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SAVINO v. MURRAY

82 F.3d 593 (4th Cir. 1996)
United States Court of Appeals, Fourth Circuit

FACTS

On the evening of November 29, 1988, Joseph John Savino killed his lover, Thomas McWaters. Savino repeatedly beat McWaters in the head with a hammer, but because he was unconvinced that his blows had killed McWaters, Savino retrieved two knives from the kitchen and stabbed McWaters' in the back and neck. Leaving the knives imbedded in McWaters's body, Savino stole one hundred dollars in cash and fled. Savino was arrested the following day, and eventually admitted to police that he had killed McWaters.[1]

Savino pleaded guilty to capital murder and robbery charges. Following three days of testimony at the penalty phase, the trial judge found Savino to be a future danger and sentenced him to death. The Supreme Court of Virginia affirmed Savino's conviction and sentence, and the United States Supreme Court denied Savino's petition for writ of certiorari.[2]

Savino then filed a state *habeas* petition which the state circuit court, after two evidentiary hearings, dismissed. The Supreme Court of Virginia denied Savino's appeal, and the United States Supreme Court again denied Savino's petition for writ of certiorari.[3]

Raising fourteen separate claims, Savino filed a federal *habeas* petition in the United States District Court for the Western District of Virginia. The district court dismissed the petition and denied Savino's motion to amend or alter the judgment. Savino appealed, challenging the district court's decision with regard to only three claims: his "legal representation, guilty plea and future dangerousness."[4]

HOLDING

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court. It found that defense counsel's assistance was not ineffective,[5] Savino's guilty plea was knowing and voluntary,[6] and the admission of the Commonwealth's expert testimony in support of the future dangerousness aggravating factor did not violate Savino's rights.[7]

ANALYSIS/APPLICATION IN VIRGINIA

Claims of ineffective assistance of counsel and propriety of guilty pleas ordinarily turn on facts specific to each individual case. Accordingly, the court's rejection of these two claims contributes very little law and will not be discussed at length here. Conversely, the court's rejection of Savino's Fifth and Sixth Amendment claims regarding the use of testimony by the Commonwealth's expert, Dr. Centor, has serious implications for the defense of capital murders.

I. Ineffective Assistance of Counsel and Guilty Plea

Savino contended that defense counsel was ineffective for failing to inform him of other viable defenses before entering his guilty plea. Specifically, Savino claimed counsel should have disclosed or pursued: 1) a challenge to the admissibility of his confession; 2) a challenge to the robbery predicate of the capital murder statute; and, 3) an intoxication defense.[8] The court found that none of the defenses were viable in the particular circumstances of Savino's case. Accordingly, the court found that counsel's assistance was constitutionally adequate.[9]

It is important to note, however, that the court reaffirmed that a defendant's expressed intention to plead guilty in no way relieves defense counsel of his duty to "investigate possible defenses and to advise the defendant so that he can make an informed decision."[10] Unless counsel is certain that there is no reasonable probability that a potential defense would succeed at trial, counsel must advise the client and pursue such defenses.[11] Reasonable probability, as defined in *Strickland v. Washington*,[12] does not mean more likely than not. Rather, it means a "probability sufficient to undermine confidence in the outcome."[13]

II. Mental Health Expert Testimony Regarding Future Dangerousness[14]

The most important part of the opinion is that concerning the testimony of Dr. Centor, the Commonwealth's reciprocal expert, who was appointed pursuant to Va. Code Ann. § 19.2-264.3:1. Dr. Centor testified first at the penalty trial, as part of the Commonwealth's case in chief, that Savino would likely be dangerous in the future.[15]

Savino claimed that Dr. Centor's testimony was obtained and presented in violation of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel.[16] In rejecting Savino's Fifth and Sixth Amendment claims, the court resolved one issue against him about which reasonable people could differ, and then proceeded to decide the remaining issues in a bizarre fashion, laying waste to common sense and reason in its analysis of precedent and the plain language of Va. Code Ann. § 19.2-264.3:1.

