Capital Defense Journal

Volume 13 | Issue 1 Article 19

Fall 9-1-2000

Johnson v. Commonwealth 529 S.E.2d 769 (Va. 2000)

Johnson v. Commonwealth
529 S.E.2d 769 (Va. 2000)

I. Facts

On July 11, 1994, sixteen-year-old Shermaine A. Johnson ("Johnson") knocked on the door of Hope Denise Hall's ("Hall") apartment in Petersburg, Virginia. Johnson raped Hall and stabbed her fifteen times, inflicting several fatal wounds. Hall's nude body was found on the floor of her bedroom. The police found four bloody steak knives in Hall's apartment. Two of the knives were in the kitchen, along with a broken drinking glass. Johnson's blood was found on the handle of a knife found in Hall's bathroom, on the broken glass in Hall's kitchen, and on Hall's bedspread. The fourth knife was found on Hall's bed. Johnson's DNA, along with the DNA of a third person, was found in sperm on a vaginal swab taken from Hall's body.[1]

The Virginia Division of Forensic Science analyzed the blood and semen samples taken from the scene of the rape and murder. Jean M. Hamilton ("Hamilton"), the forensic scientist who performed the analyses, testified at Johnson's trial that after performing initial tests on the samples she performed a DNA test known as "restriction fragment length polymorphism" ("RFLP") on a semen sample from Hall's sheet and a semen sample from Hall's bedspread. In March of 1996 Hamilton compiled a DNA profile from the two samples and searched the Division of Forensic Science's DNA data bank, but found no matching profiles. In August of 1996 Hamilton again searched the DNA data bank and found one DNA profile that was consistent with the DNA profile of Hall's rapist. The consistent DNA profile belonged to Johnson. Hamilton performed further testing on a sample of Johnson's blood that was in police custody and estimated that his DNA profile would occur in about one out of 980, or one-tenth of one percent of African-Americans.[2]

Because Johnson was sixteen-years-old at the time of the crimes he was charged by petition in the Juvenile and Domestic Relations District Court of the City of Petersburg.[3] The juvenile court found probable cause to believe that Johnson committed the rape and murder and certified the charges to the grand jury. Johnson was charged and tried as an adult be-

---

1. Johnson v. Commonwealth, 529 S.E.2d 769, 773-74 (Va. 2000).

2. *Id.* at 774-75. Johnson is African-American.

3. *Id.* at 772-73; *see* VA. CODE ANN. § 16.1-241(A)(1) (Michie 2000) (providing for juvenile courts' original jurisdiction over the disposition of children who are alleged to be delinquent).

cause he had previously been tried and convicted of rape as an adult.[4] The April 1997 grand jury issued two indictments against Johnson, alleging rape in violation of Virginia Code section 18.2-61 and capital murder in the commission of rape or attempted rape in violation of Virginia Code section 18.2-31(5).[5] On June 17, 1998, Johnson filed a motion in the circuit court to dismiss the indictments on the ground that the circuit court had violated former Virginia Code section 16.1-269.6(B).[6] On June 29, 1998, the court entered an order pursuant to section 16.1-269.6(B) authorizing the attorney for the Commonwealth to seek indictments against Johnson. The grand jury returned new, identical indictments on July 2, 1998.[7]

A jury found Johnson guilty of rape and of capital murder in the commission of rape or attempted rape.[8] The jury found both aggravating factors, future dangerousness and vileness, and recommended a sentence of death.[9] After his conviction, Johnson moved the court to dismiss the indictments on the ground that the Commonwealth violated former Virginia Code sections 16.1-263 to -264 by failing to notify Johnson's father of the transfer hearings in juvenile court. The court denied the motion and sentenced Johnson to life in prison on the rape conviction and to death on the capital murder conviction.[10]

Johnson appealed to the Supreme Court of Virginia and asserted the following claims: (1) the death penalty constitutes cruel and unusual punishment in violation of the United States Constitution and the Constitution of Virginia; (2) Virginia's death penalty statutes do not provide meaningful

---

4. *Johnson*, 529 S.E.2d at 777. Virginia Code § 16.1-271 states that "[a]ny juvenile who is tried and convicted in a circuit court . . . shall be considered and treated as an adult in any criminal proceeding resulting from any future alleged criminal acts." VA. CODE ANN. § 16.1-271 (Michie 2000).

