Capital Defense Journal

Volume 17 | Issue 1 Article 17

Fall 9-1-2004

Lenz v. Warden 593 S.E.2d 292 (Va. 2004)

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlucdj

 Part of the Law Enforcement and Corrections Commons

Recommended Citation

Lenz v. Warden 593 S.E.2d 292 (Va. 2004), 17 Cap. DEF J. 221 (2004).
Available at: https://scholarlycommons.law.wlu.edu/wlucdj/vol17/iss1/17

This Casenote, Va. Supreme Ct. is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Lenz v. Warden
593 S.E.2d 292 (Va. 2004)

I. Facts

On January 16, 2000, a correctional officer of Augusta Correctional Center witnessed Michael W. Lenz and another inmate repeatedly stabbing a third inmate. The two assailants ignored the officer's order to stop stabbing the victim and continued their attack until a number of correctional officers entered the room to end the assault. The victim died soon after the incident, with a total of sixty-eight stab wounds all contributing to his death.[1]

Lenz was tried and convicted of capital murder.[2] Upon the trial jury's subsequent recommendation, the trial court sentenced him to death.[3] On appeal, the Supreme Court of Virginia affirmed.[4] Lenz then filed a petition a for writ of habeas corpus, and the Augusta County circuit court held an evidentiary hearing.[5] Subsequently, the Supreme Court of Virginia granted the habeas petition in part and remanded the case for a new sentencing hearing.[6] Ultimately, however, the court granted the Commonwealth's petition for rehearing and reversed its prior decision granting sentencing relief.[7]

II. Holding

The Supreme Court of Virginia found that Lenz's trial counsel were not ineffective for failing to object to a verdict form that lacked the specific option of a life sentence despite a finding of one or both aggravating factors.[8] Further, the court concluded that the circuit court did not abuse its discretion in declining to consider as substantive evidence both the petitioner's and respondent's

---

1. Lenz v. Commonwealth, 544 S.E.2d 299, 301–02 (Va. 2001) [hereinafter *Lenz I*].

2. *Id.* at 301.

3. *Id.*; *see* VA. CODE ANN. § 18.2-31(3) (Michie 2004) (stating that the premeditated killing of any person by a prisoner confined in a state correctional facility constitutes a capital murder).

4. *Lenz I*, 544 S.E.2d at 311.

5. Lenz v. Warden, 579 S.E.2d 194, 195 (Va. 2003) [hereinafter *Lenz II*].

6. *Id.* at 199. The Supreme Court of Virginia initially held as follows: (1) that trial counsel were ineffective for failing to object to an improper verdict form; (2) that the petitioner was not prejudiced by the use of a stun belt during trial; and (3) that the petitioner was not entitled to a jury instruction that he could only be convicted of capital murder if the jury found that he was the "triggerman." *Id.* at 197–99.

7. Lenz v. Warden, 593 S.E.2d 292, 295 (Va. 2004) [hereinafter *Lenz III*].

8. *Id.*

affidavits submitted at the habeas hearing.[9] In addition, the Supreme Court of Virginia held that the evidence did not establish that the bailiff provided ex parte responses to juror inquiries regarding sentencing instructions, that jurors read relevant Bible passages during sentencing deliberations, or that a prospective juror would automatically vote to impose a sentence of death.[10] Finally, the Supreme Court of Virginia held that petitioner was not denied effective assistance of counsel for multiple alleged failures to investigate, develop, and present evidence.[11]

III. Analysis

A. Verdict Form

Upon rehearing, the Supreme Court of Virginia reconsidered Lenz's contention that his trial counsel were ineffective for failing to object to a verdict form that did not specifically include the option of a life sentence upon finding one or both aggravating factors.[12] Instead, the jury received the statutory verdict form in compliance with Virginia Code section 19.2-264.4(D).[13] Lenz argued that the verdict forms must include one form that specifically provides an option for life imprisonment despite a jury finding of the existence of one or both aggravating factors.[14] The Supreme Court of Virginia had first addressed and accepted this specific contention in *Powell v. Commonwealth*,[15] a decision handed down after *Lenz I*.[16] The Supreme Court of Virginia concluded that Lenz' s trial counsel were not ineffective for their inability to anticipate the court's future decision.[17]

B. Procedural Bar

Before addressing Lenz's remaining claims, the Supreme Court of Virginia examined and rejected the Commonwealth's assertion that petitioner's claims

---

9. *Id.* at 297.

10. *Id.* at 297–301.

11. *Id.* at 301–05.

12. *Id.* at 295; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (stating that a death sentence is authorized only upon a finding by the jury that the defendant "would constitute a continuing serious threat to society or that his conduct . . . was outrageously or wantonly vile, horrible or inhuman").

