Capital Defense Journal

Volume 12 | Issue 1 Article 27

Fall 9-1-1999

Walker v. Commonwealth 515 S.E.2d 565 (Va. 1999)

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I. Facts

On the evening of November 22, 1996, Catherine Taylor ("Taylor") and Stanley Roger Beale ("Beale") were at home at the University Terrace Apartments with their children, Bianca, Monique, and Sidney. Taylor was in the bedroom with Sidney when she heard "a boom-like noise." As Taylor entered the living room, she saw a man kick in the front door. The man, whom she later identified as Darick Demorris Walker ("Walker"), was holding a gun yelling "Where is he?" Still shouting, Walker asked Beale, "what you keep coming up to my door, what you looking for me for?" Beale denied knowing who Walker was or where he lived. Taylor's thirteen year old daughter, Bianca, also shouted at Walker that Beale did not know him. Walker began shooting at Beale. Taylor took Bianca and Monique into the bathroom to hide in the bathtub. Walker shot Beale three times, killing him.[1]

Both Bianca and fourteen-year-old Tameira Patterson ("Patterson") testified that they knew Walker as "Todd" and positively identified him in a photo lineup. Patterson, who was visiting a friend at the University Terrace Apartments on the day of the murder, testified that "Todd" entered her friend's apartment and later told her "I shot him."[2]

On June 18, 1997, Andrea Noble ("Noble") and Clarence Threat ("Threat"), asleep in their bedroom, were awakened when they heard a "pop," followed by a knock, coming from the screen door.[3] Noble went to the door and peered through a small window, but did not see anyone. Noble twice returned to the door after hearing knocking, but still did not see anyone. Sometime thereafter, the door was "kicked open" and upon entering the living room, Noble saw a man she knew as "Paul" holding a gun. At trial, she identified "Paul" as Walker. "Paul" pointed the gun at Noble. She began backing up and, when they reached the bedroom, "Paul" hit Noble with the back of the gun and shot Threat in the leg. After a verbal exchange with Threat, "Paul" shot him seven times, once fatally to

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1. Walker v. Commonwealth, 515 S.E.2d 565, 568 (Va. 1999).
2. *Id.* at 569.
3. *Id.*

the chest. "Paul" threatened to come back and kill Noble and her children if she told anyone about the incident.[4]

Walker was tried and convicted of the capital murder of Stanley Roger Beale and Clarence Threat within a three year period, in violation of section 18.2-31(8) of the Virginia Code.[5] The jury found the existence of both aggravating factors, vileness and future dangerousness, and recommended the death sentence. The judge imposed the sentence accordingly.[6]

On appeal, Walker alleged the following trial errors: (1) Virginia's death penalty statutes are unconstitutional;[7] (2) the trial court's failure to order the Commonwealth to provide him with a bill of particulars violated his Sixth Amendment right to effective assistance of counsel;[8] (3) *Brady v. Maryland*[9] entitled him to discovery of all evidence and materials which the Commonwealth intended to rely upon to establish his guilt;[10] (4) he was denied additional peremptory challenges necessary to ensure his Sixth, Eighth, and Fourteenth Amendment rights;[11] (5) the admission of evidence of unadjudicated acts violated his Sixth Amendment right to effective assistance of counsel;[12] (6) the trial court improperly admitted certain evidence and improperly excluded other evidence;[13] (7) the Commonwealth's evidence was insufficient to convict him of capital murder as a matter of law;[14] and (8) the death sentence was imposed arbitrarily, and was excessive and disproportionate to penalties imposed in similar cases.[15]

II. Holding

The Supreme Court of Virginia, rejecting all of Walker's claims, concluded that the trial court committed no reversible error and that the death sentence was properly imposed.[16]

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4. *Id.*

5. *Id.* at 568. *See* VA. CODE ANN. § 18.2-31(8) (Michie 1996 & Supp. 1999). Walker was also convicted of four counts of the use of a firearm and two counts of burglary.

6. *Walker*, 515 S.E.2d at 568.

7. *Id.* at 569. *See* VA. CODE ANN. §§ 19.2-264.2-19.2-264.5, 17.1-313 (Michie 1999).

