Capital Defense Journal

Volume 7 | Issue 2 Article 5

Spring 3-1-1995

STOCKTON v. MURRAY 41 F.3d 920 (4th Cir. 1994) United States Court of Appeals, Fourth Circuit

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlucdj

Part of the Criminal Procedure Commons, and the Law Enforcement and Corrections Commons

Recommended Citation

STOCKTON v. MURRAY 41 F.3d 920 (4th Cir. 1994) United States Court of Appeals, Fourth Circuit, 7 Cap. Def. Dig. 10 (1995).
Available at: https://scholarlycommons.law.wlu.edu/wlucdj/vol7/iss2/5

This Casenote, U.S. Fourth Circuit is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

ting judges to arbitrarily reject advisory jury verdicts, is an abuse of sentencing discretion.

The Court rejected this argument, reasoning that the cited statements do not indicate that the judges have divergent understandings of the statutory requirement. Rather, they illustrate how different judges have "considered" the jury's advice. It would be unreasonable to expect that advisory verdicts would be treated uniformly in every case.[34]

The result in *Harris* is not surprising, given the Court's holding in *Spaziano* that states could, consistent with the Eighth Amendment, vest sentencing authority in the judge and relegate the jury to an advisory role.[35] However, Justice O'Connor's statement that constitutional questions involve more than mere numerical tabulation is questionable. She has previously counted legislatures in determining the reach of the Eighth Amendment,[36] purportedly following the established doctrine that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[37] and that both legislatures and **juries** are primary indicators of these standards.[38]

The Court's decision in *Harris* has no direct application to Virginia practice, as a jury sentence of life imprisonment is not reviewable in Virginia.[39] However, after consideration of a post-sentence report and upon good cause shown,[40] a judge may set aside a jury's sentence of death and impose a sentence of life imprisonment.[41]

While Virginia courts rarely override jury death sentences, the post-sentencing hearing provides an opportunity for counsel to ensure that the record is adequate to preserve appellate issues. It also allows counsel to make and preserve new claims, one being that the Sixth Amendment confrontation clause is violated by the sentencing court's consideration of hearsay evidence contained in the post-sentence report.[42]

Summary and analysis by:
John M. DelPrete

---

34 115 S. Ct. at 1037.

35 *Spaziano*, 468 U.S. at 464-65.

36 *See Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) ("[A]lmost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution.") (O'Connor, J., concurring) and *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. We have also looked to data concerning the actions of sentencing juries.").

37 *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

38 *See Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (jury determinations and legislative enactments are two crucial indicators of evolving standards of decency) and *Gregg v. Georgia*, 428 U.S. 153, 179-181 (1976) ("The legislatures of at least 35 States have enacted new statutes that provide for the death penalty .... The jury also is a significant and reliable objective index of contemporary values ....."). This pivotal role of juries was simply not discussed in *Harris*.

39 Va. Code Ann. § 19.2-264.4 (A) (1990) ("In cases of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.").

40 "Good cause shown" reiterates the rule applicable in all cases when the court must consider altering a jury verdict. *See Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981).

41 Va. Code Ann. § 19.2-264.5 (1990).

42 Hearsay evidence contained in the post-sentence report can be considered by the court at the sentencing phase. *See O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988).

STOCKTON v. MURRAY

41 F.3d 920 (4th Cir. 1994)
United States Court of Appeals, Fourth Circuit

FACTS

In 1983, Dennis Stockton was convicted, as a hiree, of the capital murder of Kenneth Ardner and sentenced to death under the murder for hire provision of Virginia's capital murder statute.[1] Under this section, one is not guilty of capital murder unless the hiring element is proved. The only witness who testified to the hiring agreement was Randy Bowman, an inmate at a North Carolina prison at the time of trial.[2] Bowman testified that he had not received any promises for testifying, but that it was the right thing to do and that he hoped to benefit from it.[3]

Stockton pursued appeals and collateral proceedings, was awarded a resentencing hearing which resulted in another death sentence, and continued to seek appellate relief.[4]

The issues decided by the Fourth Circuit panel and included in Stockton's fourth state habeas corpus petition involve claimed violations of *Brady v. Maryland*[5] and its progeny. Specifically, Stockton alleged that (1) he was unaware, until defense counsel received a letter from the Commonwealth's attorney in 1990, that the prosecutor had promised Bowman that he (the prosecutor) would endeavor to get Bowman transferred to another prison; and (2) that the prosecutor failed to turn over a 1983 letter from Bowman in which Bowman threatened the prosecutor that he would not testify unless the sentence he was serving was reduced.[6]

The Virginia courts found these claims to be procedurally barred and the federal district court concurred in this finding. Stockton appealed to the Fourth Circuit.

