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WRIGHT v. COMMONWEALTH 245 Va. 177, 427 S.E.2d 379 (1993)

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245 Va. 177, 427 S.E.2d 379 (1993)
Supreme Court of Virginia

FACTS

On October 13, 1989, seventeen-year-old Dwayne Allen Wright saw thirty-three year-old Saba Tekle driving alone in her friend's car. Deciding to steal it, Wright followed her home. After Tekle had gotten out of the car, Wright approached her at gunpoint and demanded the car keys. Tekle dropped the keys on the ground and Wright ordered Tekle to remove her clothes because he wanted to take her into a wooded area and have sex with her. Tekle removed her shoes and underwear and then ran, screaming, towards her apartment. Wright chased her into the building and shot her twice, then escaped in the car that Tekle had been driving.

Wright was charged in juvenile and domestic relations district court, which found at a transfer hearing[1] that Wright: (1) was not criminally insane or mentally retarded; (2) was not amenable to treatment or rehabilitation as a juvenile through available facilities considering the nature of the offenses; and (3) the interests of the community required that Wright be placed under legal restraint or discipline. Wright appealed the transfer decision to the circuit court on three grounds. First, he argued that his Eighth Amendment right was violated because Virginia Code section 16.1-269 does not mandate consideration of defendant's moral responsibility or psychological maturity, and as a result the system fails to offer individualized consideration. Second, Wright argued that a guardian *ad litem* was not appointed to protect his interests at the transfer hearing (although he was represented by counsel). Third, the circuit court failed to address the issue of criminal insanity (although a mental evaluation was performed by a qualified psychologist). The circuit court rejected all of defendant's arguments and found that the requirements of Virginia Code section 16.1-269 had been met.

Wright was tried as an adult. During the guilt phase, Wright was found guilty of two counts of capital murder, and single counts of robbery, use of a firearm in the commission of a robbery, and attempted rape.

During the penalty phase, the Commonwealth presented evidence of other crimes, including convictions of attempted first degree murder and use of a handgun, and conviction of first degree murder, in addition to an unadjudicated act of murder on October 9, 1989, to which Wright confessed. The Commonwealth called as a witness Arthur Centor, a clinical psychologist, who had examined Wright and found him competent to stand trial. Dr. Centor also found that Wright had not suffered from any extreme mental or emotional disturbance at the time of the offense, and that his capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law was not significantly impaired.[2] The Commonwealth's psychologist also examined Wright to determine any mitigating or aggravating factors. The psychologist testified that Wright has a "borderline" verbal I.Q. of 76, an average performance I.Q. of 92, and a low-average full-scale I.Q. of 81. The psychologist testified that he found no evidence of mental disorders, emotional disturbance or brain damage. Further, he stated that in his opinion, based on Wright's "social history" and the examination, that there was a "high probability" that Wright would pose a future danger to society.[3]

Dr. Samenow, a clinical psychologist who had been appointed by the trial court for the defendant testified that he agreed with the prosecution's findings regarding intelligence. He testified regarding Wright's background, but proffered no opinion as to future dangerousness. The jury found that the aggravating factor of future dangerousness was present and sentenced Wright to death.

HOLDING

On direct appeal, the Supreme Court of Virginia held, *inter alia*,[4] that there was no Eighth Amendment violation for imposing the death penalty on a seventeen year-old, that the penalty was not substantively barred by the Eighth Amendment, and that juvenile defendants were not entitled to individualized determination of their maturity and moral culpability beyond that provided to all capital defendants at penalty trials.[5] The court also found that the evidence was sufficient to support a jury finding of future dangerousness, and thus sufficient to support the imposition of the death penalty.[6]

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[1] Va. Code Ann. § 16.1-269(A) states that on motion of the Commonwealth's attorney, the juvenile court shall hold a transfer hearing for a child who is fifteen years of age or older and who is charged with an offense that, if committed by an adult, could be punishable by confinement in a state correctional facility. The juvenile court may then transfer the child to the appropriate circuit court for trial.

[2] *See* Va. Code Ann. § 19.2-264.3:1(C) (1990).

[3] *Wright v. Commonwealth*, 245 Va. 177, 195, 427 S.E.2d 379, 393 (1993).