13. VA. CODE ANN. § 19.2-264.4(D) (Michie 2004). The jury form read: "We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder, as charged in the indictment, and having considered the evidence in aggravation and mitigation of the offense, fix his punishment at imprisonment for life." *Lenz III*, 593 S.E.2d at 295 n.1.

14. *Lenz III*, 593 S.E.2d at 295.

15. 552 S.E.2d 344 (Va. 2001).

16. *Lenz III*, 593 S.E.2d at 295; *see* Powell v. Commonwealth, 552 S.E.2d 344, 363 (Va. 2001) (finding that the jury is required to receive a verdict form that specifically states that a life sentence may be imposed even after finding one or both aggravating circumstances).

17. *Lenz III*, 593 S.E.2d at 295.

were barred in a habeas corpus proceeding for failure to raise them at trial and on direct appeal.[18] Specifically, the Commonwealth sought to bar allegations of improper juror contact with the bailiff and the reading of a Bible during jury deliberation.[19] Relying on *Slayton v. Parrigan*,[20] the Commonwealth argued that Lenz's claims were procedurally barred because he had the opportunity, immediately after the conclusion of the trial, to gather information and evidence of jurors' alleged misconduct.[21] The Supreme Court of Virginia, however, recognized that an application of the *Slayton* procedural bar in this case would require attorneys "to poll jurors and any other persons involved with the criminal trial immediately following the trial, often at the same time that counsel is involved in filing post-trial motions and preparing for appeal."[22] Declining to impose such a requirement, the court concluded that "[a]bsent any indication that counsel or petitioner knew or should have known of the complained-of conduct at a time when the trial court could address the misconduct allegations, the procedural bar in *Slayton* does not apply."[23] Because no evidence indicated that Lenz or counsel had reason to question the jurors or the bailiff, the Supreme Court of Virginia found that *Slayton* did not procedurally bar petitioner's claims.[24]

C. Affidavits

Raising a procedural issue at the habeas proceeding, Lenz argued that the circuit court erred in refusing to treat affidavits filed by both petitioner and respondent as substantive evidence.[25] The petitioner asserted that because the court is permitted to read affidavits as evidence, it should have done so.[26] However, because consideration of the affidavits fell within the circuit court's discretion, the Supreme Court of Virginia reviewed the trial court's decision to disallow the affidavits under an abuse of discretion standard.[27] The circuit court did not consider the affidavits as substantive evidence for a number of reasons,

---

18. *Id.* at 296–97.

19. *Id.*

20. 205 S.E.2d 680 (Va. 1974).

21. *Lenz III*, 593 S.E.2d at 296; *see* Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (holding that a habeas corpus proceeding cannot be substituted for an appeal if the petitioner "has been afforded a fair and full opportunity to raise and have adjudicated the question of the admissibility of evidence in his trial and upon appeal").

22. *Lenz III*, 593 S.E.2d at 296.

23. *Id.*

24. *Id.* at 297.

25. *Id.* The circuit court used the affidavits only to evaluate witness credibility. *Id.*

26. *Id.*; *see* VA. CODE ANN. § 8.01-660 (Michie 2000) (providing that "[i]n the discretion of the court or judge before whom the petitioner is brought, the affidavits of witnesses taken by either party, on reasonable notice to the other, may be read as evidence").

27. *Lenz III*, 593 S.E.2d at 297.

"including that they had no indicia of inherent credibility, were taken without benefit of a transcript, and were taken a significant time after the events occurred."[28] Because the circuit court provided multiple grounds for its decision, the Supreme Court of Virginia concluded that the circuit court had not abused its discretion.[29]

D. Insufficient Evidence

1. Improper Communication with the Bailiff

Lenz claimed that the bailiff provided jurors ex parte answers to questions regarding sentencing instructions in violation of Lenz's Sixth Amendment right to counsel.[30] Citing *Stockton v. Virginia*,[31] the Supreme Court of Virginia stated that Lenz had the burden to establish that the alleged contact took place.[32] The defense's challenge relied heavily on juror affidavits that the trial court rejected as substantive evidence, and the Supreme Court of Virginia found the remaining evidence inconclusive.[33] Without further evidence, the court rejected the claim and found that Lenz did not carry his burden of proof.[34]

2. Extraneous Influence

Lenz argued that the habeas court erred when it concluded that "there was no indication that the 'jury verdict was influenced by an improper communication in the form of a quotation from the Bible.' "[35] In *Remmer v. United States*,[36] the United States Supreme Court set the applicable standard for evaluating a claim of extraneous jury contact: any direct or indirect contact with a juror during trial is presumptively prejudicial if it concerns a matter pending before the jury.[37]

---

28. *Id.*

29. *Id.*

30. *Id.*

31. 852 F.2d 740 (4th Cir. 1988).

