Capital Defense Journal

Volume 5 | Issue 1 Article 20

Fall 9-1-1992

KING v. COMMONWEALTH 243 Va. 353, 416 S.E.2d 669 (1992)

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:
Lesley Meredith James

[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.

that the Sixth Amendment protects an individual from a "state apparatus geared up to prosecute," while the Fifth Amendment is merely a protection against the "inherent pressures of custodial interrogation."[10] Consequently, the Sixth Amendment right only attaches once judicial proceedings have begun against the defendant.

Of interest in *King* is that the state deliberately took actions to avoid having King's Sixth Amendment rights attach. Although the state immediately charged Becky with the capital murder, they arrested King on parole violation charges and waited over two months to file the capital murder charge which would trigger his right to counsel on the charge. Through this tactic the state was able to keep King in custody and investigate the murder without, according to the Virginia Supreme Court, running afoul of his right to counsel.[11]

B. Right to Counsel under *Miranda v. Arizona*

As to King's statements that he wanted an attorney, the Virginia Supreme Court found his requests were equivocal, in part because at the same time he requested an attorney for himself King also asked that Becky's attorney and the Commonwealth attorney be present.[12] In *Edwards v. Arizona*, the Court held that once an accused expresses his desire to deal with the police only through counsel, he is not subject to further interrogation unless the accused himself initiates further communication with the police.[13] The Virginia Supreme Court has required that a request for counsel must be "unambiguous and unequivocal" to invoke *Edwards*.[14]

Although in *Smith v. Illinois*,[15] the U.S. Supreme Court chose not to define specifically what circumstances qualify as an invocation of counsel, the Court did discuss three acceptable approaches. Of these approaches, even the strictest standard for finding that the right to counsel had been invoked stated that: "'**an assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity . . .**'."[16] Likewise, the Fourth Circuit's holding in *Poyner v. Murray*[17] appears to contradict directly the Virginia Supreme Court: "once a suspect makes an equivocal request for an attorney, all interrogation must cease except that which is necessary to clarify whether or not the accused wants an attorney."

Thus, the Virginia Supreme Court in *King* and *Eaton* imposed a higher standard on defendants for invoking their right to counsel than even the strictest standard that has been recognized by the United States Supreme Court. The Virginia standard also appears to conflict with the Fourth Circuit's holdings. As the dissent in *Eaton* pointed out, the Virginia Supreme Court's high standard of a clear, unequivocal request places an improper burden on the defendant: "a principle objective of [*Miranda*] was to allow a defendant to request counsel 'in any manner' and at any stage of the proceeding."[18]

The Virginia Supreme Court's analysis of King's waiver of his *Miranda* rights is also questionable. The Court relies in part on a United States Supreme Court case addressing the waiver of Fourth Amendment rights, *Schneckloth v. Bustamonte*,[19] for its waiver standard. Yet in *Bustamonte*, one of the Court's major points in that case was that the waiver standard for the Fourth Amendment was a less exacting standard than for Fifth Amendment rights.[20] Indeed, in *Edwards* itself the Supreme Court cited as one of its grounds for reversal that Arizona had improperly relied upon *Bustamonte* in determining whether *Miranda* rights were properly waived.[21] The Virginia Supreme Court's waiver standard for *Miranda* rights thus also appears vulnerable to challenge as not being in accord with federal constitutional standards.

Defense attorneys face an unusual challenge in cases where the authorities fail to recognize an invocation of counsel by the defendant. In order to control the damage in a similar situation, defense counsel must preserve any federal constitutional argument by raising the issue at the earliest possible opportunity, which will usually be at a suppression hearing. Defense counsel should also continually raise the issue throughout the proceedings. Defense counsel should argue that the holdings in *King* and *Eaton* regarding invocation of counsel and waiver contradict the clear holding of the Fourth Circuit in *Poyner* and are contrary to the United States Supreme Court's holdings in *Miranda* and *Edwards*. Moreover, defense counsel must clarify the holding of the United States Supreme Court in *Smith v. Illinois* by noting that although the Court avoided promulgating a bright line rule for invocation of counsel, it did imply that invocation of the right to counsel need not be unequivocal; the Virginia Supreme Court's standard does not meet that standard.

