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WILSON v. COMMONWEALTH 249 Va. 95, 452 S.E.2d 669 (1995) Supreme Court of Virginia

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"adequately informed the jury that the death penalty was not mandatory even if both aggravating factors were proven by evidence beyond a reasonable doubt."[17]

It seems evident, however, that there is a fundamental difference between the two instructions. Instruction No. 1 tells the jury not to find death if the Commonwealth does not prove the aggravating factors beyond a reasonable doubt. Under such instructions, the jury could mistakenly infer that once an aggravating factor is proven beyond a reasonable doubt, the jury must find death. At no time does Instruction No. 1. tell the jury that it can fix punishment at life imprisonment even if it finds both aggravating factors beyond a reasonable doubt. Instruction No. A would have clarified this assertion.[18] Furthermore, Virginia Code section 19.2-263.2 states that a court is not to refuse a proper instruction simply because it does not conform to the model instruction.

Cardwell's inability to give instruction No. A. made it virtually impossible for him to convey to the jury its right to vote life imprisonment even if it found either aggravating factor beyond a reasonable doubt. As a result, the jury may not have been clear on the scope of its power and may have thought that once it found an aggravating factor, it must vote for death. This, in effect, would make the introduction of mitigation evidence useless since the jury believes that it must vote death even if an aggravating factor was found. Such a result would be contrary to the United States Supreme Court's rulings on issues concerning the introduction of mitigating evidence and the effect a jury is required or permitted to give to it.[19]

V. *Simmons* Issue

Cardwell also asserted that the jury was entitled to be informed of the law concerning his parole eligibility under *Simmons v. South Carolina*.[20] The Supreme Court of Virginia, however, distinguished this case by stating that Cardwell's punishment of death was based on the "vileness" aggravating factor, unlike *Simmons'* sentence which was based on the "future dangerousness" aggravating factor.[21] Thus, the court held that *Simmons* did not apply.[22]

The opinion does not state unequivocally that the issue of "future dangerousness" was before the jury. The admission into evidence of Cardwell's prior misconduct, however, clearly indicates that it was.[23] Certainly, if "future dangerousness" was before the jury, the applicability of *Simmons* was at issue. If there was error, it is not rendered harmless by the fact that the jury did not formally find the "future dangerousness" factor. That is because the ultimate decision of the jury is life in prison or death. *Simmons* itself illustrates that. "Future dangerousness" was not a statutory aggravating factor in South Carolina and the jury did not make a finding of it. The United States Supreme Court merely found that "future dangerousness" was at issue, as it probably was in *Cardwell*.

Simmons issues should be raised, even when it is formally determined before the penalty trial that "future dangerousness" will not be at issue. Since the real issue at the penalty phase is choosing either a sentence of life imprisonment or death, the unresolved *Simmons* issues of utilizing parole law evidence as mitigation remain important, even in "vileness" cases.[24]

Summary and analysis by
Michael H. Spencer

[17] *Cardwell*, 248 Va. at 514, 450 S.E.2d at 154.

[18] *See* case summary of *Joseph*, Capital Defense Digest, this issue.

[19] *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (held that a trial court must provide a means to give effect to mitigating evidence); *Mills v. Maryland*, 486 U.S. 367 (1988) (held that state procedure cannot preclude the use of mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586 (1978) (held that a sentencer is not to be precluded from the consideration of mitigating factors in considering a sentence of less than death).

[20] 114 S.Ct. 2187 (1994). *Cardwell*, 248 Va. at 514-15, 450 S.E.2d at 154-55. *See* Pohl & Turner, *If At First You Don't Succeed: The Rea And Potential Impact of* Simmons v. South Carolina *In Virginia*, Capita Defense Digest, Vol. 7, No. 1, p. 28 (1994); case summary of *Simmons* Capital Defense Digest, Vol. 7, No. 1, p. 4 (1994).

