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BURKET v. COMMONWEALTH 248 Va. 596,450 S.E.2d 124 (1994) Supreme Court of Virginia

Had Weeks not been held to have defaulted this second claim, however, he may have had a viable argument. The United States Supreme Court stated in *Payne* (in a passage that the Supreme Court of Virginia quoted verbatim in *Weeks*) that "[a] State may legitimately conclude that evidence about the victim and **about the impact of the murder on the victim's family** is relevant to the jury's decision as to whether or not the death penalty should be imposed."[78] The Court's holding says nothing about such testimony being admitted as to any persons other than family members. Consequently, defense counsel should object if the Commonwealth attempts to put on victim impact testimony as to anyone other than family members. This issue should be distinguished from objecting to victim impact testimony by family members, so as to avoid the fate of default that Weeks suffered. If overruled, counsel should preserve the issue on federal constitutional grounds so that it may ultimately be resolved on its merits in a federal habeas proceeding.

Summary and analysis by:
Gregory J. Weinig

[78] *Payne*, 501 U.S. at 827 (emphasis added).

BURKET v. COMMONWEALTH

248 Va. 596, 450 S.E.2d 124 (1994)
Supreme Court of Virginia

FACTS

On January 14, 1993, Katherine Tafelski and her daughter Ashley, age five, were found dead in their beds in the family residence. Autopsies revealed that both victims suffered massive head injuries, inflicted by the same blunt object. Katherine suffered sexual penetration by an inanimate object. It was determined that the victims' wounds were inflicted by automotive tools. Katherine's son Andrew, age three, was found unconscious in his bed, suffering a double break in his jaw and an eye wound. The children's friend, Chelsea Brothers, suffered bruises to her entire body.[1]

Russel Burket lived next door to the Tafelskis. During a videotaped police station interrogation on January 20, 1993, Burket confessed to the murders and assaults.[2] Burket was charged with double homicide, two counts of malicious wounding, sexual penetration with an inanimate object, and statutory burglary. After the trial court denied a motion to suppress the confession, Burket pled guilty to all the charges but reserved the right to challenge on appeal the admissibility of his statements.[3]

In a separate penalty hearing, Burket received two life sentences and two twenty year terms for the four non-capital convictions.[4] Burket was sentenced to death for the capital murder, predicated upon findings of both "future dangerousness" and "vileness."[5]

Burket appealed only the capital murder conviction. Among his assignments of error, Burket argued it was error for the trial court not to suppress his confession which was obtained in a custodial interrogation in violation of his *Miranda* rights and Fifth Amendment right to counsel.[6]

HOLDING

Consolidating the automatic review of Burket's death sentence with his appeal of the capital murder conviction, the Supreme Court of Virginia found no reversible error on any of the presented issues,[7] including the admissibility of Burket's confession.[8]

ANALYSIS/APPLICATION IN VIRGINIA

In upholding the admissibility of Burket's confession, the Supreme Court of Virginia rejected the *Miranda* violations alleged by Burket. First, Burket claimed that his initial request for counsel was made in a custodial interrogation, thereby triggering his right to *Miranda* warnings which were not administered until after detectives obtained a full-blown confession.[9] Second, given the detectives' failure to immediately issue the *Miranda* warnings, Burket claimed his later custodial statements were rendered inadmissible.[10] Third, after finally being advised of his *Miranda* rights, Burket argued that they were violated by the failure of his interrogators to terminate questioning.[11] Finally, Burket alleged the trial court erred in finding that he validly waived his *Miranda* rights.[12] Based on the trial court findings and its own independent review of the record, the court found no merit to any of these claims.

[1] *Burket v. Commonwealth*, 248 Va. 596, 599-602, 450 S.E.2d 124, 126-27 (1994).

[2] 248 Va. at 602-04, 450 S.E.2d at 128-29.

[3] 248 Va. at 598-99, 450 S.E.2d at 125-26.

[4] 248 Va. at 599, 450 S.E.2d at 126.

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

[6] *Burket v. Commonwealth*, 248 Va. at 604, 450 S.E.2d at 129.

[7] In light of Burket's failure to raise at trial the issues of victim impact testimony and parole eligibility, the Supreme Court of Virginia refused to address the issues on appeal. 248 Va. at 612-613, 616, 450 S.E.2d at 133, 135. *See* Va. Sup. Ct. R. 5:25. Burket also argued that the death penalty was imposed contrary to the Eighth Amendment prohibition against cruel and unusual punishment and his right to due process under the Fourteenth Amendment. These challenges were also summarily dismissed by the court on the basis of precedent. 248 Va. at 612, 450 S.E.2d at 133.

