Capital Defense Journal

Volume 6 | Issue 1 Article 9

Fall 9-1-1993

PRUETT v. THOMPSON 996 F.2d 1560 (4th Cir. 1993)

PRUETT v. THOMPSON

996 F.2d 1560 (4th Cir. 1993)
United States Court of Appeals, Fourth Circuit

FACTS

In 1986, a Virginia Beach jury convicted David M. Pruett of rape, robbery, and capital murder during the commission of, or subsequent to, rape. Pruett confessed to police that he had been a friend of the victim, that he had gone to her house while her husband was out of town, spoke with her, decided to rob her and have sex with her, that she refused to have sex until he produced a knife, that he raped, killed, and robbed her, and that he attempted to conceal these facts. Pruett also confessed to robbing and killing another woman in 1975. The jury sentenced Pruett to death. Finding the death penalty appropriate because the crime satisfied both the "vileness" and "future dangerousness" components of the capital murder statute, the Supreme Court of Virginia affirmed the death sentence.[1]

Pruett then filed a habeas corpus petition in the Virginia Beach Circuit Court. The court dismissed some counts of the petition and ordered an evidentiary hearing on the others. After the hearing, the circuit court dismissed the petition in full. The Supreme Court of Virginia and the United States Supreme Court refused to hear an appeal.[2]

Next, Pruett filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia.[3] The court denied the petition and its request for an evidentiary hearing. Pruett then appealed to the United States Court of Appeals for the Fourth Circuit, basing the appeal on five grounds: (1) the state trial court erred in not instructing the jury on the lesser-included offense of first-degree murder during the guilt phase of the trial; (2) prosecutorial misconduct infected the trial and sentencing; (3) the jury instructions given at the penalty phase were inadequate; (4) Pruett received ineffective assistance of trial and appellate counsel; and (5) the district court abused its discretion under Title 28, section 2254, of the United States Code, by failing to grant Pruett an evidentiary hearing on his ineffective assistance of counsel claim.[4]

HOLDING

The Fourth Circuit Court of Appeals denied relief and affirmed the District Court's ruling.[5] The court found that the first three of Pruett's grounds for appeal were procedurally defaulted, and that the other two were without merit. Of primary interest is the court's treatment of the first three claims.

ANALYSIS/APPLICATION IN VIRGINIA

I. Default

Pruett v. Thompson is a primer on procedural default which will bar federal review of constitutional claims. It emphasizes once again the importance of raising and preserving all federal claims at trial and on direct appeal, as well as protecting them on collateral review. Its lesson is that when correct procedure is not followed, claims are defaulted, and defendants die. Virginia Supreme Court Rule 5:25 states, "Error will not be sustained to any ruling of the trial court ... unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."[6] Equally important is the requirement that all habeas claims be the same claims as were preserved earlier. Habeas counsel may not be successful in dividing a general claim of improper argument or jury instruction into several discrete claims at that stage. These may be considered new and, therefore, defaulted claims. In summary, to be preserved for further review, a claim must satisfy procedural (raised both at trial and on appeal) and substantive (must actually be the same issue) requirements.

A. Default of Claim that Lesser Included Offense Instruction Should Have Been Given at Trial

In two circumstances, Pruett could have been entitled to a lesser included offense instruction on first degree murder. First, the jury could have found that Pruett was guilty of premeditated murder, but not during or subsequent to rape. Or second, the jury could have found that Pruett was guilty of rape, but that he had no capacity to premeditate.[7] Evidence tending to show the existence of either of these two circumstances, of course, must have been presented at trial for Pruett to have been entitled to a lesser included offense instruction. The trial judge found no such evidence and refused to instruct the jury on the lesser included offense. Pruett forfeited his right to appeal on either lesser included offense theory due to procedural errors.

Predictably, the Fourth Circuit held that Pruett's claim of entitlement to a lesser included offense instruction based on an absence of rape theory was defaulted for failure to raise the issue on direct appeal to the Supreme Court of Virginia.[8] Pruett's other claim of entitlement, based on an "absence of capacity to premeditate" theory, was defaulted because he did not raise it until his appeal from the denial of his state habeas petition.[9]

B. Default of Prosecutorial Misconduct Claims

Pruett's second ground for appeal demonstrates the importance of complying with the substantive "same issue" requirement discussed above. On direct appeal to the Supreme Court of Virginia, Pruett claimed prosecutorial misconduct only with respect to the prosecutor's argument at trial that Pruett's attorney had conceded guilt. Although this claim of prosecutorial misconduct was preserved all the way through federal district court, it was then defaulted because it was not appealed to the

---

1 *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986), *cert. denied*, 482 U.S. 931 (1987).

