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WRIGHT v. COMMONWEALTH 248 Va. 485, 450 S.E.2d 361 (1994) Supreme Court of Virginia

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Stromberg appears to place the burden on the prosecution to show that the illegitimate basis was not used to convict the defendant. Again, the jury's verdict in *Stromberg* was a general one. The general verdict appears to have been the dispositive factor in this case, as it was impossible to tell which grounds the jury used to convict the defendant.³³ Thus, with a general verdict the defendant need only show that one of the grounds was unconstitutional. Presumably the burden is on the prosecution to show that the illegitimate grounds were not used to convict the defendant.

Applying that reasoning here, Strickler's conviction could have been based either on the abduction with intent to defile predicate offense (illegitimate) or the armed robbery predicate offense (legitimate). Since the jury's verdict does not clearly identify which offense it used to convict Strickler, under *Stromberg* the Supreme Court of Virginia cannot assume that the jury convicted Strickler based on the legitimate (i.e., correctly-instructed) offense. The prosecution would have to show that abduction with intent to defile was not used to convict Strickler.

Obviously defense attorneys should take care to insure that clients are not convicted of capital murder based on a non-existent capital murder offense. The first step is always to compare the evidence of the offense in the light most favorable to the Commonwealth to provisions of section 18.2-31. The statute is complex. For example, it contains two separate abduction sections—sections 18.2-31(1) and 18.2-31(8) (the

³³ *Id.*

³⁴ The Supreme Court of Virginia has addressed this issue many times and has continually held that "[i]n a robbery prosecution, where the violence against the victim and the trespass to his property combine in a continuing, unbroken sequence of events, the robbery itself continues as well for the same period of time." *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 543, 273 S.E.2d 48, 55 (1980), *cert. denied*, 451

subject of this case). Both of these subsections in turn refer to another statute, section 18.2-48. This statute covers drug-related homicides and incorporates by reference several other Virginia statutory provisions, but falls far short of encompassing all drug-related murders. If a statutory section is inapplicable under any evidence that could be presented by the Commonwealth, appropriate pre-trial actions may be taken to eliminate the charge from the case. The Virginia Capital Case Clearinghouse can help defense counsel with this problem.

Additionally, if a claim is defaulted as in *Strickler, Stromberg* may be of little help. Even though the Supreme Court of Virginia has broadly construed robbery's requirement of forcible taking from the victim to include takings after death,³⁴ that interpretation might well not have been as clear to the jury. The jury might well have found that the murder was committed during an abduction with intent to defile. Once no objection was made, however, the issue was evaluated and *Strickland*, not *Stromberg*, applied. The burden shifted to the defendant to prove prejudice—an impossible task if the robbery evidence was sufficient and the real basis for the guilty verdict was unknown.

Summary and analysis by:
Gregory J. Weinig

U.S. 1031 (1981); *accord Quesinberry v. Commonwealth*, 241 Va. 364, 373-74, 402 S.E.2d 218, 224, *cert. denied*, 502 U.S. 834 (1991). See also case summary of *Quesinberry*, Capital Defense Digest, Vol. 4, No. 1, p. 23 (1991); and Green, *Narrowing the Scope of Capital Murder During the Commission of a Robbery: When Must the Intent to Rob Arise?*, Capital Defense Digest, Vol. 5, No. 2, p. 45 (1993).

RAMDASS v. COMMONWEALTH

248 Va. 518, 450 S.E.2d 360 (1994)

WRIGHT v. COMMONWEALTH

248 Va. 485, 450 S.E.2d 361 (1994)
Supreme Court of Virginia

FACTS

Bobby Lee Ramdass was convicted for the capital murder of Mohammad Kayani. The capital murder charge was predicated on the commission of murder during the commission of a robbery while armed with a deadly weapon.¹ The jury fixed Ramdass' punishment at death, based on the "future dangerousness" aggravator of Virginia's capital murder statute.² The trial court imposed this sentence and sentences for the underlying crimes.³ The Supreme Court of Virginia affirmed this judgement and the sentences imposed.⁴

¹ Va. Code Ann. § 18.2-31(4) (Supp. 1994).

² *Ramdass v. Commonwealth*, 248 Va. 518, 519, 450 S.E.2d 360, 360 (1994).

³ *Id.* The court imposed a life sentence for the robbery and a four year sentence for the firearms violation.

⁴ *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993).

⁵ Va. Code Ann. § 18.2-31(4) (Supp. 1994).

