Capital Defense Journal

Volume 6 | Issue 1 Article 13

Fall 9-1-1993

BEAVERS v. COMMONWEALTH 245 Va. 268, 427 S.E.2d 411 (1993)

able if it was based on the reciprocal examination authorized by 3:1(F). Unlike *Stewart v. Commonwealth*,[21] the opinion does not contain an assertion by Dr. Centor that he **did not** base his opinion in part on statements made to him by Wright or on evidence derived from such statements.[22] If Dr. Centor's testimony was based on Wright's statements or on evidence derived from them, he was only entitled to testify in rebuttal of the defense expert, Dr. Samenow.[23] This he obviously did not do, since Dr. Samenow offered no opinion on future dangerousness.

Summary and analysis by:
Mari Karen Simmons

[21] 245 Va. 222, 427 S.E.2d 394 (1993). In *Stewart*, the trial court accepted Dr. Centor's assertion that he did not base his opinions about future dangerousness on any statements made by Stewart during the examination, even though Dr. Centor claimed that he based his opinion on Stewart's prior criminal record, and the **results of Stewart's psychological tests**. *Id.* at 244, 427 S.E.2d at 408. The Supreme Court of Virginia affirmed the trial court's finding. The Supreme Court of Virginia also held that when a Commonwealth expert is allowed to examine the defendant, the Commonwealth expert can examine for future dangerousness as well. *Id.* at 243, 427 S.E.2d at 407-408. *See also* case summary of *Stewart*, Capital Defense Digest, this issue.

[22] Indeed, an examination for competency to stand trial or for insanity would be difficult to conduct without statements from the defendant.

[23] *See* Va. Code Ann. § 19.2-264.3:1(G) ("[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.").

BEAVERS v. COMMONWEALTH

245 Va. 268, 427 S.E.2d 411 (1993)
Supreme Court of Virginia

FACTS

Late in the night on May 1, 1990, nineteen-year-old Thomas Beavers broke into the house of his neighbor, Marguerite Lowery, a sixty-year-old widow who lived alone. Beavers raped her, and when she started to scream, he held a pillow over her face, killing her. Before leaving, Beavers took four of her rings from a dresser. On the morning of May 2, 1990, an officer found Mrs. Lowery's body. Slightly more than a year later, the Lowery murder remained unsolved. On May 14, 1991, Beavers broke into the empty house of his fifty-year-old next door neighbor, Shirley Hodges. When she returned home, Beavers covered her mouth with his hand, ordered her to be quiet, stripped off her clothes and raped her. After Beavers left, she reported the rape to the police, and told them that Beavers had used some of her white medical gauze tape to bandage his hand that he had cut while breaking into her house. The police searched Beavers's house for the gauze, but instead found Mrs. Lowery's rings. Beavers confessed to both the rape of Shirley Hodges and the rape and killing of Mrs. Lowery.

During voir dire, the trial court refused defense counsel's requested question as to the opinion of the jurors regarding the death penalty: "Do you believe that if one is convicted of taking another's life, the proper penalty is loss of your own life?"[1] However, the trial court did ask each juror, "[i]f the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?"[2] Those jurors who did not answer in the affirmative were questioned individually. After the jury had been selected, sworn and given preliminary instructions, defense counsel moved to dismiss the jury, but the motion was denied.

During the guilt phase, the Commonwealth's attorney's opening statement contained five references to the jury's "recommendations" about the defendant's penalty. Defense counsel objected at the end of the entire statement. The trial court denied defense counsel's motion for a mistrial, concluding that counsel had defaulted by waiting too long to make an objection.

At the close of the evidence at the sentencing hearing, the trial court ruled that there was insufficient evidence to prove vileness. The jury was instructed that it would have to find future dangerousness before the death sentence could be imposed. The jury found future dangerousness and sentenced Beavers to death.

HOLDING

On direct appeal, the Supreme Court of Virginia affirmed Beaver's conviction and death sentence.[3] The court held, *inter alia*,[4] that the trial court did not err in refusing defendant's proposed jury instruction to ensure that the jurors would consider a sentence of life imprisonment

[1] *Beavers v. Commonwealth*, 245 Va. 268, 277, 427 S.E.2d 411, 418 (1993).

[2] *Id.* at 278, 427 S.E.2d at 418.

[3] *Id.* at 285, 427 S.E.2d at 423.

