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Morisette v. Commonwealth 569 S.E.2d 47 (Va. 2002)

Morrisette v. Commonwealth
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I. Facts

Dorothy White ("White") failed to report for work on July 25, 1980. Two concerned co-workers went to her house trailer to check on her. The two co-workers found White's body lying on the floor with her blouse and bra pulled up and her breasts exposed. She was found otherwise nude. Her throat had been cut, and several other wounds were found on her body. A "milky-looking substance" was visible on her pubic hair. The kitchen was splattered with blood, but there were no signs of struggle anywhere else in the trailer, nor was there any evidence of forced entry.[1]

An autopsy was performed the next day, and samples of White's hair, blood, and body fluids were collected from her body. Tests revealed intact sperm on the PERK swabs taken from White's vulva, vagina and cervix. The autopsy documented that White suffered a slash wound across her throat that completely severed her trachea, right carotid artery, jugular vein, and certain muscles in her neck and that partially severed her esophagus. In addition, White suffered eight other stab wounds to various parts of her body. Her hands contained wounds which indicated that she attempted to block the knife blows.[2]

Several of the wounds individually could have caused White's death. However, the slash wound to her neck was considered "fatal within minutes." Despite the wound's lethal nature, it did not cause White to lose consciousness instantly. The forensic pathologist who performed the autopsy testified that the slash wound's effect on White was that she essentially drowned in her own blood.[3]

The police interviewed several individuals, including Morrisette, as suspects. Morrisette acknowledged that he knew White through his employer and that he accompanied his employer to White's residence on two occasions. Morrisette also offered an alibi, in which he stated that he had gone to a restaurant, and after eating and drinking beer, he walked to a fishing pier where he spoke with some people who were fishing and drank another beer. He also stated that around 10:00 p.m. he went to the Circle Inn and stayed there until 2:00 a.m. Then, although his sister lived in an apartment right above the Circle Inn, he slept in a pickup truck in the parking lot rather than going to his sister's apartment. He

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1. Morrisette v. Commonwealth, 569 S.E.2d 47, 50 (Va. 2002).
2. *Id.*
3. *Id.*

further stated that he awoke around 9:00 or 10:00 a.m., returned to the Circle Inn, and drank with a person who lived in a trailer park across the street.[4]

The murder investigation stalled. Nineteen years later, however, a DNA profile extracted from White's PERK swabs was entered into the Virginia Forensic Laboratory's DNA databank. A search in the databank revealed a "cold hit" match between Morrisette's DNA profile and the DNA profile from White's PERK samples. A search warrant was obtained for a sample of Morrisette's blood, and tests from that sample confirmed that Morrisette's DNA profile was consistent with the DNA profile extracted from the sperm recovered from White's body. An expert in forensic biology testified that the probability of randomly selecting an unrelated individual other than Morrisette with a DNA profile matching the DNA profile of the sperm from the PERK samples was one in 900 million in the Caucasian population, one in 1.2 billion in the Black population, and one in 800 million in the Hispanic population.[5]

Morrisette was arrested in August 1999, more than nineteen years after the murder of Dorothy White. Before the trial, Morrisette moved to dismiss the indictments because the nineteen-year delay between the time of the offense in July 1980 and his arrest in August 1999 violated his due process rights under both the United States Constitution and the Constitution of Virginia. Morrisette argued that he provided the police with details of his whereabouts on the night of White's murder, including names, addresses and telephone numbers of purported corroborating witnesses. Testimony at trial revealed that the police never made an attempt to confirm Morrisette's alibi. Evidence also revealed that White's PERK samples were resubmitted to the forensic laboratory in 1985 for testing against Morrisette's PERK samples collected in connection with abduction and maiming charges. Morrisette's PERK, however, was never sent to the forensic laboratory, and the Hampton Police Department eventually directed the laboratory to return White's PERK without any additional testing.[6]

Morrisette argued that he was unable to locate his corroborating witnesses as a result of the pre-indictment delay. He relied on the 1985 forensic laboratory situation to further his claim of prejudice. The trial court concluded that both the Commonwealth and Morrisette probably experienced some actual prejudice because of the death of witnesses during the delay. The trial court denied Morrisette's motion to dismiss the indictments, however, because it determined that Morrisette failed to meet his burden of proving that: (1) the delay was intentional; and (2) the Commonwealth used the delay to gain a tactical advantage.[7]

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4. *Id.* at 50-51.
5. *Id.* at 51. Morrisette is Caucasian. *Id.* at 51 n.4.
6. *Id.* at 51-52.
7. *Morrisette*, 569 S.E.2d at 52.

