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SATCHER v. COMMONWEALTH 1992 Va. LEXIS 98

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Supreme Court of Virginia

FACTS

Michael Charles Satcher was convicted of the robbery, assault and battery, and attempted rape of Deborah Abel, and the robbery, rape, and capital murder of Ann Borghesani. Acting under Virginia Rule of Criminal Procedure 3A:6(b), the trial court joined the trial of the two offenses, finding that they were sufficiently connected in time, place, and means of commission not to warrant separate trials. Both incidents occurred on or near a bicycle path in Arlington County, on March 31, 1990.

At approximately 7 p.m. on March 31, Deborah Abel was pulled off of her bicycle by an assailant, dragged into a ditch, beaten, and partially disrobed in an attempt to commit rape. Another bicyclist interrupted the attack and pursued the assailant who escaped with Ms. Abel's purse.

Ann Borgesani had an engagement for which she never appeared at about 8 p.m. that same evening which in all likelihood would have required her to walk along the bicycle path to a nearby train station. The following morning, her body was discovered at the bottom of a stairwell in an office building adjacent to the bicycle path. She had been raped, robbed of her jewelry, and stabbed repeatedly by an instrument with a sharp tipped blade. The police found Ms. Borgesani's shoe on the bicycle path and discovered her purse, and Deborah Abel's purse, in a nearby parking lot.

Four and one-half months later on August 18th, Virginia authorities arrested Satcher on another bicycle path in Arlington County for offenses he had committed on that day. Although the police did not mention the Borgesani murder, Satcher volunteered that he believed the police were "trying to frame [him] for murder or something or a rape or something." Investigators found a weapon in Satcher's car which could have produced similar wounds to the ones Ms. Borgesani sustained. DNA testing matched semen removed from Ms. Borgesani with blood taken from Satcher.

The jury convicted Satcher in the joined proceeding where he received sentences of life plus ten years, twelve months, and two terms of life imprisonment for the non-capital offenses of which he was convicted involving Ms. Abel and Ms. Borgesani. The jury, finding both statutory aggravating factors of "vileness" and "future dangerousness" to be present,[1] imposed the death penalty for the capital murder of Ms. Borgesani.

Satcher appealed to the Supreme Court of Virginia claiming that the trial court erred in not granting his motion for separate trials in violation of Virginia Rules of Criminal Procedure, 3A:10(b) and 3A:6(b).[2] Satcher also claimed that the trial court erred in disallowing a question at the voir dire stage related to a prospective juror's inability to impose a life sentence in a brutal murder case such as this. Additionally, Satcher fashioned a number of arguments based upon the Commonwealth's use of DNA evidence: that his case was prejudiced by jurors' preconceived notions about the reliability of DNA evidence; that the DNA evidence which the Commonwealth offered was unreliable; and that the statute which permits the use of such evidence, Section 19.2-270.5 of the Virginia Code, was unconstitutional on a number of grounds: (1) that it is unconstitutional facially because the statute shifts the burden of proof to the defendant, (2) that it is unconstitutionally vague, leaving too much discretion in the hands of the judge, and (3) that the statute was unconstitutional as applied because it denied Satcher his rights to due process and confrontation.

HOLDING

The Virginia Supreme Court dismissed all of Satcher's claims and affirmed the convictions and sentences.[3] With respect to the motion for separate trials, the Virginia Supreme Court held that "the two or more acts involved in this case constituted parts of a common scheme or plan, and were closely connected in time, place, and means of commission."[4] Further, the court held that there was not significant danger that the Commonwealth relied on the strong evidence of one offense to improve its case with respect to the second offense; therefore, the interests of justice did not demand separate trials.[5]

The court dismissed Satcher's argument that the trial court had improperly prohibited defense counsel's detailed question during voir dire asking whether jurors would impose the death penalty under hypothetical circumstances identical to Satcher's case.[6] Nor did the court find reversible error in the trial court's decision to allow certain jurors with an alleged predisposition to the death penalty to be empaneled. The court found nothing improper in the voir dire record and deferred to the judgment of the trial judge.[7]

