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SMITH v. ANGELONE 111 F.3d 1126 (4th Cir. 1997) United States Court of Appeals, Fourth Circuit

affected the judgment of the jury."[66] In applying this test to the facts, the court found that there was no "reasonable probability" that the "potentially false testimony" regarding Kirchheimer's involvement with drugs and alcohol affected the jury's judgment. The court reasoned that the jury heard quite a bit of evidence regarding Kirchheimer's past, including her arrest record for drugs and prostitution.

It is unclear exactly what effect the decision in *Pope* will have on future cases in which prisoners allege that the government knowingly used perjured testimony to obtain a conviction. It bears mention, however, that the Supreme Court has, on several occasions held that "a State may not knowingly use ... false testimony to obtain a tainted conviction."[67] Further, this principle applies even if "the false testimony goes only to the credibility of the witness."[68] In *Pope*, Kirchheimer's allegedly false testimony regarding her use of alcohol that night bore directly on her credibility; however, the court of appeals determined that there was no "reasonable probability" that it affected the jury.

The court's decision on this issue should be an important lesson to defense counsel: counsel should attempt to follow every lead and investigate every issue which is practicable, especially when a witness gives questionable testimony. It is also important, as always, for attorneys to make their objections as early in the proceedings as possible in order to avoid the dreaded procedural bar in subsequent proceedings.

Summary and Analysis by:
Brian S. Clarke

[66] *Pope*, 113 F.3d at 1371 (quoting *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994)). This test seems to favor the Commonwealth, as it did in this situation, to a significant degree.

[67] *Napue v. Illinois*, 360 U.S. 264, 269 (1959). *See United States v. Agurs*, 427 U.S. 97 (1976).

[68] *Id.*

SMITH v. ANGELONE

111 F.3d 1126 (4th Cir. 1997)
United States Court of Appeals, Fourth Circuit

FACTS

On July 24, 1988, Roy Bruce Smith drank approximately fourteen beers between 2:30 p.m. and 8:30 p.m. Mr. Smith was upset by his wife's failure to invite him to her company picnic as well as other indications that she might have left him. Shortly after 8:30 p.m. Mr. Smith went to sit on his front porch armed with a .357 magnum, a .44 magnum, and an assault rifle with a bayonet attached.[1] At 8:45 p.m., Mr. Smith's next-door neighbor, Mr. Cottrell, saw Mr. Smith sitting on the front porch. Mr. Smith told Cottrell that his wife had left him and "that he was 'not going to make it through the night.'"[2] While Mr. Smith and Mr. Cottrell talked, Mr. Smith fired a shot in the air, and, a few minutes later, fired a couple shots in the general direction of two kids across the street who had set off some fireworks.[3] Saying he "had enough", Mr. Cottrell went back inside his home to which Mr. Smith replied, "I hope somebody calls the police because I'll shoot the first one that arrives and I hope they shoot me in return."[4] Another neighbor, Mr. Wood, remonstrated Mr. Smith for firing his gun. As Mr. Wood walked away, Mr. Smith said that he was waiting for somebody to call the police and that "I'll probably shoot the first one that I see."[5] Mr. Wood called the police and warned them that Mr. Smith was armed.

Around 9:00 p.m. several police officers arrived but parked where their vehicles would not arouse Mr. Smith's suspicions. Officer Anderson saw Mr. Smith sitting on the front porch and told the dispatcher to "[h]ave a unit cruise around . . . to the rear of the townhouses."[6] This order was relayed to Sgt. John Conner, a uniformed officer, who was en route. At this point, Mr. Smith, who was still out front, suddenly got up and went inside when "some person . . . started across the street."[7] A few moments later Sgt. Conner radioed that, "I've got him in sight he's coming out the back door."[8] Other officers headed to the back of Mr. Smith's house. One of the officers, James K. Ryan, heard Sgt. Conner say, "[d]rop the rifle, drop the rifle now," followed by gunfire consisting of eight to twelve sharp cracks, a short pop, and then more sharp cracks.[9] Officer Ryan found Sgt. Conner lying on the ground in the alleyway. Officer Steven Bamford found Mr. Smith crouching down next to the back deck with the rifle across his lap. Officer Bamford got Mr. Smith to drop his rifle, but he refused to comply with Officer Bamford's order to put his hands on the ground, walk out, and lay flat. A struggle ensued as several officers tried to take the rifle and the two revolvers away from him. During the struggle he requested that the officers "[g]o ahead and kill [him]."[10] After Mr. Smith was handcuffed and placed in leg restraints he said "that Conner was the 'first priority, take care of him, take care of him. He's one of us, one of ours.'"[11] Sgt. Conner died several hours later. Although sustaining several wounds, it was a head wound that proved to be fatal.[12]

