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SMITH v. COMMONWEALTH 239 Va. 243,389 S.E.2d 871 (1990)

Virginia Supreme Court has taken the position that the vileness factor contains terms of common understanding that need no definition. *Clark v. Commonwealth*, 220 Va. 211 (1979); *see also* Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest Vol. 2, No. 1, p. 19 (1989).

By motion, objection, and proposed jury instruction, defense counsel must oppose imposition of the death penalty based on the vileness factor as currently construed and applied in Virginia.

4. Juror Qualification

Lastly, the court acknowledged that a prospective juror's duty to serve may be deferred or limited "if serving on a jury . . . would cause such a person a particular occupational inconvenience." Va. Code Ann. § 8.01-341.2 (1990). In the instant case the court found no error in seating the prospective juror because he did not express personal financial hardship, but instead felt his services were of timely concern to his employer. Service as a juror is a duty and excuse from jury duty is a privilege. "The privilege, one the statute makes available at the discretion of the trial court, is purely personal to the prospective juror and altogether unrelated to the inconvenience suffered by the person's employer." *Mu'Min*, 239 Va. at 444-45, 389 S.E.2d at 894.

In a related claim by defendant, the Virginia Supreme Court found that a juror who knew the victim casually could sit as a member of the jury because she affirmed under oath that she could stand indifferent in the cause.

Summary and analysis by:
Christopher J. Lonsbury

SMITH v. COMMONWEALTH

239 Va. 243, 389 S.E.2d 871 (1990)
Supreme Court of Virginia

FACTS

On July 24, 1988, Roy Bruce Smith engaged in a gun battle with the police outside his home in Manassas, Virginia. During the shootout, one police officer was killed. Smith claimed that he did not discharge his weapon until after he had been shot in the foot by an unknown gunman. He further claimed that he did not know the victim was a police officer, or that he had killed anyone during the shooting. Smith said he thought the police were intruders.

Smith was drunk on the night of the shooting and was reported to have said he would kill a police officer. In order to attract the police, Smith began firing a rifle from his front porch. The police arrived and Smith fled to the back of his home. In the ensuing gunfight, the victim received multiple wounds, one apparently self-inflicted, and a mortal gunshot wound to the head fired at very close range. Smith made statements while struggling with the police that were used to show he knew the victim was a police officer. The trial court found Smith guilty of capital murder in the willful, deliberate and premeditated killing of a law enforcement officer for the purpose of interfering with the performance of the officer's official duties. Va. Code Ann. 1950 § 18.2-31(6) (1990). Smith was sentenced to death.

HOLDING

The court held that Virginia's capital murder statute, both as written and applied, is not unconstitutional. Smith had challenged the capital murder statute on the grounds that it does not provide an in-depth analysis in determining whether a sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. Several claims were raised on appeal which were dependent on the particular facts of the case or were dealt with in a conclusory manner by the Virginia Supreme Court. These claims are not discussed in this case summary.

A. Exclusion of Diminished Capacity Evidence

The court decided that the testimony of Smith's psychiatrist was rightfully excluded. The testimony was in support of a diminished capacity defense. The court affirmed the trial court's rejection of this testimony on the ground that it would interfere with the jury's right to find specific intent. The court relied on *Stamper v. Commonwealth*, 228 Va. 707 at 717, 324 S.E.2d 682 at 688 (1985), which held "[u]nless an accused contends that he was beyond (the borderline of insanity) when he acted, his mental state is immaterial to the issue of specific intent." *Smith v. Commonwealth*, 239 Va. 243 at 259, 389 S.E.2d 871 at 879 (1990). Apparently, in order to establish diminished capacity, a defendant must be prepared to demonstrate that at the time of the crime his condition was tantamount to that of a clinically insane person.

B. Jury Instructions - Second Degree Murder

Smith argued that an instruction allowing the jury to infer malice from his deliberate use of a deadly weapon was erroneous. Smith said this instruction violated *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Sandstrom* forbids jury instructions from which a reasonable juror could derive a mandatory presumption against the defendant for an element of the offense, or instructions which would allow a juror to presume that the burden of proof shifts to the defendant. The *Smith* court, however, applied the rule in *Warlitner v. Commonwealth*, 217 Va. 348, 228 S.E.2d 698 (1976), which allows a jury to imply malice from the deliberate use of a deadly weapon. The court reasoned that *Warlitner*-type instructions do not constitute a shift of proof or a mandatory presumption against the defendant that is significant enough to allow a reasonable juror to place an incorrect burden on the defendant in violation of *Sandstrom*.

C. Jury Instructions - Premeditation

The court held that an instruction defining premeditation as "specific intent to kill" was not improper. *Smith*, 239 Va. at 263, 389 S.E.2d at 882. Smith had offered an instruction equating premeditation with the "design to kill". The court approved the former instruction but cited with approval the definition "*adopt* a specific intent to kill". *Id.* at 263, 389 S.E.2d 882 (emphasis added). This holding allows the thought process necessary for premeditated murder to occur simultaneously with the forming of specific intent, but still describes a process and not simply a mental state.

D. Victim Impact Statement

The court decided that the submission of a victim impact statement prepared by the slain officer's widow was not improperly considered by the trial judge. The victim impact statement was never shown to the jury, nor did they know of its existence. Smith claimed that because the judge

must approve the jury's sentence in Virginia, the victim impact statement is improper under *Booth v. Maryland*, 482 U.S. 496 (1987), which held that the reading of victim impact statements to sentencing juries creates an unacceptable risk of arbitrary and capricious sentencing. This position was reiterated in *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), which stressed that information concerning the victim not connected to the crime itself is constitutionally irrelevant in that it does not bear on the moral culpability of the defendant. The *Smith* court held it is within the judge's power to view victim impact statements, based on the belief that a judge will be able to lay feelings of passion or emotion aside when deciding whether or not to impose the jury's sentence.