The court dismissed Satcher's contention that his case was prejudiced by juror preconceptions on DNA evidence, holding that the opinions expressed by jurors were in accord with the established practice in Virginia favoring the use of DNA evidence.[8] The court rejected Satcher's general objection questioning the reliability of DNA evidence, stating that the issue had been settled in *Spencer v. Commonwealth*,[9] and that the actions of the Virginia General Assembly in codifying the reliability of DNA evidence confirmed this ruling.[10] The court also rejected various claims by Satcher that the prosecution had improperly utilized DNA expert testimony.[11]

ANALYSIS/APPLICATION IN VIRGINIA

I. Motion for Separate Trials

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1 *See* Va. Code Ann. §19.2-264.2 (1990); Va. Code Ann. § 19.2-264.4(C) (1990).

2 Rule 3A:10(b) provides that all pending offenses may be joined if "justice does not require separate trials." Rule 3A:6(b) states that joinder is permissible if the offenses are "based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan."

3 *Satcher v. Commonwealth*, Nos. 920247 and 920248, 1992 Va. LEXIS 98 at *74 (Sept. 18, 1992).

4 *Id.* at *10.

5 *Id.*

6 *Id.* at *17.

7 *Id.* at *19 - *27.

8 *Id.* at *18 - *19.

9 238 Va. 563, 385 S.E.2d 850 (1989), *cert. denied*, 493 U.S. 1093 (1990) (*Spencer III*).

10 Va. Code Ann. §19.2-270.5 (1990).

11 Satcher assigned additional errors. Some of these the court treated 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: objections based on pretrial discovery matters, the admissibility of several witnesses' identifications, sufficiency of the evidence, a passion and prejudice argument based on the nature of the murder (a black defendant and a white victim), and an argument that the sentence was excessive and disproportionate.

The issue of whether Satcher should have been tried seperately for the Abel incident and the Borgesani murder rests on an interpretation of the Virginia Rules of Criminal Procedure. The rules in question in this case are Rule 3A:10(b): "The court may direct that an accused be tried at one time for all offenses then pending against him, if justice does not require separate trials . . . " and Rule 3A:6(b): "Two or more offenses . . . may be charged in separate counts of an indictment or information if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or are parts of a common scheme or plan."

The *Satcher* court insisted that the acts in this case clearly constituted part of a common scheme or plan. The court agreed with the Commonwealth that the offenses were sufficiently similar in time, place, and, most significantly, the apparent criminal intent of the perpetrator in order to warrant joinder.[12] The court dismissed Satcher's claim that the Commonwealth used the cumulative effect of the two similar incidents to improve a generally weak case.[13] Furthermore, the court disagreed with Satcher that justice required separate trials, noting that joinder of offenses was the more just alternative, and that such decisions remain within the discretion of the trial court.[14]

Alternatively, the court held that a violation of rules 3A:10(b) and 3A:6(b) will be reversible error only if the substantive rights of the defendant have been violated, and found that no such violation had occurred in Satcher's case.[15] Relying on *Coe v. Commonwealth*,[16] the court noted that the probative value of the Abel evidence would have outweighed its prejudicial effect and, therefore, would have been admissible in the Borgesani case anyway. Since the Commonwealth could have offered evidence of the Abel attack during a separate trial of the Borgesani murder, the joinder of the offenses did not, according to the court, rise to the level of reversible error.[17]

The dissent, however, argued that the trial court erred in its denial of the motion for separate trials.[18] Citing *Walker v. Commonwealth*,[19] the dissent argued that in order to join offenses over the defendant's objection, the Commonwealth must offer an unbroken chain of evidence.[20] The Commonwealth failed, according to the dissent, to offer any substantial connection between the attack on the bicycle path and the murder in the nearby office building.