8. *Walker*, 515 S.E. 2d. at 570.

9. 373 U.S. 83 (1963).

10. *Walker*, 515 S.E.2d at 570. *See* Brady v. Maryland, 373 U.S. 83, 87 (1993) (holding that suppression by the prosecution of evidence favorable to the accused violates due process if the evidence is material to punishment or guilt).

11. *Walker*, 515 S.E.2d at 571.

12. *Id.* at 571.

13. *Id.* at 573-74.

14. *Id.* at 575.

15. *Id.* at 576-77.

16. *Id.* at 577.

III. Analysis/Application[17]

A. Bill of Particulars

Walker requested a bill of particulars outlining the grounds for the capital murder charge and the evidence on which the Commonwealth intended to rely, including a request for a "narrowing construction" of the aggravating factors.[18] The Commonwealth informed Walker that it planned

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17. The court addressed but routinely dismissed several of Walker's claims and therefore they will not be discussed in detail in this note. The claims are as follows:

(1) Constitutionality of Virginia's death penalty. Walker argued that the aggravating factors used in sentencing are unconstitutionally vague. *Walker*, 515 S.E.2d at 569. He further alleged that the failure to clearly define the aggravating factors for the jury and properly inform the jury regarding mitigation evidence resulted in a violation of his rights under both the Virginia Constitution as well as the Eighth and Fourth Amendments of the United States Constitution. *Id.* The court summarily dismissed Walker's contentions as being long-settled by previous decisions upholding the constitutionality of Virginia's death penalty statutes. *Id.*

(2) Discovery. Walker maintained that under *Brady* he was entitled to all of the evidence, information, and materials which the Commonwealth intended to use in establishing his guilt. *Walker*, 515 S.E.2d at 570. Affirming that both the Due Process Clause and *Brady* require only the disclosure of exculpatory evidence, the court saw absolutely no merit in Walker's claim and concluded that Walker received all the discovery to which he was entitled. *Id.*

(3) Admissibility of photographs into evidence. Walker contested the admission of crime scene and autopsy photographs into evidence during the guilt and sentencing phases. He claimed that the photographs were presented to induce jury sympathy and were not substantially necessary to the Commonwealth's case. *Walker*, 515 S.E.2d at 574. The Fourth Circuit averred that photographs may be used to show method, atrociousness, motive, malice, and premeditation, and that the decision whether to admit them is within the trial court's discretion which will not be upset save a clear abuse of discretion. *Id.* The court found that the crime scene photos were accurate representations of the scene and depicted incidents of the murder which were relevant and probative. *Id.* Likewise, the court adjudged that the autopsy photos depicting the victim's wounds were relevant to the issue of vileness. *Id.* Hence, the court determined that the trial court had not abused its discretion by admitting the photographs into evidence. *Id.*

(4) Admissibility of toxicologist report. Walker argued that the toxicologist report detailing the presence of drugs in each victim's body should have been admitted as circumstantial evidence of a possible alternative motive for someone else who may have committed the murders. *Walker*, 515 S.E.2d at 574. The court rebuffed Walker's claim and held that the presence of drugs in a victim's body alone does not support the inference that someone else committed the murder and thus the evidence was irrelevant and inadmissible. *Id.*

(5) Additional peremptory challenges. The court found that Walker failed with his claim that he was entitled to additional peremptory challenges in order to insure his rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. *Walker*, 515 S.E.2d at 571. Neither the United States Constitution nor Virginia law affords criminal defendants the right to additional peremptory challenges. *Id.* (citing Mu'Min v. Commonwealth, 500 U.S. 415, 424-425 (1991); Strickler v. Commonwealth, 404 S.E.2d 227, 232 (Va. 1991); Spencer v. Commonwealth, 393 S.E.2d 609, 613 (Va. 1990)); *see* VA. CODE ANN. § 19.2-262 (Michie 1999). The court held that Walker did not advance an argument necessitating a departure from the court's previous decisions. *Walker*, 515 S.E.2d at 571.