[8] 248 Va. at 617, 450 S.E.2d at 135.

[9] 248 Va. at 604, 450 S.E.2d at 129.

[10] *Id.*

[11] 248 Va. at 608, 450 S.E.2d at 131.

[12] 248 Va. at 611, 450 S.E.2d at 132.

I. The Custody Inquiry

On the afternoon of January 20, 1993, Burket agreed to accompany two detectives to the police station for an interview. Forty minutes into the interrogation, the detectives falsely informed Burket that children had seen him inside the Tafelski residence and that strands of his hair were also discovered in the house.[13] In response to these allegations, Burket admitted he had been in the house on the day of the murders and stated, "I'm gonna need a lawyer."[14]

The Supreme Court of Virginia was not persuaded by Burket's argument that he was in custody at this point and accordingly should have been read his *Miranda* rights. To the contrary, the court found that Burket was free to leave at this juncture, and the detectives were therefore not required to advise Burket of his *Miranda* rights.[15]

It is true that Burket was not formally in custody when he requested counsel. It is equally clear that the *Miranda* right to counsel does not attach until the suspect is in custody.[16] However, the Court only focused on formal arrest as the event triggering the custodial right to *Miranda* warnings. While this is a proper focus, it is **not the only** indicator of custody. A suspect may in fact be in custody without having been formally arrested. In *Berkemer v. McCarty*[17] the United States Supreme Court stated that in determining whether a person **not** under formal arrest is in custody, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[18] Yet the opinion of the Supreme Court of Virginia contained no reference to how Russel William Burket or a reasonable person in his position would have understood the situation.

To the contrary, the opinion contained multiple references to what the interrogating officers said and did throughout the relevant period. The court emphasized that the officers went to Burket's home to ask him to participate in an interview and then drove Burket to the police station in an unmarked car; that Burket was never handcuffed or restrained and was told more than once that he was free to leave; and that Burket was placed in a small, unlocked interview room in order to ensure privacy.[19] By recounting the events leading up to the interrogation exclusively from the perspective of the officers, the court altogether failed to consider the episode from the suspect's point of view. While the actions of the officers were unquestionably relevant to what a reasonable person would have understood, the scope of review should not have been limited solely to the police version of the facts.

Although the court did not undertake a reasonableness analysis, it nevertheless acknowledged that the investigating detectives affirmatively misled Burket in the opening hour of the interrogation.[20] The detectives created a ruse by telling Burket that they possessed both eyewitness accounts and hard evidence of his presence in the Tafelski house. Confronted with this information, Burket obviously perceived a case against him and responded by stating his need for a lawyer.

Moreover, the detectives sent mixed signals to Burket as to his status. There were occasional admonishments that he was free to leave,[21] but when viewed in the greater context, these statements may reasonably have seemed like empty words to Burket. Burket was a man of less than average intelligence[22] who was detained in a small interrogation room with two pressing detectives. In *Oregon v. Mathiason*[23] the United States Supreme Court stated that police are required to give *Miranda* warnings prior to questioning "only when the suspect is so restricted as to be in custody."[24] Given the restrictive circumstances of Burket's detention, it would not have been unreasonable to conclude that he was in fact in custody and deserving of his *Miranda* rights.

II. Failure to Invoke *Miranda* Rights

Despite Burket's initial request for a lawyer, the interrogation continued until Burket admitted to the killings, terming them accidental.[25] Immediately following this admission, Burket again indicated his desire for the assistance of counsel when he stated, "I think I need a lawyer." After this statement Burket was frisked, placed under arrest and read his *Miranda* rights.[26] According to the Supreme Court of Virginia, Burket was not in custody for *Miranda* self-incrimination purposes until after this formal three-step process—frisk, arrest and warnings—had concluded.[27] The implications to be drawn from this finding are dual: Not only may precustodial requests for counsel be safely ignored for *Miranda* purposes, but, more critically, if a suspect does not repeat his request for counsel after being placed into custody, any subsequent custodial confessions will be deemed voluntary and admissible.[28]

After Burket was placed under arrest, a detective began to elicit personal information from him in order to complete preliminary paperwork.[29] The trial court found that Burket then initiated post-*Miranda* conversation with the detective, apart from the requested booking information. However, the record itself is quite susceptible of a contrary interpretation.

