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Green v. Commonwealth 546 S.E.2d 446 (Va. 2001)

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I. Facts

Kevin Green ("Green") was convicted of capital murder for the killing of Patricia L. Vaughn during the commission of a robbery and was sentenced to death. On appeal, Green challenged the circuit court's denial of a motion to exclude two potential jurors, Charles Overby ("Overby") and Edith Pearson ("Pearson"). During voir dire, Overby stated that he believed in "an eye for an eye, tooth for a tooth," and that the defendant "didn't give his victim any consideration when he took their life."[1] Pearson, on the other hand, indicated that she had already decided that the defendant was guilty of the charges on the basis of

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1. Green v. Commonwealth, 546 S.E.2d 446, 448 (Va. 2001). The court cited much of the colloquy of Overby's voir dire. The critical aspects of Overby's voir dire included the following:

> THE COURT: Do you know of any bias or prejudice whatsoever which would keep you from being able to give a fair trial both to the Commonwealth and to the accused?
> MR. OVERBY: I only believe in the Bible, an eye for an eye, tooth for a tooth . . .
> THE COURT: This case involves the possibility of capital punishment. Do you have any opinion such as would prevent you from convicting anyone of an offense punishable with death?
> MR. OVERBY: No, sir . . .
> [DEFENDANT'S ATTORNEY]: Would you always vote to impose the death penalty in every case where a defendant is found guilty of a capital offense?
> MR. OVERBY: Yes, sir. If it was proven guilty, yes, sir, I would vote for guilty.
> [DEFENDANT'S ATTORNEY]: If the Commonwealth proves it beyond a reasonable doubt that the defendant committed a capital offense, you would vote for the death penalty?
> MR. OVERBY: Yes.
> [DEFENDANT'S ATTORNEY]: You would not give any consideration to a lesser penalty?
> MR. OVERBY: No. He didn't give his victim any consideration when he took their life . . . .
> [DEFENDANT'S ATTORNEY]: The two possibilities, Mr. Overby, if [the defendant] is found guilty of a capital offense would be, one, death and, number two, life without parole. And what we would like to be sure is that if the Commonwealth proves beyond a reasonable doubt he's guilty of a capital offense, are you going to vote automatically for death or can you give it your consideration to vote for life without parole?
> MR. OVERBY: I would give consideration to vote for life, but still there again, as I said, I would vote an eye for an eye as the Bible says.
> [DEFENDANT'S ATTORNEY]: What I'm thinking, you correct me if I'm wrong, that what you are saying is if he is proved guilty beyond a reasonable doubt of a capital offense you are going to vote death?
> MR. OVERBY: I think it should be. Right, yes, sir.

Id. at 448-49.

newspaper accounts she had read prior to trial.[2] The circuit court nevertheless seated both prospective jurors over defense objections.[3]

II. Holding

The Supreme Court of Virginia held unanimously that the trial court abused its discretion and committed manifest error in seating the challenged jurors.[4] The court reversed the capital murder conviction and death sentence and remanded the case for a new trial.[5]

III. Analysis / Application in Virginia

The question before the court on appeal was whether the circuit court abused its discretion in refusing to remove Overby and Pearson from the jury panel.[6] Writing the opinion of the court, Justice Hassell explained that the circuit court abused its discretion by empaneling jurors when there was a reasonable doubt as to their impartiality.[7] The court held that Overby's statements reflected a strong belief in capital punishment and were sufficient to create a reasonable

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2. *Id.* at 449. The critical aspects of Pearson's voir dire included the following:

> THE COURT: Do you know anything about [the case]? Have you ever read about it, heard about it?
> MS. PEARSON: Read a little bit in the paper . . .
> THE COURT: Have you formed any opinion or expressed any opinion as to the guilt or innocence of [the defendant]?
> MS. PEARSON: No. I suppose he's guilty . . .
> THE COURT: Why do you suppose he's guilty?
> MS. PEARSON: Well, just from what I read. They say he was there . . .
> [DEFENDANT'S ATTORNEY]: Do I understand you to say in answer to the Judge's questions that you suppose the defendant is guilty because of what you read in the papers?
> MS. PEARSON: Yes.
> [DEFENDANT'S ATTORNEY]: Do you feel like the defense is going to have to prove him innocent to you if you sit as a juror?
> MS. PEARSON: Yes, I suppose I do . . .
> [DEFENDANT'S ATTORNEY]: If we presented no evidence at all, the defense, then am I assuming correctly that you have made up your mind that you would find him guilty of the charge?
> MS. PEARSON: Yes . . .
> [DEFENDANT'S ATTORNEY]: Do you understand that the defense under the law doesn't have to produce any evidence?
> MS. PEARSON: Yes.
> [DEFENDANT'S ATTORNEY]: All right. Understanding that, if we don't, is your verdict in this case – Are you telling us right now it's going to be guilty if we don't present any evidence, the defense?
> MS. PEARSON: I feel so.