18. *Walker*, 515 S.E.2d at 570.

to establish both future dangerousness and vileness as a basis for the death sentence.[19] The prosecution also generally explained the evidence on which it intended to rely to prove the aggravating factors.[20] On appeal, Walker argued that the trial court's failure to order a bill of particulars denied him of his Sixth Amendment right to effective assistance of counsel and his underlying due process right.[21]

The court rejected Walker's claim, asserting that there is no general constitutional right to discovery in criminal cases, including those involving capital murder.[22] The court asserted that a defendant may be entitled to a bill of particulars if the indictment is found to be insufficient.[23] Otherwise, the trial court may require a bill of particulars at its discretion.[24] Because Walker did not allege that the indictment was insufficient and there was no evidence that the trial court abused its discretion, the court found Walker's argument baseless.[25] However, the court's finding that a bill of particulars is not required unless an indictment is insufficient ignores its own longstanding precedent which categorically states that a bill of particulars cannot cure a defective indictment. In *Hagood v. Commonwealth*[26] and *Pine v. Commonwealth*,[27] the court pointed out that a bill of particulars may supplement a generalized indictment, but can never remedy a bad indictment.[28] This new rule, that a defendant must challenge the sufficiency of the indictment before moving for a bill of particulars, first appeared in *Swisher v. Commonwealth*.[29] This rule directly contradicts prior Virginia law as well as the law as generally understood in the United States.[30] This new rule also confuses the role of a motion to dismiss the indictment for failure to charge an offense[31] with the motion for bill of particulars.

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19. *Id.*

20. *Id.*

21. *Id.* at 569.

22. *Id.* at 570 (citing Strickler, 404 S.E.2d at 233).

23. *Id. See Strickler*, 404 S.E. 2d at 233 (holding that an indictment is sufficient if it gives the accused "notice of the nature and character of the offense charged so he can make his defense") (citation and internal quotation marks omitted).

24. *Walker*, 515 S.E.2d at 570.

25. *Id.*

26. 162 S.E. 10 (Va. 1932).

27. 93 S.E. 652 (Va. 1917).

28. *See* Hagood v. Commonwealth, 162 S.E. 10, 12 (Va. 1932); Pine v. Commonwealth, 93 S.E. 652, 659 (Va. 1917).

29. 506 S.E.2d 763, 768 (Va. 1998).

30. *See* L.S. Tellier, Annotation, *Right of Accused to Bill of Particulars*, 5 A.L.R.2d 444 (1949).

31. *See* VA. SUP. CT. R 3A:9(b)(1).

C. Unadjudicated Criminal Acts

Walker contested the use of unadjudicated criminal acts in the sentencing phase.[32] Walker challenged the admission of the unadjudicated criminal conduct on the following grounds: (1) absent a direct connection of the evidence to Walker by some standard of proof, the evidence failed to meet the test of relevancy;[33] (2) due process requires proof beyond a reasonable doubt of conduct used to expose a defendant to additional punishment;[34] and (3) the use of unadjudicated criminal acts effectively denied his due process rights to notice and meaningful opportunity to be heard and thus denied him the Sixth Amendment right to effective counsel.[35]

Evidence of any prior violent criminal conduct is relevant to the future dangerousness determination since it tends to show a defendant's propensity to commit future violent acts.[36] Nevertheless, evidence used to establish an ultimate fact must be measured by some standard of proof.[37] The ultimate fact–in this case, future dangerousness–must be established beyond a reasonable doubt.[38] The court concluded that each piece of evidence offered to prove the ultimate fact is not subject to the reasonable doubt standard of proof.[39] In other words, the prosecutor need not establish beyond a reasonable doubt the evidence used as a predicate to a finding of future dangerousness.[40]

Walker further contended that unadjudicated criminal acts must be tested by the reasonable doubt standard at sentencing in a capital murder case "because it exposes a defendant to a greater punishment and presents a radical departure from customary sentencing procedures."[41] The court rejected this claim on the ground that a defendant is subject to the death penalty upon a statutory finding of future dangerousness or vileness, which

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32. *Walker*, 515 S.E.2d at 571.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 571 (citing Pruett v. Commonwealth, 351 S.E.2d 1, 11-12 (Va. 1986) (noting that criminal conduct is relevant regardless of whether it has been adjudicated)).