[4] The defendant assigned a number of additional errors. Some of these the court rejected in brief, conclusive language. Others did not involve death penalty law. On still others, the rulings provide little if any guidance, because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in this case that will not be addressed in this summary include: (1) trial court's refusal to reinstate venire members dismissed on prosecutor's peremptory strikes, on basis that the exercise of the peremptory challenge was based upon factors other than the venire member's race; (2) trial court's refusal to grant mistrial after juror heard defendant's family members mention "capital punishment" and "life imprisonment", on basis that the particular juror was replaced and there was no impermissible effect upon remaining jurors; (3) trial court's admitting into evidence a photograph of the blood-stained door to victim's apartment, on basis that photograph was relevant to show malice and premeditation; (4) trial court's ruling that evidence that victim removed her shoes and underpants in response to defendant's force, threat and intimidation was sufficient to prove attempted rape; (5) trial court's finding that evidence was sufficient for premeditation, when defendant admitted that he followed victim from highway to her apartment building and intended to have sex with her, victim resisted and fled, defendant chased victim to bottom of steps inside apartment building and shot her two times; (6) trial court's finding that corpus delicti was established when defendant confessed to police, when there was corroborative evidence that victim's underpants had been removed, and victim's underpants and shoes were discovered at the crime scene; and (7) trial court's refusal to inform jury as to defendant's parole eligibility.

[5] *Wright*, 245 Va. at 181-83, 427 S.E.2d at 383-384.

[6] *Id.* at 198-99, 427 S.E.2d at 393.

ANALYSIS/APPLICATION IN VIRGINIA

I. Juvenile Transfer in Capital Cases

In *Thompson v. Oklahoma*,[7] the United States Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of fifteen year-olds. The Court held that "it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of the offense."[8] In both *Stanford v. Kentucky*[9] and *Wilkins v. Missouri*,[10] the United States Supreme Court held that the Eighth Amendment protection against cruel and unusual punishment does not protect all sixteen or seventeen year-olds, as a class, from being executed. The Court acknowledged that **some** sixteen and seventeen year-olds might be so protected, however.[11] The issue is to determine what procedures are required to insure that a particular juvenile is not in that class in which execution would offend civilized standards of decency. The states involved in *Thompson, Stanford* and *Wilkins* had juvenile transfer procedures much more extensive than Virginia's to make that determination. The *Stanford* court's decision permitted the execution of juveniles only after they were given individualized consideration of their moral culpability and maturity at a transfer hearing **and** at a capital sentencing proceeding. In contrast, Virginia Code section 16.1-269(C) requires only that the court consider the "nature of the offense" during the transfer hearing. The issue is not settled as a matter of federal Eighth Amendment law, and the statement by the Supreme Court of Virginia that the penalty trial individualization applicable to **all** capital defendants is sufficient is questionable. Defense counsel should raise objection to the transfer hearing process and properly preserve the issues for appeal.

II. Mental Retardation

A provision of the juvenile transfer statute[12] requires a finding by the court that the defendant is not mentally retarded or insane. The statute stipulates that the defendant cannot be transferred to the circuit court unless it is established, and the court finds, that the defendant is **not** insane. A finding of no mental retardation or insanity may then be appealed de novo in the circuit court. The court in *Wright*, by reference to the standard for establishing insanity as a defense at trial,[13] essentially reversed the burden of proof regarding insanity in juvenile transfer hearings. The court upheld Wright's transfer to circuit court on the basis of an absence of any proof that Wright was insane or mentally retarded.[14]

The transfer report concluded that the defendant was not mentally retarded. The intelligence tests showed that Wright was in the "borderline range of intelligence," and "functions in at least the low average level."[15] Dr. Arthur Centor, the clinical psychologist, gave his opinion that the tests did not measure all aspects of Wright's intelligence, as Wright possessed "street smarts."[16] However, the conclusion that "street smarts" indicated the absence of retardation was professionally incorrect and in fact may be an indication of just the opposite. Experts on mental retardation have found that it is:

> not surprising when a mentally retarded person brags about how tough he is or how he outsmarted his victim, when he accomplished neither feat. Overrating is probably closely tied to desperate attempts to reject the stigma of retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma. In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom.[17]

Thus, at the first indication that the defendant possesses a low I.Q. or is "slow," defense counsel should seek appointment of a **qualified** expert to examine for evidence of mental retardation.