2 *Pruett v. Thompson*, 495 U.S. 940 (1990).

3 *Pruett v. Thompson*, 771 F.Supp. 1428 (E.D. Va. 1991).

4 *Pruett v. Thompson*, 996 F.2d 1560, 1564 (4th Cir. 1993).

5 *Id.* at 1563, 1577.

6 It is also necessary to assign these errors on direct appeal, and to brief and argue them. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

7 *See* Virginia Code § 18.2-31 (1988): "The following offenses shall constitute capital murder, punishable as a Class1 felony ... The willful, deliberate and premeditated killing of any person in the commission of, or subsequent to, rape." *See also* Va. Code Ann. § 18.2-32 (1988): "Murder, other than capital murder ... by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit ... rape ...is murder in the first degree, punishable as a Class 2 felony."

8 *Pruett*, 996 F.2d at 1570.

9 *Id.* at 1564.

Fourth Circuit. Instead, Pruett presented for the first time before the Fourth Circuit claims of prosecutorial misconduct based on different portions of the argument of the Commonwealth's attorney.[10] The court held these claims to be new, and therefore defaulted, because they were never presented to the Supreme Court of Virginia.[11]

C. Default of Challenge to Penalty Phase Instructions

The third ground Pruett raised suffered the same fate as the first two, and for the same reason as the second. On direct appeal Pruett complained of the trial judge's failure to instruct the jury that in the event they could not agree to impose the death penalty, the court would impose a life sentence. Pruett's habeas claim, however, was different; here he complained of the trial judge's instructions concerning mitigation evidence. Because the claim was not substantively the same, it was held to be procedurally defaulted.[12]

II. Relief from Default

A. Ineffective Assistance of Counsel

Procedural default does not always indicate the end of the line for capital defendants. The refusal of federal courts to hear defaulted claims is a matter of comity, not jurisdiction. The case of *Wainwright v. Sykes* provides that procedurally defaulted claims may be heard upon a showing of (1) cause for non-compliance with state procedure and (2) prejudice to the defendant.[13] Somewhat more broadly, *Coleman v. Thompson* holds that review "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a **fundamental miscarriage of justice.**"[14] *Coleman* also suggests that some extreme level of ineffective assistance of counsel can be an excuse for default.[15]

The Fourth Circuit held that ineffective assistance of counsel did not excuse Pruett's failure to appeal the denial of the lesser included offense instruction on the absence of rape theory.[16] The court reasoned that it is not ineffective assistance of counsel to make strategic decisions about which issues are best suited for appeal; its conclusion was based on language of *Smith v. Murray:*[17] "This 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."[18] In non-capital cases this may be true, but in the realm of death penalty litigation, it is deadly advice which should never be followed.[19]

Pruett's other lesser included offense instruction claim, based on the absence of premeditation theory, was also not excused on the basis of

---

[10] Pruett presented new arguments which concerned prosecutorial misconduct at both the guilt phase and the penalty phase of trial. Failure to object to these alleged acts of misconduct might have been in itself ineffective assistance of counsel. Because that may have been true, Pruett might have been able to escape the trap of procedural default rules by offering this ineffective assistance of counsel as the cause for default. *See infra* section II.A. Unfortunately, Pruett never raised these claims in his state habeas proceedings. When the Fourth Circuit finally heard them, the court held that they were all insufficient bases for claims of ineffective assistance of counsel, and that they were all defaulted. These new claims were: the prosecutor's offering of evidence as to the victim's character, his "stating that he would offer evidence in aggravation at the penalty phase, and [his] telling the jury ...that it should show Pruett the same compassion that he had shown [the victim]" at the guilt phase; and at the penalty phase, his saying that the death penalty would be appropriate on the basis of the guilt-phase verdict alone, his saying "that the Commonwealth could not conceive of a more appropriate case for the death penalty," his arguing that mitigating evidence need not be considered by the jury and that the victim did not get due process or any alternative to the penalty of death, his offering testimony of the husband of the victim in the 1975 murder which described the victim's condition after the murder, and his arguing that the 1975 murder was heinous. *Pruett*, 996 F.2d at 1575-76.

