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Supreme Court of Virginia

FACTS

On May 12, 1991, Kenneth Manuel Stewart went to the home of his estranged wife and five-month-old son and shot his wife in the forehead at close-range. After she fell, Stewart shot her a second time in the front of the skull. He then proceeded downstairs and shot his son twice at close range, shooting him in the side of the head. Stewart then carried his son's body upstairs and placed it in the arms of Mrs. Stewart's body. Before leaving the house, he turned off the kitchen stove in which his estranged wife had been cooking a casserole, put the family dogs on the back porch and closed both doors, turned on Mrs. Stewart's answering machine, got her house key, and locked the house. Finally, Stewart drove his wife's car to New York, rather than his older pickup truck, and discarded the murder weapon.

During the guilt phase of Stewart's capital murder trial, photographs of blood spatters taken at the scene were shown in evidence by a forensic evidence technician employed by the Commonwealth. The testimony of the blood-spatter expert was a surprise to the defendant. The Commonwealth employed the expert on the Sunday evening before the trial was to begin. On Monday afternoon, the expert discussed his conclusions with the Commonwealth, but made no written report. On the morning of the second day of trial, the Commonwealth's attorney finally told defense counsel that he planned to use a blood spatter expert to interpret the blood stains in photographs taken at the scene. That evening, the expert told defense counsel essentially what he would say at trial, and offered to provide a list of other blood spatter experts located in other police departments. Instead, defense counsel telephoned an expert in Alabama, but was unable to retain him because of the cost. The next day, the court denied defense counsel's motions for a recess and for court appointment of a blood spatter expert for the defense. The Commonwealth's expert supplied a list of other experts, and defense counsel contacted one of them, but did not ask him to testify the next day. Before the Commonwealth's expert testified, defense counsel again moved for a continuance, and again the motion was denied. Basing his opinion on the photographs, the Commonwealth's expert witness testified as to his opinion of the significance of the blood spatters in reconstructing the crime scene, which among other things indicated that Stewart's wife had been "thrown violently up toward the head of the bed after she had been lying with her forehead resting upon the lower part of a spread that covered the bed."[1]

Pretrial, Stewart had been evaluated by a mental health expert appointed by the court to assist him under Virginia Code section 19.2-264.3:1. When defense counsel gave notice to the Commonwealth of its intent to use the mental health expert, a reciprocal examination by the Commonwealth's expert, Dr. Arthur Centor, was ordered under Virginia Code section 19.2-264.3:1(F). That section states:

> 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition **at the time of the offense**, the court shall appoint one or more qualified experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation, and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A. The location of the evaluation shall be governed by § 19.2-169.5 B. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in § 19.2-169.5 C. After performing their evaluation, **the experts shall report their findings and opinions** and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.
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> 2. If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.

Dr. Centor did not prepare a report mentioning future dangerousness under this statutory subsection.

At the penalty trial, Dr. Centor testified that the defendant would be dangerous in the future, alleging that his expert opinion was based not on evidence derived from any statements by Stewart, but rather on the circumstances of the case, Stewart's prior record and results of Stewart's **psychological** tests.

HOLDING

On direct appeal, the Supreme Court of Virginia affirmed Stewart's death sentence.[2] The court ruled, *inter alia*,[3] that the trial court did not

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[1] *Stewart v. Commonwealth*, 245 Va. 222, 238, 427 S.E.2d 394, 404 (1993).

[2] *Id.* at 248, 427 S.E.2d at 411.

[3] The defendant assigned 44 errors. Some of these the court rejected in brief, conclusive language. Others did not involve death penalty law. On still others, the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in these categories that will not be addressed in this summary include: (1) Commonwealth's refusal to comply with discovery request on factual basis for vileness aggravating factor; (2) trial court's refusal to allow defendant additional peremptory strikes during voir dire; (3) trial court's refusal to allow individual voir dire examination; (4) rejection of defendant's arguments that the capital murder indictment was unconstitutional on the basis that: (a) both the vileness and future dangerousness aggravating factors are too vague, resulting in unlimited and unguided jury discretion, (b) Eighth Amendment prohibits the death penalty as cruel and unusual punishment, (c) constitutional provisions against double jeopardy prohibit the use of prior convictions and unadjudicated criminal conduct to establish future dangerousness, (d) Virginia defendants are denied meaningful appellate review because the Supreme Court of Virginia has never set aside a death sentence for misapplication of an aggravating factor and has refused to consider challenges to the "vileness" factor when there was also a finding of future dangerousness, (e) 50-page limitation on brief set in Rule 5:26 does not provide meaningful appellate review for capital defendant, and (f) jury should have been instructed as to parole eligibility; (5) trial court's allowance of video cameras in courtroom during defendant's trial; (6) exclusion of venire member for his stated religious beliefs

