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Smith v. Commonwealth 542 S.E.2d 803 (Va. Ct. App. 2001)

Smith v. Commonwealth
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I. Facts

On November 20, 1994, Timothy Frazier ("Frazier") and appellant, Melvin Smith ("Smith"), went to a store in Richmond intending to kill Tyrone Reed ("Reed"). The killing was meant to be in retaliation for the earlier murder of appellant's friend, Michael Atkins. Frazier and Smith began firing their guns when they reached the store, killing two bystanders, Bruce Ross ("Ross") and Irvin Doughty ("Doughty"). Four months later, Smith told Frazier that he had shot and killed Kenneth "Randy" Smith ("Randy"). At trial, Smith testified that Kenneth Daniels ("Daniels") threatened to kill Smith for testifying against Daniels's brother in the Atkins murder trial. According to Smith's testimony, when Randy reached for Daniels's gun to shoot Smith, Smith shot Randy in self-defense. On August 19, 1996, over one year after Randy's murder, Smith told Frazier that he had shot and killed Warrick Ray ("Ray") in a rooming house in Richmond. According to the testimony of Kevin Roane, who witnessed the murder, Smith shot Ray because Ray had gone to Smith's grandmother's house.[1]

Smith was charged with the first degree murder of Ross and capital murder for the killing of Doughty in the same transaction as the killing of Ross.[2] Smith was also charged with first degree murder for the killing of Randy and capital murder for the killing of Ray within three years of the killing of Ross and/or Doughty and/or Randy. Smith was also charged with four counts of use of a firearm in the commission of murder. On September 24, 1999, a jury found Smith not guilty of the murders of Ross and Doughty, and not guilty of the related firearm charges. The jury found Smith guilty of the murder of Randy; the court declared a mistrial as to the murder of Ray and related firearm charge because the jury deadlocked on those charges. Smith appealed his conviction for the murder of Randy, contending that the trial judge committed reversible error in denying Smith's motion to sever the murder charges.[3]

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1. Smith v. Commonwealth, 542 S.E.2d 803, 805 (Va. Ct. App. 2001).

2. *See* VA. CODE ANN. § 18.2-31(7) (Michie Supp. 2001) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction").

3. *Smith*, 542 S.E.2d at 804.

II. Holding

The Court of Appeals of Virginia held that the joinder of the four murder charges was improper, and reversed Smith's convictions for the murder of Randy and the related firearm charge.[4]

III. Analysis / Application in Virginia

Smith contended that the trial court erred in denying his motion to sever the four murder charges. He asserted that the four murders should not be tried together because they did not emanate from the same act or transaction and were not part of a common plan or scheme.[5] The Commonwealth asserted that the four murders constituted a "common scheme or plan" because the murders were part of a "continuing feud between rival groups who were competing to distribute illegal drugs in the Richmond area."[6] The court found no evidence in the record to support this contention.[7] The Commonwealth also provided insufficient evidence to support its contention that the murders may have been gang-related.[8] The only evidence regarding any gang-related conflict came from Frazier's testimony.[9] Frazier, who allegedly participated in the Ross and Doughty murders, testified that there was some "general beef" between two gangs, and that he and some of his friends had shot some people from another "crew" in retaliation to a previous shooting.[10] However, the court decided that "Frazier's testimony [did] not establish . . . appellant's alleged association with either gang, nor did this testimony link any of the four murders to gang activity."[11] The court stated that "[t]o infer that appellant was part of a gang because Frazier may have belonged to one of the two gangs, and because Frazier and appellant committed the Ross and Doughty murders together, is unreasonable and insufficient to support a conclusion that appellant committed the four murders as part of a common scheme or plan."[12]

The Commonwealth also argued that all four murders were properly joined because Virginia Code Section 18.2-31(8) designates capital murder as "[t]he willful, deliberate, and premeditated killing of more than one person within a three-year period," and the capital charge for the Ray murder required proof of one of the three other murders.[13] The court rejected this argument; it held that

