Capital Defense Journal

Volume 8 | Issue 1 Article 14

Fall 9-1-1995

CHANDLER v. COMMONWEALTH 249 Va. 270, 455 S.E.2d 219 (1995) Supreme Court of Virginia

unable to prepare an effective brief in opposition . . ., to determine the material portions of the record to designate for printing, [sic] to assure [themselves] of the correctness of the record while it is in the clerk's office. . . ."[18]

As to Yeatts' assignment of error for ineffective assistance of counsel, the court emphasized that the assignment of error merely stated that the circuit court erred by dismissing the petition "'without ordering an evidentiary hearing as to his allegations of ineffective assistance of counsel.'"[19] The court determined that "[t]his assignment of error only challenge[d] the alleged **procedural** failure to order an evidentiary hearing; it [did] not challenge, with reasonable certainty, the habeas court's **substantive** ruling on the merits of the ineffective assistance claims."[20]

The draconian approach of the Supreme Court of Virginia is well worth noting for counsel writing assignments of error. Yeatts had "devote[d] a substantial portion of his brief to [the] argument" that the circuit court had erred in finding that his trial counsel were not ineffective.[21] As a practical matter, this would appear to identify with more than sufficient specificity the error committed by the trial court to enable the Commonwealth to determine the material portions of the record, to assure itself of the correctness of the record while it was in the clerk's office, and to prepare an effective brief in opposition. In light of this ruling, it is critical that habeas petitioners clearly and specifically include in their Assignments of Error section of the brief every claim which they intend to argue.

Summary and analysis by:
Douglas S. Collica

18 *Id.*
19 *Id.*
20 *Id.* at 291, 455 S.E.2d at 22 (emphasis added).
21 *Id.* at 290, 455 S.E.2d at 21.

CHANDLER v. COMMONWEALTH

249 Va. 270, 455 S.E.2d 219 (1995)
Supreme Court of Virginia

FACTS

On the evening of February 7, 1993, Lance A. Chandler, along with two of his friends, walked into a convenience store with the intent to steal beer and money.[1] The two friends walked to the back of the store for the beer. Chandler went to the cashier, pointed a gun at him, and demanded money. When the cashier did not immediately respond, Chandler closed his eyes, pulled the trigger, and said, "boom, boom." Chandler then pulled the trigger a second time and a bullet entered the cashier's head, killing him.[2] Chandler was charged with capital murder, use of a firearm in the commission of a capital murder, robbery, use of a firearm in the commission of a robbery, and conspiracy to commit robbery.[3]

In the first stage of the bifurcated trial, a jury convicted Chandler of all of the charged crimes.[4] At the penalty stage of the trial, Chandler refused to allow his attorney to present mitigating evidence. The jury then fixed Chandler's penalty at death based on future dangerousness. At the sentencing hearing, Chandler decided to offer mitigating evidence to the trial judge. Chandler then moved to have the jury sentence set aside, but the trial judge denied the motion.[5]

HOLDING

Under Virginia Code sections 17-110.1(A) and 17-110.1(F), the Supreme Court of Virginia consolidated the automatic review of Chandler's death sentence with his other appeals. The court then upheld the convictions and death sentence.[6]

1 *Chandler v. Commonwealth*, 249 Va. 270, 274, 455 S.E.2d 219, 222 (1995).
2 *Id.*
3 *Id.* at 273, 455 S.E.2d at 221.
4 *Id.*
5 *Id.* at 281, 455 S.E.2d 226, 227.
6 *Id*, at 273, 284, 455 S.E.2d at 221, 228. The Court rejected some of the defendant'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 summary include: (1) claims that the Virginia death penalty statute is unconstitutional on grounds that it violates the Eighth Amendment; it does not provide for adequate consideration of aggravating and mitigating circumstances; the term "future dangerousness" is unconstitutionally vague; it does not require a trial judge to reduce death sentence on a showing of "good cause;" it allows consideration of hearsay evidence during the sentencing phase; and it does not provide for meaningful appellate review. (Chandler's attorney should be commended, however, for raising and preserving these constitutional claims); (2) claim that the prosecution used its peremptory strikes to remove a disproportionate number of African-Americans in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); and (3) claim that the trial judge should not have allowed a hearsay admission against interest. Note, however, that this final claim was not federalized, and therefore federal review of the issue is now precluded. Every hearsay claim must also be characterized as a violation of the confrontation clause of the Sixth Amendment. For an example of proper federalization of a hearsay claim *see Idaho v. Wright*, 497 U.S. 805 (1990).