[21] *Id.* at 515, 450 S.E.2d at 155. *Compare Joseph v. Common wealth*, 452 S.E.2d 862 (Va. 1995).

[22] *Cardwell*, 248 Va. at 515, 450 S.E.2d at 155.

[23] *See supra* text accompanying note 10.

[24] Pohl & Turner, *supra* note 23, §§ VII-XI.

WILSON v. COMMONWEALTH

249 Va. 95, 452 S.E.2d 669 (1995)
Supreme Court of Virginia

FACTS

At approximately 3:00 a.m. on March 27, 1993, Kenneth L. Wilson entered the home of the decedent Jacqueline M. Stephens and her daughter Altomika. There, he murdered Ms. Stephens and stabbed both her daughter and Takeshia Banks.[1]

A neighbor, having seen Wilson leave the Stephens' home and drive away in Ms. Stephens car at approximately 6:30 a.m., called the police. When the police arrived, they found Ms. Stephens tied to the bed and covered with blood. They observed pubic hairs and a dried white substance on her body. A medical examiner testified that Ms. Stephens had at least ten knife wounds. The medical examiner also stated that none of Ms. Stephens' injuries would have rendered her unconscious during the attack.[2]

In the first stage of a bifurcated trial, pursuant to Virginia Code sections 19.2-264.3 and -264.4, a jury convicted Wilson of capital murder in commission of attempted rape, two counts of abduction, one count of abduction with attempt to defile, two counts of malicious wounding, attempted rape, and grand larceny.[3] In the second stage of the trial, the jury fixed his punishment at death based on both "vileness" and "future dangerousness".[4]

[1] *Wilson v. Commonwealth*, 249 Va. 95, 98-100, 452 S.E.2d 669, 672-73 (1995).

[2] *Id.* at 99-100, 452 S.E.2d at 673.

[3] *Id.* at 97, 452 S.E.2d at 671-72. The convictions were pursuant to Virginia Code §§ 18.2-31(5), -47, -48, -51, -67.5 and -95 respectively.

[4] *Id.*

HOLDING

Consolidating the automatic review of Wilson's death sentence with his appeal of the capital murder conviction, the Supreme Court of Virginia upheld the death sentence based on both the "vileness" and "future dangerousness" predicates.[5]

ANALYSIS/APPLICATION IN VIRGINIA

I. Defaults

Wilson assigned error to many of the trial court's actions based on constitutional grounds. These assignments of error included (1) the lack of direction of the jury's discretion regarding the "vileness" and "future dangerousness" factors, (2) the vagueness of these factors, (3) the use of prior convictions in sentencing, (4) the implementation of the death penalty, (5) death by electrocution and (6) the lack of adequate instructions on mitigation.[6] The Supreme Court of Virginia, however, held that Wilson procedurally defaulted these issues since he did not raise them at trial in accordance with Virginia Rule of Procedure 5:25.[7] This rule, along with other related rules, requires an attorney to raise the issues at trial, assign them as error, and brief them on appeal.[8] In this case Wilson failed to raise these issues at trial and therefore procedurally defaulted them on appeal.

Virginia rules of procedure create a series of hurdles that, as evidenced by the *Wilson* case, must be negotiated to preserve possibly meritorious claims for further review.

The United States Supreme Court has also held that "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."[9] As a result, a failure to follow state procedural rules will also bar federal review of the same issues unless there is a showing of "cause" and "prejudice."[10]

In addition to defaults, federal courts are without jurisdiction to decide claims raised and decided only on state law grounds.[11] As such, any issue raised and decided by a state court on state law grounds will absolutely prevent a federal court from hearing the issue. Appropriate state law grounds should also be raised of course. However, the paramount importance of federalizing issues is illustrated by the fact that since 1988, the Supreme Court of Virginia has granted relief in only two capital cases—both of which were based on fact-specific issues involving application of Virginia's "triggerman" statute.[12] This represents one of the lowest rates of reversal in the nation.

