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Fishback v. Commonwealth 532 S.E.2d 629 (Va. 2000)

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I. Facts

Richard David Fishback ("Fishback") was convicted by a jury of robbery, three counts of abduction, and four firearms charges for the robbery of the employees of a convenience store in January 1997.[1] During the penalty-determination phase, defense counsel proffered two jury instructions. The first jury instruction ("No. S") stated "there is no parole in Virginia."[2] The second proffered jury instruction ("No. T") stated "assume [the defendant] will actually serve all of the jail or prison time you find to be an appropriate sentence and you are not otherwise to concern yourselves with what may happen afterwards."[3] The judge asked defense counsel if she had authority for the proffered instructions. Defense counsel responded that she had no authority for the first instruction but that it reflected "the current state of the law now."[4] Defense counsel further responded that the second instruction was designed to address questions that juries typically ask regarding the amount of time a defendant will serve upon being sentenced. The judge refused to give either of the proffered instructions. During deliberations, the jury questioned the judge about how the sentence would be imposed.[5] After discussion with the prosecutor and defense counsel, the trial judge gave the jury the Commonwealth's model instruction which did not inform the jury that parole had been abolished. Defense counsel did not object to the instruction or renew her objection to the refusal to instruct the jury that parole had been abolished.[6] The jury returned verdicts of thirty years imprisonment for the robbery; seven years for each abduction; and eighteen years for the firearms charges.[7] The judge ordered the sentences to run concurrently and suspended fifty-one years of the sentence on the condition that Fishback serve ten years probation upon his release.[8]

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1. Fishback v. Commonwealth, 532 S.E.2d 629, 630 (Va. 2000).
2. *Id.* (quoting proposed jury instruction No. S).
3. *Id.* (quoting proposed jury instruction No. T).
4. *Id.*
5. *Id.* The jury sent a note to the judge, asking the following: (1) if the terms would run consecutively or concurrently; (2) if the sentence could be reduced by the judge; and (3) if the defendant qualified for parole. *Id.*
6. *Id.* at 631.
7. *Id.*
8. *Id.*

Fishback petitioned for appeal in the Court of Appeals of Virginia on the following issues: (1) sufficiency of the evidence to prove the abductions and abduction-related firearms charges; (2) denial of a motion to suppress; (3) refusal of an instruction defining abduction; and (4) refusal of the instruction concerning the abolition of parole in Virginia. The Court of Appeals of Virginia awarded appeal on all issues except for the refused instruction on parole.[9] The court of appeals affirmed Fishback's convictions.[10] Fishback then appealed to the Supreme Court of Virginia and reasserted all the claims he made to the court of appeals. The Supreme Court of Virginia awarded an appeal, but limited the appeal to the sole issue of whether the trial court erred in refusing the defendant's instruction concerning the abolition of parole.[11]

II. Holding

The Supreme Court of Virginia held that juries shall be instructed as a matter of law that parole has been abolished for non-capital felony offenses committed on or after January 1, 1995.[12] Where the defendant's age makes geriatric release a possibility, the jury will be instructed on the provisions of the geriatric release statute.[13] However, the court found that the consideration of good behavior credits by juries is too speculative and held that juries will not be instructed that defendants could be eligible for release based on good behavior.[14] The court determined that the jury's knowledge of the abolition of parole was vital to the penalty determination phase of Fishback's case and vacated his sentence.[15] His case was remanded to the Court of Appeals of Virginia with orders to remand to the trial court for a new sentencing hearing.[16]

III. Analysis / Application in Virginia

In *Coward v. Commonwealth*,[17] the Supreme Court of Virginia held that the jury may not be instructed on the possibility of parole.[18] The policy behind the holding was to preserve the separate roles of the judiciary in

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9. *Id.* The Court of Appeals noted in its order denying Fishback's claim that it previously held that the trial court is not required to instruct the jury on a defendant's eligibility of parole in non-capital cases. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 634.

