Capital Defense Journal

Volume 11 | Issue 2 Article 12

Spring 3-1-1999

Jenkins v. Angelone No. 98-13, 1999 WL 9944 (4th Cir. Jan. 12, 1999)

Jenkins v. Angelone
No. 98-13, 1999 WL 9944
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I. Facts [1]

Arthur Ray Jenkins, III ("Jenkins"), spent the day of October 12, 1990, drinking whiskey and beer with his younger brother, Kevin Frame ("Frame").[2] Around 10:00 p.m. that evening, Jenkins and Frame returned to the house owned by Jenkins's aunt where Jenkins had been living since his release from prison one month earlier.[3] Jenkins's uncle and Lee Brinklow, both residents of the house, were present when Jenkins and Frame arrived.[4] An argument ensued in the living room between Jenkins and Brinklow concerning Frame's presence in the house.[5] Jenkins proceeded to Brinklow's bedroom, returned with a single shot .22 caliber rifle, and shot Brinklow once in the face.[6] Jenkins then entered another bedroom where his uncle lay in bed and shot him.[7] Jenkins and Frame then obtained two butcher knives from the kitchen and brought Brinklow into the bedroom with the uncle.[8] Both Brinklow and Jenkins's uncle were still alive at this point.[9] Jenkins shot the uncle again in the head, stabbed him multiple times, and shot Brinklow again in the head.[10] Jenkins and Frame left the scene in Brinklow's truck after taking money and other items from the house.[11]

Jenkins was convicted of two counts of capital murder and given two death sentences.[12] The convictions and sentences were affirmed by the

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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 This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 168 F.3d 482 (4th Cir. 1999). Jenkins was executed by lethal injection on April 20, 1999.
2. Jenkins v. Angelone, No. 98-13, 1999 WL 9944, at *1 (4th Cir. Jan. 12, 1999).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*, at *2.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*, at *1.

Supreme Court of Virginia.[13] After exhausting his state post-conviction remedies, Jenkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia.[14] The district court denied the petition.[15]

On appeal from the district court, Jenkins presented the following four claims to the United States Court of Appeals for the Fourth Circuit: (1) the Commonwealth's failure to turn over exculpatory evidence as required under *Brady v. Maryland*[16] and subsequent knowing use of false testimony regarding this evidence violated his due process rights;[17] (2) he received ineffective assistance of counsel in violation of the Sixth Amendment; (3) the trial court denied him a competent mental health expert and an adequate mental exam in violation of *Ake v. Oklahoma*;[18] and (4) the use of his confessions at trial violated his rights under the Fifth and Fourteenth Amendments to be free from compulsory self-incrimination.

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of the petition, finding all of Jenkins's claims to be defaulted or without merit.[19]

III. Analysis / Application in Virginia

A. Due Process Claims

Jenkins alleged that he had been had been sexually abused by the head jailer at the Washington County (Virginia) jail while incarcerated prior to the instant offense.[20] This abuse, according to Jenkins, affected his mental state at the time of the murders and was thus exculpatory evidence.[21]

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13. Jenkins v. Commonwealth, 423 S.E.2d 360 (Va. 1992).

14. *Jenkins*, 1999 WL 9944, at *1.

15. *Id.*

16. 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

17. Although the court of appeals did not enumerate the grounds for this due process claim, it is a settled principle that the prosecution's knowing elicitation of false testimony, or failure to correct testimony it knows to be false, violates a defendant's due process rights. *See* Alcorta v. Texas, 355 U.S. 28, 31 (1957).

18. 470 U.S. 68, 83 (1985) (holding that when an indigent criminal defendant demonstrates that his sanity at the time of the offense will be a "significant factor" at trial, the defendant is entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense").

19. *Jenkins*, 1999 WL 9944, at *1.

20. *Id.*, at *3.

