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TUGGLE V. THOMPSON 57 F.3d 1356 (4th Cir. 1995) United States Court of Appeals, Fourth Circuit

Tuggle's case because as in *Simmons* and *Skipper*, the uncertainty as to how the jury relied upon the Commonwealth's tainted, unrebutted evidence renders the process itself so unreliable and unsound that Tuggle's death penalty should be vacated. Any effort to engage in harmless-error analysis would only be an exercise in speculation about the results of a fundamentally flawed sentencing hearing. This fundamental flaw requires that Tuggle's death penalty be vacated despite the jury's separate finding of vileness.

Summary and analysis by:
Mary E. Eade

TUGGLE V. THOMPSON

57 F.3d 1356 (4th Cir. 1995)
United States Court of Appeals, Fourth Circuit

FACTS

Lem Davis Tuggle was convicted of capital murder committed during or subsequent to the rape of Ms. Jessie Geneva Havens.[1] After being denied certiorari three times by the United States Supreme Court and after being denied state habeas relief, Tuggle petitioned for federal habeas relief to the District Court for the Western District of Virginia, raising ten allegations.

The district court granted relief. The court found, *inter alia*, that the vileness instruction was unconstitutionally vague.[2] As a result, the court vacated the sentence and ordered that Tuggle be retried within six months.[3] The Commonwealth appealed.

HOLDING

The Fourth Circuit reversed the district court. As to the adequacy of the vileness instruction, the court concluded that it met the constitutional mandate of *Godfrey v. Georgia*.[4] Hence, it was sufficient to uphold Tuggle's death sentence.[5]

ANALYSIS/APPLICATION IN VIRGINIA

Tuggle challenged the adequacy of the vileness instruction, arguing that it was unconstitutionally vague.[6] What was particularly troublesome about the actual instruction was that it had omitted the words "qualitatively and quantitatively" from the traditional instruction (itself arguably vague) employed by Virginia courts to avoid having the vileness instruction struck down as too vague.[7] Nonetheless, the Fourth Circuit found that the instruction was not so vague as to violate *Godfrey v. Georgia*.[8]

To justify this finding, the Fourth Circuit distorted the reasoning of *Lowenfield v. Phelps*.[9] *Lowenfield* simply held that the purpose of aggravating circumstances is to narrow the class of persons eligible for the death penalty and that as long as this narrowing occurs at some point in the proceedings, the constitutional mandate is met. From this basic holding, the Fourth Circuit extrapolated the conclusion that "[s]ince under Virginia law the 'narrowing' is accomplished at both the guilt and sentencing stage, a defendant is given double protection and more than the Constitution requires."[10] The Fourth Circuit then erroneously suggested, in dicta, that because two narrowings occur in a Virginia capital trial, the constitution would be satisfied even where one of the narrowings is later found to be unconstitutionally vague.[11]

Lowenfield does hold that the constitution is satisfied so long as the narrowing of the class of murderers eligible to receive the death penalty occurs at some point in the proceedings, whether it be at the guilt or sentencing phase.[12] But to the extent the Fourth Circuit was suggesting that because in Virginia some narrowing occurs at the guilt phase, any further narrowing need not be subject to vagueness analysis, it clearly was wrong.

Lowenfield merely held that the Louisiana capital murder statutory scheme was constitutional in that it satisfactorily narrowed the class of death-eligible murderers.[13] Lowenfield had argued that because the statutory aggravating circumstance which the sentencer had found merely duplicated an element of the underlying offense of murder, the death sentence should be void.[14] The Supreme Court disagreed, holding that because Louisiana's definition of capital murder itself met constitutional requirements of adequately narrowing who was death eligible, no further narrowing **need** occur at the penalty phase.[15]

But *Lowenfield* most certainly did not say that if further narrowing factors are used, those factors are then exempt from a requirement that

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[1] Va. Code Ann. § 18.2-31(5) (Supp. 1995). The full facts of this case are described in the case summary of *Tuggle v. Netherland*, Capital Defense Digest, this issue.

[2] *Tuggle v. Thompson*, 57 F.3d 1356, 1359, 1361 (4th Cir. 1995). This case note will address only the issue concerning the sufficiency of the vileness instruction. *See* the case summary of *Tuggle v. Netherland*, Capital Defense Digest, this issue for a discussion of the Fourth Circuit's error in upholding the death sentence after future dangerousness had been thrown out.

[3] *Id.* at 1359.

[4] 446 U.S. 420 (1980).

[5] *Tuggle*, 57 F.3d at 1374. The court also ruled on a number of other issues that will not be addressed in this article. The rulings included findings that (1) pretrial publicity did not require a change of venue; (2) any error in denying the right to challenge potential jurors outside the panel's presence was harmless; and (3) the evidence was sufficient to support a finding of rape under Virginia law. This third holding was significant to the court's reversal of the district court's grant of relief, which had found that the Commonwealth had not established a prima facie case of rape because the evidence was insufficient to find penetration. *Id.* at 1367-70.

[6] *Id.* at 1372-73.

[7] *Id.* at 1373. Virginia's statutory vileness factor is identical to the factor struck down as unconstitutionally vague in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Consequently, Virginia has employed an instruction that purports to solve the vagueness problem. The instruction usually given comes from *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). It defines aggravated battery as, "Battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Id.* at 478, 248 S.E.2d at 149.

[8] *Tuggle*, 57 F.3d at 1372.

[9] 484 U.S. 231 (1988).

[10] *Tuggle*, 57 F.3d. at 1374.

[11] *Id.* at 1373-74.

[12] *Lowenfield*, 484 U.S. at 241-46.

[13] *Id.* at 244-46.