There was also a claim based on *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994) (regarding admission of parole ineligibility evidence) which was found to have been defaulted for failure to raise at the proper time. The jury asked for the meaning of a life sentence, but the judge refused to instruct them on parole law. No objection was made until the post-sentencing hearing. Thus, the Supreme Court of Virginia held that the claim was defaulted for failure to make a contemporaneous objection under Va. Sup. Ct. R. 5:25.

The opinion does not reflect whether the United States Supreme Court decision in *Simmons*, requiring that juries be instructed on parole ineligibility, occurred between the trial and sentencing hearing under Va. Code Ann. § 19.2-264.4. Nonetheless, the Supreme Court of Virginia's finding that the claim was defaulted serves no legitimate state interest. The purpose of a contemporaneous objection rule is to give trial courts the opportunity to make a correct ruling, eliminating the cost and

ANALYSIS/APPLICATION IN VIRGINIA

I. Change of Venue

Prior to his trial, Chandler requested a change of venue based on a claim that newspaper coverage resulted in prejudicial pre-trial publicity. Chandler offered three articles from local newspapers as evidence to support his motion. The motion was denied by the trial court. At trial, potential jurors were questioned as to their knowledge of these articles. Those jurors who had read the articles were questioned as to their ability to give Chandler a fair trial. Two potential jurors responded that they would be unable to give a fair trial; those two individuals were dismissed. The Supreme Court of Virginia upheld the trial court's decision, finding that the record did not demonstrate unduly prejudicial pre-trial publicity.[7]

The Supreme Court of Virginia has consistently required more than a large quantity of newspaper articles to demonstrate prejudicial pre-trial publicity. The court has required a showing of either a specific inaccuracy in the printed statements or widespread prejudice, regardless of the volume of publicity coverage.[8] Therefore it is crucial that defense attorneys offer more evidence than newspaper articles in support of a motion for change of venue.

Defense attorneys should research the amount of prejudice. This research can be done by using a third party to conduct random telephone polls of eligible jurors. The third party could then testify to the results. In addition, a questionnaire table could be set up at a local shopping center, where people in the community could be randomly surveyed.[9] Defense attorneys should also research the possibility of inaccuracy in all newspaper articles. This challenge is difficult, and so is the legal standard. However, in some cases, relief has been granted. Although some relief is the result of the appeals process,[10] it is more frequent that circuit court judges in Virginia will exercise their discretion to assure fairness when substantial evidence is presented to them.

II. Sentencing Hearing

Although Chandler had refused to offer evidence in mitigation at the sentencing hearing, he changed his mind and offered evidence at the post-sentence hearing conducted pursuant to Virginia Code section 19.2-264.5.[11] He testified that he had been taking medication for stress, that he had nightmares about the victim of the murder, that he had not seen his father for several years, and that his mother had recently died of cancer. Chandler also offered the testimony of his pastor who stated that he had known Chandler for many years and that he was the pastor at Chandler's church. Chandler then moved "to set aside the jury's recommended sentence to death as contrary to the law and the evidence."[12] Chandler assigned as error the failure to grant this motion. Noting that no motion had been made at trial challenging the sufficiency of the future dangerousness finding, the Supreme Court of Virginia viewed this assignment as a claim that the trial judge should have set aside the jury's sentence when he considered all the evidence, including the mitigating evidence which the jury did not hear. The Supreme Court of Virginia upheld the decision of the trial court to impose the jury's sentence.[13]

The mitigating evidence presented to the trial judge was not substantial. The scant evidence was no doubt due in part to the fact that it had to be collected at the last minute because of Chandler's initial instruction that he wanted no mitigation evidence presented. However, this situation could have been avoided. Defense attorneys should always investigate and prepare mitigation well before the guilt phase begins and arguably should insist on presenting such evidence, regardless of the defendant's desires.[14]

III. Premeditation

The court also rejected a claim that the evidence was insufficient to establish premeditation.[15] Early Supreme Court of Virginia cases seemed to define premeditation as a process rather than a mental state. The