21. *Id.* Such evidence would be relevant only in mitigation at the penalty phase as in Virginia "evidence of a criminal defendant's mental state at the time of the offense is, in the

Jenkins raised the following due process claims stemming from the alleged abuse: (1) that the Commonwealth failed to turn over this evidence in violation of *Brady v. Maryland*;[22] and (2) that the Commonwealth elicited false testimony from the head jailer concerning his relationship with Jenkins at the trial's penalty phase.[23]

The court of appeals found both these claims to be procedurally defaulted as they had not been raised in prior state proceedings.[24] Furthermore, Jenkins could not show "cause" for his failure to present the claims in state court as the information sought was known to Jenkins and was thus "'reasonably available'" to him.[25] Nor could Jenkins establish that a "'fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing'" on the claims.[26] The court of appeals proceeded, however, to reject Jenkins's *Brady* claim on the merits. Assuming that the alleged abuse did in fact occur,[27] there was no evidence that any agent of the Commonwealth, other than the head jailer, had knowledge of the abuse.[28] In addition, the court of appeals followed its prior holding in *United States v. Wilson*[29] that "'where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine.'"[30]

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absence of an insanity defense, irrelevant to the issue of guilt." Stamper v. Commonwealth, 324 S.E.2d 682, 688 (Va. 1985). Although the "voluntary intoxication" defense provides a limited exception to this rule, it rarely provides grounds for appellate relief. *See, e.g.*, Giarratano v. Commonwealth, 266 S.E.2d 94, 99 (Va. 1980) (holding that the voluntary intoxication defense is unavailable where there is "abundant credible evidence" that the defendant was capable of deliberation and premeditation at the time of the offense).

22. 373 U.S. 83 (1963). *See supra* note 16.

23. *Jenkins*, 1999 WL 9944, at *3.

24. *Id.*

25. *Id.* (quoting Barnes v. Thompson, 58 F.3d 971, 976 (4th Cir. 1995)). Under *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992), a federal habeas court may hear a procedurally defaulted claim if the petitioner can show "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure." As the court of appeals in *Jenkins* did not find cause to excuse the procedural default, the court did not reach the issue of actual prejudice.

26. *Jenkins*, 1999 WL 9944, at *3 (quoting *Keeney*, 504 U.S. at 12). Apart from showing "cause" and "actual prejudice," a habeas petitioner may resurrect a procedurally defaulted claim in federal court by satisfying the "fundamental miscarriage of justice" standard articulated by the court of appeals. *Id.* (citing *Keeney*, 504 U.S. at 12).

27. Investigations by both the Federal Bureau of Investigation and an expert investigator appointed by the district court in Jenkins's habeas proceedings uncovered no evidence that the head jailer engaged in an improper relationship with Jenkins although the jailer was indicted for crimes involving his homosexual relations with other inmates. *Id.*

28. *Id.*, at *4.

29. 901 F.2d 378 (4th Cir. 1990).

30. *Jenkins*, 1999 WL 9944, at *4 (quoting United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990)) (internal quotation marks omitted). The construction of the *Brady* doctrine adopted by the Fourth Circuit in *Wilson* and subsequent decisions such as *Hoke v. Netherland*,

Jenkins had knowledge of his own sexual abuse by the head jailer and produced no valid reason why he was incapable of sharing this information with his attorneys.[31] As such, the court of appeals held that there could have been no *Brady* violation even if other agents of the Commonwealth knew of the alleged abuse and failed to turn over such information to Jenkins.[32]

B. Ineffective Assistance of Counsel

At trial, Jenkins requested and received the services of a clinical psychologist, Dr. Gary L. Hawk, to assist in his defense.[33] Defense counsel obtained a large volume of Jenkins's records for Dr. Hawk to review in performing a psychological evaluation of Jenkins.[34] In addition, counsel sought but did not receive approximately eight hundred pages of medical records from the Department of Corrections ("DOC") covering a five-year period during which Jenkins was incarcerated for prior offenses.[35] At habeas, Jenkins contended that his trial counsel's failure to obtain the DOC records constituted ineffective assistance of counsel in violation of the Sixth Amendment.[36]

Under *Strickland v. Washington*,[37] Jenkins was required to show both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced his defense.[38] The court of appeals found that Jenkins had failed to meet either of the *Strickland* requirements.[39] Relying largely on defense counsel's statement to the trial court that Dr. Hawk felt "'relatively certain that the eventual conclusions would not change based upon the receipt of the DOC records,'"[40] the

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92 F.3d 1350 (4th Cir. 1990), may be in doubt. The United States Supreme Court has granted certiorari in *Strickler v. Pruett*, Nos. 97-29, 97-30, 1998 WL 340420 (4th Cir. June 17, 1998), *cert. granted*, 119 S. Ct. 40 (1998), to determine whether the Fourth Circuit's construction of *Brady* is correct. However, even a favorable ruling for Strickler will probably not affect cases such as *Jenkins*, where there is no evidence that any agent of the Commonwealth knew of the existence of the allegedly exculpatory evidence, and defendant presumably had actual knowledge of the evidence.