13. *Id.*; *see* VA. CODE ANN. § 53.1-40.01 (Michie 2000).

14. *Id.*

15. *Id.* at 635.

16. *Id.*

17. 178 S.E. 797 (Va. 1935).

18. Coward v. Commonwealth, 178 S.E. 797, 799 (Va. 1935); *see Fishback*, 532 S.E.2d at 631.

assessing punishment and the executive in administering it.[19] The enactment of section 53.1-165.1 of the Virginia Code, abolishing parole, has eroded the policy underlying the *Coward* rule.[20] Under section 53.1-40.01, prisoners serving life sentences for class one felonies are ineligible for geriatric release.[21] As a result, defendants convicted of capital murder for crimes committed on or after January 1, 1995, are ineligible for parole or release from prison.[22] In *Yarbrough v. Commonwealth*,[23] the court declined to apply the *Coward* rule in capital cases.[24] The *Yarbrough* court held that a defendant convicted of capital murder was entitled to an instruction that he would be parole-ineligible if sentenced to life imprisonment.[25] However, the dissent in *Yarbrough* suggested that the Commonwealth should be permitted an instruction on the possibility of executive clemency.[26]

The continued viability of the *Coward* rule in non-capital felony cases was questioned but not decided in *Yarbrough*.[27] In *Fishback*, the Supreme Court of Virginia addressed the continued application of the *Coward* rule in non-capital felony cases.[28] The court's main concern was balancing the goal of "truth in sentencing" with the preservation of the separate functions of the judiciary and the executive.[29] The Supreme Court of Virginia resolved the concern for preserving the separate functions of the judiciary and the executive by looking to Virginia Code section 53.1-165.1.[30] The court was satisfied that the statute left no room for the jury to speculate about

19. *Fishback*, 532 S.E.2d at 632 (citing Hinton v. Commonwealth, 247 S.E.2d 704, 706 (Va. 1978)).

20. VA. CODE ANN. § 53.1-165.1 (Michie 2000); *see Fishback*, 532 S.E.2d at 633.

21. VA. CODE ANN. § 53.1-40.01 (Michie 2000); *see also Fishback*, 532 S.E.2d at 631.

22. *Fishback*, 532 S.E.2d at 631.

23. 519 S.E.2d 602 (Va. 1999).

24. Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999).

25. *Yarbrough*, 519 S.E.2d at 616. This instruction was already required in cases where the Commonwealth presented evidence of the defendant's future dangerousness. *See* Simmons v. South Carolina, 512 U.S. 154, 168-69 (1994) (holding that when the state raises the specter of defendant's future dangerousness due process requires that the jury be instructed that life imprisonment means life without the possibility of parole). The Virginia General Assembly recently amended Virginia Code § 19.2-264.4 to encompass the *Yarbrough* holding. *Fishback*, 532 S.E.2d at 632 n.3; *see* VA. CODE ANN. § 19.2-264.4 (Michie 2000).

26. *Fishback*, 532 S.E.2d at 634 n.4. In *Fishback*, the court answered the question left open in *Yarbrough* and held that because jury consideration of the possibility of executive clemency would be pure speculation, the Commonwealth will not be permitted an instruction on the matter of executive clemency. *Id.* The portion of the holding concerning executive clemency implicates capital cases as well as non-capital cases. *Id.* at 634.

27. *Id.* at 631.

28. *Id.* at 631-32.

29. *Id.* at 632.