---

inefficiency of retrials when errors are made. Under then-existing precedent from the Supreme Court of Virginia, the trial judge was absolutely precluded in any event from answering the parole law question asked by the jury. *See, e.g., Mickens v. Commonwealth*, 247 Va. 395, 404-05, 442 S.E.2d 678, 685 (1994); *Wright v. Commonwealth*, 245 Va. 177, 197, 427 S.E.2d 379, 392 (1993); *Mueller v. Commonwealth*, 244 Va. 386, 408-09, 422 S.E.2d 380, 394-95 (1992); *Eaton v. Commonwealth*, 240 Va. 236, 248-49, 397 S.E.2d 385, 392-393 (1990). Thus, if the refusal was error, nothing could have been accomplished by contemporaneous objection.

[7] *Chandler*, 249 Va. at 275, 455 S.E.2d at 222. (The opinion does not reflect if the change of venue motion was made on grounds that denial would violate the Sixth Amendment right to trial by fair and impartial jury and other United States Constitution provisions. All trial and appellate issues must be raised and preserved on federal as well as state law grounds.)

[8] *See, e.g., Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992); *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606 (1992); *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991); *Mackall v. Commonwealth*, 236 Va. 240, 372 S.E.2d 759 (1988); *Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987); *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 352 (1984); *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982); *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974); *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974).

[9] Please contact the Virginia Capital Case Clearinghouse for assistance in this matter.

[10] *Rideau v. Louisiana*, 373 U.S. 723 (1963).

[11] This code section requires that, when a person's sentence has been fixed a death, a probation officer of the court shall investigate the history of the person and all other relevant facts. The officer is then to prepare a report on his findings. Finally, the court is to consider the report and, "upon good cause shown," may set aside the death sentence and impose life imprisonment.

[12] *Chandler*, 249 Va. at 281, 455 S.E.2d at 227.

[13] *Id.* at 280-82, 455 S.E.2d at 226, 227.

[14] For a discussion of this ethical and professional dilemma, *see* Henderson, *Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?*, Capital Defense Digest, Vol. 6, No. 1, p. 32 (1993).

[15] Chandler argued that his testimony demonstrated that he did not intend to kill the victim. His testimony included the fact that he had opened the gun and looked at the cylinder, seeing "'about three empty shell casings and one that still had the slug in it.'" He therefore thought he would have to pull the trigger at least four times before there would actually be a live round. Thus, he did not expect the gun to fire when he pulled the trigger the second time. *Chandler*, 244 Va. at 280, 455 S.E.2d at 225.

Supreme Court of Virginia has held that premeditation means that the defendant "reflected with a view to determine whether he would kill or not, and that he . . . **determined to kill**, as result of that reflection."[16] In recent years, however, the Supreme Court of Virginia has not often commented on premeditation. Most often, the only comment by the court is that no specific time is necessary.[17] Some recent cases even seem to equate premeditation with intent to kill—"[t]o premeditate means to adopt a specific intent to kill."[18]

Chandler, however, does seem to reaffirm the holdings of the early cases. The court stated that premeditation need not exist for any specific amount of time.[19] But the court went on to say that, in order for the jury to decide whether Chandler possessed the requisite premeditation, jurors had to "decide whether they believed Chandler's testimony that he did not think the gun would go off until he pulled the trigger four times or whether Chandler **planned to commit murder**, either prior to entering the store with a loaded gun or as he fired twice at [the victim's] head."[20] Thus, the court seems to suggest again that premeditation is more than a mental state. Rather, it involves the process of planning to commit murder.[21]

Although Chandler's claim addressed sufficiency of premeditation evidence, the court's response suggests that, at the very least, defense counsel should consider proffering a jury instruction in the language of *McDaniel*, which is still good law.[22]

IV. Statutory Review

In capital murder cases in which the sentence is fixed at death, the defendant is entitled by Virginia Code section 17-110.1(C) to an automatic review of the sentence by the Supreme Court of Virginia to determine whether (i) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, or (ii) the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In order to take a more active role in this automatic review process, Chandler's attorney presented forty-eight cases by which the Supreme Court of Virginia could conduct proportionality comparisons to this case.[23] These cases included eighteen in which the sentence of death had been given based on the future dangerousness predicate, and thirty in which death had been given based on both the vileness and the future dangerousness predicates. Chandler then argued that his case and background formed a profile that was much less likely to be dangerous in the future than the defendants' profiles in the cases presented for comparison.[24]