---

1 Va. Code Ann. § 18.2-31(b) (1990).

2 A full description of the underlying facts can be found in *Stockton v. Commonwealth*, 852 F.2d 740 (4th Cir. 1988), *cert. denied sub nom.*

3 *Stockton v. Murray*, 41 F.3d 920, 922 (4th Cir. 1994).

4 *Id.* at 923.

5 373 U.S. 83 (1963) (holding that due process is violated when material and exculpatory evidence is withheld from defendant).

6 *Stockton*, 41 F.3d at 923. Another claim involved an allegation that the prosecution withheld evidence that a second witness at Stockton's trial, who alleged that Stockton had committed a second murder, had mentioned an additional motive Stockton allegedly harbored for killing Ardner. The claim was relatively unimportant compared to Stockton's two other *Brady* claims, and the court's rejection of the claim was probably correct. It will not be discussed further in this summary.

HOLDING

A panel of the Fourth Circuit held that Stockton's *Brady* claims were procedurally barred, that no acceptable excuse for the default had been demonstrated, and that the claims were, in any event, without merit.[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. The Procedural Bar Ruling

The Virginia courts dismissed Stockton's fourth state habeas petition pursuant to Virginia's procedural default statute, Virginia Code section 8.01-654(B)(2). The statute provides, "'No writ shall be granted on the basis of any allegation the facts of which petitioner **had knowledge** at the time of filing any previous petition.'"[8] The Fourth Circuit, however, seemed to construe the plain language of the default statute, which triggers default upon omissions involving actual knowledge only, as if it read "should have had knowledge." There are no indications that Stockton argued that he had not defaulted his claims, though such an argument may have been available. The court merely stated that since Stockton's claims were found to have been defaulted by the Supreme Court of Virginia, the Fourth Circuit would not hear them.[9]

In *Waye v. Murray*[10] the Fourth Circuit held that "a finding of default under section 8.01-654(B)(2) establishes that 'all of the facts on which the current petition was based were either known or **available** to the petitioner years ago.'"[11]

Once a claim has been deemed defaulted, the petitioner must persuade the federal court to hear it. A showing of cause for default coupled with a finding of prejudice to the petitioner in the event the federal court refuses to hear the claim is the principle avenue of persuasion.[12] A showing of cause requires that the petitioner show that he not only had no previous knowledge of the facts underlying his claim, but that he had no reasonable way of discovering those facts.[13] This is the "should have known" standard which is in contrast with the "did know" standard found in the Virginia default statute.

Even if Stockton did in fact default his claims, it is highly questionable whether Stockton should have known of the specific promise the prosecutor made to try to obtain a prison transfer for Bowman.[14] Contrary to the court's reasoning, the fact that Stockton mounted other attacks on Bowman's credibility does not refute a claim that Stockton had no knowledge and no reasonable way of knowing of the specific prison transfer promise.[15]

Similarly, the Commonwealth attorney's post hoc affidavit reciting that he told Bowman of his limitations in fulfilling the transfers promise does not vitiate the fact that the promise was made and that Bowman denied it on the stand.[16] In any event, the promise was to **try** to obtain the transfer, not to bring it about.[17] Finally, Stockton's knowledge from a civil suit that Bowman had told other inmates that Gregory, the Commonwealth's investigator, had "promised him things" does not answer the issue either. In the court's view, however, Stockton could have "marshalled his facts" before filing his fourth state habeas petition and, therefore, could have uncovered the specific promises the prosecutor withheld until 1990.[18]

II. The Merits of the *Brady* Claim

The Fourth Circuit, while denying the obligation to do so, "in an exercise of care," considered the merits of the claims and rejected them.[19]

Giglio v. United States[20] held that evidence which has a tendency to undermine a witness' credibility is exculpatory evidence within the definition of that phrase from *Brady*. In deciding that the letter from Bowman to the prosecutor was not exculpatory evidence, the court focused on what it concluded that Bowman thought, rather than what the prosecutor did or failed to do. The prosecutor failed to correct the perjury committed as Bowman claimed that he was not promised anything, was motivated by a desire to "do the right thing," and was merely hoping that his testimony would improve his condition in general. The effect the promises and the content of the letter had on Bowman's credibility should have been for the jury to decide. Bowman's subjective knowledge that the prosecutor could not force the North Carolina authorities to reduce his sentence or transfer him to another facility is not determinative of the prosecutor's *Brady* obligation.