[11] *Id.* at 1576. Had these claims not been defaulted, they may have had some merit. One example is the prosecutor's stating at the penalty phase that the death penalty would be appropriate solely on the basis of the guilt-phase verdict. *See supra* note 10. This was a misstatement of the law; evidence both of aggravation and in mitigation must be considered. The prosecutor's statement is prohibited by Disciplinary Rules 7-102(A)(2) and (5) of the Virginia Code of Professional Responsibility: "In his representation of a client, a lawyer shall not ... [k]nowingly advance a claim or defense that is unwarranted under existing law, ... [or k]nowingly make a false statement of law or fact." A second example of a claim which might have had merit is the prosecutor's arguing that since the victim did not get due process or any alternative to the death penalty, that Pruett also should not receive these. *See supra* note 10. This claim may have led to success if supported by the reasoning of *Zant v. Stephens*, 462 U.S. 862 (1983). The prosecutor in *Pruett* in effect asked the jury to consider the defendant's engaging in constitutionally protected conduct — exercising his right to due process — as an aggravating factor. The *Stephens* court, however, would not allow this. Because in *Stephens* the state had not "attached the 'aggravating' label to factors that are constitutionally impermissible," the Court provided no relief. But the Court did conclude that if the aggravating circumstance was invalid for a reason such as constitutional impermissibility (which Pruett could have shown), due process would require that the jury's decision in favor of the death penalty be set aside. *Stephens*, 462 U.S. at 885.

[12] *Pruett*, 996 F.2d at 1565, 1577.

[13] 433 U.S. 72 (1977). *See also McClesky v. Zant*, 111 S. Ct. 2546 (1991) (applying the *Wainwright v. Sykes* standard). *See also* case summary of *McClesky*, Capital Defense Digest, Vol. 4, No. 1, p. 7(1991).

[14] 111 S. Ct. 2546, 2565 (1991) (emphasis added). *See also* case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991).

[15] *Coleman*, 111 S. Ct. at 2566-2567.

[16] *Pruett*, 996 F.2d at 1569.

[17] 477 U.S. 527 (1986).

[18] *Id.* at 536 (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

[19] *See* Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679 (1990). Bright illustrates that such advice can be deadly through *Smith v. Murray*, 477 U.S. 527 (1986). In that case the defendant was executed after his claims were held to be procedurally defaulted. Smith's attorney had chosen not to pursue a claim concerning unlawfully obtained psychiatric evidence; this issue was raised on direct appeal, however, in an amicus curiae brief, but that was held to be insufficient. 92 W. Va. L. Rev. at 686 n.39. The dissent characterized this defaulted claim as "unquestionably ... meritorious," but said that its not being raised was "an unsurprising decision in view of the fact that a governing ...precedent, which was then entirely valid and only two years old, decisively barred the claim." *Smith*, 477 U.S. at 540 (Stevens, J., dissenting) (citation omitted). The lesson of *Smith*, in particular, is that **all** non-frivolous claims in capital cases must be preserved, including (and even especially) those flatly rejected by the Supreme Court of Virginia. The recent grant of certiorari in *Simmons v. South Carolina*, 62 U.S.L.W. 3244 (Oct. 4, 1993), provides an example. In *Simmons*, the Supreme Court of South Carolina held that the trial judge did not make any appealable error under state law in refusing to give accurate parole information to the jury. *State v. Simmons*, 427 S.E.2d 175, 179 (S.C. 1993). If the United States Supreme Court holds that such information is indeed required, such a holding will only help those Virginia defendants who have preserved this issue during their trials.

ineffective assistance of counsel. In fact, the court found "double default." Pruett, of course, defaulted the instruction claim by failing to raise it at trial or on direct appeal to the Supreme Court of Virginia. Likewise, ineffective assistance of counsel as an excuse for defaulting the underlying claim was not **separately** raised until the case reached the Fourth Circuit. "[T]he very claim on which Pruett relies to establish cause and prejudice for the procedural default of his claim with respect to lack of premeditation ... is itself subject to dismissal for failure to exhaust and, as well, would be procedurally defaulted under state law."[20] It is important also to note the court's holding that ineffective assistance of counsel claims offered as cause, or as an excuse for procedural default, must be separate discrete claims. If such claims are not separately appealed, they are defaulted on their own.[21]