32. *Lenz III*, 593 S.E.2d at 297; *see* Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988) (finding that the burden rests with the petitioner to establish that improper contact occurred).

33. *Lenz III*, 593 S.E.2d at 297–98. The court stated:

> A review of the record shows that some of the jurors and the bailiff could not recall whether the bailiff was asked any questions at all; other jurors recalled that they asked the bailiff some questions. No juror testified that any of the questions that may have been asked related to the trial court's instructions.

Id.

34. *Id.* at 298.

35. *Id.*

36. 347 U.S. 227 (1954).

37. *Lenz III*, 593 S.E.2d at 298; *see* Remmer v. United States, 347 U.S. 227, 229 (1954) (holding that any form of contact with a member of the jury during trial is presumed to be prejudicial if it regards an issue before the jury).

The circuit court found during the evidentiary hearing that there had been a Bible open during jury deliberations and that jurors both looked at and read from it, but that no evidence established which passage or passages were read.[38] Given the circuit court's decision not to credit petitioner's affidavits as substantive evidence, the circuit court's factual findings were not plainly wrong, and the Supreme Court of Virginia concluded that it was bound by them.[39]

Lenz further claimed that the circuit court failed to apply the presumption of prejudice that *Remmer* mandates.[40] However, the Supreme Court of Virginia noted that the *Remmer* presumption is only triggered by showing both that extraneous contact occurred and also that "such contact was 'about the matter pending before the jury.' "[41] The court conceded that Lenz established that extraneous contact occurred.[42] However, because the circuit court's factual findings did not reveal which Bible passages were read during deliberations, the court concluded that Lenz had failed to establish that the contact was about the matter pending before the jury.[43] Thus, the court found that *Remmer*'s presumption of prejudice did not apply and that the extraneous contact did not influence the integrity of the verdict.[44]

2. Juror Durrett

Lenz contended that the circuit court erred in seating juror Durrett, who stated in a posttrial affidavit offered at the habeas proceeding that the "Bible says that the death penalty is the appropriate punishment for murder."[45] The petitioner argued that seating Durrett as a juror violated the standards of *Morgan v. Illinois*.[46] However, during voir dire, juror Durrett specifically stated that she would consider both life without parole and death as possible sentences in a capital murder trial, and the circuit court found that this assertion sufficiently refuted the suggestion that Durrett was biased in support of the death penalty.[47]

---

38. *Lenz III*, 593 S.E.2d at 298.

39. *Id.*; *see* Hedrick v. Warden, 570 S.E.2d 840, 847 (Va. 2002) (establishing that "[t]he circuit court's factual findings . . . are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them").

40. *Lenz III*, 593 S.E.2d at 298.

41. *Id.* (quoting *Remmer*, 347 U.S. at 229).

42. *Id.*

43. *Id.* at 298–99 (recounting juror testimony that, if the Bible had been consulted, jurors did not know which passages had been read).

44. *Id.* at 299.

45. *Id.*

46. *Lenz III*, 593 S.E.2d at 299; *see* Morgan v. Illinois, 504 U.S. 719, 738 (1992) (holding that jurors who would automatically vote in favor of imposing the death penalty in every case are unable to follow the law and should be disqualified).

47. *Lenz III*, 593 S.E.2d at 300.

The Supreme Court of Virginia determined that the statement from the affidavit constituted "insufficient evidence upon which to find that juror Durrett herself concurred with the statement and that she would automatically apply this 'appropriate punishment' in every capital murder case."[48] Therefore, the court concluded that seating juror Durrett was appropriate and did not violate the principles of *Morgan*.[49]

E. Ineffective Assistance of Counsel

Lenz argued multiple claims of ineffective assistance of counsel ("IAC"), and to succeed on the allegations, he was responsible for meeting the two prong test set forth in *Strickland v. Washington*.[50] In considering Lenz's contentions against the backdrop of *Strickland*, the Supreme Court of Virginia noted that a failure to prove the required prejudice negated any need to examine the counsel's performance.[51] The court subsequently rejected each of Lenz's IAC claims.[52]

IV. Application to Virginia Practice

A. Verdict Form

In *Lenz III*, the Supreme Court of Virginia stated that the petitioner's counsel could not be found ineffective for failure to anticipate the decision later handed down in *Powell*.[53] However, Lenz's contention regarding trial counsel's failure to recognize that a jury must be given a complete verdict form stating all sentencing options was based on reasonable inferences from *Atkins v. Commonwealth*,[54] decided before Lenz's trial.[55] The jury in *Atkins* received a verdict form missing the option for life imprisonment if no aggravating factor was proved, and the Supreme Court of Virginia held this to be reversible error.[56]

At the trial level, Lenz's counsel failed to preserve the verdict form issue for appeal, and the Supreme Court of Virginia raised the issue *sua sponte* in *Lenz I*

---

48. *Id.*

49. *Id.*

50. *Id.* at 300–05; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that in order to obtain relief on an IAC claim, petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced the case).

