Capital Defense Journal

Volume 8 | Issue 1 Article 10

Fall 9-1-1995

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FACTS

Walter Mickens, Jr. was convicted of capital murder under Virginia Code section 18.2-31(5).[1] During the sentencing phase of the bifurcated trial, the jury fixed the sentence at death based on both the vileness and future dangerousness predicates. The Supreme Court of Virginia affirmed the conviction and sentence. Mickens then petitioned the United States Supreme Court for a writ of certiorari claiming that the Virginia rule barring admission of parole ineligibility evidence prevented the jury from considering all mitigating factors. The Supreme Court granted certiorari, vacated the judgment, and remanded to the Supreme Court of Virginia[2] for consideration in light of *Simmons v. South Carolina*.[3]

HOLDING

The Supreme Court of Virginia remanded the case to the trial court for a new sentencing hearing because under *Simmons*, Mickens had a right to present evidence of his ineligibility for parole if sentenced to life in prison rather than death.[4]

ANALYSIS/APPLICATION IN VIRGINIA

Because of the decision in *Simmons*, this case at first appears to be one in which the Supreme Court of Virginia simply had no choice but to remand. However, two issues the court did not consider deserve mention here.

I. Automatic Salvage of Death Sentence

The Supreme Court of Virginia has held that when a death sentence is based on both the vileness and future dangerousness predicates, the invalidation of one predicate does not invalidate the death sentence.[5] Instead, a new sentencing hearing is not required and the sentence may stand based on the remaining predicate. This rule is questionable under recent United States Supreme Court precedent,[6] but was claimed by the Supreme Court of Virginia as recently as its initial review in *Mickens*.[7]

On this remand from the United States Supreme Court, however, the Supreme Court of Virginia did not make or even discuss a claim that *Simmons* error affects only the future dangerousness aggravating factor, and therefore, although the future dangerousness finding may have been invalid, the death sentence was still valid based on the vileness predicate. This may mean that the Supreme Court of Virginia has discarded the automatic salvage of death sentences rule.[8]

II. Proper Grounds for a *Simmons* Claim

In *Simmons v. South Carolina*, the United States Supreme Court held that a jury is entitled to know if the capital murder defendant is ineligible for parole.[9] The Court decided this on the basis of the due process right to defend against the state's case for death.[10] The court, however, specifically did not address Simmons's claim that the jury was also entitled to this information on grounds that it was mitigation evidence, or that precluding it violated the Eighth Amendment requirement of increased reliability in capital sentencing.[11]

In the present case, Mickens raised his *Simmons* claim solely on the grounds that parole ineligibility was mitigating evidence. The Supreme Court of Virginia rigidly enforces default and waiver,[12] including requirements that the "same claim" be raised throughout.[13] In this case, however, the court awarded a new sentencing hearing rather than deny relief because Mickens did not make his *Simmons* claim on the exact grounds decided by the United States Supreme Court.

As of January 1, 1995, the Virginia Code now requires that no parole be given in any capital case where the defendant is sentenced to life in prison. Consequently, defense attorneys should always request *Simmons* jury instructions. This should be done even in cases where the Commonwealth states that it is officially seeking to prove only vileness and not future dangerousness for at least two reasons. First, in *Simmons*, future dangerousness was not a statutory aggravating factor in South Carolina. Thus, it was not something which the prosecution had to prove. Future dangerousness was injected into the case by remarks of one prosecutor. Whether the prosecution relies upon the statutory

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[1] *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

[2] *Id.* For a further discussion of the facts of this case, *see Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994), and case summary of *Mickens*, Capital Defense Digest, Vol. 7, No. 1, p. 23 (1994).

[3] 114 S.Ct. 2187 (1994).

[4] *Mickens*, 249 Va. at 425, 457 S.E.2d at 10.

[5] *See Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985); *Stout v. Commonwealth*, 237 Va. 126, 376 S.E.2d 288 (1989).

[6] *See Stringer v. Black*, 503 U.S. 222, 232 (1992), holding that states which require the jury to weigh aggravating and mitigating factors must perform a reweighing if one factor is found invalid; in states which do not require such a weighing, the Court "assume[s] a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination" would be made. *See also Sochor v. Florida*, 504 U.S. 527 (1992), and *Clemons v. Mississippi*, 494 U.S. 738 (1990).

[7] *Mickens v. Commonwealth*, 247 Va. 395, 404-05, 442 S.E.2d 678, 685 (1994).

[8] However, it should be noted that the Supreme Court of Virginia did not expressly reject the rule.

[9] 114 S. Ct. 2187, 2193.

[10] *Id.*

[11] *Id.* at n.4.

[12] *See, e.g., Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993), and case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p.26 (1993); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991); *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196 (1991), and case summary of *Stockton*, Capital Defense Digest, Vol. 4, No. 1, p. 18 (1991); *Spencer v. Commonwealth*, 238 Va. 563, 385 S.E.2d 850 (1989); *Fisher v. Commonwealth*, 236 Va. 403, 374 S.E.2d 46 (1988).

