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Lovitt v. Commonwealth
537 S.E.2d 866 (Va. 2000)

I. Facts

On November 18, 1998, Robin Lovitt ("Lovitt") stabbed Clayton Dicks ("Dicks") to death and stole the cashdrawer from the pool hall where Dicks worked. Lovitt was arrested four days later and charged with the capital murder and robbery of Dicks. He was convicted on both counts and sentenced to death. Lovitt appealed both convictions. The Supreme Court of Virginia consolidated his appeals with the automatic review of his death sentence.[1]

II. Holding

The Supreme Court of Virginia found no error in the trial court's decision and affirmed Lovitt's conviction and death sentence.[2]

III. Analysis / Application in Virginia

A. Preclusion from Arguing that a Life Sentence Means Death in Prison

In his appeal, Lovitt asserted that he should have been permitted to argue during the sentencing phase that a life sentence meant that Lovitt would die in prison.[3] The court disagreed.[4] The court was satisfied that Lovitt's jury was given the "life means life" instruction and that Lovitt was

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1. Lovitt v. Commonwealth, 537 S.E.2d 866, 870 (Va. 2000). In addition to the issues discussed in this note, Lovitt argued the following issues on appeal: (1) the trial court erred in allowing the testimony of several witnesses; (2) the trial court abused its discretion by failing to strike for cause a juror who had lived next to five neighbors who had been murdered; (3) the trial court violated Lovitt's right to a fair and impartial jury by refusing to allow the defendant to individually examine prospective jurors during voir dire; (4) the trial court failed to protect Lovitt's constitutional rights by refusing to award the defendant additional peremptory challenges; (5) the death penalty violated the Eighth Amendment prohibition against cruel and unusual punishment; (6) the "future dangerousness" and "vileness" aggravating factors for capital sentencing were unconstitutionally vague; (7) the "future dangerousness" aggravating factor unconstitutionally permitted consideration of unadjudicated acts; (8) Virginia's penalty phase instructions failed to adequately instruct the jury regarding mitigation; and (9) post-verdict review of the death sentence was unconstitutional. *Id.* at 873-75. The Supreme Court of Virginia rejected these claims and the court's discussion of them shed no new light on these issues. *Id.*

2. *Id.* at 881.

3. *Id.* at 878.

4. *Id.*

allowed to tell the jury of his parole ineligibility.[5] The court held that the possibility of executive clemency meant that Lovitt's argument was an inaccurate statement of the law.[6] The weight the court placed on the possibility of executive clemency stands in sharp contrast to the speculative nature of executive clemency discussed by the same court in *Fishback v. Commonwealth*.[7] In *Fishback*, the Supreme Court of Virginia held that because the possibility of executive clemency is speculative the Commonwealth could not proffer sentencing-phase arguments that would allow the jury to consider clemency.[8] This is so because the jury might be misled into believing that executive clemency was a realistic possibility and be more inclined to impose a sentence of death rather than a life sentence. It is this "tilt" toward death that informs the decision in *Fishback*. Yet *Lovitt* treats the application of clemency as a sufficiently real possibility that the defendant cannot argue "death in prison" despite a statutory framework that dictates that result.[9]

Moreover, the court simply ignored the application of clemency in post-*Furman* death penalty cases in Virginia. Six defendants sentenced to death have had their sentences commuted.[10] In each case the commutation

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5. *Lovitt*, 537 S.E.2d at 878; *see* VA. CODE ANN. § 19.2-264.4.A (Michie 2000) (requiring that "[U]pon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life"); *see also* Simmons v. South Carolina, 512 U.S. 154, 171 (1994) (holding that when the State introduces evidence of a capital defendant's future dangerousness the defendant is entitled to inform the jury of the defendant's parole ineligibility); Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that in the penalty phase of a trial where the defendant has been convicted of capital murder the trial court shall instruct the jury that the words "imprisonment for life" mean "imprisonment for life without possibility of parole") (internal citations omitted).

6. *Lovitt*, 537 S.E.2d at 878.

7. *See* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000).

8. *Id.* at 634 (noting that a jury's consideration of executive clemency would be "an exercise in pure speculation").