[14] *Id.* at 241.

[15] *Id.* at 246.

they be meaningful. Indeed, it would violate *Furman* to say that once in the category of people for whom the death penalty is possible, the jury could be given arbitrary factors to use in choosing whom to actually impose that penalty upon. Thus, where a state chooses to impose an additional narrowing, as Virginia does in requiring an aggravating factor to be found, that narrowing must also be meaningfully guided. That guidance can only come from an adequate definition.

This constitutional requirement recently was reiterated by the United States Supreme Court in *Tuilaepa v. California*.[16] In *Tuilaepa*, the Court addressed the question of whether certain statutory factors given to the sentencer to consider after a defendant was found death-eligible were unconstitutionally vague.[17] In order to avoid being vague and therefore unconstitutional, the Court concluded that the factor must have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding.'"[18]

Although the Court upheld the statutory factors at issue in *Tuilaepa*, it still did so only after subjecting them to vagueness analysis. In *Tuggle*, the Fourth Circuit was faced with an incomplete version of a vileness instruction that, even in its complete form, has serious vagueness problems. To the extent the Fourth Circuit was arguing that a non-vague definition of vileness was not required because the defendant had already been convicted of capital murder, its argument would violate the teachings of *Tuilaepa* and *Furman*.

Summary and analysis by:
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[16] 114 S. Ct. 2630 (1994).
[17] *Id.* at 2626.
[18] *Id.* (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring in judgment)).

BARNES v. THOMPSON

58 F.3d 971 (4th Cir. 1995)
United States Court of Appeals, Fourth Circuit

FACTS

Using an employee of Bon's Supermarket as a shield, Herman Barnes and accomplice James Corey forced their way into the Hampton store on June 27, 1985.[1] Owner Clyde Jenkins, age seventy-three, struggled with Barnes. Barnes shot him twice. Store employee Mohammed Afifi, running from the back of the store, jumped on Barnes. Barnes shot and killed Afifi after shaking him off his back. Jenkins then tried to get up but Barnes shot him again. When police arrived, they found an unfired gun under or near Jenkins' body. Jenkins died in the hospital two weeks later.[2]

Jenkins' gun was admitted into evidence at Barnes' trial, but no witness gave any testimony as to exactly where it was found. The Circuit Court for the City of Hampton convicted Barnes of capital murder and subsequently sentenced him to death based on the "vileness" aggravating factor.[3] The Supreme Court of Virginia affirmed the conviction and death sentence[4] and the United States Supreme Court denied certiorari.[5] Barnes filed a petition with the Commonwealth for writ of habeas corpus. The Circuit Court for the City of Hampton dismissed the petition and the Supreme Court of Virginia denied Barnes' petition for appeal.[6] The United States Supreme Court denied certiorari.[7]

Barnes next filed a habeas petition in federal court, raising the same issues he had in state court. He also raised a new claim, charging that the Commonwealth had violated his right to due process under *Brady v. Maryland*[8] and *United States v. Bagley*[9] by failing to disclose the specific location of Jenkins' gun.[10] Barnes moved to dismiss his first petition and filed a new one in state court, raising the *Brady* claim.[11] The state court dismissed it on the ground that, pursuant to Virginia Code section 8.01-654(B)(2), writs are not to be granted based on facts the petitioner knew about and could have included in previous petitions.[12]

Barnes filed his second federal habeas petition in 1992. The district court dismissed seven of his ten assignments of error, but ordered an evidentiary hearing on the other three: the *Brady* claim; an ineffective assistance of counsel claim; and a claim that the death penalty had been improperly imposed if the victim had been armed.[13] The court granted Barnes relief on the *Brady* claim, finding that although the suppression of the evidence concerning the victim's gun was not sufficient to undermine confidence in Barnes' capital murder conviction, it was sufficient to undermine confidence in the death sentence. The district court vacated the sentence accordingly, finding specifically that if Barnes had had evidence of the gun's location at trial, the trial court might not have found he had committed an aggravated battery and might not have found "vileness."[14] The district court denied Barnes relief on his ineffective assistance of counsel claim. The Commonwealth appealed, contending that the district court had erred in failing to find that Barnes had procedurally defaulted the *Brady* claim under Virginia Code section 8.01-654(B)(2).[15] Barnes cross-appealed the denial of his ineffective assistance of counsel claim.[16]

HOLDING

The United States Court of Appeals for the Fourth Circuit reversed the judgment of the district court as to the *Brady* claim, finding that Barnes had procedurally defaulted it, and had failed to show cause for the

[1] *Barnes v. Thompson*, 58 F.3d 971, 973 (4th Cir. 1995).
[2] *Id.*
[3] *Id.*
[4] *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987).
[5] *Barnes v. Virginia*, 484 U.S. 1036 (1988).
[6] *Barnes v. Thompson*, 58 F.3d at 973.
[7] *Barnes v. Thompson*, 497 U.S. 1011 (1990).
[8] 373 U.S. 83 (1963).
[9] 473 U.S. 667 (1985).
[10] *Barnes v. Thompson*, 58 F.3d at 973.
[11] Under *Rose v. Lundy*, 455 U.S. 509 (1982), Barnes had to exhaust all his state remedies before proceeding to federal court. Since he had not raised the *Brady* claim previously at the state level, he had to do so before bringing his entire case to federal court. The *Brady* claim is referred to as a "*Bagley* claim" by the Court of Appeals throughout its opinion. *Barnes*, 58 F.3d at 974.
[12] *Id.* at 973.
[13] *Id.*
[14] *Id.* at 973-74.
[15] *Id.* at 974.
[16] *Id.* at 979.