[13] *See, e.g., Yeatts v. Murray*, 249 Va. 285, 455 S.E.2d 18 (1995), and case summary of *Yeatts v. Commonwealth*, Capital Defense Digest, this issue.

aggravator in Virginia officially or not, references to future dangerousness will be similarly difficult to keep out of a case. Arguably, the factor is always a concern of jurors. Second, parole ineligibility is in fact a mitigating factor.[14] Precluding mitigation evidence is of course constitutionally impermissible regardless of the aggravating factors relied upon by the Commonwealth.[15]

Summary and analysis by:
Jeanne-Marie S. Raymond

[14] For additional discussion of the Supreme Court of Virginia's treatment of *Simmons* issues, *see* case summaries, *Joseph v. Commonwealth*, Capital Defense Digest, Vol. 7, No.2, p. 23 (1995); *Cardwell v. Commonwealth*, Capital Defense Digest, Vol. 7, No. 2, p. 25 (1995); *Wilson v. Commonwealth*, Capital Defense Digest, Vol. 7, No. 2, p. 27 (1995); and *Ramdass v. Commonwealth* and *Wright v. Commonwealth*, Capital Defense Digest, Vol. 7, No. 2, p. 31 (1995)

[15] *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

ROYAL V. COMMONWEALTH

250 Va. 110, 458 S.E.2d 575 (1995)
Supreme Court of Virginia

FACTS

On February 21, 1994, Thomas Lee Royal met with three accomplices near a shopping center. Royal handed each accomplice a gun, and they proceeded across the center. They intended to kill Officer Curtis Cooper. Instead of finding him, however, they encountered Officer Kenneth E. Wallace, sitting in his patrol car. Royal fired two shots at Wallace from a .38 caliber handgun.[1]

Royal was indicted for the capital murder of a police officer and the use of a firearm to commit the murder. He entered guilty pleas to both charges.[2] The pleas were taken based on a stipulation of the facts.

At the penalty phase, the Commonwealth's evidence included the testimony of the probation officer who prepared the pre-sentence report, an investigating officer, and the intended victim. The Commonwealth also put on Dr. Ryans, a forensic psychiatrist, who explained that Royal had an anti-social personality and that he could not definitely conclude that Royal would **not** be a future danger to society.[3]

Based upon a finding of future dangerousness, the trial judge sentenced Royal to death.[4] Royal appealed his death sentence, challenging the judge's finding of future dangerousness and arguing that the judge succumbed to community pressure in imposing the death penalty.[5]

HOLDING

The Supreme Court of Virginia upheld the convictions and death sentence, finding that the trial judge, who also had acted as sentencer, properly applied the future dangerousness factor and that the record did not support Royal's claim that public pressure had led to his sentence.[6]

ANALYSIS/APPLICATION IN VIRGINIA

I. Erroneous Capital Murder Charge

The primary difficulty with the Supreme Court of Virginia's opinion goes to an issue apparently not raised on appeal: based on the stipulation as recited by the court, Royal did not commit capital murder. The Code provision reads that the killing of a law officer is capital murder only when "such killing is for the purpose of interfering with the performance of his official duties."[7] But, according to the stipulation, although Officer Wallace was sitting in his patrol car, Royal did not kill him to prevent him from carrying out police activities. Rather, the stipulated facts state that Royal killed Wallace simply because Wallace had the misfortune of being where the defendant thought he would find the intended victim.[8]

Virginia Code section 18.2-31(6) **requires** a purposeful interference on the part of the culprit. It is similar to section 18.2-31(9) which requires that the killing take place in order to **further** the commission or attempted commission of a drug transaction.[9] Moreover, because this claim goes to the court's jurisdiction to try the defendant in the first place, it is not a claim which is to be viewed as subject to default.[10] The court had no power to try him under section 18.2-31(6).

Counsel should remember that a close reading of section 18.2-31 often reveals that the Commonwealth cannot charge capital murder. Although Virginia death penalty law is in many ways unfavorable to the defendant, its capital murder statute has narrow requirements that sometimes are overlooked by defense counsel. The first step, therefore, should **always** be to carefully review the facts under the statute and file a motion to dismiss the indictment if the facts cannot support a capital murder charge.

[1] *Royal v. Commonwealth*, 250 Va. 110, 112-13, 458 S.E.2d 575, 576 (1995).

[2] *Id.* at 112, 458 S.E.2d at 576.

[3] *Id.* at 113-14, 458 S.E.2d at 576-77.

[4] *Id.* at 115, 458 S.E.2d at 577.

[5] *Id.* at 115, 119, 458 S.E.2d at 577, 579.

[6] The court rejected all of defendant's assignments of error. Some of 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 that will not be addressed in this summary include: (1) limitation of evidence to past criminal record in determining future dangerousness; (2) failure to limit evidence relating to the killing to that stipulated in the guilt phase; (3) failure to establish a prima facie case of future dangerousness.

[7] Va. Code Ann. § 18.2-31 (6).

[8] 250 Va. at 113, 458 S.E.2d at 576. The Supreme Court of Virginia does not make clear why Royal wanted to kill Cooper. But it is clear from the stipulated facts that he did not kill Wallace for the purpose of interfering with police activities.

[9] Va. Code Ann. § 18.2.31 (9). (emphasis added).

[10] For a discussion of procedural default, *see* Groot, *To Attain The Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol.6, No.2, p. 44 (1994).