31. *Jenkins*, 1999 WL 9944, at *4. The court of appeals rejected Jenkins's claim that a mental illness prevented him from revealing the alleged abuse to his attorneys. *Id.*

32. *Id.*

33. *Id.*, at *5. In Virginia, an indigent capital defendant has the right to the assistance of one or more court-appointed mental health experts. *See* VA. CODE ANN. § 19.2-264.3:1 (Michie 1998).

34. *Jenkins*, 1999 WL 9944, at *5.

35. *Id.* Dr. Hawk stated that obtaining the DOC records was important "because Jenkins had been incarcerated for much of the time between ages 12 and 21, the age when he committed the double murders in this case." *Id.*

36. *Id.*

37. 466 U.S. 668 (1984).

38. Strickland v. Washington, 466 U.S. 668, 687 (1984).

39. *Jenkins*, 1999 WL 9944, at *6.

40. *Id.*, at *5.

court of appeals concluded that counsel was not unreasonable in failing to ensure that Dr. Hawk obtained the records.[41] With regard to *Strickland*'s prejudice requirement, the court adopted the district court's finding that Dr. Hawk's ultimate opinion was not substantially altered by the fact of the missing records, that the records actually supported the Commonwealth's evidence of Jenkins's future dangerousness, and that counsel's failure to obtain the records thus did not prejudice Jenkins.[42]

Little may be gleaned from the court's treatment of Jenkins's ineffective assistance of counsel claim. Since its inception, the *Strickland* standard has proved to be a heavy burden for defendants to shoulder. However, the issue of the DOC records is noteworthy for another reason. Although defense counsel was ultimately unable to procure the DOC records, the fact remains that he attempted to provide Dr. Hawk with all potentially relevant records concerning Jenkins's mental health history. In doing so, it appears that defense counsel made an effort to equip Dr. Hawk with the necessary resources to perform a meaningful psychological evaluation, thus working to provide the metal health expert with the best opportunity to assist in the defense effort. It is disappointing that no mention is made of any reason for the DOC's failure to release the records.

C. Ake *Claim*

Jenkins argued that he was "denied a competent mental health expert and the right to an adequate mental health evaluation"[43] in violation of *Ake v. Oklahoma*.[44] As previously stated, Jenkins requested and received the assistance of Dr. Hawk, a clinical psychologist. The court of appeals held that *Ake* is not violated where the defendant chooses the services of a psychologist rather that a psychiatrist.[45] Furthermore, the court ruled Jenkins could not raise a claim under *Ake* challenging the competency of Dr. Hawk's evaluation as *Ake* as does not guarantee a "particular substantive result" from the psychological evaluation.[46] Based on these determinations, the court ruled that Jenkins's rights under *Ake* were not violated.[47]

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41. *Id.*, at *6.

42. *Id.*, at *7.

43. *Id.*, at *1.

44. 470 U.S. 68, 83 (1985) (holding that when an indigent criminal defendant demonstrates that his sanity at the time of the offense will be a "significant factor" at trial, the defendant is entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense").

45. *Jenkins*, 1999 WL 9944, at *7.

46. *Id.* (quoting Wilson v. Greene, 155 F.3d 396, 401 (4th Cir.), *cert. denied*, 119 S. Ct. 536 (1998)). *See* Anne Duprey, Case Note, 11 CAP. DEF. J. 175 (1998) (analyzing *Wilson v. Greene*, 155 F.3d 396 (4th Cir. 1998), and discussing the issue of *Ake*'s guarantee of a competent psychological examination).

