Capital Defense Journal

Volume 5 | Issue 1 Article 22

Fall 9-1-1992

THOMAS v. COMMONWEALTH 244 Va. 1, 419 S.E.2d 606 (1992)

THOMAS v. COMMONWEALTH

244 Va. 1, 419 S.E.2d 606 (1992)
Supreme Court of Virginia

FACTS

Douglas Christopher Thomas, 17 years old, was charged in juvenile court with first degree murder[1] in the killing of James Baxter Wiseman II and with capital murder in the killing of Kathy J. Wiseman as the premeditated killing of more than one person as part of the same act or transaction.[2] Two offenses of using a firearm[3] were also included.

Thomas, who lived with his aunt and uncle, the Marshalls, was romantically involved with Jessica Wiseman, the fourteen-year-old daughter of the decedents. The Wisemans were trying to break up the relationship, and three months before the murder, Jessica was overheard wishing to "get rid of" her parents. On the day before the murder, Thomas' twelve-year-old cousin, Lanie, heard the young lovers discussing specific details of "getting rid of her parents." Thomas also made several other statements to Lanie concerning the upcoming murder, and on the Friday evening before the murder, Thomas and Lanie left the house and smoked some "pot" before Thomas went "over to Jessica's. . . to kill two people."

Later that evening, the Marshall household was awakened by Jessica's pounding on the door, screaming that her parents were dead. The Marshalls called the authorities. Thomas was interviewed twice by an agent of the Virginia State Police, and during the second interview, Thomas confessed to killing the Wisemans.

Two-and-a-half weeks before trial, Thomas moved for dismissal of all charges against him, alleging that the Commonwealth had intentionally destroyed marijuana found among Thomas' possessions. On this point, Thomas further alleged that the Commonwealth had received information that he had smoked marijuana laced with PCP before the murders. Citing *Brady v. Maryland*[4] and *Arizona v. Youngblood*,[5] Thomas argued at trial that destruction of the PCP-laced marijuana was willful concealment of exonerating evidence in violation of Thomas' due process rights.

Thomas waived both a preliminary hearing and a transfer hearing. Therefore, his case was transferred from juvenile to circuit court. On January 28, 1991, Thomas was indicted on the four offenses. He pled guilty to first degree murder and use of a firearm in the killing of Mr. Wiseman, and not guilty to the charges of capital murder and use of a firearm in the killing of Mrs. Wiseman. He was convicted of capital murder and use of a firearm in the killing of Kathy Wiseman. The jury sentenced Thomas to four years in prison on the weapons charge, and after finding "vileness," the jury set Thomas' punishment at death.

On appeal, Thomas argued that under the Virginia statute,[6] a juvenile cannot waive a transfer hearing when facing capital charges. The hearing, he argued, is necessary to provide the individual consideration required by the Constitution before a juvenile can receive the death penalty. Thomas also argued that the destruction of the marijuana constituted a willful concealment of evidence and was a due process violation under *Brady v. Maryland* and that the jury's identification of the aggravating factor of "vileness" was insufficiently established by the evidence at trial.[7]

HOLDING

The Virginia Supreme Court affirmed Thomas' conviction and death sentence, finding no error in any of the issues he raised. On the issue of the waiver of the transfer hearing, the court held that "the waiver provision is clearly applicable where a juvenile is charged with a capital offense."[8] The court also found "'nothing corrupt or in bad faith' in the destruction of the marijuana . . . Nor [did the court] think Thomas established that, had the marijuana been subjected to tests, the results 'might have exonerated him.'"[9] Also, since the marijuana was in Thomas' closet, the court found it "unrealistic" to say that the Commonwealth was involved with any concealment or withholding of evidence so as to violate *Brady*.[10] Finally, the court felt the murder of Mrs. Wiseman involved both the aggravated battery and depravity of mind necessary to constitute vileness.[11]

ANALYSIS/APPLICATION IN VIRGINIA

I. Waiver of Transfer Hearing

In rejecting Thomas' argument that he shouldn't have been allowed to waive his transfer hearing under the Juvenile Transfer Statute,[12] the court relied upon the same language pinpointed by Thomas:

> At any time prior to commencement of the adjudicatory hearing, a child fifteen years of age or older charged with an offense which if committed by an adult **could be punishable** by confinement in a state correctional facility . . . may elect . . . to waive the jurisdiction of the juvenile court . . . .[13]

Thomas had argued that because the language spoke of "confinement," waiver could not be made where the sentence was death rather than imprisonment.