Id. at 449-50.

3. *Id.* at 449-50.
4. *Id.* at 451.
5. *Id.* at 452.
6. *Id.* at 447.
7. *Id.* at 452.

doubt as to his ability to vote for a sentence other than death in the event of a guilty verdict.[8] The unanimous decision was the first time the Supreme Court of Virginia has reversed a death sentence for the seating of a juror who was biased in favor of death.[9] The court similarly found that Pearson's views reflected that she held preconceived notions of the guilt of the defendant and might not be able to reach an impartial determination on guilt or innocence.[10]

The court went on to hold that the trial court's abuse of discretion constituted reversible error.[11] The voir dire of both jurors reflected at least the possibility that either or both was biased toward guilt (Pearson) and death (Overby). Since all questions about juror qualifications must be resolved in favor of the defendant, the court explained that a juror's ability to give a defendant an impartial trial cannot be left to chance.[12]

A. Implications for Virginia Code Section 8.01-358

The Code of Virginia provides that a party may question any juror as to whether she is related to any party, is interested in the cause, has a fixed opinion regarding the cause, or "is sensible of any bias or prejudice therein" and may object to any juror that appears biased.[13] The language of Section 8.01-358 is directed more toward guilt or innocence bias than toward the juror's predilections in sentencing and, indeed, the text of Section 8.01-358 has been used by trial judges to restrict capital voir dire. The Supreme Court of Virginia's treatment of jurors Pearson and Overby in *Green* makes clear that counsel-conducted voir dire, granted by Section 8.01-358, extends equally to trial on guilt or innocence and sentence. As to juror Pearson, who was predisposed to guilt, the court found that "she had formed firm opinions which would have impaired her ability to be impartial and stand indifferent in the cause."[14] Similarly, when discussing juror Overby, who was predisposed to the death sentence, the court stated that "he had formed a fixed opinion about the punishment that the defendant should

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8. *Id.*

9. *See, e.g.*, Schmitt v. Commonwealth, 547 S.E.2d 186, 195 (Va. 200[1]) (rejecting claim that trial court abused its discretion by seating jurors who expressed willingness to automatically vote for death penalty).

10. *Green*, 546 S.E.2d at 452.

11. *Id.* at 451.

12. *Id.* at 452 (citing Breeden v. Commonwealth, 227 S.E.2d 734, 735 (Va. 1976)).

13. VA. CODE ANN. § 8.01-358 (Michie 2000). The statute reads, in pertinent part:

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection.

Id.

14. *Green*, 546 S.E.2d at 452.

receive if the defendant were convicted of a capital offense and, thus, Overby was not impartial and 'indifferent in the cause.'"[15] The identity of language and the very direct connection of that language with the text of Section 8.01-358 can only mean that the Section 8.01-358 issues, especially the "opinion" and "bias" issues, apply to capital voir dire. Section 8.01-358, therefore, mandates counsel-conducted capital voir dire exploring a juror's predisposition toward the death penalty.

If *Green* left any doubt about the reach of Section 8.01-358, that doubt was erased by the Court of Appeals of Virginia in *Hill v Commonwealth*.[16] *Hill* is a felony case in which the trial court refused to allow defense counsel to ask on voir dire whether a prospective juror could "consider the full range of penalty for the charges."[17] The court of appeals reversed and remanded for a new sentencing proceeding, holding that the defense was entitled to explore juror bias as to sentence.[18] In its unanimous opinion, the court explained that "in order for counsel to properly explore [sic] whether the jury panel may be irrevocably biased toward one end or the other of the sentencing spectrum, it is proper for counsel to inform the panel of the sentencing parameters."[19] The court maintained that re-sentencing was necessary, because the defendant did not receive an opportunity to determine whether the jurors "stood indifferent in the cause."[20] The *Hill* opinion explicitly relied on the language of Section 8.01-358.[21] *Hill* and *Green* require trial courts to permit counsel-conducted voir dire into sentencing issues.

B. Prior Discretion Restricting Cases

Green falls in a line of cases suggesting that the Supreme Court of Virginia is reining in the discretion that trial judges enjoy in determining whether to exclude a prospective juror for cause. Generally, the appellate courts in Virginia will deferentially review the trial court's determinations that a juror is impartial on the issues of guilt or innocence and sentencing. This is because the trial court is in a better position to make those decisions.[22]

The court took a similar limiting approach in *Medici v Commonwealth*.[23] The defendant was charged with, inter alia, rape and attempted forcible sodomy.[24] At

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15. *Id.*

16. *See also* Hill v. Commonwealth, 550 S.E.2d 351, 352-53 (Va. Ct. App. 2001).

17. *Id.* at 352.

18. *Id.* at 354.

19. *Id.*

20. *Id.*

21. *Id.* at 352-53.

