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CARDWELL v. COMMONWEALTH 248 Va. 501, 450 S.E.2d 146 (1994) Supreme Court of Virginia

law permits a sentence of life in prison even if the Commonwealth has proven one or both aggravating factors beyond a reasonable doubt. A reasonable juror might conclude, however, that "if you believe from all the evidence that the death penalty is not justified"[20] means "if the Commonwealth has failed to prove one or more aggravating factors beyond a reasonable doubt." In any event, Virginia Code section 19.2-263.2 provides that courts are not to refuse instructions that are correct statements of the law simply because they do not conform to model instructions.

Communication from judge to jury about consideration of aggravating and mitigating factors implicates important Eighth and Fourteenth Amendment issues.[21] Consequently, instructions such as those rejected in *Joseph* should continue to be proffered. In many instances, they will be given by the trial judge. If denied, claims of error should be preserved on federal constitutional grounds.

III. Sentence Review

Joseph utilized a very salutary strategy by claiming that the cumulative effect of the trial court's errors produced a jury recommendation based upon impermissible factors.[22] The trial court and the Supreme Court of Virginia summarily rejected this contention.[23]

There may be great benefit, however, to Joseph's argument of error based on the entirety of the record. By making a cumulative claim and being rejected, Joseph may have preserved on appeal some issues not specifically addressed at trial. He has, in any event, added to the list of claims potentially eligible for federal review. All assignments of error should be raised broadly and narrowly.

IV. Proportionality

The Supreme Court of Virginia compared the record in this case and the records in other capital murder cases pursuant to Virginia Code section 17-110.1(E).[24] The court explained that it paid particular attention to cases in which the underlying felony was robbery and the death penalty was imposed based on "future dangerousness."[25] The court also claimed to have reviewed cases where life sentences were imposed, citing, *Whitley v. Commonwealth*.[26] *Whitley*, however, was a case where death was imposed. In all its proportionality review the Supreme Court of Virginia claims to review life sentence cases reaching it. Citations to such cases are never included. Appellate counsel might consider seeking them under Virginia Freedom of Information Act.[27] Even if life cases reaching the court are considered, the pool of cases is inadequate. Many capital cases resulting in life sentences are not appealed and others do not reach the Supreme Court of Virginia.

Summary and analysis by:
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[20] *Id.* at 869.

[21] Issues raised by the court's denial of proffered defense instructions suggest a procedural barrier to the jury's consideration of mitigation evidence. Such barriers are forbidden by *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (holding that a state cannot have a unanimity requirement for the jurors consideration of mitigation evidence) and *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that a sentencer must be able to consider all mitigating evidence).

[22] *Joseph*, 452 S.E.2d at 870.

[23] *Id.*

[24] *Id.* at 871. This section requires that the Supreme Court of Virginia to conduct an analysis to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases.

[25] *Id.*

[26] 223 Va. 66, 81, 286 S.E.2d 162, 171 (1982), *cert. denied.* 459 U.S. 882 (1982).

[27] *See* Heavner, *Leaving No Stone Unturned: Alternative Methods of Discovery in Capital Cases*, Capital Defense Digest, this issue.

CARDWELL v. COMMONWEALTH

248 Va. 501, 450 S.E.2d 146 (1994)
Supreme Court of Virginia

FACTS

On January 26, 1992, a badly decomposed body was found in the woods behind a shopping center at the intersection of Patterson Avenue and Pump Road in Henrico County. The body was identified as fifteen-year-old Anthony Brown. He was determined to have died in November 1991. An autopsy revealed that Brown had sustained injuries to the throat and wrist, as well as two gunshot wounds to the back of the head. It was later determined that on November 20, 1991, Brown had travelled from New York City to Richmond, where he was abducted, robbed and killed by Kevin Cardwell.[1]

A Circuit Court jury in Henrico County convicted Cardwell of the capital murder of Anthony Brown in the commission of armed robbery, in violation of Virginia Code section 18.2-31(4) and capital murder in the commission of an abduction with intent to extort money or pecuniary benefit, in violation of Code section 18.2-31(1). The jury also found Cardwell guilty of related non-capital felonies and fixed punishment for those offenses.[2] In the second phase of the capital trial, the jury fixed Cardwell's punishment at death for capital murder based upon the "vileness" predicate under Virginia Code section 19.2-264.2. The court, pursuant to Code section 19.2-264.5, sentenced Cardwell in accord with the jury verdicts.[3]

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[1] *Cardwell v. Commonwealth*, 248 Va. 501, 506, 450 S.E.2d 146, 150 (1994).

