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Bell v. Commonwealth 563 S.E.2d 695 (Va. 2002)

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I. Facts

On October 29, 1999, Edward Nathaniel Bell ("Bell"), a Jamaican national, shot and killed Sergeant Ricky Lee Timbrook ("Timbrook") of the Winchester Police Department ("the department").[1] Timbrook and two probation/parole officers were making home visits to individuals on probation or parole. On the sixth visit to one individual's home, the officers approached a man standing between an apartment building and a dumpster. As they approached, Bell, who had ducked into the shadows, ran from them. Timbrook chased Bell, identified himself as the police, and repeatedly ordered Bell to stop. Bell climbed over a fence, and as Timbrook began to climb the fence, Bell shot Timbrook in the head, killing him.[2]

A jury convicted Bell of the capital murder of Timbrook.[3] At the sentencing hearing, the jury found the future dangerousness aggravator and fixed Bell's sentence at death.[4] Bell appealed his conviction and sentence to the Supreme Court of Virginia.[5]

II. Holding

The Supreme Court of Virginia found no error in the judgment of the Circuit Court of the City of Winchester and affirmed Bell's conviction and death sentence.[6]

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1. Bell v. Commonwealth, 563 S.E.2d 695, 701-02 (Va. 2002).

2. *Id.*

3. *Id.* at 700; *see* VA. CODE ANN. § 18.2-31(6) (Michie Supp. 2002) (defining capital murder as the "willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9.1-101 or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties"). The jury also found Bell guilty of the use of a firearm in the commission of murder, possession of cocaine with intent to distribute, and possession of a firearm while possessing cocaine. *Bell*, 563 S.E.2d at 700 n.1.

4. *Bell*, 563 S.E.2d at 700-01; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (setting forth the conditions a jury must find prior to imposing the death penalty).

5. *Bell*, 563 S.E.2d at 701.

6. *Id.* Bell made a number of assignments of error that are not addressed here. These issues include speedy trial, search of his vehicle, evidence of other suspects, evidence of Bell's prior possession of a firearm, uniformed law-enforcement officers in the courtroom, evidence of unadjudicated criminal conduct, evidence regarding execution procedure, constitutionality of the death penalty as applied in Virginia, and statutory review. *See id.* at 703-19.

III. Analysis / Application in Virginia

A. Vienna Convention

Bell argued that the department violated his rights under Article 36 of the Vienna Convention on Consular Relations ("Article 36").[7] Bell alleged that his rights were violated in the following three respects: (1) the police did not advise him of his right to communicate with the Jamaican consulate; (2) he made his statement to the police prior to being notified of the department's obligation to notify his consulate; and (3) the department unreasonably delayed notifying his consulate of his arrest.[8] The court found that Article 36 required the department to inform Bell of his Article 36 rights and to notify his consulate of his arrest "without delay."[9] The department notified Bell of his consular rights shortly after the police finished their questioning and thirty-six hours later a police officer faxed a notification to the Consulate of Jamaica.[10] The court, noting that Article 36 did not require immediate consular notification, found that such a delay did not violate Bell's rights under Article 36.[11] Applying the reasoning of *County of Riverside v. McLaughlin*,[12] the court concluded that the thirty-six hour delay in notifying the Jamaican consulate was reasonable.[13]

Under *Bell*, in order for a defendant to establish a violation of Article 36, he must show that the police unreasonably delayed notifying his consulate of his arrest.[14] The court found that the forty-eight hour "rule" of *County of Riverside* satisfied the reasonableness requirement.[15] Thus, a defendant may have a legitimate claim if the delay is longer than this presumptively reasonable time frame. In addition, the court interpreted the language "without delay" in Article 36 to mean that a defendant may be questioned prior to his notification of his Article 36 rights or his consulate's notification of his arrest.[16]

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7. *Id.* at 705. *See generally* Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100-01 (hereinafter *Vienna Convention*).

8. *Bell*, 563 S.E.2d at 706; *see Vienna Convention*, *supra* note 7, art. 36, 21 U.S.T. 77, 101.

9. *Bell*, 563 S.E.2d at 706; *see Vienna Convention*, *supra* note 7, art. 36, 21 U.S.T. 77, 101.

