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STAMPER v. MUNCIE 944 F.2d 170 (4th Cir. 1991)

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states to decide whether victim impact evidence is relevant to the sentencer's decision whether or not to impose the death penalty.

Virginia case and statutory law still prohibit this type of evidence. In *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (Va. 1929), the supreme court held that sympathy for the victims of crime "in no way assists in determining either the guilt or innocence of the accused." 149 S.E. at 415. Likewise, Virginia's two statutory aggravating factors —

vileness and future dangerousness — which define relevance of the Commonwealth's evidence at the penalty trial relate only to the personal blameworthiness of the defendant in accord with *Booth* and *Gathers*. Therefore, to date the *Payne* rule is not the law of Virginia.

Summary and analysis by:
Wendy Freeman Miles

STAMPER v. MUNCIE

944 F.2d 170 (4th Cir. 1991)
United States Court of Appeals, Fourth Circuit

FACTS

In 1978, Charles Sylvester Stamper was tried and convicted on three counts of felony murder and four associated felony counts in Henrico County, Virginia. The appeals process has consistently affirmed Stamper's trial court death sentence.

Stamper was a cook at Shoney's Restaurant where three employees were found shot to death at close range during the course of a robbery from the restaurant safe. A great deal of circumstantial evidence tied Stamper to the scene. A car resembling his was spotted at the time of the murders in the vicinity of the crime; the glass door to the restaurant was broken from the inside, out; glass particles were found on the floor of the defendant's car, 20% of which matched in optical properties the glass of the door; a set of keys of one of the murder victims was found near the home of Stamper's parents; a gun found near the home of Stamper's parents was the same type as that used to kill the victims and the bullets which had been shot from that gun were of the same type as those found in the victims; Stamper paid off a good deal of indebtedness within two days of the crime.

Stamper's case was remanded twice by the Court of Appeals for the Fourth Circuit for failure to exhaust state remedies and a full decade after his trial, he petitioned for a writ of habeas corpus in the U.S. District Court. The petition was denied.

HOLDING

The Fourth Circuit affirmed the district court's denial of relief. Stamper assigned three general counts of error which were all rejected. The court summarily dismissed as a matter of law Stamper's first assertion that the evidence presented at trial was insufficient to find him guilty beyond a reasonable doubt because of its circumstantial nature. Second, the court found no clear error concerning Stamper's position that he had ineffective assistance of counsel during voir dire. Finally, the court found no error regarding the judge's response to a juror's question posed to the court.

ANALYSIS / APPLICATION IN VIRGINIA

Stamper raised a number of issues and grounds for relief. Some of these the court treated in a summary fashion, did not involve capital penalty law, or revolved around facts peculiar to the case and are unlikely to arise often. These items are not discussed here.

A. Circumstantial Evidence Standard

While it is well established that circumstantial evidence may be used as probative and meaningful in a criminal case, the law in

Virginia seems to require that a trier of fact relying on circumstantial evidence **must**, in fact, exclude every other **reasonable** possibility except guilt. This rule was promulgated by the Virginia Supreme Court which held that circumstantial evidence may be used in a criminal case "provided it is of such convincing character as to exclude every **reasonable** hypothesis other than that the accused is guilty." *Dukes v. Commonwealth*, 227 Va. 119, 313 S.E.2d 382 (1984) (emphasis in original). Attesting to this standard, the Virginia Court of Appeals has held that "[w]here the evidence is wholly circumstantial, a conviction can be obtained only if the evidence is consistent with guilt and inconsistent with innocence, and excludes every reasonable hypothesis of innocence." *Beck v. Commonwealth*, 2 Va. App. 170, 342 S.E.2d 642 (1986).

The circuit court, however, may have applied a different standard in *Stamper* than the one handed down in the foregoing cases. The Fourth Circuit held that the prosecution is not constitutionally required to negate every hypothesis except that of guilt. *Jackson v. Virginia*, 443 U.S. 307 (1979). Interestingly, the court cited no Virginia law to substantiate this conclusion. It pointed out that the Tenth Circuit has ruled that "circumstantial evidence need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities save guilt." *United States v. Gay*, 774 F.2d 368, 373 (10th Cir. 1985). The court also relied upon Fifth Circuit and Seventh Circuit opinions to support its position. Based on those holdings, the circuit court in *Stamper* found that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt because the evidence sufficiently supported such inferences.

Stamper argued that, given the facts in his case, no rational trier of fact could find guilt beyond a reasonable doubt or conclude that he was the trigger man. A *Jackson* analysis may allow a court to make such a finding, but the Virginia rules may not. The Fourth Circuit's dismissal of Stamper's contention based on the United States Supreme Court's decision in *Jackson* and the other circuit courts' holdings may be a misapplication of the law given the Virginia rules promulgated in *Dukes* and *Beck*.

The question is whether a conclusion that a rational trier of fact could find guilt is the complete equivalent of excluding every reasonable hypothesis except guilt. If it is true, under *Jackson*, that federal due process as a general proposition might not require exclusion of every hypothesis of innocence beyond a reasonable doubt as Virginia state cases do require, a separate violation of due process may occur through the arbitrary administration of state created rights. This is the result if the Fourth Circuit failed to apply a Virginia evidentiary standard which is more liberal than that applied by the United States Supreme Court. For a more detailed discussion of this issue, see Konrad, *Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State Created Rights*, Capital Defense Digest,

Vol. 3, No. 2, p. 16 (1991).

