Capital Defense Journal

Volume 9 | Issue 1 Article 16

Fall 9-1-1996

CLAGETT v. COMMONWEALTH 252 Va. 79, 472 S.E.2d 263 (1996) Supreme Court of Virginia

CLAGETT v. COMMONWEALTH

252 Va. 79, 472 S.E.2d 263 (1996)
Supreme Court of Virginia

FACTS

On June 30, 1994, Richard T. Reed arrived at the Witchduck Inn, a tavern and restaurant in Virginia Beach. Upon entering the back door of the Inn, Reed discovered the bodies of Inn owner Lam Van Son, Inn employees Wendell Parish and Karen Sue Rounds, and Inn patron Abdelaziz Gren. Each victim had been shot once in the head. The Inn's cash register was open and empty. Based upon information supplied by Denise Holsinger, Michael David Clagett's girlfriend, Clagett was identified as a suspect in the killings. He was arrested on July 1, 1994 on a public intoxication charge. Once in custody, Clagett was served with arrest warrants for the murders. Clagett confessed to the killings, admitting that he and Holsinger had intended to "rob" the inn and that Holsinger had taken approximately $400 from the cash register.[1]

On October 3, 1994, two indictments were returned against Clagett. In the first indictment, Clagett was charged with four separate counts of capital murder during the commission of a robbery,[2] and various related non-capital offenses. In the second indictment, Clagett was charged with one count of multiple homicide capital murder.[3] The second indictment predicated the charge of multiple homicide murder on the killing of all four victims as part of the same act or transaction.[4]

Clagett was convicted on all charges, and at the conclusion of the penalty phase, the jury returned a verdict of five death sentences, based upon a finding of both "vileness" and "future dangerousness." Thus, Clagett received five death sentences for four homicides. Clagett appealed his death sentences, challenging the Commonwealth's failure to disclose certain statements, the refusal of the trial court to strike certain jurors for cause, and the fact that five death sentences were imposed for four homicides.[5]

HOLDING

Apart from the conviction and sentence for multiple homicide capital murder, the Supreme Court of Virginia found no error in the rulings of the trial court. The court held that the trial court's refusal to strike jurors for cause was not an abuse of discretion and that the trial court properly denied Clagett's request for disclosure of the notes of a police officer and a statement made by a potential witness. Because the court held that the conviction for multiple homicide capital murder was derivative of the convictions for capital murders during the commission of a robbery, it vacated the sentence and conviction for multiple homicide murder and affirmed the remainder of the judgment of the trial court including each of the four convictions for capital murder during the commission of a robbery and the corresponding death sentences.[6]

ANALYSIS/APPLICATION IN VIRGINIA

I. A Note on Default

Because Clagett did not address in his brief the issues raised in five assignments of error, the court found that he waived them on direct appeal by failure to include them in his brief.[7] The holding is yet another reminder that in order to preserve the issues, it is imperative that defense counsel object at trial, assign errors, and brief the assignments. Although it is often impossible to brief every assignment of error within the 50 page limit imposed by the Rules of the Supreme Court of Virginia, defense counsel may move for permission to exceed the 50 page limit.[8]

Introducing a new twist on default, the Supreme Court of Virginia held that assignment of error 14 relating to the cross-examination of a witness was defaulted because although counsel properly objected to the error at trial, counsel advanced a different argument on appeal than he advanced to the trial judge in support of his objection.[9] To support this argument, the court cited Rule 5:25, which provides that "error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." The text of Rule 5:25 does not require that every conceivable argument supporting an objection be advanced to the trial judge.[10] At a minimum, the practical message is that defense counsel must take whatever time is required, no matter how it may slow the trial, to raise all grounds for an objection, including the renewal of objections later in the trial and the offering of additional arguments.

Some issues not discussed by the Supreme Court of Virginia or treated in a cursory fashion by the court were nonetheless well-preserved by counsel. They included (1) the denial of defendant's request for bill

---

[1] *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 266 (1996).

[2] Va. Code Ann. § 18.2-31(4).

[3] Va. Code Ann. § 18.2-31(7).

[4] *Clagett*, 252 Va. at 83, 472 S.E.2d at 265.

[5] *Id.* at 88-90, 95-96, 472 S.E.2d at 268-269, 272-273.