III. Commonwealth Experts and 3:1[18]

Wright indicates several errors and probable errors (it is unclear from the opinion) in the application of Virginia Code section 19.2-264.3:1, regarding expert assistance at the sentencing phase relative to mental condition. It is essential that defense counsel be familiar with what the statute does and does not authorize in order to employ it properly in defense and assess the alternatives to its use. Errors and probable errors suggested in *Wright* include limitation of exam scope and limitation of testimony.

Dr. Centor's authority for his initial examination of the defendant is unclear, but the opinion suggests that it was to conduct competency/sanity examinations under Virginia Code sections 19.2-169.1 and 19.2-169.5,[19] as well as to act as the Commonwealth's reciprocal expert under section 19.2-264.3:1(F).[20] Authority for the examination granted by Virginia Code sections 19.2-169.1 and 19.2-169.5 does not encompass examination for future dangerousness.

Dr. Centor's testimony on future dangerousness is also question-

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7 487 U.S. 815 (1987).

8 *Id.* at 830.

9 492 U.S. 361 (1989).

10 *Id.*

11 The court in *Stanford*, citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 194 (1982), stated that: "In the realm of capital punishment in particular, 'individualized consideration [is] a constitutional requirement', and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age...**Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of sixteen and seventeen year-old offenders before they are even held to stand trial as adults.** The application of this particularized system to the petitioners can be declared constitutionally inadequate only if there is a consensus, not that seventeen or eighteen is the age at which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that seventeen or eighteen is the age before which no one can reasonably be held fully responsible." *Stanford*, 492 U.S. at 375-376 (emphasis added).

12 Va. Code Ann. § 16.1-269(C) (1993).

13 *Wright*, 245 Va. at 183-84, 427 S.E.2d at 384 (citing *Taylor v. Commonwealth*, 208 Va. 316, 322, 157 S.E.2d 185, 189 (1967)).

14 *Wright*, 245 Va. at 181-82, 427 S.E.2d at 384.

15 *Id.* at 195, 427 S.E.2d at 385.

16 *Id* at 184, 427 S.E.2d at 385.

17 Ellis and Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 430 (1985).

18 In a given case, seeking appointment of an expert under *Ake v. Oklahoma*, 470 U.S. 68 (1985), instead of under Va. Code Ann. § 19.2-264.3:1, and consideration of ways to limit or block the Commonwealth expert may be appropriate. Please contact the Virginia Capital Case Clearinghouse for further information on these alternatives.

19 Virginia Code section 19.2-264.3:1(A) also authorizes competency and sanity evaluations, but only to be performed by the defense expert.

20 "Dr. Arthur Centor, a clinical psychologist in forensic psychology, examined Wright to determine his competence to stand trial and his competence at the time of the alleged offenses. The doctor also examined Wright to ascertain factors in mitigation and in aggravation in the event Wright was found guilty of capital murder." *Wright*, 245 Va. at 195, 427 S.E.2d at 391.

able if it was based on the reciprocal examination authorized by 3:1(F). Unlike *Stewart v. Commonwealth*,[21] the opinion does not contain an assertion by Dr. Centor that he **did not** base his opinion in part on statements made to him by Wright or on evidence derived from such statements.[22] If Dr. Centor's testimony was based on Wright's statements or on evidence derived from them, he was only entitled to testify in rebuttal of the defense expert, Dr. Samenow.[23] This he obviously did not do, since Dr. Samenow offered no opinion on future dangerousness.

Summary and analysis by:
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[21] 245 Va. 222, 427 S.E.2d 394 (1993). In *Stewart*, the trial court accepted Dr. Centor's assertion that he did not base his opinions about future dangerousness on any statements made by Stewart during the examination, even though Dr. Centor claimed that he based his opinion on Stewart's prior criminal record, and the **results of Stewart's psychological tests**. *Id.* at 244, 427 S.E.2d at 408. The Supreme Court of Virginia affirmed the trial court's finding. The Supreme Court of Virginia also held that when a Commonwealth expert is allowed to examine the defendant, the Commonwealth expert can examine for future dangerousness as well. *Id.* at 243, 427 S.E.2d at 407-408. *See also* case summary of *Stewart*, Capital Defense Digest, this issue.