[4] Beavers assigned a number of other errors. Some of these the Supreme Court of Virginia 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 discussed are: (1) trial court's refusal to allow defense counsel more peremptory strikes during jury selection; (2) rejection of defense counsel's claims that Virginia's capital death statute, §§ 19.2-264.2 through 19.2-264.5, violates the Fifth, Eighth and Fourteenth Amendments; (3) Commonwealth's refusal to provide defense counsel with the names of all witnesses it intended to call at both the guilt and sentencing phases of the trial; (4) refusal of the trial court to suppress defendant's confession on the basis that the detective did not bring defendant to a magistrate without unnecessary delay; (5) trial court's admission of rings into evidence when search warrant stated that police were to look for white medical gauze tape; and (6) judge's refusing to grant a mistrial, but instead instructing the jury to disregard a police officer's testimony concerning premeditation, when officer was reading from a report that had not been admitted into evidence.

over death.[5] The court also held that defense counsel waived any objections it had to the entire jury panel, because counsel waited until after the jury had been selected, sworn and preliminarily instructed before making an objection.[6] To be timely, the court held, the defense objection should have been made at the time that the trial court excluded prospective jurors for cause. Similarly, the court held that defense counsel defaulted on its motion for a mistrial, and in the alternative, on its right to a curative jury instruction, because counsel did not object to comments made during the Commonwealth's attorney's opening statement referring to the jury's role as that of making "recommendations" on defendant's penalty.[7] The court stated that to be timely, objection must have been made to the Commonwealth's attorney's statements at the time they were uttered, rather than after the entire statement had been made to the jury. Finally, the court held that there was sufficient evidence for the jury to find future dangerousness, based on testimony of other women raped by Beavers, his continuing drug and alcohol abuse and his criminal history.[8]

ANALYSIS/APPLICATION IN VIRGINIA

I. Voir Dire

In *Wainwright v. Witt*,[9] the United States Supreme Court held that the prosecution can exclude venire members from sitting on the jury if their attitude towards the death penalty would prevent or substantially impair their ability to consider the death penalty as an option. On the rationale of that decision, defense counsel have attempted to get rulings that would also require exclusion of any venire member who is too "pro-death." The United States Supreme Court held in *Morgan v. Illinois*[10] that the trial court must allow "reverse-*Witt*" questions to potential jurors. The permissible manner of this inquiry in Virginia has not been settled.

In *Stewart v. Commonwealth*,[11] the Supreme Court of Virginia upheld the trial court's rejection of two reverse-*Witt* questions, and its acceptance of two other such questions.[12] The court held that the trial court had correctly refused two of the questions, as they provided no factual basis upon which prospective jurors could express an opinion.[13] In *Beavers*, defense counsel's "reverse-*Witt*" question was ostensibly rejected because the Commonwealth's attorney had already covered the issue in his questions to the venire members. The Commonwealth's attorney asked, "[i]f the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?"[14] Yet, it is difficult to see substantive difference between this question and those excluded in *Stewart*.

It is imperative for defense counsel to conduct "reverse-*Witt*" inquiry. Similar to the objections to jurors discussed *infra*, trial court limitations of any kind on meaningful inquiry must probably be preserved both by objection at the time of the limitation (e.g., refusal to propound a written question submitted or to permit defense counsel to inquire orally) **and** at the time the jury is being empaneled.[15]

II. Default

In *Beavers*, the trial court ruled that defense counsel's motion to strike the entire jury panel was defaulted. Defense counsel had failed to object at the time that each of three venire members were dismissed for cause. The Supreme Court of Virginia affirmed that ruling, stating that the objection was untimely because defense counsel waited until after the jury had been selected, sworn and preliminarily instructed.[16] To avoid default, counsel must object twice: first at the time the potential juror is dismissed and again immediately before the jury is seated. Defense counsel are allowed under Virginia Code section 8.01-358 to introduce evidence in support of the objection, and they should do so to ensure that the objection is preserved for appeal.

During the Commonwealth's attorney's opening statement, several references were made to "recommendations" to be made by the jury regarding defendant's penalty. Defense counsel correctly objected to those statements on the basis that the Commonwealth's attorney had undermined the increased sentencing reliability mandated by *Caldwell v. Mississippi*.[17] *Caldwell* held that an argument is subject to objection if the prosecutor attempts to diminish the jury's sense of responsibility for its decision. Unfortunately, defense counsel in *Beavers* again waited too long to make an objection. For an objection concerning opposing counsel's statements to be timely, it is necessary to move for mistrial as soon as the prejudicial words are uttered. One, of course, may wait until the conclusion of the sentence, but if the attorney waits until the entire opening or closing statement has been completed, the motion for mistrial will be defaulted.

III. Penalty/Trial Issues

During the penalty phase, at the close of all the evidence, the trial court ruled as a matter of law that evidence of the "vileness" aggravating factor was insufficient. As a practical matter, the exclusion of the vileness issue from the jury may have had limited effect, as the jury had already heard all of the evidence. Still, the successful exclusion of the vileness factor in *Beavers* indicates that defense counsel should make motions to strike the Commonwealth's evidence at the end of the penalty phase as well as at the guilt phase.

---

5 *Beavers*, 245 Va. at 278, 427 S.E.2d at 418.

6 *Id.*, 427 S.E.2d at 418-19.

7 *Id.* at 278-79, 427 S.E.2d at 419.

8 *Id.* at 284-85, 427 S.E.2d at 422.

9 469 U.S. 412 (1985).

10 112 S.Ct. 2222 (1992). *See* case summary of *Morgan*, Capital Defense Digest, Vol. 5, No. 1, p. 4 (1992).