[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) admission of videotape and photographs; (2) trial court's refusal to grant a mistrial after court sustained one of defendant's objections to domestic abuse testimony; (3) suppression of post-arrest statements; (4) denial of defendant's proposed question for the jury panel designed to assure the removal of those jurors who would automatically impose the death penalty; (5) admissibility of prior criminal acts; (6) the state's failure to disclose firearms expert's report prior to trial; (7) prosecution's recall of a witness to correct her testimony; (8) corroboration of defendant's confession; (9) sufficiency of the evidence; (10) jury instruction on flight; and (11) jury instruction on circumstantial evidence.

[7] *Clagett*, 252 Va. at 84-85, 472 S.E.2d at 266 (citing Rule 5:27).

[8] Rule 5:26(a) provides, in relevant part: "**Except by permission of a justice of this Court,** neither the opening brief of appellant, nor the brief of appellee, nor a brief of *amicus curiae* shall exceed 50 typed or 36 printed pages.... Page limits under this Rule do not include appendices." (emphasis added) Denial of permission should itself be assigned as error on federal due process grounds.

[9] *Clagett*, 252 Va. at 85, 472 S.E.2d at 266.

[10] For further discussion of the implications of this new interpretation, *see* case summary of *Goins v. Commonwealth*, Capital Defense Journal, this issue.

of particulars; (2) denial of defendant's request for assistance of an expert medical witness to examine his former spouse in order to refute her claims of domestic violence; (3) denial of defendant's request for additional peremptory challenges; (4) the admissibility of an interview of defendant with a local reporter; and (5) the constitutionality of Virginia's death penalty statutes.[11]

Furthermore, defense counsel preserved an important claim relative to communication of accurate parole information to the jury. During its sentencing phase deliberations, the jury submitted a two-part question to the trial court asking it to define a life sentence with respect to the effect of parole and asking whether mandatory sentences were served concurrently or consecutively. The trial court responded that the jury should "impose such punishment" it felt the evidence warranted and "not to concern [itself] with what might happen afterwards."[12]

On appeal, Clagett argued that based on *Simmons v. South Carolina*,[13] the jurors should have been instructed that the mandatory sentences had to run consecutively. The Supreme Court of Virginia upheld the trial court's response to the jury's inquiry, stating that *Simmons* was inapplicable to Clagett because he was not parole ineligible.[14] However, the United States Supreme Court has not decided whether the reasoning of *Simmons* also applies to life sentenced prisoners who, like Clagett, would technically be eligible for parole many years later. Thus, the fact that defense counsel in *Clagett* preserved the *Simmons* issue is very important. *Simmons* rests on the proposition that a defendant has a due process right to rebut the state's case for death. In the future, parole evidence may be found to be permissible also as evidence in mitigation.[15]

II. Testimony of Potential Sentencing Phase Witness During Guilt Phase

During the guilt phase, the Commonwealth called Wendy Singer as a witness. Clagett objected to her testimony and moved for a mistrial on the ground that Singer had been identified as a potential witness only shortly before trial and that the Commonwealth had indicated that she would be called only during the penalty phase. The Supreme Court of Virginia held that there was no prejudice to Clagett, stating, "Even accepting Clagett's assertions as true, he was nonetheless informed that Singer was a potential witness prior to trial."[16]

The court's conclusion that there was no prejudice to Clagett was an overstatement, as the relevant issues during the guilt phase are not the same as those relevant during the sentencing phase. For example, a reasonable attorney would be on notice to meet evidence supporting the Commonwealth's burden of proving "vileness" or "future dangerousness." There would be no reason to investigate or prepare to meet testimony from Singer in support of Clagett's guilt of capital murder.

III. Failure of Commonwealth to Disclose Statements

During his trial, Clagett requested an opportunity to examine the notes of a police officer and the statement made by a potential witness. Both of Clagett's requests were denied. In neither instance did the court review the material, nor did Clagett's counsel request an *in camera* review of such notes and statements. Because the notes and the statement were not made part of the record, the Supreme Court of Virginia was limited in its review of the rulings made by the trial court to the representations made by the Commonwealth.

At a suppression hearing, the arresting officer was permitted, without objection, to refresh her memory by examining an investigation memorandum prepared following the arrest. During cross-examination, defense counsel determined that the officer prepared this memorandum using handwritten notes taken at the time of Clagett's arrest. Clagett requested that these notes be produced for his examination, and the officer retrieved them at the request of the court. The Commonwealth represented to the trial court that no statements made by Clagett or other potentially exculpatory evidence were contained within the notes, and the trial court denied Clagett's request to review the notes based upon on the Commonwealth's representation.[17]

According to the law of evidence in Virginia, a defendant in Clagett's situation has a right to examine the material used by the witness to refresh her memory.[18] Thus, Clagett had a right to view the investigation memorandum. Although there is no rule of evidence that would directly permit a defendant in Clagett's position to view the notes used to prepare the memorandum, it is arguable that a defendant has a right to examine the notes based on his Sixth Amendment right to confront and effectively cross-examine a witness, quite apart from the Commonwealth's obligation to disclose exculpatory evidence.

