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SPENCER v. COMMONWEALTH Supreme Court of Virginia SPENCER I (victim-Tucker): 1989 Va. LEXIS 147, WL 109529 (1989) and SPENCER II (victim-Davis): 1989 Va. LEXIS 127, WL 109530 (1989)

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neous objection rule, Waye could not raise the issue on appeal unless he could show cause under *Sykes*. The most common "cause" is an ineffective assistance of counsel claim, which requires a defendant to meet the stringent two-part test of *Strickland*. Alton Waye was executed on August 30, 1989.

No one can predict which claims the United States Supreme Court will recognize in the years to come. *Sykes* does recognize later "new law" as an excuse for not raising claims at trial. Nevertheless, because of Virginia's contemporaneous objection rule, unless a claim was *unheard of before* a client's trial, failure to object at trial will close the door to federal collateral review for a capital defendant. The only protection the attorney representing a capital defendant can provide a client is to know *all existing law, including "logical extensions" of that law*. This includes the law of your own state, but also the law of any jurisdiction with similar capital statutes.

Of course, this is impossible. No one has the unlimited time and resources such a task would require. Nevertheless, federal courts require such foresight. The attorney's only defense is to use his or her own sense of fairness to guide making of objections at trial.

Additionally, it is critical to tie every objection to the 6th, 8th and 14th amendments of the United States Constitution. This is necessary because, even if an objection was made to the correct issue at trial, if the court overrules an objection on purely state law grounds, federal courts do not have jurisdiction to hear the claim. Trial counsel must assert a federal basis for every objection. One arguable basis is the necessity for a heightened degree of reliability in death penalty cases ("super due process") under the 8th and 14th amendments and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

As to matters that implicate only state law in non-capital cases, the United States Supreme Court has sometimes required the higher standard, and sometimes not. *Green v. Georgia*, 442 U.S. 586, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1978), for example, overrode a state hearsay rule to require consideration of mitigating evidence. *Strickland* itself, however, refused to impose a higher standard of competence for attorneys in capital cases.

Summary and analysis by: Diane U. Montgomery

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and
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The defendant received two separate trials for the murders of two women. In both of the trials the jury found him guilty of capital murder and deserving of the death penalty. He appealed the conviction and sentence of both trials asserting numerous assignments of error. In reviewing the alleged errors the Supreme Court of Virginia, in two per curiam opinions by Justice Stephenson, affirmed the conviction and sentence of the defendant and held that "DNA printing" is both a reliable and admissible form of identification evidence. In addition, Spencer II reviewed alleged errors pertaining to the selection of prospective jurors and assignments of error regarding the admission of evidence.

NOTE: Although they are two separate cases, due to the similarity of the facts and holdings both decisions will be discussed in a single summary. Also, all *Spencer* citations are to *LEXIS* pages.

FACTS

Timothy Wilson Spencer was arrested and charged with the rape and murder of both Susan Tucker and Debbie Dudley Davis. The murders occurred approximately ten weeks apart in 1987. In each case, Spencer entered the dwellings through a ground floor window. Both victims were found strangled in their bed, naked or partially clothed. Each victim was bound in a similar fashion; their wrists were tied behind their back and the bindings connected to a ligature around their neck.

At both locations the police found hair that was described as "characteristically Negroid" in origin, as well as semen stains on the victims' bedding. Upon analysis, the hair samples removed from the scene were found to be "consistent with Spencer's underarm hair". *Spencer II*, at 4. Further, the testing indicated that the semen stains on the bedding were deposited by a "secretor" (an individual whose bodily fluids exhibit chemical traits of the person's blood). *Id.* The chemical properties of the stains were found to be consistent with those of a member of a blood group comprising about 13 percent of the population, a group to which Spencer belongs. *Id.* The prosecution had the DNA structures in the semen stains compared to

known blood samples taken from the defendant. This process identified the semen stains and blood samples as belonging to the same person and the court noted that the chance of mis-identification error had a statistical probability numbering 1 in 705 million. *Id.* at 5.

HOLDING

In *Spencer II*, defendant asserted (44) separate assignments of error, many of which the court dismissed as being without merit. Many of the other alleged errors were dismissed as being based on well settled areas of law, such as the claim that the death penalty violated both the U.S. and Virginia Constitutions. However, four holdings issued by the court deserve analysis because they involve either a new and previously undeveloped area of the law, or discuss a common error committed by defense attorneys.

The summarized holdings are: (1) That "DNA printing" is a reliable and admissible form of identification evidence; (2) That once a prima facie *Batson* challenge is made, the prosecution has the burden of articulating *racially neutral* reasons for its exclusion of potential jurors; (3) That the objection to the seating of a juror made during voir dire is deemed *waived unless restated* immediately prior to the actual seating of that juror; and (4) That an alleged restriction in the defendant's cross-examination of a witness cannot be appealed where the defense counsel failed to proffer evidence, *on the record*, regarding the nature of the proposed questions and the witness's answers to those questions.

ANALYSIS

(1) DNA PRINTING:

Spencer alleged that the trial court erred in admitting into evidence the results of a DNA analysis comparing his blood to the semen stains found at the scene of the crimes. *Spencer II*, at 27. Specifically, Spencer claimed that the prosecution had not proved the *reliability* of DNA testing procedures. *Id.* at 29.