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1 *Savino v. Murray*, 82 F.3d 593, 596-597 (4th Cir. 1996).
2 *Id.* at 597-598 (citations omitted).
3 *Id.* at 598 (citations omitted).
4 *Id.* (citations omitted).
5 *Id.* at 602.
6 *Id.* at 603.
7 *Id.* at 606.
8 *Id.* at 598-602.
9 *Id.* at 602.
10 *Id.* at 599 (citations omitted).
11 *Id.*
12 466 U.S. 668 (1984).
13 *Id.* at 694. Savino's guilty plea claim was rejected on the merits, although the court also found it to be procedurally defaulted. The default was upheld because the claim was not raised on direct appeal. *Savino*, 82 F.3d at 602. This finding may be correct, as it is a claim that the trial court erred in accepting the guilty plea. However, it is doubtful that Savino's appellate counsel, the same individuals who represented him at trial, would have raised it. Hence, as Savino contended, this claim is akin to an ineffective assistance of counsel argument. *Id.*
14 The characterization of the court's opinion in this section should be attributed to William Geimer, Director of Virginia Capital Case Clearinghouse, not the author.
15 *Savino*, 82 F.3d at 604.
16 *Id.* at 603.

In *Estelle v. Smith*,[17] the United States Supreme Court ruled that a capital defendant who faces the results of a psychological evaluation as evidence at the penalty stage is protected by both the Fifth and Sixth Amendments.[18] Not only is the defendant entitled under the Sixth Amendment to "receive notice of the scope, nature and intended use of the evaluation"[19] but the defendant's Fifth Amendment rights require that he receive a warning before the evaluation.[20] This warning must inform the defendant that if he gives up his right to remain silent and cooperates, "his statements to the evaluator may be used against him at the penalty phase."[21]

Relying on *Buchanan v. Kentucky*,[22] the court of appeals held that when a "defendant asserts a mental status defense and introduces psychiatric testimony in support of that defense, he may face rebuttal evidence from the prosecution taken from his own examination."[23] Thus, a defendant who asserts such a defense has "no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence."[24]

Buchanan dealt with the affirmative defense of extreme emotional disturbance which, if made out, would have reduced a charge of murder to manslaughter.[25] Va. Code Ann. § 19.2-264.3:1, however, concerns presenting mitigating evidence at a capital penalty trial, an entirely different context, which is supported by a long line of Supreme Court precedent.[26] Simply put, mitigation in a capital sentencing proceeding is not the same as presenting a "mental status defense," the situation in *Buchanan*. The Court has never directly decided the latter issue.

Even if the court of appeals is correct, however, that a defendant's notice of intent to introduce mental mitigation evidence under Va. Code Ann. § 19.2-264.3:1 constitutes a waiver of his Fifth Amendment privilege, the language remains overreaching: "it is clear that Savino waived his Fifth Amendment rights by requesting a psychiatric evaluation pursuant to the applicable statute."[27] The language of the statute itself belies this assertion. Under Va. Code Ann. § 19.2-264.3:1, defendants are entitled to request and receive an evaluation, and a report of it, making use of it as they wish. If the defendant decides not to have the expert testify at trial, the Commonwealth is not even entitled to a reciprocal examination, much less one at which the accused has no Fifth Amendment protection.[28]

From that point, the opinion gets stranger. Although the court acknowledged that defendants have a Sixth Amendment right to clear notice of the scope and possible use of any reciprocal examination,[29] it cited the language of Va. Code Ann. § 19.2-264.3:1 as satisfying this requirement.[30] The statute says nothing about examinations relating to future dangerousness. In fact, on its face, the statute purports to limit the scope of the Commonwealth's reciprocal examination to factors present at the time of the offense.[31] In *Stewart v. Commonwealth*,[32] the Supreme Court of Virginia found that the "order entered pursuant to the provisions of the Code § 19.2-264.3:1 gave sufficient notice that the proposed examination 'would be conducted by the Commonwealth's expert in an effort to produce evidence against Savino's interest.'"[33] Compare these interpretations of the notice requirement with *Estelle* itself, where no notice was found to have been given. In *Estelle* defense counsel was aware that the trial court file contained a report by the state psychiatrist referring to Smith as a "severe sociopath" but did not contain any specific reference to future dangerousness.[34]

Finally, to get around the fact that Dr. Centor was allowed to make his future dangerouness prediction as part of the Commonwealth's case in chief and not in rebuttal of defense mitigation evidence, the court, by accident or design, neglected to discuss what the statute actually requires.