[2] *Id.* at 504, 450 S.E.2d at 148-49. The jury fixed Cardwell's punishment at life imprisonment for abduction, twenty years for robbery and ten years for firearms charges as well as a $100,000 fine for the abduction.

[3] *Id.*

HOLDING

Consolidating the automatic review of Cardwell's death sentence with his appeals of capital murder and other convictions, pursuant to Code sections 17-110.1(F) and 17-110.2, the Supreme Court of Virginia upheld the convictions and the death sentence based on the "vileness" predicate.[4]

ANALYSIS/APPLICATION IN VIRGINIA

I. Denial of a Continuance

Cardwell contended that the trial court erred in denying his request for a second continuance.[5] This request was made after the defense learned that the psychologist appointed to assist Cardwell in the penalty phase of the trial would not be able to evaluate Cardwell until August 25, 1993. This became problematic since the trial date was scheduled for September 7, 1993 and the psychological evaluation would take one and a half months to complete. The Supreme Court of Virginia, however, held that the granting of a continuance is within the sound discretion of a trial court, and its ruling will not be reversed unless plainly wrong.[6]

Unfortunately, this assignment of error was characterized only as a state law issue. Consequently, the Supreme Court of Virginia had the final word. In addition to applicable state law grounds, denial of a continuance could and should be characterized as denying the accused effective assistance of counsel and compulsory process as well as the applicable guarantees embodied in the Sixth Amendment of the U.S. Constitution. By following this scheme, the issue will be preserved for federal review.

II. Irrelevant Penalty Trial Evidence

During the penalty phase of Cardwell's trial, the prosecution introduced evidence of his past marijuana possession, unemployment and trespassing.[7] Since this evidence did not pertain to Cardwell's conduct in committing the crime itself, the evidence must have been directed towards the "future dangerousness" predicate.[8] The record does not show that Cardwell objected to this evidence even though these acts bear no relation to a propensity to commit serious violent acts in the future. Thus, this issue was addressed by neither the trial court nor the Supreme Court of Virginia.

It should be noted that the penalty phase of a capital trial ought not to be turned into a "free-for-all" of evidence. The Virginia rules of relevancy still apply to the evidence admitted during the penalty phase of a capital trial.[9] During this stage of the trial, the prosecution can offer evidence that tends to show the "vileness" of the defendant's conduct or the "future dangerousness" of the defendant.[10] It is important that the defense attorney consistently force the prosecution to meet its burden of relevancy in order to prevent inflammatory and wholly irrelevant material from being admitted. This could take the form of a pretrial motion in limine that bars evidence that is irrelevant to either "vileness" or "future dangerousness" predicates. Defense counsel could also object when such evidence is offered at the penalty phase of the trial.

III. The Theme of Mitigation

The only mitigating evidence offered by Cardwell consisted of the testimony of his grandmother.[11] This minimal showing in mitigation may have stemmed from the court's denial of a continuance to permit an examination by a defense mitigation expert. As a result of the trial court's denial, the defense may have had insufficient information from which to create a theme of mitigation—an example of the prejudice that flowed from the lack of assistance from the mental health expert.[12] Formulating a theme of mitigation is essential so that all available evidence can be marshalled around it and presented. Testimony of a single witness, a grandmother, is plainly inadequate.

