



Spring 3-1-1996

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(1995) Supreme Court of Virginia**

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Recommended Citation

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SHEPPARD v. COMMONWEALTH

250 Va. 379, 464 S.E.2d 131 (1995)
Supreme Court of Virginia

FACTS

On November 30, 1993, police discovered the bodies of Richard A. Rosenbluth and his wife, Rebecca, in the den of their home. The victims had been killed two days earlier. Mr. Rosenbluth had been shot twice by a .38 caliber revolver; Mrs. Rosenbluth had been shot four times: twice with a .38 caliber revolver and twice with a .45 caliber automatic handgun.¹

On December 3, Mark A. Sheppard was arrested after police discovered him attempting to set fire to Mr. Rosenbluth's car. The Commonwealth charged Sheppard with three indictments for capital murder,² two indictments for robbery, and four indictments for the use of a firearm in the commission of a felony.³

Although Sheppard admitted that he was present at the Rosenbluth's house at the time of the murders, he testified at trial that he had not participated in the killings, claiming that he was in another room of the house while his co-defendant, Andre Graham, and a third party committed the murders. The jury, however, convicted Sheppard of all charges. At the penalty stage, the jury sentenced Sheppard to death based on both the vileness and future dangerousness aggravating factors.⁴

HOLDING

The Supreme Court of Virginia consolidated the automatic review of Sheppard's death sentence with his other appeals based on the capital murder conviction. The appeal alleged various substantive errors at the penalty stage, as well as an error in refusing to allow the jury to hear that Sheppard's co-defendant had received a life sentence rather than the death penalty. The court upheld the convictions and the death sentence.⁵

ANALYSIS/APPLICATION IN VIRGINIA

I. The Future Dangerousness Claims That Were Dismissed for Failure to Properly Raise Them on Appeal

In an alarming decision that violates fundamental notions of fair play, the Supreme Court of Virginia set up a novel procedural bar to a number of Sheppard's claims that elevates formalism to new and possibly unconstitutional heights. In his assignments of error, Sheppard did not state a general challenge to the jury's finding of future dangerous-

ness. Instead, he assigned seven specific errors arising out of the sentencing phase which, he argued, rendered the jury's future dangerousness finding invalid. These errors included matters such as improperly admitting unadjudicated acts, improperly allowing the jury to observe the victim of an unrelated maiming in which Sheppard allegedly participated, improperly admitting evidence of his conduct in prison, improperly admitting testimony regarding the defendant's statements about other criminal activity, denying a motion for a new sentencing hearing because Sheppard was denied individualized sentencing consideration by the jury, failure of the Commonwealth to inform Sheppard of exculpatory evidence, and improperly admitting testimony by a criminologist.⁶

The Supreme Court of Virginia refused to review these assignments of error, stating for each one that because the defendant had not assigned error as to the general finding of future dangerousness, alleged specific errors relating to future dangerousness would not be reviewed. For example, in denying review of the error of improper admission of evidence of unadjudicated crimes, the court stated:

We do not reach this question for decision. The defendant has failed to assign error to the jury's finding of future dangerousness. See Rules 5:22(b); 5:17(c). Therefore, the defendant will not be allowed to challenge the admission of any evidence relevant to that predicate about which there is no claim of invalidity.⁷

In other words, because Sheppard did not include a throw-away general challenge to the future dangerousness finding, but instead specifically stated why different components of the future dangerousness finding were in error, the court refused to consider each of the particular assignments of error.

The court's decision to deny review is highly troubling and violates Sheppard's due process rights. First, Sheppard had no notice of the procedural bar which the Supreme Court of Virginia invoked in his case. The rules the court cited do not support its reasoning. Rule 5:22(b) gives the appellant ten days from the "Filing Date" to file the assignments of errors, supplemented with specifications of the relevant portion of the record. It then gives the appellee ten days from the filing of the assignment of errors to file any additional portions of the record which it deems relevant.⁸

¹ *Sheppard v. Commonwealth*, 250 Va. 379, 382-84, 464 S.E.2d 131, 133-34 (1995).

² *Id.* at 382, 464 S.E.2d at 133. Two of the capital murder indictments were based on the killings of each of the Rosenbluths in the commission of a robbery in accordance with Va. Code Ann. § 18.2-31(4); the third indictment was based on the two killings as part of the same act or transaction in accordance with Va. Code Ann. § 18.2-31(7). *Id.*

³ *Id.*

⁴ *Id.* at 383, 464 S.E.2d at 134.

⁵ *Id.* at 386, 396, 464 S.E.2d at 134, 141. 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 specific to the case being reviewed. Issues in these categories include: (1)

four assignments of error not discussed because of the defendant's failure to brief and argue them; (2) claims that the trial court erred in excluding three jurors for cause; (3) a claim that there was insufficient evidence to support the verdict; (4) a claim that the refusal of the trial judge to allow defense counsel to question potential jurors about "mitigation" on *voir dire* was error; (5) a claim that the denial of a motion to suppress evidence found in defendant's home was error; (6) a claim that the prosecutor engaged in prejudicial argument in both the trial and penalty phases of the bifurcated trial; (7) a claim that the jury should have been instructed that they could find Sheppard guilty of accessory after the fact; and, (8) a claim that the jury's finding of aggravated battery was not based on sufficient evidence.

⁶ *Id.* at 391-395, 464 S.E.2d at 138-41.