9. *Id.*

10. *See Death Sentences Commuted in Virginia*, RICH. TIMES-DISPATCH, Nov. 15, 1998, at A17. Joseph M. Giarratano, Jr. was granted a conditional pardon by Governor L. Douglas Wilder in February 1991. *Id.* Herbert Russell Bassette's death sentence was commuted in January 1992. *Id.* The death sentence of Joseph Patrick Payne, Sr. was commuted to a sentence of life without parole in November 1996. *Id.* Governor George Allen commuted the death sentence of William Aristede Saunders in September 1997. *Id.*; *see* Donald P. Baker, *Gilmore Stops Execution for First Time; Mental Illness of Inmate Cited*, WASH. POST, May 13, 1999, at A01. In May 1999, Calvin E. Swann was granted executive clemency by Governor James Gilmore. *Id.*; *see* Tim McGlone, Matthew Dolan, and Bill Sizemore, *A Near-Fatal Injustice: How One Man's Wrongful Murder Conviction Almost Cost Him His Life and Led the State That Held Him for 18 Years to Question Its Faith in the Death Penalty*, VA. PILOT, Jan. 22, 2001, at A1. Governor Wilder commuted the death sentence of Earl Washington, Jr. in January 1994. *Id.* Governor James Gilmore granted Washington a full pardon in February 2000 after exhaustive DNA tests excluded Washington as the person who committed the rape

was from a sentence of death to a sentence of life without parole. Thus, even when executive clemency is factored in, its effect on death-sentenced defendants is death in prison. The possibility of executive clemency is speculative, but the fate of a capital defendant sentenced to life is not. A capital defendant should be permitted to argue that a life sentence will result in death in prison because the law operates to bring about that result and there is no evidence that executive clemency will alter the outcome.[11]

B. Society Means Prison Society

Virginia Code Section 19.2-264.2 permits a capital sentencing jury to recommend a sentence of death only if one or both aggravating factors ("future dangerousness" and "vileness") are found.[12] A death sentence recommendation based on "future dangerousness" means that the jury found that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."[13] Lovitt's appeal attacked the determination of "future dangerousness" upon which the jury based its recommendation of a death sentence.[14] Lovitt contended that because he would not be eligible for parole, prison society was the only society to which he could present a future danger.[15] The Supreme Court of Virginia flatly rejected this argument.[16] Justice Keenan found that Section 19.2-264.2 did not by its terms limit consideration of society to prison society and declined to "rewrite the statute to restrict its scope."[17] The court also declined to read the Code of Virginia as a synthesized body of laws in which some statutes are narrowed or defined by other relevant statutes.[18]

Justice Keenan was correct that the literal language of Section 19.2-264.2 does not restrict a capital sentencing jury's consideration of the relevant "society" to prison society. However, statutes must be read together with other relevant statutes. When Section 19.2-264.2 was enacted,

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and murder of Rebecca Lynn Williams. *Id.*

11. *See* VA. CODE ANN. § 53.1-165.1 (Michie 2000) (abolishing parole for defendants convicted of first-degree felonies committed on or after January 1, 1995); discussion *infra* at Part III.B.

12. VA. CODE ANN. § 19.2-264.2 (Michie 2000) (setting out aggravating factors that must be found for a jury to impose a sentence of death).

13. *Id.*

14. *Lovitt*, 537 S.E.2d at 878.

15. *Id.*

16. *Id.* at 879.

17. *Id.*

18. The *Lovitt* court's analysis of the relevant "society" was affirmed in the recent Supreme Court of Virginia case *Burns v. Commonwealth*. Burns v. Commonwealth, Nos. 001879, 001880, 2001 WL 208453 (Va. Mar. 2, 2001). *Burns* will be analyzed in detail in Volume 14, number 1 of the Capital Defense Journal (Fall 2001).

parole had not been abolished for felonies.[19] Before the enactment of Section 53.1-165.1, the relevant "society" for Section 19.2-264.2 arguably was the general population. Once parole was abolished, however, the correct way to read "society" can only be prison society. Virginia Code Section 53.1-165.1 abolished parole for defendants convicted of felonies committed on or after January 1, 1995, but Section 19.2-264.2 has remained unchanged.[20] The effect of Section 53.1-165.1 on Section 19.2-264.2 is that capital defendants sentenced to life imprisonment will never re-enter society.[21] The only reasonable way to read Section 19.2-264.2 is in conjunction with Section 53.1-165.1. The abolition of parole acts as a restriction on the scope of Section 19.2-264.2. The correct reading of "society" does not require the Supreme Court of Virginia to "rewrite the statute to restrict its scope,"[22] but does require a complete and logical reading of the Virginia Code and an understanding of how the statutes impact one another. Justice Keenan's reading of Section 19.2-264.2 alone frustrates the will of the General Assembly in enacting Section 53.1-165.1 and does not make sense when the chronological context is considered.

C. Proportionality Review is Not Mandatory at the Trial Court Level

The trial judge is not obligated to impose the sentence recommended by the jury.[23] Under Section 19.2-264.5, upon "good cause shown" the judge may set aside the jury's recommendation of a death sentence and instead sentence the defendant to life imprisonment.[24] There is no express statutory requirement of proportionality review at the trial level, but *Lovitt* indicates that the trial judge heard arguments from counsel that included comparison of Lovitt's case with other capital murder cases.[25] The Supreme Court of

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19. Code § 19.2-264.2 was enacted in 1977. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (setting out aggravating factors that must be found for a jury to impose a sentence of death). Code § 53.1-165.1 was enacted in 1994. *See* VA. CODE ANN. § 53.1-165.1 (Michie 2000) (abolishing parole for defendants convicted of first-degree felonies committed on or after January 1, 1995).