The Commonwealth is explicitly forbidden by Va. Code Ann. § 19.2-264.3:1(G) to establish an aggravating factor by use of any statements, or any evidence derived from statements, made by the defendant during the reciprocal examination. Nonetheless, the court apparently gave credence to Dr. Centor's questionable assertion that his opinion was not based on statements made by Savino, but was instead formulated on

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17 451 U.S. 454 (1981).

18 *Id.* at 471.

19 *Id.* at 470-471.

20 *Id.* at 462-463.

21 *Savino*, 82 F.3d at 603 (citations omitted).

22 483 U.S. 402 (1987).

23 *Savino*, 82 F.3d at 604 (citations omitted).

24 *Id.*

25 *Buchanan*, 483 U.S. at 408 & n.8, 423.

26 The Supreme Court has held that the Eighth Amendment requires that the jury in a capital case, must consider a wide range of mitigating factors. *See, Perry v. Lynaugh*, 492 U.S. 302, 319-328 (1989) (finding error where trial court's instructions to the jury did not allow jury to consider as mitigating factor evidence of defendant's mental retardation and childhood abuse); *Eddings v. Oklahoma*, 455 U.S. 104, 112-116 (1982) (sentencing court's conclusion that it could not consider defendant's turbulent family history as a mitigating factor in deciding punishment was constitutional error); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (requiring death penalty schemes to allow consideration "as a mitigating factor, any aspect of defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death"). Furthermore, the court's holding that a defendant's stated intent to present expert testimony in mitigation constitutes a complete waiver of his Fifth Amendment rights may well be seen as a procedural barrier to the presentation of mitigation, something the Supreme Court has forbidden in other contexts. *See, McKoy v. North Carolina*, 494 U.S. 433, 439-444 (1990) (striking down a North Carolina statute that held that a mitigating factor can only be considered if all jurors find it present because one juror can prevent others from considering mitigating factor); *Mills v. Maryland*, 486 U.S. 367, 373-375 (1988) (holding Maryland death penalty sentencing instructions which a reasonable juror could interpret as requiring unanimous findings by jury on absence as well as presence of mitigating factors unconstitutional); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (finding exclusion of evidence at sentencing phase based upon Georgia's hearsay rule unconstitutional).

27 *Savino*, 82 F.3d at 604.

28 Va. Code Ann. § 19.2-264.3:1(E) and (F).

29 *Savino*, 82 F.3d at 603. It is clear that in order to consult effectively with his client, counsel must be advised of the scope and nature of the Commonwealth's examination. *Buchanan*, 483 U.S. at 424.

30 *Savino*, 82 F.3d at 604.

31 Va Code Ann. § 19.2-264.3:1(F) reads, in relevant part:

> "If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances **relating to the defendant's mental condition at the time of the offense** the court shall appoint one or more qualified experts to perform such an evaluation." (emphasis added).

32 245 Va. 222, 427 S.E.2d 394 (1993).

33 *Id.* at 243, 427 S.E.2d at 408 (quoting *Savino v. Commonwealth*, 239 Va. 534, 544, 391 S.E.2d 276, 281-282, *cert. denied*, 498 U.S. 882 (1990)).

34 *Estelle v. Smith*, 451 U.S. 456, 458 (1981); *See* Case Summary of *Payne v. Netherland*, Capital Defense Journal, this issue.

the basis of three factors: Savino's previous criminal history; the nature of the crime; and, his history of substance abuse.[35] However, when the defense expert, Dr. Hovermale, was cross-examined by the Commonwealth, it was revealed that Dr. Centor's report contained statements made by the defendant. Instead of addressing this fourth factor, evidence that Dr. Centor was less than truthful about the source of his opinion, the court simply ignored it. Finally, the court held that even if Dr. Centor's testimony constituted error, it was harmless, speculating that excluding Savino's statements would "probably have had little if any effect on Dr. Centor's assessment."[36]

Because the court's analysis of Savino's Fifth and Sixth Amendment rights regarding the use of the Commonwealth's mental health expert testimony concerning future dangerous is erroneous, defense counsel must preserve these issues. Unless and until the United States Supreme Court reverses, counsel must give serious consideration to this strategy: using a mental health expert but precluding him or her from testifying at trial, even if the defendant's sanity or competency is in question.[37]

Summary and Analysis by:
C. Cooper Youell, IV

35 *Savino*, 82 F.3d at 605.

36 *Id.* at 605-606.

