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DUBOIS v. COMMONWEALTH 435 S.E. 2d 636 (Va. 1993)

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).

evidence to be used in support of a death sentence, as well as opportunity to present evidence in mitigation. In *Lankford*, the United States Supreme Court examined a situation similar to that presented in *Dubois* and stated that "[p]etitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an **impermissible risk that the adversary process may have malfunctioned in this case.**"[5] In *Lankford*, a silent judge listened to arguments about sentencing length and never indicated that the real issue was whether or not to impose the death sentence. The Court held that the defendant and his counsel did not have adequate notice that the judge might impose the death penalty; therefore, the sentencing process did not satisfy Fourteenth Amendment due process requirements.[6]

In *Dubois*, there was a similar risk that the adversary system malfunctioned. There may be meaningful distinctions supporting the conclusion of the Supreme Court of Virginia,[7] but it is amazing that the due process limitations imposed by *Lankford* are not even discussed in *Dubois*.

II. Improper and Untested Evidence

In sentencing Dubois to death, the trial judge considered improper and untested evidence. The Commonwealth offered a summary of the evidence that it could have shown at trial. None of this evidence had been tested in an adversary setting.

The evidence considered was not only unreliable, but some of it was also irrelevant. The judge mentioned charges against the defendant that had been nolle prossed. A trial judge, however, cannot presume the defendant guilty of charges of which he was not convicted. Indeed, in *Johnson v. Mississippi*,[8] the United States Supreme Court held that the prosecutor could not use a reversed conviction as a basis for a death sentence because the defendant still had the presumption of innocence. The trial judge also considered the statement of the probation officer in the presentence report that Dubois had said that he made his living selling drugs. No evidence presented had been adversarially tested in a court of law. In addition to issues concerning the reliability of such a statement, the relevance of selling drugs to a propensity to commit serious acts of violence that constitute a continuing danger is tenuous or non-existent.

The Supreme Court of Virginia held that the trial judge "did not impose the death sentence based on passion, prejudice or any other arbitrary factor."[9] The trial judge's statement, however, that "[y]ou are 26 years of age and you have nine children already, not supporting a one,"[10] indicates his moral distaste for the defendant rather than a belief that non-support is relevant to future dangerousness.

III. Use of Defendant's Statements To Doctor To Establish Future Dangerousness

A. Scope of the Examination

The examining physician had no authority to evaluate Dubois for future dangerousness. The doctor examined Dubois under Virgina Code section19.2-169.5 which states the duty of the physician is only to "evaluate the defendant's sanity at the time of the offense..." The doctor also evaluated the defendant pursuant to Virginia Code section19.2-169.1 (D) which states that the physician should evaluate and report "(i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent." Neither statute makes any reference to an analysis for any future tendencies much less the specific finding of future dangerousness.

In *Stewart v. Commonwealth*,[11] the Supreme Court of Virginia held that an expert appointed to conduct a reciprocal examination for the Commonwealth under the authority of Virginia Code section19.2-264.3:1, after the defendant gives notice of intent to use a neutral mitigation expert at a capital penalty trial, may examine for future dangerousness.[12] The court's decision rested upon the assumption that this statute made the physician an expert for the Commonwealth, acting against the defendant's interests.[13] In contrast, nothing about Virginia Code section19.2-169.5 or section19.2-169.1 makes the examining physician partisan to either side. Therefore, the scope of the examination in *Dubois* and its use clearly exceeded the boundaries of these statutes.

B. Use of Incriminating Statements

The use of the defendant's statements against him in the sentencing proceeding violated the mandate set forth by the United States Supreme Court in *Estelle v. Smith*.[14] In *Estelle*, the Court held that a defendant should have been given *Miranda* warnings prior to his examination in order to use subsequent, incriminating statements against him.[15] Dubois was not warned about the possible use of his statements here. The utilization of these statements, without prior warning, compromised the defendant's Fifth Amendment right to avoid self-incrimination.

C. Notice

In addition to the apparent deficiencies in the scope of the examination and the lack of warnings given, the Supreme Court of Virginia's opinion does not indicate that the defense counsel received any notice that the defendant would be examined for future dangerousness. In *Satterwhite v. Texas*,[16] the United States Supreme Court held that an examining physician must give notice to defense counsel that he intends to evaluate future dangerousness.[17] Without this notice, the prosecution cannot use the conclusion of future dangerousness against the defendant. The Court reemphasized this premise in *Powell v. Texas*.[18]

The Supreme Court of Virginia, in *Stewart*, held that notice sufficient to satisfy Virginia Code section19.2-264.3:1 satisfies *Satterwhite*.[19] However questionable that holding may be,[20] it has no relevance to Dubois who was not examined under section19.2-264.3:1. The lack of notice given to Dubois casts additional doubt on the constitutionality of the medical evidence considered by the trial court in support of future dangerousness.

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6 *Id.* at 1731.

7 In *Lankford*, the statute gave the defendant notice that he could be sentenced to death in spite of the plea agreement. Idaho Code § 19-2515 (1987). In *Dubois*, the judge asked the defendant in open court if he understood that he could be sentenced to death.