47. *Jenkins*, 1999 WL 9944, at *7. It is important to note that *Ake* requires a *competent*

D. Involuntary Confessions

Subsequent to his arrest, Jenkins made two videotaped confessions to police.[48] Prior to the first confession, a police investigator informed Jenkins that "he could have an attorney present."[49] An exchange followed in which Jenkins expressed reservations about proceeding without an attorney and the investigator assured him that an attorney was not necessary if he would tell the truth.[50] Jenkins ultimately confessed without an attorney present.[51] The following day authorities gave Jenkins "a more traditional *Miranda* warning."[52] Jenkins waived his *Miranda* rights and confessed a second time.[53] Both confessions were admitted at trial over Jenkins's objection.[54]

At habeas, Jenkins argued that the investigator's comments to Jenkins before the first confession concerning Jenkins's right to an attorney rendered the confession involuntary in violation of the Fifth Amendment.[55] As such, this confession was inadmissible and his second confession was also required to be suppressed under the "fruit of the poisonous tree" doctrine.[56] However, the court of appeals deftly sidestepped a consideration of the merits of this argument by analyzing Jenkins's claim as though the first confession was voluntary under the Fifth Amendment but obtained in violation of *Miranda*. Under this reasoning, even though the first confession would be inadmissible, the second confession would be admissible if voluntarily made after proper waiver of *Miranda* warnings.[57]

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psychiatrist and an *appropriate* examination. *Ake*, 470 U.S. at 83 (emphasis added). This will often require the appointment of multiple mental health experts, for example, where there are indicators of both mental illness and mental retardation.

48. *Jenkins*, 1999 WL 9944, at *8.

49. *Id.*

50. *Id.* As summarized by the court of appeals, after Jenkins asked the investigator whether an attorney would be helpful, the following exchange took place:

Investigator:	Well, that depends on whether or not you want to tell the truth.
Jenkins:	That ain't going to hurt me in the courtroom?
Investigator:	No. Uh, I told you evidence is going to prove what is true. And it always helps a fellow to tell the truth. It shows that you're cooperative.

Id.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* Under *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." The Fourth Circuit has interpreted *Elstad* as requiring a constitutional violation in order to apply the

Even if both confessions were erroneously admitted at the guilt phase, the court of appeals found that the harmless error doctrine precluded habeas relief for Jenkins as he had admitted the killings to "almost everyone with whom he talked subsequent to the day in question."[58] Jenkins also argued that the confessions, in which he described the killings "in graphic detail with little sign of remorse," had a substantial and injurious effect on the penalty phase.[59] However, the court of appeals held this claim to be procedurally defaulted as it had not been raised in the prior state proceedings.[60]

The court's procedural default ruling raises a potential red flag for defense counsel. If a confession may possibly be used by the prosecution at both the guilt and penalty phases of the trial, a general motion to suppress the statement as involuntary or in violation of *Miranda* or *Edwards* may not be sufficient to preserve the issue for appellate review. Rather, defense counsel must object to the statement's use at *both* the guilt *and* the penalty phases to preserve the claim for federal habeas review.

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"fruit of the poisonous tree" doctrine. *See* Howard v. Moore, 131 F.3d 399, 413 (4th Cir. 1997) (en banc) (holding that "[t]he 'tainted fruits' doctrine is simply inapplicable absent a constitutional violation"). Under *Howard*, a statement obtained in violation of *Miranda* or *Edwards v. Arizona*, 451 U.S. 477 (1981), is not itself a constitutional violation and does not provide a basis for suppression of further incriminating statements. *Howard*, 131 F.3d at 414.

Defense counsel facing a situation in which a client has made multiple confessions (assuming that the subsequent confessions are voluntary and obtained in compliance with *Miranda*) must argue, as Jenkins's counsel attempted to do, that the first confession was involuntary under the Fifth Amendment. An involuntary confession is a direct constitutional violation and will allow for application of the "tainted fruits" doctrine to subsequent confessions. *Id.* at 415. Establishing that the initial confession was involuntary is not easy. "[C]oercive police activity" is an initial prerequisite to a finding of involuntariness. Colorado v. Connelly, 479 U.S. 157, 167 (1986). Furthermore, the defendant must establish that in making the statement "his will has been overborne and his capacity for self-determination critically impaired." Columbe v. Connecticut, 367 U.S. 568, 602 (1961). However, only by proving that the initial confession was involuntary will defense counsel be able to argue for suppression of the subsequent confessions.

58. *Jenkins*, 1999 WL 9944, at *8 (quoting Jenkins v. Commonwealth, 423 S.E.2d 360, 363 (Va. 1992)). Constitutional error provides a ground for federal habeas relief only where the petitioner establishes that the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 766 (1946) (internal quotation marks omitted)).

59. *Jenkins*, 1999 WL 9944, at *8.

60. *Id.*