37 *See* Case Summary of *Payne v. Netherland,* Capital Defense Journal, this issue (where a competency evaluation was used against a defendant before the enactment of Va Code Ann. § 19.2-264.3:1.) See also; Collica, *Alice in Wonderland Interpretations: Rethinking the Use of Mental Mitigation Experts*, Capital Defense Journal, this issue.

TUGGLE v. NETHERLAND

79 F.3d 1386 (4th Cir. 1996)
United States Court of Appeals, Fourth Circuit

FACTS

In 1984, Lem Tuggle was convicted of capital murder committed during or subsequent to a rape.[1] He was sentenced to death after the jury found the Commonwealth had proven both the future dangerousness and vileness aggravating factors. Tuggle's conviction and sentence were affirmed by the Supreme Court of Virginia on direct appeal.[2] The United States Supreme Court vacated Tuggle's sentence and remanded the case for reconsideration in light of *Ake v. Oklahoma*,[3] which had held that when the prosecution presents psychiatric evidence to prove future dangerousness, due process requires that an independent psychiatrist also be appointed to assist the defense.[4]

On remand, the Supreme Court of Virginia held that the trial court had indeed violated *Ake* by denying Tuggle an independent psychiatrist to rebut the prosecution's psychiatric evidence of future dangerousness during the sentencing phase.[5] However, the Supreme Court of Virginia reaffirmed Tuggle's death sentence. Relying on *Zant v. Stephens*,[6] the court reasoned that because the vileness factor was separately found by the jury in addition to future dangerousness, the vileness factor alone was sufficient to sustain the sentence.[7]

Tuggle subsequently filed and was denied a petition for writ of *certiorari*,[8] a petition for state *habeas* relief, and a third petition for *certiorari*.[9] Tuggle then petitioned for a writ of *habeas corpus* in United States District Court, and the district court granted relief on several grounds, including *Ake*. The Fourth Circuit Court of Appeals, however, reversed and remanded, agreeing with the Supreme Court of Virginia that Tuggle's death sentence was valid under *Zant*.[10] The United States Supreme Court, however, granted *certiorari* and vacated the judgment of the court of appeals.[11] The Supreme Court noted that while *Zant* had held that an invalid aggravating circumstance does not always invalidate a death sentence, the presence of an otherwise valid aggravator cannot excuse the unconstitutional admission or exclusion of evidence. Thus, while the Court was willing to assume that the *Ake* error had no influence upon the jury's finding of "vileness," the Court was not willing to assume that the *Ake* constitutional error had no effect on the jury's ultimate decision on whether to impose a life sentence or the death penalty. Accordingly, the Court remanded the case to the court of appeals for a determination of whether harmless error analysis was applicable.[12]

HOLDING

On remand, the Fourth Circuit held that the *Ake* error was "trial error," as opposed to structural error, and therefore was subject to harmless-error analysis.[13] The court of appeals further concluded that federal *habeas* courts must apply the *Brecht* standard of harmlessness, which requires a court to find that the error had a "substantial and injurious effect or influence in determining the jury's verdict" before it can grant relief.[14]

1 Va. Code Ann. § 18.2-31(5) (Supp. 1995).

2 *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984) (*Tuggle I*).

3 470 U.S. 68 (1985).

4 *Id.* at 83.

5 *Tuggle v. Commonwealth*, 230 Va. 99, 334 S.E.2d 838 (1985) (*Tuggle II*).

6 462 U.S. 862 (1983).

7 *Tuggle*, 230 Va. at 108-11, 334 S.E.2d at 844-46.

8 *Tuggle v. Virginia*, 478 U.S. 1010 (1986).

9 *Tuggle v. Bair*, 503 U.S. 989 (1992).

10 *Tuggle v. Thompson*, 57 F.3d 1356, 1374 (4th Cir. 1995).

11 *Tuggle v. Netherland*, 116 S. Ct. 283 (1995).

12 *Id.* at 285.

13 *Tuggle v. Netherland*, 79 F.3d 1386, 1391 (4th Cir. 1996).

14 *Brecht v. Abramson*, 507 U.S. 619 (1993). In *Brecht*, the Supreme Court concluded that granting federal collateral relief upon a mere "reasonable possibility" that the error contributed to the verdict would be inconsistent with the historic purpose of *habeas corpus* to afford relief only to those who have been "grievously wronged" by society. *Id.* at 637.