Clagett also sought disclosure of statements made by his girlfriend, Holsinger. The Commonwealth represented that her statements were wholly inculpatory and did not offer any exculpatory benefit to Clagett. On that basis, the trial court again denied Clagett's request to review these statements. Holsinger did not testify at Clagett's trial.[19]

Even assuming that this claim involved only the duty to disclose exculpatory evidence, there is a danger inherent in allowing the Commonwealth to decide what is or is not exculpatory. The scope of what is "exculpatory" is very extensive.[20] Furthermore, the right to view exculpatory material is not limited to the statements of those witnesses who testify at trial. Thus, at the very least, if defense counsel is not permitted to see what the witness uses to refresh her recollection or to view witness statements represented to be wholly inculpatory, defense counsel should make such statements part of the record by: (1) referring to the applicable Virginia law, the Sixth Amendment right to effectively cross-examine, and the right to have exculpatory evidence,[21] and (2)

---

[11] *Clagett*, 252 Va. at 85-86, 472 S.E.2d at 266-67.

[12] *Id.* at 94, 472 S.E.2d at 272.

[13] 114 S. Ct. 2187 (1994) (holding that where future dangerousness is at issue and state law prohibits parole if defendant sentenced to life in prison, due process requires that jury be informed—either by instruction or by argument of counsel—that the only alternative to a death sentence is a sentence of life without parole).

[14] Because Clagett's offense occurred prior to Virginia's abolition of parole on January 1, 1995, Clagett would technically have been eligible for future parole consideration under former Va. Code Ann. 53.1-151 if sentenced to life in prison.

[15] For discussion of the rationale of *Simmons*, *see* case summary of *O'Dell v. Netherland*, Capital Defense Journal, this issue.

[16] *Clagett*, 252 Va. at 87, 472 S.E.2d at 267.

[17] *Id.* at 88, 472 S.E.2d at 268-69.

[18] Friend, The Law Of Evidence In Virginia § 3-7 (a) (1996).

[19] *Clagett*, 252 Va. at 89, 472 S.E.2d at 269.

[20] *See Kyles v. Whitley*, 115 S. Ct. 1555 (1995). In *Kyles*, the Court held to be exculpatory: (1) evidence casting doubt on certainty and reliability of eyewitness testimony, (2) prior statements of state's key witness, and (3) evidence showing that state's investigation was less than thorough. *See also* case summary of *Gray v. Netherland*, Capital Defense Journal, this issue.

[21] *Kyles v. Whitely*, note 19, *supra*; *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment").

requesting an *in camera* review and moving that the documents be preserved for further appellate review. If necessary, and in an appropriate case, effort should be made to have the Commonwealth attorney testify concerning her understanding of the law regarding her obligation to disclose exculpatory material.[22]

IV. *Voir Dire* Issues

During *voir dire*, Clagett sought to ask the members of the venire if they would automatically impose the death penalty even if they accepted Clagett's theory of the case. The trial court ruled, and the Supreme Court of Virginia upheld, that this was not the proper inquiry. Instead, the trial court permitted the members of the venire to be asked the narrowest form of question addressed in *Morgan v. Illinois*:[23] whether they would automatically impose the death penalty "no matter what the facts were."[24] Although the refusal to ask the question in the words sought by Clagett may not have been error, it did reveal the trial court's cramped view of what disqualifies potential capital jurors. That being so, it is important for defense counsel to know how to preserve the record if the court is going to permit what defense counsel considers unlawfully pro-death jurors to sit.[25]

First, defense counsel should request that the juror be removed for cause. Denial calls for objection on federal grounds and request for additional peremptory strikes. If the trial court refuses to accord the defendant an additional peremptory challenge, it should then be made clear on the record that the defense would have used the additional peremptory challenge to strike the juror. If the arguably "pro-death" juror is then chosen to sit on the jury that ultimately sentences the defendant to death, objection must again be made at the time the jury is empaneled. This process will preserve the issue on federal grounds under *Ross v. Oklahoma*[26] for appellate review. Further, under Virginia law entitling the defendant to a pool of twenty qualified veniremen, if the appellate court finds that the trial court erred in refusing to remove the killer juror for cause, note that even the prosecution's use of a peremptory challenge to remove the killer juror will not cure the error or remove the prejudice to the defendant.[27]