This theme is necessary in order to facilitate a jury's understanding of why the defendant acted in a manner which led to the commission of a capital crime. Such a theme should be built from the evaluations made by individual mental health experts as well as other individuals who may be able to testify as to the defendant's family history, or adjustment to prison life or to the restrictions that would be placed upon the defendant if given a life sentence.[13]

IV. Penalty Trial Instructions

Cardwell also argued that the trial court erred in refusing his jury instruction No. A., which would have told the jury that it was "'not compelled to impose the death penalty even if [the jury] find[s] one or both of [the aggravating factors] proven beyond a reasonable doubt.'"[14] The Supreme Court of Virginia, however, held that instruction No. 1., which was given to the jury, was adequate. It "told the jury that it must decide whether Cardwell shall be sentenced to death or to imprisonment for life and that, before the penalty can be fixed at death, the Commonwealth must prove by evidence beyond a reasonable doubt either or both of the aggravating factors, *i.e.* 'vileness' or 'future dangerousness.'"[15] Citing *Stewart v. Commonwealth*,[16] the court held that Instruction No. 1.

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[4] The court rejected some of Cardwell's assignments of error 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 addressed in this analysis include: (1) refusal to require the Commonwealth to elect between one of the two capital murder charges, (2) refusal to give a cautionary jury instruction on taking the uncorroborated testimony of the accomplice, and (3) allegation of trial court error in admitting unadjudicated criminal conduct in the penalty phase of the trial.

[5] *Cardwell*, 248 Va. at 507, 450 S.E.2d at 150.

[6] *Id.* at 508, 450 S.E.2d at 151.

[7] *Id.* at 512, 450 S.E.2d at 153.

[8] *Id.*

[9] Prosecutorial evidence should only encompass evidence that makes it more likely that the defendants conduct was vile or that he will commit violent acts in the future. *See generally* 1 Charles E. Friend, The Law of Evidence in Virginia, § 135 (4th ed. 1993).

[10] Va. Code Ann. § 19.2-264.4(C) (1990).

[11] *Id.* at 513, 450 S.E.2d at 154.

[12] "[T]he court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition . . . ." Va. Code Ann. § 19.2-264.3:1 (1990). A post-trial motion may be necessary in order to make a showing of prejudice from the trial court's denial of time or other resources.

[13] These suggestions are not exhaustive. *See* case summary of *Joseph*, Capital Defense Digest, this issue. *See also* William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. Rev. L. & Soc. Change 273 (1990-91).

[14] *Cardwell*, 248 Va. at 514, 450 S.E.2d at 154.

[15] *Id.*

[16] 245 Va. 222, 244-45, 427 S.E.2d 394,408-09 (1993), *cert. denied*, 114 S. Ct. 143 (1993).

"adequately informed the jury that the death penalty was not mandatory even if both aggravating factors were proven by evidence beyond a reasonable doubt."[17]

It seems evident, however, that there is a fundamental difference between the two instructions. Instruction No. 1 tells the jury not to find death if the Commonwealth does not prove the aggravating factors beyond a reasonable doubt. Under such instructions, the jury could mistakenly infer that once an aggravating factor is proven beyond a reasonable doubt, the jury must find death. At no time does Instruction No. 1. tell the jury that it can fix punishment at life imprisonment even if it finds both aggravating factors beyond a reasonable doubt. Instruction No. A would have clarified this assertion.[18] Furthermore, Virginia Code section 19.2-263.2 states that a court is not to refuse a proper instruction simply because it does not conform to the model instruction.

Cardwell's inability to give instruction No. A. made it virtually impossible for him to convey to the jury its right to vote life imprisonment even if it found either aggravating factor beyond a reasonable doubt. As a result, the jury may not have been clear on the scope of its power and may have thought that once it found an aggravating factor, it must vote for death. This, in effect, would make the introduction of mitigation evidence useless since the jury believes that it must vote death even if an aggravating factor was found. Such a result would be contrary to the United States Supreme Court's rulings on issues concerning the introduction of mitigating evidence and the effect a jury is required or permitted to give to it.[19]

V. *Simmons* Issue

Cardwell also asserted that the jury was entitled to be informed of the law concerning his parole eligibility under *Simmons v. South Carolina*.[20] The Supreme Court of Virginia, however, distinguished this case by stating that Cardwell's punishment of death was based on the "vileness" aggravating factor, unlike *Simmons'* sentence which was based on the "future dangerousness" aggravating factor.[21] Thus, the court held that *Simmons* did not apply.[22]

