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MUELLER v. COMMONWEALTH 1992 Va. LEXIS 97

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1992 Va. LEXIS 97
Supreme Court of Virginia

FACTS

Ten-year old Charity Powers disappeared the morning of October 6, 1990. Four months later her body was found in a shallow grave near the home of Everett Lee Mueller. Mueller was arrested and soon after confessed to the rape and murder of the child.

Following Mueller's arrest, there was extensive media coverage of the murder. The articles and television reports included information that Mueller was charged with the murder of Charity Powers, that Mueller had a record which included prior rape convictions, and that Mueller had already confessed to the rape and murder of the victim. In support of a motion for change of venue, Mueller provided affidavits from residents of the county that stated that based on what they had seen or heard in the media, they had already ascertained that Mueller was guilty. The trial judge denied the motion.

During voir dire, the trial court refused to allow "reverse-*Witherspoon* questions" that the defense asserted were necessary in order to strike for cause those jurors who automatically would impose the death penalty if a guilty verdict was reached. The jury which was chosen found Mueller guilty of capital murder pursuant to Virginia Code Section 18.2-31(5) and (8) (murder in the commission of a rape, and murder of a child under 12 in the commission of abduction). The jury also convicted Mueller of rape and abduction with intent to defile, and it fixed his punishment at life imprisonment with respect to each of these charges.

At the penalty stage of Mueller's trial, the defense attempted to enter Mueller's past rape convictions into evidence to show that under Virginia sentencing guidelines he would be ineligible for parole. The trial court held the evidence inadmissible. After finding both "vileness" and "future dangerousness",[1] the jury fixed the defendant's punishment at death. After the hearing required by Section 19.2-264.5 of the Virginia Code, the trial court imposed the sentences fixed by the jury.

Mueller appealed to the Virginia Supreme Court, claiming that the trial court erred in not granting Mueller's change of venue motion due to the excessive pretrial publicity; that the court erred in not allowing reverse-*Witherspoon* questions during voir dire; and that the court's suppression of Mueller's parole ineligibility evidence was incorrect.

HOLDING

The Virginia Supreme Court affirmed Mueller's conviction and sentence.[2] The court held that the claims raised by Mueller were invalid and asserted that Mueller was not denied a fair trial based on several factors. First, the Virginia court held that the trial judge appropriately denied the change of venue because the record did not show that any of the media reports were inaccurate.[3] Second, the court held that the trial court did not err in refusing to allow the reverse-*Witherspoon* questions on voir dire requested by the defendant,[4] because the requested questions were not within the United States Supreme Court's holding in *Morgan v. Illinois*.[5] Finally, the court held that the trial court did not violate Mueller's due process rights by refusing to instruct the jury that Mueller would not be eligible for parole if convicted of the rape of Charity Powers.[6] In support of its conclusion, the Virginia court simply stated that it had uniformly and repeatedly held that information regarding parole eligibility is not relevant for the jury's consideration.[7]

Other issues raised were decided by the court in a summary fashion and will not be discussed. These issues include the claim that the jury's finding of death violated the constitution's Cruel and Unusual Punishment Clause, that the aggravating circumstances of "vileness" set forth in the capital murder statute is unconstitutionally vague, and that the verdict form was defective because it did not list the mitigating factors mentioned in the statute.[8] In addition, this article will not discuss the *Miranda* issues raised by Mueller.[9]

ANALYSIS/APPLICATION IN VIRGINIA

I. Change of Venue

The first error Mueller asserted was that because of extensive media coverage of the murder, he was unable to receive a fair trial in Chesterfield County and should have been granted a change of venue. Mueller argued that because the media coverage was inflammatory and contained information regarding his confession and his prior criminal record, the denial of the venue change violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

The Virginia Supreme Court began by observing that:

> [T]here is a presumption that a defendant can receive a fair trial from the citizens of the jurisdiction in which the offense occurred. It is the burden of the defendant to overcome this presumption by demonstrating that the feeling of prejudice on the part of the citizenry is widespread and is such that would "be reasonably certain to prevent a fair trial".[10]

The court also stated that the decision to grant a change of venue lies within the sound discretion of the trial court and will not be disturbed unless the record affirmatively shows an abuse of discretion.[11]

Although the Virginia Supreme court stated it was using the test set forth in *Stockton v. Commonwealth* to justify the trial court's denial of a change of venue, it appeared to give the "accuracy" (of media reports) factor greater emphasis. *Stockton*, as stated above, requires the defendant to demonstrate that the prejudice among the community was "widespread". The facts in Mueller's case revealed that all nine jurors discussed in the opinion had been exposed to the media coverage of the case and a majority of the nine were aware of Mueller's confession and prior record. A careful review of the statements of the prospective jurors

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1 Va. Code Ann. §19.2-264.2 and §19.2-264.4(C) (1990).