10. *Bell*, 563 S.E.2d at 705-06; *see Vienna Convention*, *supra* note 7, art. 36, 21 U.S.T. 77, 101.

11. *Bell*, 563 S.E.2d at 706; *see Vienna Convention*, *supra* note 7, art. 36, 21 U.S.T. 77, 101.

12. 500 U.S. 44 (1991).

13. *Bell*, 563 S.E.2d at 706; *see* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (holding that a probable cause finding made within forty-eight hours of a warrantless arrest is effectively presumed to meet the promptness requirement of the Fourth Amendment).

14. *Bell*, 563 S.E.2d at 706; *see Vienna Convention*, *supra* note 7, art. 36, 21 U.S.T. 77, 100-01.

15. *Bell*, 563 S.E.2d at 706; *see also County of Riverside*, 500 U.S. at 56.

16. *Bell*, 563 S.E.2d at 706; *see Vienna Convention*, *supra* note 7, art. 36, 21 U.S.T. 77, 101. In extensive dictum, the court also addressed the remedies for a violation of Article 36. *See Bell*, 563 S.E.2d. at 706-07.

B. Grand Jury

Bell further claimed that the circuit court should have dismissed his indictment because the grand jury was exposed to prejudicial information.[17] Information about Timbrook's death and the creation of a scholarship fund for his unborn child was posted on fliers on the doors of the courthouse.[18] Bell claimed that the grand jurors could not have entered the courthouse without seeing one of these fliers.[19] The court found that the effect of the fliers on the grand jurors was "pure speculation."[20] Thus, the court found no error because the finding of probable cause at the preliminary hearing and Bell's conviction at trial demonstrated that he was guilty beyond a reasonable doubt and, therefore, that there was probable cause to indict him.[21]

In effect, the court made objections to the indictment, based upon defects in the grand jury, impossible to prove.[22] Moreover, the court adopted the rule applied in federal cases.[23] *United States v. Mechanik*[24] sets out the federal rule.[25] A defendant appealing his conviction on the ground that there were defects in the grand jury proceeding already has been proven guilty beyond a reasonable doubt. Under *Mechanik*, this finding of guilt demonstrates that there was probable cause to indict the defendant, and thus any defect in the grand jury is harmless error.[26]

C. Jury Selection / Voir Dire Questions

Bell claimed that the circuit court erred by denying his motion to strike juror Golding for cause.[27] Juror Golding subsequently was excused from jury duty because she could not arrange for child care.[28] The court found that because Bell

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17. *Bell*, 563 S.E.2d at 708.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 708 (citing United States v. Mechanik, 475 U.S. 66, 70 (1986)).
22. *See* VA. CODE ANN. § 19.2-192 (Michie 2000) (requiring members of a grand jury to keep secret "all proceedings which occurred during sessions of the grand jury"). While it is not clear that Section 19.2-192 applies to this case, it does apply to most grand jury proceedings.
23. *Bell*, 563 S.E.2d at 708; *see* United States v. Mechanik, 475 U.S. 66, 72-73 (1986) (holding that a "jury's verdict of guilty . . . demonstrates . . . that there was probable cause to charge the defendants with the offenses for which they were convicted," thus rendering alleged prosecutorial misconduct before the grand jury harmless).
24. 475 U.S. 66 (1986).
25. *Mechanik*, 475 U.S. at 72-73.
26. *Id.*
27. *Bell*, 563 S.E.2d at 709.
28. *Id.*

failed to object to the court's denial of his motion, the assignment of error was mooted.[29] In addition, the court found that several of Bell's assignments of error regarding voir dire also were procedurally defaulted due to his failure to object at the time of the alleged error.[30]

The court first noted that Bell does not have a constitutional right to individual voir dire.[31] The court held that the circuit court's refusal to allow individual voir dire was not an error because the circuit court permitted extensive questioning of the potential jurors.[32] Next, Bell contended that seven jurors were improperly rehabilitated.[33] Bell failed to object to the seating of five of the seven jurors, thus waiving any claim on appeal regarding these jurors.[34] Bell did not allege that the court's decision to strike the remaining two jurors for cause was erroneous. Instead, he claimed that the court asked leading questions during the voir dire of these jurors.[35] The court found no error because it concluded that the circuit court's questioning was not improper and because Bell did not object to the circuit court's questioning during the voir dire of these two jurors.[36]