DNA printing is a relatively new scientific process. It involves the comparing of the internal molecules of an individual's chromosomes. Chromosomes are essentially the building blocks of each person's characteristics, for example, hair color, color of the eyes, height, etc. The molecules that make up each chromosome, and give the chromosome its genetic pattern are the DNA (deoxyribonucleic acid) molecules.

In a testing procedure such as the one utilized in these cases, the first step is to extract a sample of the DNA molecule from the semen stain left at the scene of the crime. *Id.* at 5. The sample is then chemically treated to cause the molecule to fragment into particular sections. These sections are then arranged according to length on a sheet of electrically charged gel. The internal "pairing" of each of these sections is then separated in a fashion the court analogized, in *Spencer I*, to the opening of a zipper. Once separated, they are transferred to a nylon membrane and bombarded with radioactively charged "probes" that are designed to mesh with only one particular type of fragment. After the probes have found their appropriate sites, the remaining probes are washed from the surface of the membrane. Following this irrigation the membrane is exposed to an x-ray film. The remaining sections emit radioactive energy which is displayed on the film in a particular and unique band pattern. The same procedure is conducted on a known sample of the accused's DNA in order to compare the visible patterns.

Despite uncontradicted expert testimony that the procedures were properly performed and the test results highly reliable, Spencer asserted that the trial court erred when it admitted the results into evidence. *Id.* at 27. In holding that the trial court did not err when it admitted the results into evidence, the court noted and accepted as fact the statistical accuracy of the testing. *Id.* at 29. The court indicated that the chances of another individual, other than an identical twin, having the same DNA print are 1 in 705 million. *Id.* at 28. Further, the court emphasized the significance of this statistic by pointing out that there are presently only about 10 million adult black males in this country. *Id.* at 5. The expert witnesses also testified that if the procedures were improperly performed it would *not* cause a "false-positive" result, but would instead result in a failure to match the DNA prints.

Future litigation regarding novel scientific testing procedures such as DNA analysis may lead to defense motions for expert analysis to enable the defendant to challenge the State's evidence. Under a line of authority exemplified by *Ake v. Oklahoma*, 470 U.S. 68 (1985), indigent defendants are entitled to the "basic tools" to foster a viable defense. It would seem that expert analysis would be the only conceivable method available to the defense to contradict or challenge evidence similar to that utilized in *Spencer*.

(2) BATSON CHALLENGE:

In 1986, the U.S. Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Spencer II*, at 20 (quoting *Batson v. Kentucky*, 476 U.S. 79, 89 (1986)).

Spencer alleged that the Commonwealth violated the holding in *Batson* when the prosecution used its four peremptory strikes to remove only black jurors. *Id.* In holding that the trial court correctly found that the prosecution had *not* violated *Batson*, the court referred to basic tests for evaluating a *Batson* challenge. The first element the defendant must show is that the prosecution has utilized its peremptory strikes to remove members of the accused's racial group. *Id.* Once the accused proves the first part of the test, the second part shifts the burden to the prosecutor who is then required to

articulate a "racially neutral" reason for striking the juror in question. *Id.* at 21.

In this case, the trial court found that the prosecution was not racially motivated in the use of its peremptory strikes. *Id.* at 22. The reasons given for excluding the venireman included past criminal activity, alleged lack of required knowledge, and inconsistent statements. *Id.* at 21. Further, the court noted that the *reputation and past practices of the prosecutor* regarding the use of peremptory strikes were relevant to the determination of credibility. *Id.*

(3) OBJECTION TO THE SEATING OF A JUROR:

During the voir dire examination of the potential jurors, Spencer's attorney attempted to ask a question intended to show bias on the part of one juror. The trial court held that the question was improper. *Id.* at 14. Spencer objected to the trial court's ruling, *but did not restate his objection* at the time the juror was seated. In rejecting Spencer's claim of error the court stated, "If a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has *waived* the voir dire objections." *Id.* at 15 (emphasis added). Further, the court held that unless the grounds on which the objection is based are specifically preserved at the time of the trial court's ruling, the claim will not be reviewed on appeal. *Id.*

As discussed in other summaries contained in this issue, *contemporaneous objection*, on the record, and at each phase of the trial is of the utmost importance in order to preserve issues for appeal. (See *Buchanan* summary this issue; also Virginia S. Ct. Rule 5:25).

(4) FAILURE OF DEFENSE TO PROFFER:

Spencer claimed that during a pretrial hearing he was unjustifiably limited in his cross examination of one of the Commonwealth's expert witnesses, a Dr. Roberts. *Id.* at 13. He also made a similar claim of error concerning the testimony of a Detective Williams.

In both cases, the court emphasized that Spencer failed to repeat the objections during the actual trial. The court held that it was unable to review his claim because he did not make a proffer of what questions he would have asked the witnesses, and a further proffer of what their answers would have been. *Id.* Without a record of both the questions and answers, the reviewing court held that it was unable to determine the probable impact of the testimony on the jury and therefore could not review the issue on appeal. *Id.*

This decision further emphasizes that attorneys must be sure to put *on the record*, in the absence of the jury, any and all evidence that they may wish to have reviewed for claims of error.

Summary by: Thomas Marlowe