Capital Defense Journal

Volume 11 | Issue 1 Article 9

Fall 9-1-1998

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I. Facts

The petitioner, Arthur Martin Boyd, Jr. ("Boyd"), and the victim, Wanda Mae Phillips Hartman ("Hartman") lived together for three and one-half years.[1] In April of 1982, Hartman moved out and returned to her parents' house.[2] Boyd protested this decision and, subsequent to her move, attempted to reconcile with Hartman.[3] Eight days prior to the murder, Boyd visited Hartman's parents' house where Lawrence Phillips, Hartman's father, "instructed Boyd 'to get off of [his] property and stay off of it.'"[4] In response, Boyd allegedly threatened Hartman, "I'll see you like a German submarine, when you are not expecting it."[5] On Monday, August 2nd, an arrest warrant was sought and served on Boyd for trespassing.[6]

Following a night of drinking and drug use, Boyd called Hartman and spoke to her for approximately two hours.[7] During the course of this conversation, Hartman revealed that she planned to go to the Mayberry Mall in Mount Airy, North Carolina the following day.[8] Following the phone call, Boyd resumed his drinking and drug use at a bar.[9] Around noon, the bartender refused to serve Boyd any more alcohol and Boyd took a taxi to the Mayberry Mall.[10] Once at the mall, Boyd went to a store that sold knives and purchased a lock-blade knife.[11]

Boyd spotted Hartman and her mother, approached them and requested that Hartman step outside to speak with him.[12] According to the record, Boyd and Hartman sat on a curb outside the mall, near the car wash, "apparently discussing the possibility of a reconciliation."[13] At approximately 2:00 p.m.,

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1. Boyd v. French, 147 F.3d 319, 322 (4th Cir. 1998).
2. *Boyd*, 147 F.3d at 322.
3. *Id.*
4. *Id.* (citation omitted).
5. *Id.* (internal quotation marks omitted).
6. *Boyd*, 147 F.3d at 322.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Boyd*, 147 F.3d at 322.
11. *Id.* The salesman who waited on Boyd testified at trial that "[a] lock-blade knife is a knife that once it's opened it is locked in an open position. It cannot come back against your hands or fingers or cut you in any way. It's locked in." *Id.*
12. *Id.*
13. *Id.* at 322-23.

Hartman's mother approached them and indicated that it was time to leave.[14] When Boyd begged her to stay with him for a few more minutes, Hartman told him "that she had lived in hell for three months, that if he was going to kill her just go ahead and kill her and get it over with."[15] At that point, Boyd brandished his recently purchased knife at Hartman, assuring Hartman that he would not hurt her.[16] However, Boyd soon commenced stabbing Hartman.[17] Despite Hartman's efforts to defend herself as well as her mother's unsuccessful attempt to intervene, Hartman died from the infliction of thirty-seven stab wounds in the presence of numerous witnesses, including her eight-year-old daughter.[18] Boyd was apprehended quickly in the parking lot and the murder weapon was recovered from under a nearby vehicle.[19]

Boyd was charged and convicted of first-degree murder in violation of section 14-17 of the North Carolina General Statutes.[20] At trial, Boyd did not contest that he had inflicted the fatal wounds. He did, however, present the testimony of two friends with whom he had been drinking prior to the murder as well as that of the bartender who refused to serve Boyd prior to his departure for the mall.[21]

At sentencing, Boyd spoke to his relationship with Hartman, their break-up, his efforts at reconciliation, as well as his strong love for Hartman.[22] Further, Boyd testified that he sought mental health assistance when Hartman terminated their relationship, that he repeatedly attempted to reconcile with Hartman, that he was experiencing difficulties in sleeping, and that he was abusing alcohol and illegal drugs.[23] During sentencing, Boyd's emotional history of abandonment was also explored. This consisted of testimony regarding the desertion of Boyd's immediate family by his father when Boyd was very young and the death of Boyd's grandfather, with whom he was very close, at age five.[24] The defense then called Dr. Jack Humphrey, a professor of criminology at the University of North Carolina, to testify as to the relationship between this pattern of emotional loss and Boyd's criminal behavior.[25] The trial court sustained the State's objection to

14. *Boyd*, 147 F.3d at 323.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Boyd*, 147 F.3d at 323. When Hartman's mother tried to rescue her daughter, Boyd threw the 76-year-old woman to the ground.

19. *Id.*

20. *Id. See also* N.C. GEN. STAT. § 14-17 (1993).

