserved for appeal, having been decided on their merits at trial and on appeal to the Virginia Supreme Court. Others, such as a sentence review for passion and prejudice were held by the Virginia Supreme Court to be defaulted due to the fact that George did not object at trial. This case summary will address George's *Ake* claim, the relevance of animal cruelty to "future dangerousness," the scope of "in commission of robbery," the relevance of "aggravation" evidence, and the fact that the mandatory review of death sentence under Va. Code Ann. § 17-110.1 can not be defaulted.

ANALYSIS / APPLICATION IN VIRGINIA

Issues Summarily Dismissed

The court summarily dismissed several of George's claims under the heading "ISSUES PREVIOUSLY RESOLVED," which briefly cited holdings of its earlier cases respecting certain claims. It is important to note that these claims are preserved for federal review. Some of these claims, as well as others more fully addressed by the court, are discussed below.

A. *Ake* Claim

In *Ake v. Oklahoma*, the United States Supreme Court held,

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist . . . . We leave to the State the decision on how to implement this right.

470 U.S. 68, 83 (1985). In frequently cited text, the Court added,

> We recognize long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense . . . we have focused on identifying the 'basic tools of an adequate defense or appeal' . . . and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake 470 U.S. at 77. Since *Ake*, subsequent cases have held *Ake* to apply not only to psychiatrists but also expert witnesses and expert investigators.

In *George*, the court summarily dismissed the defendant's request for an expert investigator and his request for funds to employ an expert witnesses by citing its previous cases under "ISSUES PREVIOUSLY RESOLVED" without applying this prior case law to the specific facts of his case. *George*, 242 Va. at 271. Each request requires a specific showing by the defendant that the expert requested is a "basic tool" of his defense in his circumstances and, therefore, arguably require fact-specific determinations by the court. George argued that the trial court's denial of his requests constituted a denial of due process and equal protection. By citing its cases without applying them to the specific facts of his case, the court, in essence, stated the law but did not address the particular showings made by George, as *Ake* and its progeny require. Thus, even though the law is "previously resolved," these claims should not have been resolved until the court decided them based upon the merits of the individual case.

B. Relevance of "Future Dangerousness" Evidence

The Virginia Supreme Court upheld the admission of evidence of animal cruelty by the defendant at the sentencing phase of the trial. Although this behavior occurred twenty years ago and "may have had emotional aspects," the court stated, "[i]t is essential in determining the probability of a defendant's future criminal conduct 'that the jury have before it **all possible relevant information** about the individual defendant whose fate it must determine.'" 242 Va. at 273 (quoting *J. Watkins v. Commonwealth*, 229 Va. 469, 487, 331 S.E.2d 422, 436 (1985)(citations omitted)). As for the passage of twenty years, the court stated, "twenty years affected only the weight to be afforded the evidence, not its admissibility." *Id.* It is important to note that this issue was properly preserved because the defendant made a pretrial motion *in limine* to exclude evidence of animal cruelty from the sentencing phase of trial. This motion is on the record for further appeal and was not raised on appeal merely as part of the larger issue of whether or not there was sufficient evidence of "future dangerousness." There may be other cases where a similar motion in limine will be granted by the trial court or, if denied, will be held to contribute to a cumulative finding of a constitutional violation on appeal.

C. Scope of "in Commission of Robbery"

The court considered certain circumstantial evidence to determine whether the prosecution's evidence was sufficient to allow the jury to draw the inference that George had committed a murder in the commission of a robbery. Such evidence included a statement that George made to a cellmate, while incarcerated awaiting trial, that he stopped Alex, grabbed him, dragged him off his bike back into the woods to have sex with him, sodomized him, stunned him in his genitals, and shot him in his head. 242 Va. at 270. The evidence also showed that a group of people, who were in the woods the evening of Alex's murder, found the victim's motorcycle and helmet, took them joyriding, and, upon learning of Alex's murder, turned them over to the police. There was also evidence that the victim carried two twenty-dollar bills in his wallet.

George claimed that "there was absolutely no evidence that robbery ever occurred" and the evidence was, therefore, insufficient to convict him of capital murder in the commission of robbery while armed with a deadly weapon under Va. Code Ann. § 18.2-31(4). *Id.* at 277. The Commonwealth argued "that George had robbed his victim of his wallet, the two twenty-dollar bills kept therein, his shoes, his motorcycle, and his helmet." *Id.* The court held, "[w]e need not decide whether the evidence was sufficient to establish robbery involving the victim's wallet, money, and shoes. We think the evidence clearly establishes robbery with respect to Alex Sztanko's motorcycle and helmet." *Id.* The fact that the jury may not have given sufficient weight to the motorcycle and helmet evidence and may have given weight to the wallet, money, and shoe evidence was found to be irrelevant. Citing *Turner v. United States*, 396 U.S. 398, 420-421 (1970), the court added, "when [a] jury returns a guilty verdict on indictment charging several acts in the conjunctive, the verdict stands if evidence is sufficient with respect to any one of the acts charged; status of case with respect to other allegations is irrelevant to validity of conviction." *Id.*

In Virginia, robbery is defined under the common law "as the taking, **with intent to steal**, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation."