⁷ *Id.* at 391, 464 S.E.2d at 139.

⁸ Va. Sup. Ct. R. 5:22(b).

Likewise, Rule 5:17(c) does not support the Supreme Court of Virginia's argument. Although it does describe assignments of error, it does not require that one formally state the more general error before alleging the specific errors for which any relief would actually be granted. In fact, the rule states that "[a]n assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient."⁹ Thus, Sheppard actually complied with the spirit of the written rule by submitting the more specific assignments of error required by the rule.

Moreover, Sheppard's assignments of error were completely in accord with the purposes of such assignments as the Supreme Court of Virginia itself has described them. In *Yeatts v. Murray*,¹⁰ the defendant challenged the circuit court's dismissal of his habeas petition without ordering an evidentiary hearing on his claim of ineffective assistance of counsel. The Supreme Court of Virginia determined that "[t]his assignment of error only challenges the alleged procedural failure to order an evidentiary hearing; it does not challenge, with reasonable certainty, the habeas court's substantive ruling on the merits of the ineffective assistance claims."¹¹ In Sheppard's case, he did exactly what the Supreme Court of Virginia had wanted in *Yeatts*. Instead of merely challenging the general defect, Sheppard claimed error on specific substantive grounds. Thus, Sheppard should have been applauded for following the desires of the Supreme Court of Virginia in that he clearly announced exactly what he was arguing.

Finally, not only do the Rules of the Supreme Court of Virginia belie the court's analysis, the court had not applied this rule to prior capital cases.¹² Because no rule requires a throw-away assignment of error that challenges the finding of the aggravating factor generally, and because the Supreme Court of Virginia had not required such an assignment in previous cases, Sheppard had no notice of this requirement; thus, he was denied due process.

Because of the Supreme Court of Virginia's decision in this case, it is imperative that defense counsel include a general assignment of error for each aggravating factor as a violation of the Sixth, Eighth, and Fourteenth Amendments. The brief should state that the assignment of error was made in order to avoid default under *Sheppard* and that the specific errors giving rise to this error are developed in each assignment of error.

⁹ Va. Sup. Ct. R. 5:17(c).

¹⁰ 249 Va. 285, 455 S.E.2d 18 (1995); see case summary of *Yeatts*, Capital Defense Digest, Vol. 8, No. 1, p. 27 (1995).

¹¹ *Id.* at 291, 455 S.E.2d at 22.

¹² See *Cardwell v. Commonwealth*, 248 Va. 501, 450 S.E.2d 146 (1994), reviewing defendant's claim of improper admission of evidence of unadjudicated acts even though defendant did not challenge the jury's finding of aggravating circumstance.

¹³ 220 Va. 243, 254, 257 S.E.2d 797, 805 (1979).

¹⁴ *Sheppard*, 250 Va. at 390-91, 464 S.E.2d at 138.

¹⁵ *Id.*

II. A Co-Defendant's Life Sentence As Mitigation Evidence

Sheppard argued that because he and his co-defendant were equally culpable for the murders, the jury should have been allowed to hear that his co-defendant had been sentenced to life imprisonment plus a \$100,000 fine. The Supreme Court of Virginia rejected this argument. Quoting *Coppola v. Commonwealth*,¹³ the court stated that such information was "irrelevant to the determination by the jury of the appropriate punishment for the defendant."¹⁴ The court explained that the statutory scheme required the appellate court to perform a comparison analysis, but it did not require such an analysis by the jury. The court stated that the jury's analysis should instead focus on the defendant's history and his conduct in committing the present crime.¹⁵

This particular issue has not been resolved by the United States Supreme Court. However, capital murder defendants should be allowed under the constitution to inform the jury of a co-defendant's sentence as evidence in mitigation. In *Lockett v. Ohio*, the United States Supreme Court held that the jury must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁶ Therefore, if the sentence of the co-defendant is considered a circumstance of the offense, the jury should not be precluded from hearing such evidence. In fact, several other jurisdictions have already held that evidence of a co-defendant's sentence should be allowed as mitigation evidence.¹⁷

The argument that the jury should be allowed to hear such evidence is especially important in Virginia, for although the court in rejecting Sheppard's argument had said that the co-defendant's sentence was appropriate for appellate proportionality review, later in the opinion it declined to compare Sheppard's sentence to that of his co-defendant.¹⁸ The Supreme Court of Virginia thus continues to engage in a cursory proportionality review. It follows that any meaningful comparison of a defendant and co-defendant's sentences will come only if the evidence is presented to the jury. Not allowing the defendant to introduce a co-defendant's sentence into evidence is both bad policy and a violation of the Eighth Amendment.

Summary and analysis by:
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¹⁶ 438 U.S. 586, 604 (1978).

¹⁷ See, e.g., *Williamson v. State*, 511 So.2d 289, 292 (Fla. 1987) (stating that "the sentence that a co-defendant receives is relevant and may be considered by the judge and jury in determining the appropriate sentence."); *Jackson v. State*, 599 So.2d 103, 110 (Fla. 1992) (stating that "disparate treatment accorded [a co-defendant] . . . may have served as a reasonable basis for the recommendation [of life rather than death.];" and *State v. Stokely*, 185 Ariz. 505, 523, 898 P.2d 454, 472 (1995) (stating that "sentences of co-defendants may be considered in mitigation.").

¹⁸ *Sheppard*, 250 Va. at 390, 395, 464 S.E.2d at 138, 141.