Twice during the interrogation Burket exclaimed, "I just don't think that I should say anything," and "I need somebody that I can talk to."[30] These exclamations were followed by an explicit threat from one of the interrogating officers who warned that if Burket did not cooperate, the severity of the situation would only escalate. The officer also made it quite clear to Burket that the degree of severity lay exclusively within the officer's control.[31] The officer then resumed his questioning and for the third time Burket stated, "I need somebody that I can talk to."[32] Based on the foregoing exchange, Burket claimed that his statements indicated his desire and right to halt the interrogation. The Supreme Court of

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13 248 Va. at 603, 450 S.E.2d at 128.
14 *Id.*
15 248 Va. at 609-10, 450 S.E.2d at 129-30.
16 *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).
17 468 U.S. 420 (1984).
18 *Id.* at 442.
19 *Burket v. Commonwealth*, 248 Va. at 603, 450 S.E.2d at 128.
20 *Id.*
21 *Id.*
22 248 Va. at 611, 450 S.E.2d at 132.
23 429 U.S. 492 (1977).
24 *Id.* at 495.
25 *Burket v. Commonwealth*, 248 Va. at 606, 450 S.E.2d at 130.
26 248 Va. at 606-07, 450 S.E.2d at 130.
27 248 Va. at 605, 450 S.E.2d at 129.
28 These issues have been raised in *Burket v. Commonwealth*, petition for cert. filed (U.S. Feb. 2, 1995)(No. 94-__).
29 In *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990), a plurality announced a "'routine booking question' exception which exempts from Miranda's coverage express questions to secure the biographical data necessary to complete booking or pretrial services."
30 *Burket v. Commonwealth*, 248 Va. at 609-10, 450 S.E.2d at 131-32.
31 248 Va. at 609, 450 S.E.2d at 131.
32 248 Va. at 610, 450 S.E.2d at 131-32.

Virginia disagreed with this characterization, finding that these remarks did not amount to an invocation by Burket of his right to terminate the questioning.[33] This means that not only did Burket fail to invoke his right to counsel, but he also did not invoke his right to remain silent.

A. Invocation of the Right to Counsel

Burket did not claim on appeal that his statements, of "I need somebody I can talk to" were requests for counsel. Yet even if he had made such a claim, it undoubtedly would have failed. This is due to the court's position regarding the degree of specificity and clarity that a suspect's request for counsel must meet. As stated in *Eaton v. Commonwealth*,[34] "the standard prevailing in Virginia is that a request for counsel must be 'unambiguous and unequivocal' . . . ." This means that if a suspect's statements regarding counsel are susceptible of varying interpretations by a reasonable police officer, the issue will be resolved in favor of the Commonwealth.[35] Given this linguistically high threshold,[36] it seems clear that the court would have refused to read Burket's statements as effective requests for counsel.

An important consequence flowed from Burket's failure to clearly invoke his right to counsel at this point in the interrogation. When a suspect exercises his right to counsel under *Miranda*, he simultaneously triggers the non-waiver rule announced by the United States Supreme Court in *Edwards v. Arizona*.[37] Under *Edwards*, when a suspect invokes his right under *Miranda* to counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless [defendant] himself initiates further communication, exchanges, or conversations with the police."[38] The underlying purpose of the *Edwards* rule is to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[39] Thus by not clearly and unambiguously requesting an attorney, Burket forfeited the protective mandate of *Edwards*.

B. Scrupulously Honoring the Right to Remain Silent

If not requests for counsel, Burket claimed that his three statements to detectives were an invocation of his right to remain silent. Under the rule of *Michigan v. Mosley*,[40] once a suspect has made a decision not to speak, officers may not immediately press for further statements. In other words, a suspect's expressed desire to remain silent is to be "scrupulously honored" by police.[41] Accordingly, Burket asked the Court to determine whether his right to terminate questioning had been "scrupulously honored" by his interrogator. The court's answer to that inquiry would in turn determine the admissibility of Burket's confession.