However, assuming defense counsel still has a peremptory challenge left to challenge an arguably pro-death juror, the better tactical decision will often be to remove the killer juror. Obtaining the best possible jury even at the expense of preserving an appellate issue is usually the best cause of action. In an effort to preserve under *Ross* even after the strike, however, counsel could: (1) move to strike the juror for cause; (2) object to the denial of the challenge for cause on federal grounds; (3) request additional peremptory challenges on due process grounds; (4) strike the killer juror; and (5) if other jurors are also arguably pro-death, indicate that such jurors would have been struck had additional peremptory challenges been granted.

V. Double Jeopardy in Sentencing

In vacating the conviction and death sentence for multiple homicide capital murder in *Clagett*, the Supreme Court of Virginia compared the circumstances of *Clagett* with its holding in *Buchanan v. Commonwealth*,[28] stating

> Although *Buchanan* dealt with greater and lesser degrees of homicide, we believe that the same rationale should apply to cases where the convictions are for crimes of equal magnitude. In this case, each of the convictions for capital murder during the commission of a robbery should stand on its own. The conviction for multiple homicide capital murder, although of equal magnitude, is derivative of the other four.[29]

Although the Commonwealth may advance multiple theories for the commission of a crime, and under *Blockburger v. United States*,[30] cumulative punishment is allowed if the statute for each offense requires proof of an additional fact which the other does not, the court's holding in *Clagett* may nonetheless be useful to defense counsel in Virginia. Based on *Clagett*, counsel can move to strike the Commonwealth's evidence on "derivative" conclusions at the close of the Commonwealth's case. If successful, it may at least combat the cumulative effect of the evidence on the jury, particularly at sentencing.

Summary and analysis by:
Lisa M. Jenio

---

22 *Kyles* is particularly helpful when dealing with trial judges on this issue.

23 504 U.S. 719 (1992).

24 *Id.* at 723.

25 In *Clagett*, defense counsel objected to two veniremen as being unlawfully pro-death jurors: Holmes and Gunby. During *voir dire*, Holmes stated that it was "silly" of Clagett to confess "at the early stages of the charges." Holmes later stated that he did not know Clagett's state of mind at the time of his confession and twice stated that he could base his verdict solely on the evidence presented at trial. Holmes was selected as a member of the jury. *Clagett*, 252 Va. at 89-90, 472 S.E.2d at 269.

Responding to a lengthy question posed by Clagett containing hypothetical facts similar to the case, Gunby stated that he would impose the death penalty without considering a sentence of life imprisonment. When questioned further by the Commonwealth, Gunby stated that he had misunderstood the question and that he could consider imposition of life imprisonment. The defense used one of its peremptory strikes to remove Gunby from the panel. *Clagett*, 252 Va. at 90, 472 S.E.2d at 269.

26 487 U.S. 81 (1988). In *Ross*, the defendant was charged with capital murder. After the trial court denied defendant's motion to remove for cause prospective juror Huling, who had declared that he would vote to impose the death penalty automatically if the jury found defendant guilty, the defense exercised one of its peremptory challenges. The jury found defendant guilty and sentenced him to death. The defendant appealed his conviction, arguing that the failure to remove Huling for cause violated his Sixth and Fourteenth Amendment right to an impartial jury. The Court held that although the trial court erred in failing to remove Huling for cause under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), such failure did not abridge his right to a fair trial, since Huling did not sit on the jury. The Court stated, "Had Huling sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned." *Ross*, 487 U.S. at 85.

27 *See DeHart v. Commonwealth*, 19 Va. App. 139, 449 S.E.2d 59 (1994)(holding that where trial court erred in failing to strike a juror for cause, the prosecution's use of peremptory challenge to strike the juror did not remove any prejudice to defendant or cure any error in the trial court's refusal to strike the juror for cause.)

28 238 Va. 389, 384 S.E.2d 757 (1989). In *Buchanan*, the Supreme Court of Virginia held that an "excess conviction must be set aside and the related sentence vacated." *Id.* at 415, 384 S.E.2d at 772 (*citing Morris v. Commonwealth*, 228 Va. 206, 209, 321 S.E.2d 633, 634-35 (1984)).

29 *Clagett*, 252 Va. at 95-96, 472 S.E.2d at 273.

30 284 U.S. 299 (1932).