Capital Defense Journal

Volume 11 | Issue 2 Article 9

Spring 3-1-1999

Drayton v. Moore No. 98-18, 1999 WL 10073 (4th Cir. Jan. 12, 1999)

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I. Facts[1]

Leroy Joseph Drayton was convicted and sentenced to death by a South Carolina jury for the 1984 kidnaping, armed robbery, and murder of Rhonda Smith.[2] The South Carolina Supreme Court vacated Drayton's conviction, and, at his second trial, he was once again convicted and sentenced to death.[3] After the South Carolina Supreme Court affirmed his conviction and sentence, Drayton filed a petition for state habeas relief, which was denied. Subsequently, he filed a habeas petition in federal court, which also was denied.[4]

On appeal, Drayton asserted several claims. He argued that he received ineffective assistance of counsel ("IAC") at both the guilt phase and the sentencing phase.[5] First, he claimed that his trial counsel erred by failing to present evidence of his relationship with the victim, Rhonda Smith.[6] He also claimed that his trial counsel erred by failing "to contest the forensic evidence."[7] With respect to his counsel's penalty phase performance, Drayton contended that his counsel should have done the following: (1) presented evidence regarding his adaptability to prison; (2) requested an instruction that the jury should give the term "life imprisonment" its "ordinary meaning" and not consider the possibility of parole in issuing a sentence recommendation; and (3) investigated Drayton's "mental state,

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1. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 168 F.3d 481 (4th Cir. 1999).

2. Drayton v. Moore, No. 98-18, 1999 WL 10073, at *1 (4th Cir. Jan. 12, 1999). According to the facts set forth by the court of appeals, Drayton abducted Smith from the gas station at which she worked, forced Smith to drive the two of them for a little while, and then returned to the station with Smith. Upon returning to the station, Smith apparently waited on customers. Drayton then abducted Smith for a second time, and the two of them went to an abandoned coal trestle, where Drayton claimed (through his confession) that he accidentally shot Smith. *Drayton*, 1999 WL 10073, at *1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*, at *2.

7. *Id.*

alcohol and substance abuse, learning disabilities, and hypoglycemia."[8] Finally, Drayton argued that he had received ineffective assistance on the basis of his counsel's faulty closing argument.[9]

Drayton asserted several other claims on appeal which were unrelated to his IAC claims.[10] He contended that the district court should have granted him an evidentiary hearing on any one of his claims.[11] He claimed that his Sixth Amendment rights were violated when he was questioned by police in the absence of counsel after making a request for counsel at his bond hearing.[12] He claimed that the police violated *Miranda v. Arizona*[13] in questioning him and obtaining his confession after giving him erroneous *Miranda* instructions.[14] He also claimed that the police violated *Michigan v. Mosley*[15] in continuing to question him after he had requested the presence of counsel.[16] Additionally, he argued that the trial judge erred in the following two ways: (1) by declining to give the jury an instruction on manslaughter; and (2) by instructing the jury so as to lead it to believe that unanimity was required with respect to mitigating circumstances.[17] Finally, Drayton claimed that the state supreme court's failure to conduct proportionality review, as required under South Carolina law, denied him due process.[18]

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8. *Id.*, at *2-3.

9. *Id.*, at *3.

10. *Id.*, at *1.

11. *Id.*

12. *Id.*, at *4.

13. 384 U.S. 436, 468-69 (1966) (holding that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has a right to remain silent, . . .[that] anything said can and will be used against the individual in court," and that he has a right to have counsel present).

14. *Drayton*, 1999 WL 10073, at *5.

15. 423 U.S. 96, 103 (1975) (citation omitted) (holding that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored'").

16. *Drayton*, 1999 WL 10073, at *5. According to the majority, "[p]olice first administered the warnings when they arrested Drayton on February 16, 1984, between 7:30 and 8:00 a.m. When Drayton exercised his right to remain silent, the questioning stopped. Police administered a second set of warnings several hours later at headquarters. Again, when Drayton chose to remain silent, the police suspended their questioning. Finally, after Drayton had returned from his bond hearing and asked to speak with Lieutenant Frazier, an officer with whom he had had prior contact, Frazier administered a third set of warnings." *Id.*, at *6. However, as the dissent noted, the evidence indicated that Drayton invoked his right to remain silent twice before his bond hearing, communicated at the hearing that he intended to retain his own attorney, and after the hearing, asked to speak to Frazier only when he overheard Frazier's "familiar" voice while he (Drayton) was being interrogated by two police officers. *Id.*, at *8-9.

17. *Id.*, at *1.