5. *Johnson*, 529 S.E.2d at 773; *see* VA. CODE ANN. § 18.2-61 (Michie 2000) (defining rape as engaging in sexual intercourse against a victim's will by force, threat or intimidation, or through the use of the victim's mental or physical incapacity); VA. CODE ANN. § 18.2-31(5) (Michie 2000) (defining one of the predicates for capital murder as "willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape).

6. *Johnson*, 529 S.E.2d at 773. The opinion of the court makes reference to former Virginia Code § 16.1-296(B). However, the requirement to which the court refers in its opinion appears in former Virginia Code § 16.1-269.6(B). Former § 16.1-269.6(B) required the circuit court to review the transfer documents from the juvenile court before allowing the Commonwealth to seek indictments against a juvenile in the circuit court. VA. CODE ANN. § 16.1-269.6(B) (Michie 1994).

7. *Johnson*, 529 S.E.2d at 772-73; *see* § 16.1-269.6(B).

8. *Johnson*, 529 S.E.2d at 773.

9. *Id.*

10. *Id.*; *see* 1997 Va. Acts ch. 441 (requiring a juvenile court, after a petition has been filed to "direct the issuance of summonses, one directed to the juvenile . . . and another to the parents, guardian . . . and such other persons as appear to the court to be proper or necessary parties to the proceedings"); VA. CODE ANN. § 16.1-263 (Michie 1997).

guidance to jurors; (3) the aggravating factor of "vileness" is unconstitutionally vague and overbroad; (4) the aggravating factor of "future dangerousness" is unconstitutionally vague and unconstitutionally permits the consideration of unadjudicated conduct; (5) the penalty phase instructions do not adequately instruct the jury about mitigation; and (6) the trial court's post-verdict review of the death sentence is not constitutional because the trial court may consider hearsay evidence from a pre-sentence report and is not required to set aside the death sentence upon a showing of good cause.[11]

Johnson also asserted that the trial court erred in denying the following motions: (1) to dismiss the indictments because of errors in the juvenile transfer proceedings; (2) to suppress the evidence obtained by a search warrant because of unreasonable delay in its execution; (3) for appointment of co-counsel with expertise in DNA evidence; (4) to exclude evidence of prior crimes offered to prove identity; and (5) to allow evidence of third party guilt. Johnson contested the trial court's overruling of his *Batson* challenge, the Commonwealth's chain of custody of his blood sample, and the trial court's allowance of courtroom spectators wearing buttons featuring Hall's picture. Johnson also challenged the constitutionality of Virginia's DNA data bank, the qualifications of the Commonwealth's expert witnesses on DNA, and the sufficiency of the evidence offered to prove rape.[12]

II. Holding

The Supreme Court of Virginia rejected all of Johnson's claims and affirmed his death sentence.[13]

---

11. *Johnson* 529 S.E.2d at 776.

12. *Id.* at 776-85.

13. The Supreme Court of Virginia tersely rejected the following arguments, which will not be discussed in detail in this note: (1) imposition of the death penalty is cruel and unusual punishment; (2) Virginia's death penalty statutes do not provide meaningful guidance to the jury; (3) the aggravating factor of "vileness" is vague and overbroad; (4) the "future dangerousness" factor is vague and unconstitutionally permits the consideration of unadjudicated conduct; (5) the penalty phase instructions do not adequately instruct the jury about mitigation; and (6) the trial court's post-verdict review of the death sentence does not pass constitutional muster because the court may consider hearsay evidence and is not required to set aside the sentence of death upon a showing of good cause. *Id.* at 776.

