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RAMDASS v. COMMONWEALTH

246 Va. 413, 437 S.E.2d 566 (1993)
Supreme Court of Virginia

FACTS

Bobby Lee Ramdass and his accomplices returned home in the early morning of September 2, 1992, after abandoning a plot to rob a restaurant. On the journey home, Ramdass suggested the robbery of a 7-Eleven instead. Ramdass and Darrell Wilson carried pistols but the other three men were unarmed. Wilson held the customers at gunpoint while the other men pilfered money from the store and the wallets of the customers. Ramdass ordered a convenience store clerk at gunpoint to open a safe and shot him in the head when he was unsuccessful. The men then left the store.

Ramdass pleaded guilty to robbery and requested immediate sentencing, but the court deferred in response to the Commonwealth's attorney's concern over a later double jeopardy claim. A jury convicted Ramdass of use of a firearm in the commission of a murder and capital murder. The jury imposed the death sentence based on a finding of future dangerousness. Ramdass waived his right to a pre-sentence report and asked to be sentenced immediately. Again, the court deferred until after the report and then sentenced the defendant to death.

HOLDING

Consolidating the automatic review of Ramdass's death sentence with his appeal from the capital murder conviction, the Supreme Court of Virginia upheld the death sentence based on future dangerousness. The court rejected each of Ramdass's numerous assignments of error, finding that some were previously resolved in the court's prior decisions.

The court found that the Commonwealth's attorney was under no obligation to make the results of accomplice polygraph examinations known to the defense. The court stated that "Ramdass's speculation that such statements might contain 'potentially exculpatory evidence' imposes neither a duty of disclosure upon the Commonwealth nor a duty of inspection *in camera* by the court."[1]

The court also held that Ramdass had no constitutional right to an *ex parte* hearing on his motion for the appointment of a medical doctor and an investigator to aid his defense.[2] In addition, the court found that Ramdass suffered no illegal disadvantage when the trial judge refused to sentence him immediately for robbery.[3]

The court also reiterated its prior holding that evidence of parole ineligibility is not admissible in capital murder cases and that the trial judge's refusal to answer the jury's question concerning the defendant's parole eligibility was proper. The trial judge decided this even though an immediate robbery conviction would have meant life without parole.[4] The court also reaffirmed its position that cross-examination on unadjudicated acts cannot be used for the impeachment of witnesses.[5]

Finally, the Supreme Court of Virginia reviewed the imposition of the death sentence and found that the sentence was not arbitrary or excessive under Virginia Code section 17-110(c).[6]

ANALYSIS/APPLICATION IN VIRGINIA

I. *Ex Parte* Hearings

The Supreme Court of Virginia held that a constitutional right to an *ex parte* hearing on a motion for a medical doctor and investigator does not exist. In *Ake v. Oklahoma,*[7] however, the United States Supreme Court found that the defendant has a constitutional right to the use of an independent expert at the state's expense when this expert is necessary for the preparation of a defense.[8] Moreover, the Court specifically stated that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense the need for the assistance of a psychiatrist is readily apparent. . . ."[9] Thus the Court made clear that it envisioned *Ake* hearings to be *ex parte* proceedings. This holding rests on the foundation that a trial is fundamentally unfair if the defendant is not given the basic tools to establish a defense.

It is this fundamental fairness that precludes the presence of the state at the hearing. The United States Supreme Court has recognized that the Fourteenth Amendment Due Process Clause requires that the defendant be given more than "mere access to the courthouse doors."[10] The defendant must be given the tools with which to build an adequate defense before the state may proceed against him.[11] This fundamental fairness argument also requires that the defendant be given an *ex parte* hearing in which to argue for these basic components of his defense. In order to establish the need for this expert, *Ake* requires a threshold showing that the expert is necessary to examine a significant factor in the defense.[12] This threshold showing often requires that the defendant reveal much of his defense as well as attorney work product. Both the Fifth Circuit[13] and the Tenth Circuit[14] have reversed convictions because of the failure of the trial court to grant an *ex parte* hearing to the accused on his motion for state payment for the cost of expert services.

