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GARDNER v. DIXON 1992 U:S. App. LEXIS 12971

GARDNER v. DIXON

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United States Court of Appeals, Fourth Circuit

FACTS

At 12:30 a.m. on December 23, 1982, John Sterling Gardner, Jr. entered a restaurant in Winston-Salem, North Carolina, and demanded money from two employees at gunpoint. Though the employees turned over the money without a struggle, Gardner killed them, shooting them in the head and neck. Before Gardner fled in a waiting automobile, Linda Cain, another employee, had eye contact with him for several seconds.

In March 1983, an inmate at the Forsyth County jail implicated Gardner in the murders. After Gardner initially denied that he was the triggerman, the police took Gardner to the crime scene where Gardner confessed to the murders in detail. At trial Gardner recanted his confession and presented an alibi defense. In September 1983, Gardner was convicted by the jury under the felony-murder rule of two counts of first degree murder. The jury recommended the death penalty at the sentencing stage.

After the North Carolina Supreme Court and the U.S. Supreme Court affirmed his conviction,[1] Gardner commenced state habeas proceedings, but was denied relief.[2] The federal district court also denied his petition. On appeal to the Fourth Circuit, Gardner claimed that he had received ineffective assistance of counsel from his trial counsel. In making his claim, Gardner argued that: (1) his attorney had failed to spend adequate time preparing for the case; (2) he had not performed a thorough investigation of social service records and possible witnesses who would have provided mitigating evidence; and (3) his attorney's performance was "generally" ineffective.[3] Gardner also petitioned for relief based on the trial court's failure to appoint a psychiatric expert in violation of his due process rights under *Ake v. Oklahoma*.[4] In addition, Gardner claimed that a comment the prosecutor made to the jury during closing arguments asking them to compare the victims to their own children was improper and amounted to prosecutorial misconduct.[5]

HOLDING

Applying the test for ineffective assistance of counsel established by *Strickland v. Washington*,[6] the Fourth Circuit held that Gardner failed to demonstrate that counsel's performance fell below an objective standard of reasonableness, especially in light of Gardner's reluctance to cooperate fully with his attorney.[7] Furthermore, the court held that although the claim based on inadequate investigation was a close one, Gardner had failed to show how his attorney's investigation efforts ultimately prejudiced his defense,[8] and therefore found no merit in his ineffective assistance of counsel claim.[9] As to the prosecutor's remark asking the jury to compare the victims to their own children, the court found that it was unquestionably improper, because "it invites the jury to 'depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence'."[10] Despite this finding, the Fourth Circuit failed to find resulting prejudice from the remarks necessary to warrant a new hearing.[11]

Finally, the court held that the requirement of a state-appointed expert under *Ake* is a "new rule" under *Teague v. Lane*,[12] and therefore, because Gardner's trial occurred in 1983 before the Supreme Court decided *Ake*, the rule could not be applied retroactively upon collateral review.[13]

ANALYSIS/APPLICATION IN VIRGINIA

I. Ineffective Assistance of Counsel

Gardner's chief argument on appeal was that trial counsel's performance amounted to ineffective assistance of counsel. According to Gardner, his attorney's primary failure occurred at the sentencing phase of the trial when he neglected to call relatives as character witnesses or to present county social service records indicating a troubled home life

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1 *State v. Gardner*, 319 S.E.2d 591, 594-96 (N.C. 1984), *cert. denied*, 469 U.S. 1230 (1985).

2 *Gardner v. State*, 361 S.E.2d 598 (N.C. 1986), *cert. denied*, 486 U.S. 1061 (1987), *reh'g denied*, 487 U.S. 1246 (1988).

3 To prove general ineffectiveness, Gardner offered the testimony of another criminal defense attorney who testified that he would have handled the case differently.

4 470 U.S. 68 (1985). In *Ake*, the Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue." *Id.* at 74.

5 Gardner assigned a number of other errors. Some of these the court dealt with in conclusory fashion, while others did not involve death penalty law or are unlikely to arise often because they revolved around facts peculiar to this case. These issues, which will not be discussed in this summary, include: the state's failure to produce discovery relating to statements made by, and possible inducements made to, the inmate who implicated Gardner (*see* Miles, *Subtle Influences: The Constitutionality of Jailhouse Informant Testimony in Capital Cases*, Capital Defense Digest, this issue); alleged misconduct by the prosecutor with respect to questions he asked Gardner about previous *Miranda* warnings and about an unrelated, unadjudicated crime; and finally, Gardner's argument that the jury instructions and verdict form improperly required unanimity in finding the existence of mitigating factors.