8 486 U.S. 578, 586 (1988).

9 *Dubois*, 435 S.E. 2d at 639.

10 *Id.* at 640.

11 245 Va. 222, 427 S.E.2d 394 (1993).

12 *Id.* at 243, 427 S.E.2d at 407-08.

13 *Id.* (citing *Savino v. Commonwealth*, 239 Va. 534, 544, 391 S.E.2d 276, 281-82 (1990)).

14 451 U.S. 454 (1981).

15 *Id.* at 467.

16 486 U.S. 249 (1988). *See* case summary of *Satterwhite*, Capital Defense Digest, Vol. 1, No. 1, p. 14 (1988).

17 *Id.* at 254.

18 492 U.S. 680 (1989). *See* case summary of *Powell*, Capital Defense Digest, Vol. 2, No. 1, p. 9 (1989).

19 *Stewart*, 245 Va. at 243, 427 S.E.2d at 408.

20 *See* case summary of *Stewart*, Capital Defense Digest, this issue.

IV. Why did this disaster happen?

It is difficult to see a case like this without wondering why such a travesty occurred. The first possibility is ineffective assistance of counsel. The defense attorney made no objections to the pre-sentence report nor did he question the probation officer. He did not offer any evidence in mitigation.[21] Another explanation is that the defense attorney neither made objections nor presented evidence for fear of breaching his plea bargain agreement.[22]

V. Lessons

Defense attorneys will want to be very careful in the future not to plead guilty to capital murder without formal or strong informal assurance from a **judge** that the defendant will receive a sentence less than death. Still, it should be possible to achieve the goals of a Commonwealth/Dubois agreement if the Commonwealth is firm that it is offering no evidence of aggravating factors.[23]

Summary and analysis by:
Cameron P. Turner

[21] Defense counsel did raise Eighth Amendment objections in order to preserve the *Lankford* issue and other federal issues. The Supreme Court of Virginia said that these issues were defaulted because counsel did not argue them and did not move to withdraw the plea. It remains to be seen whether these issues were actually defaulted.

[22] *See Ricketts v. Adamson*, 483 U.S. 1 (1987) (holding that the state could seek death penalty in subsequent proceeding if the defendant breaches the plea agreement).

[23] *See, e.g. Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993) (finding evidence of aggravating factor insufficient) and case summary of *Beavers*, Capital Defense Digest, this issue.

CHABROL v. COMMONWEALTH

245 Va. 327, 427 S.E.2d 374 (1993)

MURPHY v. COMMONWEALTH

246 Va. 136, 431 S.E.2d 48 (1993)

Supreme Court of Virginia

In 1993, the Supreme Court of Virginia examined two cases and offered guidelines about what arguments the Virginia courts will hear after a defendant has pled guilty to capital murder. This summary will examine each case individually and then attempt to draw broader implications from the aggregate of the two opinions.

FACTS AND HOLDINGS

I. *Chabrol v. Commonwealth*

Andrew J. Chabrol and his accomplice, Stanley Berkeley, abducted Melissa Harrington on her way to work. The victim was a married co-worker of Chabrol's to whom he had previously made sexual propositions. After tying her to a bed and repeatedly sexually assaulting her, Chabrol manually strangled Harrington, tied a rope around her neck, wrapped her face in duct tape and enveloped her head in a plastic bag. Medical testimony indicated that Harrington died as a result of the strangulation and suffocation. After police arrested Chabrol for the murder, they searched his personal belongings and found a computer disk and diaries that contained detailed entries of Chabrol's plans to murder Harrington. A search of Chabrol's home revealed two five-gallon containers of gasoline. Chabrol planned, according to the diary, to use the gasoline and powdered magnesium to burn Harrington's body at a temperature high enough to obliterate all traces of the body.

Chabrol pleaded guilty to capital murder. After the judge sentenced him to death, the defendant elected not to exercise his appeal of right. Virginia law, however, requires that "[a] sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court."[1] This opinion is the result of that review. Virginia Code section 17-110.1 establishes the guidelines for the Supreme Court of Virginia's mandatory review of the sentence of death:

> The court shall consider and determine:
> 1. whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
> 2. whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[2]

The court quickly dispensed with the first part of the review, stating that they found "no indication that the trial court's decision was affected by passion, prejudice or any other arbitrary factor."[3] The opinion also noted that Chabrol made no contentions to the contrary.

The court next addressed Chabrol's argument that the evidence did not support the trial court's vileness determination. The court first looked to the applicable Virginia statute which states that:

> [A] sentence of death shall not be imposed unless the court...shall (1) after consideration of the past criminal record of convictions of the defendant, find ... that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.[4]

[1] Va. Code Ann. § 17-110.1 (1990).

[2] Va. Code Ann. § 17-110.1(C) (1990).

[3] *Chabrol v. Commonwealth*, 245 Va. 327, 334, 427 S.E.2d 374, 377 (1993).

[4] Va. Code Ann. § 19.2-264.2 (1990).