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4. *Id.* at 807.
5. *Id.*
6. *Id.* at 805.
7. *Id.*
8. *Id.* at 806.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*; *see also* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2001) (defining capital murder as

the Commonwealth may not side-step the joinder rule under Rule 3A:10(c) or the requirements of Rule 3A:6(b) when seeking to try a defendant for capital murder under Virginia Code Section 18.2-31(8) as well as for the predicate murders.[14]

The Court of Appeals of Virginia held that the impermissible joinder of the four murder charges was not harmless error.[15] Under Rule 3A:10(c), a court may join separate charges in one trial if, inter alia, "the offenses meet the requirements of Rule 3A:6 (b)."[16] Rule 3A:6(b) stipulates that separate offenses may be joined "if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan."[17]

The court held that "[t]he four murders in this case [did] not meet the 'same act or transaction' requirement because they involved three separate acts which occurred at three different times and places."[18] The court also found that the offenses were not "connected" because they did not occur on the same day or in the same place, and there was no evidence linking or connecting the murders.[19] In so holding, the court relied on *Cook v Commonwealth*,[20] which held that two or more acts or transactions are "connected" if the offenses are "connected by time, place, method and perpetrators."[21] The court relied upon *Godwin v Commonwealth* to state that offenses constitute a common scheme or plan when the "relationship among [the] offenses . . . is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses."[22]

The court found that the trial court's abuse of discretion affected a substantive right of the appellant.[23] According to *Foster v Commonwealth*,[24] joinder error

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"[t]he willful, deliberate, and premeditated killing of more than one person within a three-year period").

14. *Smith*, 542 S.E.2d at 806.

15. *Id.* at 807.

16. VA. SUP. CT. R. 3A:10 (2001).

17. VA. SUP. CT. R. 3A:6 (2001).

18. *Smith*, 542 S.E.2d at 805 (citing Godwin v. Commonwealth, 367 S.E.2d 520, 522 (Va. Ct. App. 1998)) (holding that when two robberies were committed at two different times and two different places, and no evidence linked one with the other, the two robberies could not meet the "same act or transaction" requirement).

19. *Id.*; *see also Godwin*, 367 S.E.2d at 522.

20. 372 S.E.2d 780 (Va. Ct. App. 1988).

21. *Smith*, 542 S.E.2d at 805; *see* Cook v. Commonwealth, 372 S.E.2d 780, 782 (Va. Ct. App. 1988) (holding that three counts of concealment were "connected" and "parts of a common scheme or plan" where the offenses involved three separate incidents occurring within one hour at three separate stores of the same retail chain and involving concealment of same items by defendant and accomplice).

22. *Smith*, 542 S.E.2d at 805 (citing *Godwin*, 367 S.E.2d at 522).

23. *Id.* at 806.

24. 369 S.E.2d 688 (Va. Ct. App. 1988).

is harmless where "the evidence related to each of the counts would have been admissible in a separate trial of any of the other counts."[25] The Commonwealth argued that any error in joining the offenses was harmless.[26] First, the Commonwealth alleged that evidence pertaining to each murder would have been permitted as evidence in separate trials for each murder because the evidence showed that Smith committed the murders as part of a "general scheme."[27] However, the court rejected this argument because there was no evidence to support allegations that the murders were part of Smith's involvement in a drug business or in any gang-related activity.[28]

The Commonwealth also asserted that "any error in joining the offenses was harmless because the evidence supporting appellant's conviction for [the Randy murder] was overwhelming."[29] The court rejected this argument, finding that the Commonwealth had provided little evidence to refute Smith's claim of self-defense.[30] The court acknowledged that the jury was entitled to disbelieve Smith's testimony, but the court stated that it did not find that "the evidence supporting a first degree murder conviction for the killing of Randy Smith was so overwhelming that the erroneous joinder of the other murder charges 'clearly had no impact upon the verdict.'"[31] Further, the court held that even if evidence of Smith's guilt was overwhelming, the error of joining the offenses was not harmless because it may have affected the jury's decision regarding Smith's sentencing for the Randy murder.[32]

IV. Implications of the Smith *Decision*

The following are three examples in which the *Smith* decision may affect joinder of charges. Assume that all the crimes charged occurred within a single venue.