21. *Id.*

22. *Boyd*, 147 F.3d at 323. Boyd testified that his love for Hartman was the "most beautiful thing that's ever happened to me. It's the best thing that ever happened in my life. I loved her, more than anybody, I guess, could ever love anybody." *Id.* (citation and internal quotation marks omitted).

23. *Id.*

24. *Id.*

25. *Id.* at 323-24.

the use of Dr. Humphrey's testimony as it was elicited on voir dire.[26]

In upholding Boyd's conviction and sentence on direct appeal, the North Carolina Supreme Court held that the exclusion of Dr. Humphrey's testimony was not error because it was not mitigating.[27] Boyd unsuccessfully sought postconviction relief in state court by filing a motion for appropriate relief ("MAR").[28] Thereafter Boyd filed a federal habeas petition that was also denied.[29] He appealed the denial to the United States Court of Appeals for the Fourth Circuit.

II. Holding

The United States Court of Appeals for the Fourth Circuit, held that (1) although the testimony of Dr. Humphrey may have been characterized as mitigating, the sentencing court's failure to admit this testimony was harmless;[30] (2) the jury instructions did not violate the Constitution;[31] (3) the prosecution's closing argument, while improper, did not deprive Boyd of a fair trial;[32] (4) the prosecution's knowing use of perjured testimony did not constitute a due process violation;[33] and (5) the district court did not err in holding that federal habeas review of the use of Boyd's nolo contendere plea to establish a prior violent felony was barred because it was procedurally defaulted.[34]

III. Analysis/Application in Virginia

A. Exclusion of Expert Testimony

The Fourth Circuit turned first to the sentencing court's refusal to admit Dr. Humphrey's testimony linking Boyd's criminal acts to the circumstances of his childhood as mitigating evidence. Dr. Humphrey's testimony, in addition to having significance in mitigation, was also useful to rebut the State's case for death. He interviewed Boyd and compared Boyd's history and characteristics to those of the subjects of his research. He concluded that the class of people who

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26. *Boyd*, 147 F.3d at 324.

27. *Id. See also* State v. Boyd, 319 S.E.2d 189, 197-99 (N.C. 1984).

28. *Id.* This motion was made pursuant to section 15A-1415 of the North Carolina General Statutes. *Id.*

29. *Id.* at 325.

30. *Boyd*, 147 F.3d at 325-28.

31. *Id.* at 328. The court dismissed this argument by referencing precedent holding identical jury instructions not to be violative of the Constitution. *Id.* Accordingly, the analysis of this claim is not discussed further in this case note.

32. *Id.* at 328-29.

33. *Id.* at 329-31.

34. *Boyd*, 147 F.3d at 321-22. This claim was procedurally defaulted under North Carolina state law and is not discussed further in this analysis. Defense counsel should be aware that the Virginia law regarding the nolo contendere plea is similar, if not more stringent.

commit murder under similar circumstances are, among other things, less likely to be violent in the future than the homicidal act itself might suggest.[35]

The Fourth Circuit found the exclusion of Dr. Humphrey's testimony to be error, but harmless error.[36] Defense counsel in Virginia, where future dangerousness is explicitly an aggravating factor, might well consider the use of such expert testimony. If this tool is utilized, it is important to ensure that the expert interviews or tests the client. This may well be essential to admissibility of the expert's testimony.

The determination that exclusion of Dr. Humphrey's testimony was harmless error was made by employing the habeas review standard of *Brecht v. Abrahamson*,[37] a more forgiving standard to the state, the beneficiary of the error. *Brecht* asks whether the error had "substantial and injurious effect or influence in determining the jury's verdict."[38] As a practical matter, this standard rewards state courts for failure to correct constitutional error. On direct appeal, the applicable standard is that announced in *Chapman v. California*;[39] that is, the state (again, the beneficiary of the error) must show the error to have been harmless beyond a reasonable doubt.[40] At least in those situations where the Supreme Court of Virginia has not expressly ruled on an issue, defense counsel should consider urging the reasoning found in *Orndoff v. Lockhardt*,[41] an Eighth Circuit decision, that applies *Chapman*.[42]

B. Commonwealth's Closing Argument

The court of appeals also evaluated the prosecution's closing argument in light of due process requirements. Boyd challenged the argument on the basis that the prosecution made references to his personal opinions, biblical quotations, the appropriateness of the death penalty for Boyd, and to a later-repudiated system of mandatory capital punishment.[43] The court of appeals determined that the State's argument was "improper" and went on to question whether it rendered the sentencing trial "fundamentally unfair."[44] The court found that the

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35. *Id.* at 326.

36. *Id.* at 326-28.

37. 507 U.S. 619 (1993).

