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Sexton v. French
163 F.3d 874 (4th Cir. 1998)

I. Facts

On August 8, 1990, Michael Sexton ("Sexton") was in the parking lot of the Wake County Medical Center ("WCMC") in Raleigh, North Carolina. He was trying to start his broken-down car when he was spotted by Kimberley Crews ("Crews"), a child abuse counselor at WCMC. Crews offered to give Sexton a ride to the WCMC security office. Sexton instead requested that Crews give him a ride to a nearby street, where Sexton's cousin had a car parked. Once inside Crews's minivan, Sexton either asked or forced Crews into the backseat of the car, had sex with Crews, and then strangled Crews to death as she screamed and tried to get out of the minivan.[1]

At the guilt phase of the trial for the murder of Crews, a jury found Sexton guilty of first-degree murder, first-degree rape, first-degree sexual offense, first-degree kidnaping, and robbery. At the penalty trial, the jury found that the aggravating circumstances outweighed the mitigating circumstances and recommended that Sexton be sentenced to death. In accord with the jury's recommendation, the trial judge sentenced Sexton to death. Sexton's appeals to the Supreme Court of North Carolina and the Supreme Court of the United States were denied. Sexton's North Carolina state habeas petition was also denied. On July 3, 1997, Sexton filed for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. The district court granted Sexton a certificate of appealability.[2] Sexton presented twenty-five different claims to the United States Court of Appeals for the Fourth Circuit. The court did not rule on twenty-three of Sexton's twenty-five claims.[3] The claims ruled upon by the Fourth Circuit were ineffective assistance of counsel and a claim that the North Carolina death penalty statute was unconstitutional because whether a defendant was sentenced to death or not depended on the place of indictment and trial, as well as the defendant's race.[4]

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1. Sexton v. French, 163 F.3d 874, 876-78 (4th Cir. 1998).

2. *Id.* at 878-80.

3. For various reasons, the claims, which were not identified, were found to be procedurally barred or without merit.

4. *Sexton*, 163 F.3d at 881-88.

II. Holding

The United States Court of Appeals for the Fourth Circuit, ruled that (1) Sexton's trial counsel was not ineffective under the standard announced in *Strickland v. Washington*[5] and later "clarified" in *Lockhart v. Fretwell*[6] and (2) the North Carolina death penalty statute was not unconstitutional because the evidence presented by Sexton was not sufficiently detailed or developed to support an inference of discrimination against capital defendants in North Carolina.[7]

III. Analysis / Application in Virginia

Sexton presented several arguments of ineffective assistance of counsel to the court. The arguments included claims that Sexton's trial counsel was constitutionally ineffective for forcing Sexton to testify at trial, failing to get Sexton's consent not to challenge the admissibility of his confession, failing to advise Sexton of his right to personally participate in voir dire, failing to secure his consent not to raise the issue of racial bias during voir dire, failing to raise the issue of racial bias on voir dire, and failing to secure Sexton's consent to present certain mitigating evidence.

A. Forcing a Defendant to Testify at Trial

The court referred to Sexton's claim regarding forced testimony as the "most salient argument" which Sexton presented on appeal.[8] Accordingly, the court went to great lengths to explain the nature of Sexton's claim and the underlying case law dealing with forced testimony. The court began by explaining the nature of a defendant's right *to* testify. In *Rock v. Arkansas*,[9] the Supreme Court held that each defendant has a constitutional right to testify at trial.[10] The Fourth Circuit noted that although, as a general matter, constitutional rights may be waived by either the defendant or his counsel, some constitutional rights are "personal" and may only be waived

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5. 466 U.S. 668 (1984).

6. 506 U.S. 364 (1993).

7. *Sexton*, 163 F.3d at 881-88. The court's disposition of the claim that the North Carolina death penalty statute is unconstitutional will not be discussed any further in this article. The claim provides no new insight on capital defense in Virginia.

8. *Id.* at 881.

9. 483 U.S. 44 (1987).

10. Rock v. Arkansas, 483 U.S. 44, 51 (1987). The Supreme Court held that although not found in the text of the Constitution, a defendant's right to testify "has sources in several provisions of the Constitution." *Id.* The Court then looked to the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's guarantee against compelled testimony and the "necessary corollary" of that guarantee—the right to testify. *Id.* at 51-52.

by the defendant or with the defendant's consent.[11] Every circuit has held that the right to testify is a "personal" right and therefore may only be waived by the defendant.[12]

After deciding that the right to testify was personal in nature, the court turned to the question of whose job it is to advise the defendant of his right to testify and his right to knowingly and intelligently waive this right. In prior cases, the Fourth Circuit had determined that the trial court had no *sua sponte* responsibility to ensure that the defendant has knowingly and intelligently waived the right to testify.[13] In accordance with other circuits, the court ruled that "trial counsel . . . has the primary responsibility for advising the defendant of his right to testify and for explaining the tactical implications of doing so or not."[14]

"Because the burden to inform the defendant of the nature and existence of the right to testify rests upon trial counsel," the court ruled that this burden makes up part of effective assistance of counsel.[15] Accordingly, counsel's performance relative to this burden is subject to the two-prong test established in *Strickland v. Washington*[16] for ineffective assistance of counsel claims.[17]

In *Strickland*, the Supreme Court elaborated on both prongs of the test, stating that to satisfy the prejudice prong of the test a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[18] The Court further ruled that a reasonable probability is one which is "sufficient to undermine confidence in the outcome."[19] However, the Fourth Circuit, in this and other recent opinions[20] has added yet another obstacle to ineffective

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11. *Sexton*, 163 F.3d at 881 (citing Brown v. Artuz, 124 F.3d 73 (2nd Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998)).