Because Bowman said on the stand that he felt testifying was the right thing to do, though he hoped to benefit therefrom, the 1983 threat in writing not to testify was also material to the credibility of his "goodness of his heart" trial testimony. Here, the court reversed its method of analysis and erroneously found that what the prosecutor did was determinative, as it ruled that since there was no evidence that the prosecutor acceded to Bowman's demand, the letter was not within *Brady*.[21] The inconsistency of the content of the letter with Bowman's trial testimony, not solely whether Bowman received consideration for the testimony, was relevant to Bowman's credibility.

III. Conclusion

If appellate courts insist upon circumventing and undermining *Brady* and its progeny, there is little that counsel can do to prevent it.[22] There are, however, specific actions defense counsel can take to make it more difficult for appellate courts to side step *Brady* issues. Foremost among these is investigation and more investigation.[23]

---

[7] *Id.* at 927.

[8] *Id.* at 924 (emphasis added).

[9] *Id.*

[10] 884 F.2d 765 (4th Cir.), *cert. denied*, 492 U.S. 936, (1989).

[11] *Id.* (quoting *Stockton v. Virginia*, 113 S. Ct. 612 (1992) (emphasis added).

[12] If Stockton could have shown cause, he could easily have shown prejudice because Bowman was the only witness to an essential element of capital murder.

[13] *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[14] *Stockton v. Murray*, 41 F.3d at 925.

[15] *Id.* at 924.

[16] *Id.* at 926.

[17] "I made it clear to Bowman at the time [prior to Stockton's trial] that I could not make him any promises; I told him I would try." *Id.* (quoting from the Virginia prosecutor's affidavit).

[18] *Id.* at 925.

[19] *Id.*

[20] 405 U.S. 150 (1972); *see also Dozier v. Commonwealth*, 219 Va. 1113, 253 S.E.2d 655 (1979).

[21] *Stockton*, 41 F.3d at 927.

[22] Some encouragement may be found by the United States Supreme Court's grant of certiorari to *Kyles v. Whitley*, 114 S. Ct. 1610, case below, 5 F.3d 806 (5th Cir. 1993), a case which raises the issue of whether the prosecution has an independent duty to disclose *Brady* material to defense counsel apart from a request for such material. The Court, through *Kyles*, may directly address the meaning of exculpatory evidence once again and relieve defense attorneys of the burden to speculate correctly about what evidence the Commonwealth possesses.

[23] For further discussion of the importance of investigation, see case summary of *Schulp v. Delo*, Capital Defense Digest, this issue.

Counsel should use all available means to obtain information in addition to the formal discovery process. In regard to discovery, counsel should make requests as particular and specific as possible, thereby limiting the courts' ability to recharacterize the requests as requests which do not encompass the *Brady* material later found to have been withheld. In addition, every request or demand must be made on the record and must require that the trial judge rule on each and every piece of information requested. Even in "open file" jurisdictions, the record must reflect what was demanded, the response made, and exactly what material defense counsel received, and when it was received.

Summary and analysis by:
Angela Dale Fields

WEEKS v. COMMONWEALTH

248 Va. 460, 450 S.E.2d 379 (1994)
Supreme Court of Virginia

FACTS

Late on the night of February 23, 1993, twenty year-old Lonnie Weeks was travelling southbound on I-95 between Washington and Richmond with his twenty-one year-old uncle, Lewis J. Dukes, Jr.[1] Dukes was driving the car at a high rate of speed when they passed the vehicle of Virginia State Trooper Jose M. Cavazos around midnight. Dukes eventually stopped the car on the Dale City exit ramp, where Trooper Cavazos pulled up behind them.[2] Trooper Cavazos asked the two men to get out of the car. Dukes complied, but as Weeks exited, he drew a pistol and shot the officer at least six times. Trooper Cavazos died several minutes later.[3]