6 466 U.S. 668, 687-691 (1984).

7 *Gardner v. Dixon*, No. CA-88-179-WS, 1992 U.S. App. LEXIS 12971 at *14-*20 (4th Cir. June 4, 1992).

8 The court noted that despite Gardner's assertions that Fraser failed to put on an adequate case in mitigation, the jury "specifically found as mitigating circumstances Gardner's family history, his history of alcohol abuse, and drug addiction . . . ." *Id.* at *23.

9 *Id.* at *25.

10 *Id. at* *31 (quoting *U.S. v. Teslim*, 869 F.2d 316, 328 (7th Cir. 1989)).

11 *Id.* at *31.

12 489 U.S. 288 (1989). *See Bassette v. Thompson*, 915 F.2d. 932, 938-39, and case summary of *Bassette*, Capital Defense Digest, Vol. 3, No. 2, p. 8 (1991).

13 *Gardner*, 1992 U.S. App. LEXIS 12971 at *33.

as a youth. Gardner blamed these failures on the fact that his attorney had not made a thorough investigation which would have uncovered this mitigating evidence.[14]

The court began by acknowledging that "[a]n attorney has a duty to 'conduct appropriate investigations, both factual and legal to determine if matters of defense can be developed . . .'."[15] However, citing *Bunch v. Thompson*,[16] the court also stated that a proper evaluation of attorney misconduct calls for an examination of the "totality of the circumstances."[17] In this case, the court pointed out that the attorney had just two months to prepare for Gardner's case and that Gardner had handicapped his own defense by insisting on an alibi defense after having confessed.[18] Second, the court noted that the attorney had informed Gardner that testimony from family members about his childhood home life would be valuable mitigating evidence.[19] Gardner nevertheless wished to avoid the involvement of his family and rejected counsel's attempts to contact family members, informing the attorney that such an investigation would be fruitless. Finally, the Court concluded that there was no reason for Gardner's attorney to believe that county social service records would be helpful or that they even existed in this case.[20]

The court did hold that counsel's duty to investigate is not limited by the information provided to him by his client; a reasonable investigation requires more than the typical defendant can provide.[21] However, in evaluating an ineffective assistance of counsel claim, "a defendant's cooperativeness in the investigative process . . . helps determine the reasonableness of a particular course of conduct."[22] The court afforded substantial weight to the evidence in the record that showed Gardner may have impeded his counsel's efforts by a lack of cooperation. In conclusion, although the court found that the issue of whether Gardner's attorney acted reasonably under the circumstances was a close question, the court decided that the attorney's conduct did not amount to ineffective assistance.[23]

Defense counsel in Virginia should note that although the court did not find a violation of Gardner's Sixth Amendment right to effective assistance of counsel, his attorney's lack of investigation probably fell short of professional responsibility requirements. The obligation to fully investigate all possible mitigating evidence extends beyond the wishes of the defendant.[24] People accused of crimes, especially capital murder, cannot be fully relied upon to dictate investigation strategy, as their judgment is often impaired under the tremendous stress of their position. Therefore, defense counsel must weigh requests by the defendant to not pursue certain avenues of investigation against the need to properly defend one's client. Nothing in the Virginia Code of Professional Responsibility, for example, would have prevented Gardner's attorney from pursuing interviews with witnesses for the case in mitigation over the objection of his client. In fact, he had a positive duty to do so.

Although the court did not fault Gardner's attorney for failing to search social service records, in most cases, this should be standard procedure. School records, medical and mental health records, and police records all may contain valuable evidence that the defendant may be hesitant to offer voluntarily. Release of some records will require the consent of the defendant, but others may be acquired during the normal discovery procedures. Precise documentation of the investigation by defense counsel is essential in defending against later claims that representation was ineffective. In *Gardner*, the court gave a great deal of weight to the fact that the attorney's records indicated that he had spent one-hundred-fifty hours preparing for this case.[25]

Defense counsel wishing to employ an ineffective representation claim on appeal should stress, as Gardner's appellate counsel did, that trial counsel failed to pursue many possible sources of mitigating evidence. Being able to show that such evidence was readily available may persuade an appellate court. Although the Fourth Circuit ruled against Gardner, it discussed the issue extensively and noted that whether the attorney's behavior amounted to ineffective assistance of counsel was a close question. Although the *Strickland* test seems to favor deference to the judgment of the trial attorney, it is essential that ineffective assistance of counsel claims be pursued vigorously when appropriate.

