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Cardwell v. Greene
152 F.3d 331 (4th Cir. 1998)

I. Facts

On September 9, 1993, Kevin DeWayne Cardwell ("Cardwell") was convicted of two counts of capital murder in the death of fifteen year-old Anthony Brown ("Brown"). The murder occurred on November 20, 1991, incident to an abduction and robbery. Brown, a narcotics runner, arrived in Richmond with drugs strapped to his leg. Cardwell had been alerted to Brown's arrival and, with the aid of a friend, managed to abduct Brown. After obtaining the narcotics, Cardwell brought Brown to a wooded area behind a shopping center and killed him. Brown's body was found two months later, an autopsy revealing knife wounds to the wrist and neck and two gunshot wounds to the head.[1]

A year and a half separated the murder and Cardwell's indictment. Cardwell was appointed counsel on May 20, 1993, and trial was scheduled for July 19, 1993, a mere two months later. Following the appointment of co-counsel, a June 24 defense motion for a continuance was granted, rescheduling the trial for September 7.[2] After granting the continuance the trial court warned the parties that any other cause of delay should be promptly addressed and that later continuance requests would not be granted.[3]

Defense counsel moved to have Dr. Randy Thomas ("Dr. Thomas"), a mental health expert, appointed. The trial court granted the motion on August 3. When defense counsel contacted Dr. Thomas after his appointment to the case, Dr. Thomas's office informed counsel that he was on vacation and would return in late August. Upon learning that Dr. Thomas would need one month and a half to perform his evaluation of Cardwell, defense counsel, on August 23, moved for a continuance. The trial court denied the motion on the 24th of August and the trial began, as scheduled, on September 7.[4]

Cardwell's trial lasted two days, resulting in jury convictions on two counts of capital murder in addition to abduction, robbery and three counts of using a firearm in the commission of a felony. The sentencing phase started on the 9th of September with a renewed motion from defense counsel for a continuance. Defense counsel included a preliminary report from Dr. Thomas, who suggested that further investigation of "Cardwell's family history, the possibility of severe abuse of drugs and alcohol, and the possibility that Cardwell had suffered brain dysfunction or a learning disability as a consequence of a childhood head injury"

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1. Cardwell v. Greene, 152 F.3d 331, 333-34 (4th Cir. 1998).

2. The continuance meant that the trial would be held less than four months, as opposed to two months, after the indictment.

3. *Cardwell*, 152 F.3d at 334.

4. *Id.*

was warranted.[5] The court denied the motion, and after the defense called only one witness in mitigation,[6] the jury recommended a sentence of death.[7]

On November 10, 1993, the trial court imposed the death sentence. At this hearing, the trial judge asked defense counsel if they wished to submit any additional evidence with regard to sentencing. Fearing that no amount of mitigating evidence would sway the trial judge, defense counsel declined the invitation, deciding to utilize any further evidence during the appeal process.[8] Cardwell's convictions and sentence were affirmed on direct appeal by the Supreme Court of Virginia in 1994. Certiorari was denied by the United States Supreme Court in May of 1995.[9]

The trial court appointed habeas counsel on July 7, 1995, and an incomplete petition was filed the following month. In addition, counsel filed motions to have experts appointed in preparation for the habeas petition. The Supreme Court of Virginia denied Cardwell's motions for the appointment of experts on December 15, 1995, and gave counsel 30 days to amend the habeas petition. An amended petition was filed on January 23, 1996. In May, the Supreme Court of Virginia denied Cardwell's petition, stating that one issue had been defaulted and "finding no merit in other complaints raised by prisoner."[10]

At federal habeas, Cardwell again moved for the appointment of experts. The district court granted this motion, appointing a neuropsychiatrist and a clinical psychologist. The reports generated from these experts were filed with the federal court on March 17, 1997, with a request for an evidentiary hearing. The court expanded the record to include the expert reports, but denied Cardwell's motion for an evidentiary hearing.[11] With regard to Cardwell's ineffective assistance of counsel claim, the district court found that trial counsel had acted below an "objective standard of reasonableness,"[12] because counsel failed "to secure the services of a mental health expert in a timely fashion, and . . . to move for a continuance in a timely fashion when counsel's delay jeopardized the ability of the appointed expert to prepare an evaluation in time for trial."[13] The district

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5. *Id.*

6. *Id.* The defense called Mrs. Donzell Cardwell, the grandmother of the defendant.

7. *Cardwell*, 152 F.3d at 334. The jury's finding of guilt came 111 days after counsel was appointed to Cardwell's case. The jury's recommendation of the death sentence came 112 days after counsel was appointed to Cardwell's case.

8. *Id.* at 335. Defense counsel apparently made this decision soon after the trial. Dr. Thomas never completed his evaluation of Cardwell. Counsel believed that a negative finding by the trial judge would have undercut Cardwell's claim at the appellate level. In addition, the initial presentation of mitigating evidence to a sentencing jury is fundamentally different from attempting to persuade a judge that there is "good cause" to overturn a jury's death sentence. *See* VA. CODE ANN. § 19.2-264.5 (Michie 1995).