⁶ Va. Code Ann. § 18.2-31(5) (Supp. 1994).

Dwayne Allen Wright was convicted of two offenses of capital murder for the killing of Saba Tekle in the commission of a robbery while armed with a deadly weapon⁵ and the killing of Tekle subsequent to attempted rape.⁶ The jury fixed Wright's punishment at death based on the "future dangerousness" aggravator.⁷ The trial court imposed this sentence and other sentences for the underlying crimes.⁸ The Supreme Court of Virginia affirmed the judgments and sentence of death.⁹

The United States Supreme Court granted writs of certiorari for both of these cases on June 20, 1994, vacating the judgments and remanding both cases "for further consideration in light of *Simmons v. South Carolina*."¹⁰

⁷ *Wright v. Commonwealth*, 248 Va. 486, 450 S.E.2d 362 (1994).

⁸ *Id.* The trial court imposed a life sentence for the robbery, ten years' imprisonment for the attempted rape, and two years imprisonment for the firearm violation.

⁹ *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379 (1993)

¹⁰ *Ramdass v. Virginia*, 114 S. Ct. 2701 (1994); *Wright v. Virginia* 114 S. Ct. 2701 (1994).

¹¹ 114 S. Ct. 2187 (1994).

HOLDING

The Supreme Court of Virginia held that in *Simmons v. South Carolina*¹¹ the United States Supreme Court required that a jury is entitled to be informed of parole information only when the defendant is ineligible for parole and "future dangerousness" is at issue in the sentencing phase of a capital murder trial.¹²

It further determined that at the time their penalty was being considered, both Ramdass and Wright would not have been ineligible for parole if sentenced to life imprisonment so therefore it was unnecessary to inform their sentencing juries concerning parole law.¹³ The court affirmed both trial court decisions and reinstated the capital murder convictions and death sentences.¹⁴

ANALYSIS/APPLICATION IN VIRGINIA

The Supreme Court of Virginia has taken a narrow view of the holding in *Simmons v. South Carolina* by allowing parole information to be provided to the jury only when the defendant was "ineligible for parole at the time he was before the sentencing jury."¹⁵

In Virginia parole eligibility is defined in Virginia Code section 53.1-151. A person is not eligible for parole if that person has been sentenced to death; has been convicted of three separate felony offenses of murder, rape or robbery by the presenting of a deadly weapon; or convicted of three separate felony controlled substance violations.¹⁶ Also, any person who is convicted of an offense and sentenced to life imprisonment after being paroled from a previous life sentence shall not be eligible for parole.¹⁷

Both Ramdass and Wright were potentially ineligible for parole under the "three strikes" rule established by Virginia Code section 53.1-151(B1). Due to the bifurcated trial process in a capital murder case,¹⁸ the outcome of the guilt phase of the capital murder trial does constitute one offense that is used in the calculation for parole eligibility. However, the statute states that the felony offenses may not be "part of a common act, transaction or scheme" for them to be counted separately, thus the predicate felonies that underlie the capital murder conviction may not be used in this calculation.¹⁹

Dwayne Wright had previously been convicted in Maryland of first degree murder, attempted murder, and two firearm offenses.²⁰ Only the murder conviction was an offense that could be counted as an offense which fits the requirements of Code section 53.1-151(B1). The only other conviction for Wright was at the guilt phase of the capital murder trial. Thus Wright had only two "strikes" and was not ineligible for parole. Under the Supreme Court of Virginia's analysis of the *Simmons* holding, the determination that Wright was not ineligible for parole and that the jury was thus not entitled to parole law information is proper.

Prior to his capital murder conviction, Bobby Lee Ramdass had been convicted for the armed robberies of two persons in Fairfax County. These robberies were part of the same transaction and were only counted

as one felony offense under Code section 53.1-151(B1).²¹ Ramdass also argued that he had been convicted of an armed robbery in Alexandria on January 7, 1933. These two separate convictions, combined with the capital murder conviction, would have made Ramdass ineligible for parole. The Supreme Court of Virginia determined that the January 7 conviction was a "conviction by a jury" and that "[j]udgment had not been entered on the verdict; therefore it cannot be considered as a conviction under Va. Code Ann. § 53.1-151(B1)."²² The court cited *Smith v. Commonwealth*²³ as its basis for holding that this conviction was not one that could be used in the parole eligibility calculation. In *Smith* a Commonwealth's attorney was found guilty of a violation of the "White Slave Act"²⁴ by a federal court jury. The accused moved the federal court to set aside this verdict and the court continued the case until the next term. The Commonwealth used this "conviction" as the basis for a complaint in state court that sought the removal of the attorney from his office under section 2705 of the Virginia Code of 1919, which allowed for removal if the officer was "convicted of an act constituting a violation of a penal statute involving moral turpitude."²⁵ The Supreme Court of Virginia held that judgment must have been ordered by the federal court on the jury's verdict before the "conviction" requirement of the state removal statute had been met.²⁶