II. Prosecutorial Misconduct

Gardner asserted that the prosecutor's remark during closing arguments asking the jury to think of the victims as "your kids [and] . . . my kids" violated the defendant's right to due process. Relying upon *Gaskins v. McKellar*,[26] the court noted, however, that inappropriate prosecutorial comments in the presence of the jury deny a defendant due process only in cases where "the disputed statement so infected the . . . sentencing with unfairness that the ultimate conviction and sentence constituted a denial of due process."[27] Failing to find such an infection, the court denied the motion for a new sentencing hearing.

The court stated in no uncertain terms, however, that the remarks were improper.[28] Defense counsel must be on guard during closing arguments for such inflammatory remarks, which play on the jury's emotions and interfere with their role as neutral decision-makers. Defense counsel should make a proper and timely objection to such

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14 Gardner also claimed that his attorney spent an inadequate amount of time on his case, but the Court notes that the attorney's records belied this assertion. Gardner also submitted evidence that his lawyer had been reprimanded by the state bar and that he had drug and alcohol problems stemming back to the time of Gardner's trial. The court ruled that this addition to the records was untimely and that the record failed to suggest any prejudice to the defendant due to drug and alcohol abuse. *Id.* at *20.

15 *Id. at* *12, (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968), *cert. denied* 393 U.S. 849 (1968)).

16 949 F. 2d. 1354 (4th Cir. 1991). *See* case summary of *Bunch*, Capital Defense Digest, Vol. 4, No. 2, p. 3 (1992).

17 *Gardner*, 1992 U.S. App. LEXIS 12971 at *12.

18 *Id.* at *13.

19 *Id.* at *14.

20 *Id.* at *18. Although the Eleventh Circuit has held in *Thompson v. Wainright*, 787 F.2d 1447, 1451 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987), that a defendant's childhood and school records should be investigated, in that case the defendant had manifested psychological problems which Gardner did not have.

21 *Gardner*, 1992 U.S. App. LEXIS 12971 at *19.

22 *Id.*

23 *Id.* at *21.

24 Two recent Fourth Circuit cases which address ineffective assistance of counsel claims are *Bunch v. Thompson*, 949 F.2d 1354 (1991); and *Jones v. Murray*, 947 F.2d 1106 (1991). *See* case summary of *Bunch*, Capital Defense Digest, Vol. 4, No. 2, p. 3 (1992); and case summary of *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992).

The issues of professional responsibility and ineffective assistance of counsel meet head on in *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992). In *Davidson*, the defendant asked that his attorneys not offer any evidence during the sentencing phase, even after being informed of the possible value of various mitigating evidence. *See* case summary of *Davidson*, Capital Defense Digest, this issue.

25 *Gardner*, 1992 U.S. App. LEXIS 12971 at *11.

26 916 F.2d 941, 951 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2277 (1991).

27 *Gardner*, 1992 U.S. App. LEXIS 12971 at *30, (citing *Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2277 (1991)).

28 *Id.* at *31.

comments. Such an objection bears special significance, as it addresses a constitutional violation. Finally, counsel must take care to preserve this issue for appeal on both state and federal grounds.

III. Denial of Court Appointed Psychiatric Expert

Two years after the completion of Gardner's trial, the U.S. Supreme Court held in *Ake v. Oklahoma*[29] that a defendant had the right to a state appointed psychiatric expert in cases where sanity at the time of the offense was an issue. Gardner, whose conviction became final before *Ake* was decided, claimed that the rule should be applied retroactively in his case. However, the court noted that its previous decision in *Bassette v. Thompson*[31] had found the *Ake* requirement to be a "new rule" as interpreted in *Teague v. Lane*.[32]

In *Teague*, the United States Supreme Court held that a habeas petitioner defendant may not employ a new rule from a case decided after his sentence became final unless the case falls under one of two exceptions.[33] The new rule doctrine does not apply if the conduct in question was (1) "beyond the power of the law-making authority to proscribe,"[34] or (2) "if it requires the observance of 'those procedures that are implicit in the concept of ordered liberty,'."[35] Neither exception applied to Gardner, and, therefore, because *Ake* was decided after his sentence had become final, *Ake* could not be retroactively applied upon collateral review.[36]

The *Teague* decision should put defense counsel on notice that the Supreme Court intends to seriously curtail access to federal habeas corpus review. Taking this into consideration, counsel must be most conscientious in developing and advancing all possible constitutional arguments, both state and federal, at the earliest possible stages of the proceedings so as to avoid permanently waiving them. Preserving issues for appeal also allows the defendant to take advantage of any favorable changes in the law. In the meantime, counsel should continue to advance new rules, even on habeas, because they may fit within the exceptions, and to test the limits to which the Court is willing to carry the *Teague* "new rule" doctrine.