12. *See Brown*, 124 F.3d at 77-78; United States v. McMeans, 927 F.2d 162,163 (4th Cir. 1991); United States v. Ortiz, 82 F.3d 1066, 1070 (D.C. Cir. 1996); United States v. Pennycooke, 65 F.3d 9, 10-13 (3d Cir. 1995); United States v. Joelson, 7 F.3d 174,177 (9th Cir. 1993); United States v. Teague, 953 F.2d 1528, 1532 (11th Cir. 1992) (en banc).

13. *See McMeans*, 927 F.2d at 163.

14. *Sexton*, 163 F.3d at 882.

15. *Id.*

16. 466 U.S. 668 (1984) (holding that to succeed on a claim of ineffective assistance of counsel, a defendant must show a reasonable probability that counsel's performance was unreasonable and that counsel's deficient performance was prejudicial).

17. *Sexton*, 163 F.3d at 882.

18. Strickland v. Washington, 466 U.S. 668, 694 (1984).

19. *Id.*

20. *See* Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), *stay granted*, No. 98-8384, 1999 WL 179763 (U.S. Apr. 2, 1999), *cert. granted*, No. 98-8384, 1999 WL 148296 (U.S. Apr. 5, 1999). *See also* Paige McThenia, Case Note, 11 CAP. DEF. J. 385 (1999) (analyzing Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998)).

assistance of counsel claimants by interpreting *Lockhart v. Fretwell*[21] as a clarification of the *Strickland* standards. In making such "clarifications," the court, via *Lockhart*, has required petitioners to show not only the probability that reasonable assistance would have produced a different result, but also that the entire "proceeding was fundamentally unfair or unreliable."[22] The Supreme Court of Virginia has recently held the same in *Williams v. Warden*.[23] This interpretation, while not necessarily an accurate representation of *Lockhart*, is the present state of the law.[24]

After laying out the applicable case law, the court examined Sexton's claim that he had not been advised of his right to waive his right to testify and that he was forced to testify. The state habeas court had found substantial evidence that Sexton was not forced to testify, but found no evidence that Sexton had ever been apprized of his right to waive his right to testify or that the ultimate decision to testify rested with him.[25] The Fourth Circuit hinted that the failure to advise Sexton of his rights was unreasonably deficient performance by trial counsel, but did not explicitly rule so. Instead, the court ruled that there was no need to decide whether counsel's actions were unreasonable because Sexton could not satisfy the prejudice prong as it was reformulated in *Lockhart*. In support of this holding, the court stated that Sexton's testimony actually helped his case. The court also ruled that Sexton's claim that he would not otherwise have testified had his counsel not told him the importance of testifying did not make the proceeding fundamentally unfair or unreliable because of the overwhelming evidence against Sexton.[26]

The Fourth Circuit's holding that (1) the right to testify or not is a personal right of the defendant and (2) that the duty to advise the defendant of this right is a component of effective assistance of counsel illustrates the importance of developing a good relationship with the client.[27] It is also

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21. 506 U.S. 364 (1993).

22. *Sexton*, 163 F.3d at 882 (quoting Lockhart v. Fretwell, 506 U.S. 364, 369 (1993)).

23. 487 S.E.2d 194, 198 (Va. 1997)).

24. For ways that this new *Strickland* standard could work to the advantage of defense counsel, see Douglas M. Banghart, Case Note, 11 CAP. DEF. J. 329 (1999) (analyzing Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998)). For a full discussion of why this "clarification" of *Lockhart* may not be accurate, see Brian S. Clarke, Case Note, CAP. DEF. J., Fall 1997, at 30-33 (analyzing Williams v. Warden, 487 S.E.2d 194 (Va. 1997)).

25. *Sexton*, 163 F.3d at 882-83.

26. Id. at 883-84. Evidence against Sexton demonstrated that Sexton's footprint was removed from Crews's shoe; Sexton's head hair was found on the carpet of Crews's minivan, the headlining in the back of Crews's minivan, and the minivan's seats; and Sexton's pubic hair was found on the seat underneath Crews's body, in Crews's pubic area, and on Crews's back. Further, Sexton's spermatozoa were found in Crews's mouth and vagina, and underneath Crews's buttocks. Crews also had been severely battered. Sexton also used Crews's ATM card at a shopping center approximately an hour after the murder. *Id.*

27. The importance of this relationship is heightened further by the fact that some trial

worth noting that Sexton's counsel took him to the courtroom to practice his testimony in the setting in which it would be given. This is a useful tactic, since defendants may often be the only trial actor not familiar with the courtroom and its procedures.