9. *Id.*

10. *Id.* The Supreme Court of Virginia provided no evidentiary hearing or guidance as to its denial of the majority of issues involved in the petition other than the explanation found in the quote.

11. *Cardwell*, 152 F.3d at 335.

12. Strickland v. Washington, 466 U.S. 688, 694 (1984).

13. *Cardwell*, 152 F.3d at 334 (quoting Cardwell v. Netherland, 971 F.Supp. 997, 1016 (E.D.

court then concluded that Cardwell had not demonstrated the occurrence of prejudice as a result of his attorney's failure.[14] The district court granted the Commonwealth's motion to dismiss the petition.[15] Cardwell appealed the denial of habeas relief to the United States Court of Appeals for the Fourth Circuit.[16]

II. Holding

Affirming the dismissal, the United States Court of Appeals for the Fourth Circuit held that Cardwell was not entitled to an evidentiary hearing in order to develop the factual basis for his ineffective assistance of counsel claim.[17] In addition, the Fourth Circuit held that Cardwell had not been denied effective assistance of counsel.[18]

III. Analysis/Application in Virginia

A. Capital Murder Preparation Time

Perhaps the most important appellate issue in *Cardwell* was never addressed by the court. It is the question of whether Cardwell was denied the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution when he was forced to trial within four months. During state proceedings, the matter was summarily dismissed, because under Virginia law, denial of a "continuance of a trial is a matter within the sound discretion of a trial court, and its ruling will not be reversed on appeal unless it is plainly wrong."[19] The federal courts did not address this important matter because it was not raised on federal grounds. Four months is insufficient time to provide effective assistance in any capital case, and that was particularly true in *Cardwell.*

Cardwell was denied effective assistance of counsel when the trial court denied his motion for a continuance after Cardwell's attorney discovered that the court-appointed mental health expert would not be able to conclude a full mental health examination until after September 7, 1993, the scheduled commencement of the trial. The denial of the continuance acted to deny Cardwell his right to expert assistance in mitigation, including the development of mental health evidence for mitigation use during the sentencing phase of trial.[20]

Va. 1997)).

14. *Id.*

15. *Id.* at 335.

16. *Id.* at 336.

17. *Cardwell,* 152 F.3d at 339.

18. *Id.* at 339-41.

19. Cardwell v. Commonwealth, 450 S.E.2d 146, 151 (Va. 1994). *See also* Lomax v. Commonwealth, 319 S.E.2d 763, 765 (Va. 1984); Parish v. Commonwealth, 145 S.E.2d 192, 195 (Va. 1965).

20. VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 1998). Section 19.2-264.3:1(A) states that upon a "motion by the attorney for the defendant charged with or convicted of capital murder [provided that said defendant is indigent], the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition." *Id.*

Defense counsel should not hesitate to raise a Sixth Amendment claim whenever the government acts to deny essential resources, including time. This form of institutional ineffective assistance claim is not aimed at deficient individual performance by lawyers. It places responsibility for deficient performance where it belongs, with the Commonwealth.

B. Denial of an Evidentiary Hearing

The denial at state and federal habeas of an evidentiary hearing to develop mental health mitigating evidence represents the first of Cardwell's claims addressed by the Fourth Circuit. The Commonwealth argued that the defendant's failure to develop facts at the state court level prevents the presentation of these facts during federal habeas proceedings.[21] Rejecting a blanket denial of evidentiary hearings at the federal level, the Fourth Circuit cited the need for a threshold determination of the reason for the failure to develop the facts in question.[22] The court determined that an evidentiary hearing could be denied under the Antiterrorism and Effective Death Penalty Act ("AEDPA")[23] when the failure of factual development occurred as a result of the petitioner's actions or omissions.[24] The denial of Cardwell's motion for an evidentiary hearing resulted from the state court's determination that a hearing was unnecessary, not because of defense counsel's failure or omission to act at the state level.[25] AEDPA places no automatic bar on a petitioner's motion for an evidentiary hearing at the federal habeas level in the circumstances involved in Cardwell's petition.[26]

The Fourth Circuit also looked to federal jurisprudence in determining when a motion for an evidentiary hearing should be granted. Citing *Townsend v. Sain*,[27] the Fourth Circuit stated that a federal court has the power "to grant an

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21. *Cardwell*, 152 F.3d at 338. The Commonwealth relies here on an expansive interpretation of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (holding that when a petitioner has caused deficiencies in the record the state court has not been afforded a full and fair opportunity to address and resolve the claim on the merits; this leads to default of the claim). The Commonwealth relies on *Keeney* and 28 U.S.C. § 2254(e)(2) in arguing that an evidentiary hearing is barred by petitioner's failure to develop facts in state court.

22. *Cardwell*, 152 F.3d at 337-38. Quoting *Burris v. Parke*, 116 F.3d 256, 259 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 462 (1997), the Fourth Circuit refused to allow the state to "insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts." Citing *McDonald v. Johnson*, 139 F.3d 1056 (5th Cir. 1998), the court stresses the need for an initial showing that the petitioner is not at fault for the failure of fact development at the state level.

23. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 1996 which amended 28 U.S.C. § 2254(e)(2)(Supp. 1997). Section 2254(e)(2) provides that a federal court shall not provide an evidentiary hearing unless "the claim relies on a factual predicate" undiscoverable through due diligence or "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." *Cardwell*, 152 U.S. at 336-37.

24. *Cardwell*, 152 F.3d at 337.

25. *Id.* at 338.

26. *Id.*

27. 372 U.S. 293 (1963).

evidentiary hearing 'where an applicant for a writ of habeas corpus allege[d] facts which, if proved, would entitle him to relief.'"[28] In certain circumstances, a state court's refusal to provide a full and fair evidentiary hearing mandated a hearing at the federal level.[29] In *Keeney v. Tamayo-Reyes*,[30] the United States Supreme Court held that when a federal court finds a lack of factual development occurred at the state level which would require an evidentiary hearing during federal habeas proceedings, such hearing may only be granted if the petitioner had not caused the lack of factual development below.[31] Should the federal court find all circumstances favorable to the defendant, then it may grant an evidentiary hearing at its discretion.[32]

Nevertheless, the Fourth Circuit found that it was not error to deny an evidentiary hearing to Cardwell. The court cited the expansion of the record by the federal district court to include the opinion of Caldwell's two mental health experts and the petitioner's failure to cite any further evidence which would be proffered at an evidentiary hearing as obviating the need for such a hearing.[33] The court stated that the district court made an appropriate determination, relying on all of the new evidence which the petitioner possessed and provided.[34]

The court's initial analysis could aid federal habeas counsel, who generally have more resources then state habeas counsel in Virginia. These resources often result in the development of new facts which could entitle the prisoner to relief. Counsel's charge is to develop a factual dispute, creating a genuine issue of material fact which will persuade a federal court to provide an evidentiary hearing.[35] Cardwell demonstrates that an evidentiary hearing will not be deemed

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28. *Cardwell*, 152 F.3d at 336 (quoting Townsend v. Sain, 372 U.S. 293, 312-13 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).

29. *Id.*

30. 504 U.S. 1 (1992).

31. *Cardwell*, 152 F.3d at 336. If the facts were not developed at state court due to an omission or failure to act on the part of the defense counsel then an evidentiary hearing may only be granted pursuant to one of the two scenarios listed in 28 U.S.C. § 2254(e)(2):

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
> (A) the claim relies on–
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (Supp. 1997).

32. *Cardwell*, 152 F.3d at 336-39.

33. *Id.* at 338-39.

34. *Id.*

35. *See* David D. Leshner, *An Attempt to Level the Playing Field: Obtaining Resources in State and Federal Habeas*, 11 CAP. DEF. J. 21 (1998).

necessary simply to permit experts to explain their findings.

C. *Effect of Summary State Court Denials*

Cardwell claimed that the Virginia habeas court's summary denial of his individual ineffective assistance of counsel claims regarding development of mental mitigation evidence was not an "adjudication on the merits" sufficient to invoke the restrictive review standards of AEDPA.[36] The court disagreed, but since the Supreme Court of Virginia had provided no rationale for its ruling,[37] the Fourth Circuit gave Cardwell the functional equivalent of what he asked for, de novo review.[38]

Using de novo review, the Fourth Circuit determined that the record did not support Cardwell's claim.[39] The court applied the two pronged test developed in *Strickland v. Washington*.[40] First, the Fourth Circuit disagreed with the district court's finding that the trial counsel's performance was deficient due to a failure to secure a mental health expert in a timely fashion.[41] Turning to the second prong of the test, the Fourth Circuit determined that any deficiency by trial counsel would not have affected the outcome of Cardwell's sentence because the newly developed facts only challenged one of the two aggravating factors, future dangerousness, on which the jury based its recommendation.[42] Even if the evidence could disprove the future dangerousness of the prisoner, the lack of evidence attacking the other aggravating factor would result in confirmation of the sentence.[43]

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36. 28 U.S.C. § 2254(d)(1) (Supp. 1997). Section 2254(d)(1) provides that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . ." *Id.*

37. Although Cardwell did not prevail in federal court, given the record of the Supreme Court of Virginia at state habeas, defense counsel should be unconcerned about, if not grateful for, Supreme Court of Virginia unexplained summary denials.

38. Actually had the court agreed with Cardwell he would have been permitted to return to Virginia courts to exhaust the claim. This procedure is almost unheard of in Virginia because, unlike many other jurisdictions, claims not exhausted in state court are defaulted under the rule found in *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), and federal courts will not hear them.

39. *Cardwell*, 152 F.3d at 340-41.

40. 466 U.S. 688 (1984).

41. *Cardwell*, 152 F.3d at 340-41. The Fourth Circuit cited trial counsel's diligence in attempting to secure a mental health expert over a two month period.

42. *Id.* Dr. Hagan's report addressed Cardwell's future dangerousness. Dr. Hart's report "created a more human portrait of Cardwell," but did nothing to diminish the prisoner's culpability. *Id.* at 341.

43. *Id.* at 341.