A. Example # 1

Amy shot Bill two months ago. In retaliation, Cindy, Bill's best friend, went to Amy's house and shot Amy and her brother, Douglass. The Commonwealth charges Cindy with first degree murder for the murder of Douglass. The Commonwealth wants to seek the death penalty against Cindy, and therefore charges

25. Foster v. Commonwealth, 369 S.E.2d 688, 694 (Va. Ct. App. 1988) (finding that "no action was taken to establish a common scheme or plan" where three years had passed between the offenses).

26. *Smith*, 542 S.E.2d at 807.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (citing Burley v. Commonwealth, 510 S.E.2d 265, 270 (Va. Ct. App. 1999) (holding that error had no effect on the verdict where the other evidence was overwhelming)).

32. *Id.*

Cindy under Virginia Code Section 18.2-31(7) with capital murder for the murder of Amy in the same transaction as the murder of Douglass.[33] This hypothetical is substantively identical to the Doughty and Ross murders in *Smith*.[34] Joinder would be permissible in this situation because the murders of Amy and Douglass were part of the same act or transaction. Murders committed in the same act or transaction fit squarely within the language of Virginia Code Section 18.2-31(7), which permits joinder if the murder is "the willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction," as well as within the broader language of Rule 3A:6(b), which permits joinder if the murders were part of the same act or transaction or parts of a common scheme or plan.[35]

B. Example # 2

Alex killed his wife to collect from her life insurance. Eight months later, Alex killed his girlfriend because he discovered that she was having an affair. The Commonwealth charges Alex with first-degree murder under Virginia Code Section 18.2-32 for the murder of his girlfriend.[36] In the same indictment the Commonwealth seeks to charge Alex with capital murder for the murder of his wife within three years of the murder of his girlfriend under Virginia Code Section 18.2-31(8).[37] Although the murders meet the criteria of Virginia Code Section 18.2-31(8), they do not pass muster under the joinder test of Rule 3A:6(b).[38] The murders were not part of the same act or transaction or parts of a common scheme or plan. Thus, applying the rule articulated by the court in *Smith*, the indictment charging the first degree murder of the girlfriend cannot be joined with the capital murder indictment.

C. Example # 3

Ashley ran a prostitution ring, managing several prostitutes. Two other pimps, Betty and Clark, also ran major prostitution rings in the same area. To cut down on competition, Ashley murdered Betty. Two years later, Ashley also murdered Clark. The Commonwealth charges Ashley with first-degree murder for the murder of Clark. In the same indictment the Commonwealth charges Ashley under Virginia Code Section 18.2-31(8) with capital murder for the killing of Betty within three years of the killing of Clark.[39] The two charges may properly be joined in the same indictment only if the charges fulfill the joinder re-

33. *See* VA. CODE ANN. § 18.2-31(7) (Michie Supp. 2001).
34. *See Smith*, 542 S.E.2d at 805.
35. *See* § 18.2-31(7); VA. SUP. CT. R. 3A:6(b) (2001).
36. *See* VA. CODE ANN. § 18.2-32 (Michie Supp. 2001).
37. *See* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2001).
38. *See* VA. SUP. CT. R. 3A:6 (2001).
39. *See* § 18.2-31(8).

quirements of Rule 3A:6(b).[40] In this hypothetical, joinder is proper because the murders were committed as part of a common scheme or plan to eliminate Ashley's competitors.

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40. *See* VA. SUP. CT. R. 3A:6 (2001).

STATUTE NOTE:
Code of Virginia