err in refusing defendant's proposed jury instructions to ensure that the jurors could consider life imprisonment over death.[4] Further, the court ruled that the forensic psychologist expert who was appointed on behalf of the Commonwealth to evaluate defendant concerning the presence or absence of mitigating factors relating to defendant's mental condition could evaluate future dangerousness as well.[5] The Court upheld the finding of vileness[6] and ruled that future dangerousness did not have to be considered because the jury's separate finding of vileness was sufficient to support the death penalty.[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. Voir Dire

In *Wainwright v. Witt*,[8] the United States Supreme Court held that the prosecution can exclude venire members from sitting on a capital jury if their attitude towards the death penalty would prevent or substantially impair their ability to consider the death penalty as an option. Since that decision, there have been attempts by defense counsel to make a "reverse-*Witt*" inquiry which would allow the defense to exclude those venire members who are too "pro-death." The Supreme Court ruled that "reverse-*Witt*" examination must be allowed in *Morgan v. Illinois*.[9] The exact formulation of this questioning is unsettled in Virginia.

In *Stewart*, the Supreme Court of Virginia upheld the trial court's refusal to permit the following questions:

> [1] Would you be of the opinion that [death is] the appropriate penalty for all persons found guilty of first degree murder when there are aggravating factors proven that Virginia has set out in the definition of capital murder?
> [2] Would you be of the opinion that death is the appropriate penalty for all persons found guilty of capital murder when the Commonwealth has proved certain aggravating factors to be taken into account at sentencing?[10]

Although the second question is more specific, and thus allows venire members a narrower scope on which to base their answers, the court held that the trial court correctly excluded those questions because they provided no factual basis upon which a prospective juror could express an opinion.[11] However, the trial court did allow defendant to ask two other "reverse-*Witt*" questions that, according to the court, enabled the defendant to inquire if venire members would consider life imprisonment if he was found guilty of capital murder. They were:

> [1] [I]f you find the accused guilty of capital murder, and the Court gave you the option of death or a life sentence...could you fairly consider both options, or would you automatically conclude that death was the appropriate sentence?
> [2] Would you be of the opinion that death is the appropriate penalty for all persons found guilty of capital murder when the prosecution has proven certain aggravating factors, even when the Judge has instructed you that you still have the option of a life sentence?[12]

Whatever the precise formulation, it is imperative that defense counsel conduct "reverse-*Witt*" jury questioning and make every reasonable effort to determine if a prospective juror's affinity for the death penalty would substantially impair her ability to follow the law.

II. Expert Assistance and *Ake v. Oklahoma*

The prosecution surprised Stewart with a blood-spatter expert. Defense counsel acted properly and moved as soon as possible for his own expert to be appointed to permit him to intelligently confront the Commonwealth's expert.[13] Although the opinion does not reflect that the motion was grounded on *Ake v. Oklahoma*,[14] that decision may have and should have been the authority relied upon.

In *Ake*, the United States Supreme Court held that under certain circumstances, an indigent capital defendant is entitled to court appointment of a mental health professional who will help evaluate a defense, present it, and cross-examine a prosecution witness. *Ake* dealt with the need for a psychiatrist when insanity was at issue, but the decision in that case has been construed to require appointment of other experts for the defense when it is essential to a fair trial that the prosecutor's evidence be confronted.[15] A significant showing is required under *Ake* to satisfy the court that the requested defense expert is essential to due process in the context of a particular case. Defense attorneys confronted with evidence such as that offered by the Commonwealth's blood spatter expert in *Stewart*; however, should seek appointment of their own expert, based on *Ake*, if the trial court is determined to allow "blood- spatter expert" testimony. However, admission of this testimony for either side is objectionable. Such "experts" are no more qualified than jurors to interpret blood spatters, certainly not from merely examining photographs.