Moreover, the Fourteenth Amendment Equal Protection Clause requires that the defendant be given an *ex parte* hearing on his motion. A defendant with the money to pay for an expert may refrain and use the assistance of an expert without revealing anything to the Commonwealth. The United States Supreme Court has held that the quality of the defendant's trial should not depend on the amount of money that the defendant has.[15] In fact, the very purpose of the expert assistance is to place the indigent defendant at least in part on the same level with the wealthy defen-

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[1] *Ramdass v. Commonwealth*, 246 Va. 413, 420, 437 S.E.2d 566, 570 (1993) (citing *United States v. Navarro*, 737 F.2d 625, 631-32 (7th Cir. 1984)).
[2] 246 Va. at 422, 437 S.E.2d at 571.
[3] *Id.* at 423, 437 S.E.2d at 572.
[4] *Id.* at 422-23, 437 S.E.2d at 572.
[5] *Id.* at 424, 437 S.E.2d at 572.
[6] *Id.* at 426, 437 S.E.2d at 574.
[7] 470 U.S. 68 (1985).
[8] *Id.* at 86-87.
[9] *Id.* at 82-83.
[10] *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).
[11] *Id.*
[12] *Ake*, 470 U.S. at 86-87.
[13] *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972).
[14] *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1980).
[15] *Griffin v. Illinois*, 351 U.S. 12 (1956).

lant.[16] Obviously, if the indigent defendant has to take all of these risks nherent in the presence of the adversary in order to get the money for an xpert, the two have not been placed on equal footing.

The *Ake* Court made clear that criminal defendants do not have to ely upon the state's evidence and appraisal of the case for factors central o their defense. In situations where expert assistance is a "basic tool of lefense"[17] as to these important issues, Due Process and the Equal 'rotection clause require that the defendant be able to obtain such assistance at the state's expense. *Ake* and its progeny, however, require a significant threshold showing before the courts provide the funding necesary to employ the expert.[18] The presence of the prosecution during the *Ake* hearing would undercut the substance of the Equal Protection Clause s interpreted by *Ake*.

Finally, the defendant deserves an *ex parte* hearing in order to preerve his Fifth Amendment right to avoid self-incrimination. In *Estelle v. Smith*,[19] the United States Supreme Court recognized that the right to emain silent has only been observed when the defendant suffers no enalty for his silence. In this instance, the defendant may suffer a very eal penalty indeed if he chooses to remain silent; he may not get the xpert necessary to present his defense.

Counsel should not be deterred by the *Ramdass* holding from seekng *ex parte* hearings in order to make the requisite *Ake* showing.

II. Pleading Guilty to the Robbery Charge

In *Ramdass*, the defendant attempted to plead guilty to the robbery charge and receive sentencing immediately. Prior to the holding in *United States v. Dixon*,[20] this adjudicated guilt on the robbery charge possibly[21] could have enabled the defendant to plead a double jeopardy bar to the capital murder charge under the holding of *Grady v. Corbin*.[22] *Dixon*, however, overruled *Grady*. The law, as it stands today, provides that the double jeopardy bar only applies when the state uses the same offense in successive prosecutions. In the same prosecution, the state may use the same conduct as the basis for indictments for multiple crimes.

A. The *Simmons* Issue

Another purpose to pleading guilty to robbery and requesting immediate sentencing was to enable Ramdass to establish his ineligibility for parole because of his three convictions for armed robbery. Under Virginia Code section 53.1-151(B1)(iii), a person who has been convicted three times of "robbery by the presenting of firearms or other deadly weapon" in three separate transactions is not eligible for parole.

The Virginia Capital Case Clearinghouse has argued that the defendant has the right to present his ineligibility for parole to the jury as mitigation evidence.[23] In *Gardner v. Florida*,[24] the United States Supreme Court held that due process requires that a capital defendant be given the chance to rebut any aggravating factors presented by the Commonwealth in its effort to support the death penalty. Arguably, accurate parole law information concerning a life sentence rebuts the Commonwealth's case for death. This is especially true when the case rests on the future dangerousness aggravating factor and the defendant will not be eligible for parole if sentenced to life in prison. Also, in *Lockett v. Ohio*,[25] the Court held that the Eighth and Fourteenth Amendments enable the defendant to present all relevant mitigation evidence to the sentencing body. Accurate parole law information can be seen as part of the evidence proffered as a basis for a sentence less than death. It is relevant to the defendant's contention that life in prison is severe and sufficient punishment. The United States Supreme Court recently heard the *Gardner/Lockett* arguments in *Simmons v. South Carolina*[26] and is currently considering the issues. Should the Court agree in *Simmons* that the presentation of this form of mitigation evidence is a basic constitutional right, a new sentencing hearing for Ramdass will be required.

