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Swisher v. Commonwealth 506 S.E.2d 763 (Va. 1998)

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I. Facts

On February 5, 1997, Dawn McNees Snyder ("Snyder") disappeared from the flower shop where she worked in Augusta County.[1] Her body, badly mutilated by animals, was discovered on February 21, 1997, near a riverbank two miles from the florist shop.[2] Because of the state of Snyder's body, dental records were used for establishing Snyder's identity.[3] On February 22, 1997, Bobby Wayne Swisher ("Swisher") revealed to his friend Henry Ridgeway, Jr. ("Ridgeway") that he had abducted, raped, sodomized, and killed Snyder.[4] Ridgeway went to the police the next day and relayed the details of Swisher's confession to them.[5]

On February 5, Swisher entered the florist shop where Snyder worked, approached her and said, "I have a gun in my pocket."[6] Swisher revealed a butcher knife to Snyder and forced her to leave the flower shop through the rear door.[7] In a field some distance away, near the South River, Swisher stopped Snyder and directed her to perform oral sodomy on him, which she did.[8] Next, Swisher forced Snyder to remove her clothes and raped her.[9] Swisher then permitted Snyder to dress and then forced her to perform another act of oral sodomy upon him.[10] At this point, Swisher decided it would be in his best interest to kill Snyder since she had seen his face and might have been able to identify him to the authorities.[11]

Swisher slit Snyder across the left side of her face and, again, across the throat.[12] He then "gouged her" and threw her into the river; Swisher then walked along the river, following Snyder's floating body, asking, "[a]re—are

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1. Swisher v. Commonwealth, 506 S.E.2d 763, 765 (Va. 1998).
2. *Id.* at 765.
3. *Id.*
4. *Id.*
5. *Id.* at 766.
6. *Id.* at 765 (internal quotation marks omitted).
7. *Id.*
8. *Id.* (internal quotation marks omitted).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

you dead yet?"[13] When Swisher saw Snyder crawl up the riverbank, he "got scared and took off running."[14]

Pursuant to this tip from Ridgeway, several officers went to Swisher's residence and invited him to the police station for questioning in connection with the murder of Snyder.[15] Swisher spoke with the deputies but did not confess until after his arrest.[16]

Swisher was tried before a jury and found guilty of the capital murder of Snyder in the commission of abduction with the intent to defile the victim of such abduction or in the commission of or subsequent to rape or forcible sodomy, the abduction with intent to defile Snyder, the rape of Snyder, and forcible sodomy of Snyder.[17]

During the sentencing phase of the capital murder trial, the jury fixed Swisher's punishment at death, finding that he represented a continuing serious threat to society and that his offense was outrageous or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.[18]

Swisher alleged on direct appeal to the Supreme Court of Virginia that the trial court erred in its failure to (1) direct the Commonwealth to file a bill of particulars in response to Swisher's motion;[19] (2) grant Swisher's motion to dismiss the indictment on the basis that the phrase "to defile" is inadequate to provide sufficient guidance to the jury regarding the imposition of a death sentence;[20] and (3) grant Swisher's proposed jury instruction on voluntary intoxication.[21]

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13. *Id.* (internal quotation marks omitted).
14. *Id.* (internal quotation marks omitted).
15. *Id.* at 766.
16. *Id.*
17. *Id.* at 765.
18. *Id.*
19. *Id.* at 768.
20. *Id.* at 771.
21. *Id.* at 772. Swisher raised several additional claims that will not be addressed at length in this summary because the court's discussion centered on either well-settled law or facts specific to the case. The first of these claims was Swisher's argument that the trial court erred in denying his motion to declare the death penalty scheme in Virginia unconstitutional. Citing *Jenkins v. Commonwealth*, 423 S.E.2d 360 (Va. 1992), the Supreme Court of Virginia found the defendant's reference to a memorandum filed in trial court insufficient to preserve the issue for appeal. *Swisher*, 506 S.E.2d at 767. This is an unnecessarily technical application of Virginia's procedural default rules since, by statute, the entire record may be designated for appeal. VA. R. ANN. 5:10. It follows that all of Swisher's arguments were squarely before the court. However, should the court's finding of procedural default under these circumstances prevail, federal review will be precluded. Given the fifty-page limit to appellate briefs, it is likely that the defense made a tactical decision to reference the trial court record for purposes of economy. In order to deal with the Catch-22 presented in this situation, it is suggested that defense counsel do the following: (1) file a request for an extension of the normal fifty-page limit; and (2) include in this request a description of all issues that would

II. Holding

The Supreme Court of Virginia held (1) that the trial court did not abuse its discretion in refusing to direct the Commonwealth to file a bill of particulars in response to Swisher's request;[22] (2) that a person of "ordinary intelligence" would conclude that the term "defile" is interchangeable with the phrase "sexually molest," and, thus, that Swisher was adequately informed of the charges against him and that the jury was capable of making a knowing determination of guilt or innocence;[23] and (3) that the trial court properly refused Swisher's proposed jury instructions since they contained incorrect statements of law.[24]

III. Analysis / Application in Virginia

A. Denial of Appellant's Motion for a Bill of Particulars

Swisher asserted that the trial court's denial of his motion for a bill of particulars denied him the ability to effectively make pretrial challenges to Virginia's capital murder statutory scheme.[25]

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be raised should the request for an extension be granted.