18. *Id.*

II. Holding

The United States Court of Appeals for the Fourth Circuit held that defense counsel's failure to present evidence of Drayton's relationship with the victim did not constitute ineffective assistance of counsel under *Strickland v. Washington*[19] but, instead, constituted a "reasonable strategic choice."[20] The court summarily dismissed Drayton's IAC claim regarding the forensic evidence as procedurally barred.[21] With respect to Drayton's penalty phase IAC claims, the court determined that Drayton failed to make the two-pronged showing required by *Strickland*.[22] Specifically, the court held that defense counsel's failure to present evidence regarding Drayton's adaptability to prison was a "strategic calculation."[23] In addition, the court held that defense counsel's decision not to seek the instruction regarding life imprisonment and parole constituted a "reasoned strategic decision."[24] With respect to defense counsel's failure to investigate possible mitigating circumstances, including Drayton's "mental state, alcohol and substance abuse, learning disabilities, and hypoglycemia," the court held that defense counsel's performance was not "unreasonable" and not violative of the *Strickland* standard.[25] The court dismissed Drayton's claim that his counsel's closing argument constituted ineffective assistance of counsel by stating that even "assuming deficient performance," Drayton had failed to meet the prejudice prong of the *Strickland* standard. Finally, the court rejected Drayton's contention that "the cumulative effect of the bad decisions by his lawyer constituted ineffective assistance," finding that he failed on both prongs of the *Strickland* standard.[26]

The court rejected all of Drayton's other claims, as well. The court found that Drayton was not entitled to an evidentiary hearing because the record indicated that he had received a "full and fair hearing in state court."[27] The court, crediting the trial court's finding that Drayton had not requested the appointment of counsel, held that the police's questioning of Drayton, despite the absence of counsel, did not violate his Sixth Amendment rights.[28] The court rejected both of Drayton's *Miranda* claims, finding that the

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19. 466 U.S. 668, 669 (1984) (holding that to obtain reversal of a conviction or death sentence on the basis of counsel's performance, a defendant must show (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense").

20. *Drayton*, 1999 WL 10073, at *2.

21. *Id.*

22. *See supra* note 19.

23. *Drayton*, 1999 WL 10073, at *3.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*, at *6.

28. *Id.*, at *4-5.

element of the instructions rendering them faulty was "inconsequential" and that because the police officers issued *Miranda* warnings to Drayton each time they resumed questioning, they had not violated the dictates of *Miranda*.[29] The court deemed Drayton's claim regarding the trial court's failure to give an instruction on manslaughter to be procedurally barred.[30] The court also rejected as procedurally barred Drayton's claim regarding the jury's potential belief, due to faulty instructions, that unanimity was required with respect to mitigating circumstances.[31] Finally, the court upheld the lower court's finding that the state supreme court had properly conducted its proportionality review.[32]

III. Analysis / Application in Virginia

A. Providing Effective Assistance of Counsel in the Fourth Circuit and in Reality

1. The Court's Facile Strickland *"Analysis"*

In a nutshell, the court engaged in a cynical and conclusory analysis of virtually all of Drayton's IAC claims. The court transformed defense counsel's failures into strategic decisions with little, if any, pretense of analysis. For example, the court excused defense counsel's failure to introduce evidence of Drayton's relationship with the victim by citing defense counsel's desire to take an approach different from that employed at the first trial–namely, "to avoid placing Drayton at the crime scene altogether."[33] The court continued, "[defense counsel] took this approach because he believed that Drayton's confession could be excluded and that, without the confession, the state had only a circumstantial case."[34] This disingenuous analysis ignores the fact that at the time of the trial–presumably after the

29. *Drayton*, 1999 WL 10073, at *5-6.

30. *Id.*, at *7. The court indicated that even if the claim had not been procedurally barred, the court would have agreed with the district court that the instruction at issue was not supported by the record. *Id.*, at *6.

31. *Id.*, at *7. The court also found that the claim would fail on the merits were it not procedurally barred. *Id.*

32. *Id.*, at *8. The court also noted that "[i]n any case, such a claim is insufficient to merit granting the writ." *Id.*

This summary will address only those aspects of the opinion which relate to the defense counsel's performance–specifically, his failure to investigate–and the defendant's rights to have counsel and to remain silent. It will not address the other claims asserted by the defendant, for such claims generally turn upon the specific details of individual cases, and the court provided very little detail with respect to nature or merit of the other claims asserted by Drayton.

33. *Id.*, at *2. Drayton also told counsel of an incident where he had protected Smith from some drug dealers. Without comment or critique, the court answered that counsel decided it would be too difficult to track down witnesses to the incident. *Id.*, at *2 n.1.