11 245 Va. 222, 427 S.E.2d 394 (1993). *See* case summary of *Stewart*, Capital Defense Digest, this issue.

12 *Stewart*, 245 Va. at 233-34, 427 S.E.2d at 402. The excluded questions were:

> [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] [W]ould 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?

Id. The permissible questions 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?

Id.

13 *Stewart*, 245 Va. at 233, 427 S.E.2d at 402.

14 *Beavers*, 245 Va. at 278, 427 S.E.2d at 418.

15 *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

16 *Beavers*, 245 Va. at 278, 427 S.E.2d at 418-19.

17 472 U.S. 320 (1985).

The Supreme Court of Virginia affirmed that the future dangerousness aggravating factor had been established. In reaching that conclusion, the court relied on "other crimes" evidence including vandalism and petit larceny. In reality, such non-violent crimes have no bearing upon the defendant's propensity to commit **violent** crimes in the future.[18] It is desirable to contest the relevancy of evidence offered in support of future dangerousness. Objections at trial, or pretrial motions in limine are appropriate vehicles for excluding any irrelevant evidence, including that which is irrelevant to the existence of aggravating factors.[19]

Summary and analysis by:
Mari Karen Simmons

18 Va. Code Ann. §19.2-264.4(C) states in relevant part that: "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts **of violence** that would constitute a continuing threat to society..." (emphasis added).

19 *See* Fenn, *Anything Someone Else Says Can and Will be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Capital Defense Digest, Vol. 5, No. 2, p. 31 (1993).

DUBOIS v. COMMONWEALTH

435 S.E. 2d 636 (Va. 1993)
Supreme Court of Virginia

FACTS

Johnile L. Dubois and three other men sought to rob a convenience store in Portsmouth, Virginia. Only the defendant was armed with a gun. He immediately fired at Shari Watson, a store employee, barely missing her head. Another of the robbers ordered the two remaining employees, both male, to open the cash register. Philip Council, suffering from neurological problems, could not open the register quickly. The defendant shot Council in the chest, killing him, and left with $400 in cash.

Dubois pleaded guilty to five charges, including capital murder, pursuant to an agreement with the Commonwealth that it would not seek the death penalty. Dubois testified that he understood the charges against him and that the trial court could impose the death penalty. The Commonwealth summarized its evidence against him, and Dubois reaffirmed his plea. The trial court ordered a pre-sentence report.

At the sentencing hearing the defendant stated that he had read the pre-sentence report and had understood it. He neither questioned the author of the report nor presented any evidence in mitigation. The defense attorney stated that the record did not support imposition of the death penalty, and the Commonwealth informed the court that it was not seeking the death penalty. The Commonwealth did request the longest sentence available.

The trial judge sentenced the defendant to death based on a finding of future dangerousness. The trial judge based this finding on several factors, including the report of the physician who examined Dubois for competency to stand trial and sanity at the time of the offense. Dubois appealed and challenged the trial court's imposition of the death penalty. Dubois asserted that his criminal record was the sole basis for the trial court's finding of future dangerousness and that it did not sufficiently support the finding because he had been convicted of only a single act of physical violence.

HOLDING

The Supreme Court of Virginia rejected Dubois's contention and upheld the conviction and sentence. The court conceded that the prior convictions were not extensive but found that the evidence of the crimes "reveal[s] Dubois's prior activities in closer detail."[1] Specifically, the court noted the probation officer's statement in the pre-sentence report that the defendant had been involved in an attempted murder, was selling drugs, and had been charged with other crimes that were nolle prossed. The court also mentioned the examining doctor's finding of anti-social tendencies and the defendant's ringleader role in the robbery. The court found that Dubois's role in the robbery showed a marked disregard for human life. The court summed up its impression of Dubois with the statement that "[h]e engaged in criminal activity as if it were a commercial enterprise."[2]

The Supreme Court of Virginia found that, although the trial court "was obliged to consider" the Commonwealth's agreement not to seek the death penalty as a factor in its decision, the court was not bound to accept its recommendation.[3] The court further held that on appeal the Commonwealth could present its evaluations and conclusions regarding sufficiency of the evidence to support a death sentence, notwithstanding its plea agreement. In addition to denying Dubois's appeal, the court found that the imposition of the death penalty had no basis in passion, prejudice, or other arbitrary factor.

ANALYSIS/APPLICATION IN VIRGINIA

A number of important issues, most of them unrecognized or not addressed by all parties, including the Supreme Court of Virginia, are raised by this decision.

I. *Lankford v. Idaho*

The fact situation in *Dubois* is very similar to that found in *Lankford v. Idaho*[4] and raises issues virtually identical to those raised in that case—fundamental issues concerning notice and opportunity to defend against

1 *Dubois v. Commonwealth*, 435 S.E. 2d 636, 638 (Va. 1993).
2 *Id.* at 639.
3 *Id.*
4 111 S. Ct. 1723 (1991).
5 *Id.* at 1733 (emphasis added).