37. *Id.*

38. *Id.*

39. *Id.*

40. The use of unadjudicated criminal acts to determine future dangerousness absent a finding that the defendant committed an act beyond a reasonable doubt diminishes the great amount of reliability which a death sentence requires. For a more thorough discussion on the constitutionality of Virginia's use of unadjudicated criminal acts in the sentencing determination, see Tommy Barrett, *A Modest Proposal: Requiring Proof Beyond A Reasonable Doubt For Unadjudicated Acts Offered To Prove Future Dangerousness*, CAP. DEF. J., Spring 1998, at 58.

41. *Walker*, 515 S.E.2d at 571.

must be established by proof beyond a reasonable doubt.[42] The court referred to the United States Supreme Court's holding in *McMillan v. Pennsylvania*[43] to affirm that the prosecution need not "prove beyond a reasonable doubt every fact it recognizes as a circumstance affecting the severity of punishment."[44]

The court admitted that Walker's attempt to raise a Sixth Amendment claim[45] without raising the issue of counsel's performance at trial may be sufficient in some situations.[46] However, such a finding requires circumstances which warrant a presumption of ineffectiveness.[47] The admission of unadjudicated criminal conduct fails to raise an presumption of ineffective assistance of counsel.[48]

D. Prison Life as Mitigating Evidence

Walker sought to use testimony regarding the conditions of prison life as a mitigating factor during the sentencing phase.[49] The court, reaffirming its decision in *Cherrix v. Commonwealth*,[50] held that testimony regarding prison conditions is not proper mitigating evidence.[51] The court in both *Walker* and *Cherrix* asserted that evidence of the conditions of life imprisonment without parole cannot be introduced to mitigate future dangerousness. The Commonwealth's burden of proving future dangerousness beyond a reasonable doubt necessitates a showing that the defendant is a continuing

42. *Id.* at 572. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 1999).

43. 477 U.S. 79 (1986).

44. *Walker*, 515 S.E.2d at 572 (quoting McMillan v. Pennsylvania 477 U.S. 79, 85 (1986)) (citations omitted). Note that the United States Supreme Court's decision in *Jones v. United States*, 119 S. Ct. 1215 (1999) casts doubt upon the principle stated in *McMillan*. *See Jones*, 119 S. Ct. at 1216 (holding that statutory provisions establishing higher penalties when the offense resulted in serious bodily injury or death were additional elements of the offense to be proven beyond a reasonable doubt rather than mere sentencing enhancements to be proven by a preponderance of evidence).

45. *Walker*, 515 S.E.2d at 572. Walker claimed that forcing an attorney to defend against past unadjudicated criminal conduct is "beyond the resources and realm of effective representation." *Id.*

46. *Id.*

47. *Id.* at 572-73 (citing United States v. Cronic, 466 U.S. 648, 662 (1984)). The court gives the following examples of circumstances which may justify a presumption of ineffectiveness: (1) where counsel was totally absent; (2) where counsel was prevented from assisting during a critical phase; and (3) when counsel was prevented from exercising independent judgment in conducting the defense. *Id.*

48. *Id.* at 573.

49. *Id.* at 574. Walker wished to introduce the testimony of the Chief of Operations for the Virginia Department Corrections to attest to the conditions of life imprisonment in a maximum security facility without parole. *Id.*

50. 513 S.E.2d 642 (Va. 1999).

51. *Walker*, 515 S.E.2d at 574 (citing Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999)).

threat to society.[52] However, death and life without parole are the only sentencing options for defendants convicted of capital murder in Virginia.[53] Thus, a defendant convicted of capital murder poses a threat solely to "prison society." Accordingly, defense attorneys should offer testimony of prison life and the unavailability of parole to directly rebut the prosecution's assertion that a defendant is a continuing threat to prison society, rather than offering it as mitigating evidence.[54] Pursuing this course of action should guarantee admission of evidence of prison life and avoid the holding in *Cherrix*. The Virginia Capital Case Clearinghouse is developing this argument and defense attorneys are encouraged to contact the Clearinghouse for more information.