II. Parole Eligibility

At the sentencing phase of his trial, King sought to introduce evidence that he would remain in prison for at least thirty years if the jury declined to impose the death penalty. King argued that under *Skipper v. South Carolina*[22] any evidence that a defendant offers which may serve "as a basis for a sentence less than death" must be admitted under the Eighth Amendment. King attempted to distinguish his case from prior Virginia cases by arguing that he was offering evidence of parole **ineligibility**, rather than evidence of eligibility at "an unspecified future date."

The court dismissed the *Skipper* contention, noting that *Skipper* did "not involve any question relating to parole ineligibility."[23] In addition, the court failed to recognize any distinction between King's parole ineligibility evidence and similar claims rejected by the court in the past. The Court dealt with this matter in summary fashion, reaffirming its earlier decisions,[24] simply stating that "parole is not a proper matter for consideration by a jury."[25]

---

10 486 U.S. 675, 684 (1988).

11 In the leading case on deliberate circumvention by the police of the right to counsel, *Maine v. Moulton*, the United States Supreme Court stated that: "[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." 474 U.S. 159, 177 (1985).

12 *King*, 243 Va. at 360, 416 S.E.2d at 672. The court suggests that King could not validly request counsel unless he seeks a meeting with his lawyer in "the traditional atmosphere of confidentiality." *Id.*

13 451 U.S. 477, 484-485 (1981).

14 *Eaton v. Commonwealth*, 240 Va. 236, 253, 397 S.E.2d 385, 395 (1990) (citing *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983)).

15 469 U.S. 89, 101 (1984).

16 *Id.* at 97, n.3 (citing *People v. Krueger*, 82 Ill.2d 305, 311, 412 N.E.2d 537, 540 (1980)) (emphasis added). The quotation continues: "but not 'every reference to an attorney no matter how vague should constitute an invocation of the right to counsel'."

17 964 F.2d 1404, 1410 (1992) (quoting *United States v. Jardina*, 747 F.2d. 945, 948 (5th Cir. 1984)).

18 *Eaton*, at 262, 397 S.E.2d at 400, (citing *Miranda*, 384 U.S. 436 at 444) (Lacy, J., dissenting).

19 412 U.S. 218, 225 (1973).

20 *Bustamonte*, 412 U.S. at 242.

21 *Edwards*, 451 U.S. at 483-84.

22 476 U.S. 1, 5, (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

23 *King*, 243 Va. at 367, 416 S.E.2d at 677, n.3.

24 *See e.g., Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989), and case summary of *Watkins*, Capital Defense Digest Vol. 2, No. 1, p. 15 (1989); *O'Dell v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989); *Williams v. Commonwealth*, 234 Va. 168, 178-180; *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836-837 (1985).

25 *King*, 243 Va. at 368, 416 S.E.2d at 677.

Although the Virginia courts continue to reject admission of parole eligibility evidence, defense counsel should persist in presenting this issue for consideration, especially where the prosecution relies on future dangerousness as an aggravating factor.[26] Defense counsel may approach the parole eligibility issue in several different ways. First of all, defense counsel may raise the issue pretrial during voir dire. Jurors' misperceptions of the actual length of a life sentence can be extremely damaging to the defendant at the sentencing phase.[27] During voir dire, jurors could be questioned as to whether they are capable of considering a sentence less than death if they were prohibited from considering parole eligibility and the defendant's ultimate return to society.[28] Additionally, counsel could use voir dire to identify and correct juror misconceptions in this area.[29]

At the sentencing phase, defense counsel should argue that evidence of parole ineligibility should be admitted not only as mitigating evidence, but also to rebut the Commonwealth's evidence of future dangerousness. If a defendant can show that he will not be eligible for release for twenty-five or more years, such evidence tends to refute the Commonwealth's case on the issue of future dangerousness because society at large will not be put at risk.