The court in *Smith* discussed the different definitions that may be given to the word "conviction." The court admitted that many authorities designate that the "ordinary legal meaning" of conviction is "not that judgment has been entered or sentence pronounced, but only that a verdict of guilt has been returned."²⁷ The court stated, however, that this definition has only been applied when "the context in which the word is found has reference merely to something which should or may be done at a particular stage in a criminal prosecution triable by jury . . ."²⁸ When the meaning of conviction would impose any "punitive consequences as the result of the conviction of the offense," then a verdict will not be sufficient to establish a "conviction" when judgment has not been entered on that verdict.²⁹ The rationale for this decision appears to be that when the determination of whether a person has been "convicted" will be used to the detriment of the person, "conviction" must be read in the strictest sense and thus requires entry of judgment by the court. However, when a person would benefit or receive no detriment from having "conviction" used in its broadest sense, then a jury verdict should constitute a "conviction."

Applying this reasoning to *Ramdass*, the court has misapplied *Smith* to prohibit Ramdass from getting the benefit of the *Simmons* decision. When the court attempted to determine the parole eligibility of Ramdass, it was not for the purpose of imposing any punitive consequences or taking away any right Ramdass may have to parole. The ultimate goal of the analysis was to determine whether a jury should be given information on that parole status. This fits precisely within the circumstances that would require the "ordinary legal meaning" of conviction because it is a determination of "something which should or may be done at a particular stage in a criminal prosecution triable by jury . . ."³⁰ It also fits within

¹² *Ramdass*, 248 Va. at 520, 450 S.E.2d at 361; *Wright*, 248 Va. at 487, 450 S.E.2d at 362.

¹³ *Ramdass*, 248 Va. at 520, 450 S.E.2d at 361; *Wright*, 248 Va. at 485, 450 S.E.2d at 363.

¹⁴ *Ramdass*, 248 Va. at 521, 450 S.E.2d at 361; *Wright*, 248 Va. at 487, 450 S.E.2d at 363.

¹⁵ *Wright*, 248 Va. at 487, 450 S.E.2d at 362.

¹⁶ Va. Code Ann. § 53.1-151(B) (Supp. 1994).

¹⁷ Va. Code Ann. § 53.1-151(E) (Supp. 1994).

¹⁸ Va. Code Ann. §§ 19.2-264.3, 264.4 (1990).

¹⁹ Va. Code Ann. § 53.151(B1) (Supp. 1994). The court correctly applies this principle in *Ramdass*. See *Ramdass*, 248 Va. at 520, 450 S.E.2d at 361.

²⁰ *Wright*, 248 Va. at 487, 450 S.E.2d at 363.

²¹ *Ramdass*, 248 Va. at 520, 450 S.E.2d at 361.

²² *Id.*

²³ 134 Va. 589, 113 S.E. 707 (1922).

²⁴ U.S. Comp. St. § 8812-8819.

²⁵ *Smith*, 134 Va. at 590, 113 S.E. at 707.

²⁶ *Id.* at 592, 113 S.E. at 708.

²⁷ *Id.* at 595, 113 S.E. at 709.

²⁸ *Id.*

²⁹ *Id.* at 594, 113 S.E. at 709.

³⁰ *Id.* at 595, 113 S.E. at 709.

the rationale behind the *Smith* decision to use the broadest meaning of "conviction," since such a construction would not be to the detriment, but would benefit Ramdass by allowing the jury to see that life imprisonment without parole may be an appropriate and sufficient penalty. Thus *Smith* shows that Ramdass' "conviction" was sufficient to count as a "strike" when determining whether to give the jury parole law information.

The disallowance of this conviction as sufficient to establish parole ineligibility defies logic. It is established in *Simmons* that the capital murder conviction may be the final "strike" necessary to cause parole ineligibility. The Supreme Court of Virginia recognized this when it stated that the robbery and capital murder "convictions" arise from the same transaction and are thus considered as only one felony.³¹ However, due to the bifurcated nature of a capital murder trial, the court will not have entered a judgment on the jury's verdict until after the penalty phase of the trial. Thus the court is saying that the jury verdict of guilty in a capital trial is a "conviction" but other non-capital jury verdict convictions are not.