38. Brecht v. Abrahamson, 507 U.S. 619, 631 (1993) (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted).

39. 386 U.S. 18 (1967).

40. Chapman v. California, 386 U.S. 18, 22-24 (1967).

41. 998 F.2d 1426 (8th Cir. 1993).

42. Orndorff v. Lockhardt, 998 F.2d 1426, 1429 (8th Cir. 1993) (reasoning that because the "state courts did not have the opportunity to review the error at all... th[e] rule announced in *Brecht* does not apply and that the *Chapman* harmless error standard is the appropriate test in this case").

43. Boyd v. French, 147 F.3d 319, 328-29 (4th Cir. 1998)

44. *Boyd*, 147 F.3d at 329 (citing Bennett v. Angelone, 92 F.3d 1336, 1345-46 (4th Cir.), *cert. denied*, 117 S. Ct. 503 (1996)).

following required a finding that the prosecution's closing argument did not deprive Boyd of a fair trial: (1) the fact that the evidence pointed overwhelmingly to Boyd's guilt; (2) the heinous nature of the crime; (3) Boyd's stipulated prior history of violence; (4) the fact that some of the biblical references were made in response to Boyd's explanation for his motivation for the commission of the murder; and (5) that the trial judge instructed the jurors that the comments made by attorneys were not evidence on which they were permitted to base their verdict.[45]

The court's familiar treatment of impermissible argument, that is, to condemn the prosecution's behavior and then forgive it based on harmless error, highlights the limited means available to defense counsel to combat the practice. Even in order to preserve the merits of the issue from default, however, objection must be made on due process grounds at the moment the offending words are spoken.[46]

Improper arguments are also unethical. When the United States Supreme Court shielded prosecutors from civil liability, it did so in part in reliance on the profession's ability to police itself.[47] In aggravated instances of prosecutorial misconduct, defense counsel should consider filing complaints with the Virginia Bar pursuant to Disciplinary Rule 7-105[48] or Rule 3.4(f) of the Proposed Rules,[49] in the event these rules are adopted.

C. Intoxication and the Issue of Premeditation

Boyd also claimed that his conviction resulted from the prosecution's illegal use of perjured testimony and was therefore violative of due process requirements. Either the prosecution's solicited use or passive acceptance of perjured testimony violates due process.[50] The responsibility for the knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecutor. This relationship was explained by the Fourth Circuit in *Barbee v. Warden*[51] as follows:

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45. *Id.*

46. *See* Russo v. Commonwealth, 148 S.E.2d 820, 825 (Va. 1966) ("Objection to improper argument of counsel should be made at the time and the court should be requested to instruct the jury to disregard it.... Failure to make timely objection ordinarily constitutes a waiver.") (citations omitted).

47. *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.").

48. VA. CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-105 (1997).

49. *Proposed* VA. RULES OF PROFESSIONAL CONDUCT, Rule 3.4.

50. Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998) (citing Giglio v. United States, 405 U.S. 150, 153 (1972); & Napue v. Illinois, 360 U.S. 264, 269 (1959)).

51. 331 F.2d 842 (4th Cir. 1964)

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the non-disclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. [52]

A due process violation exists when "there is *any* reasonable likelihood that the false testimony could have affected the judgement of the jury."[53]

In Boyd's case, the State's witness testified at trial that Boyd was not, or did not appear to be, intoxicated.[54] However, during Boyd's subsequent MAR hearings, the same witnesses testified that they believed Boyd to be under the influence of alcohol around the time of the murder.[55] The court of appeals declined to hold that testimony by the officers that Boyd appeared to be under the influence would have affected the verdict of the jury.[56]

With respect to the use of evidence indicating intoxication, under Virginia law, intoxication may, in the rare circumstance, negate premeditation. This defense is available only in first degree and capital murder cases[57] and the threshold showing for this argument is very high.

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52. Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) (footnote omitted).

53. *Boyd*, 147 F.3d at 330 (internal quotation marks and citations omitted) (emphasis added).

54. *Id.*

55. *Id.* at 330-31.

56. *Id.* at 331. The following rationale was offered for this holding:

> The jury heard a wealth of testimony concerning the amount of alcohol and drugs that Boyd had ingested in the hours prior to the murder; undoubtedly the jury recognized that Boyd must have been impaired to some degree. However, the testimony of the lay witnesses and police officers established that despite the alcohol and drugs, Boyd's demeanor prior to and immediately after the murder was calm and controlled. As such, testimony by the officers that Boyd was under the influence would not have affected the verdict of the jury.

Id.

57. *See* Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998).