2 *Mueller v. Commonwealth*, Nos. 920287, 920449, 1992 Va. LEXIS 97 at *2 (Sept. 18, 1992).

3 *Id.* at *20.

4 *Id.* at *23.

5 *Morgan v. Illinois*, 112 S.Ct. 2222, 2232-33 (1992). *See* case summary of *Morgan*, Capital Defense Digest, this issue.

6 *Mueller*, 1992 Va. LEXIS 97 at *39.

7 *Id.*

8 *Id.* at *8,*9.

9 For an example of the Virginia Supreme Court's approach to *Miranda* issues, *see King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992). *See* case summary of *King*, Capital Defense Digest, this issue.

10 *Mueller*, 1992 Va. LEXIS 97 at *19 (quoting *Stockton v. Commonwealth*, 227 Va. 124,137, 314 S.E.2d 371, 380 (1984)).

11 *Id.* at *20.

relating to their knowledge of the case seems to raise a colorable claim under *Stockton* that prejudice — in the sense that there existed a preexisting belief in the defendant's guilt — was, in fact, "widespread" among the community.

In *Mueller*, the Virginia court seems to have somewhat altered the meaning of prejudice which the defendant must show to overcome the presumption of a fair trial. The Supreme Court in *Mueller* placed great emphasis on whether the media reports were actually fair and accurate in determining if a change of venue is warranted.[12] In other words, the Virginia Supreme Court has given the "accuracy" factor of the *Stockton* test new life by increasing its weight.

While the Virginia Supreme Court has held that the accuracy of the media reports is a factor to be properly considered, the decision to change venue remains within the trial judge's discretion. Virginia attorneys, therefore, should continue to argue that in their particular cases, pretrial publicity will preclude a fair trial, with "accuracy" being only **one** of several factors for the trial judge to weigh in determining whether sufficient prejudice exists. However, defense should be aware that *Mueller* seems to give greater consideration to the "accuracy" factor than before. Noting this new emphasis, attorneys should be prepared to argue the inaccuracy of pretrial publicity while still emphasizing that accuracy is still only one factor to be considered.

In addition, attorneys should be aware that *Mueller* was decided as a state law decision. Thus, regardless of the Virginia Supreme Court's standard, the federal constitutional requirement that a jury be capable of rendering an impartial verdict despite pretrial publicity, set forth in *Irvin v. Dowd,*[13] must still be satisfied. In recognizing that there may be a discrepancy between the Virginia Supreme Court's standard and the federal standard, attorneys should be sure to raise the *Dowd* claim in order to preserve the issue for appeal.

II. The Reverse-*Witherspoon* Issue: *Morgan v. Illinois*

The court also refused to allow certain questions on voir dire which Mueller contended were necessary to determine whether any prospective jurors were predisposed toward imposing the death penalty. Because the Commonwealth, under *Witherspoon v. Illinois,*[14] was entitled to conduct the opposite line of questioning, i.e., whether certain prospective jurors were unalterably opposed to the death penalty, Mueller argued that his questions should have been allowed.[15]

In response, the Virginia Supreme Court held that "where the voir dire questioning conducted by the trial court otherwise 'assures the removal of those who would invariably impose capital punishment,' it is not reversible error for the trial court to deny defense counsel additional questions on this subject."[16] Applying the United States Supreme Court's ruling in *Morgan* for the first time, the Virginia court distinguished *Morgan* from the case at hand by stating that in *Morgan* the trial court had not asked any questions on the subject of whether a juror would automatically impose the death penalty if the defendant was found guilty.[17]

In *Mueller*, on the other hand, the trial court did, in fact, ask questions which probed whether a prospective juror would automatically vote for the death penalty. One of the difficulties may have been that the questions proposed by Mueller's attorney on the reverse-*Witherspoon* issue were confrontational. His questions were worded in such a way that challenged and provoked the jurors, instead of simply exposing their biases. For example, Mueller's attorney asked: "If you sit in the guilt phase of the trial and you determine beyond a reasonable doubt that Mr. Mueller raped and abducted and killed a 10 year old girl, and then you sit in the sentencing phase and listened to the evidence in aggravation and the evidence in mitigation, aren't you going to think the only appropriate sentence is death?"