The court, however, found no statutory limitation on juveniles waiving their transfer hearings. Emphasizing that capital murder can be punished not only through imposition of the death penalty but also by imprisonment, the court found that the waiver provision was clearly applicable in the prosecution of all capital offenses. In other words, the court found that the specific statutory language "could be punished" was intended to reflect a sentencing possibility, rather than a sentencing fact. Therefore, in Virginia, the juvenile transfer statute can be waived without

---

1 Va. Code Ann. § 18.2-32 (1990).
2 Va. Code Ann. § 18.2-31(7) (1990).
3 Va. Code Ann. § 18.2-53.1 (1990).
4 373 U.S. 83 (1963).
5 488 U.S. 51, 57 (1988).
6 Va. Code Ann. § 16.1-270 (1990).
7 Thomas made numerous additional claims which will not be discussed in this summary, including claims based on double jeopardy, denial of continuance, admissibility of photographs, judge or jury capital sentencing for juveniles, lack of remorse, jury selection, effect of youthful immaturity on the voluntariness of a confession, and excessiveness or disproportionality.
8 *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606, 610 (1992).
9 *Id.* at 19, 419 S.E.2d at 616 (citing *Arizona v. Youngblood*, 488 U.S. at 57).
10 *Thomas*, 244 Va. at 18, 419 S.E.2d at 419 (citing *United States v. Valera*, 845 F.2d 923, 927-28 (11th Cir. 1988)).
11 244 Va. at 24-5, 419 S.E.2d at 619.
12 Va. Code Ann. § 16.1-270 (1990).
13 *Thomas*, 244 Va. at 8, 419 S.E.2d at 609 (emphasis added).

recourse by a juvenile defendant even though he ends up being sentenced to death.

II. Destruction of Evidence

The United States Supreme Court has ruled that when evidence in control of the State is lost or destroyed, the defendant must show bad faith on the part of authorities **and** resulting prejudice.[14] The *Thomas* court, finding the case at hand to be one of failure to preserve evidence rather than concealment,[15] found no *Youngblood* bad faith on the part of the Commonwealth and, more importantly, emphasized that Thomas had alleged none either. Further, the court emphasized that Thomas had not established prejudice resulting from the destruction of the marijuana. While Thomas argued on appeal that testing the marijuana would have led to a discovery of PCP-induced behavior (arguably mitigating if not exculpatory evidence), the court remained unconvinced. The court found no reasonable probability that even if the evidence had been disclosed it would have changed the result of the proceeding.[16]

The *Thomas* court once again makes clear to Virginia practitioners the importance of (1) alleging bad faith when invoking *Youngblood* for the destruction of evidence, (2) establishing prejudice resulting from such destruction, (3) raising evidence issues in a timely fashion, and (4) arguing the exculpatory or mitigating nature of such evidence at trial.[17]

III. Vileness

Beginning in *Furman v. Georgia*[18] and continuing through *Godfrey v. Georgia*[19] and *Maynard v. Cartright*,[20] the United States Supreme Court has consistently stated that the death penalty must not be inflicted in an arbitrary and capricious manner and that terms such as "vile" or "heinous" must be sufficiently narrowed so as to inform the jury's discretion. Despite the court's efforts, however, the dangers inherent in applying the vileness factor in Virginia remain real. In fact, Virginia's vileness factor — "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"[21] — parallels Georgia's statute as analyzed and criticized in *Godfrey*.[22]

Clark v. Commonwealth,[23] in which the court stated that Virginia's "vileness" factor has a variety of possible definitions, each of varying quality, is emblematic of the problems facing Virginia defendants. The court, for example, has held that proof of any one of the three vileness factors—torture, depravity of mind, or aggravated battery—is sufficient to support a finding of vileness and therefore the death penalty.[24] Virginia courts have defined aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder"[25] and depravity of mind as "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."[26]

It was against such a backdrop that Thomas tried to argue that the evidence presented at trial was insufficient to show vileness. Not surprisingly, given its broad definition of vileness, the court responded that the murder of Mrs. Wiseman showed both aggravated battery and depravity of mind. The physical evidence at trial showed that the Wisemans were shot in the face at close range and that the initial shots would have been fatal. In shooting Mrs. Wiseman again, the court found that Thomas aggravated the battery. The *Thomas* court equated aggravated battery with multiple gunshot wounds "'where there is an appreciable lapse of time between the first shot and the last, and where death does not result instantaneously from the first.'"[27] Finally, the court found depravity in the execution-style of the murders, Thomas' failure to register remorse or regret, and Thomas' careful planning and premeditation.[28] With any one of the three vileness prongs sufficient to act as an aggravating factor, the *Thomas* court's finding that two of the three were present surpasses the sufficiency test in Virginia.