Swisher also raised two arguments that have been settled by previous decisions these claims were (1) whether appellant should have been granted additional peremptory challenges; and (2) whether the trial court erred in denying the defendant's request to mail a questionnaire to the potential jury venire. *Swisher*, 506 S.E.2d at 767.

The court also summarily dismissed Swisher's challenges to the following rulings made by the trial court: (1) the denial of his motions to suppress his confession and all evidence obtained from the police search of his house; (2) the denial of his motion for a change of venue because of prejudicial media coverage of his confession; (3) the denial of Swisher's request to ask additional questions to potential jurors during voir dire; and (4) the court's refusal to admit testimony regarding a pillowcase containing arguably exculpatory "genetic material" into evidence. *Id.* at 769-72.

22. *Id.* at 768.

23. *Id.* at 771.

24. *Id.* at 772.

25. *Id.* at 768. Portions of the motion requesting the bill of particulars were included in the court's opinion:

> [The Commonwealth is requested:]
> a) To identify the grounds, and all of them, on which it contends that defendant is guilty of Capital Murder under . . . Code § 18.2-31.
> b) To identify the evidence, and all of it, upon which it intends to rely in seeking a conviction of Defendant upon the charge of Capital Murder.
> c) To identify the aggravating factors, if any, upon which it intends to rely in seeking the death penalty, should defendant be convicted of Capital Murder.
> Additionally:
> 1) If the Commonwealth intends to prove "vileness" as an aggravating factor . . . to identify as many of the components of the factor, including torture, depravity of mind, and aggravated battery, on which it intends to offer evidence.
> 2) If the Commonwealth intends to prove "vileness" as an aggravating factor . . . to further identify every narrowing construction of that factor on which it intends to offer evidence.
> 3) If the Commonwealth intends to prove "future dangerousness" as an aggravat-

Specifically, Swisher contended that the bill of particulars was needed to (1) insure that he receive constitutionally effective assistance of counsel; (2) assist him in challenging the suppression of specific items of evidence; and (3) assist him in challenging the constitutionality of the vileness and future dangerousness predicates.[26] The Supreme Court of Virginia dismissed this argument, noting that "[t]he purpose of a bill of particulars is to state sufficient facts regarding the crime *to inform an accused in advance of the offense for which he is to be tried.*"[27] The court went on to point out that, because the defendant was not entitled to a bill of particulars as a matter of right when he was not challenging the sufficiency of his indictment, whether or not to direct the Commonwealth to file a bill of particulars was within the trial court's discretion.[28] Finally, the court noted that there was no constitutional right to discovery.[29]

Swisher claimed a due process right to notice of the charges against him *and* to notice of the aggravating factors the Commonwealth would rely upon in seeking its capital murder conviction.[30] The claim clearly had merit, in spite of the Supreme Court of Virginia's refusal to address it directly. While the indictment may contain information specific enough to put the defendant on notice as to the charges against him, the indictment *does not* set out the aggravating factors the Commonwealth intends to use at trial.[31] Further, under Virginia law, the defendant is *entitled* to a bill of particulars providing this information when he is either challenging the constitutionality of the indictment or seeking the suppression of evidence

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ing factor . . . to identify any unadjudicated allegations of misconduct by defendant upon which it intends to offer evidence and circumstances of the offense it contends are relevant to proof of the factor.
4) If the Commonwealth intends to prove "future dangerousness" as an aggravating factor . . . to further identify every narrowing construction of that factor on which it intends to offer evidence.
d) To identify the evidence, and all of it, on which it intends to rely in support of the aggravating factors identified, and all other evidence which it intends to introduce in support of its contention that death is the appropriate punishment for this Defendant.

Id. at 767-68 (internal quotation marks omitted).

26. *Id.* at 768.

27. *Id.* (emphasis added) (internal quotation marks omitted) (quoting Hevener v. Commonwealth, 54 S.E.2d 893, 899 (Va. 1949)).

28. *Id.* (citing Goins v. Commonwealth, 470 S.E.2d 114, 122 (Va.), *cert. denied*, 519 U.S. 887 (1996)).

29. *Id.* (citing Strickler v. Commonwealth, 404 S.E.2d 227, 233 (Va.), *cert. denied*, 502 U.S. 944 (1991)).

