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Elliott v. Commonwealth 593 S.E.2d 270 (Va. 2004)

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I. Facts

At 4 a.m. on January 2, 2001, a newspaper delivery person noticed a man standing beside a pick-up truck on Belfry Lane in the Woodbridge community of Prince William County, Virginia. The man walked through a grassy area between two townhouses and disappeared. The delivery person, aware of several recent break-ins in the area, called the police. Shortly thereafter, police received another call, a report of a domestic disturbance at a townhouse on Jousters Way, located just north of Belfry Lane and accessible via the same grassy area through which the unidentified man had walked. Responding officers arrived at the Jousters Way townhouse where they discovered Robert Finch ("Finch") dead on the floor and Dana Thrall lying in a pool of blood. Emergency workers airlifted Thrall to a hospital where she later died.[1]

Later that day, Detective Charles Hoffman interviewed Finch's sister. He learned that Finch had a prior romantic relationship with Rebecca Gragg and that Gragg and Finch were involved in a custody dispute over their children. Hoffman drove to Gragg's residence and discovered that one of two cars in the driveway was registered to Larry Bill Elliott. Two detectives interviewed Gragg, who stated that Elliot was a "friend and business partner." Gragg told the detectives that she knew nothing about the morning's crime.[2]

During the course of the investigation, Gragg continued to deny any knowledge of the murders. Police suspected that Gragg was withholding information because a polygraph examination indicated that her interview answers were untruthful. However, over the next several months, she provided the police with no additional information concerning Elliott.[3]

On May 9, 2001, the police charged Elliott with capital murder.[4] The following day, police again interviewed Gragg.[5] She submitted to a second polygraph, and the police told her that the results of the test indicated deception.[6] Gragg asked for and consulted with her attorney.[7] She then informed police that, in a series of phone calls, Elliott told her that he was "tired of this s* * * and was

1. Elliott v. Commonwealth, 593 S.E.2d 270, 273–75 (Va. 2004).
2. *Id.* at 275.
3. *Id.* at 277.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Elliott*, 593 S.E.2d at 277.

going to take care of it" and later that "all of [their] problems had been taken care of."[8] In another call, Elliott informed Gragg that he was looking for a place "to dump . . . [the] bloodied black trash bags from the mess that Jerry had made."[9] Jerry was someone Elliott supposedly knew through his work.[10]

Elliott was tried on charges of capital murder, first-degree murder, and two counts of the use of a firearm in the commission of a felony. Prior to trial, Elliott filed several motions, including a motion to have the Virginia capital murder statutes declared unconstitutional and a motion for a jury instruction that the jury must unanimously find the elements supporting vileness at the sentencing phase. The trial court denied the motions. The jury found Elliott guilty and sentenced him to death. However, the trial court learned of juror misconduct and declared a mistrial.[11]

Prior to his retrial, Elliott moved for disclosure of exculpatory and impeaching material within Gragg's statements and related police reports. He also sought an *in limine* ruling to allow the introduction of videotape evidence of Gragg's polygraph examinations. Elliott alleged that the video would reveal Gragg's motive for fabricating a story. Specifically, the evidence would establish that she altered her statement and implicated Elliott only after police confronted her with polygraph evidence that her previous statements were untruthful. The trial court directed the Commonwealth to provide the defense with "all statements, whether exculpatory or not, 'authored by Rebecca Gragg and furnished to the Office of the Commonwealth's Attorney at some point during the pendency of this prosecution.' "[12] The Commonwealth complied and provided Elliott with previously undisclosed information and averred in writing that the packet contained all material contacts between Gragg and the police.[13]

Prior to trial, the court conducted a hearing on Elliott's motion to admit the video evidence. The court ruled that Elliott could establish, on cross-examination of Gragg, that she had been confronted with her untruthful statements and had changed her story as a result. However, Gragg could not show the videotape or mention the polygraph.[14]

Following the second trial, the jury returned a verdict of guilty and sentenced Elliott to death for the capital murder of Thrall. On appeal, Elliott raised twenty assignments of error. The Supreme Court of Virginia consolidated the

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 278.
12. *Id.*
13. *Elliott*, 593 S.E.2d at 278.
14. *Id.*

automatic death sentence review with his appeal of the capital murder under Virginia Code section 17.1-313(F).[15]

II. Holding

The Supreme Court of Virginia denied relief.[16] Only two of the court's holdings will be discussed in this note. First, the Supreme Court of Virginia found that the trial court did not abuse its discretion when it denied Elliott's motion to admit the video evidence of Gragg's polygraph examinations.[17] Second, the court held that when a criminal trial ends in a mistrial, the court's pretrial and trial rulings do not carry over to the retrial.[18] Thus, some of Elliott's claims were waived due to counsel's failure to renew them after adverse rulings at the first trial.[19]

