Capital Defense Journal

Volume 5 | Issue 2 Article 10

Spring 3-1-1993

WISE v. WILLIAMS 982 F.2d 142 (4th Cir. 1992)

aggravating factor. For instance, the Fourth Circuit's inability to describe Virginia's narrowing approach beyond stating that it requires "*something other* than those factors . . . present in an ordinary murder" can be seen as continuing to defy the *Godfrey* prescriptions against arbitrariness. If opinions such as *Godfrey, Stringer and Shell* mean anything, they mean courts must ensure that aggravating factors give **specific guidance** or **explanations**. Also, while it is true that the Virginia Supreme Court has defined two of the three factors for vileness—aggravated battery and depravity of mind (torture has not been defined)—the United States Supreme Court has yet to consider the *Smith* constructions approved by the Fourth Circuit in *Jones*.[24]

The Fourth Circuit's decision also addressed the question of whether an appellate court may find an aggravating factor that was not unanimously found by the jury. For example, in *Jones* it is impossible to know if the jury ever unanimously found "depravity of mind" vileness, "aggravated battery" vileness, or split on which type of vileness applied. The Fourth Circuit found it did not matter since the Supreme Court has held that a jury is not essential to capital sentencing.[25] The crucial issue, however, is whether where a jury *is* used by the state's sentencing scheme, may an appellate court find an aggravating factor which the jury did not unanimously find (or, as in *Jones*, use a factor for which it is impossible to tell). Thus, while the Supreme Court has held appellate courts may throw out invalid aggravating factors and reweigh the remainder, it is not so clear, as the Fourth Circuit assumed, that a state appellate court can find aggravating factors in the first instance. The issue appears ripe, therefore, for further litigation.

On a more practical note, a useful tool for preserving challenges to the Virginia vileness factor is a pre-trial motion for a bill of particulars, in which counsel can request that the court direct the Commonwealth to specify the factors upon which it intends to rely in seeking the death penalty. If the vileness factor arises, counsel should request that the Commonwealth identify every narrowing construction upon which it will rely. Should the Commonwealth fail to provide such constructions, counsel can preserve the *Godfrey* "unconstitutionally vague" issue by filing a brief to that point. Should the Commonwealth respond with *Smith*, counsel may want to challenge *Smith*, using *Shell* to argue that the narrowing constructions are themselves unconstitutionally vague.[26]

In summary, the United States Supreme Court has continued to emphasize the importance of giving meaningful guidance to juries, guidance that by necessity must come from narrowing constructions of statutes as vague as Virginia's.[27] While approval of the *Smith* narrowing constructions in cases such as *Jones* might be seen as discouraging Virginia practitioners from pursuing challenges to specificity, *Stringer* and *Sochor* emphasize the continued importance of requesting narrowing instructions and preserving challenges for appeal.

Summary and analysis:
Roberta F. Green

---

[23] *See supra* note 6 and accompanying text.

[24] *Id. See also Shell*, 111 S. Ct. 313 (1990), where the modified dictionary definitions were found insufficient to pass constitutional muster. *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

[25] *Jones*, 976 F.2d at 175 (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990) (rejecting the argument that a jury need impose the sentence of death or make findings to that end) and *Walton v. Arizona*, 497 U.S. 639 (1990) (rejecting the necessity of a jury deciding aggravating and mitigating factors)0.

[26] *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990), and *see also* case summaries of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991), *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992), *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992) and *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 1 (1992).

[27] *See* case summaries of *Stringer*, *Sochor* and *Espinosa v. Florida*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992); case summary of *Bunch v. Thompson*, Capital Defense Digest, Vol. 4, No. 2, p. 3 (1992); Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991); Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 1, p. 19 (1989); Priddy, Comment, *Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law*, 15 U. Rich. L. Rev. 951 (1981).