Mr. Smith was convicted of the willful, deliberate, and premeditated killing of a law enforcement officer for the purpose of interfering

[1] *Smith v. Commonwealth*, 239 Va. 243, 248-49, 389 S.E.2d 871, 873 (1990).

[2] *Id.* at 249, 389 S.E.2d at 873.

[3] *Id.*, 389 S.E.2d at 874.

[4] *Id.*

[5] *Id.*

[6] *Smith v. Commonwealth*, 239 Va. at 250, 389 S.E.2d at 874.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Smith v. Commonwealth*, 239 Va. at 251, 389 S.E.2d at 875 (alteration in original).

[11] *Id.*

[12] *Id.*

[13] This section has been changed to Virginia Code section 18.2-31(6).

with the performance of his official duties under Virginia Code section 18.2-31(f).[13] The jury found that the Commonwealth had proven both vileness and future dangerousness beyond a reasonable doubt and sentenced Mr. Smith to death. The trial court entered the sentence on May 26, 1989.[14] The Virginia Supreme Court affirmed the conviction and sentence.[15] The United States Supreme Court denied certiorari.[16] Mr. Smith filed a petition for habeas corpus relief in state court, which was dismissed on August 19, 1991.[17] He appealed, unsuccessfully, to the Virginia Supreme Court.[18] The United States Supreme Court again denied certiorari.[19] He next petitioned for a writ of habeas corpus in federal court under 28 U.S.C. § 2254. On June 10, 1996, the district court denied the writ.[20] Mr. Smith then appealed to the Court of Appeals for the Fourth Circuit raising four issues, including: (1) that his trial counsel was constitutionally ineffective in failing to seek the appointment of non-psychiatric experts; and (2) that the district court erred in finding his federal constitutional claims procedurally barred.[21]

HOLDING

The Court of Appeals affirmed the district court's denial of relief.[22]

ANALYSIS/ APPLICATION IN VIRGINIA

I. Ineffective Assistance of Counsel

At trial Mr. Smith's defense was essentially that he did not know that Sgt. Conner was a police officer and fired his gun only after he was first shot in the foot by someone he could not see. He testified that he fired only his rifle and denied shooting Sgt. Conner in the back of the head with his .357 magnum. The Commonwealth elicited testimony from three "experts" to establish that Mr. Smith shot Sgt. Conner in the back of the head at close range with his .357 magnum. Mr. Smith's trial counsel attempted to undercut this expert testimony through cross-examination. On federal habeas Mr. Smith alleged ineffective assistance of counsel due to his trial counsel's decision to rely solely on cross-examination rather than to seek the appointment of experts.[23]

Mr. Smith presented expert testimony to establish that he did not shoot Sgt. Conner in the back of the head with his .357 magnum. The court of appeals stated that "[e]ven in hindsight, and with the help of a battery of experts, Smith was not able to prove much more at the habeas hearing than his lawyers did at trial."[24] The court then, in typical *Strickland*[25] language, concluded, "Smith's lawyers made a **tactical decision** to rely on [the state's firearm expert] and other prosecution experts to dispute the prosecution's theory, and we cannot say in hindsight that this was an **unreasonable tactic**."[26]