III. Virginia Code Section 19.2-264.3:1

The Supreme Court of Virginia's treatment in *Stewart* of issues raised by Virginia Code section 19.2-264.3:1 (often referred to simply as 3:1) is puzzling, given the plain language of the statute. For example, the Commonwealth's expert, Dr. Centor, was appointed under the reciprocal provision of the statute, subsection (E). Dr. Centor testified about his

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against the death penalty; (7) retention of venire member who was wife of a policeman; (8) admission into evidence of a videotape of the crime scene, shown to the jury without sound; and (9) admission of hearsay testimony that defendant and his estranged wife had consulted an attorney about separation or divorce.

Defense counsel is to be commended for preserving those issues for federal review and assigning 44 errors.

[4] *Stewart*, 245 Va. at 244-45, 427 S.E.2d at 409.

[5] *Id.* at 243, 427 S.E.2d at 407-08.

[6] *Id.* at 246, 427 S.E.2d at 409.

[7] *Id.* at 246, 427 S.E.2d at 410.

[8] 469 U.S. 412 (1985).

[9] 112 S. Ct. 2222 (1992). *See* case summary of *Morgan*, Capital Defense Digest, Vol. 5, No. 1, p. 4 (1992).

[10] *Stewart*, 245 Va. at 233, 427 S.E.2d at 402.

[11] *Id.*

[12] *Id.* at 234, 427 S.E.2d at 402.

[13] *Id.* at 237, 427 S.E. 2d at 404-05.

[14] 470 U.S. 68 (1985). Indeed, the court in *Stewart* cited only *Britt v. North Carolina*, 404 U.S. 226 (1971) (finding that before a court shall appoint an expert, the defendant must show that the expert is necessary as a basic tool of an adequate defense).

[15] *See, e.g., O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988) (court appointment of forensic expert for defense); *United States v. Patterson*, 724 F.2d 1128, (5th Cir. 1984) (fingerprint specialist); *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) (firearms expert); *Williams v. Martin*, 618 F.2d. 1021 (4th Cir. 1980) (pathologist); *Bowen v. Eyman*, 324 F.Supp. 339 (D. Ariz. 1970) (serologist). *See also Thorton v. State*, 339 S.E.2d 241 (Ga. 1986) (dental expert); *Patterson v. State*, 232 S.E.2d 233 (Ga. 1977) (narcotics analyst).

finding that Stewart would be dangerous in the future, without providing defense counsel a report of that finding.

Another of Stewart's assignments of error arising from Dr. Centor's testimony was that the plain language of 3:1 limits the examination by the Commonwealth expert to the "existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense,"[16] and thus could not encompass future dangerousness. The court's rejection of this assignment of error was unresponsive. The court said that the notice given to the defense that a reciprocal examination would be conducted adequately notified defense counsel that Dr. Centor would seek evidence against Stewart's interest. However, Stewart's claim was not about the sufficiency of notice, but rather that an exam for future dangerousness was not authorized by the statute.

Stewart did make a separate claim relating to notice, but the court again apparently ignored the plain language of the statute. Stewart complained that Dr. Centor's written report did not mention his opinion as to Stewart's future dangerousness. The court responded:

> Stewart does not claim that Dr. Centor prepared a written report on the subject of Stewart's future dangerousness. Nor does he dispute the trial court's factual finding that Stewart had an expert in the same field as Dr. Centor and that, at least a week prior to trial, Stewart was told that Dr. Centor would testify about the issue of future dangerousness. Under these circumstances, we conclude that the court did not err in permitting this testimony.[17]

The court did not address the 3:1(F) requirement that the Commonwealth's reciprocal experts, after performing their evaluation, "shall report their findings and opinions and provide copies of...records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense." Sanctioning **oral** notification of future dangerousness testimony a week before trial approves of little more than trial by ambush. In particular, it does not permit defense counsel who did not plan to offer expert testimony (as Stewart apparently did not) to secure evidence about the general unreliability of future dangerousness testimony.[18]

Finally, in a transparent attempt to evade both the requirements of 3:1 and the constitutional constraints of *Estelle v. Smith*,[19] Dr. Centor claimed that his opinion was based not on Stewart's statements, but rather on the circumstances of the case, Stewart's prior criminal record and the **results of Stewart's psychological tests.** The trial court, having previously ruled that Dr. Centor could not base his opinions on any statements made by Stewart during the examination, accepted this assertion. The Supreme Court of Viriginia rejected Stewart's assignment of error based on this testimony. The court failed to discuss 3:1's further prohibition of use by the Commonwealth's expert of any "evidence **derived from** any such statements or disclosures" by the defendant during the evaluation.[20] Obviously, results of psychological tests are derived from the defendant's statements, though it is not clear whether the tests were given during the evaluation.