A jury convicted Morrisette of capital murder.[8] During the penalty phase, the Commonwealth presented photographs of the victim as evidence of the vileness of the murder.[9] The Commonwealth also argued future dangerousness by presenting evidence of Morrisette's previous convictions for burglary in 1984, abduction and maiming in 1986, and driving under the influence of alcohol in 1999.[10] The Commonwealth presented the testimony of the victim of the abduction and maiming, who testified that Morrisette attacked her as she sat in a car parked outside of a high school.[11] He had a knife, pushed her down onto the car seat, and tried to gag her.[12] She also testified that Morrisette cut her jawbone and neck and that he fled only when other vehicles approached.[13]

In mitigation, Morrisette and the Commonwealth stipulated that, during his incarceration prior to trial, Morrisette was a model inmate with a positive attitude.[14] Morrisette also presented testimony from his daughter and sister regarding his affection for his family.[15] The jury returned its verdict imposing a death sentence for the capital murder charge and life imprisonment for the rape charge.[16] The jury based its sentence of death on both future dangerousness and vileness.[17] Based upon the jury's verdict, the trial court sentenced Morrisette to death.[18] The Supreme Court of Virginia then consolidated the automatic review of the death sentence with Morrisette's appeal of the capital murder conviction.[19]

II. Holding

The Supreme Court of Virginia held that: (1) the nineteen-year delay between the time of the murder and Morrisette's arrest did not violate Morrisette's due process rights; (2) the trial court did not err in its decisions

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8. *Id.* at 49.
9. *Id.* at 51.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Morrisette*, 569 S.E.2d at 51.
14. *Id.*
15. *Id.*
16. *Id.* at 49.
17. *Id.*
18. *Id.*
19. *Morrisette*, 569 S.E.2d at 50; *see* VA. CODE ANN. § 17.1-313(A) (Michie 1999) (stating that Supreme Court of Virginia shall review sentence of death once judgment is final); VA. CODE ANN. § 17.1-313(C) (Michie 1999) (stating that Supreme Court of Virginia shall consider and determine whether sentence of death was imposed under influence of passion, prejudice, or other arbitrary factor, and whether sentence of death was excessive or disproportionate to penalty imposed in similar cases); VA. CODE ANN. § 17.1-313(F) (Michie 1999) (stating that Supreme Court of Virginia may consolidate sentence review and appeal of conviction).

during jury selection; (3) the evidence was sufficient to sustain the charge of rape; and (4) the prior holdings that Morrisette contested were reaffirmed.[20]

III. Analysis / Application

A. Speedy Prosecution

Morrisette argued that the nineteen-year delay violated his due process rights under both the state and federal constitutions.[21] The trial court denied his motion to dismiss the indictments and the Supreme Court of Virginia affirmed.[22] The court agreed with the trial court's conclusion that Morrisette had not carried his burden of proving that the delay was intentional and used by the Commonwealth to gain a tactical advantage.[23]

The court first held that the Speedy Trial Clause of the Sixth Amendment was not applicable to this case because it involved pre-indictment rather than post-indictment delay.[24] The court, instead, examined whether the pre-indictment delay violated Morrisette's limited due process rights.[25] The court applied the two-part test for oppressive delay claims in which the defendant must prove that: (1) the prosecutor intentionally delayed indictment of the defendant to gain a tactical advantage; and (2) the defendant incurred actual prejudice as a result of the delay.[26] Morrisette conceded that he did not have direct evidence to prove the first element of the test.[27] He argued, however, that the court could infer an improper motive because: (1) the forensics laboratory did not complete the requested comparison tests of White's and Morrisette's PERK samples in 1985; and (2) the police failed to verify the statements Morrisette gave to them a few

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20. *Morrisette*, 569 S.E.2d at 51-56. The second issue will not be discussed further in this note.

