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Sheppard v. Taylor No. 98-12, 1998 WL 743663 (4th Cir. Oct. 23, 1998)

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I. Facts[1]

The police found the bodies of Mr. and Mrs. Rosenbluth on November 30, 1993, inside their Chesterfield County, Virginia, home.[2] Mr. Rosenbluth had been shot twice in the face and Mrs. Rosenbluth had been shot four times from close range and sustained additional wounds in the head and neck.[3] Although there was no sign of a struggle or forced entry, the house had been looted and the Rosenbluth's automobiles were missing, in addition to several of their personal belongings.[4] Evidence traced the appellant, Mark A. Sheppard ("Sheppard"), and Andre Graham ("Graham") to the murders.[5] When Sheppard was arrested, he was in possession of Mrs. Rosenbluth's watch and several of Mr. Rosenbluth's credit cards.[6] Sheppard's fingerprint was uncovered in the Rosenbluth home and the .38 caliber handgun responsible for the infliction of Mr. Rosenbluth's wounds and two of Mrs. Rosenbluth's wounds was linked to Sheppard.[7] Mrs. Rosenbluth's remaining wounds were made by a .45 caliber automatic weapon traced to Graham.[8] Autopsies indicated that the Rosenbluths had ingested alcohol and cocaine shortly before the murders.[9] The prosecution's theory at trial was that the Rosenbluths were regular customers of Graham and Sheppard, who were close friends and cocaine suppliers.[10] The Commonwealth argued that the Rosenbluths had either failed to pay a drug debt associated with the deals or had given the appellants some reason to believe

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1. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 165 F.3d 19 (4th Cir. 1998).

2. Sheppard v. Taylor, No. 98-12, 1998 WL 743663, at *1 (4th Cir. Oct. 23, 1998). This decision will not be published in a printed volume.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* The Commonwealth contended at trial that while Graham shot Mrs. Rosenbluth twice, Sheppard inflicted the fatal wounds with his two shots. *Id.*

9. *Id.*

10. *Id.*

that they might identify them as their suppliers, and as a result, Graham and Sheppard murdered the couple.[11]

Sheppard was convicted of two counts of capital murder, one for the murder of each of the Rosenbluths.[12] At the penalty trial, the prosecution presented evidence of Sheppard's prior unadjudicated criminal conduct.[13] The jury found both aggravating factors available under Virginia law, specifically (1) that Sheppard represented a future danger to society and (2) that the Rosenbluth murders were "vile" because they involved "aggravated battery" or "depravity of mind."[14] The jury imposed a sentence of death, which was subsequently confirmed by the trial judge.[15]

After unsuccessfully pursuing review of his convictions and failing to obtain post conviction relief in the Virginia courts, Sheppard filed a petition for writ of habeas corpus in federal district court.[16] The district court denied the petition and Sheppard appealed to the Fourth Circuit. Sheppard's major arguments on appeal were as follows: (1) that the Supreme Court of Virginia's failure to review his claims relating to the "future dangerousness" factor on the basis of a technicality in wording made Virginia's appellate review meaningless;[17] (2) that the trial court erred in permitting the Commonwealth to introduce evidence of prior unadjudicated conduct;[18] and (3) that the trial court erred in its refusal to allow Sheppard to inform the jury that his co-defendant, Graham, received a life sentence.[19]

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11. *Id.*

12. *Id.*, at *2. The jury also convicted Sheppard of two counts of robbery and four counts of using a firearm in the commission of robbery. *Id.*, at *2 n.3.

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

14. *Id.*, at *2.

15. *Id.* Sheppard, who was executed on January 20th, was the first execution of 1999 for Virginia. *Virginia Holds First Execution of the Year*, THE ROANOKE TIMES, Jan. 20, 1999, at B4.

16. *Id.*

17. *Id.*

18. *Id.*, at *3.

19. *Id.*, at *6. A number of Sheppard's claims will not be discussed in this case note for want of notable developments in the law. The court held Sheppard's contention that the Commonwealth's attorney deprived him of his due process rights by making improper closing arguments was foreclosed from review because Sheppard failed to preserve the issue for appeal. *Id.*, at *3. *See* Russo v. Commonwealth, 148 S.E.2d 820, 825 (Va. 1966) (finding that "[o]bjection 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) (emphasis added)).

Sheppard's claim that the "vileness" predicate for the death penalty is unconstitutionally vague was summarily dismissed by the court based on the rationale that Sheppard's conviction rested on solid ground since a specific finding of the "future dangerousness" factor was made. *Sheppard*, 1998 WL 743663, at *6. The United States Supreme Court has addressed the review process in a non-weighing state, like Virginia, in the situation where an aggravating factor *has* been found to be invalid:

II. Holding[20]

The Fourth Circuit held the following: (1) Sheppard's claim that appellate review of death sentences in Virginia is, in effect, meaningless was procedurally defaulted;[21] (2) Sheppard's claims that the trial court erred in

> In a non-weighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate remedy. *Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination*, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings.