34. *Drayton*, 1999 WL 10073, at *2.

suppression hearing had taken place–defense counsel knew that evidence of the confession would be introduced at trial by the prosecution. The court followed this analysis with a conclusory analysis of the prejudice prong, determining that because Drayton had made prior statements which denied a relationship with Smith and because his first trial, "at which evidence of his relationship with Smith was introduced, resulted in a conviction and a death sentence," Drayton's claim necessarily failed.[35]

The court's refusal to consider properly Drayton's IAC claims was most apparent in its analysis of defense counsel's failure to investigate Drayton's "mental state, alcohol and substance abuse, learning disabilities, and hypoglycemia."[36] Devoting a mere four sentences to the claim, the court began by simply crediting defense counsel's testimony that he wished "to present Drayton in a 'positive' light," as if that testimony bore some relevance to his failure to investigate possible lines of mitigation.[37] The court continued, "[defense counsel] believed he had a very good jury for his client, and he said that he didn't want to 'rock the boat' with negative testimony."[38] Again, the court did not explain how that belief justified defense counsel's failure to *investigate* possible lines of mitigation and discover what kinds of evidence and testimony he might be able to present. Finally, the court concluded, "[g]iven the circumstances of this case, we cannot say that this approach was unreasonable."[39]

2. *Beyond the Fourth Circuit: What* Strickland *Really Means*

In this case, the *Strickland* standard for effective assistance of counsel required defense counsel at a minimum to investigate possible lines of mitigation before making any strategic decisions about what types of evidence to present at either the guilt phase or the penalty phase. The Court stated, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[40] Thus, as *Strickland*'s language clearly indicates, the Supreme Court contemplated that strategic decisions would and could be deemed reasonable or unreasonable only insofar as the predicate decision to investigate or not to investigate is judged to be reasonable.[41]

In *Drayton*, defense counsel failed to investigate and thus present evidence of Drayton's "mental state, alcohol and substance abuse, learning

35. *Id.*
36. *Id.*, at *3.
37. *Id.*
38. *Id.*
39. *Id.*
40. Strickland v. Washigton, 466 U.S. 668, 690-91 (1984).
41. *Id.*

disabilities, and hypoglycemia." The court's summary approval of that failure, which it countenanced as a "strategic" decision, defies logic and should not serve as a guide to any capital defense attorney seeking to provide effective assistance of counsel to his or her client. No capital defense attorney could properly make a strategic decision about whether to present evidence concerning a defendant's mental state, alcohol and substance abuse, learning disabilities, or health without first conducting an investigation to discover what that evidence would be. Thus, while the court's decision in this case may demonstrate how very little competence the Fourth Circuit will demand from capital defense attorneys, again, it should not be interpreted as a credible explanation or definition of what constitutes effective assistance of counsel.

B. Preserving Fifth and Sixth Amendment Rights

1. The Dissent's Analysis

The dissent disagreed with the majority's finding that the police officers complied with the dictates of the Sixth Amendment when they continued to interrogate Drayton after he had invoked his rights to remain silent and retain his own attorney. The dissent explained that once Drayton invoked his rights to remain silent and to retain his own attorney, the police should not have continued to question him unless he initiated such contact.[42] In determining that the police officers had not violated Drayton's right to counsel, the majority focused upon the fact that Drayton allegedly "initiated" contact with the police (Officer Frazier) when he was being interrogated by two police officers. The dissent contended that his request to speak with Officer Frazier, in that context, did not constitute an "initiation" for purposes of analyzing whether he had waived his rights because he was in the midst of undergoing a plainly unlawful interrogation at the time he noticed Officer Frazier.[43]

2. Towards Remaining Silent

Although Drayton would have been back in his cell and never seen Officer Frazier had the police been acting lawfully, his case highlights the need to make every effort to protect clients from making statements to the police. The practical realities of capital cases demand that defense counsel work hard to ensure that defendants remain silent from the outset. A capital defendant triggers these constitutional protections by declaring clearly, "I want a lawyer."[44] He or she should follow this declaration with

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42. *Drayton*, 1999 WL 10073, at *9-11.

43. *Id.*, at *11-12.

44. Davis v. United States, 512 U.S. 452, 458-59 (1994) (holding that suspect who

silence and should remain quiet in the face of repeated interrogation. The theoretical possibility of suppressing a wrongfully obtained confession, because it is so slim, cannot justify anything less than absolute vigilance in protecting a defendant's right to remain silent and ensuring that the defendant actually exercise that right by being quiet.

The importance of keeping a capital defendant quiet stems from the reality that confessions which might be suppressed in other contexts because they were obtained in a manner contrary to the Constitution will almost always be somehow admitted in capital trials, simply because the trials are capital, if the confessions constitute an integral part of the prosecution's case. For example, Drayton's trial counsel contended, in the present case, that the prosecution's case was weak without the confession. If he was correct, the trial court's admission of the confession is understandable, albeit not justified. It is, in any event, typical of the treatment of suppression issues in Virginia.[45]

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"unambiguously requests counsel" has a right to be free from continued questioning "regarding any offense unless an attorney is actually present").

45. *See generally* Cherrix v. Commonwealth, Nos. 981798, 982063, 1999 WL 101077 (Va. Feb. 26, 1999); Swisher v. Commonwealth, 506 S.E.2d 763 (Va. 1998); Green v. Commonwealth, 500 S.E.2d 835 (Va. Ct. App. 1998); Roach v. Commonwealth, 468 S.E.2d 98 (Va. 1996).