The following rulings also will not be discussed in detail: (1) Johnson waived his claim of ineffective assistance of counsel due to counsel's inability to evaluate DNA evidence by withdrawing his request for appointment of co-counsel and requesting and receiving appointment of a DNA expert; (2) Johnson did not rebut the Commonwealth's evidence of the chain of custody of his blood sample that was included in the DNA data bank; (3) the court refused to disturb the trial court's ruling that the Commonwealth's expert witnesses were qualified to testify about DNA analysis and statistics; (4) the trial court did not abuse its discretion in refusing to allow the testimony that Johnson proffered regarding the alleged guilt of a third party, particularly since the third party had been eliminated as a possible source of DNA found at the crime scene; and (5) the evidence was sufficient to prove Johnson guilty of Hall's

III. Analysis / Application in Virginia

A. Motions to Suppress Fruits of Search Warrant

Johnson argued that there was an unreasonable delay between the date his DNA was first matched with DNA from the crime scene and the date that the search warrant was executed. He argued that the fruits of the search, his statement, blood sample, and hair samples, should be suppressed because of the unreasonable delay of thirty two days. The Supreme Court of Virginia rejected Johnson's argument because the DNA and other physical samples "were not subject to change over the 32-day period at issue."[14] The standard for determining the "staleness" of a search warrant is whether, at the time the search is actually conducted, the allegations in the warrant give probable cause to believe that the execution of the warrant will lead to the discovery of relevant evidence.[15] The court also held that Johnson's statement to the police upon the execution of the warrant was properly admitted since the warrant was valid.[16]

B. Constitutionality of DNA Data Bank

Johnson argued that Virginia Code sections 19.2-310.2 through -310.7, providing for the DNA data bank maintained by the Virginia Department of Forensic Sciences, violated numerous federal and state constitutional rights.[17] Johnson claimed that the statutory scheme violated the Fourth Amendment protection from unreasonable searches and seizures, the Fifth Amendment protection from self-incrimination, the Eighth Amendment protection from cruel and unusual punishment, and the constitutional right to due process, along with the parallel provisions of the Constitution of Virginia.[18] Johnson also criticized the statutes as being arbitrary, failing "to establish meaningful restrictions on the seizure and dissemination of DNA material" and being an "undue delegation of [legislative] powers."[19] The court rejected all of Johnson's arguments.[20]

The Supreme Court of Virginia agreed with two cases decided by the United States Court of Appeals for the Fourth Circuit, *Jones v. Murray*[21] and

---

rape. Proof of a charge of rape requires proof of penetration by a penis of a vagina, and proof that the sexual intercourse was accomplished by force, threat, or intimidation, against the victim's will. The court stated that "[t]he presence of Johnson's sperm in Hall's vagina alone is sufficient to support the finding that penetration occurred." The court also found that Hall's fifteen stab wounds, facial abrasions, and broken fingernail constituted "overwhelming" evidence that the sexual intercourse was against Hall's will. *Id.* at 781-85.

14. *Id.* at 778-79.
15. *Id.* at 778.
16. *Id.* at 779.
17. *Id.*; *see* VA. CODE ANN. §§ 19.2-310.2 to -310.7 (Michie 2000).
18. *Johnson*, 529 S.E.2d at 779.
19. *Id.*
20. *Id.* at 779-80.
21. 962 F.2d 302 (4th Cir. 1992).