Generally, the vileness factor in Virginia has been identified as suffering from at least two constitutional ills. Not only are the words of the factor too vague to be of meaningful assistance to the sentencer, but defense counsel are rarely, if ever, notified of the narrowing constructions to be applied by the courts.[29] It remains crucial, therefore, that defense counsel litigate at the pretrial stage how the Commonwealth intends to use vileness in the case as a means of limiting the scope of relevant evidence the Commonwealth may use at trial and to preserve later constitutional claims bars on an invalid use of the vileness factor.

IV. Change of Venue

Thomas appealed the trial court's refusal of his motion for change of venue. In his motion, Thomas cited a bombardment of pre-trial publicity as a barrier to a fair trial and had attached thirteen newspaper articles. The court ruled, however, that while there appeared to be extensive coverage of the case in the local press, none of the coverage was inflammatory.

Virginia practitioners are reminded that to argue the negative effects of pre-trial publicity, counsel must argue that widespread prejudice is reasonably certain to interfere with a fair trial by an impartial

---

14 *Arizona v. Youngblood*, 488 U.S. at 58.

15 "Distinguishing the situation where evidence is lost or destroyed from the circumstance where evidence is concealed, the Supreme Court held that, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Thomas*, 244 Va. at 18, 419 S.E.2d at 615 (citing *Youngblood*, 488 U.S. at 58). Here the *Thomas* court, like the *Youngblood* court before it, distinguished between concealment, which the court presumed would indicate bad faith, from loss or destruction (i.e., "failure to preserve"), which the Court did not presume to be in bad faith without supporting evidence presented by defendant.

16 *Thomas*, 244 Va. at 19, 419 S.E.2d at 616 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that prosecution must give defendant, upon general request for discovery, all impeachment evidence held by the prosecution)).

17 *Youngblood*, 488 U.S. at 58; *Bagley*, 473 U.S. at 682; *Brady*, 373 U.S. 83 (1963).

18 *Furman v. Georgia*, 408 U.S. 238, 309-310 (1972) (Stewart, J., concurring).

19 *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980).

20 *Maynard v. Cartright*, 486 U.S. 356 (1988).

21 Va. Code Ann. § 19.2-264.2 (1990).

22 *Godfrey*, 446 U.S. at 426. For an analysis of the Virginia "vileness" factor in light of three current United States Supreme Court cases, *see* case summary of *Stringer v. Black*, *Sochor v. Florida*, and *Espinosa v. Florida*, Capital Defense Digest, this issue.

23 *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979).

24 *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984).

25 *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978).

26 *Id.* at 478, 248 S.E.2d at 149.

27 *Thomas*, 244 Va. at 24, 419 S.E.2d at 619 (citing *Barnes v. Commonwealth*, 234 Va. 130, 139-40, 360 S.E.2d 196, 203 (1987), *cert. denied*, 484 U.S. 1036 (1988)).

28 *Id.*

29 *See* Lago, *Litigating the 'Vileness' Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991).

jury.[30] Further, counsel must establish the need for the change.[31] For instance, it would be helpful in establishing need and prejudice to show publicity concerning any of the following: defendant's confession, inadmissible evidence, sympathetic information about the victim, wrong or inaccurate information.

Also of significant interest in *Thomas* is the court's use of statistics to counter Thomas' arguments concerning the biased jury pool. Having determined that in *Thomas* only 31 percent of the prospective jurors were dismissed for bias, the court compared this statistic with that for other Virginia trials. The court found 31 percent compatible with juror dismissal rates in other Virginia cases (i.e., 20 percent, 37.84 percent, 18 percent, 26 percent).[32] Therefore, the court concluded, "a jury was selected with relative ease."[33] Practitioners will want to watch the court's future opinions to determine whether the use of statistics in an effort to prove the condition of the jury is an aberration with the *Thomas* court or a trend in Virginia appellate review.

Summary and analysis by:
Roberta F. Green

---

30 *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984).

31 *Murphy v. Florida*, 471 U.S. 794 (1978).

32 *Thomas*, 244 Va. at 11, 419 S.E.2d at 611 (citing *George v. Commonwealth*, 242 Va. 264, 275, 411 S.E.2d 12, 18 (1991), *cert. denied*,112 S.Ct. 1591 (1992); *Greenfield v. Commonwealth*, 214 Va. 710, 717, 204 S.E.2d 414, 420 (1974); *Wansley v. Commonwealth*, 210 Va. 462, 468, 171 S.E.2d 678, 682-83 (1970); *Beck v. Washington*, 369 U.S. 541, 556 (1962)).