51. *Lenz III*, 593 S.E.2d at 300.

52. *Id.* at 301–05.

53. *Id.* at 295.

54. 510 S.E.2d 445 (Va. 1999).

55. *Lenz III*, 593 S.E.2d at 295; *see* Atkins v. Commonwealth, 510 S.E.2d 445, 456–57 (Va. 1999) (finding reversible error in a verdict form that lacked the option to impose a life sentence absent the required aggravating factors).

56. *Atkins*, 510 S.E.2d at 457.

only to conclude that the issue was procedurally defaulted.[57] Subsequently, the majority in *Lenz III* identified the issue advanced in the petitioner's writ of habeas corpus as "whether the verdict form must specifically provide the option of imposing a sentence of life when the Commonwealth has established *one or both* aggravating factors."[58] The court had previously stated that "it is materially vital to the defendant in a criminal case that the jury have a proper verdict form," and the verdict form given to the jury in *Lenz I* did not fully reflect the sentencing options available.[59] Specifically, the forms did not include the options for a life sentence or a life sentence and a fine of no more than $100,000 despite findings of statutory aggravation.[60] However, rather than fault the defense for failing to grasp the rationale of *Atkins*, the Supreme Court of Virginia absolved counsel for not extending *Atkins* to its logical conclusion.

In *Powell*, the Supreme Court of Virginia directly addressed the issue that the court recognized in *Lenz III* as follows:

> [w]e hold that in a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.[61]

Thus, although the court denied Lenz's writ of habeas corpus on the grounds of ineffective assistance of counsel for failure to object to an insufficient verdict form, *Powell* clearly established that a defendant can now successfully bring such a claim.[62]

B. Affidavits

As the Supreme Court of Virginia noted, the decision to credit affidavits as substantive evidence remains within the circuit court's discretion, and accordingly, the decision must be reviewed on a standard of abuse of discretion.[63] The court rejected the affidavits in *Lenz II* because they "were taken without benefit of a transcript and . . . a significant time after the events occurred."[64] Therefore, attorneys should strive to give courts compelling reason to receive affidavits as evidence. However, *Lenz* shows that reliance on affidavits rather than live testimony will always carry some risk and, whenever possible, habeas counsel

57. *Lenz I*, 544 S.E.2d at 311.
58. *Lenz III*, 593 S.E.2d at 295.
59. *Atkins*, 510 S.E.2d at 456.
60. *Lenz III*, 593 S.E.2d at 295.
61. *Powell*, 552 S.E.2d at 363.
62. *Id.*
63. *Lenz III*, 593 S.E.2d at 297.
64. *Id.*

should present in-court testimony rather than trusting that the habeas court will credit evidence in the form of affidavits.

C. Proof of Improper Influences on Jurors

Lenz failed to meet the requisite burden of proof regarding the bailiff's alleged ex parte contact with jurors and the extraneous influence of the jurors' reading of a Bible passage during sentencing deliberations.[65] In both the ex parte contact and extraneous influence instances, jurors could not recall with clarity how or even whether the events took place.[66] Attorneys should make efforts when potential juror issues arise to interview those parties involved as quickly as possible to obtain the most accurate and reliable evidence possible.[67]

Similarly, the record inadequately supported petitioner's argument that the seating of juror Durrett violated *Morgan.* Although Durrett stated that the Bible regards a death sentence as the proper penalty for murder, the fact that she specifically stated during voir dire that she would be able to consider both life without parole and death as viable penalty alternatives outweighed any after-discovered evidence of potential bias.[68] This result demonstrates the importance and value of probing voir dire to unearth latent bias that may be concealed by jurors' reflexive assertions that they will impartially weigh all sentencing options.

V. Conclusion

Although counsel in *Lenz III* were not held responsible for applying *Atkins* to new factual circumstances, the Supreme Court of Virginia's decision in *Powell* lays to rest any uncertainty regarding verdict forms that fail to reflect all of the jury's sentencing options. This case also demonstrates the danger of post-conviction reliance on affidavits rather than in-court testimony. *Lenz* illustrates that despite the proffered affidavits' strong relevance and factual importance, counsel should nevertheless anticipate a strong judicial preference for live testimony of witnesses at habeas proceedings.

Mark J. Goldsmith

---

65. *Id.* at 298.

66. *Id.* at 297–99.

67. For a complete discussion of issues concerning the Bible and the jury, see generally Terrence T. Egland, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations*, 16 CAP. DEF. J. 337 (2004).

68. *Id.* at 299–300.