While the court's first statement, that the testimony of Mr. Smith's experts did not prove much more than his lawyers did at trial, is arguable, its ultimate conclusion, that Mr. Smith did not satisfy the performance prong of the *Strickland* test, is correct. The court's analysis in this case, however, demonstrates a common error in reasoning in ineffective assistance of counsel claims. The court framed the issue as whether it was a reasonable tactical decision for Mr. Smith's trial counsel to rely on cross-examination **rather** than defendant's own expert to counter the Commonwealth's theory. This framing of the issue creates a false dichotomy. Mr. Smith's trial counsel was not confronted with the dilemma of choosing between cross-examination of the prosecution's experts **or** introducing defendant's own expert. The decision was whether to seek the appointment of defense experts at all. Thus, the real inquiry for the court should have been whether it was a reasonable tactical decision for Mr. Smith's trial counsel to rely solely on cross-examination to counter the prosecution's experts. Without knowing defense counsel's reason for not seeking the appointment of such experts, whether it was due to ignorance or strategy, it is impossible to assess whether that decision was a reasonable tactical one.

Trial counsel should take advantage of all available resources, especially the appointment of expert assistance, in defending a capital case. Under the rationale of *Ake v. Oklahoma*,[27] a Supreme Court case not cited by the court of appeals,[28] a capital defendant has a due process right to the appointment of an expert upon a showing that the expert is a "basic tool" that is essential to the defense.[29] Assuming that Mr. Smith would have been able to make such a showing, the prosecution's theory that he shot Sgt. Conner in the back of the head with his .357 magnum would have been significantly undermined.

The Commonwealth's first expert was Dr. Frances Field, an assistant medical examiner, with questionable qualifications as a ballistics expert.[30] Dr. Field testified that she found powder residue in Sgt. Conner's head wound that was consistent with a gunshot within three feet for a revolver or six feet for a rifle.[31] She further stated that the blood found on the barrel of Mr. Smith's .357 magnum was consistent with "blow back" from a gunshot within four to six inches of Sgt. Conner's head.[32] On cross-examination Dr. Field admitted that the blood on the muzzle of the .357 magnum was not necessarily the result of "blow back" and that the bullet that caused Sgt. Conner's back wound might have ricocheted.[33] Compare Dr. Field's concession on cross-examination, that the blood on the .357 magnum was not necessarily consistent with "blow back", with the proffered testimony of Stewart James, a blood

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[14] *Smith v. Angelone*, 111 F.3d 1126, 1128 (4th Cir. 1997).

[15] *Smith v. Commonwealth*, 239 Va. 243, 389 S.E.2d 871 (1990).

[16] *Smith v. Virginia*, 498 U.S. 881 (1990).

[17] *Smith v. Angelone*, 111 F.3d at 1128.

[18] *Id.*

[19] *Smith v. Virginia*, 506 U.S. 848 (1992).

[20] *Smith v. Angelone*, 111 F.3d at 1128.

[21] *Smith v. Angelone*, 111 F.3d at 1131, 1133. Smith's other two claims, that the newly enacted *in forma pauperis* filing fee provisions of the Prison Litigation Reform Act apply to habeas proceedings and that the district court's denial of Smith's motion to amend his habeas petition was an abuse of discretion, will not be discussed in this summary.

[22] *Id.* at 1128.

[23] The court notes that there was uncertainty on appeal over whether the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") new evidentiary standard for habeas corpus actions, as contained in Title I of that Act, should be applied in this case. The court did not answer that uncertainty. Instead, it decided that even under the more expansive prior scope of review, Smith was not entitled to relief. *Id.* at 1131 n. 2. Defense counsel should be aware that for the next few years courts will be wrestling with this uncertainty as to when AEDPA takes effect on habeas petitions and should be on the lookout for when it does.

[24] *Smith v. Angelone*, 111 F.3d at 1132.

[25] *Strickland v. Washington*, 466 U.S. 668 (1984).

[26] *Smith v. Angelone*, 111 F.3d at 1132-33 (emphasis added).

[27] 470 U.S. 68 (1985).

[28] *See Smith v. Angelone*, 111 F.3d at 1132 (where the court cites two Fourth Circuit cases for the proposition that an indigent defendant has a right to assistance of an expert in certain circumstances but also indicates that the United States Supreme Court has not ruled on the issue).