The same assertion that defendant's statements were not involved in Dr. Centor's opinion apparently permitted Dr. Centor to avoid the statute's requirement that they not be used to prove aggravating factors, but could only be used in rebuttal.[21] There is no indication that Dr. Centor's testimony was in rebuttal to anything offered by Stewart.

The court's treatment (or non-treatment) of 3:1 issues suggests several options for defense practice. Under 3:1(C), defense counsel is required to file a written report, but *Stewart* clearly indicates that, in fairness, there can be no requirement that it be a complete report. Defense counsel should communicate orally with the defense expert. Where the statute requires, for example, that the written report advise whether there are mitigating factors other than those listed in Virginia Code section 19.2-264.4, the written report should state only, "There are."

Future dangerousness predictions are suspect, even when based on evaluations conducted in a professionally acceptable manner. They are even more suspect when they are not based on a personal evaluation at all.[22] Defense attorneys would be well advised, upon receipt of notice that the Commonwealth will rely on future dangerousness, to seek appointment of an expert on the subject of the reliability of future dangerousness testimony.[23]

Finally, the court's interpretation of 3:1 in *Stewart* suggests re-examination by defense counsel of the usefulness of the statute and calls for consideration of three difficult tactical options. One, expert assistance in mitigation can be sought under *Ake*, with the claim that 3:1 burdens defendant's right to present mitigation evidence. Two, a defendant has the Sixth Amendment right to have counsel notified of an evaluation that will encompass future dangerousness.[24] Arguably, the right to counsel means the right to have counsel function as counsel. Defense counsel may insist on being present at the Commonwealth's reciprocal exam in order to protect the defendant's rights. Three, although 3:1 allows, but does not mandate, preclusion of defendant's expert mitigation evidence for failure to cooperate with the Commonwealth expert, preclusion of defendant's expert mitigation evidence may be unconstitutional.[25] A capital defendant may be entitled to put on expert evidence in mitigation without cooperating with the Commonwealth expert.

In summary, the Supreme Court of Virginia has made using the statutory rights granted by 3:1 difficult. It has also, however, created federal constitutional issues that may result in relief if those issues are raised and properly preserved.

Summary and analysis by:
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16 Va. Code Ann. § 19.2-264.3:1(F) (1990).

17 *Stewart*, 245 Va. at 243-44, 427 S.E.2d at 408.

18 *See* J. Marquart, S. Ekland-Olson and J. Sorensen, *Gazing Into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 Law & Society Rev. 449 (1989). *See also* J. Marquart and J. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders.*, 23 Loy. L.A. L. Rev. 5 (1989).

19 451 U.S. 454 (1981) (holding that a violation of defendant's Fifth Amendment right against self-incrimination when defendant had not been warned prior to a court-ordered psychiatric exam that he could remain silent, and that any statements he made during exam could be used against him during penalty phase).

20 Va. Code Ann. § 19.2-264.3:1(G) (1990) (emphasis added).

21 Va. Code Ann. § 19.2-264.3:1(G) provides in part: "[N]o evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in §19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense."

22 Grisso and Appelbaum, *Is it Unethical to Offer Predictions of Future Violence?*, 16 L. & Hum. Behav. 621 (1992).

23 The Virginia Capital Case Clearinghouse can assist in securing testimony of a qualified expert in this area.

24 *See Satterwhite v. Texas*, 486 U.S. 249 (1988), and case summary of *Satterwhite*, Capital Defense Digest, Vol. 1, No. 1, p. 14 (1988); and *Powell v. Texas*, 492 U.S. 680 (1989), and case summary of *Powell*, Capital Defense Digest, Vol. 2, No. 1, p. 9 (1989).

25 *See Chambers v. Mississippi*, 410 U.S.284 (1973); *Simmons v. United States*, 390 U.S. 377 (1968) (holding that it is unconstitutional to force defendant to make a choice between constitutional rights); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Mills v. Maryland*, 486 U.S. 367 (1988) (holding that procedural barriers to presentation of mitigation evidence are impermissible). *See also* Bennett, *Is Preclusion Under Va. Code Ann. § 19.2-264.3:1 Unconstitutional?*, Capital Defense Digest, Vol. 2, No. 1, p. 24 (1989).