21. *Id.*

22. *Id.* at 52-53.

23. *Id.* at 52.

24. *Id.*; *see* U.S. CONST. amend. VI (stating that accused shall enjoy right to speedy and public trial); United States v. Marion, 404 U.S. 307, 320 (1971) (holding that speedy trial provision of Sixth Amendment does not apply until formal indictment, information, or actual restraint by arrest is imposed on defendant).

25. *Morrisette*, 569 S.E.2d at 52; *see* U.S. CONST. amend. XIV, § 1 (stating that no state shall deprive any person of life, liberty, or property without due process of law); VA. CONST. art. I, § 11 (stating that no person shall be deprived of life, liberty, or property without due process of law); Willis v. Mullett, 561 S.E.2d 705, 708 (Va. 2002) (stating that due process guarantees of Constitution of Virginia are virtually same as due process guarantees of United States Constitution). *But see* United States v. Lovasco, 431 U.S. 783, 789 (1977) (stating that Due Process Clause plays limited role in protecting against oppressive pre-indictment delay).

26. *Morrisette*, 569 S.E.2d at 52; *see* United States v. Gouveia, 467 U.S. 180, 192 (1984) (finding that Fifth Amendment requires dismissal of indictment if defendant can prove that delay in bringing indictment was deliberate act by government to gain tactical advantage and that delay caused actual prejudice in presenting defense).

27. *Morrisette*, 569 S.E.2d at 52.

days after White's murder.[28] The court disagreed because it found that the police investigated several suspects and shifted its investigation to persons other than Morrisette.[29] It therefore affirmed the trial court's denial of Morrisette's motion to dismiss the indictments, even though it did not address Morrisette's first claim in regards to the Commonwealth's failure to conduct the DNA comparison tests in 1985.[30]

Morrisette was the third "cold hit" DNA case that resulted in a capital conviction since the Commonwealth began searching for "cold hit" matches within the Virginia Forensic Laboratory's DNA databank.[31] It is possible that many cases that involve long delays between the time of murder and the time of arrest will arise in the next several years based on "cold hits" from DNA and fingerprint evidence. Samples taken after an arrest for any felony may yield "cold hits" from previous murders. Such cases will not involve Sixth Amendment speedy trial issues. Courts will require the defense to meet a very high burden of proving both that the government intentionally delayed arrest of the defendant in order to gain a tactical advantage and that the delay was prejudicial.

Defense attorneys will need to be particularly aware of the proper jury instructions, pursuant to *Simmons v South Carolina*,[32] *Yarbrough v Commonwealth*,[33] and the Virginia Code, during sentencing in such "cold hit" cases.[34] For all capital offenses that occurred on or after January 1, 1995, a defendant *is* entitled to a "life means life" instruction once a request is made for such instruction.[35] For capital offenses that occurred before January 1, 1995, three situations arise: (1) a defendant *may not* be entitled to a "life means life" instruction if only

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28. *Id.* at 52-53.

29. *Id.* at 53.

30. *Id.*

31. *See* Patterson v. Commonwealth, 551 S.E.2d 332, 334-36 (Va. 2001) (affirming death sentence in which government found DNA "cold hit" match more than ten years after rape and murder occurred); Johnson v. Commonwealth, 529 S.E.2d 769, 774-75 (Va. 2000) (affirming death sentence in which government found DNA "cold hit" match two years after rape and murder occurred).

32. 512 U.S. 154 (1994).