Summary and Analysis by:
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29 470 U.S. 68, 83 (1985).

30 915 F.2d at 938-39. *See* case summary of *Bassette,* Capital Defense Digest, Vol. 3, No. 2, p. 8 (1991).

31 *Gardner,* 1992 U.S. App. LEXIS at *33; *Teague*, 489 U.S. 288 (1989). In *Teague*, a defendant attempted to invoke, upon collateral review, the new rule from *Batson v. Kentucky*, 476 U.S. 79, that the prosecutor must give a racially neutral justification for his use of peremptory challenges. The Court held that *Batson* was a "new rule" which could not be retroactively applied. The *Teague* Court defined a "new rule" as one which "breaks new ground or imposes a new obligation on the States or Federal Government, . . . or if the result was not **dictated** by precedent." 489 U.S. at 301 (emphasis in original).

32 *Teague*, 489 U.S. at 310.

33 *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

34 *Id.* at 311 (quoting *Mackey*, 401 U.S.at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

35 For a more extensive discussion of the "new rule" doctrine, *see* case summary of *Williams v. Dixon,* Capital Defense Digest, this issue; case summary of *Adams v. Aiken*, Capital Defense Digest, this issue; and case summary of *Stringer v. Black*, Capital Defense Digest, this issue.

36 *See, e.g. Williams v. Dixon*, 691 F.2d 448 (4th Cir. 1992) (finding that even if the Court's ruling in *McKoy v. North Carolina*, 494 U.S. 433 (1990), was a new rule, it fell within an exception to *Teague* and thus could be retroactively applied). *See* case summary of *Williams*, Capital Defense Digest, this issue.

SPANN v. MARTIN

963 F.2d 663 (1992)
United States Court of Appeals, Fourth Circuit

FACTS

In October 1981, Sterling Barnett Spann was indicted for criminal sexual conduct in the first degree, robbery, burglary, and murder of an 82-year-old widow. He was convicted on all counts and received a life sentence for the burglary, thirty years (consecutively) for criminal sexual conduct in the first degree, ten years (consecutively) for robbery, and death by electrocution for murder.

Spann appealed to the South Carolina Supreme Court, which affirmed both the conviction and the sentence.[1] Spann then appealed to the United States Supreme Court, which dismissed his appeal.[2] He subsequently began state postconviction proceedings, claiming ineffective assistance of counsel and alleging various guilt and sentencing errors, but the state court denied his petition. Spann's petition for certiorari to the South Carolina Supreme Court was denied in 1985. Spann's subsequent petition for writ of certiorari to the United States Supreme Court was also denied. In 1986, Spann filed for a writ of habeas corpus in the United States District Court for the District of South Carolina. The court referred the matter to a magistrate for findings and recommendations. The magistrate subsequently filed a 173-page report and recommendation. After a ninety-day extension, petitioner filed objections to the report and sought to amend his habeas corpus petition. In 1988, the district court allowed the amendment and once again submitted the matter to the magistrate. A fifty-page recommendation followed, as did a response (and two supplemental memoranda) by petitioner.

In February 1991, Spann "filed a motion for leave 'to reexhaust his claim of ineffective assistance of counsel in the South Carolina Courts in light of *Frett v. State*,'"[3] a new state case. The U.S. District Court granted Spann's request and dismissed the writ without prejudice. The issue before the Fourth Circuit was whether the district court abused its discretion in granting that motion without prejudice.

HOLDING

The United States Court of Appeals for the Fourth Circuit held that the district court abused its discretion in granting Spann's motion to dismiss without prejudice.[4] The court found that the respondent (here the

1 *State v. Spann*, 308 S.E.2d 518 (S.C. 1983).

2 *Spann v. South Carolina*, 466 U.S. 947 (1984).

3 *Spann v. Martin*, 963 F.2d 663, 671; *Frett*, 378 S.E.2d 249 (S.C. 1988).

4 *Spann*, 963 F.2d at 672.