Weeks and Dukes left the scene in their vehicle and stopped at a gas station.[4] Soon after at a nearby motel, another police officer stopped and questioned Weeks and Dukes. They volunteered information about the shooting, claiming they had "heard the shots" while in the motel parking lot.[5] Subsequent suspicious behavior on the part of Weeks and Dukes prompted the police officers on the scene to detain them with their consent.[6] State police Special Agent J.K. Rowland advised Weeks that he was "free to leave" but then read Weeks *Miranda* warnings. Weeks wrote on the "Advice of Rights" form: "Do not want to discuss case further."[7] Meanwhile, Dukes told another police officer that Weeks had shot the trooper. When this police officer informed Rowland of Dukes' account, Rowland arrested Weeks.[8] Later, at about 6:00 p.m. that evening (February 24), Rowland asked Weeks if he remembered the rights read to him earlier that day. Weeks answered that he did, was questioned further, and soon confessed to shooting the trooper.[9]

Weeks was indicted for capital murder for the willful, deliberate, and premeditated killing of a police officer for the purpose of interfering with the police officer's performance of official duties;[10] grand larceny of a motor vehicle; and use of a firearm in the commission of murder.[11] The jury later found Weeks guilty of capital murder and sentenced him to death based on the "vileness" aggravating factor. After considering a probation officer's report and the probation officer's testimony relating to punishment, the court upheld the sentence of death.[12]

HOLDING

Deciding his appeal and conducting its statutory review, the Supreme Court of Virginia held that Weeks' sentence had not been imposed under passion, prejudice, or other arbitrary factor, and that the sentence was not excessive or disproportionate to penalties imposed in similar cases.[13] The court also rejected all of his forty-seven assignments of error[14] and affirmed the conviction and sentence of death.[15]

---

1 *Weeks v. Commonwealth*, 248 Va. 460, 464, 450 S.E.2d 379, 382-83 (1994).

2 *Id.* at 464, 450 S.E.2d at 383.

3 *Id.* at 465, 450 S.E.2d at 383.

4 *Id.*

5 *Id.* at 466, 450 S.E.2d at 383-84.

6 *Id.* at 466-67, 450 S.E.2d at 384.

7 *Id.* at 468, 450 S.E.2d at 385.

8 *Id.* at 469, 450 S.E.2d at 385.

9 *Id.*

10 Va. Code Ann. § 18.2-31(6) (Supp. 1994).

11 *Weeks*, 248 Va. at 463, 450 S.E.2d at 382.

12 *Id.* at 464, 450 S.E.2d at 382.

13 *Id.* at 478-79, 450 S.E.2d at 390-91.

14 As noted in the text, Weeks commendably raised forty-seven assignments of error for appeal, although the Supreme Court of Virginia refused to consider ten of these errors since they were not briefed or argued. For further information on these ten errors, *see* Section III and the text accompanying Footnote 62 *infra*. As to some of the remaining thirty-two issues, either the court summarily rejected them, they did not involve death penalty law, or the court applied broad and well-settled principles of law to situations which are too fact-specific to be useful generally. These issues include: (1) the constitutionality of Weeks's two-hour detention without arrest; (2) the trial court's denial of Weeks's motion to suppress his confession, based on the failure of authorities to scrupulously honor Weeks's request to remain silent (more specifically, the court's application of the five factors in the United States Supreme Court's decision in *Michigan v. Mosley*, 423 U.S. 96 (1975), used to determine whether re-interrogation of a criminal defendant, once that defendant has exercised his *Miranda* rights, is constitutional—*see* Bieber, Commonwealth v. Burket: *Don't Put All Your Defense Eggs in the Suppression Basket*, Capital Defense Digest, this issue); (3) the trial court's error in denying individual voir dire; (4) the trial court's error in denying Weeks' challenge for cause to a juror whose wife's first cousin had been a police officer killed in the line of duty; (5) the trial court's error in permitting hearsay testimony concerning statements of Dukes to investigators that Weeks had killed the trooper; (6) the trial court's error in denying Weeks's motion to strike the Commonwealth's evidence of capital murder based on the evidence's failure to prove premeditation sufficiently. Of the remaining issues, the trial court stated that it had "considered all the arguments in support of those issues, and conclude[d] that none ha[d] any merit." *Weeks*, 248 Va. at 476, 450 S.E.2d at 390.

15 *Weeks*, 248 Va. at 479, 450 S.E.2d at 391.