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Commonwealth v. Hill
568 S.E.2d 673 (Va. 2002)

I. Facts

Ernest Oliver Hill, Jr. ("Hill") was indicted for rape, sodomy, breaking and entering, and robbery. During voir dire, Hill's attorney attempted to question jurors about penalty range biases.[1] The Commonwealth objected to this line of questioning and the trial court sustained the objection. The jury found Hill guilty of each charge. The jury sentenced Hill to ten years imprisonment for statutory burglary, forty years imprisonment for sodomy, twenty years imprisonment for robbery, and forty years imprisonment for rape. The circuit court entered the judgment on the verdict.[2]

Hill appealed the judgment to the Virginia Court of Appeals.[3] On appeal, he argued that he had a right to determine possible biases of the veniremen and was therefore, entitled to ask the jury panel during voir dire about the range of punishment that could be imposed upon him.[4] Hill contended that the court's refusal to allow him to explore prospective jurors' views on the statutory range of punishment violated his right to an impartial jury.[5] Hill further argued that without these questions, he could not determine whether jurors are "irrevocably

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1. Commonwealth v. Hill, 568 S.E.2d 673, 674 (Va. 2002); Hill v. Commonwealth, 550 S.E.2d 351, 352 (Va. Ct. App. 2001) ("*Hill I*"). The critical aspects of the voir dire included the following:

> [DEFENSE COUNSEL]: I just want to ask you if you can consider the full range of penalty for the charges? The charges carry a minimum of five years to--
>
> [COMMONWEALTH'S ATTORNEY]: Objection.
>
> THE COURT: Objection sustained. You can have your exception. Let's move on.
>
> [DEFENSE COUNSEL]: Judge, my client has a right to a fair and impartial jury under his Fourth and Sixth Amendment rights.
>
> THE COURT: I am very familiar with those. All right. Let's move on.
>
> [DEFENSE COUNSEL]: If I can just preserve for the record. He has the right to an impartial jury that is impartial not only to the issue of guilt but also the question of punishment, and I should be able to--
>
> THE COURT: I have ruled. Don't argue. Take your exception and go on to your next question.

Hill I, 550 S.E.2d at 352.

2. *Hill*, 568 S.E.2d at 674-75.

3. *Id.* at 674.

4. *Hill I*, 550 S.E.2d at 352.

5. *Id.*

biased toward one end or the other of the sentencing spectrum."[6] The Commonwealth argued that a defendant does not have a constitutional or statutory right to ask questions concerning the range of punishment imposed in a non-capital case.[7] The Court of Appeals reversed Hill's sentence, holding that because he was not permitted to question jurors about the range of punishment that could be imposed upon him, he was denied a fair and full opportunity to ascertain whether the prospective jurors were biased as to sentencing.[8] The Commonwealth appealed the court's reversal to the Supreme Court of Virginia.[9]

II. Holding

The Supreme Court of Virginia reversed the Court of Appeals and held that questioning jurors about the possible range of punishment is not a statutory or constitutional right available for the defendant or the Commonwealth in a non-capital case.[10]

III. Analysis / Application in Virginia

The Supreme Court of Virginia began by reiterating that a defendant has the right to a trial by an impartial jury, as is guaranteed by the United States Constitution and the Constitution of Virginia.[11] However, the Supreme Court of Virginia noted that a defendant does not have an unrestricted constitutional or statutory right to ask questions to a jury panel.[12] The court, quoting *LeVasseur v. Commonwealth*,[13] stated, "A party has no right . . . to propound any question he wishes, or to extend voir dire questioning *ad infinitum*."[14] Virginia Code Section 8.01-358 governs voir dire in capital and non-capital cases.[15] The Supreme Court of Virginia assessed Hill's claim under the relevancy test that it had established in

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6. *Id.*

7. *Hill*, 568 S.E.2d at 675.

8. *Id.*

9. *Id.*

10. *Id.* at 676.

11. *Id.* at 675; *see also* U.S. CONST. amend. XIV (guaranteeing accused trial by impartial jury); VA. CONST. art. I, § 8 (encompassing guaranteed rights of an accused to a trial by an impartial jury); VA. CODE ANN. § 8.01-358 (Michie 2000) (providing the right of counsel to question a potential juror to reveal "any bias or prejudice").

12. *Hill*, 568 S.E.2d at 675.

13. 304 S.E.2d 644 (Va. 1983).

14. *Hill*, 568 S.E.2d at 675 (emphasis in original); LeVasseur v. Commonwealth, 304 S.E.2d 644, 653 (stating that the court must afford "full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause'").