The dissent perceived a shift away from established principles of joinder in the majority decision. Unlike the majority, the dissent argued that a heavy burden rests with the Commonwealth to prove that the crimes "are 'so intimately connected and blended with the main facts adduced in evidence, that they cannot be departed from with propriety . . . '."[21] Moreover, the dissent contended the Virginia Supreme Court had made clear in *Day v. Commonwealth*[22] that if the only relevancy of other allegedly related crimes "is to show the character of the accused or his disposition to commit an offense similar to that charged," then that evidence is inadmissible.[23]

The *Satcher* decision indicates that the Virginia Supreme Court will generally defer to the trial court's discretion as to when to join offenses. However, the strongly worded dissent indicates an audience for a less permissive interpretation of Virginia's joinder rules. Defense counsel must make a pretrial motion for separate trials before trial in order to avoid waiving that right. Whether or not to make such a motion for separate trials is an important tactical decision for defense counsel. Acquittal on the greater of two charges in a joined trial may have a "coattail" effect and carry the weak one with it. Moreover, agreeing to a joint trial may put the defendant in a better bargaining position with the prosecution, and lesser charges may be dismissed altogether. However, a decision not to move for separate trials may be prejudicial as the jury may be influenced by the cumulative effect of the charges, and conviction on one charge could lead the jury to convict on the other.

In a capital trial, joinder of offenses offers fewer advantages. For example, the Commonwealth charged Satcher with murder during the course of an attempted rape.[24] At the sentencing stage, Satcher's case certainly suffered under the cumulative effect of his apparent "one-man-crime wave."[25] Had defense counsel been able to have the Abel and Borgesani matters tried separately, the jury's likelihood of imposing death may have been lessened, especially with respect to finding future dangerousness.

In order to have charges tried separately, defense counsel must show that the incidents sought to be joined do not constitute a common plan. Such a strategy involves a fact intensive argument and requires a thorough investigation of the incidents in question. Defense counsel should distinguish their cases from *Satcher* and should argue, as the dissent did in *Satcher*, that *Satcher* represents a departure from settled principles of joinder and should not be followed. Finally, because joinder may have due process implications, any objections to joinder must be stated both in terms of the Virginia statute and on federal and state constitutional grounds.

II. The Use of DNA Evidence

A. Juror Bias Towards DNA

Satcher argued that jurors have preconceived notions about the reliability of DNA evidence that prejudice defendants. The court dismissed this contention, stating that all jurors will carry some preconceived notions with them into a case.[26] Even if potential jurors exaggerate the reliability of DNA evidence, the Virginia Supreme Court and the General Assembly have decided that DNA evidence is reliable. As a result, the court concluded that such exaggeration by jurors was consistent with the approach mandated under Virginia law.

B. Reliability and Admissibility of DNA Evidence

Satcher also made a general attack on the reliability of DNA evidence. He claimed that the statute which always permits DNA evidence to be introduced into evidence[27] was unconstitutional because it improperly shifted the burden of proof to the defendant to show that the evidence was not reliable. The court dismissed this contention, stating that the statute "'merely creates a rule of evidence and does not determine the guilt of the accused.'"[28]

Satcher proceeded to argue that the statute was unconstitutional as applied, and violated his rights to due process, confrontation, and a fair trial, because it allowed the Commonwealth to rely on inherently unreliable evidence. The court held that despite these claims, the trial judge properly allowed the question of reliability to be decided by the jury after hearing expert testimony from both sides.[29]