WISE v. WILLIAMS

982 F.2d 142 (4th Cir. 1992)
United States Court of Appeals, Fourth Circuit

FACTS

On November 8, 1984, Joe Louis Wise was convicted of capital murder, grand larceny, armed robbery and use of a firearm in the commission of a felony. At the ensuing penalty hearing the jury found Wise's conduct "outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder" and sentenced Wise to death.[1]

The Virginia Supreme Court affirmed Wise's conviction and sentence on November 27, 1985,[2] and on April 7, 1986, the United States Supreme Court denied certiorari.[3] After a hearing, the state circuit court dismissed Wise's state habeas petition on December 11, 1989. Wise did not file a notice of appeal until more than two months after the expiration of the thirty-day time limit. Wise then made a change in his court-appointed counsel and was granted leave to file an appeal. After the Virginia Supreme Court dismissed the petitioner's motion, he filed a petition for federal habeas corpus relief under 28 United States Code Section 2254. The district court granted the Commonwealth of Virginia's motion to dismiss Wise's petition, holding that Wise's claims were procedurally barred from consideration because the Virginia court had based its decision on the "adequate and independent" state ground that he did not file his notice of appeal within the set time limit.

To the Fourth Circuit, Wise challenged this conclusion on four grounds: that the procedural bar was not adequate because the Virginia

---

[1] *See* Va. Code Ann. § 19.2-264.2; § 19.2-264.4(C).

[2] *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985).

[3] *Wise v. Virginia*, 475 U.S. 1112 (1986).

[4] *Wise v. Williams*, 982 F.2d 142, 146 (4th Cir. 1992).

Supreme Court does not strictly or regularly enforce the mandatory time limit for notice of appeal; that the Virginia Supreme Court should have considered the merits of the appeal and not merely dismissed it on timeliness grounds; that Wise's counsel's failure to file a timely notice of appeal constitutes "cause," excusing his procedural default; and that review of his claims was necessary to correct a fundamental miscarriage of justice.

HOLDING

The United States Court of Appeals held that: "Wise failed to show that the procedural default relied upon by the Virginia Supreme Court was not an adequate and independent state ground, that his attorneys' error constitutes cause to excuse the default, or that federal review of his claims is necessary to prevent a fundamental miscarriage of justice."[4] Thus, the United States Court of Appeals affirmed the judgment of the district court.[5]

ANALYSIS/APPLICATION IN VIRGINIA

The *Wise* decision sends a clear message that procedural default as interpreted in *Coleman v. Thompson*[6] will be strictly applied. Federal courts will not search for ways around this Supreme Court holding.

As to Wise's claim that the Virginia Supreme Court does not regularly or strictly enforce the mandatory time limit for notice of appeal, the Fourth Circuit stated that "the periodic grant of extensions on motion . . . does not mean that the rule is not strictly and regularly enforced."[7] Rather, the court noted that the United States Supreme Court in *Coleman* had found that Virginia did apply the rule consistently and concluded that "the conscientious consideration of motions for extension and the granting of such motions may well be evidence that the rule is very strictly enforced; that is, that the rule's requirement is absolute, absent express dispensation from the court."[8] The Fourth Circuit stated that there is simply no evidence that the Virginia Supreme Court does not consistently enforce its filing requirement, and the court found that Wise cited no authority to suggest otherwise.[9]

Wise's second claim, that the Virginia court's dismissal was on the merits as well as timeliness, was hastily dismissed by the court of appeals. The court stated that "the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard."[10] Relying on *Coleman*, the court of appeals rejected Wise's contention that he had a constitutional right under the Sixth Amendment effective assistance of counsel, noting that "'there is no constitutional right to an attorney in state post conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.'"[11] The court here also denied Wise relief on his claim that a Fourteenth Amendment due process right was created through the "special relationship" petitioner developed with Virginia by virtue of the Commonwealth's appointment of counsel for him.[12]

Third, the court of appeals rejected Wise's contention that his counsel's failure to file timely notice of appeal constituted "cause" to excuse his procedural default. As stated in response to Wise's second claim, the court asserted that an attorney's error will only constitute "cause" if the client was denied the constitutional right to effective assistance of counsel.[13] Reiterating the *Coleman* holding, the Fourth Circuit simply stated that Wise had no right to counsel in his state habeas appeal.[14]

Additionally, the *Wise* court stated that "Wise, like Coleman, was not deprived by his attorneys of an opportunity to have the merits of his constitutional claims reviewed."[15] It is at this point in the opinion that the *Wise* court may have created a window of opportunity for defense counsel. The above language seems to suggest that because Wise was given the opportunity to have his constitutional claims reviewed by the state habeas trial court, the court was not willing to grant him a second opportunity for review. However, in a case where no such review took place at the state level, attorneys should attempt to distinguish the situation from *Wise* and *Coleman*. On habeas, an attorney in such circumstances should argue that because petitioner was denied review at the state habeas proceedings, he should be granted this right at the federal level. The quoted language in *Wise* appears to indicate that the court may be more sympathetic to this type of claim. But it should be noted that, in general, the court's decision here signals to attorneys that the court plans to adhere strictly to procedural rules and time limits.