15. § 8.01-358 (reading in pertinent part that "[t]he 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").

prior case-law.[16] The court had previously interpreted "relevant questions" in Section 8.01-358 to be questions that elicit disclosure of relationship, interest, opinion, or prejudice.[17] Any questions addressing other issues are purely at the trial court's discretion.[18] The Supreme Court of Virginia held that Hill's questions about the possible range of punishment were not relevant to the four factors.[19] The court found that the defendant's questions resulted in speculation by the jury panel.[20]

In *Green v. Commonwealth*,[21] the Supreme Court of Virginia addressed Code Section 8.01-358 in the capital context.[22] The court found that views about the death penalty are relevant to Code Section 8.01-358 factors because a juror with a fixed opinion about punishment is biased and must be removed.[23] Thus, the *Green* court clarified that Section 8.01-358 questions include questions about sentencing impartiality in the capital context.[24] In *Hill*, the Supreme Court of Virginia acknowledged that "in a capital murder case in which a defendant can be subjected to the death penalty, the parties are entitled to ask the members of the jury panel 'whether they be unalterably in favor of, or opposed to, the death penalty in every case.'"[25] Therefore, *Hill* bolsters *Green's* mandate that trial courts permit counsel-conducted voir dire on matters of sentencing range in a capital case. However, it is unclear how punishment is a relevant Section 8.01-358 question only in a death case.[26]

The Supreme Court of Virginia also addressed appropriate capital voir dire questions in *Schmitt v. Commonwealth*.[27] The court held that the trial court did not err by preventing the defendant "from asking prospective jurors to speculate as to whether they would automatically impose the death sentence for certain types

16. *Hill*, 568 S.E.2d at 675.

17. *Id.*

18. *Id.*

19. *Id.* at 676.

20. *Id.*

21. 546 S.E.2d 446 (Va. 2001).

22. Green v. Commonwealth, 546 S.E.2d 446, 451 (Va. 2001) (holding that the circuit court abused its discretion and that such abuse of discretion constituted manifest error when the circuit court failed to remove juror Pearson [biased toward guilt] and juror Overby [biased toward death]).

23. *Id.* at 452.

24. *Id.*

25. *Hill*, 568 S.E.2d at 676 (quoting Morgan v. Illinois, 504 U.S. 719, 735 (1992)).

26. For example, a potential juror could believe that all rapists should be punished with death. The sentencing range for the crime of rape is five years to life. As a result of his conviction, the potential juror will automatically vote for a life sentence. A court must find that this juror had an "interest in the cause" and was unalterably biased.

27. Schmitt v. Commonwealth, 547 S.E.2d 186, 196 (Va. 200[1]) (concluding "that the trial court did not abuse its discretion in restricting Schmitt's questions during voir dire, and that the questioning allowed by the trial court assured the removal of those prospective jurors who would automatically impose the death penalty").

of killings or under certain hypothetical circumstances."[28] Similar to the holding in *Schmitt*, the Supreme Court of Virginia, in *Hill*, reasoned that the jurors would have to speculate when answering range of punishment questions because they would be required to answer in a "factual vacuum, without the benefit of the evidence that would be presented to them during the guilt and sentencing phases of the trial."[29] The *Schmitt* court found defense counsel's questions inappropriate because the "questions were posed without any reference to the prospective jurors' [sic] ability to consider the evidence and the court's instructions in deciding whether to impose the death penalty."[30] Therefore, voir dire questions in a capital case, after *Schmitt*, may be hypothetical as to punishment, but must include the applicable law. The use of hypotheticals prevents potential jurors from speculation in a "factual vacuum,"— the *Hill* court's primary concern.[31]

Furthermore, the use of hypotheticals is necessary to ascertain whether a juror automatically would impose a life or death sentence. It is insufficient to "ask the question: 'Would you ever vote to impose the death penalty?'"[32] What could be more speculative? Hypotheticals are essential to determine whether a juror truly can consider both life and death. The questions that should be asked to establish the juror's potential for consideration "must be posed with reference to the juror's ability to consider the evidence and the court's instructions."[33]

Thus, the issue for the practitioner is not whether hypotheticals can be used, but which hypotheticals can be used. The answer to this question is a carefully crafted hypothetical which includes both facts and law. Prohibiting hypothetical questions prevents the "defense [from] determining where potential jurors stand on the issue of the death penalty."[34]

Most notably, in *Hill*, the Supreme Court of Virginia stated that capital murder cases are "qualitatively different" from non-capital cases.[35] This language should prove useful for arguing any number of issues. The language may be most useful to practitioners making arguments about issues which the court has previously decided, but only in non-capital cases.[36] The court's explicit wording

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28. *Id.*

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

30. *Schmitt*, 547 S.E.2d at 196.

31. *Hill*, 568 S.E.2d at 676. Specifically, the court stated, jurors' "responses to questions about the range of punishment would be speculative because the jurors would be required to answer these questions in a factual vacuum, without the benefit of the evidence." *Id.*

32. Cynthia M. Bruce, Case Note, 14 CAP. DEF. J. 145, 188 (2001) (analyzing Schmitt v. Commonwealth, 547 S.E.2d 186 (Va. 200[1])).

33. *Id.*

34. *Id.*

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

36. *See, e.g.*, Bell v. Commonwealth, 563 S.E.2d 695, 711 (Va. 2002) (maintaining that a defendant does not have a constitutional right to individual voir dire). The court affirmed the lower court's use of extensive questioning and believed it to be sufficient to preserve Bell's rights. *Id.* However, in light of Hill's recognition that capital cases are "qualitatively different," practitioners

is a forward step in terms of recognizing that, because death is different, a capital defendant should be offered greater procedural protections than are accorded other defendants.

IV. Conclusion

Hill, while not a capital case, provides three important lessons to the capital practitioner. First, it strengthens the *Green* rule that capital voir dire includes questions about death penalty bias. Second, it instructs that well-crafted hypothetical questions must be used to avoid objections that the question asks the juror to speculate. Third, death in Virginia is now "qualitatively different."

Priya Nath

should request individual voir dire questions that adhere to the Code Section 8.01-358 guideline.

ARTICLES