III. Analysis

Elliott relied on *Crumpton v. Commonwealth*[20] for his assertion that evidence of the polygraph test should have been admitted into evidence at trial.[21] Specifically, Elliott contended that such evidence was admissible to explain "the motive for, or context underlying, testimony or statements given by a witness after the witness is told of the results of his polygraph examination."[22] However, the Supreme Court of Virginia concluded that *Crumpton* was limited to its facts and inapplicable to Elliott's case.[23] The court relied instead on *Robinson v. Commonwealth*,[24] in which the court determined "that the results of a polygraph examination may not be used to impeach a witness."[25] Accordingly, the court concluded

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15. *Id.* at 281; *see* VA. CODE ANN. § 17.1-313(F) (Michie 2003) (stating that "[s]entence review shall be in addition to appeals, if taken, and review and appeal may be consolidated").

16. *Elliott*, 593 S.E.2d at 292.

17. *Id.* at 284.

18. *Id.* at 290.

19. *Id.*

20. 384 S.E.2d 339 (Va. Ct. App. 1989).

21. *Elliott*, 593 S.E.2d at 282; *see* Crumpton v. Commonwealth, 384 S.E.2d 339, 343 (Va. Ct. App. 1989) (holding that the defendant "had a right to give a full explanation of his prior inconsistent statements so long as that explanation did not also necessarily invoke the polygraph examination results as proof that he had been truthful" when he testified).

22. *Elliott*, 593 S.E.2d at 282.

23. *Id.*

24. 341 S.E.2d 159 (Va. 1986).

25. *Elliott*, 593 S.E.2d at 282; *see* Robinson v. Commonwealth, 341 S.E.2d 159, 167 (Va. 1986) (concluding that polygraph examinations are so unreliable as to be of no evidentiary use and therefore, that polygraph test results were not admissible to impeach a prosecution witness).

that the trial court did not err in denying Elliott's motion to admit the videotape of Gragg's polygraph examination.[26]

Elliott also contended that the trial court erred when it overruled his motion to declare Virginia's death penalty statute unconstitutional and when it failed to instruct the jury on a particular construction of the vileness aggravator adopted by the Supreme Court of Virginia.[27] Elliott included these two arguments in an omnibus motion that he filed prior to his first trial.[28] The record showed, however, that Elliott did not refile the motion or request the instruction on retrial.[29] Therefore, the court held that Elliott had defaulted both claims.[30] Likewise, the court rejected Elliott's argument that the trial court erred when it denied his request to instruct the jury that it needed to agree unanimously on a single element of vileness; again, the court found that Elliott filed the motion for this instruction prior to the first trial but did not renew the request during the penalty phase of his second trial.[31]

Elliott argued that he was not required to reassert the pretrial motions from his first trial at his second trial.[32] He relied on *Bradley v. Duncan*[33] and *City of Cleveland v. Cleveland Electric Illuminating Co.*[34] for his assertion that the rulings from a mistrial carry over to the subsequent retrial.[35] The court distinguished those cases and held that a defendant may not rely upon objections made at an aborted trial to preserve an issue for appeal.[36] Similarly, the court ruled that a "defendant may not assert that . . . pretrial motions [made] prior to a mistrial are binding upon the trial court in a subsequent trial unless the court adopt[ed] those rulings" on a motion.[37] Thus, Elliott was barred from asserting the assignments of error on appeal.[38]

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26. *Elliott*, 593 S.E.2d at 282.

27. *Id.* at 288–89. The Supreme Court of Virginia explained in a footnote that Elliott provided no authority for the assertion that the court had adopted instructions limiting the definition of vileness. *Id.* at 289 n.9.

28. *Id.* at 289.

29. *Id.*

30. *Id.* at 290.

31. *Id.* at 289.

32. *Elliott*, 593 S.E.2d at 288–89.

33. 315 F.3d 1091 (9th Cir. 2002).

34. 538 F. Supp. 1328 (N.D. Ohio 1981).

35. *Elliott*, 593 S.E.2d at 289; *see* Bradley v. Duncan, 315 F.3d 1091, 1107 (9th Cir. 2002) (holding that "[t]he judge in a second trial is not compelled to follow determinations of fact or law established by the judge in an earlier proceeding that ended in a mistrial"); City of Cleveland v. Cleveland Elec. Illuminating Co., 538 F. Supp. 1328, 1329 (N.D. Ohio 1981) (considering a motion, following a mistrial, for recognition of twenty-one orders issued by the previous trial court).

36. *Elliott*, 593 S.E.2d at 289–90.

37. *Id.* at 290.