Id. at 277 (emphasis added). The court found that "[c]onsidering all the circumstances present in this case and the reasonable inferences to be drawn from the evidence," George "harbored the intention both to molest Alex sexually and to steal his motorcycle and helmet." *Id.* at 279-280. The court was convinced that "George . . . removed the motorcycle and helmet from the trail and hid them, planning to return later and retrieve his bounty" because of the circumstances surrounding the murder; because he returned to the scene of the crime the day after the murder; because he had a topographical map marking where the evidence was found; and because there was circumstantial evidence that he had moved the motorcycle and helmet five-tenths of a mile away from where the victim's body was discovered. *Id.* at 278-280.

Citing *Bassett v. Commonwealth*, 222 Va. 844, 855-56 (1981), the court stated, "[m]urder in the commission of robbery is a killing which takes place before, during, or after the robbery and is **so closely related** thereto in time, place, and causal connection as to make the killing part of the **same criminal enterprise** as the robbery." *George*, 242 Va. at 278 (emphasis added). Although George was arrested in the area of the murder when he went to "retrieve his bounty" approximately twenty hours after the victim's murder, the court held that "the evidence supports the finding that the murder and robbery of Alex Sztanko were parts of the **same criminal enterprise** and that George was motivated by the dual purpose of molesting Alex sexually and robbing him." *Id.* at 280 (emphasis added). The fact that George returned approximately twenty hours later was seen as a continuation of the intent to steal and not as an attempt to destroy evidence related to the murder. In *George*, the court affirms that it will allow a jury's finding of murder in the commission of a robbery whenever the evidence supports such a finding, even if drawn from inferences that suggest that the taking and killing are separated by a period of twenty hours.

D. Relevance of "Aggravation" Evidence

George claimed that there were grounds for a mistrial because, during closing arguments for the **guilt and innocence** phase of the capital murder charge which was also the sentencing phase for three non capital charges under Virginia law, the prosecutor argued for the maximum penalty for the noncapital convictions and noted the loss to the community and victim's family from the victim's death. His claim was based upon *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). *Booth* and *Gathers* held that victim impact evidence could not be introduced or argued in the sentencing phase of a capital murder trial. *See* case summary of *South Carolina v. Gathers*, Capital Defense Digest, Vol. 2, No. 1, p. 5 (1991).

In *Payne v. Tennessee*, 111 S.Ct. 2597, 2609 (1991), the United States Supreme Court held that victim impact evidence introduced at the **sentencing phase** of a capital murder trial does not violate the eighth amendment's guarantee against imposing death sentences based on arbitrary factors unrelated to defendant's culpability. This holding overruled the constitutional protection of *Booth* and *Gathers*. *See* case summary of *Payne v. Tennessee*, Capital Defense Digest, Vol. 4, No. 1, p. 14 (1991). However, the Court did state, " [a] State **may** legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 111 S.Ct. at 2609 (emphasis added). Thus, *Payne* removed the federal constitutional barrier prohibiting the introduction of impact evidence at the sentencing phase of a capital murder trial and leaves the question of whether or not to do so to each state.

In Virginia, in capital murder cases, there is no statutory law which permits victim impact evidence. Va. Code Ann. § 19.2-299.1 specifically exempts capital murder cases from its provisions requiring or permitting preparation of a victim impact report. The statute does not directly address the issue of prosection argument or evidence at a capital penalty trial. The relevance of capital penalty trial evidence is governed by the Commonwealth's burden at that stage to prove one or both of the two statutory aggravating factors of "vileness" and "future dangerousness." These factors relate only to increased individual culpability of defendant's for sentencing. Likewise, case law reaffirms *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E.2d 414 (1929) which specifically disfavors reference to a victim's family.

In *George*, the Virginia Supreme Court felt the issue was "[w]hether it was improper for the prosecutor to argue for punishment on the non-capital offenses that took into account Alex Sztanko's human qualities and the impact of his death," and correspondingly held, "the argument was not improper." *George*, 242 Va. at 282. However, the essence of George's argument was that the prosecutor's statements during the penalty phase of the non-capital convictions, occurring simultaneously as the guilt and innocence phase of his capital murder offenses, created a mistrial error. *Booth* and *Gathers* did not purport to forbid victim impact evidence or argument in non-capital cases.

George does not decide the question of whether or not Virginia will follow *Payne* now that it is constitutionally free to do so. The court did, however refer to the fact that George's argument was based upon *Booth* and *Gathers* and that *Payne* had overruled these cases. This may signal a willingness by the court to reinterpret Virginia law once the issue is squarely presented. The definitive answer, however, must wait for another day.

E. Mandatory Review of Death Sentence Under Va. Code Ann. § 17-110.1 Can Not Be Defaulted

Va. Code Ann. § 17-110.1, Review of a Death Sentence, states, "[a] sentence of death, upon the judgement thereon becoming final in the circuit court, **shall** be reviewed on the record by the Supreme Court," and adds, "the court **shall** consider and determine . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." This is a state-created right, separate from the right of appeal in capital cases. *See* Konrad, *How to Look the Virginia Gift Horse in The Mouth: Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights*, Capital Defense Digest, Vol. 3, No. 2, p. 16 (1991). George claimed a verdict influenced by passion or prejudice in part because a charge of abduction with intent to defile was consolidated for trial with the capital murder charge. The court refused to consider this, apparently holding the issue defaulted because George did not object to consolidation at trial. This is error, arguably amounting to arbitrary administration of the state created right to mandatory review, because the court is obligated to review the entire record, regardless of defaults. This obligation would exist even if there had been no appeal. Appellate counsel may and does draw the court's attention to factors deemed to be relevant to passion and prejudice. The court is obligated to consider them all.