ANALYSIS/APPLICATION IN VIRGINIA

It should be noted that the court's rejection of diminished capacity coexists with cases recognizing intoxication as a defense to first degree murder. *Johnson v. Commonwealth*, 135 Va. 524, 115 S.E.2d 673 (1923) held that someone who was so intoxicated at the time of the murder that he was unable to premeditate (i.e., adopt a specific design or plan to kill the victim), cannot be convicted of first degree murder. *Fitzgerald v. Commonwealth*, 223 Va. 615, 295 S.E.2d 798 (1982), demonstrates this case law is still valid in Virginia. In *Fitzgerald*, a capital murder defendant was permitted to advance the diminished capacity/voluntary intoxication defense and support it with testimony from expert witnesses. The Virginia Supreme Court said his ability to premeditate was "an issue of fact to be resolved by the jury". *Id.* at 632, 295 S.E.2d 807. Smith does not overrule this line of cases, and both interpretations are currently within the body of valid state law. Attorneys should continue to avail themselves of the earlier, more helpful interpretation of premeditation and diminished capacity/voluntary intoxication defense.

Defense counsel raised a number of issues pretrial and preserved others during the trial for appellate review. As to other issues, however, the court found procedural waivers and defaults. Two issues the court found waived or defaulted illustrate the importance of *renewing objections* in some circumstances. An objection to the qualification of a prospective alternate juror was lost for failure to renew at the time the jury was empanelled. Another objection concerning the admissibility of certain testimony of a forensic expert lost because objection was not renewed after prosecution argued the issue and the witness continued to testify.

The *Sandstrom* objection to the court's malice instruction illustrates the importance of raising even issues that are virtually certain to lose in state court, and raising them on federal constitutional grounds. See Avoiding Procedural Default, this issue. In addition, when the Virginia Supreme Court is forced to rule on federal constitutional matters, it must address them in the published the record, and this helps the reported opinions alert other defense counsel to the presence of these issues.

Summary and analysis by:
Peter Hansen

CHENG v. COMMONWEALTH

240 Va. 26, 393 S.E.2d 599 (1990)
Supreme Court of Virginia

FACTS

A Circuit Court jury in Arlington, Virginia, convicted Dung Quang Cheng of capital murder pursuant to Virginia Code § 18.2-31(a) (now 1) and § 18.2-31(d) (now 4), abduction, robbery, conspiracy to commit abduction, robbery or murder; use of a firearm in the commission of robbery, abduction, or murder; and possession of a "sawed-off" shotgun.

On September 3, 1988, Mohamad Amir overheard Dung Cheng tell two other accomplices that he planned to rob a restaurant. One accomplice testified that he saw a shotgun in a brown bag at Cheng's house on September 3rd and had seen Cheng with a pistol the week before.

All three men went to the Grand Garden Restaurant in McLean, Virginia which was co-owned by Hsaing "Freddie" Liu. Cheng handed a note containing his name and telephone number to a receptionist and directed her to deliver the note to Liu. The men waited for approximately one-half hour and then departed without seeing Liu.

The next day Cheng informed his accomplices that he again planned to rob a restaurant. He instructed them to bring a jeep and the shotgun. The men drove to one of the accomplice's house to pick up a jeep and then made a brief stop at Cheng's house to allow him to retrieve a brown bag.

At about 10:00 p.m. that night, Cheng was seen talking to Liu at the Grand Garden Restaurant. Cheng departed after their brief conversation. At 11:30 Liu, taking his briefcase, left the Grand Garden Restaurant in his automobile.

The next morning, the Arlington Police discovered Liu's body between the front and back seat of his car. Liu's hands were tied behind his back, and he had been shot in the head four times. The police could find neither Liu's briefcase nor his wallet at the scene of the crime. The back pocket where Liu usually carried his wallet was untucked.

A police officer testified that the position of the bullet casings led him to believe that two shots were fired from the front seat, and two were fired from a position above Liu and outside the vehicle. An autopsy was performed; however, it was impossible to determine the sequence in which the shots were fired. The report did note that two of the shots to the head region were fatal.

The only pieces of evidence found at the scene were a blood soaked piece of paper containing Cheng's name, address and license plate number, some cigarette butts, and an unidentified partial fingerprint. Two days later, the Arlington Police located Cheng's jeep in Washington, D.C. The police impounded the vehicle, seizing a shotgun, a Marlboro cigarette box, a briefcase and an American Express credit card receipt signed by Liu.

On September 9th, two days after impounding Cheng's vehicle, Arlington County Deputy Sheriff, Suwit Yon Kwan, visited Cheng in jail. Kwan and Cheng had met and become friends six years earlier when they worked at a restaurant. During their conversation, Cheng stated that "he didn't do it." *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d. 599, 603 (1990). On direct examination, Officer Kwan testified that when Cheng later expressed his desire to confess, Kwan advised him to speak with his attorney before making any additional statements. Kwan further testified that despite this warning Cheng stated that they had no choice but to kill Liu because he had a contract out on Cheng. *Id.* 393 S.E.2d at 608. Furthermore, Cheng stated that the police would not find anything at the scene of the crime because the only thing that he left was from his cigarette.

HOLDING

A divided Supreme Court of Virginia held that there was insufficient evidence that Cheng was in fact the triggerman. Excluding murder-for-hire, the Virginia legislature has limited the death eligible class of