B. Sexton's Other Ineffective Assistance of Counsel Claims

1. Tactical Decisions Within Counsel's Realm

Sexton's other ineffective assistance of counsel claims were dismissed by the Fourth Circuit. The court noted that in contrast to personal decisions, such as the right to testify, some decisions may be made by trial counsel without the defendant's consent. These decisions include "what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed."[28] Since Sexton's ineffective assistance claim for the failure to obtain his consent to not file a pre-trial motion challenging the admission of Sexton's confession was designated a tactical decision, the court ruled that Sexton's counsel was not constitutionally ineffective. Also, Sexton claimed ineffective assistance when trial counsel failed to secure his consent to present mitigating evidence which portrayed Sexton as the product of a severely dysfunctional upbringing. The court dismissed the claim by restating that "[t]he decision concerning what evidence should be introduced in a capital sentencing is best left in the hands of trial counsel."[29]

The court's ruling on these two claims enforces the proposition that certain trial and sentencing decisions are solely in the realm of counsel. From the court's disposition it is apparent that decisions on what evidence to present, what motions to file, and what objections to make are decisions left to counsel. Other decisions, such as the waiver of the right to testify, waiver of a jury trial, the decision to enter a guilty plea, and the decision to pursue an appeal, are decisions on which counsel should ultimately defer to the client.[30]

It is particularly important to note that the decision of what evidence to present in mitigation is the responsibility of trial counsel. Often times, mitigation evidence such as upbringing and psychological background may

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decisions rest with the defendant, but most rest with counsel. For further discussion of this point, see *infra* Part III.A.1.

28. *Sexton*, 163 F.3d at 885 (quoting United States v. Teague, 953 F.2d 1528, 1531 (11th Cir. 1992) (en banc)).

29. *Id.* at 887 (quoting Brown v. Dixon, 891 F.2d 490, 499-500 (4th Cir. 1989), *cert. denied sub nom.*, Brown v. French, 119 S. Ct. 559 (1998)).

30. However, being deferential in no way means that counsel should not make their opinions known on all of the decisions which are personal to a defendant. As seen in the waiver of the right to testify, it is important for counsel to do just that—counsel and advise to help the client make wise legal choices.

be embarrassing or discomforting for defendants. In these situations, counsel's duty to be a defender becomes apparent because no matter how embarrassing or unwanted certain mitigation evidence may be to the defendant, if that evidence will spare the defendant's life, it should be presented. The *Sexton* court has affirmed that counsel has the final word on whether evidence is presented. This action becomes even more vital in cases where defendant's may suffer from some mental infirmity. It would be unwise and unfair to allow an impaired client to dictate what evidence should be entered in mitigation, or even in the guilt/innocence phase of the trial.[31]

2. *Racial Naivete*

Another ineffective assistance of counsel claim by Sexton was based on counsel's failure to apprize Sexton of his right to participate in voir dire, to secure Sexton's consent not to raise the issue of racial bias on voir dire, and to raise the issue of racial bias on voir dire. Sexton is black; Crews was white. The court rejected all of these claims, finding that Sexton did participate in voir dire, that absent a request by the client that counsel inquire into racial bias such an inquiry is not required, and that the decision to not raise racial bias was a reasonable tactical decision.

While the court was probably correct under existing case law, the conclusion of counsel that "the case was not particularly racially charged, especially because Sexton maintained his encounter with Crews as consensual"[32] was at best naive. The capital trial of a black man for rape and murder of a white woman, who was a stranger to him, before 11 white jurors,[33] in a location, where only 35 years ago blacks and whites could not eat at the same lunch counter, presents a very real racial issue. The same would most certainly be true in Virginia. It is impossible to know just how the issue should be addressed in any given case, but it is unwise to ignore it.

Jason J. Solomon

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31. For further discussion of when and how counsel should pursue mitigation evidence and how the client's wishes come into play, see Alix M. Karl, Case Note, 11 CAP. DEF. J. 85 (1998) (analyzing Chandler v. Greene, No. 97-27, 1998 WL 279344 (4th Cir. May 20, 1998)). *See also* Susan F. Henderson, *Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?*, CAP. DEF. DIG., Fall 1993, at 32. It is also worth noting and commending trial counsel's approach to mitigation evidence. In portraying Sexton's rough and isolated youth, counsel developed a theme and presented evidence in support of it. The theme, that too little had been done too late for Sexton, centered around defendant's background, his life at an orphanage, family support, his mental and social services experience, and his mental health during his minority. That Sexton's past was especially difficult and spread out did not discourage counsel, however, from gathering and presenting defendant's story. It is in just such difficult cases that this effort is most needed and sometimes not undertaken.

32. *Sexton*, 163 F.3d at 887.

33. *Id.* at 886.