III. Request for the Results of the Accomplice Polygraph Tests

The version of events that painted Ramdass as the more culpable actor in the crime was proved by his accomplice Ramirez. Any evidence undermining his credibility would be quite relevant. Here, the Supreme Court of Virginia held that the Commonwealth did not have to disclose the results of the accomplice's polygraph tests to the defense.[27] It held a showing that evidence was "potentially exculpatory" was insufficient even to require *in camera* inspection by the court. It said that "[a]lthough a defendant need not make an avowal of how a witness might testify in order to obtain pretrial discovery of a witness's statement to the police, he should describe the events to which the witness might testify and the relevance of such matters to the crime charged in order to demonstrate its required constitutional materiality to his guilt or punishment."[28] Ramdass faced a "Catch-22" situation. He did not know the precise contents of the polygraph results so he could not tell the court the requisite information. Without access to the results, he could not elicit the information to make the showing the court required.

As the court did recognize, the Commonwealth has a due process obligation to turn over any evidence that tends to exculpate on guilt or sentencing to the defense.[29] The court also recognized that exculpatory evidence includes evidence that tends to undermine the credibility of the prosecution witnesses, regardless of the good faith or bad faith of the

16 *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1973). True equality is, of course, neither a legal requirement nor a practical possibility. Wealthy defendants may avail themselves of expert resources concerning minor issues not central to their defense.

17 470 U.S. 68, 77 (1985).

18 *See Volanty v. Lynaugh*, 874 F.2d 243 (5th Cir. 1989) (finding defendant's contention that addiction made him insane insufficient as a significant factor without supporting evidence). *But see Little v. Armentrout*, 835 F.2d 1240 (8th Cir. 1987) (ruling that refusal to appoint hypnotist was error when the witness did not make identification until after hypnosis).

19 451 U.S. 454, 468 (1981).

20 113 S. Ct. 2849 (1993).

21 It is also very possible that this tactic would not have worked because of the "successive prosecution," "separate proceeding requirement." *See Schiro v. Farley*, 114 S. Ct. 783 (1994) and case summary of *Schiro*, Capital Defense Digest, this issue.

22 495 U.S. 508 (1990) (forbidding use of some conduct relied upon in prosecution of lesser offense to be employed in succeeding prosecution on greater offense).

23 For a comprehensive explanation of all of these arguments, *see* Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol. 5, No. 1, p. 45 (1992).

24 430 U.S. 349 (1977).

25 438 U.S. 536 (1978).

26 114 S.Ct. 57 (1993).

27 *Ramdass*, 246 Va. at 421, 437 S.E.2d at 571.

28 246 Va. at 421, 437 S.E.2d at 570.

29 Other defendants have faced the "Catch-22." The difference in *Ramdass*, however, may be the court's refusal to require *in camera* inspection by the trial judge. Such inspections are to the advantage of both the prosecution and the defense. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) (holding that the trial judge had the right to deny the discovery motion but that the trial judge had to examine the requested record *in camera*).

prosecution.[30] Thus, although the restrictive position of the court may be constitutionally permissible, the Commonwealth risked a later determination that the polygraph results did include exculpatory evidence material to the defense.[31] It may be possible to maximize the chances of a later reversal by adopting a very specific discovery request. The prosecution has a duty to disclose any obviously exculpatory evidence even in the absence of a request, but an especially specific request puts the government and the court on notice that the defense considers this evidence to be important. This, in turn may influence a later appellate determination of the importance of the evidence to the trial outcome.[32]