30. *Id.* Virginia Code § 53.1-165.1 reads in part, "[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense." VA. CODE ANN. § 53.1-165.1 (Michie 2000).

how the defendant's sentence would be imposed, nor did the statute give discretion to the executive in administering the sentence imposed.[31] The court found it "simply defies reason" that the jury not be instructed by the trial court regarding the abolition of parole.[32] The Supreme Court of Virginia held that "henceforth juries shall be instructed, as a matter of law, on the abolition of parole for non-capital felony offenses committed on or after January 1, 1995, pursuant to Code section 53.1-165.1"[33]

However, the court recognized that defendants in non-capital felony cases could be eligible for geriatric release or early release on the basis of good behavior credits.[34] The court considered geriatric release as "in the nature of a parole statute."[35] The court distinguished geriatric release from sentence reduction on the basis of good behavior.[36] Geriatric release involves a mathematical calculation that is readily determinable and not subject to speculation.[37] The court held that because geriatric release is a form of parole and that determination of eligibility was not speculative, juries in appropriate cases should be instructed on the possibility of geriatric release.[38] The Supreme Court of Virginia found that good behavior sentence reductions, in contrast to geriatric release, are speculative and based on unpredictable factors such as the defendant's behavior and the executive branch's largely subjective evaluation of that behavior.[39] The court found that the speculative nature of the possibility of early release based on good behavior credit supported the holding of *Coward* that juries should not be instructed on the possibility of parole.[40] As a result, the court held that

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31. *Fishback*, 532 S.E.2d at 633.

32. *Id.* The court found that

> within the permissible range of punishment a jury is required to determine a specific term of confinement that it considers to be an appropriate punishment under all the circumstances revealed in the case. A jury should not be required to perform this critical and difficult responsibility without the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision. Surely a properly informed jury ensures a fair trial both to the defendant and the Commonwealth.

Id.

33. *Id.* at 634.

34. *Id.* at 632.

35. *Id.* at 633.

36. *Id.* at 634.

37. *Id.*

38. *Id.* The court reasoned that the policy underlying the *Coward* rule (the preservation of the separate functions of the judiciary and the executive) retains validity; because good behavior release is solely at the discretion of the executive branch, sentencing juries should not be allowed to consider the possibility of early release for good behavior. *Id.*

39. *Id.*

40. *Id.*

juries are not to be instructed on the possibility of good behavior sentence reductions.[41]

In *Fishback*, the Supreme Court of Virginia partially overruled *Coward*. The court's analysis of *Coward* in light of the abolition of parole established that the *Coward* rule did not retain its validity in every circumstance. The court set out a new procedural rule that requires that juries in felony cases be instructed that parole has been abolished, but that when the particular facts make geriatric release a possibility the Commonwealth is entitled to an instruction regarding geriatric release.[42] The court applied this new procedural rule[43] to Fishback's appeal and noted that deficiencies in his proffered instruction did not bar consideration of the appeal.[44] Although the general rule is that the trial court is not required to amend erroneous instructions, the rule is limited when the error in the instruction is materially vital to the defendant.[45] The Supreme Court of Virginia held that the jury's knowledge of the abolition of parole was materially vital to the penalty-determination phase of Fishback's trial. Thus, Fishback will receive a new sentencing hearing.[46]

IV. Conclusion

In *Fishback*, the Supreme Court of Virginia answered the question raised by the *Yarbrough* dissent. It held that the Commonwealth will not be permitted an instruction on the possibility of executive clemency.[47] This portion of the holding implicates capital cases as well as non-capital felony cases.[48] Thus, after *Fishback* and *Yarbrough*, juries in all Virginia capital cases must be instructed that "life means life." At the same time, the Commonwealth is precluded from arguing or proffering a jury instruction stating that the possibility of executive clemency could result in a defendant's release from prison even though the defendant was sentenced to life imprisonment.

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41. *Id.*

42. *Id.*

43. *Id.* The court held that, because the rule developed in *Fishback* was a new rule of criminal procedure, application of the rule is limited to cases not yet final as of June 9, 2000. *Id.* (citing Mueller v. Murray, 478 S.E.2d 542, 546 (Va. 1996)).

44. *Id.* at 635.

45. *Id.* (citing Whaley v. Commonwealth, 200 S.E.2d 556, 558 (Va. 1973)).

46. *Id.*

47. *Id.* at 634.

48. *Id.*