Finally, the Fourth Circuit responded to Wise's claim of a "fundamental miscarriage of justice" by stating that "this argument is foreclosed by the Supreme Court's decision in *Sawyer v. Whitley*."[16] The court explained its denial of relief by stating that "*Sawyer* requires Wise to show 'by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [Virginia] law.'"[17]

In the case at hand, Wise asserted, as the petitioner did in *Sawyer*, that if trial counsel had presented the mitigating evidence of his abusive and criminal family environment, no juror would have found him eligible for the death penalty. The Fourth Circuit disagreed. The court held that, as in *Sawyer*, "'the psychological evidence [that] petitioner alleged was kept from the jury due to the ineffective assistance of counsel does not relate to petitioner's guilt or innocence of the crime.'"[18] The *Wise* court further stated that the exclusion of mitigating evidence simply does not warrant application of the "fundamental miscarriage of justice" exception.[19]

Whether *Sawyer* was not the appropriate standard to apply might be debated. *Sawyer* can be distinguished from the case at hand in that Sawyer's claim for the miscarriage of justice exception was in a case where the defendant was on his second federal habeas petition. It may be possible for attorneys to assert that the *Sawyer* standard is improper and too stringent[20] when a petitioner is bringing his first federal

---

5 *Id.*

6 111 S.Ct. 2546 (1991). In *Coleman*, the Court held that habeas corpus petitions are procedurally barred by failure to comply with state requirements for filing notice.

7 *Wise*, 982 F.2d at 146.

8 *Id.* at 143.

9 *Id.* at 144.

10 *Id.* (quoting *Coleman*, 111 S.Ct. at 2560-61).

11 *Id.* (quoting *Coleman*, 111 S.Ct. at 2566).

12 *Id.* at 145. In rejecting Wise's claim that a Fourteenth Amendment due process right had been created, the court stated that Wise's claim "'rests on a premise that we are unwilling to accept — that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, . . . the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position — at trial and on first appeal as of right.'" (quoting *Pennslyvania v. Finley*, 481 U.S. 551, 559 (1987)).

13 *Wise*, 982 F.2d at 145.

14 *Id.*

15 *Id.*

16 *Id.* (quoting *Sawyer* v. *Whitley*, 112 S.Ct. 2514 (1992)).

17 *Id.* (quoting *Sawyer*, 112 S.Ct at 2523).

18 *Id.* at 146 (quoting *Sawyer*, 112 S.Ct at 2523-24).

19 *Id.*

20 *See generally* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992).

habeas claim. Such an argument would have to persuade the court that where a defendant has **never** had an opportunity to present a claim of constitutional error to a federal court, a more expansive view of the "miscarriage of justice" exception should be adopted.

Summary and analysis by:
Lesley Meredith James

JENKINS v. COMMONWEALTH

244 Va. 445 423 S.E.2d 360 (1992)
Supreme Court of Virginia

FACTS

On October 12, 1990, after Arthur Ray Jenkins III and a companion had become intoxicated at a restaurant and engaged in a fight with a restaurant patron, family members took Jenkins and his companion from the scene to his aunt's home where he had been living, along with his uncle, Floyd Jenkins, age 69, and Lee H. Brinklow, age 72. After Brinklow attempted to prevent Arthur Jenkins from entering the house, an argument ensued, and a grisly series of events commenced. Jenkins shot Brinklow in the face with a .22 rifle, shot his uncle in the head leaving him on the floor "gagging," and after a short interval outside with Brinklow, returned to the house, shot his uncle in the head again, and then, using a butcher knife, stabbed him repeatedly until his "guts came out." Though Brinklow pled for mercy, Jenkins shot him in the head.[1] He then robbed his two victims of their personal items, stole cash and other valuables from his aunt's bedroom, and left the premises carrying his two victim's bodies in the back of Brinklow's truck. Jenkins and his companion abandoned the truck, and after an attempt to clean up the murder scene, fled the area. Jenkins was apprehended later near Abingdon.