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12 *Satcher*, 1992 Va. LEXIS 98 at *10.
13 *Id.* at *9.
14 *Id.* at *13.
15 *Id.*
16 231 Va. 83, 87 340 S.E.2d 820, 823 (1986).
17 *Satcher*, 1992 Va. LEXIS 98 at *13.
18 *Id.* at *75 (Hassell, J., dissenting).
19 28 Va. (1 Leigh) 574 (1829).
20 *Satcher*, 1992 Va. LEXIS 98 at *77, (Hassell, J., dissenting).
21 *Id.* at *78 (quoting *Kirkpatrick v. Commonwealth*, 211 Va. 269, 276, 176 S.E.2d 802, 807-808 (1970) (quoting *Walker*, 28 Va. (1 Leigh) at 576)).
22 196 Va. 907, 914, 86 S.E.2d 23, 26 (1955).
23 *Satcher*, 1992 Va. LEXIS 98 at *84 (Hassel, J. dissenting).
24 Va. Code Ann. § 18.2-31(5) (1991).
25 *Satcher*, 1992 Va. LEXIS 98 at *71.
26 *Id.* at *18.
27 Va. Code Ann. §19.2-270.5 (1990). "In any criminal proceeding, D.N.A. . . . testing shall be deemed to be a reliable scientific technique and the evidence of a D.N.A. profile comparison may be admitted to prove or disprove the identity of any person. . . ."
28 *Satcher*, 1992 Va. LEXIS 98 at *34 (quoting *Dooley v. Commonwealth*, 198 Va. 32, 35, 92 S.E.2d 348, 350 (1956)).
29 *Id.* at *38.

Few subjects create as much controversy as the admissibility and reliability of DNA evidence in the context of a criminal trial. Although most jurisdictions apply the rule of *Frye v. United States*[30] — that a new scientific technique must be both reliable and generally accepted by the scientific community — Virginia uses the relevancy standard, which evaluates evidence according to logical relevancy, and excludes it only if its prejudicial effect outweighs its probative value.[31] In a series of cases culminating with *Spencer v. Commonwealth*,[32] the Virginia Supreme Court held that DNA evidence is a relevant and reliable scientific technique, and therefore such evidence is admissible. Though DNA evidence has not yet reached the level of reliability that a fingerprint carries, this type of evidence will be a part of criminal trials for the foreseeable future.

General arguments at trial that DNA evidence is inherently unreliable are likely to fail as they did in *Satcher*. As a result, objections by defense counsel must address flaws in the process itself. Defense counsel should be familiar enough with the procedures of DNA testing that major flaws in testing procedures can be identified and articulated. Errors may occur depending on how samples are collected and preserved, the quality and quantity of the sample, and what method of DNA testing was used. For example, certain DNA tests require a greater quantity of genetic materials in order to make a reliable match than others.[33]

Defense counsel must guard against the false conclusions that the jury may draw from statistical evidence offered by DNA experts. For example, testing laboratories have extensive samples from European-Americans and African-Americans, but do not have the same data from Asians and Native Americans, and making reliability projections in such cases might be misleading. Other issues that defense counsel should be aware of include: the duty of the Commonwealth to properly preserve essential evidence, the advantages and disadvantages of pursuing independent DNA testing, whether or not the prosecution will use DNA evidence, and the possible conflicts of interest inherent in expert testimony from people trying to sell their technology to law enforcement agencies.[34]

III. Voir Dire and Predisposition to the Death Penalty

Defense counsel attempted to ask the following question during voir dire:

> If we have a situation in which a young woman is raped, robbed by a person armed with a deadly weapon, stabbed twenty-one times, beaten and murdered, . . . in that type of situation do any of you believe that imposition of the death penalty would be the most appropriate sentence?

The trial court rejected this question because of its broadness and argumentative nature. The court implied that a proper question would only address the venireperson's ability to impose the death sentence. The Virginia Supreme Court had upheld the refusal of similar less argumentative questions in the past,[35] and the *Satcher* court upheld the trial court's refusal to allow this question as well.

In so doing, the court distinguished *Satcher* from the United States Supreme Court's recent ruling in *Morgan v. Illinois*.[36] In *Morgan*, the Supreme Court ruled that the defendant's right to a fair and impartial jury was violated by the trial court's refusal to inquire whether prospective jurors would vote automatically for the imposition of the death penalty.[37] The trial court had allowed the prosecutor to ask jurors the *Witherspoon* question of whether they definitely could not impose the death penalty.[38] The Supreme Court held in *Morgan* that general questions respecting a juror's ability to carry out his duties were inadequate in determining whether the juror was truly impartial.[39] In a capital case, a juror could answer in good faith that she will follow the law without realizing that she must be able to consider mitigating evidence in deciding whether to impose the death penalty. The Supreme Court concluded that only a "reverse *Witherspoon*" question can address that possibility.[40]