33. 519 S.E.2d 602 (Va. 1999)

34. *See* Simmons v. South Carolina, 512 U.S. 154, 171 (1994) (holding that issue of future dangerousness entitles defendant to inform jury of parole ineligibility); Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that trial court must instruct jury that "imprisonment for life" means "imprisonment for life without the possibility of parole" upon request by defendant, regardless of statutory aggravator at issue); *see also* VA. CODE ANN. § 53.1-165.1 (Michie 2002) (abolishing parole for defendants convicted of felony occurring on or after January 1, 1995); VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (requiring instruction regarding parole ineligibility for felony offenses committed after January 1, 1995, upon request by defendant, in capital sentencing proceeding).

35. *See* § 19.2-264.4(A); *see also Yarbrough*, 519 S.E.2d at 616 n.11 (emphasizing that defendant must request instruction when vileness is at issue and that trial court is not required to raise sua sponte).

vileness is at issue;[36] (2) a defendant *is not* entitled to a "life means life" instruction, even if future dangerousness is at issue, if the defendant is actually eligible for parole;[37] and (3) a defendant *is* entitled to a "life means life" instruction *only* when future dangerousness is at issue *and* a defendant is actually ineligible for parole under the Virginia Code.[38]

Old cases involving "cold hits" may also raise ex post facto issues. Morrisette argued that the evidence was insufficient to support a charge of rape because "the Commonwealth failed to prove nonconsensual intercourse by the use of force."[39] The court, in a footnote, stated, "In 1980, when the offense was committed, the provisions of Code § 18.2-61 required proof that the sexual intercourse occurred against the victim's will and through the use of force. The use of threat or intimidation is included in the present version of Code § 18.2-61."[40] The court then found that the evidence was sufficient to support Morrisette's conviction for rape and the use of that conviction as the predicate offense for his capital murder conviction.[41] Interpretation of ex post facto rules, however, requires more than simply looking at changes in statutory definitions.[42] Defense attorneys should pay particular attention to any shift in the burden of persuasion or mode of proof and whether ex post facto rules are applicable.

B. Jury Instructions Regarding Mitigating Evidence

Morrisette raised several issues that the Supreme Court of Virginia in previous cases decided adversely to his position.[43] Morrisette asked the court to revisit the issues he raised.[44] The court rejected each of Morrisette's arguments and reaffirmed its prior holdings.[45]

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36. *See Yarbrough*, 519 S.E.2d at 612 (holding that *Simmons* does not apply when death sentence was based solely on aggravating factor of vileness). *Yarbrough* has not yet been held to apply retroactively.

37. *See* § 53.1-165.1; Ramdass v. Angelone, 530 U.S. 156, 166 (2000) (finding that *Simmons*'s required "life means life" instruction for future dangerousness applies only when defendant is actually ineligible for parole).

38. *See Ramdass*, 530 U.S. at 166; *Simmons*, 512 U.S. at 171.

39. *Morrisette*, 569 S.E.2d at 54.

40. *Id.* at 54 n.6. At the time that White was murdered, Section 18.2-61 of the Virginia Code required proof that the sexual act occurred: (1) against the victim's will; and (2) by force, in order to prove rape. VA. CODE ANN. § 18.2-61 (Michie 1975). By the time of Morrisette's arrest, Section 18.2-61 was revised to require proof that the sexual intercourse occurred: (1) against the victim's will; and (2) by force, threat, or intimidation. VA. CODE ANN. § 18.2-61 (Michie Supp. 2002).

41. *Morrisette*, 569 S.E.2d at 54.

42. *See* Carmell v. Texas, 529 U.S. 513, 541 (2000) (broadening application of ex post facto rule to statutes that make any change to burden of persuasion and mode of proof). *But see* Rogers v. Tennessee, 532 U.S. 451, 466-67 (2001) (holding that outdated prior laws that did not conform to common sense are not subject to ex post facto laws).

43. *Morrisette*, 569 S.E.2d at 55.