Finally, Bell alleged that the circuit court erred by sustaining the Commonwealth's objections to four of his questions.[37] These questions dealt with the death penalty, presumption of innocence, and presentation of evidence.[38] The court concluded that potential jurors would be confused by these questions and that they would force the jurors to speculate.[39] The court found no error in the circuit court's decision to sustain the Commonwealth's objections.[40]

In light of *Commonwealth v Hill*,[41] the court may need to reexamine its conclusion that a defendant has no right to an individual voir dire.[42] In *Hill*, a non-capital case, the court concluded that "neither the defendant nor the Commonwealth has a constitutional or statutory right to question a jury panel about

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29. *Id.*
30. *Id.* at 711.
31. *Id.* (citing Cherrix v. Commonwealth, 513 S.E.2d 642, 647 (Va. 1999)).
32. *Id.*
33. *Bell*, 563 S.E.2d at 711.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Bell*, 563 S.E.2d at 711.
40. *Id.*
41. 568 S.E.2d 673 (Va. 2002).
42. Commonwealth v. Hill, 568 S.E.2d 673, 676 (Va. 2002) (stating that "neither the defendant nor the Commonwealth has a constitutional or statutory right to question a jury panel about the range of punishment that may be imposed upon the defendant").

the range of punishment that may be imposed upon the defendant."[43] However, the *Hill* court reaffirmed the holding of *Green v Commonwealth*,[44] that juror views on the death penalty are relevant to bias and impartiality in capital cases.[45] The court in *Hill* noted that capital cases are "qualitatively different" from non-capital cases.[46] This language clearly recognizes the need for greater procedural protection for capital defendants. One procedure which will help insure increased fairness and accuracy in capital cases is individual voir dire.

Bell lost a number of his claims of error due to his failure to object to the errors at the time that they occurred.[47] Bell's counsel remained silent through the seating of objectionable jurors and through a line of questions by the Commonwealth that he later alleged was leading.[48] These lost assignments of error reemphasize the importance of recognizing error, objecting at the moment that it occurs, and requesting the proper remedy in order to avoid procedurally defaulting these claims.

D. Racial Composition of Venire

Bell argued that the circuit court should have struck the jury array and impaneled a new venire because there were only two black individuals in the fifty-person venire.[49] The black population of Winchester is 10.5% of the total population.[50] He alleged that this difference constituted a violation of his Sixth Amendment right "to select a jury from a representative cross-section of the community."[51] The circuit court denied Bell's motion on the ground that he failed to show a systematic exclusion of black individuals from the venire.[52] The Supreme Court of Virginia agreed and stated that in order to establish a constitutional violation of the defendant's right to a fair jury selection system, the defendant must show a systematic exclusion of a "distinctive group in the community."[53]

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43. *Id.*

44. 546 S.E.2d 446 (Va. 2001).

45. *Hill*, 568 S.E.2d at 676; *see* Green v. Commonwealth, 546 S.E.2d 446, 452 (Va. 2001) (stating that "courts should be mindful that if any reasonable doubt exists regarding whether a juror stands indifferent in the cause, that doubt must be resolved in favor of the defendant").

46. *Hill*, 568 S.E.2d at 676.

47. *Bell*, 563 S.E.2d at 703-04.

48. *Id.* at 711.

49. *Id.* at 712.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Bell*, 563 S.E.2d at 712 (quoting Watkins v. Commonwealth, 385 S.E.2d 50, 53 (Va. 1989)).

The court requires a defendant to show that the system of jury selection systematically excludes a distinct group of people.[54] In *Corbin v Commonwealth*,[55] the court concluded that a defendant must put on evidence of the jury commission's selection process and its flaws in order to challenge a jury list under Section 8.01-345 of the Virginia Code.[56] Without such evidence, the court presumes the list to be proper.[57] The evidentiary requirements set forth in *Bell* and *Corbin* make a successful challenge to a venire nearly impossible.