Further, in a situation similar to this one where the attorney does not have detailed knowledge of the contents of the evidence, then a *subpoena duces tecum* can be a useful tool. Virginia Rule 3A:12 allows the defense to request the subpoena which will then issue unless the Commonwealth resists. The *subpoena duces tecum* then puts the burden on the Commonwealth to prevent the defense access to the records. Often, no objection is made. If the Commonwealth objects to the issuance of the subpoena, several grounds are available to support compelling its issuance. The first of these grounds is the Compulsory Process and Confrontation Clause of the Sixth Amendment, supporting the right to put on a defense and to meet the Commonwealth's case. Second, Virginia's constitutional counterpart to the Compulsory Process Clause is Article I, Section 8. This part of the Virginia Constitution has been liberally interpreted to include the right to investigate and the right to obtain documents.[33] There is a materiality requirement to the *subpoena duces tecum* but it has been interpreted as "whether a **substantial basis for claiming** materiality exists."[34] It is conceivable that the fact that the polygraph is that of an accomplice might meet this standard all by itself.

There are other limitations on the use of *subpoenas duces tecum* in these situations. The defense cannot issue a *subpoena duces tecum* to a party. Therefore, a *subpoena duces tecum* will not be helpful if the Commonwealth or some member of the Commonwealth's staff has possession of the information. It might have been possible in this case, however, to serve a *subpoena duces tecum* on Ramirez if he got a copy of the polygraph results. In any event, the *subpoena duces tecum* is a valuable but under-utilized defense tool and is often superior to a discovery motion.

IV. Use of Unadjudicated Acts to Impeach Accomplices' Testimony

Defendant attempted to cross-examine the accomplice concerning unadjudicated criminal acts he may have committed.[35] The Supreme Court of Virginia stated that "[i]t is well settled in Virginia that a litigant's right to impeach the credibility of adverse witnesses by showing their participation in criminal conduct has been confined to questions about a **conviction** for a felony, perjury, and a misdemeanor involving moral turpitude."[36]

The Federal Rules of Evidence allow for the attorney to question the witness about unadjudicated criminal actions for the purpose of undermining the credibility of the witness.[37] We do not know the purpose of the unadjudicated act examination in this case, but most jurisdictions allow the use of unadjudicated bad acts to impeach the witness's veracity. State jurisdictions differ, however, about the use of bad acts to impeach the witness when the acts do not result in a conviction.[38]

V. Conclusion

The Supreme Court of Virginia exercised its usual rigorous application of default rules[39] holding several issues defaulted that were previously raised at trial and assigned as error for failure to brief.[40] Nevertheless, counsel preserved on federal grounds a number of issues that may result in the grant of relief as the case progresses beyond the Supreme Court of Virginia.

Summary and analysis by:
Cameron P. Turner

[30] *Ramdass*, 246 Va. at 420, 437 S.E.2d at 571. *See also Giglio v. United States*, 405 U.S. 150 (1972) and *United States v. Agurs*, 427 U.S. 97 (1976).

[31] *United States v. Agurs*, 427 U.S. 97 (1976). *See also United States v. Bagley*, 772 F.2d 482 (9th Cir. 1985).

[32] *Brady v. Maryland*, 373 U.S. 83 (1963).

[33] *Cox v. Commonwealth*, 227 Va. 324, 315 S.E.2d 228 (1984).

[34] *Id.* at 328, 315 S.E.2d at 230 (emphasis added).

[35] Again the defense counsel did an excellent job of federalizing the issue of limiting the cross-examination of accomplices to prior convictions with the claim that this restriction violated not just Virginia law, but the defendant's Sixth Amendment right to confrontation.

[36] *Ramdass*, 437 S.E.2d 566, 572 (emphasis added).

[37] Fed. R. Evid. 608(b).

[38] For example, South Carolina does not require a conviction but Maryland does. *See State v. Hale*, 526 S.E. 2d 418 (S.C. 1985). *But see Robinson v. State*, 468 A.2d 328 (Md. 1983). *See also Marten Chevrolet Inc. v. Seney*, 439 A.2d 534 (Md. 1982).

[39] *See* Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, this issue.

[40] *Ramdass*, 426 Va. at 419, 437 S.E.2d at 569 (1993).