44. *Id.*

45. *Id.*

The court, however, should have given more attention to Morrisette's fourth argument. Morrisette argued that:

> Virginia's jury instructions regarding mitigating evidence do not provide meaningful guidance to the jury because the instructions do not inform the jurors that they have a duty to consider mitigating evidence, do not provide any standard of proof regarding mitigating evidence, do not state that the death penalty can be imposed only if the jury is convinced beyond a reasonable doubt that aggravating factors outweigh mitigating ones, do not advise jurors that they are free to give mitigating evidence the weight and effect that each juror believes is appropriate, do not list the statutory examples of mitigating evidence, and do not define the terms "fairness" and "mercy."[46]

The court cited a number of its prior cases in rejecting Morrisette's arguments.[47]

The court's mere affirmation of its prior holdings leaves many issues about mitigating evidence unresolved. None of the cases cited by the court addressed the burden of persuasion or the weight that should be given to individual decisions or unanimous decisions. The court merely hinted in a footnote that mitigating evidence does not need to be proven beyond a reasonable doubt.[48] The court cited the trial court's instructions, which told the jury that it shall consider any mitigating evidence, that "a mitigating factor is one that would tend to favor a sentence of . . . imprisonment for life," and that such evidence does not have to be proven beyond a reasonable doubt.[49] The court left unanswered the questions of whether the jury must be unanimous in finding that: (1) the factor exists; and (2) the factor is a mitigator. Furthermore, the defendant's burden of persuasion, if any, remains unknown.

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46. *Id.*

47. *Id.*; *see* Buchanan v. Angelone, 522 U.S. 269, 275-77 (1998) (holding that United States Constitution only forbids states from precluding jury from giving effect to mitigating evidence and does not require states affirmatively to structure manner in which juries consider mitigating evidence); Cherrix v. Commonwealth, 513 S.E.2d 642, 647 (Va. 1999) (rejecting defendant's argument that Virginia's penalty stage instructions did not adequately inform jury about concept of mitigation); Breard v. Commonwealth, 445 S.E.2d 670, 674-75 (Va. 1994) (rejecting defendant's arguments that Virginia's death penalty statutes were unconstitutional because they did not require jury to find beyond reasonable doubt that aggravating factors outweigh mitigating factors and that trial court failed to instruct jury properly on how it should consider mitigating evidence); Swann v. Commonwealth, 441 S.E.2d 195, 200 (Va. 1994) (rejecting defendant's argument that penalty phase instructions inadequately informed jury on how it should consider mitigating evidence); Satcher v. Commonwealth, 421 S.E.2d 821, 826 (Va. 1992) (rejecting defendant's argument that manner in which jury receives evidence and instructions on subject of mitigating evidence was unconstitutional); Watkins v. Commonwealth, 331 S.E.2d 422, 438 (Va. 1985) (finding that only safeguard necessary to satisfy constitutional requirements was that jury instructions allow jury to consider mitigating evidence).

48. *Morrisette*, 569 S.E.2d at 55 n.7.

49. *Id.*; *see* Mills v. Maryland, 486 U.S. 367, 384 (1988) (holding that jury cannot be instructed that it must unanimously find each mitigating factor beyond a reasonable doubt).

Because the court left these questions unanswered, the Commonwealth can shape its penalty phase strategy in a number of ways. First, it can imply to a jury that the defendant must prove a mitigating factor by a preponderance of the evidence or even more. Second, without a jury instruction that states otherwise, the Commonwealth can combine several of its arguments to create the impression that the jury must reach a unanimous decision as to whether the mitigating factor exists. The Commonwealth can also employ the same strategy for the jury's determination of whether the factor is a mitigator. These potential situations, individually or as a whole, can create situations in which juries or individual jurors may lean in favor of recommending a life sentence, but instead hold the defendant to a higher burden and sentence the defendant to death.

IV. Conclusion

Defense attorneys should note the two primary issues mentioned in this casenote. First, the defense should be aware of the court's holding in regards to the pre-indictment delay and note that such cases surely will continue to arise. When they do arise, particular issues of "old" law may also arise. Second, defense attorneys should note the ways in which the Commonwealth may use, to its advantage, the court's ambiguity in its requirements for jury instructions regarding mitigating evidence. If the courts refrain from providing more specific jury instructions, defense counsel should shape its arguments carefully in such a manner that the jury understands it is not the defendant's burden to disprove a sentence of death.

Philip H. Yoon

CASE NOTES:
Court of Appeals of Virginia