[22] Indeed, an examination for competency to stand trial or for insanity would be difficult to conduct without statements from the defendant.

[23] *See* Va. Code Ann. § 19.2-264.3:1(G) ("[N]o evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.").

BEAVERS v. COMMONWEALTH

245 Va. 268, 427 S.E.2d 411 (1993)
Supreme Court of Virginia

FACTS

Late in the night on May 1, 1990, nineteen-year-old Thomas Beavers broke into the house of his neighbor, Marguerite Lowery, a sixty-year-old widow who lived alone. Beavers raped her, and when she started to scream, he held a pillow over her face, killing her. Before leaving, Beavers took four of her rings from a dresser. On the morning of May 2, 1990, an officer found Mrs. Lowery's body. Slightly more than a year later, the Lowery murder remained unsolved. On May 14, 1991, Beavers broke into the empty house of his fifty-year-old next door neighbor, Shirley Hodges. When she returned home, Beavers covered her mouth with his hand, ordered her to be quiet, stripped off her clothes and raped her. After Beavers left, she reported the rape to the police, and told them that Beavers had used some of her white medical gauze tape to bandage his hand that he had cut while breaking into her house. The police searched Beavers's house for the gauze, but instead found Mrs. Lowery's rings. Beavers confessed to both the rape of Shirley Hodges and the rape and killing of Mrs. Lowery.

During voir dire, the trial court refused defense counsel's requested question as to the opinion of the jurors regarding the death penalty: "Do you believe that if one is convicted of taking another's life, the proper penalty is loss of your own life?"[1] However, the trial court did ask each juror, "[i]f the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?"[2] Those jurors who did not answer in the affirmative were questioned individually. After the jury had been selected, sworn and given preliminary instructions, defense counsel moved to dismiss the jury, but the motion was denied.

During the guilt phase, the Commonwealth's attorney's opening statement contained five references to the jury's "recommendations" about the defendant's penalty. Defense counsel objected at the end of the entire statement. The trial court denied defense counsel's motion for a mistrial, concluding that counsel had defaulted by waiting too long to make an objection.

At the close of the evidence at the sentencing hearing, the trial court ruled that there was insufficient evidence to prove vileness. The jury was instructed that it would have to find future dangerousness before the death sentence could be imposed. The jury found future dangerousness and sentenced Beavers to death.

HOLDING

On direct appeal, the Supreme Court of Virginia affirmed Beaver's conviction and death sentence.[3] The court held, *inter alia*,[4] that the trial court did not err in refusing defendant's proposed jury instruction to ensure that the jurors would consider a sentence of life imprisonment

[1] *Beavers v. Commonwealth*, 245 Va. 268, 277, 427 S.E.2d 411, 418 (1993).

[2] *Id.* at 278, 427 S.E.2d at 418.

[3] *Id.* at 285, 427 S.E.2d at 423.

[4] Beavers assigned a number of other errors. Some of these the Supreme Court of Virginia rejected in brief, conclusive language. Others did not involve death penalty law. On still others, the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in these categories that will not be discussed are: (1) trial court's refusal to allow defense counsel more peremptory strikes during jury selection; (2) rejection of defense counsel's claims that Virginia's capital death statute, §§ 19.2-264.2 through 19.2-264.5, violates the Fifth, Eighth and Fourteenth Amendments; (3) Commonwealth's refusal to provide defense counsel with the names of all witnesses it intended to call at both the guilt and sentencing phases of the trial; (4) refusal of the trial court to suppress defendant's confession on the basis that the detective did not bring defendant to a magistrate without unnecessary delay; (5) trial court's admission of rings into evidence when search warrant stated that police were to look for white medical gauze tape; and (6) judge's refusing to grant a mistrial, but instead instructing the jury to disregard a police officer's testimony concerning premeditation, when officer was reading from a report that had not been admitted into evidence.