E. Appointment of Expert to Testify Regarding Conditions of Confinement

Bell claimed that the circuit court should have granted his motion for appointment of a correctional specialist as an expert to provide testimony regarding the conditions of confinement that would be imposed on Bell if he were to be sentenced to life imprisonment.[58] Bell alleged that the jury needed such information in order to assess the likelihood that Bell would pose a future danger in prison.[59] The court has rejected this type of evidence in the past, but Bell argued that the issue should be reexamined because decisions of the Supreme Court of Virginia are in conflict with decisions of the United States Supreme Court and because trial courts throughout Virginia have inconsistently applied *Burns v Commonwealth*,[60] and *Cherrix v Commonwealth*.[61]

Bell argued that a string of United States Supreme Court cases recognized that "many inmates who would be dangerous if released are not dangerous when confined to the 'structured environment' of prison."[62] The Supreme Court of

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54. *Id.*

55. 564 S.E.2d 147 (Va. Ct. App. 2002).

56. Corbin v. Commonwealth, 564 S.E.2d 147, 149 (Va. Ct. App. 2002) (stating that the burden was on the defendant to prove his allegation that the jury commissioners "failed to follow the statutory selection process"); *see* VA. CODE ANN. § 8.01-345 (Michie 2000).

57. *Corbin*, 564 S.E.2d at 149.

58. *Bell*, 563 S.E.2d at 713.

59. *Id.*

60. 541 S.E.2d 872 (Va. 2001).

61. *See generally* Burns v. Commonwealth, 541 S.E.2d 872 (Va. 2001) (stating that evidence of the nature of prison life is not relevant to a jury's future dangerousness inquiry); Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999) (stating that "'what a person may expect in the penal system' is not relevant mitigation evidence").

62. *Bell*, 563 S.E.2d at 713-14. *See generally* Williams v. Taylor, 529 U.S. 362 (2000) (finding that defense counsel's failure to present mitigating evidence at the sentencing hearing constituted ineffective assistance); Simmons v. South Carolina, 512 U.S. 154 (1994) (holding that when the future dangerousness aggravator is at issue, due process requires a court to inform a jury at sentencing that a life sentence means life without parole if the defendant would be parole ineligible); Skipper v. South Carolina, 476 U.S. 1, 7 (1986) (finding that the state court erred by excluding relevant mitigating evidence because the exclusion "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender").

Virginia found that the cases cited by Bell stand for a defendant's right at sentencing to present evidence that is relevant to the jury's future dangerousness inquiry.[63] A defendant may present evidence of his character, history, and background.[64] The court reiterated its holding in *Burns*, stating that "[e]vidence regarding the general nature of prison life in a maximum security facility is not relevant to that inquiry, even when offered in rebuttal to evidence of future dangerousness."[65] The Supreme Court of Virginia concluded that its decisions in *Burns* and *Cherrix* are not inconsistent with the United States Supreme Court's decisions on this issue.[66]

F. Jury Question Regarding Early Release

During the jury's penalty-phase deliberations, the jury asked, "Understanding that imprisonment for life means no possibility of parole, is there any other way to be released from prison?"[67] The circuit court originally planned to inform the jury that there were no other means of release for a defendant who has been convicted of capital murder.[68] The Commonwealth objected to this proposed answer on the ground that a defendant could be released by executive clemency.[69] The court agreed.[70] Because the court believed that a completely truthful answer to the jury's question, which addressed the Commonwealth's concern, would have allowed the jury to consider "speculative and inappropriate" matters, it told the jury that it "would have to rely on the evidence that they [sic] heard and the instructions already presented in deciding the punishment."[71]

Bell claimed that this answer left the jury speculating about whether he might be released at some time in the future.[72] He alleged that this unresolved speculation may have caused the jury to impose death rather than life imprisonment.[73] Bell argued that his death sentence was imposed in violation of Virginia law, his due process rights under the Fourteenth Amendment, and his Eighth Amendment rights to a fair and reliable sentencing determination.[74] Relying

63. *Bell*, 563 S.E.2d at 714.
64. *Id.*
65. *Id.* (quoting *Burns*, 541 S.E.2d at 893).
66. *Id.*; *see Burns*, 541 S.E.2d at 872; *Cherrix*, 513 S.E.2d at 642.
67. *Bell*, 563 S.E.2d at 716.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Bell*, 563 S.E.2d at 716.
74. *Id.*; *see Simmons*, 512 U.S. at 164; Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that a defendant who has been convicted of capital murder has a right to have his

heavily on *Fishback v Commonwealth*,[75] the court concluded that the circuit court's instructions were correct and that its decision not to inform the jury of the availability of executive pardon and clemency was also correct.[76]

