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Swann v. Taylor No. 98-20, 1999 WL 92435 (4th Cir. Feb. 18, 1999)

Swann v. Taylor
No. 98-20, 1999 WL 92435
(4th Cir. Feb. 18, 1999)[1]

I. Facts

On the night of November 7, 1992, Calvin Eugene Swann ("Swann") approached the home of Conway Forrest Richter ("Richter"), in search of someone to rob for drug money. Swann entered Richter's home masked and armed with a shotgun. Swann approached Richter at the dinner table and told him that "This is a stickup."[2] Richter reacted by charging at Swann. Swann shot him in the chest, killing him. Swann then took sixty dollars from Richter's wallet. Several weeks later, the police brought Swann in for questioning upon learning through police investigation that he disposed of a shotgun sometime after the killing. Swann confessed orally and in writing to the killing.[3]

Swann was charged with capital murder in the commission of a robbery while armed with a deadly weapon and robbery. A jury convicted Swann of both crimes and set his punishment for the robbery at life imprisonment. During the sentencing phase of the bifurcated trial for capital murder, the jury found the future dangerousness predicate and sentenced Swann to death.[4]

Swann's appeals to the Supreme Court of Virginia and the United States Supreme Court were unsuccessful and state habeas proceedings were exhausted. Swann's federal habeas corpus petition was denied by the United States District Court. The district court also denied Swann's motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The United States District Court for the Fourth Circuit granted Swann's application for a certificate of appealability.[5]

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1. This is an unpublished opinion referenced in the "Table of Decisions Without Reported Opinions" at 173 F.3d 425 (4th Cir. 1999).

2. Swann v. Taylor, No. 98-20, 1999 WL 92435, at *1 (4th Cir. Feb. 18, 1999).

3. *Id.* For a more detailed discussion of the facts underlying Swann's conviction, see Swann v. Commonwealth, 441 S.E.2d 195 (Va. 1994).

4. *Swann*, 1999 WL 92435, at *1. Specifically, the jury found a probability that Swann "would commit criminal acts of violence that would constitute a continuing serious threat to society." VA. CODE ANN. § 19.2-264.4(C) (Michie 1995 & Supp. 1998).

5. *Swann*, 1999 WL 92435, at *1-2.

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed in part, vacated in part, and remanded with instructions the decision of the district court.[6] The Fourth Circuit affirmed the denial of Swann's claims (1) that he was entitled to a psychiatrist under *Ake v. Oklahoma*,[7] (2) that jury misconduct denied Swann his right to trial by an impartial jury and the failure to object to these jury deficiencies rendered his counsel constitutionally ineffective, and (3) that the jury's viewing of the crime scene denied his right to a fair trial.[8] The Fourth Circuit vacated the denial of Swann's claim that he was not competent to be executed[9] based on *Ford v. Wainwright*.[10] The court remanded the claim to the district court with instructions to dismiss it without prejudice, thus allowing Swann to raise it once his death became imminent.[11]

III. Analysis / Application in Virginia

A. Ake v. Oklahoma

Swann appealed the denial of his request under *Ake* for a psychiatrist to evaluate him and assist in his defense.[12] During trial, the court granted Swann's motion for a mental health expert, pursuant to section 19.2-264.3:1(E) ("3:1") of the Virginia Code by appointing Dr. Stanton E. Samenow, a clinical forensic psychologist.[13] Dr. Samenow evaluated Swann

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6. *Id.*, at *19.

7. 470 U.S. 68, 83-84 (1985) (holding that when an indigent criminal defendant's sanity at the time of the offense is likely to be a significant factor at trial, or when a capital defendant's future dangerousness is to be a significant factor at the penalty phase of the trial, a state must assure the defendant's access to a competent psychiatrist to assist in his defense per the Due Process Clause of the Fourteenth Amendment).

8. *Swann*, 1999 WL 92435, at *9-16. The court's disposition of Swann's claim based on his right to an impartial jury is briefly discussed within this footnote. Swann claimed that the jury's viewing of the crime scene denied him his rights (1) to a fair trial because jurors noticed his leg shackles and (2) to effective counsel because his trial counsel did not object to these viewing conditions at that time. The court did not find Swann's claim barred by section 2254(e) of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No.104-132, 110 Stat. 1214 (amending 28 U.S.C. Title 153). The court did find Swann to have procedurally defaulted the fair trial claim per Virginia's procedural rules since he presented the claims for the first time in his state habeas petition. Swann's effectiveness of counsel claim was regarded by the Supreme Court of Virginia to have no merit and was further found by the Fourth Circuit to be barred from a new evidentiary hearing per section 2254(d). *Swann*, 1999 WL 92435, at *14-15.

9. *Swann*, 1999 WL 92435, at *19.

10. 477 U.S. 399, 410 (1986) (recognizing that a state is constitutionally prohibited from inflicting the death penalty upon a prisoner who is insane).

