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SAUNDERS v. COMMONWEALTH 242 Va. 107, 406 S.E.2d 39 (1991)

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based on the evidence that the victim's hands had been cut off. Vileness is characterized as conduct which was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." *Stockton,* 241 Va. at 212, 402 S.E.2d at 207. Aggravated battery has been defined as "qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth,* 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978).

Aggravated battery in Virginia "ordinarily connote[s] conduct preceding death of the victim." *Jones v. Commonwealth,* 228 Va. 427, 448, 323 S.E.2d 554, 565 (1984). Stockton claimed that the finding was unwarranted in his case because there was no evidence to suggest that the victim's hands were removed prior to his being shot. However, the court found that even if the wounds were inflicted after the gunshot, the victim would have become immediately unconscious and death may not have been instantaneous. Either the gunshot or the dismemberment could have caused death and the Commonwealth is not required to prove the order of the infliction of multiple wounds. *Barnes v. Commonwealth,* 234 Va. 130, 139-140, 360 S.E.2d 196, 203 (1987). Further, the court has stated that it is immaterial for the purposes of the vileness determination whether the decedent remains conscious during the course of several assaults. *Boggs v. Commonwealth,* 229 Va. 501, 521, 331 S.E.2d 407, 421 (1985). This determination allows the court to find aggravated battery and vileness even if the victim is immediately unconscious though death may not be instantaneous.

The cases cited by the court, however, deal with series of wounds inflicted upon victims so that absolute order could not be established conclusively and therefore, the particular wound ultimately causing death could not be determined. The cases may be applied inappropriately by the Supreme Court of Virginia because the only circumstance constitutionally reliable to support a death sentence is battery which either by the quantity of the blows inflicted or by the manner in which the crime was committed is indicative of an increased degree of culpability in the defendant. Therefore, the victim's state of consciousness is not truly immaterial in the consideration of vileness as the court asserts in this case. For additional treatment of this topic, *see* Lago, *Litigating the "Vileness" Factor*, Capital Defense Digest, this issue.

With regard to the "vileness" factor, the United States Supreme Court has established that the statutory language of the factor alone is insufficient to guide the jury in a constitutionally acceptable manner and that a constitutionally sufficient narrowing construction or definition of the factor must be communicated to the sentencer or applied on appellate review. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988). In Stockton, the court stated that "a murder-for-hire case imports its own special heinousness." This does not meet the *Godfrey* standard. Murder-for-hire should not be considered as part of the statutory aggravating factors as it is already part of the death-eligible offense. The court, instead, equates the offense itself with vileness and offers no discussion of the increased culpability of the defendant based on a qualitatively more culpable battery.

It is important for Virginia attorneys to seek, pretrial, the narrowing construction of vileness to which they are entitled under *Godfrey.*

E. Federal Issues

The court also noted that Stockton had requested waiver of the 50-page limit on briefs imposed by Virginia Supreme Court Rule 5:26.

Defense counsel should keep in mind that any federal issues which are not raised on appeal will not be heard on review. If the 50-page limit on briefs imposed by the Rules of the Supreme Court of Virginia is insufficient to cover all issues, a waiver of that page limit should be requested. Even if the request is denied, a federal court may be less inclined to find that issues not briefed due to page limitations are defaulted.

Summary and analysis by:
Laura J. Fenn

SAUNDERS v. COMMONWEALTH

242 Va. 107, 406 S.E.2d 39 (1991)
Supreme Court of Virginia

FACTS

On July 17, 1989, Saunders killed and robbed a man. Saunders was indicted for capital murder pursuant to Virginia Code §18.2-31(4) (murder "in the commission of robbery, while armed with a deadly weapon"). An eyewitness to the crime testified at the trial that Saunders shot the victim and immediately began counting the victim's money. A while later, at a friend's apartment, Saunders went to the bathroom to wash the victim's blood off his hands. Another witness testified that on the day after the crime, she told Saunders that she was so upset over the crime that she could not sleep; Saunders replied, "Don't let that bother y'all. I slept like a baby..."

The testimony at trial also revealed that Saunders, while awaiting trial in jail, admitted to shooting the victim in the back of the head because "he wouldn't give him the money." Yet Saunders presented evidence that he killed the victim because he was white, thereby attempting to show that the murder was motivated by race rather than by robbery. Saunders attempted to show that the taking of the victim's money was an afterthought.

At the penalty phase of Saunders' trial, two expert witnesses testified as to whether Saunders "would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. §19.2-264.4(C). Saunders' expert witness testified that Saunders' conduct and comments following the crime did not necessarily show that Saunders would commit future crimes, while an expert for the Commonwealth testified that there was a chance that he would pose a future danger to society. Also during the penalty phase, three witnesses testified that they had knowledge of Saunders having committed an unadjudicated murder in the District of Columbia.

The court, sitting without a jury, sentenced Saunders to death pursuant to the "future dangerousness" predicate. Va. Code Ann. §19.2-264.4(C).

HOLDING

The Supreme Court of Virginia held that there was sufficient evidence to support the conclusion that robbery was Saunders' motive in committing the murder.

The court also held that the fact finder is free to disregard conflicting expert testimony as to the "future dangerousness" of the defendant. The court reasoned that future dangerousness is a factual issue and that the fact finder must determine the weight to be given to

expert testimony on that issue. 242 Va. 107, 114, 406 S.E.2d 39, 43 (1991), citing *Edmonds v. Commonwealth*, 229 Va. 303, 311, 329 S.E.2d 807, 813 (1985); *Barefoot v. Estelle*, 463 U.S. 880, 891 (1983).

