Capital Defense Journal

Volume 5 | Issue 1 Article 18

Fall 9-1-1992

DAVIDSON v. COMMONWEALTH 244 Va. 129,419 S.E.2d 656 (1992)

State of South Carolina) and the public have vital interests in the prompt and fair resolution of habeas claims.[5] Further, the court found that the court had a "'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"[6] Such an obligation became even more compelling in light of the nature of the crimes and the length of delay in the case before the court.

ANALYSIS/APPLICATION IN VIRGINIA

In its recounting of Spann's process through the judicial system, the Fourth Circuit did little to hide its ire at the administrative burden and delay occasioned by Spann's various motions. In its findings, the court recounted the series of delays, extensions, and amendments won for Spann by his counsel. The court balanced these against the federal magistrate's "comprehensive . . . careful[] and meticulous[]"[7] recommendations—over two hundred pages of documents. Finding Spann's newly alleged state claim frivolous and refusing to add to the already "embarassing length of time that has elapsed since the case was filed in the federal courts," the court reversed and remanded to the district court for determinations on the two issues the district court had not yet formally ruled upon.[8]

Virginia practitioners will want to make note of the court's growing impatience with what it sees as administrative delays that work against state and public interests.[9] The net effect of such impatience for those representing capital defendants would seem to be that errors and possible remedies should be raised early and often. Saving them for later habeas relief will most likely result in their loss.

Summary and analysis by:
Roberta F. Green

5 *Id.* at 673.

6 *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

7 *Id.* at 672.

8 *Id.* at 673.

9 The United States Supreme Court has demonstrated similar impatience in the area of requests for stays of executions. *See In re Blodgett*, 112 S.Ct. 674 (1992). *See* case summary of *Blodgett*, Capital Defense Digest, this issue.

DAVIDSON v. COMMONWEALTH

244 Va. 129, 419 S.E.2d 656 (1992)
Supreme Court of Virginia

FACTS

On June 13, 1990, Mickey Wayne Davidson killed his wife, Doris Jane, and his two teenage stepdaughters, Mamie Darnell Clatterbuck and Tammy Lynn Clatterbuck. Autopsies revealed that each victim had been beaten with a crowbar. Davidson's wife, Doris, suffered numerous lacerations to her head and face, skull fractures, and bruises and contusions to the brain. Mamie suffered the most extensive injuries, with severe injuries to her head and face. Tammy suffered blows to her head, face and chest.

A psychologist examined Davidson and found him competent to stand trial and to make decisions regarding trial strategy. At the guilt phase of trial, Davidson pled guilty to each charge of capital murder. Before accepting the guilty pleas, the trial court heard witness testimony and considered numerous exhibits. The court also examined Davidson and determined that the guilty pleas were made knowingly, voluntarily, and intelligently. The court accepted the pleas and found Davidson guilty of the three capital murder charges. The court ordered a presentence investigation report.

At the penalty phase of the trial, Davidson's counsel advised the court that Davidson had ordered counsel not to present any mitigating evidence. Davidson then testified that he had been fully advised by his counsel of the charges against him, his right to a competency evaluation, and the possible sentences he could receive. He further testified that he had waived the competency evaluation and that he had directed that no evidence be presented on his behalf during the penalty stage. The court then considered the evidence presented by the Commonwealth and the pre-sentence report and found that Davidson's conduct in the commission of the offenses satisfied the "depravity of mind" and "aggravated battery" components of the Virginia "vileness" aggravating factor.[1] The court sentenced Davidson to death.

A timely notice of appeal to the Supreme Court of Virginia was filed by Davidson's lawyers, but Davidson requested permission to waive his appeal of right. The trial court conducted an evidentiary hearing and found Davidson's waiver to be knowingly, voluntarily, and intelligently made.

HOLDING

The Supreme Court of Virginia conducted its mandatory review of the imposition of Davidson's death sentence[2] and affirmed the trial court's actions.[3]

First, the Court confirmed the trial court's finding of two aggravating factors, depravity of mind and aggravated battery, either of which are sufficient for the imposition of the death penalty.[4] The Court also held that the trial court was not "under the influence of passion, prejudice or any other arbitrary factor" in imposing the death sentence on Davidson.[5] The Court further held that under the circumstances of Davidson's case, the sentence of death was not "excessive nor disproportionate to the penalty imposed in similar cases."[6]

Because the court treated these issues in a summary fashion under its mandatory review, they are not fully discussed here. The focus instead is on the duties imposed under Virginia law for presenting mitigating evidence during the sentencing phase of a capital murder trial.

1 Va. Code Ann. § 19.2-264.2 (1990); Va. Code Ann. §19.2-264.4(c) (1990).

2 Va. Code Ann. § 17-110.1 (1990).

3 *Davidson v. Commonwealth*, 244 Va. 129, 138, 419 S.E.2d 656, 661 (1992).

4 *Id.* at 135-136, 419 S.E.2d at 660. *See* Va. Code Ann. § 19.2-264.2 (1990); Va. Code Ann. §19.2-264.4(C) (1990).

5 *Davidson*, 244 Va. at 137-138, 419 S.E.2d at 661.

6 *Id.* at 136, 419 S.E.2d at 660.

ANALYSIS/APPLICATION IN VIRGINIA

In its mandatory review of Davidson's conviction and death sentence, the Virginia Supreme Court addressed the issues that were presented on appeal in light of the evidence presented at trial and summarily affirmed the trial court's actions. The opinion reveals that the trial court had heard evidence and argument from **both** the prosecution and defense during the guilt phase of the trial. However, during the sentencing phase, evidence was presented **only** by the prosecution. In this respect, the *Davidson* case suggests an issue not directly presented on appeal: what is defense counsel's obligation during the penalty phase of a capital murder trial to present mitigating evidence despite a defendant's request to the contrary?