[29] *See* Virginia Capital Case Clearinghouse Trial Manual, pp. 29-53, on what is required to make an *Ake* showing.

[30] The extent of her qualifications were that she had received training in and read about the "distance of weapons . . . and the cause and effect of wounds," and was usually allowed to testify about such things. *Smith v. Commonwealth*, 239 Va. at 257, 389 S.E.2d at 878.

[31] *Smith v. Angelone*, 111 F.3d at 1131.

[32] *Id.*

[33] *Id.*

stain expert, on federal habeas. Mr. James concluded that the blood on the .357 magnum could not have been "blow back."[34] The unequivocal conclusion of Mr. James, a conclusion rendered by an expert more clearly within his field of expertise, goes much further toward undermining the Commonwealth's theory regarding the .357 magnum than does Dr. Field's equivocal concession on cross-examination.

The Commonwealth produced two other experts to substantiate its theory regarding the .357 magnum. Julien Mason, a firearms identification expert, testified that the bullet abrasions on Smith's fence were consistent with a .357 magnum.[35] Donald McClanrock, a forensic scientist, testified that Mr. Smith had more barium gas on his left hand than right hand, which was consistent with his having shot a revolver with his left hand. On cross-examination, Mr. Smith's trial counsel was able to get Mr. Mason to admit that the same bullet that caused the back wound may have caused the head wound, that he found no gunpowder residue in Sgt. Conner's head tissue, and that he could not determine when the spent .357 casings had been fired.[36] Mr. McClanrock conceded on cross- examination that the gases on Mr. Smith's hand could have come from the rifle.[37]

Mr. Smith's trial counsel clearly obtained valuable concessions from the prosecution experts. But again, consider how much more the prosecution's theory would have been refuted by following cross-examination with expert testimony. On federal habeas, for example, Gary Laughlin, a forensic microscopist and metallurgist, testified that the metal fragments in the head wound **could not have come** from the .357 magnum and that there was no powder residue in the head wound. Dr. Vincent DiMaio, a forensic pathologist, stated that the head wound **was caused** by the rifle and that it was fired from at least two or more feet away. Finally, Lucien Haag, a firearms expert, concluded that there was evidence that Mr. Smith did not fire the .357 at all that night and that the bullet that wounded Mr. Smith's foot was more consistent with him not facing Sgt. Conner when he was hit.[38]

The testimony of experts would have substantially undermined the prosecution theory, much more so than mere concessions on cross-examination. Moreover, it is quite likely that with the assistance of such experts Mr. Smith's trial counsel could have elicited even more concessions from the prosecution's experts. Although the failure to seek the appointment of such experts did not violate *Strickland*, and so long as the court continues to frame the *Strickland* inquiry to create a false dichotomy it probably never will, trial counsel should hesitate before foregoing the defendant's due process right to expert assistance.

II. Federal Constitutional Claims Procedurally Barred

The district court found that Mr. Smith had procedurally defaulted a number of his federal constitutional claims, apparently, because he failed to file them along with his state constitutional claims on state habeas. The court of appeals did not explicitly say that this was the reason for default; further, there is no published district court decision from which one can ascertain the reason. Nevertheless, Mr. Smith claimed as "cause" for his default "his state habeas attorney's refusal to present his federal claims, despite Smith's orders."[39] The court of appeals acknowledged that "[i]t does appear that Smith's state habeas counsel ignored Smith's requests to file federal constitutional claims along with his state constitutional claims."[40] Moreover, the court of appeals does not mention any other basis for defaulting Mr. Smith's claims.