According to the court, because evidence established that Saunders' crime was dispassionate and unprovoked and that the crime was followed by a threat to silence an eyewitness to the crime, and because the evidence included Saunders' past criminal record and prior history, the trial court's finding of future dangerousness and its consequential imposition of the death penalty were justified. The trial court's sentence, the court held, was not tainted by passion or prejudice and was not disproportionate to the penalty imposed in similar cases.

ANALYSIS / APPLICATION IN VIRGINIA

The court dismissed Saunders' claim that the evidence was insufficient to convict him of capital murder in the commission of a robbery. Although the evidence suggested that the killing occurred before Saunders took the victim's possessions, and that the robbery may have been a mere afterthought, the court followed its precedents by construing "in the commission of robbery," Va. Code Ann. §18.2-31(4), very broadly. *See Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982)(holding that whether the victim is dead when the theft occurs is immaterial) and Mosley, *Robbery, Rape and Abduction: Alone and as Predicate Offenses to Capital Murder*, Capital Defense Digest, Vol. 2, No. 2 (April 1990).

Saunders argued that the trial court erred in admitting evidence of unadjudicated crimes to show future dangerousness at the penalty phase of his trial. Although the court noted that the trial court did not base its findings and sentence on unadjudicated crimes, it is clear that the use of this type of evidence at the penalty stage would have been approved. *See Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985). If unadjudicated crimes are admissible, it is imperative that Virginia defense counsel acquire notice that the Commonwealth intends to use this type of evidence. A motion *in limine* and a motion for a Bill of Particulars are two means through which the defense may demand to know what crimes, either adjudicated or unadjudicated, will be used by the Commonwealth to show future dangerousness; these motions are also mechanisms through which the defense may seek to exclude the crimes from the proceedings.

Some adjudicated crimes are not relevant to the penalty phase of a capital trial. Thus, defense counsel should also use the motion *in limine* to exclude evidence of those crimes from the sentencing phase.

It is also advisable that defense counsel offer jury instructions regarding the necessity that the fact finder conclude by some standard of proof (beyond a reasonable doubt, clear and convincing evidence, etc.) that the defendant committed the unadjudicated acts before they may be considered as evidence of future dangerousness.

Likewise, since the Virginia Supreme Court held that the weight to be accorded to expert testimony is a function of the fact finder, Virginia defense counsel, faced with expert testimony supporting future dangerousness, could offer jury instructions that reiterate the notion that this type of testimony is merely "educated opinion" testimony to which the jury does not have to give evidentiary weight.

Saunders also contended that the trial court erred in its finding of future dangerousness. Saunders argued that evidence presented at the penalty phase that showed that, while awaiting his sentencing hearing, Saunders engaged in violent conduct within the jail unduly influenced the trial court. However, the Virginia Supreme Court, in considering this evidence, viewed it as falling under the purview of Code §19.2-264.4(C) in that Saunders' behavior while he awaited sentencing was part of "the prior history of the defendant."242 Va. at 117, 406 S.E. 2d at 45. The court found Saunders' post-trial conduct to be "uniquely probative of future dangerousness," because it felt that the impending penalty phase "would prompt model behavior." 242 Va. at 119, 406 S.E. 2d at 46.

It can be argued that post-trial conduct should never be allowed into evidence, for Virginia's statute authorizes only the defendant's history prior to the offense, not the defendant's history prior to sentencing.

Finally, the court held that a defendant who murders and then expresses no regret or remorse for his crime is proper evidence for the sentencer to consider in its finding of future dangerousness; however, the parameters of the defendant's lack of remorse must be confined to the time of the offense (arguably, the time **immediately** surrounding the offense). The Commonwealth should not be permitted to violate the defendant's fifth amendment rights by arguing, for instance, that the defendant's silence at trial is evidence of a lack of remorse.

Summary and analysis by:
Wendy Freeman Miles

YEATTS v. COMMONWEALTH

1991 WL 184812 (VA.)
Supreme Court of Virginia

FACTS

Ronald Dale Yeatts was convicted of robbery and capital murder in the commission of robbery while armed with a deadly weapon. Based upon a finding only of "future dangerousness," the jury set Yeatts' penalty at death. The trial court accepted the jury's findings.

After spending the entire afternoon of September 23, 1989 drinking alcohol and smoking marijuana and crack cocaine, Yeatts and Charles Michael Vernon, an acquaintance, befriended Mrs. Ruby Meeks Dodson and then gained entrance into her house. Upon entry, Yeatts followed Dodson to the kitchen, where she was later found dead, and Vernon proceeded to the bedroom where he searched for money. Subsequently Yeatts joined Vernon in the bedroom. There they found a pocketbook with seven hundred dollars. Vernon testified that as they were leaving he noticed that Yeatts had bloody hands and a pocket knife that he had given him. Yeatts told Vernon, "'I cut her throat, don't worry about it . . . .'" *Yeatts v. Commonwealth*, 1991 WL 184812, *1. Dodson's "death resulted from a 'large incised wound of the right neck, with . . . extensive bleeding from the carotid artery and jugular vein.' The victim suffered at least twelve other stab wounds to the face, neck, and Chest." *Id.* at *12. Vernon then drove Yeatts to a riverbank where Yeatts threw the pocket knife and empty pocketbook into the river.

At the scene of the crime the police found sunglasses with a fingerprint of Yeatts' girlfriend and bloody footprints identical in size and type to Yeatts' tennis shoes. In addition to circumstantial evidence, Yeatts implicated himself in Dodson's murder through statements given to the police, his sister-in-law, and Vernon.

HOLDING

The Virginia Supreme Court affirmed the conviction and sentence of death, deciding numerous issues adversely to the claims raised by Yeatts.