11. *Swann*, 1999 WL 92435, at *18-19.

12. *See* Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985).

13. *Swann*, 1999 WL 92435, at *2.

and wrote a report attesting to Swann's sanity at the time of the shooting as well as his competency to stand trial.[14]

Swann then advised the court that, if he were found guilty of capital murder, he intended to use mental expert testimony at the penalty phase of his trial.[15] In response to this, the Commonwealth moved successfully for the appointment of Dr. Arthur Centor, a clinical forensic psychologist, to conduct an evaluation of Swann.[16] Dr. Centor found no symptoms of mental illness.[17] Shortly thereafter, Swann moved for the appointment of a second mental health expert under 3:1, specifically asking for the appointment of a psychiatrist to assist in the preparation of evidence relating to the effect of medication on Swann's mental condition.[18] Swann based his motion partly upon a letter written by Dr. Samenow in which he stated that he was unqualified to proffer expert testimony on such medicinal treatment.[19] Swann further noted that Dr. Ryans, a psychiatrist who had treated him in the past, was willing to evaluate Swann pursuant to his second 3:1 request.[20] The trial court denied this second motion, finding the appointment of Dr. Samenow sufficient to satisfy 3:1.[21]

Nevertheless, Dr. Ryans did testify at the penalty phase that Swann suffered from chronic undifferentiated schizophrenia and that he had responded well to medication in the past.[22] Swann claimed that the court's failure to appoint a psychiatrist violated *Ake*.[23] Swann argued that, either literally or as applied, *Ake* entitled him to the appointment of a psychiatrist rather than a psychologist.[24] The court, finding that the appointment of Dr.

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14. *Id.* Note that Samenow is a co-author of a study which concludes that neither mental illness nor environmental factors cause people to commit crimes. The study espouses the hypothesis that criminals commit crimes because they believe they will not be caught. *See* Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998); *see also* Jason J. Solomon, Case Note, 11 CAP. DEF. J. 185 (1998) (analyzing *Wright*, 151 F.3d 151). Defense counsel should suggest the use of a different, qualified expert when making a 3:1 motion.

15. *Swann*, 1999 WL 92435, at *2.

16. *Id.* The Commonwealth was entitled to the appointment of Centor because once defense counsel decides to have an appointed expert testify at trial, 3:1 entitles the Commonwealth to receive the report prepared by the expert for defense counsel; it also permits the Commonwealth to have an examination of the defendant performed by its own court-appointed expert. VA. CODE. ANN. § 19.2 - 264.3:1(D) (Michie 1998).

17. *Swann*, 1999 WL 92435, at *2.

18. *Id.*, at *3.

19. *Id.*

20. *Id.*

21. *Id.*, at *3.

22. *Id.*, at *3-4.

23. *Id.*, at *6.

24. *Id.*, at *4-6. In analysis of this claim, the Fourth Circuit first noted that since Swann raised the issue on direct appeal, the court was not barred from hearing the claim on review in federal habeas merely because it had not been raised at the state habeas proceeding. Next,

Samenow satisfied the Commonwealth's constitutional obligation under *Ake*, rejected Swann's argument.[25]

Swann's attorney deserves applause for his efforts in arguing this point. The recognition that 3:1 as written does not set a limit on the number of mental health experts that may be appointed was astute. Further, the attorney realized that a psychologist was not the proper expert to assist the defense in understanding the effects of medicinal treatments on aberrant behavior. This claim was made manifest by Dr. Samenow's letter and it is a plausible argument when the circumstances of the case involve medicinal treatment. Knowledgeable testimony about the effectiveness of medicinal treatments is especially important when future dangerousness is at issue.

The United States Supreme Court dealt with the issue of expert assistance in preparation of a defense in *Caldwell v. Mississippi*.[26] In *Caldwell*, the Court rejected the petitioner's argument that he was denied experts necessary to an adequate defense.[27] However, the Court did *not* reject the notion that a defendant's due process rights, upon a showing of particularized need, require the appointment of expert assistance beyond the mental health experts provided for under *Ake*. In *Husske v. Commonwealth*,[28] the Supreme Court of Virginia interpreted *Ake* and *Caldwell* to require appointment of non-psychiatric expert witnesses if the defendant can show that the assistance requested will probably be a significant factor in his defense and that the lack of such assistance would prejudice his case.[29] Thus, although counsel in this case was correct to move under rule 3:1 for a psychiatric expert, the *Ake-Caldwell-Husske* combination may provide a stronger basis for appointment of experts beyond mental health experts.