The Virginia Supreme Court has not addressed the effect of a defendant's demand that no mitigation evidence be offered during the penalty phase of trial. There is no explicit statutory requirement in Virginia that counsel for a defendant present mitigating evidence at the penalty phase of a capital murder proceeding, nor have the Virginia courts imposed such a requirement. However, Virginia Code Section 17-110.1 does establish guidelines for the Virginia Supreme Court's mandatory review of the sentence of death: "In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, **considering both the crime and the defendant.**"[7]

By refusing to allow defense counsel to present mitigating evidence at the penalty phase, a defendant thwarts the Virginia Supreme Court's statutory obligations under Section 17-110.1. If a defendant presents no mitigating evidence, the Supreme Court knows little or nothing about the defendant's background, education, personality, intelligence or other circumstances. If no mitigating evidence is presented at trial, the Supreme Court can hardly meet its statutory duty to consider both the crime **and** the defendant in determining whether the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases."[8]

Indeed, because the *Davidson* court found that a defendant is prohibited from waiving the mandatory review of a death sentence,[9] there necessarily would be a concomitant duty under Section 17-110.1 for defense counsel to present mitigating evidence at the penalty phase in order to provide the Virginia Supreme Court with the necessary information with which to fulfill its statutory obligation. Thus, just as the Virginia Supreme Court has held that a capital defendant cannot waive his appeal, a capital defendant could not waive his case in mitigation.

Under this interpretation of Section 17-110.1, if a defendant instructs his attorney not to present mitigating evidence at the penalty phase and such evidence is, in fact, not presented, the defendant may present two additional issues on appeal. First, the defendant can argue that his attorney had a duty under Section 17-110.1 to present mitigating evidence despite defendant's instructions to the contrary. Counsel's failure to comply with this duty, therefore, denies defendant his right to effective assistance of counsel. Second, the defendant can argue that the trial court erred in not requiring defendant's counsel to present mitigating evidence pursuant to the duty established by Section 17-110.1.

The American Bar Association Standards for Criminal Justice provide some further support for imposing a duty upon defense counsel to present mitigating evidence at the penalty phase. Standard 4-4.1 requires counsel "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."[10] The accompanying comments note that "this standard contemplates. . . that an attorney should vigorously seek to ascertain all mitigating circumstances concerning the offense and characteristics of the defendant."[11]

Standard 4-5.2 establishes the decisions which may be left to a defendant after full consultation with counsel: the plea to be entered, the waiver of a jury trial, and whether a defendant should testify.[12] All other decisions regarding trial strategy or tactics are the "exclusive province" of defense counsel after consultation with the defendant.[13] This standard would appear to place the decision on presenting mitigating evidence in the hands of the defense counsel. There appears to be no requirement that defense counsel defer to the defendant's wishes in such a situation.

Standard 4-8.1 on sentencing requires that defense counsel "present to the court any ground which will assist in reaching a proper disposition favorable to the accused."[14] Standard 18-6.3 further requires that "the defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed."[15] This standard also establishes specific duties for the attorney, including:

> The attorney should satisfy himself or herself that the factual basis for the sentence will be adequate both for the purposes of the sentencing court and, to the extent ascertainable, for the purposes of subsequent dispositional authorities. The attorney should take particular care to make certain that the record of the sentencing proceedings will accurately reflect all relevant mitigating circumstances relating either to the offense or to the characteristics of the defendant which were not disclosed during the guilt phase of the case and to ensure that such record will be adequately preserved."[16]

The ABA standards may be used in conjunction with the implied statutory duty placed upon defense counsel under Virginia Code Section 17-110.1 to bolster an argument on appeal that a defendant was denied effective assistance of counsel by the failure to present mitigating evidence at the penalty phase despite a defendant's instructions to the contrary.

It is important to remember that a capital defendant is affected by a host of emotional factors, ranging from shame and depression to bravado, and often is at his or her most vulnerable point entering the penalty phase. The emotional weight of having been found guilty or of entering a guilty plea to a capital crime may lead a defendant to not want to vigorously contest the death penalty — a decision that is almost always regretted later.[17] Defense counsel has the statutory, constitutional and ethical duty to protect the defendant's long-term interests by zealously pursuing the case in mitigation, even where the defendant does not wish to do so.

Summary and analysis by:
Susan F. Henderson

---

7 Va. Code Ann. § 17-110.1C.2. (1990) (emphasis added).

8 *Id.*

9 *Davidson*, 244 Va. at 132, 419 S.E.2d at 658.

10 ABA Standards for Criminal Justice Rule 4-4.1 (2d ed. 1980 & Supp. 1986).

11 ABA Standards for Criminal Justice Rule 4-4.1 cmt. (2d ed. 1980 & Supp. 1986).

12 ABA Standards for Criminal Justice Rule 4-5.2 (2d ed. 1980 & Supp. 1986).

13 *Id.*

14 ABA Standards for Criminal Justice, Rule 4-8.1 (2d ed. 1980 & Supp. 1986).

15 ABA Standards for Criminal Justice, Rule 18-6.3 (2d ed. 1980 & Supp. 1986).

16 *Id.*

17 Indeed, this is the case with Davidson, who has now indicated a desire to pursue the appeals process.