Morgan was primarily aimed at exposing biases of jurors and their ability to consider mitigating evidence. The Court in *Morgan* stated that "based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views [an inclination to automatically impose the death penalty]."[18] Thus, defense attorneys must carefully formulate their questions in advance and be prepared to defend them based on *Morgan*. For example, defense counsel might attempt to ask a reverse-*Witherspoon* question by asking, "Would your beliefs about the death penalty impede you from considering a life sentence where you found the defendant guilty of raping and murdering a ten year old girl?" This type of question is less confrontational and probes the proper *Morgan* issue of exposing a juror's inability to consider mitigating evidence.[19]

Finally, attorneys should be aware that it is at this stage in the proceedings that jurors get their first impression of the attorneys involved in the trial. Thus, the manner in which questions are phrased to jurors will bear on their attitudes towards the attorneys throughout the course of the trial. A hostile examination of jurors while conducting voir dire may serve as a detriment to the defense attorney.

III. Refusal to Allow Parole Ineligibility Information

The Virginia Supreme Court also upheld the trial judge's refusal to allow evidence that Mueller would not be eligible for parole under Virginia law if given a life sentence because he would have been convicted for rape three times. The court noted that it had held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration.[20]

Notwithstanding the merits of Virginia's established rule of inadmissibility of parole eligibility,[21] the Virginia Supreme Court did not address the fact that Mueller's ineligibility evidence was being proffered not as mitigating evidence, but to rebut future dangerousness. The Commonwealth had used Mueller's past parole violations to help establish that the defendant would be a "future danger" to society. By refusing to admit evidence that Mueller would **never** have been eligible for parole, the court did not give the defense an opportunity to rebut this aggravating evidence. Thus, the state's introduction of Mueller's past parole violations to establish future dangerousness should have given Mueller the opportunity to show that he would never actually be paroled.

Defense should argue that in this type of situation, the court must allow ineligibility evidence to be introduced, as the prosecution has

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12 *Id.*

13 366 U.S. 717 (1961).

14 391 U.S. 510 (1968).

15 In support Mueller relied on the United States Supreme Court's ruling in *Morgan v. Illinois*, 112 S.Ct. at 2232-33, which held that a capital defendant is entitled to ask on voir dire if a potential juror would impose the death penalty no matter what might be presented in mitigation.

16 *Mueller*, 1992 Va. LEXIS 97 at *25 (citing *Turner v. Commonwealth*, 221 Va. 513,523 (1980)).

17 *Id.* at *25.

18 *Morgan*, 112 S.Ct. at 2226.

19 For a discussion of other voir dire techniques, *see* case summary of *Morgan*, Capital Defense Digest, this issue.

20 *Mueller*, 1992 Va. LEXIS 97 at *39.

21 For a general discussion of the parole ineligibility issue, *see* Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, this issue. *See also Quesinberry v. Commonwealth*, 241 Va. 364, 402, 402 S.E.2d 218 (1991); and case summary of *Quesinberry*, Capital Defense Digest, Vol.4 No.1., p.23, 25 (1991).

already opened the door to admitting parole-related evidence. Attorneys should heavily rely on *Gardner v. Florida*,[22] which gives the defendant a general right to introduce evidence that rebuts evidence relied upon by the state to justify the death penalty. Moreover, in *Skipper v. South Carolina*[23] Justice Powell's concurring opinion made clear that although certain evidence might not normally be admitted in mitigation, it must be allowed in order to rebut the state's aggravating evidence.

Summary and analysis by:
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[22] 430 U.S. 349 (1977).
[23] 476 U.S. 1 (1986) (Powell, J., concurring).

KING v. COMMONWEALTH

243 Va. 353, 416 S.E.2d 669 (1992)
Supreme Court of Virginia

FACTS

On October 8, 1990, Danny Lee King, recently released on parole, and his wife by a bigamous marriage, Becky Hodges King, stole a van. Three days later, they lured Carolyn Horton Rogers, a real estate agent, into a vacant house in a residential section of Roanoke. Later that afternoon, Ms. Rogers was discovered murdered in the basement of the house. The evidence indicated that Rogers had been struck continuously about the head and face, choked, thrown against a wall, and finally stabbed in the chest. King and Becky took Roger's jewelry, checkbook, and car. On October 15th, King and Becky were arrested in the stolen van in Ohio. While Becky was immediately charged with the capital murder of Carolyn Rogers, King was arrested only for violating parole.