Jenkins was charged in a multiple count indictment which included: the capital murder of more than one person as part of the same transaction,[2] two counts of capital murder for the killings of Brinklow and Jenkins in the commission of robbery,[3] two counts of robbery, and two counts of illegal use of a firearm.[4] At trial Jenkins pled guilty to the illegal use of a firearm in the commission of Brinklow's murder, and the jury found Jenkins guilty on the remaining charges, including three charges of capital murder. Jenkins was sentenced to life imprisonment for each of the robbery convictions and two years imprisonment for the weapons charge. At the sentencing phase for the capital offenses, the jury sentenced Jenkins to death for the two remaining capital charges,[5] basing their decision on both the vileness and future dangerousness aggravating factors.[6]

On appeal to the Virginia Supreme Court, Jenkins presented a number of arguments centering around the trial court's failure to properly take into consideration that Jenkins had been sexually abused as a child. Jenkins argued that some victims of child abuse suffer from a psychological disorder, "child abuse accommodation syndrome," which, if triggered by the appropriate provocation, followed by a sufficient "heating-up period," can result in uncontrollable rage. Jenkins alleged that a suggestive remark made by his uncle caused just such a reaction, and therefore he should have been charged with manslaughter rather than capital murder.

In order to support this theory, defense counsel was prepared to offer the testimony of Dr. Faye Sultan, a North Carolina psychologist, who had examined Jenkins eight days before trial, and the testimony of Ronald Mabry, a social worker familiar with Jenkins' case. The trial court refused to allow Mabry's testimony because the court deemed his testimony to be part of an improper attempt by defense counsel to offer a diminished capacity defense in a case where defendant did not claim to be mentally incompetent. In addition the court held that such an attempt violated the "*Stamper* principle,"[7] which holds evidence of the state of mind of the defendant to be irrelevant unless an insanity defense is mounted. On appeal to the Virginia Supreme Court, defense counsel argued that in barring Mabry's testimony, the court was stripping the defendant of the right "to mount a manslaughter defense."

Unlike Mr. Mabry, Dr. Sultan voluntarily decided not to testify. Her decision was based on a motion filed by the prosecutor during the penalty phase, five days into the trial, suggesting that Dr. Sultan could not properly testify in Virginia because she was not licensed here. The prosecutor went so far as to allege that should Dr. Sultan testify, she might be violating Virginia licensing statutes, a criminal violation. Though the trial court overruled the prosecutor's motion, Dr. Sultan, after consulting with independent counsel, decided not to risk possible legal and ethical sanctions by testifying. Defense counsel objected to the prosecutor's tactic as improper, and suggested that it interfered with the defendant's constitutional right to present favorable evidence during the penalty phase of the trial.

Finally, defense counsel alleged that there may have been juror misconduct. Published accounts after the trial revealed that the foreman had made a plea for a capital sentence by arguing that if his fellow jurors failed to impose the death penalty, Jenkins might be released on parole in as few as ten years. Because this statement is clearly inaccurate, and

---

[1] Medical examination of the victims indicated Brinklow had received four gunshot wounds to the head, and the uncle had received two gunshot wounds in addition to seven stab wounds to the abdomen which penetrated the body up to eight inches.

[2] *See* Va. Code Ann. § 18.2-31(7) (1990).

[3] *See* Va. Code Ann. § 18.2-31(4) (1990).

[4] Jenkins was also charged in the original indictment with the murder of Brinklow under Va. Code Ann. §18.2-32, but the prosecutor subsequently made a motion to nolle prosequi that count.

[5] Although the defendant was also convicted of capital murder for the killing of Floyd Jenkins in the commission of robbery, that charge was dismissed during the penalty phase upon the Commonwealth's motion.

[6] *See* Va. Code Ann. § 19.2-264.2; § 19.2-264.4(C) (1990).

[7] *See Stamper v. Commonwealth*, 228 Va. 707, 717, 324 S.E.2d 682, 688 (1985).