Finally, it can also be argued that in order to deliver a just verdict, the jury must be properly informed of the consequences of their choosing a verdict of life rather than death. Without evidence of parole eligibility, the jury cannot determine whether a life sentence will properly and severely punish the defendant. Admission of sections of the Virginia Code could greatly aid the jury in making its decision. Section 53.1-151, for example, contains precise rules for when parole will be denied to a defendant due to sentences which have already been imposed.

III. Excessiveness and Disproportionality of Sentence

King contended that because his codefendant only received five consecutive twelve-month sentences, his death sentence was disproportionate and excessive. King also claimed the death penalty was excessive because he lacked a "prior record of violence and criminal conduct which resulted in injury to others."[30]

After a detailed account of King's criminal history, the court dismissed King's claims that he did not pose a future threat to society and that he lacked a criminal record.[31] As for the disproportionality claim, the court quoted its decision in *Stamper v. Commonwealth*: "'[t]he test is not whether a jury may be inclined to recommend the death penalty in a particular case but rather whether juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant.'"[32] The court proceeded to note that because Becky Hodges King, King's codefendant, was convicted as an accessory after the fact, their sentences could not fairly be compared.[33] The court concluded its proportionality analysis by finding that King's sentence was not disproportionate compared to similar cases.[34]

IV. Unadjudicated Acts and Future Dangerousness

Alhough not discussed in the *King* decision, the evidence used by the prosecution at the penalty stage to prove future dangerousness serves as a reminder for defense counsel to try to control the introduction of such evidence. In *King*, the Commonwealth introduced as aggravating evidence a possession of stolen property charge which was later nolle prossed, evidence of his bigamous marriage to Becky Hodges King, and evidence of violent behavior in the home of his legal wife.[35]

Introduction of unadjudicated acts at the penalty stage of the trial raises many concerns and should be objected to vigorously by defense counsel. At a minimum, defense counsel should make a pretrial motion for a bill of particulars, directing the Commonwealth to identify all aggravating factors upon which it intends to rely in seeking the death penalty in the event that the defendant is convicted of capital murder. If the Commonwealth intends to rely on future dangerousness, the bill of particulars should identify any unadjudicated acts by the defendant which it intends to offer into evidence, as well as any related circumstances which are relevant to proof of that factor. Such a pretrial motion may help to remedy the notice problems which defense counsel commonly face in the context of evidence of unadjudicated acts. Defense counsel should also be ready to pursue objections to such evidence based on due process arguments grounded in the Sixth Amendment right to effective assistance of counsel and double jeopardy.[36]

Summary and Analysis by:
Paul M. O'Grady

---

26 *See* Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, this issue.

27 *See* Paduano & Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 221-22 & nn. 30-34 (1987).

28 Defense counsel unsuccessfully employed this strategy in *Eaton*, 240 Va. at 248, 397 S.E.2d at 392.

29 *See Morgan v. Illinois*, 112 S.Ct. 2222 (1992), and case summary of *Morgan*, Capital Defense Digest, this issue.

30 *King*, 243 Va. at 369, 416 S.E.2d at 678.

31 *Id.* at 369-370, 416 S.E. 2d at 678-679.

32 *Id.* at 371, 416 S.E. 2d. at 679, (quoting *Stamper*, 220 Va. 260, 283-284, 257 S.E.2d 808, 824 (1979)).

33 *Id.* at 371, 416 S.E.2d at 679.

34 *Id.*

35 *Id.* at 370, 416 S.E.2d at 678.

36 The Spring 1993 issue of the Capital Defense Digest, Vol. 5, No. 2, will include an extended discussion of prosecutorial use of unadjudicated acts evidence at the penalty stage.