20. § 53.1-165.1.

21. *See also* VA. CODE ANN. § 53.1-40.01 (Michie 2000) (prohibiting geriatric release for defendants convicted of Class One felonies committed on or after January 1, 1995).

22. *Lovitt*, 537 S.E.2d at 879.

23. *See* VA. CODE ANN. § 19.2-264.5 (Michie 2000) (permitting judge to set aside a jury's recommendation of death and instead sentence a convicted capital defendant to life imprisonment).

24. *Id.*

25. *Lovitt*, 537 S.E.2d at 880. Virginia Code § 17.1-313(E) directs that the Supreme Court of Virginia shall make available to the circuit courts the records of capital cases accumulated by the Supreme Court of Virginia. *See* VA. CODE ANN. § 17.1-313(E) (Michie 2000). The implication of this requirement is that the trial court should conduct proportionality review. Section 17.1-313(E) can be read in conjunction with § 19.2-264.5 to create an obligation on the part of the trial judge to conduct proportionality review before imposing

Virginia rejected Lovitt's claim that the trial court erred in denying his motion to commute his sentence to life imprisonment.[26] The court held that the trial judge did not abuse his discretion in declining to commute the sentence.[27] Because it is within the trial judge's discretion to set aside a jury verdict of death, defense counsel should be prepared to present a proportionality review-style argument even though the Supreme Court of Virginia in *Lovitt* noted that such a review based on proportionality is not mandatory.[28]

D. Proportionality Review Required by the Supreme Court of Virginia

The Supreme Court of Virginia is required to review each death sentence to determine whether the trial court erred in its discretion or "(1) [W]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and (2) [W]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[29] The court discussed its independent obligation to determine whether other courts generally imposed the death penalty for "comparable or similar crimes, considering both the crime and the defendant."[30] The court purported to comply with Section 17.1-313(E), which requires the court to consider the available records of cases to determine whether the imposition of the death penalty in a particular case is excessive.[31] The court noted that it was not required to consider life sentence cases in proportionality review.[32] Though the court did note cases in which juries recommended life sentences, the court focused on capital murder cases predicated on robbery where a sentence of death was recommended based on a finding of "future dangerousness."[33] The limited consideration of life sentence cases in proportionality review and the focus on "future dangerousness" capital murder-robbery cases practically compelled the court to uphold Lovitt's sentence. The court asked the wrong question when it compared Lovitt's case to those cases in which

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a sentence of death. For more discussion of trial court proportionality review, see Kelly E. P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 113-15 (1999).

26. *Lovitt*, 537 S.E.2d at 880.

27. *Id.*

28. *Id.*

29. VA. CODE ANN. § 17.1-313(C) (Michie 2000).

30. *Lovitt*, 537 S.E.2d at 880 (quoting Johnson v. Commonwealth, 529 S.E.2d 769, 786 (Va. 2000)).

31. *Id.*; *see also* VA. CODE ANN. § 17.1-313(E) (Michie 2000).

32. *Lovitt*, 537 S.E.2d at 880.

33. *Id.*; *see also* Jeremy P. White, Case Note, 13 CAP. DEF. J. 423 (2001) (discussing the Supreme Court of Virginia's proportionality review in *Akers v. Commonwealth* and *Overton v. Commonwealth*); Akers v. Commonwealth, 535 S.E.2d 674 (Va. 2000); Overton v. Commonwealth, 539 S.E.2d 421 (Va. 2000).

death has been imposed. The court should not have focused so strongly on whether Lovitt's crime was as bad as those for which juries in other cases have imposed death. An equally proper inquiry for the court would have been whether Lovitt's crime was worse than those crimes for which juries have imposed life sentences. Proportionality review, as undertaken by the court in *Lovitt*, will necessarily support affirmation of the death sentence in the case under review because the comparison focuses on cases in which a death sentence was imposed.

Practitioners should note that in *Lovitt* the Supreme Court of Virginia, although it did not compare Lovitt to other defendants, actually focused on him during its proportionality review.[34] In previous cases the court usually has focused proportionality review on the underlying crimes and not on the defendant. Although this worked against Lovitt, it creates an opening for future cases in which the defendant has a favorable history.

Matthew S. Nichols

34. *Lovitt*, 537 S.E.2d at 880.

STATUTE NOTE:

Amendments to the Virginia Code