The Supreme Court of Virginia stated that the "proportionality review, however, is not a comparison of the perceived degrees of potential future dangerousness."[25] Instead, the court uses the finding of future dangerousness to "delineate[] the category of case in which a sentence of death was imposed that we will use for comparison purposes."[26]

The court also stated that "mitigating circumstances generally have been a factor in instances where similar crimes have received the lesser penalty."[27] This statement indicates that the Supreme Court of Virginia does not consider mitigation in its review.

Finally, the court determined that, in cases where the defendant was sentenced to death, the factor which was "[c]ommon to each such murder [was] a cruelty and lack of respect for human life which is independent of the perpetrator's prior activities or other factors."[28]

The problem with this part of the court's analysis is that its standard, "cruelty and lack of respect for human life," which is supposed to separate classes of murder, does not. All murder involves cruelty and lack of respect for human life to some degree. Thus, it is impossible to distinguish capital murder from murder, or capital murder for which death is appropriate from capital murder for which it is not. Therefore, the court's standard is a meaningless one.

Another problem with the court's analysis is its discussion of proportionality review. The court explained that the test for the proportionality review required by Virginia Code section 17-110.1(C) is "'whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime **and the defendant**.'"[29] However, in its application of that test in this case, the court considered only the circumstances of the crime—that it involved a firearm and that it was committed in the course of robbery. The court never considered comparatively this particular defendant, his mitigation evidence, or the possibility of his being dangerous in the future, in its discussion. Thus, in rejecting the defendant's proposed analysis, the court failed to fully consider its **own test**. Arguably, this refusal was a denial of a state created right in that the court did not follow its own process and a denial of meaningful appellate review, and thus violated due process.[30]

Summary and analysis by:
Jeanne-Marie S. Raymond

---

[16] *McDaniel v. Commonwealth*, 77 Va. 281, 284 (1883).

[17] *See, e.g., Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394 (1993); *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987); *Clozza v. Commonwealth*, 228 Va. 124, 321 S.E.2d 273 (1984).

[18] *Smith v. Commonwealth*, 220 Va. 696, 700, 261 S.E.2d 550, 553 (1980). ("Adopt," however, may be consistent with weighing options and deciding—i.e., a process.)

[19] *Chandler*, 249 Va. at 280, 455 S.E.2d at 225, citing *Clozza v. Commonwealth*, 228 Va. 124, 134, 321 S.E.2d 273, 279 (1984).

[20] *Id.* at 280, 455 S.E.2d at 225 (emphasis added).

[21] Defense attorneys should use this case, as well as the early Supreme Court of Virginia cases, to request a jury instruction explaining that premeditation involves more than just intending to kill; it involves **planning** to kill.

[22] *See* Va. Code Ann. § 19.2-263.2, which states, "A proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with model jury instructions."

[23] This was an excellent attempt to force the court to exercise its statutory duty and even though it was unsuccessful, it is a potentially effective way to preserve the issue for federal review.

[24] *Chandler*, 249 Va. at 283-4, 455 S.E.2d at 227.

[25] *Id.* at 284, 455 S.E.2d 227.

[26] *Id.*

[27] *Id.* at 284, 455 S.E.2d at 227-28.

[28] *Id.* at 284, 455 S.E.2d at 227.

[29] *Id.* at 283, 455 S.E.2d at 227, quoting *Jenkins v. Commonwealth*, 244 va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 113 S.Ct. 1862 (1993) (emphasis added).

[30] This issue can be preserved on two federal grounds. The first is an Eighth Amendment claim that there must be meaningful appellate review. *Pulley v. Harris*, 465 U.S. 37 (1984). In refusing to follow its own review standard, the Supreme Court of Virginia has denied the defendant meaningful appellate review. The defendant's attorney in this case did preserve this issue. The second federal claim is that by refusing to follow its own standard of review, the Supreme Court of Virginia has arbitrarily administered a state created right in violation of the Fourteenth Amendment Due Process Clause. This claim should also be preserved for federal review. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Wolff v. McDonnell*, 418 U.S. 539 (1974).