22. *See, e.g.*, Lovitt v. Commonwealth, 537 S.E.2d 866, 875 (Va. 2000) (holding that the trial court is in a superior position to determine juror's qualifications and that trial court's ruling will not be disturbed absent clear abuse of discretion).

23. Medici v. Commonwealth, 532 S.E.2d 28 (Va. 2000).

24. *Id.* at 29.

voir dire, Medici moved to strike Inga Bennett from the panel because Bennett's husband had been murdered and both Medici and the alleged murderer of Bennett's husband were represented by the public defender's office.[25] The trial court refused, however, to strike Bennett for cause because the prospective juror "was very adamant that she could be objective in the case."[26] The Supreme Court of Virginia reversed, holding that even if Bennett was convinced that she could be impartial, the diminution of public confidence in the process resulting from the appearance of bias mandated reversal.[27]

The *Medici* court relied heavily on *Cantrell v Crews*,[28] a tort action in which the trial court denied the defendant's motion to strike a prospective juror.[29] During voir dire, prospective juror Clingempeel admitted that she was represented by an attorney in the same firm as the plaintiff's counsel.[30] Clingempeel also stated that she was represented by the attorney in a tort cause similar to that at issue in the case.[31] In ruling on the defendant's motion to strike, the trial court stated that in that particular jurisdiction the association of Clingempeel and the plaintiff's counsel was not prejudicial per se and would not necessarily lead to obvious bias.[32] The Supreme Court of Virginia reversed and remanded for a new trial, stating public confidence in the integrity of trials could not be sustained when a client of a firm representing one of the parties to the action was permitted to sit on the jury, even if the juror sincerely believed that she could be impartial.[33]

In *City of Virginia Beach v Giant Square Shopping Center Co*,[34] the Supreme Court of Virginia ruled in an eminent domain case that the trial court abused its discretion for failing to strike a prospective commissioner.[35] During voir dire,

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25. *Id.* at 30.
26. *Id.*
27. *Id.* at 31.
28. 523 S.E.2d 502 (Va. 2000).
29. Cantrell v. Crews, 523 S.E.2d 502, 503 (Va. 2000).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 504. *Contra* Barrett v. Commonwealth, 542 S.E.2d 23, 26 (Va. Ct. App. 2001) (en banc). In *Barrett*, defendant was charged with assaulting a police officer. *Barrett*, 542 S.E.2d at 24. The circuit court permitted a juror to sit who was the brother to one of the police officers on the scene of the incident. *Id.* at 24-25. The juror admitted in voir dire that he would be likely to assign more credibility to his brother's testimony than to the testimony of the defendant, but maintained that he could remain impartial. *Id.* at 24. The Court of Appeals of Virginia held that the circuit court did not commit error in seating the juror because the record showed that the prospective juror was capable of remaining impartial in spite of his familial relationship to one of the Commonwealth's witnesses. *Id.* at 26.
34. 498 S.E.2d 917 (Va. 1998).
35. City of Virginia Beach v. Giant Square Shopping Ctr. Co., 498 S.E.2d 917, 919 (Va. 1998). In eminent domain cases, the value of compensation for the land taken is determined by "disinterested freeholders" serving as commissioners. *Id.* at 918 (citing VA. CODE ANN. § 25-46.20

George R. C. McGuire admitted that one of the partners in the Giant Square company was his attorney and one of the other partners had worked for him as an appraiser.[36] McGuire also admitted that the City had previously acquired some of his own property.[37] During an individual examination, McGuire explained that Grover Wright, one of the Giant Square partners, had represented him in a condemnation trial against the City and that D.L. McKnight, another Giant Square partner, had appraised McGuire's property in the condemnation action.[38] In spite of these contacts, the trial court refused the City's motion to strike McGuire.[39] The Supreme Court of Virginia reversed, stating that "it is extremely unlikely the public would have confidence in the integrity of the process when a commissioner has the identity of interests demonstrated by this prospective commissioner."[40]

The above line of cases demonstrates a reticence on the part of the Supreme Court of Virginia to grant trial judges unfettered discretion in seating jurors. The dicta in these cases indicates that the court is primarily concerned with the appearance of bias in the proceedings, rather than a showing of actual prejudice. *Green*, however, departs slightly from this reasoning, in that the court is more concerned with substantive fairness than with public perceptions.[41] One explanation for this departure is the obvious difference in gravity between a civil action or a non-capital prosecution and a death penalty case. Another possible explanation is that the Supreme Court of Virginia has simply decided no longer to grant trial judges such broad discretion in determining juror qualifications. Whatever the explanation, it appears that the selection of the jury is one area where the court is willing to give defendants a more searching review.

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(Michie 2000)). The selection of these commissioners is analogous to the selection of a jury.

36. *Id.* at 918.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 919.

41. *Green*, 546 S.E.2d at 452 (stating that "any reasonable doubt . . . regarding whether a juror stands indifferent in the cause . . . must be resolved in favor of the defendant").