Although King was not formally being held in connection with Ms. Roger's murder, the police made two investigatory visits to King in order to get hair and blood specimens, foot impressions, and handwriting samples. During those visits, which took place on November 1st and 9th of 1990, King indicated that he wanted to talk about the murder of Ms. Rogers. After being read his *Miranda* rights, King said he would make a statement about the case if the officers would appoint an attorney for him and arrange a meeting with his lawyer, Becky's lawyer, the Commonwealth's attorney, and the officers.

In both instances, the officers replied that because King was not charged with the murder of Ms. Rogers, counsel could not be appointed. Officer Kern said to King on November 1st, that he did not "have any way of appointing him [an attorney] at [that] particular time," but suggested that King could retain his own attorney. King made a similar request and received a similar response during the November 9th meeting. After his request was denied, during both the November 1st and 9th visits, King made statements to the police which later proved to be incriminating.

King finally was charged with the Rogers murder on January 4, 1991, and was convicted of capital murder in the commission of a robbery. At the sentencing phase of the trial, King attempted to introduce evidence that he would not be eligible for parole for at least thirty years, but the trial court refused to admit the evidence.[1] The jury convicted King of capital murder in the commission of robbery while armed with a deadly weapon, and fixed his punishment at death.[2] King's co-defendant, Becky Hodges King, received five consecutive twelve month sentences as a result of her involvement in the case.

King's appeal to the Virginia Supreme Court alleged that his statements to the police on November 1st and 9th should have been suppressed because they were obtained in violation of *Edwards v. Arizona*,[3] that the trial court erred by not allowing him to introduce evidence of his parole ineligibility, and that his sentence was excessive and disproportionate compared to that received by his co-defendant, Becky Hodges King.[4]

HOLDING

The Virginia Supreme Court affirmed the trial court's rulings regarding the admission of his statements on several grounds: (1) that because adversarial judicial proceedings had not begun, King's Sixth Amendment right to counsel had not attached; (2) King had failed to unequivocally assert his right to counsel; and (3) the officers had not engaged in "interrogation" within *Miranda's* meaning.[5] As to evidence of parole eligibility, the court affirmed its earlier rulings that such evidence is inadmissible.[6] Finally, the court concluded that King's sentence was not disproportionate or excessive, even though his co-defendant received a lesser sentence.[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. King's Statements

In *King* and the recent capital case of *Eaton v. Commonwealth*,[8] the Virginia Supreme Court addressed police behavior apparently designed to circumvent defendant's Sixth Amendment and *Miranda* rights to counsel.

A. Sixth Amendment Right to Counsel

In finding that King's Sixth Amendment right to counsel had not been violated, the court placed a great deal of weight on the fact that King had not yet formally been charged with the murder at the time of the investigatory visits.[9] In *Arizona v. Roberson*, the U.S. Supreme Court distinguished Fifth and Sixth Amendment rights to counsel by stating

[1] However, the court did admit evidence of unadjudicated acts as aggravating evidence. For example, an unadjudicated theft charge, King's bigamous marriage, and incidents of violent behavior in his wife's home were relied upon by the Commonwealth.
[2] Va. Code Ann. § 18.2-31(4) (1990). The jury also convicted King of robbery, two offenses of forgery, and two offenses of uttering, with punishment fixed at life imprisonment for robbery and ten years' imprisonment for each of the other four non-capital offenses.
[3] 451 U.S. 477 (1981).
[4] King also argued that the evidence was insufficient to show that he, rather than Becky, his co-defendant, committed the murder. The court dismissed this claim, and it will not be discussed in this summary.
[5] *King v. Commonwealth*, 243 Va. 353, 360, 416 S.E.2d 669, 672 (1992).
[6] *Id.* at 368, 416 S.E.2d at 677.
[7] *Id.* at 369-372, 416 S.E.2d at 677-679.
[8] 240 Va. 236, 397 S.E.2d 385 (1990).
[9] *King*, 243 Va. at 360, 416 S.E.2d at 672.