30. *Id.*

31. In Virginia, juries may not consider a sentence of death until the Commonwealth has proven one of the two aggravating factors beyond a reasonable doubt. VA. CODE ANN. § 19.2-264.4(C)(Michie 1998). Consequently, the factors are elements of the Commonwealth's case for death and the defendant is as much entitled to notice and opportunity to contest them as he is to the elements of capital murder.

on constitutional grounds.[32] The Supreme Court of Virginia ignored Swisher's claim of entitlement to notice of the aggravating factors to be used against him and dismissed his argument by only addressing the portions of Swisher's request that are left to the discretion of the trial court.[33]

Because the court did not squarely address Swisher's claim of entitlement to the requested bill of particulars, defense counsel should continue to raise objections to the denial of such a request. Furthermore, a motion for a bill of particulars which the trial court maintains the discretion to order should also be made. Although the trial court is not required to grant the motion, many judges are doing so in the interest of fairness.

B. Vagueness of the Term "Defile"

The trial court denied Swisher's motion to dismiss the indictment charging him with capital murder under section 18.2-31(1) of the Virginia Code,[34] which alleged that the term "to defile" fails to describe sufficiently the conduct it encompasses.[35] The appellate court rejected this argument and held "a person of ordinary intelligence would . . . conclude that the term intent 'to defile' is interchangeable with the phrase intent to 'sexually molest'" and, therefore, that Swisher was sufficiently informed of the charges against him.[36]

Recently, the United States Court of Appeals for the Fourth Circuit obliquely acknowledged that because an aggravating factor is an eligibility term for a death sentence, the jury must make a concrete finding of its existence before it may be used to convict the defendant of capital murder.[37]

A similar approach may be successful in challenging the vagueness of

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32. VA. CODE ANN. § 19.2-266.2 (Michie 1998) ("To assist the defense in filing [a Constitutional claim] in a timely manner, the trial court *shall*, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230 [of the Virginia Code].") (emphasis added).

33. *Swisher*, 506 S.E.2d at 768. The court opined, "The indictment adequately informed Swisher of the charged offenses, and we are of opinion [sic] Swisher did not wish to use the bill to challenge the sufficiency of the indictment, but . . . he desired the bill of particulars for other reasons." *Id.*

34. VA. CODE ANN. § 18.2-31(1) (Michie 1998). The relevant part of the statute is as follows:

> The following offenses shall constitute capital murder, punishable as a Class 1 felony:
> 1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money of a pecuniary benefit or with the intent to defile the victim of such abduction.

Id.

35. *Swisher*, 506 S.E.2d at 771.

36. *Id.*

37. Keel v. French, 162 F.3d 263, 270 (4th Cir. 1998).

the term "defile." A suggested argument proceeds as follows: (1) the term "defile" is, unquestionably, an eligibility term for capital murder under section 18.2-31(1) of the Virginia Code; (2) as such, it requires a "yes" or "no" determination to be made by the jury; and (3) use of the comparably vague term "sexually molest" to define "defile," is unconstitutionally vague.[38]

C. *Voluntary Intoxication Jury Instructions*

Swisher also objected to the trial court's failure to grant two of the defense's proposed jury instructions.[39] The first was to instruct the jury that (1) a sufficient degree of voluntary intoxication could negate the requisite intent for capital murder and (2) voluntary intoxication is not relevant to the finding of second degree murder or manslaughter.[40] The second instruction proposed by Swisher directed the jury to consider the charges and lesser included offenses in order of seriousness.[41] Strangely, the Supreme Court of Virginia held that the trial court did not err in its refusal to read these instructions because they "contained incorrect statements of the law."[42] This is *simply not true*; both instructions were accurate.[43] The question remains, however, as to how to characterize such an error to pursue it on federal review. Two potential attacks on a court's denial of jury instructions that accurately depict the law in Virginia are to argue (1) that the ruling violated the defendant's Fourteenth Amendment due process rights by the

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38. *See* Tuilaepa v. California, 512 U.S. 967 (1994) (concluding that more specificity required for death eligibility factors, compared with "selection" factors).

39. *Swisher*, 506 S.E.2d at 772.

40. *Id.* The language of the proposed instruction follows:

> "If you find that the defendant was so greatly intoxicated by the voluntary use of alcohol and drugs that he was incapable of deliberating or premeditating, then you cannot find him guilty of capital murder or murder in the first degree . . . . Voluntary intoxication is not a defense to second degree murder or manslaughter."

Id.

41. *Id.* This proposed instruction read:

> "You have been instructed on more than one grade of homicide and if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant, and find him guilty of the lesser offense. . . . For example, if you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of second degree murder or of voluntary manslaughter. . . . If you have a reasonable doubt as to whether his is guilty at all, you shall find him not guilty."

Id.

42. *Id.*

43. *See* Griggs v. Commonwealth, 255 S.E.2d 475 (Va. 1979) (stating that evidence of voluntary intoxication may negate the existence of premeditation and deliberation), Wright v. Commonwealth, 363 S.E.2d 711 (Va. 1988) (same).

arbitrary enforcement of a state created right[44] or (2) that the ruling, and others like it, served to create two classes of defendants charged with the same crime—those who receive the benefit of settled Virginia law and those who do not—and, therefore, it violated the defendant's Fourteenth Amendment equal protection rights.

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44. Virginia is, of course, free to attach whatever defensive significance it wishes to voluntary intoxication. The problem here is that Swisher was plainly denied that which state law grants to all criminal defendants.