With little elaboration, the Virginia Supreme Court held that counsel's question in this case was significantly different from the question in *Morgan*, and therefore the trial court did not err in refusing the question.[41] In its examination of the record, the court in *Satcher* failed to find that any jurors could not perform their duties as jurors and follow their oaths as required by law. As a result the court dismissed Satcher's objections.[42]

Defense counsel should seek to use *Morgan* as a means of exploring juror attitudes on capital sentencing issues. In order to do that, carefully crafted questions with supporting memoranda are required. Moreover, *Morgan* appears to allow defense counsel to not only explore jurors' views on the death penalty generally, but also their abilities to consider certain types of evidence as mitigating.[43] The United States Supreme Court recognized in *Morgan* that a certain amount of equity between the defendant and the state is necessary during the voir dire process, and defense counsel should stress this when attempting to ask more elaborate "reverse *Witherspoon*" questions.

Summary and Analysis by:
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30 293 F. 1013 (D.C. Cir. 1923).

31 *See O'Dell v. Commonwealth*, 234 Va. 672, 695-96, 364 S.E.2d 491, 504, *cert. denied*, 109 S.Ct. 186 (1988).

32 238 Va. 563, 385 S.E.2d 850 (1989) *cert. denied* 493 U.S. 1093 (1990) (*Spencer III*). *See* case summary of *Spencer III*, Capital Defense Digest, Vol. 2, No. 2., p. 10 (1990). *See also Spencer v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1989), *cert. denied* 493 U.S. 1093 (1990) (*Spencer II*), and case summary of *Spencer II*, Capital Defense Digest, Vol. 2, No. 1, p. 13 (1989); and *Spencer v. Commonwealth*, 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied*, 493 U.S. 1093 (1990) (*Spencer I*), and case summary of *Spencer I*, Capital Defense Digest, Vol. 2, No. 1, p. 13 (1989). A fourth case, *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609 (1990), *cert. denied* 111 S.Ct. 281 (1990) (*Spencer IV*), involved an entirely different type of D.N.A. analysis.

33 *See Spencer IV*, 240 Va. at 95, 393 S.E.2d at 620 (1990).

34 See Lonsbury, *The Current State of DNA Evidence*, Capital Defense Digest, Vol. 4, No. 2, p. 11 (1992).

35 *See Patterson v. Commonwealth*, 222 Va. 653, 657, 283 S.E.2d 212, 214 (1981) and *Buchanan v. Commonwealth*, 238 Va. 389, 402, 384 S.E.2d 757, 765 (1989). *See* case summary of *Buchanan*, Capital Defense Digest, Vol. 2, No. 1, p. 16 (1989).

36 112 S.Ct. 2222 (1992). *See* case summary of *Morgan*, Capital Defense Digest, this issue.

37 112 S.Ct. 2222, 2234 (1992).

38 In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a venireperson could be excused for cause based on their opposition to the death penalty only if it would lead them to automatically vote against the death penalty. A "reverse *Witherspoon*" question asks whether a juror is incapable of imposing a life sentence, but would always vote for death.

39 *Morgan*, 112 S.Ct. at 2232-33.

40 *Id.*

41 *Satcher*, 1992 Va. LEXIS 98 at *17, n.7. *See also Mueller v. Commonwealth*, Nos. 920287 and 920449, 1992 Va. LEXIS 97 (Sept. 18, 1992). According to the Virginia Supreme Court's recent decision in *Mueller*, a trial court need not allow the defense counsel to elaborate on his question if the voir dire process has sufficiently investigated the possibility that a juror definitely would or would not impose the death penalty. *See* case summary of *Mueller*, Capital Defense Digest, this issue.

42 *Id.* at *22.

43 For suggested lines of questioning, *see* case summary of *Morgan*, Capital Defense Digest, this issue.