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the court considered the effect of AEDPA on Swann's *Ake* claim. *Id.*, at *4. If a federal claim has been adjudicated on the merits in the state court, federal habeas relief is prohibited unless the adjudication's resulting decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C.A. § 2254(d)(1),(2) (West 1994 & Supp. 1998). The court agreed with Swann that this issue was not adjudicated on the merits at the state court level since the claim was decided under state law without reference to or reliance on federal precedent. *Swann*, 1999 WL 92435, at *5.

25. *Swann*, 1999 WL 92435, at *6. The court relied on *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998), for the premise that appointment of a competent psychologist satisfies a state's constitutional obligation. *See also* Anne Duprey, Case Note, 11 CAP. DEF. J. 175 (1998) (analyzing *Wilson*, 155 F.3d 396).

26. 472 U.S. 320, 323 n.1 (1985) (denying appointment of a criminal investigator, a fingerprint expert, and a ballistics expert to assist in defense preparation due to the lack of showing of reasonableness of the requests).

27. Caldwell v. Mississippi, 472 U.S. 320, 323 & n.1 (1985).

28. 476 S.E.2d 920 (Va. 1996) (reading *Ake* and *Caldwell* together to show defendant's entitlement to non-psychiatric experts).

29. Husske v. Commonwealth, 476 S.E.2d 920, 925-27 (Va. 1996).

B. Jury Misconduct

Swann claimed that juror misconduct infringed upon his Sixth and Fourteenth Amendment rights to trial by an impartial jury.[30] Swann alleged the following errors: (1) failure to disclose that one of the jurors worked at a store that was robbed by Swann; (2) failure to disclose that one of the jurors was on the jury that convicted Terry Williams, who had committed a robbery with Swann, of capital murder;[31] and (3) improper consideration by the jury of Swann's parole eligibility if he were sentenced to life imprisonment.[32] Upon review of these claims under the standards set forth in 28 U.S.C. § 2254(d) and 28 U.S.C. § 2254(e), as amended by AEDPA, the court found Swann barred from arguing these claims and that, even if the claims had merit, they would amount to harmless error.[33]

The court's analysis of this argument shows the importance of counsel's actions at the trial level in selecting an impartial jury. During voir dire, prospective jurors should be questioned as to their prior service, if any, on other capital juries. Another important question is whether they have served on juries in noncapital trials of the defendant's friends or acquaintances. The concern is that, by allowing jurors that have served on juries in either of these situations to sit on a defendant's capital jury, a connection may be made between the two defendants. Even though separated by time and guilt, the juror may transfer the guilt of the first defendant to the defendant in the current case. This transfer is particularly dangerous in cases in which the Commonwealth attempts to prove future dangerousness, because the connection might be made through testimony regarding prior criminal acts. These matters must be addressed at voir dire because if they are recognized and litigated later in the process, they will likely be treated as harmless error.

C. Effective Assistance of Counsel

Swann claimed that his Sixth and Fourteenth Amendment rights were violated by his trial counsel's failure to question prospective jurors on prior jury service or to object to the admission into evidence of Terry Williams's

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30. *Swann*, 1999 WL 92435, at *9.

31. *Id.* Note also that the juror who sat on the Terry Williams jury was not the only one present from those proceedings. The judge and prosecutor from the Williams case were the judge and prosecutor in Swann's case. *Id.*

32. *Id.*, at *10. A juror apparently had wanted to vote for life imprisonment without the possibility of parole. The trial court instructed the jurors that this verdict was not an option. *Id.* This case was tried prior to *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), which held that where future dangerousness is at issue and state law prohibits parole for capital life imprisonment sentences, as is true in Virginia, due process requires that the jury be informed of parole ineligibility.

33. *Swann*, 1999 WL 92435, at *12.

death sentence.[34] The court analyzed these claims under *Strickland v. Washington*[35] which held that a defendant must prove that counsel's performance fell below an objective standard of reasonableness and that this performance was prejudicial to the outcome of the trial in order to succeed on an ineffective assistance of counsel claim.[36] The court, relying on *Williams v. Taylor*,[37] concluded that the Supreme Court had clarified the prejudice prong of *Strickland* in *Lockhart v. Fretwell*.[38] The *Lockhart* Court held that an ineffectiveness claimant would need to show that the result of his trial was "fundamentally unfair or unreliable" for the claim to succeed.[39] Since Swann could not convince the court that his case was prejudiced, his claim failed.[40]

While failing to identify and strike veniremen during voir dire who have convicted a defendant's friends of capital murder may not rise to the level of ineffective assistance of counsel, it should nevertheless be avoided because of the possible transfer of guilt to the defendant in the second trial.

D. Ford v. Wainwright

Swann claimed that, under *Ford v. Wainwright*, his execution would violate his Eighth and Fourteenth Amendment rights because of his mental condition.[41] Swann first raised this issue before the Supreme Court of Virginia, which held the claim to be procedurally defaulted.[42] Swann argued before the Fourth Circuit that this decision was in error under recent United States Supreme Court decision *Stewart v. Martinez-Villareal*,[43] which

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34. *Id.*

35. 466 U.S. 668, 690 (1984) (setting forth two-prong test to be employed in ineffective assistance of counsel claims).