The court of appeals correctly rejected Mr. Smith's claim that his state habeas attorney's refusal to present his federal constitutional claims in state habeas constituted "cause." The United States Supreme Court, in *Coleman v. Thompson*,[41] directly answered Mr. Smith's contention when it stated, "[b]ecause Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas."[42] The court of appeals then, relying upon *Slayton v. Parrigan*[43] and *Hawks v. Cox*,[44] made the following observation in a footnote:

> Smith has not been denied review of [his federal constitutional] claims; rather, those claims have been fully reviewed on direct appeal. Indeed, even if those claims had been pursued on state habeas, they would almost certainly have been barred because they had already been raised and rejected on direct appeal, and Virginia bars repetitive review of identical issues on habeas.[45]

The court's reasoning, as to why Mr. Smith's claims are procedurally defaulted, goes as follows: Mr. Smith was procedurally barred from raising his federal constitutional claims on federal habeas because he did not include them in his state habeas petition. Mr. Smith was procedurally barred from raising his federal claims on state habeas because those claims were raised and rejected on the merits on direct appeal. Thus, to follow the court's reasoning, Mr. Smith was barred from raising his federal constitutional claims on federal habeas because they were raised and rejected on the merits by the Virginia Supreme Court on direct appeal. Not only does *Slayton* not stand for the proposition for which it is cited, but the court's observation shows a lack of understanding about what is meant by a procedural bar to federal habeas review. More importantly, the court's observation indicates that Smith's federal constitutional claims should not, in fact, have been procedurally barred from federal review.

Slayton held that claims raised for the first time on state habeas, that could have been but were not raised on direct appeal, cannot be raised on state habeas.[46] Obviously that holding is completely irrelevant here because, as the court noted, Mr. Smith's federal constitutional claims were raised, reviewed, and rejected by the Virginia Supreme Court on direct appeal. The Virginia Supreme Court in *Hawks* specifically held that, absent changed circumstances, claims raised and decided on direct appeal cannot be raised on state habeas.[47] In *Turner v. Williams*[48], the court of appeals for the Fourth Circuit explained the difference between

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[34] *Id.* at 1132.

[35] *Id.* at 1131.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1132 n. 3. The court dismisses Mr. Haag's latter conclusion as being irrelevant because "the direction Smith was facing was not pivotal to the prosecution's case." The evidence of course is relevant because it corroborates Mr. Smith's testimony that he was turning to walk back into his house when he "saw a 'flash' out of the corner of his eye and felt something hit his right foot." *Smith v. Commonwealth*, 239 Va. at 252, 389 S.E.2d at 875. By corroborating this aspect of his testimony, Mr. Smith's contention that he fired only in response to being fired upon is more believable than without such corroborative evidence.

[39] *Id.* at 1133.

[40] *Id.*

[41] 501 U.S. 722 (1991).

[42] *Coleman*, 501 U.S. at 757.

[43] 215 Va. 27, 205 S.E.2d 680 (1974).

[44] 211 Va. 91, 175 S.E.2d 271 (1970).

[45] *Smith v. Angelone*, 111 F.3d at 1133 n. 4.

[46] *Slayton*, 215 Va. at 30, 205 S.E.2d at 682.

[47] *Hawks*, 211 Va. at 95, 175 S.E.2d at 274.

[48] 35 F.3d 872 (4th Cir. 1994).

the *Hawks* rule and a true procedural default rule such as in *Slayton*. It stated:

> *Slayton* is a valid procedural default rule . . . *Hawks*, however, is not a true procedural default rule; rather, it is more in the nature of a collateral estoppel rule. *Hawks* cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal. . . . Thus, we must ascertain whether Turner raised on direct appeal the aforementioned challenges to the application of the vileness factor. If he did, he is not procedurally barred from raising them here.[49]

According to the observation by the court of appeals in its footnote, that Smith's federal claims were raised and rejected on the merits by the Virginia Supreme Court on direct appeal, it follows that the district court was not prevented from reviewing Smith's federal constitutional claims. Thus, while the court of appeals' conclusion that Smith's state habeas counsel's errors could never constitute cause is correct, that conclusion is as irrelevant as *Slayton* is to this case. As *Turner* makes clear, Mr. Smith's federal constitutional claims cannot be defaulted by his counsel's failure to include them in his state habeas petition because those claims had already been raised and rejected by the Virginia Supreme Court on direct appeal.