The opinion does not state unequivocally that the issue of "future dangerousness" was before the jury. The admission into evidence of Cardwell's prior misconduct, however, clearly indicates that it was.[23] Certainly, if "future dangerousness" was before the jury, the applicability of *Simmons* was at issue. If there was error, it is not rendered harmless by the fact that the jury did not formally find the "future dangerousness" factor. That is because the ultimate decision of the jury is life in prison or death. *Simmons* itself illustrates that. "Future dangerousness" was not a statutory aggravating factor in South Carolina and the jury did not make a finding of it. The United States Supreme Court merely found that "future dangerousness" was at issue, as it probably was in *Cardwell*.

Simmons issues should be raised, even when it is formally determined before the penalty trial that "future dangerousness" will not be at issue. Since the real issue at the penalty phase is choosing either a sentence of life imprisonment or death, the unresolved *Simmons* issues of utilizing parole law evidence as mitigation remain important, even in "vileness" cases.[24]

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[17] *Cardwell*, 248 Va. at 514, 450 S.E.2d at 154.

[18] *See* case summary of *Joseph*, Capital Defense Digest, this issue.

[19] *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (held that a trial court must provide a means to give effect to mitigating evidence); *Mills v. Maryland*, 486 U.S. 367 (1988) (held that state procedure cannot preclude the use of mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586 (1978) (held that a sentencer is not to be precluded from the consideration of mitigating factors in considering a sentence of less than death).

[20] 114 S.Ct. 2187 (1994). *Cardwell*, 248 Va. at 514-15, 450 S.E.2d at 154-55. *See* Pohl & Turner, *If At First You Don't Succeed: The Rea And Potential Impact of* Simmons v. South Carolina *In Virginia*, Capita Defense Digest, Vol. 7, No. 1, p. 28 (1994); case summary of *Simmons* Capital Defense Digest, Vol. 7, No. 1, p. 4 (1994).

[21] *Id.* at 515, 450 S.E.2d at 155. *Compare Joseph v. Common wealth*, 452 S.E.2d 862 (Va. 1995).

[22] *Cardwell*, 248 Va. at 515, 450 S.E.2d at 155.

[23] *See supra* text accompanying note 10.

[24] Pohl & Turner, *supra* note 23, §§ VII-XI.

WILSON v. COMMONWEALTH

249 Va. 95, 452 S.E.2d 669 (1995)
Supreme Court of Virginia

FACTS

At approximately 3:00 a.m. on March 27, 1993, Kenneth L. Wilson entered the home of the decedent Jacqueline M. Stephens and her daughter Altomika. There, he murdered Ms. Stephens and stabbed both her daughter and Takeshia Banks.[1]

A neighbor, having seen Wilson leave the Stephens' home and drive away in Ms. Stephens car at approximately 6:30 a.m., called the police. When the police arrived, they found Ms. Stephens tied to the bed and covered with blood. They observed pubic hairs and a dried white substance on her body. A medical examiner testified that Ms. Stephens had at least ten knife wounds. The medical examiner also stated that none of Ms. Stephens' injuries would have rendered her unconscious during the attack.[2]

In the first stage of a bifurcated trial, pursuant to Virginia Code sections 19.2-264.3 and -264.4, a jury convicted Wilson of capital murder in commission of attempted rape, two counts of abduction, one count of abduction with attempt to defile, two counts of malicious wounding, attempted rape, and grand larceny.[3] In the second stage of the trial, the jury fixed his punishment at death based on both "vileness" and "future dangerousness".[4]

[1] *Wilson v. Commonwealth*, 249 Va. 95, 98-100, 452 S.E.2d 669, 672-73 (1995).

[2] *Id.* at 99-100, 452 S.E.2d at 673.

[3] *Id.* at 97, 452 S.E.2d at 671-72. The convictions were pursuant to Virginia Code §§ 18.2-31(5), -47, -48, -51, -67.5 and -95 respectively.

[4] *Id.*