As stated above, Burket voiced his unwillingness to talk to the detectives, not once, but three times in a row. Furthermore, between his second and third request to end the questioning, Burket was threatened by one of the detectives. This is exactly the type of police behavior that the *Mosley* rule prohibits. Nevertheless, the Supreme Court of Virginia found that Burket failed to invoke his right to remain silent and that he had, in fact, persisted in engaging the detectives in a detailed discussion of the case.[42]

The court viewed Burket's statements to the officers as nothing more than "a reservation about the wisdom of continuing the interrogation."[43] This implies that something more is required to halt questioning. The court did not, however, advise what language or action by the suspect would be sufficient to invoke the right to remain silent. Expressions that one does not think he should speak, coupled with expressions of a desire to speak with someone other than the interrogator, are obviously insufficient in Virginia. Having decided that Burket failed to invoke his right to remain silent, the court never reached the *Mosley* issue regarding the duty to scrupulously honor the defendant's right to silence.

III. Valid Waiver and the Government's Burden of Proof

Burket argued that the trial court erred in finding that he validly waived his *Miranda* rights. A suspect may waive his privilege against self-incrimination and right to counsel before or during the custodial interrogation. However, before accepting such a waiver, it is the duty of the court to uncover the true nature of the waiver by applying the standard of review set forth in *Johnson v. Zerbst*.[44] Under the *Zerbst* test, an alleged waiver of *Miranda* rights must be voluntary, knowing and intelligent in order to be valid as a matter of law.[45] The Supreme Court of Virginia's manifestation of this test is that the waiver must be the "product of an essentially free and unconstrained choice by its maker"[46] and the court must determine whether the maker's will "has been overborne and his capacity for self-determination critically impaired."[47]

It was established in the trial court proceedings that Burket suffered from severe dyslexia and his academic abilities were severely impaired. Burket's intellectual abilities were assessed as falling in the lower level of the average range. It was also opined that Burket suffered from persistent depression and had twice attempted suicide.[48] Notwithstanding this evidence, the Supreme Court of Virginia upheld as substantial and credible the lower court's findings that Burket's "demeanor was that of an alert, composed, even knowledgeable individual. There was nothing unusual about his behavior."[49] Accordingly, the court held the waiver to be valid and the confession voluntary.[50]

IV. Other Issues

Prominent among Burket's other claims was the argument that he was denied his constitutional right to a jury trial by virtue of the trial court's refusal to allow an explanation to the jury of his minimum period of imprisonment if given a life sentence. Under the recent holding of *Simmons v. South Carolina*,[51] trial courts may no longer refuse to instruct juries that a life sentence means imprisonment without parole.

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33 *Id.*

34 240 Va. 236, 253, 397 S.E.2d 385, 395 (1990).

35 *See Davis v. United States*, 114 S. Ct. 2350 (1994) (holding that a suspect's post-*Miranda* request for counsel must be clear and unambiguous before police are constitutionally required to stop questioning).

36 For greater explanation of the Supreme Court of Virginia's views regarding the invocation of counsel issue, see Bieber, Burket v. Commonwealth: *Don't Put All Your Defense Eggs in the Suppression Basket*, Capital Defense Digest, this issue.

37 451 U.S. 477 (1981), *reh'g denied*, 452 U.S. 973 (1981).

38 *Id.* at 484-85.

39 *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

40 423 U.S. 96 (1975).

41 *Id.* at 104.

42 *Burket v. Commonwealth*, 248 Va. at 610, 450 S.E.2d at 132.

43 *Id.*

44 304 U.S. 458 (1938).

45 "This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, and we re-assert these standards as applied to in-custody interrogation." *Miranda v. Arizona*, 384 U.S. at 475 (citation omitted).

46 *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

47 *Id.*

48 *Burket v. Commonwealth*, 248 Va. at 613, 450 S.E.2d at 133.

49 248 Va. at 611, 450 S.E.2d at 132.

50 248 Va. at 612, 450 S.E.2d at 133.

51 114 S. Ct. 2187 (1994).

However, due to Burket's failures to raise the issue in the trial court[52] and assign it as error on appeal,[53] the Supreme Court of Virginia refused to consider the merits of the issue. Burket's loss of the *Simmons* issue is yet another example of how procedural default is a trap for the unwary. Interestingly, in spite of Burket's guilty plea, the court nevertheless reviewed the penalty phase issues raised by the defense.[54] This may signal a movement away from the court's earlier pronouncements that "[w]hen an accused enters a voluntary and intelligent plea of guilty to an offense he waives all defenses except those jurisdictional."[55]

Much to the credit of the defense, an extensive case in mitigation was put on in the penalty phase of the proceedings. Yet this very presentation of evidence exemplifies why a capital defendant should not plead guilty without an agreement that he will receive a sentence less than death. By pleading guilty without such assurances, the defendant waives all appellate questions regarding guidance of jury discretion in sentencing[56] and drastically reduces any chance of appellate relief.