36. *Swann*, 1999 WL 92435, at *13-14.

37. 163 F.3d 860, 869 (4th Cir. 1998) (deciding that the prejudice standard announced by the Court in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), was a clarification of *Strickland*).

38. 506 U.S. 364 (1993).

39. *Id.* at 369. Note that this interpretation of *Lockhart* as a clarification of *Strickland* is controversial. In her concurring opinion in *Lockhart*, Justice O'Connor expressed the concern that this "clarification" interpretation would result from the Court's decision, and stated that *Lockhart* should have "no effect on the prejudice inquiry under *Strickland* . . . ." *Lockhart*, 506 U.S. at 373 (O'Connor, J., concurring). For further discussion of why *Lockhart* may be an improper clarification of *Strickland*, see Jason J. Solomon, Case Note, 11 CAP. DEF. J. 367 (1999) (analyzing Sexton v. French, 163 F.3d 874 (4th Cir. 1998)); Alix M. Karl, Case Note, 11 CAP. DEF. J. 169 (1998) (analyzing Williams v. French, 146 F.3d 203 (4th Cir. 1998)).

40. *Swann*, 1999 WL 92435, at *16. Note that the court looked only to the prejudice prong of *Strickland* and did not claim that the conduct fell below objective reasonableness. *Id.*, at *13.

41. *Swann*, 1999 WL 92435, at *16.

42. *Id.*, at *17.

43. 118 S. Ct. 1618, 1622 (1998) (stating that a *Ford* claim is not ripe until death is

was decided after the Supreme Court of Virginia adjudicated Swann's claim.[44] The *Martinez-Villareal* Court held that a *Ford* claim does not ripen for resolution until execution is imminent because only then can an individual's competency to be executed be properly assessed.[45] The Fourth Circuit remanded Swann's claim to the state court with instructions to dismiss without prejudice so that he might properly raise it at the appropriate time after his other remedies have been exhausted.[46]

It is unclear what Swann argued on remand to convince the court that he was not competent to be executed. Presumably, Swann would have been required to demonstrate that the logic of *Ford* precludes the execution of defendants who, although not legally insane, nevertheless suffer from severe mental illness. The United States Supreme Court in *Ford* basing its decision on history, tradition, and the Eighth Amendment, concluded that states are prohibited from inflicting the death penalty on prisoners who are insane.[47] Because the bases for this conclusion are largely moral and historical, they seem to apply equally to the severely mentally ill: if someone is severely mentally ill, he, like the insane, may well be prevented from "comprehending the reasons for the penalty or its implications."[48] Although the Court gave the states ultimate responsibility for enforcement, some evidentiary hearing is indisputably appropriate. Further, the Court showed willingness to strike down procedures which it finds constitutionally deficient, which should encourage defense counsel to file motions which challenge inadequate procedures like those found in this case. Swann's argument on remand did not convince the Virginia court that he was not competent to be executed and, subsequently, the United States Supreme Court denied granting certiorari on this issue.[49]

IV. Epilogue

On Wednesday, May 12, 1999, about four hours before his scheduled execution, Governor James S. Gilmore granted Swann clemency by commuting his sentence to life imprisonment without parole due to his severe mental impairment.[50] There was a strong and highly documented basis for Governor Gilmore's decision to commute the sentence. Swann had, in his

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imminent).

44. *Swann*, 1999 WL 92435, at *16-17.

45. Stewart v. Martinez-Villareal, 118 S. Ct. 1618, 1622 (1998).

46. *Swann*, 1999 WL 92435, at *18.

47. Ford v. Wainwright, 477 U.S. 399, 401 (1986).

48. *Id.* at 417.

49. Swann v. Taylor, 119 S.Ct. 1591 (1999).

50. *See* Frank Green, *Gilmore Grants Swann Clemency Sentence Commuted to Life Without Parole*, RICHMOND TIMES-DISPATCH, May 13, 1999, at A1; *Calvin Swann Gilmore Gives Life*, VIRGINIAN-PILOT & LEDGER-STAR, May 14, 1999, at B10.

twenty-five year history of mental illness, been diagnosed as having schizophrenia at least forty-one times, been described as psychotic at least thirty-one times, been declared incompetent to stand trial twice, been involuntarily committed to mental hospitals at least sixteen times, been regularly medicated with eight different antipsychotic drugs, and received Social Security payments because of his illness. This was the sixth time clemency has been granted a death row inmate in Virginia and the fortieth time in the United States since the death penalty was reinstated by the United States Supreme Court in 1976.[51]

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51. Death Penalty Information Center, *Facts About Clemency*, <http://www.essential.org/orgs/dpic/clemency.html>.