It is difficult to decide what to recommend to habeas counsel in light of the court's holding. On the one hand, the law does not require habeas counsel, absent changed circumstances, to raise the same federal constitutional claims in state habeas that were raised and rejected on the merits on direct appeal in order to preserve them for federal habeas review. On the other hand, if a federal court does not understand that such claims do not need to be raised on state habeas to be preserved it might mistakenly find those claims to be procedurally defaulted for that very reason. In the Fourth Circuit it is always best to be overly cautious and prepared to explain to the court the crucial distinction between *Slayton* and *Hawks*.

Summary and analysis by:
Tommy Barrett

[49] *Turner*, 35 F.3d at 890 (citing *Yl st v. Nunnemaker*, 501 U.S. 797, 803-07 (1991)).

BECK v. COMMONWEALTH

253 Va. 373, 484 S.E.2d 898 (1997)
Supreme Court of Virginia

FACTS

Before the court, sitting without a jury, Christopher Beck pleaded guilty to: (1) capital murder of his cousin Florence Marie Marks during or subsequent to rape or in the commission of robbery while armed with a deadly weapon; (2) capital murder of William Miller in the commission of robbery while armed with a deadly weapon; (3) capital murder of David Stuart Kaplan in the commission of robbery while armed with a deadly weapon; (4) statutory burglary; (5) rape; (6) three offenses of robbery; and (7) seven offenses of the use of a firearm.[1]

The facts surrounding the murders are mainly drawn from statements Beck made to the police after his arrest.[2] According to Beck, he devised a plan to kill Miller, his former employer, several days before the murders actually occurred.[3] On June 5, 1995, Beck took a bus from his home in Philadelphia, Pennsylvania, to Washington, D.C. The next day, at approximately 11 a.m., Beck arrived in Arlington and went to the house shared by the three victims. He broke into the house through a basement window.[4]

After knocking a hole through to the first floor of the house, Beck went to Miller's apartment and took a loaded .22 caliber semi-automatic pistol belonging to Miller. Beck loaded a spare magazine for the weapon, and returned to the basement to wait for Miller.[5]

Sometime during the afternoon, Beck heard noises and realized someone was coming into the basement. He raised the pistol, and as the door opened, he closed his eyes and fired two shots. Upon opening his eyes, Beck found his first victim, Florence Marks, lying on the basement floor. According to Beck, he tried to make it look like Marks had been raped by cutting off her clothes, stabbing her in the right buttock, throwing a condom he had found in the washer onto the floor, kicking her, and penetrating her vagina with a hammer.[6] Beck reasoned that if the police believed Marks had been raped, then they would think a stranger, and not a family member, had murdered her.

[1] *Beck v. Commonwealth*, 253 Va. 373, 376, 484 S.E.2d 898, 900 (1997).

[2] When the Arlington Police first interviewed Beck, he claimed that at the time of the murders he was transporting bikes from Tennessee. After a friend failed to corroborate Beck's story, Beck confessed to the police that he had committed the three murders. Upon returning to Arlington after his arrest, Beck gave a full statement to the police. While making his statement, the police gave Beck an opportunity to say something on his behalf. He said:

> That ah I know what is like to kill somebody, its one of the worst feelings you can live with that I don't know that it is pretty painful that is one of the things that you can't go to sleep and I'm so sorry that I did, I'm so sorry that I had all that anger built up, I should had went to a counselor or something could have prevented it. I don't know, I'm sorry but I know this is going to be pretty hard for people to believe what happened. *Id.* at 378, 484 S.E.2d 901-02.

[3] *Beck*, 253 Va. at 376, 484 S.E.2d at 901.

[4] *Id.* at 376-77, 484 S.E.2d at 901.

[5] *Id.* at 377, 484 S.E.2d at 901.

[6] *Id.* According to the testimony of the assistant chief medical examiner, Marks' autopsy confirmed everything Beck said in his statement except Beck's remark regarding the "staged" rape. The Commonwealth presented evidence from the used condom found in the house, asserting that genetic material of both Marks and Beck was found in the condom. *Id.* at 378-79, 484 S.E.2d at 902.