B. Witherspoon/Witt Standard

The standard for questioning members of the venire with regard to their opinions of the imposition of the death penalty at the time of Stamper's trial was set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon* stands for the proposition that a prospective juror cannot be excused from jury service on the basis of her scruples against imposition of the death penalty unless (1) she would automatically vote against death without regard to the evidence, or (2) her attitude would prevent the making of an impartial decision as to the defendant's guilt. That standard was subsequently modified in *Wainwright v. Witt*, 469 U.S. 412 (1985). *Witt* allowed exclusion of prospective jurors when their beliefs regarding capital punishment, either way, would substantially impair their ability to follow their instructions and render a fair and impartial verdict.

The lower standard should disqualify a greater number of jurors with reservations about the death penalty. It should also make it easier for defense attorneys to exclude potential jurors on the basis of their pro-death inclinations. Even under *Witherspoon*, however, jurors

who are irrevocably pro-death are not qualified to sit. The Virginia Supreme Court has recognized that "the process of selection of an impartial jury permits elimination for cause of those veniremen who are biased in favor of the death penalty under all circumstances as well as those who are biased against its imposition under all circumstances." *Patterson v. Commonwealth*, 222 Va. 653, 659, 283 S.E.2d 212, 216 (1981). Stamper was unsuccessful in urging that his counsel was ineffective for failure to explore this possibility.

It is important to remember, though, that the "reverse *Witt*" inquiry to identify jurors who are substantially impaired by their views from considering evidence supporting a life sentence should be undertaken as a part of every capital jury selection process. Defense counsel should make such challenges at trial and not wait for an ineffective assistance of counsel claim under habeas. Denial of a "reverse *Witt*" challenge for cause at trial is a better appellate issue than a claim of ineffective assistance of counsel for failing to raise the challenge or undertake "reverse *Witt*" examination.

Summary and analysis by:
Laura J. Fenn

FITZGERALD v. THOMPSON

943 F.2d 463 (1991)

United States Court of Appeals, Fourth Circuit

FACTS

A Virginia jury convicted Edward B. Fitzgerald of capital murder in the commission of, or subsequent to, a rape. Virginia Code § 18.2-31(5). On direct appeal, both the Virginia Supreme Court and the United States Supreme Court affirmed Fitzgerald's conviction. State collateral proceedings also failed to afford relief to Fitzgerald. On federal collateral proceedings, the district court dismissed Fitzgerald's petition for a writ of habeas corpus, and this appeal followed.

At the guilt phase of the trial, the principal witnesses against Fitzgerald were his codefendant, Daniel Johnson, and a prison cellmate, Wilbur Caviness. Fitzgerald's attorney made a specific request for evidence relating to the credibility of the Commonwealth's witnesses. The Commonwealth attorney refused to disclose any credibility information, claiming that impeachment information was not discoverable. Although the Commonwealth's position was incorrect as a matter of law, *Giglio v. United States*, 405 U.S. 150 (1972), Fitzgerald's attorney made no objection.

Fitzgerald was convicted after a jury instruction that "a person is presumed to intend the natural consequences of his acts." Although this instruction shifted the burden of persuasion to the defendant — plainly a violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979) — defense counsel made no objection.

At the penalty phase, the jury sentenced Fitzgerald to death, basing its decision on the defendant's future dangerousness "and/or" the vileness of the murder. The trial judge asked the jury foreman which word, "and" or "or" was a correct statement of the jury's position. The foreman responded that the jury had found future dangerousness or vileness. The judge sent the jury back to the jury room to choose which factor was the basis for its decision. The jury again stated its decision with the word "or." After the judge reinstructed the jury, they again sentenced Fitzgerald to death, this time basing its decision on the "vileness" factor alone.

HOLDING

The Fourth Circuit affirmed the dismissal of Fitzgerald's petition, in part finding his *Giglio* claim procedurally barred and in part ruling against the claim on the merits. The court also rejected Fitzgerald's claim of ineffective assistance of counsel, including the attorney's failure to object to a *Sandstrom* error. Finally, the court rejected Fitzgerald's claim that the trial judge's statements to the jury foreman regarding the verdict form in effect directed a penalty of death.

ANALYSIS / APPLICATION IN VIRGINIA

A. *Giglio* claim

The Fourth Circuit held that Fitzgerald's claim regarding the Commonwealth's failure to disclose credibility information was procedurally barred. *Fitzgerald v. Thompson*, 943 F.2d 463, 466 (4th Cir. 1991). The court applied the test of *Coleman v. Thompson*, 111 U.S. 2546 (1991), and ruled that Fitzgerald had not shown sufficient "cause" for the default.

Caviness testified at trial that Fitzgerald had admitted killing the victim. On cross-examination, defense counsel asked several questions to impeach Caviness' credibility. Caviness testified that he had only one prior felony conviction, that no charges were pending against him, and that he had been offered nothing in exchange for his testimony. In fact, Caviness had previously been convicted of three felonies, two more charges were pending against him, and he had received reimbursement for expenses of testifying. The Commonwealth's attorney made no attempt to correct the inaccurate statements as required by *Giglio*.

The Fourth Circuit viewed the record as a whole, addressing the merits of this portion of Fitzgerald's *Giglio* claim, and found no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Fitzgerald*, 943 F.2d at 467 (quoting *United*