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

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).

II. Burden of proof for future dangerousness

In his assignments of error, Royal asserted that during the penalty phase, the court erroneously shifted the burden of persuasion to him to "disprove that he was a future danger."[11] The prosecution had put on Dr. Ryans who testified that he was unable to state with medical certainty that Royal would not repeat "violent behavior that put others at risk."[12] Royal moved to strike this evidence on the ground that it was "equivocal."[13] The trial judge, who was also acting as sentencer, denied the motion and commented to this effect: had Dr. Ryans stated there was a reasonable degree of certainty that Royal would not repeat the behavior, "I would have listened to [him]."[14]

Royal argued that the judge's statement implied that the defendant had the burden to disprove whatever evidence the Commonwealth put on as to future dangerousness.[15] The Supreme Court of Virginia dismissed Royal's argument, stating that, taken in context, the judge's comment did not function to require affirmative expert testimony that Royal did not constitute a continuous threat to society. Instead, it went to the weight that the sentencer could give to Dr. Ryans' testimony.[16] As the Supreme Court of Virginia saw it, the trial court's comment concerned only the significance of the Commonwealth's evidence and was **not** intended to say to the defendant, "If the prosecution has 'evidenced' future dangerousness, you must disprove it."[17] Nonetheless, while rejecting the defendant's argument, the Virginia Supreme Court also reaffirmed that the burden of persuasion as to future dangerousness remains upon the Commonwealth to prove beyond a reasonable doubt.

III. Record requirement

Royal also assigned as error the trial judge's refusal to recuse himself. He contended that there was substantial publicity surrounding the case and that there was significant public pressure on the judge to impose the death penalty.[18] In rejecting this argument, the Supreme Court of Virginia stated: "The record is devoid of any indication that the trial court's sentencing decision was affected by public pressure or publicity."[19] The court also declared that public notoriety alone is not enough to vacate a death sentence.[20] The court's opinion is a reminder that counsel must be careful to create a record which evidences that the court's decision was affected by community pressures. Such a record should include comments made by the prosecution and the judge that appear to reflect public opinion, as well as any other evidence available to document the community atmosphere surrounding the trial.

IV. Vileness Removed

Finally, counsel should note that although Royal fired two shots into Wallace, the trial judge granted Royal's motion at the penalty phase to strike the Commonwealth's evidence relating to vileness as a statutory predicate.[21] The success of Royal's motion stresses the need to make such motions in attacking the sufficiency of the Commonwealth's evidence and makes clear that multiple shots by themselves do not constitute vileness.

Summary and analysis by:
Mary E. Eade

[11] *Royal*, 250 Va. at 117-18, 458 S.E.2d at 579.
[12] *Id.* at 118, 458 S.E.2d at 579.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 119, 458 S.E.2d at 579-80.
[20] *Id.* at 119, 458 S.E.2d at 579, (citing *Beaver v. Commonwealth*, 232 Va. 521, 536, 352 S.E.2d 342, 350, cert. denied, 483 U.S. 1033 (1987)).
[21] *Id.* at 114, 458 S.E.2d at 577.

FITZGERALD v. COMMONWEALTH

249 Va. 299, 455 S.E.2d 506 (1995)
Supreme Court of Virginia

FACTS

Ronald Lee Fitzgerald was convicted of robbery and capital murder of Coy M. White and rape and capital murder of Claudia Denise White.[1] During the sentencing phase, Fitzgerald requested a jury instruction based on *Simmons v. South Carolina*.[2] The proposed instruction would have informed the jury that under Virginia law, a person found guilty of three separate felony offenses of murder, rape, or robbery by presenting a firearm or other deadly weapon, or any combination of those offenses which were not part of a common act, transaction, or scheme, is not eligible for parole.[3] The trial judge denied this instruction.[4]

In the first stage of a bifurcated trial, the jury convicted Fitzgerald of all the charged crimes.[5] In the penalty stage, the jury fixed Fitzgerald's sentence at death for the first count of capital murder based on the future dangerousness predicate, and death for the second count of capital murder based on the vileness and/or future dangerousness predicates.[6]

HOLDING

Under Virginia Code sections 17.110.1(A) and 17-110.1(F), the Supreme Court of Virginia consolidated the automatic review of Fitzgerald's death sentence with his other appeals.[7] The court then upheld the convictions and death sentence.[8]

[1] *Fitzgerald v. Commonwealth*, 249 Va. 299, 301, 455 S.E.2d 506, 507 (1995).
[2] 114 S. Ct. 2187 (1994).
[3] Va. Code Ann. § 53.1-151(B1) (1994).
[4] *Fitzgerald*, 249 Va. at 305, 455 S.E.2d at 510.
[5] *Id.* at 301, 455 S.E.2d at 507.
[6] *Id.* at 301, 455 S.E.2d at 508.
[7] *Id.* at 301-02, 455 S.E.2d at 508.
[8] *Id.* at 310, 455 S.E.2d at 512.