II. *Simmons* Issue

The only federalized issue preserved for further appeal in *Wilson* was whether it was error to refuse Wilson's request to put before the jury accurate information regarding his parole eligibility if sentenced to life in prison.[13] This issue was based on the United States Supreme Court's holding in *Simmons v. South Carolina*.[14] In *Simmons* the Court held that a jury is entitled to be informed of a capital defendant's parole ineligibility under a life sentence.[15] The Supreme Court of Virginia distinguished Wilson's case and held that since he would have been eligible for parole, *Simmons* did not apply.[16] The issue raised by Wilson, however, has not been settled by the highest court. Thus, it is imperative that the claim be maintained in order to secure federal review.[17]

III. Use of Other Life-Sentenced Prisoners as Mitigation Evidence

Wilson apparently tried to utilize the testimony of a current life-sentenced prisoner as evidence of what he would encounter if given a life

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[5] The court rejected some of the defendant's assignments of error 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 addressed in this summary include insufficiency of the evidence of (1) rape, (2) capital murder, (3) grand larceny, (4) malicious wounding and of (5) abduction. These claims, as raised and decided, are probably foreclosed from further review because Wilson did not allege federal law grounds for them. Insufficiency of the evidence claims are difficult to federalize. These issues, however, can be federalized based on a claim of an arbitrary application of state law. *See* Konrad, *How to Look the Virginia Gift Horse in The Mouth: Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights*, Capital Defense Digest, Vol. 3, No. 2, p. 16 (1991).

[6] *Wilson*, 249 Va. at 100, 452 S.E.2d at 673.

[7] *Id.*

[8] *See* Va. R. Sup. Ct. 5:25, 5:21(i) and 5:17(c).

[9] *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). *See, e.g., Sochor v. Florida*, 112 S. Ct. 2114, 2119-20 (1992) (holding that Sochor could not make a constitutional challenge to a jury instruction because the state supreme court defaulted the issue based on the lack of a timely objection at trial).

[10] *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (holding that all procedural defaults are to be reviewed based on cause and prejudice) and case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1 p. 4 (1991). *See also Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977) (holding that a failure to comply with a state contemporaneous objection rule will foreclose federal habeas review unless the petitioner can show "cause" and "prejudice" in connection with the failure to object).

[11] If a state court's ruling on an issue is considered "adequate" and "independent," then the federal courts will not hear the issue. *See Sochor*, 112 S. Ct. at 2119 (explaining that the Court lacks jurisdiction over the issue of federal law if the state court based its holding on adequate and independent state law grounds).

[12] *See Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990); *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991). *See also* Va. Code Ann. § 18.2-18 (1990).

[13] *Wilson*, 249 Va. at 104, 452 S.E.2d at 675.

[14] 114 S. Ct. 2187 (1994).

[15] *Id.* at 2198. *See* case summary of *Simmons*, Capital Defense Digest, Vol. 7, No. 1. p. 4 (1994). *See also* Pohl & Turner, *If at First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, Vol. 7, No. 1. p. 28 (1994). All perpetrators of crimes committed in Virginia on or after January 1, 1995 will be ineligible for parole.

[16] *Wilson*, 249 Va. at 104 n.2, 452 S.E.2d at 675 n.2.

[17] *See Joseph v. Commonwealth*, 452 S.E.2d 862 (1995), and case summary of *Joseph*, Capital Defense Digest, this issue.

sentence.[18] Although the court found this claim to be defaulted,[19] it may still be advisable for defense counsel to consider utilizing this type of evidence in mitigation, particularly of the "future dangerousness" predicate. In addition to its relevance as mitigation, the rationale is that a court cannot prohibit the introduction of evidence that rebuts an aggravating factor.[20] The United States Supreme Court has observed that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating."[21] Thus, the denial of this type of evidence by the trial court would mean another potential federal claim for a defendant.

Summary and analysis by:
Michael H. Spencer

[18] *Wilson*, 249 Va. at 104 n.1, 452 S.E.2d at 675 n.1.