Prior to *Simmons*, it had been held that the Virginia Parole Board, not the courts, were to make determinations of parole eligibility.³² These decisions made sense when the question was when, if ever, the defendant would be eligible for release. After *Simmons*, however, the question is whether a defendant's parole status, if sentenced to life imprisonment, is a necessary or permissible component of his right to rebut the state's case for death and to present evidence in mitigation.³³ Obviously this determination must be made at trial. Understandably, there is uncertainty about whether "same transaction" issues are to be resolved by the judge or the jury,³⁴ or whether testimony from a parole official is necessary. After *Simmons*, however, the question must be answered at the trial of the capital case.

A new parole statute has recently been enacted providing that any person convicted of a felony that was committed on or after January 1, 1995, will be ineligible for parole.³⁵ For all capital defendants who meet this requirement, parole information will be allowed to be given to the jury under *Simmons*. If the defendant must rely on the earlier statutes to determine his parole eligibility, then defense counsel must prepare to litigate the parole status of the defendant. The aim is not only to prove

ineligibility if that is the case, but to preserve a record of the exact parole status of the defendant so that post-*Simmons* issues may be raised on appeal if necessary.

If the capital defendant would be statutorily eligible for parole if sentenced to life imprisonment, counsel should argue that, according to reasoning detailed by the Supreme Court in *Simmons*, the defendant should still be allowed to present parole information to the jury. The basis for the argument is, like *Simmons*, that the Eighth and Fourteenth Amendments require that this information be provided due to the misconceptions of most jurors concerning the meaning of "life imprisonment." Under the Eighth Amendment, the parole information is mitigation evidence that might serve as "a basis for a sentence less than death"³⁶ that must be allowed to be given to the jury. The withholding of such information diminishes the reliability that the jury's verdict of death was the appropriate punishment. This reliability requirement also stems from the Eighth Amendment. It may also be argued that, based on *Gardner v. Florida*,³⁷ the defendant's Fourteenth Amendment right to due process is violated because he was limited in his ability to rebut the prosecution's assertions of future dangerousness by his inability to show the jury that a non-capital sentence could adequately protect society.³⁸ Although it is generally wise to get parole information to the jury, there may be cases when it would be best not to litigate this issue. Defense counsel must be aware of the law of parole eligibility to determine whether this issue should be litigated in a particular case.

It is unlikely that the Supreme Court of Virginia will voluntarily retreat from its strict reading of the *Simmons* decision. However, it is important to litigate fully the issue of parole eligibility, even when the capital defendant may be eligible for parole. This will preserve the issue for later hearing by federal courts. Were it not for the preservation of issues by defense counsel in the *Simmons* case, there would be no *Simmons* decision by the United States Supreme Court. Therefore it is vital to base parole arguments on federal as well as state grounds and to continue to preserve these issues at each stage of the capital case.

Summary and analysis by:
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³¹ *Ramdass*, 248 Va. at 520, 450 S.E.2d at 361.

³² *Garrett v. Commonwealth*, 14 Va. App. 154, 157, 415 S.E.2d 245, 247 (1992). See also *Jackson v. Shields*, 438 F.Supp. 183, 184 (1977) (Boards of parole are "'given absolute discretion in matters of parole'", thus "courts cannot properly grant a parole or determine eligibility for parole.") (quoting *Tarleton v. Clark*, 441 F.2d 384 (5th Cir. 1971)).

³³ For a more comprehensive analysis of the questions that must be determined by the trial court under *Simmons*, see 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).

³⁴ *Fitzgerald v. Commonwealth*, 1995 WL 86261, at *4 (Va. 1995) ("same transaction" determination held to be question of law, not fact, but trial court did not rule).

³⁵ Va. Code Ann. § 53.1-165.1 (1994).

³⁶ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

³⁷ 430 U.S. 349 (1977) (holding that reliance by court on confidential presentence report that was not made available to the defendant violated the Eighth and Fourteenth Amendments, because it undermined the right to reliable procedures at sentencing phase of capital trial and denied him an opportunity to "deny or explain" such information).

³⁸ For a more complete discussion of these arguments for allowing parole information for parole eligible capital defendants, 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).