Stringer v. Black, 503 U.S. 222, 231-32 (1992) (emphasis added). This language strongly suggests that, in all states, death sentences based in part on invalid aggravators cannot be automatically salvaged by the existence of a valid factor. Remand, at least for harmless error analysis, is required.

Based on Sheppard's admission that he was in the Rosenbluth's house at the time of the murder, the fact that the murder weapon was linked to Sheppard as recently as six days prior to the murder, and other witness testimony, Sheppard's contention that there was insufficient evidence to identify him as the triggerman was rejected by the Fourth Circuit. *Sheppard*, 1998 WL 743663, at *7.

Finally, the court held Sheppard's ineffective assistance of counsel claims to be without merit, finding an absence of unprofessional error on the part of defense counsel. *Id.* Note that one of these defaulted claims was based upon defense counsel referring to Sheppard as a "predator." Referring to one's client as a "predator" may not be ineffective assistance of counsel in the Fourth Circuit. *But cf.* Osborn v. Shillinger, 861 F.2d 612, 628-29 (10th Cir. 1988) (finding counsel ineffective in part because of his reference to the defendant as a "shark[] feeding in the ocean in a frenzy; something that's just animal in all aspects"). However, it is always unprofessional to violate one's duty to advocate *for* one's client.

20. On January 19, 1999, the Fourth Circuit granted Sheppard's motion for expedited appeal and affirmed the dismissal of Sheppard's action. Sheppard v. Early, No. 99-6048, 1999 WL 30642 (4th Cir. Jan. 19, 1999) (the opinion, originally a nonpublished opinion, was amended to be published in mid-February). Sheppard challenged the constitutionality of section 53.1-232.1 of the Virginia Code on equal protection grounds. *Sheppard*, 1999 WL 30642, at *1. Section 53.1-232.1 requires that an execution date be set within sixty to seventy days following the denial of habeas relief by the Fourth Circuit. *Id.*, at *2. Because Rule 13 of the Rules of the United States Supreme Court provides for a ninety-day period following a decision by a court of appeals in which to file a timely petition for certiorari, Sheppard argued that the Virginia statute deprived him of his Fourteenth Amendment right to equal protection. *Id.* The court of appeals, employing the "rational basis" test, found that section 53.1-232.1 is rationally related to a legitimate government interest. *Id.*, at *2-3. The court held that Virginia has a legitimate state interest in "the finality of its criminal judgments and in executing sentence on those determined by state law to be the most serious offenders." *Id.*, at *3.

Although the equal protection challenge to section 53.1-232.1 was unsuccessful, Sheppard's attorneys also considered pursuing an attack based upon the Supremacy Clause. *See* 28 U.S.C.A. § 2101(c) (West 1994) (codifying Rule 13 of the Rules of the United States Supreme Court which states that applications for writs of certiorari to the Supreme Court should be filed within ninety days after judgment is entered). Defense counsel are encouraged to object to the time frame used to set an execution date under section 53.1-232.1 on this ground.

21. *Sheppard*, 1998 WL 743663, at *2.

admitting various pieces of evidence regarding his prior unadjudicated conduct, thereby depriving Sheppard of his constitutional rights under the Eighth and Fourteenth Amendments, were either procedurally defaulted or failed on the merits;[22] and (3) the trial court did not err in its decision to exclude evidence that Sheppard's co-defendant received a life sentence from the penalty phase of the trial.[23]

III. Analysis / Application in Virginia

A. Meaningless Appellate Review of Future Dangerousness Finding

Sheppard made several claims relating to the trial court's admission of evidence of his prior unadjudicated conduct during the sentencing trial.[24] The Supreme Court of Virginia held these claims to be procedurally defaulted although they were all related to the finding of the future dangerousness factor because defense counsel failed to make a *general* assignment of error to the finding of future dangerousness.[25] Sheppard argued that the finding of procedural default was inadequate to foreclose federal habeas corpus review because it has not been "consistently or regularly applied."[26] The court seemed to agree with Sheppard's claim, stating that "Sheppard facially complied with Rules 5:17(c) and 5:22(b) by raising an assignment of error directed at each of the types of evidence that he now argues were unconstitutionally admitted. . . . [I]t appears that a persuasive argument can be made that Sheppard cannot be deemed to have been appraised of the requirement in time to bring his actions into compliance with it."[27] However, the court went on to find all of the specific claims either defaulted for other reasons or without merit.[28]

Although the Fourth Circuit seemed to reject the bizarre default rule applied by the Supreme Court of Virginia, it did so because Sheppard was the first to fall victim to this rationale. That leaves the question of whether counsel are *now* required to include general objections along for every specific one. The answer is probably "yes."