[19] *Id. See supra* section I.

[20] *See Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion).

[21] *Skipper*, 476 U.S. at 5.

STRICKLER v. MURRAY

249 Va. 120, 452 S.E.2d 648 (1995)
Supreme Court of Virginia

FACTS

Nineteen year-old James Madison University student Leanne Whitlock was returning her boyfriend's car to him on January 5, 1990 in Harrisonburg.[1] While she was stopped in traffic, Thomas David Strickler forced his way into her car. His two companions, Ronald Henderson and an unidentified blond woman, entered the car immediately afterwards. Subsequently, the intruders brought Whitlock to a nearby cornfield, where a witness saw them turn off the main road.[2]

Police searched the cornfield eight days later. They found Henderson's wallet, Whitlock's clothing, and her body in quick succession. Her assailants had killed her by striking her head with a sixty-nine pound rock. Later investigators discovered that Strickler had taken Whitlock's driver's license, identification card, bank card, wristwatch, and earrings.[3] Investigators also located hairs matching Strickler's on Whitlock's clothing. They also found that the shirt Strickler had worn on the day of the murder contained human blood stains and semen stains consistent with Strickler's semen. Unidentified semen was also taken from Whitlock's body.[4]

At trial, the jury was instructed, *inter alia*, as to the crime of capital murder, the meaning of "deadly weapon," and the crime of robbery.[5] As to capital murder, the jury was instructed as follows:

> The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> (1) That the defendant killed Leanne Whitlock; and
>
> (2) That the killing was willful, deliberate and premeditated; and
>
> (3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit **or with the intent to defile** or was of a person during the commission of, or subsequent to, rape.[6]

As to the definition of "deadly weapon," the jury was instructed that "a 'deadly weapon' is any object or instrument that is likely to cause death or great bodily injury because of the manner, and under the circumstances, in which it is used."[7] As to the crime of robbery, the jury was instructed as follows:

> The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> (1) That the defendant intended to steal; and
>
> (2) That a motor vehicle and other personal property was taken; and
>
> (3) That the taking was from Leanne Whitlock or in her presence; and
>
> (4) That the taking was against the will of the owner or possessor; and
>
> (5) That the taking was accomplished by violence to the person or the threat of serious bodily harm.[8]

Strickler's attorney apparently did not object to any of the jury instructions.

The jury found Strickler guilty of capital murder (and fixed his punishment at death), guilty of robbery (and fixed his punishment as life imprisonment), and guilty of abduction (and fixed his punishment as life imprisonment).[9] The Supreme Court of Virginia affirmed Strickler's conviction, and the United States Supreme Court denied certiorari.[10] Strickler later filed a petition for habeas corpus. He made several claims, among them that his trial attorney's ineffective assistance of counsel should have served to invalidate his conviction. The Commonwealth moved to dismiss, and the circuit court granted this motion.[11] The Supreme Court of Virginia granted Strickler an appeal limited to two issues. First, Strickler contended that the trial court had erred in refusing to vacate his sentence because the capital murder jury instruction included the predicate offense of abduction with intent to defile. This

[1] *Strickler v. Murray*, 249 Va. 120, 122, 452 S.E.2d 648, 649 (1995).

[2] *Id.* at 123, 452 S.E.2d at 649.

[3] *Id.* at 123-24, 452 S.E.2d at 649-50.

[4] *Id.* at 124, 452 S.E.2d at 650.

[5] *Id.* at 124-25, 452 S.E.2d at 650.

[6] *Id.* (emphasis added).

[7] *Id.* at 125, 452 S.E.2d at 650.

[8] *Id.*

[9] *Id.* at 125-26, 452 S.E.2d at 650-51.

[10] *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991), *cert. denied*, 502 U.S. 944 (1991).

[11] *Strickler*, 249 Va. at 121-22, 452 S.E.2d at 648.