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

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:
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[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.

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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.

ANALYSIS/APPLICATION IN VIRGINIA

I. *Simmons* Jury Instruction

Simmons v. South Carolina held that when a defendant would be ineligible for parole were he sentenced to life imprisonment rather than death, the jury is entitled to that information.[9] In this case, Fitzgerald wanted the jury to be given the opportunity to determine whether he would be ineligible for parole pursuant to Virginia Code section 53.1-151(B1).[10] This would require a jury determination of whether the crimes for which he had just been convicted constituted a common act, transaction, or scheme. The trial judge denied Fitzgerald's proposed jury instruction. The Commonwealth on appeal argued that Fitzgerald was indeed eligible for parole since his convictions were part of a common act, transaction, or scheme.[11]

The Supreme Court of Virginia held that parole eligibility was a matter of law and not a question of fact for the jury. Even though the trial court had simply denied the proposed instruction and had not decided the issue, the Supreme Court of Virginia determined that Fitzgerald would have been parole eligible since his offenses were part of a common scheme related to his girlfriend, Amanda White.[12] This determination by the court is probably binding as a matter of state law. However, Fitzgerald may have preserved for federal review the question of whether he was nonetheless entitled to a *Simmons* instruction. He argued on appeal that the rationale of *Simmons* required that the jury be informed of "foreseeable parole eligibility" by some appropriate means.[13]

Since Fitzgerald's trial, Virginia has abolished parole, effective January 1, 1995. However, even in cases which are governed by the previous parole laws, capital defendants are arguably entitled to the instruction. The fact that the defendant will be ineligible for twenty-five or thirty years may be seen by the jury as sufficient to save the defendant from a death sentence, so the parole information is mitigation. Further, the increased reliability demanded in capital cases in determining that future dangerousness exists may require the instruction.[14] Attorneys who may still be defending cases that arose prior to January 1, 1995 are urged to contact the Virginia Capital Case Clearinghouse for further development of these arguments.

II. Juror Misconduct Claim

During *voir dire*, the court asked potential juror, James Bradshaw, whether he or any member of his family had "been the victim of a rape, robbery, or abduction," to which Bradshaw responded in the negative.[15] The opinion does not reflect whether at that time the attorney for the defendant requested any further questioning of Bradshaw on this or related subjects. Bradshaw was eventually impaneled. At a post-trial hearing, another juror reported that during the sentencing deliberations, Bradshaw had stated that "he had no sympathy for a rapist because either his daughter or granddaughter was molested or raped when she was 13 years old."[16] Bradshaw also testified at the post-trial hearing. Upon being questioned by counsel and the court, he stated that his granddaughter had indeed been molested, but that this fact had no bearing on his determination of guilt or innocence of this defendant, or on what punishment he should receive. Fitzgerald moved for a new trial based on Bradshaw's failure to disclose this information. The trial court denied the motion.[17]

The Supreme Court of Virginia upheld the trial court's ruling. During *voir dire*, the court had asked only if Bradshaw or any member of his family had been a victim of rape, robbery, or abduction. No one questioned Bradshaw as to whether he or a family member had been the victim of molestation. The court stated that since Bradshaw's granddaughter was molested, not raped, he had answered truthfully all questions asked of him.[18]

The Supreme Court of Virginia's ruling in this matter stresses how important it is that attorneys insist on taking an active role during *voir dire*. Attorneys are entitled to question potential jurors. The Code states, "The court **and counsel** for either party **shall have the right** to examine under oath any person who is called as a juror therein and **shall have the right** to ask such person or juror directly any relevant question."[19] Rule 3A:14 of the rules of the Supreme Court of Virginia reinforces the idea that attorneys must be allowed to question jurors. The rule lists seven questions which the court should ask. The rule then states that, after the court has asked those questions, "the court, **and counsel as of right**, may examine on oath any prospective juror and ask any question relevant to his qualifications as an impartial juror."[20] Thus, there is clear legislative intent that the attorneys take an active role in *voir dire*. Of course, the trial court is likely to use its discretion in order to limit the scope of relevant questions. Nevertheless, it is important that defense attorneys insist on taking an active role in this process, and that the attorney object on state and federal grounds if the right to ask questions is denied or unduly curtailed.[21]

Finally, although the juror misconduct claim and possibly the *Simmons* claim were preserved for federal review, it is disturbing that only two claims were advanced on appeal. Every capital trial in Virginia raises numerous constitutional questions. They should be raised, even in the face of clearly adverse Virginia precedent. *Simmons* itself is a testament to that.[22]

Summary and analysis by:
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[9] 114 S. Ct. 2187, 2193.

[10] *Fitzgerald*, 249 Va. at 305, 455 S.E.2d at 510. Va. Code Ann. § 53.1-151(B1) states:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

[11] *Id.*

[12] *Id.* at 306, 455 S.E.2d at 510. (Fitzgerald wrote a letter to Amanda White stating, "You just don't know how many people I was going to kill over you girl. I tried to keep them off you but I couldn't.")

[13] *Fitzgerald v. Commonwealth*, Record Nos. 941426, 941586, Brief for Appellant at 12-19.

[14] *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and *Simmons* 114 S.Ct. at 2198 (Souter, J. concurring) (discussing increased reliability requirement).

[15] *Fitzgerald*, 249 Va. at 307, 455 S.E.2d at 511.

[16] *Id.* at 307-08, 455 S.E.2d at 511.

[17] *Id.* at 307-09, 455 S.E.2d 511-12.

[18] *Id.* Note, however, that Fitzgerald argued that Bradshaw's failure to disclose the information about his granddaughter denied him the right to an impartial jury (a federal claim based on the Sixth Amendment), not merely that Bradshaw had been untruthful in his answers. *Id.*

[19] Va. Code Ann. § 8.01-358 (1992) (emphasis added).

[20] Va. Sup. Ct. R. 3A:14 (emphasis added).

[21] It is also important to remember to federalize the issue, claiming a violation of Sixth Amendment right to trial by an impartial jury and the arbitrary application of a state created right, in order to preserve meaningful review. For a discussion of how to achieve this, *see* Konrad, *Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights*, Capital Defense Digest, Vol. 3, No. 2, p. 16 (1991).

[22] *See* Pohl and Turner, *If at First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994).