38. *Id.*

IV. Application to Virginia Practice

In *Elliott*, defense counsel unsuccessfully sought to enter polygraph evidence to show the circumstances leading up to the prosecution's star witness's initial accusation.[39] Elliott relied on *Crumpton*.[40] In *Crumpton*, the trial court ruled, and the Court of Appeals of Virginia agreed, that the results of the defendant's polygraph examinations were not admissible at trial.[41] However, the polygraph examination and statements allegedly made by the polygraph examiner provided the background against which the defendant could have explained his prior inconsistent testimony.[42] Specifically, the defendant altered his statements after learning the results of a polygraph examination.[43]

The court of appeals reconciled the rule prohibiting the admission of polygraph results with the rule protecting the right of the defendant to explain fully his prior inconsistent statements.[44] Without reference to the results of the examination and coupled with a cautionary instruction to the jury, the defendant "could and should have been permitted to fully explain the surrounding circumstances and reasons for which he gave his July 11 statement."[45] The court found that such balancing would preserve the integrity of both firmly embedded legal rules.[46]

In *Elliott*, however, the Supreme Court of Virginia limited *Crumpton* to the particular facts of the case.[47] The court relied instead on its decision in *Robinson*.[48] In *Robinson*, the court held that the results of a polygraph examination of a prosecution witness were not admissible in a murder prosecution to impeach the witness.[49] Applying *Robinson* to the facts in *Elliott*, the court stated,"[i]t [was] evident that Elliott sought to impeach Gragg's credibility by the introduction of evidence of Gragg's polygraph examinations as reflected in the videotape of those examinations."[50] The court thus disallowed the evidence.[51]

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39. *Id.* at 282.
40. *Id.*
41. *Crumpton*, 384 S.E.2d at 341–42.
42. *Id.* at 342–43.
43. *Id.* at 341.
44. *Id.* at 343.
45. *Id.*
46. *Id.*
47. *Elliott*, 593 S.E.2d at 282.
48. *Id.*
49. *Robinson*, 341 S.E.2d at 167.
50. *Elliott*, 593 S.E.2d at 282.
51. *Id.*

To the extent that the Supreme Court of Virginia relied on *Robinson*, the court's decision arguably conflicts with the United States Supreme Court's suggestion in *Banks v. Dretke*[52] that the circumstances leading up to a witness's accusatory statement can be both relevant and material under *Brady v. Maryland*.[53] In *Banks*, the prosecution failed to disclose a witness's status as a paid informant despite the prosecution's representation that it maintained an open-file policy and would disclose exculpatory evidence to the defense.[54] A second witness testified at trial and repeatedly claimed that he had not talked to anyone about his testimony.[55] In fact, the witness participated in at least one practice session with prosecutors in which they coached him intensively in preparation for his trial testimony.[56] Although the Supreme Court did not reach Banks's claim based upon the coached witness testimony because the narrow issue to be decided was the denial of a certificate of appealability, the Court's discussion in *Banks* suggests that the circumstances of a witness's preparation can in themselves be *Brady* material and also potentially relevant and admissible at trial.[57]

Elliott also makes clear that appellate counsel must establish the record from scratch following a mistrial or successful post-trial motion for a new trial.[58] Counsel must raise and preserve all claims and objections made at the first trial unless the second trial court expressly excuses the defense from doing so. The court in *Elliott* indicated that if counsel moved for and obtained a ruling from the second trial court that the initial motions and rulings remained in effect, he might have preserved claims that he otherwise defaulted.[59]

V. Conclusion

Elliott illustrates the importance of establishing that the circumstances leading up to a witness's testimony can be *Brady* material. Evidence that reveals a witness's status as a paid informant, coercive interrogation techniques, and

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52. 124 S. Ct. 1256 (2004).

53. Banks v. Dretke, 124 S. Ct. 1256, 1271–81 (2004) (impliedly adding witness preparation to the range of possible exculpatory material under *Brady v. Maryland*); *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process if the evidence is material either to guilt or to punishment"). For a complete discussion of *Banks*, see generally Jessica M. Tanner, Case Note, 17 CAP. DEF. J. 91 (2004) (analyzing Banks v. Dretke, 124 S. Ct. 1256 (2004)).

54. *Banks*, 124 S. Ct. at 1273.

55. *Id.* at 1264.

56. *Id.*

57. *See* Tanner, *supra* note 53, at 93 (discussing Banks v. Dretke, 124 S. Ct. 1256 (2004)). For a more in-depth discussion of the implications of *Banks* for prosecutorial discretion in determining materiality under *Brady* see generally Jannice Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33 (2004).

58. *Elliott*, 593 S.E.2d at 290.

59. *Id.*

prior inconsistent statements may serve a crucial impeachment function at trial. Finally, after *Elliott*, counsel at a second trial carefully must reconstruct the record of pretrial and trial motions asserted during the proceeding that resulted in a mistrial. Otherwise, counsel risks defaulting those claims and objections.

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