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22. *Id.*, at *4.

23. *Id.*, at *6.

24. *Id.*, at *3.

25. *Id.* Note that Sheppard specifically objected to the admissibility of (1) evidence concerning his participation in a motel robbery and shooting; (2) evidence concerning his participation in a robbery that involved a murder and a maiming; (3) the maiming victim's testimony; (4) the testimony of Maurice Turner, a fellow inmate, concerning Sheppard's statements about his involvement in as many as ten additional murders in Richmond, Virginia; and (5) the testimony of Lonnie Athens, a criminologist who offered his opinion concerning Sheppard's future dangerousness. *Id.*

26. *Id.*, at *4 (citing Johnson v. Mississippi, 486 U.S. 578, 587 (1988)).

27. *Id.*

28. *Id.*

In *Kasi v. Commonwealth*,[29] the defense raised ninety-two assignments of error on direct appeal.[30] This approach is to be encouraged; *Sheppard* illustrates why. Currently, there are a number of unresolved issues with respect to future dangerousness evidence and the process by which that factor is proven; included among these issues are the following claims: (1) the term "future dangerousness" is too vague for the defense to adequately defend against it; (2) defense had insufficient notice of unadjudicated acts; (3) *Brady v. Maryland*[31] and *Kyles v. Whitley*[32] require full disclosure of all favorable evidence related to mitigation and credibility of witnesses related to unadjudicated acts; (4) evidence introduced of unadjudicated acts was irrelevant;[33] (5) an inappropriate standard of proof was used to determine the existence of future dangerousness; and (6) the Commonwealth misled the defense as to what the future dangerousness evidence would be.[34]

B. Admissibility of Co-Defendant's Life Sentence

Sheppard contended that the trial court deprived him of his constitutional right to present evidence in mitigation by preventing him from informing the jury that his co-defendant, Graham, received a life sentence for his participation in the Rosenbluths' murders.[35] Citing *Eddings v. Oklahoma*,[36] the Fourth Circuit noted that the Eighth and Fourteenth Amendments require the sentencer to have access to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[37] However, the court concluded that a co-defendant's sentence is "neither an aspect of the defendant's character or record nor a circumstance of the

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29. 508 S.E.2d 57 (Va. 1998).

30. *See* Douglas R. Banghart, Case Note, 11 CAP. DEF. J. 437 (1999) (analyzing Kasi v. Commonwealth, 508 S.E.2d 57 (Va. 1998)).

31. 373 U.S. 83 (1963).

32. 514 U.S. 419 (1995).

33. Motions in limine should be employed to exclude this evidence; objections to their denial, properly federalized, form the basis for appeal.

34. *See* Gray v. Netherland, 518 U.S. 152, 166 (1996) (although the case was remanded for a determination as to whether petitioner raised the claim that the prosecution deliberately misled him regarding what evidence of unadjudicated acts would be presented at trial was defaulted, the Court recognized the potential merits of the claim), *on remand*, Gray v. Netherland, 99 F.3d 158, 164 (4th Cir. 1996) (finding Gray's claim to be procedurally defaulted and lacking prejudice, emphasizing the fact that the Commonwealth provided sufficient notice by disclosing the evidence it intended for proof of future dangerousness to the defense the day before the sentencing trial commenced).

35. *Sheppard*, 1998 WL 743663, at *6.

36. 455 U.S. 104 (1982).

37. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (internal quotation marks omitted).

offense" and denied Sheppard's claim.[38] In so doing, the court noted that Sheppard failed to point to any United States Supreme Court precedent holding that all reasonable jurists would conclude that a co-defendant's sentence is mitigating evidence.[39]

Despite the court's holding in *Sheppard*, this question is still open. While the United States Supreme Court has not specifically held that a co-defendant's sentence is mitigating evidence, it also has not held that a co-defendant's sentence is *not* mitigating evidence. Current law does not suggest that such evidence is inadmissible. Relative blame is a recognized factor relevant to the appropriateness of a death sentence.[40] It is important to remember that trial court judges retain the discretion to admit such evidence.[41]

Alix M. Karl

38. *Sheppard*, 1998 WL 743663, at *6.

39. *Id.*

40. *See* Burger v. Kemp, 483 U.S. 776, 784-85 (1987) (noting that counsel's failure to pursue a "lesser culpability" argument to the jury may be sufficient to constitute the basis of an ineffective assistance of counsel claim). *See also* VA. CODE ANN. § 17.1-313 (Michie Supp. 1998) (noting that comparative consideration of both the crime and the defendant is required of an adequate proportionality review of a death sentence).

41. For a more thorough analysis of the potential role of the co-defendant's sentence in mitigation, see Alix M. Karl, Case Note, 11 CAP. DEF. J. 379 (1999) (analyzing Ward v. French, No. 98-7, 1998 WL 743664 (4th Cir. Oct. 23, 1998)).