33 *Id.*

THE CAPITAL DEFENDANT AND PAROLE ELIGIBILITY

BY: CRYSTAL S. STRAUBE

I. INTRODUCTION

"You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life."[1] In contemplating the proper penalty for the capital defendant members of the jury are likely to question if and when the defendant may be released on parole should the penalty be set at life imprisonment. In fact, it is not uncommon for Virginia juries to interrupt their deliberations to ask the trial judge about the defendant's eligibility for parole.[2] The Virginia Supreme Court, however, consistently has refused to provide any explanation to jurors, contending that parole is of "no concern."[3] The Virginia Supreme Court's answer itself is of concern, given that juror misperceptions on parole often prove to be a critical factor in the sentencing determination.[4]

Although the mandatory minimum sentence in Virginia for capital murder is twenty-five years imprisonment,[5] studies reveal that people believe that a capital defendant, if sentenced to life imprisonment, will serve only seven to ten years in prison before being released on parole.[6] In 1988, the National Legal Research Group issued a report that the typical jury-eligible citizen living in Edward County, Virginia believes that a defendant sentenced to "life" for a murder during the commission of a robbery will serve only ten years before being released.[7]

These misperceptions may lead a juror to choose death because of a belief that a life sentence would allow the defendant to be released after serving just a few years. One study, for example, indicated that more than two-thirds of those questioned would be more likely to favor a life sentence over a death sentence if they knew the defendant would have to serve at least 25 years before becoming eligible for parole.[8] Clearly, a jury's ability to distinguish between the myth and the reality of parole eligibility carries vast consequences for capital defendants in Virginia.

This article looks at the defendant's right to introduce evidence of parole in the capital murder trial from five different aspects: (1) Virginia law and policy on the introduction of parole evidence; (2) the defendant's right to question or educate jurors on parole during voir dire; (3) the defendant's right to present evidence concerning parole eligibility as a potential mitigating factor; (4) the right to introduce parole evidence in

---

1 Va. Model Jury Instructions, Instruction No. 34.120, (1991). *See* Va. Code Ann. § 19.2-264.4 (1991).

2 *See Delong v. Commonwealth*, 234 Va. 357, 370, 362 S.E.2d 669, 776 (1987), *cert. denied*, 108 S.Ct. 1100 (1988); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836, *cert. denied*, 474 U.S. 865 (1985); *Peterson v. Commonwealth*, 225 Va. 289, 296, 302 S.E.2d 520, 525, *cert. denied*, 464 U.S. 865 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 54-55, 286 S.E.2d 172, 179-80 (1982); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 792 (1979), *cert. denied*, 444 U.S. 1049 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 278, 257 S.E.2d 808, 821 (1979), *cert. denied*, 445 U.S. 972 (1980); *Jones v. Commonwealth*, 194 Va. 273, 275, 72 S.E.2d 693, 694 (1952).

3 *Coward v. Commonwealth*, 164 Va. 639, 646, 178 S.E. 797, 799-800 (1935); *Hinton v. Commonwealth*, 219 Va. 492, 494-95, 247 S.E.2d 704, 706 (1978).

4 For a comprehensive analysis of jurors' misperceptions, *see* Paduano & Smith, *Deathly Errors: Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987)[hereinafter Paduano & Smith, *Deathly Errors*].

5 Va. Code Ann. § 53.1-151(C)(1991). A capital defendant's sentence may be reduced for good conduct in prison, but even with the maximum reduction possible the defendant must serve twenty-one years and nine months in jail before even being considered for parole eligibility. Va. Code Ann. § 53.1-199 (1991). This section states that a defendant sentenced to life shall be eligible for up to five days credit for each 30 days served. Thus, a person convicted of capital murder can receive up to three years and three months good conduct credit.

6 *See, e.g.*, Hood, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L.Rev. 1605, 1624 (1989) [hereinafter, Hood, *The Meaning of "Life"*] (citing National Legal Research Group, Inc., Jury Research and Trial Simulation Services, *Report on Jurors' Attitudes Concerning the Death Penalty* (Dec. 6, 1988) [hereinafter *NLRG Report*]).

This study was completed for and utilized in *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (1988). *See also*, Paduano & Smith, *Deathly Errors* (citing Codner, *The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole* (Jan. 24, 1986) (unpublished study supervised by the Southern Prisoners' Defense Committee) [hereinafter Codner, *The Only Game in Town*]).

7 Hood, *The Meaning of "Life,"* at 1606 (citing *NLRG Report*, Question no.4, at 3).

8 *See* Paduano & Smith, *Deathly Errors*, at 223 (citing Codner, *The Only Game in Town*, 45, n. 114).