Finally, the *Burket* decision confirms that as of yet, the Supreme Court of Virginia has not found any Fifth or Sixth Amendment problems with any confession in the history of the modern capital murder statute.

V. Conclusion

The motion to suppress has not proven to be an effective tool for the Virginia capital defendant. The motion should not be abandoned, but by the same token the defense strategy certainly should not hinge on its success.[57]

Summary and analysis by:
Jody M. Bieber

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52 Va. Sup. Ct. R. 5:25.

53 Va. Sup. Ct. R. 5:17.

54 *Burket v. Commonwealth*, 248 Va. at 613-16, 450 S.E.2d at 133-35. Specifically, Burket argued that the trial court erred in finding the prosecution's expert witness more credible than the defense expert witnesses and in not considering all the evidence in mitigation. The Court found these challenges to be without merit. *Id.*

55 *Savino v. Commonwealth*, 239 Va. 534, 539, 391 S.E.2d 276, 278 (1990). *See also Stout v. Commonwealth*, 237 Va. 126, 131-32, 376 S.E.2d 288, 291 (1989).

56 For example, a meritorious and unresolved challenge to the "vileness" factor may be lost because the trial judge is presumed to apply a proper limiting construction. *See* Walton v. Arizona, 497 U.S. 639 (1990), *reh'g denied*, 497 U.S. 1050 (1990); *see also* Lago, *Litigating the "Vileness" Factor*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991).

57 For a more thorough discussion of the state of confession law in Virginia, see Bieber, Burket v. Commonwealth: *Don't Put All Your Defense Eggs in the Suppression Basket*, Capital Defense Digest, this issue.

WILLIAMS v. COMMONWEALTH

248 Va. 528, 450 S.E.2d 365 (1994)
Supreme Court of Virginia

FACTS

Michael Wayne Williams was tried upon indictments charging him with twelve felonies, five of which were capital murder charges for the killing of Morris C. and Mary Elizabeth Keller.[1] At the guilt phase of a bifurcated trial conducted under Virginia Code sections 19.2-264.3 and 264.4, a jury convicted Williams of all twelve charges. At the penalty phase, the jury fixed the punishment for both capital murders at death based on both the "future dangerousness" and "vileness" aggravators. Williams appealed his capital murder convictions.[2] The Supreme Court of Virginia consolidated his appeal with their automatic review of his death sentences under Virginia Code section 17-110.1(A).[3]

HOLDING

The Supreme Court of Virginia conducted its mandatory review of the imposition of Davidson's death sentence, denied his appeal and affirmed the trial court's actions.[4]

Among the many issues raised and briefed on appeal,[5] the court stated that it would not consider certain contentions by Williams because they were not contained in his brief or were "incorporated by reference" to arguments made in the trial court.

In response to Williams' argument that the Commonwealth is required, by means of a bill or particulars, to "identify every narrowing construction of [the "vileness"] factor on which it intends to offer

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1 Two of the capital murder charges were based on Va. Code Ann. § 18.2-31(d) (1990) (murder in the course of a robbery while armed with a deadly weapon); two indictments were based on Va. Code Ann. § 18.2-31(e) (1990) (murder subsequent to rape); the fifth indictment was based on Va. Code Ann. § 18.2-31(g) (1990) (murder of more than one person as a part of the same act or transaction).

2 *Williams v. Commonwealth*, 248 Va. 528, 532, 450 S.E.2d 365, 369 (1994).

3 *Id.*

4 *Id.* at 528, 450 S.E.2d at 379.

5 Some of the errors briefed on appeal were rejected in brief, conclusive language. Arguments in this category that will not be addressed in this summary include: 1) the Virginia capital murder statute does not give meaningful guidance to a jury because it does not require the jury to find that the aggravating circumstances outweigh the mitigating circumstances; (2) the statute fails to inform the jury that it must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors; (3) the statute fails to provide sufficient guidance to the jury to assure that the death penalty is not applied arbitrarily or capriciously; (4) the "future dangerousness" aggravator is inherently misleading; (5) the part of the statute that allows a finding of "future dangerousness" to be based on unadjudicated criminal conduct is unconstitutional; (6) if unadjudicated acts are allowed, the jury should be instructed that they must only be considered if established beyond a reasonable doubt; (7) the "future dangerousness" aggravator is inherently unreliable and insufficient to guide a jury's discretion; (8) the