E. Admissibility and Sufficiency of Evidence

1. Cartridge

Steve Martin ("Martin"), property manager for the University Terrace Apartments, found a cartridge case in Walker's previous apartment.[55] A certificate of analysis matched this cartridge case to cartridge cases discovered at the scene of the Beale murder.[56] Walker objected to admission of Martin's testimony and the certificate of analysis on the grounds that they were irrelevant, immaterial, and prejudicial in excess of their probative value.[57] The court asserted that every fact, regardless of how minute, which "establishes the probability or improbability of a fact in issue, is factually relevant and admissible."[58] Because Martin's testimony and the certificate of analysis implicated Walker in the Beale murder, the court found that the evidence was indeed relevant.[59] The court also explained that the four months that had elapsed between Martin's discovery of the cartridge and the murder went only to the weight of the evidence and not its relevancy or admissibility.[60] Furthermore, the court acknowledged that exclusion or admission of factually relevant evidence by weighing its probative value against the risk of unfair prejudice is a determination within the trial court's

52. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 1999).

53. *See* VA. CODE ANN. §§ 53.1-151(B1), 53.1-165.1. (Michie 1999).

54. *See* David D. Leshner, Case Note, 11 CAP. DEF. J. 419 (1999) (analyzing *Cherrix*, 513 S.E.2d 642).

55. *Walker*, 515 S.E.2d at 573.

56. *Id.*

57. *Id.*

58. *Id.* (citing Epperly v. Commonwealth, 294 S.E.2d 882, 891 (Va. 1982)).

59. *Id.*

60. *Id.*

discretion.[61] The court held that Walker failed to establish prejudice from the admission of evidence regarding the cartridge; thus, there was no error.[62]

2. *Sufficiency of the Evidence*

Walker further argued that the Commonwealth's guilt evidence was insufficient as a matter of law in that the sole evidence, eyewitness testimony, was inherently incredible.[63] Specifically, Walker asserted that the ages of two of the witness (thirteen and fourteen), contradictory statements by one witness, and inconsistent statements by another, rendered the evidence inherently incredible.[64] Without much discussion, the court pronounced that the trier of fact is the sole judge of witnesses' credibility and that while those issues are to be weighed, they do not support a finding that the testimony was inherently incredible.[65]

F. Arbitrary Factor and Excessive/Disproportionate Death Sentence Review

Walker invoked section 17.1-313(C) of the Virginia Code,[66] which mandates the Supreme Court of Virginia to review whether a death sentence was imposed arbitrarily and whether the sentence was excessive or disproportionate to penalties imposed in similar cases.[67] The court found nothing in the record to suggest that the sentence had been imposed under the influence of passion, prejudice, or any other arbitrary factor.[68]

Walker's case is the court's first proportionality review of a death sentence imposed for the killing of more than one person within a three year period in violation of section 18.2-31(8) of the Code of Virginia.[69] Absent existing cases prosecuted under that statutory provision, the court examined *Walker* against factually similar cases in which the jury recom-

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61. *Id.*
62. *Id.* at 573-574.
63. *Id.* at 575.
64. *Id.*
65. *Id.*
66. Section 17.1-313(C) of the Virginia Code reads:

> In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

VA. CODE ANN. § 17.1-313(C) (Michie 1999).

67. *Walker*, 515 S.E.2d at 576.
68. *Id.*
69. *Id. See* VA. CODE ANN. § 18.2-31(8) (Michie 1999).

mended a death sentence.[70] Past juries have recommended death sentences where victims were killed at home in front of family members and in cases of multiple homicides.[71] The court found these situations analogous to *Walker* and concluded that the death sentence was proper.[72]

It should also be noted that the court considered the gap in time between Beale's and Threat's murders as demonstrative of a heightened disregard for human life beyond that found where multiple victims are killed in the same incident.[73]

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70. *Walker*, 515 S.E.2d at 576-77.
71. *Id.*
72. *Id.*
73. *Id.* at 577.