B. Innocence of Death Penalty

Another reason procedural default may not always be deadly to capital defendants is the existence of a second excuse, actual "innocence of the death penalty"; that is, innocence of the capital crime itself, or non-existence of aggravating factors sufficient to support the death penalty. The United States Supreme Court has held that to prove such a claim "one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[22] The *Pruett* court found no constitutional error with respect to the trial judge's refusal to give the lesser included offense instruction because there was no evidence supporting Pruett's contention. Even if there had been error, the court found that no reasonable juror, given the chance, would have chosen first degree murder over capital murder when assessing Pruett's guilt.[23]

III. Avoiding Default - Lessons from *Pruett*

To avoid having a claim defaulted because it is not substantially the same claim, trial counsel must make as many discrete objections and claims of error as there are legal bases to support. Habeas counsel must then brief and argue for the broadest possible interpretation of the claims raised at trial. The Attorney General will argue for dismissal by challenging every nuance of difference between what was raised at trial, on appeal, and what is now in the habeas petition. Because of the adversarial nature of our legal system, an expansion/contraction conflict is almost inevitable in habeas cases. The defense attorney will attempt to enlarge a claim's reach; the prosecutor, to narrow its reach. Inexperienced habeas counsel should be aware that this struggle is part of collateral representation and should seek assistance.[24]

At habeas, the Attorney General may also argue for dismissal by challenging the grounds on which relief is sought. (Obviously, federal courts have jurisdiction only over questions of federal law.) Any variation between the grounds urged in the state court appeal and the grounds urged in the habeas petition, the state will argue, is enough for dismissal. Fortunately, however, the United States Supreme Court has not required that unreasonably precise grounds for relief be articulated.[25]

Another lesson to be learned from *Pruett* is the importance of interrupting opposing counsel's arguments and preserving appellate issues. Not only must all grounds for appeal be raised during trial to be reviewable on appeal, all objections must be made as soon as the objectionable words are spoken. An issue will be considered defaulted if it is not objected to immediately.[26] Because of the rigid default rules enforced by the Supreme Court of Virginia, the genteel tradition of not interrupting argument must be abandoned in capital cases. It should be possible to interrupt and make the record without abandoning the laudable goal of civility in litigation.[27] In any event, however, it must be done.

Summary and analysis by:
Barbra Anna Pohl

---

20 *Pruett*, 996 F.2d at 1569.

21 *See* case summary of *Justus v. Murray*, Capital Defense Digest, Vol. 3, No. 1, p. 14 (1990). *See also Murray v. Carrier*, 477 U.S. 478, 489 (1986) (holding that ineffective assistance of counsel is cause for procedural default, but that the exhaustion doctrine "requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default").

22 *Sawyer v. Whitley*, 112 S. Ct. 2514, 2517 (1992). *See also* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992).

23 *Pruett*, 996 F.2d at 1570. The existence of aggravating factors was not a part of this claim.

24 Attorneys can contact the Virginia Capital Case Clearinghouse and the Virginia Capital Representation Resource Center, 1001 East Main Street, Suite 510, Richmond, Virginia 23219, (804) 643-6845.

25 *See Taylor v. Illinois*, 484 U.S. 400, 406 n. 9 (1988) (holding that "[a] generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction"). *See also Trevino v. Texas*, 112 S. Ct. 1547, 1550 (1992) (Defendant "preserved his equal protection claim before the Court of Criminal Appeals. His argument caption made an express reference to the Fourteenth Amendment and the issue presented for review was the very one that he had raised before the trial court."). *See also* case summary of *Trevino*, Capital Defense Digest, Vol. 5, No. 1, p. 20 (1992).

26 *See Beavers v. Commonwealth*, 245 Va. 268, 279, 427 S.E.2d 411, 419 (1993) and case summary of *Beavers*, Capital Defense Digest, this issue.

27 The American Bar Association's Model Code of Professional Responsibility commands that "[i]n appearing in his professional capacity before a tribunal, a lawyer shall not . . . [f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply." DR7-106(C)(5) (1983). *See also* the Rules of the Supreme Court of Virginia (1983). Canon EC7-35 suggests in similar fashion that an attorney "be courteous to opposing counsel ..."