The court reasoned that instructing the jury on the possibility of executive pardon or clemency would have allowed speculation that might have resulted in a harsher punishment than the jury otherwise would have given.[77] In addition, the court noted that an instruction that addressed Bell's ineligibility for geriatric release or sentencing credits and ordered the jury not to concern itself with anything else would leave the jury speculating as to what other possibilities for release existed.[78] The court concluded that the instruction given by the circuit court was the only instruction that was accurate and did not leave the jury speculating on whether the defendant might be released through other means.[79]

In *Dingus v Commonwealth*,[80] the Supreme Court of Virginia held that the Commonwealth's attorney acted improperly when he argued to the jury that the defendant should be given the death penalty because it was easy to obtain a pardon.[81] The court emphatically stated that such arguments were unjustifiable and could not be tolerated.[82] If the court in *Bell* had given the jury an answer that included the possibility of executive pardon or clemency, the Commonwealth's attorney might have been able to avoid the prohibition of *Dingus* and argue this instruction to the jury. The Commonwealth's attorney would have had an opportunity to argue to the jury that the defendant may be released if he is not sentenced to death.

Kelly v South Carolina,[83] and its predecessor *Simmons v South Carolina*, held that a jury must be informed of a defendant's parole ineligibility when future

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sentencing jury informed that life imprisonment means life without parole).

75. 532 S.E.2d 629 (Va. 2000).

76. *Bell*, 563 S.E.2d at 718; *see* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000) (holding that juries should be instructed on the abolition of parole for non-capital felony offenses committed after January 1, 1995). Using the analysis of *Fishback*, a jury should be informed if a defendant is eligible for geriatric release, but when a defendant is not eligible for geriatric release, the jury need only be informed of his parole ineligibility. *Bell*, 563 S.E.2d at 717 (citing *Fishback*, 532 S.E.2d at 634).

77. *Bell*, 563 S.E.2d at 718.

78. *Id.*

79. *Id.*

80. 149 S.E. 414 (1929).

81. Dingus v. Commonwealth, 149 S.E. 414, 415 (1929) (concluding that the Commonwealth's attorney erred by arguing to the jury that the defendant should be given the death penalty because of the likelihood that he would receive a pardon). The Commonwealth's attorney said to the jury, "Give him the death penalty. What does life imprisonment mean to a criminal with pardon so easy?" *Id.*

82. *Id.*

83. 534 U.S. 246 (2002).

dangerousness is at issue.[84] In *Simmons*, the United States Supreme Court noted that,

> [t]he jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration.[85]

This case nicely posits the dilemma created by *Dingus* and *Fishback* on one hand and *Yarborough*, Section 19.2-264.4(A), and the *Simmons* line of cases on the other.[86] Once a *Simmons* instruction has been given, a jury question asking for more information about the defendant's possible release can only be fully and truthfully answered by reference to clemency.[87] But, the reference to clemency might tip the scales toward death.

The judge probably should have re-instructed the jury very specifically that there is no form of parole available to an individual convicted of capital murder. A more specific response would be preferable, but the judge correctly avoided the clemency issue. The suggested response is accurate and truthful, and best protects the defendant because it does not specifically address the clemency issue. In *Bell*, the judge faced a complex issue.[88] He gave an answer that balanced the interests of the defendant and the Commonwealth.

Kristen F. Grunewald

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84. *See* Kelly v. South Carolina, 534 U.S. 246 (2002) (holding that the *Simmons* instruction is mandatory when future dangerousness is at issue); *Simmons*, 512 U.S. at 156 (1994).

85. *Simmons*, 512 U.S. at 161.

86. *See* VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (stating that a defendant may request that the sentencing jury be instructed that a sentence of life imprisonment means life without parole); *Kelly*, 534 U.S. at 246; *Simmons*, 512 U.S. at 154; *Fishback*, 532 S.E.2d at 629; *Yarborough*, 519 S.E.2d at 602; *Dingus*, 149 S.E. at 414.

87. *See Bell*, 563 S.E.2d at 716.

88. *See id.* at 695.