Ewell v. Murray.[22] The cases stand for the proposition that Virginia's DNA data bank statutory scheme does not violate the Fourth Amendment guarantee of freedom from unreasonable searches and seizures.[23] The *Jones* court held that "in the case of convicted felons who are in the custody of the Commonwealth, we find that the minor intrusion caused by the taking of a blood sample is outweighed by Virginia's interest . . . in . . . improved law enforcement."[24] The Supreme Court of Virginia held that the same conclusion applied to the parallel provision of the Constitution of Virginia.[25] The court relied on *Schmerber v. California*[26] for its conclusion that giving a blood sample is not a communicative or testimonial act, and therefore does not implicate one's Fifth Amendment right against self-incrimination.[27] The court further found that the statutory scheme does not constitute cruel and unusual punishment under the Eighth Amendment and the parallel provision of the Constitution of Virginia, since "[t]he DNA statutes are not penal in nature."[28] The court rejected Johnson's due process and arbitrary nature arguments by stating that the enactment of the statutory scheme provided adequate notice that all persons convicted of a felony in Virginia will be required to give a blood sample and that the statutory scheme applies equally to every convicted felon.[29] Finally, the court noted that the statutory scheme restricts the use of DNA collected from each felon to law enforcement purposes and therefore provides "meaningful restrictions on the seizure and dissemination of DNA material."[30]

C. Batson *Challenge*

Johnson argued that the trial court erred in rejecting his *Batson* challenge to the jury panel.[31] The prosecutor used each of her five peremptory

---

22. Ewell v. Murray, 11 F.3d 482, 484 (4th Cir. 1993) (holding that Virginia Department of Corrections regulations taking away good conduct credits of inmates who refused to provide a blood sample for the DNA data bank did not violate the Fourth Amendment); *see* Jones v. Murray, 962 F.2d 302, 305-08 (4th Cir. 1992) (holding that Virginia's statutory provision for collecting DNA samples and storing them in a data bank does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures).

23. *Ewell*, 11 F.3d at 484; *Jones*, 962 F.2d at 305-08.

24. *Jones*, 962 F.2d at 307.

25. *Johnson*, 529 S.E.2d at 779.

26. 384 U.S. 757 (1966).

27. *Johnson*, 529 S.E.2d at 779; *see* Schmerber v. California, 384 U.S. 757, 760-771 (1966) (holding that the withdrawal of a blood sample by medical personnel, at the direction of a police officer and despite the defendant's refusal to consent, did not violate the Fifth Amendment protection against self-incrimination or the Fourth Amendment protection against search and seizure).

28. *Johnson*, 529 S.E.2d at 779.

29. *Id.* at 780.

30. *Id.*

31. *Id.*; *see* Batson v. Kentucky, 476 U.S. 79 (1986). *Batson* requires that once a defendant has made a prima facie case of discriminatory strikes a prosecutor must state race-neutral

strikes to strike African-Americans from the jury panel.[32] Johnson raised his *Batson* challenge, and the trial court ruled against him, noting "[i]t's clear the jury is predominantly black."[33] The jury panel included ten African-Americans, one Hispanic, and three Caucasians.[34] The trial judge found that Johnson had not established a prima facie case of purposeful discrimination on the part of the prosecutor.[35] Therefore, the prosecutor was not required to state race-neutral reasons for exercising each of her peremptory strikes against African-Americans.[36] The Supreme Court of Virginia stated that "[t]he trial court's determination whether discrimination has occurred in the selection of a jury is entitled to great deference."[37] The court noted that the burden is on the defendant to identify facts and circumstances, beyond the fact that the prosecution has exercised peremptory strikes against members of a certain race, to suggest that the prosecutor was engaged in purposeful discrimination, and found that Johnson had not offered any such facts or circumstances.[38]

D. *Spectator Buttons Depicting Victim*

Johnson asserted that the jury was improperly influenced by courtroom spectators' display of "campaign-size" buttons showing a photograph of Hall.[39] At the beginning of the trial Johnson objected to the presence of the buttons in the courtroom.[40] The trial court ruled that the buttons could not be displayed "in any manner that would allow the jurors to see them," and that "anyone wearing a button was required to refrain from any contact with any of the jurors."[41] The Supreme Court of Virginia ruled that Johnson had waived his objections to the display of the buttons because he failed to object to the trial court's ruling or to subsequently object to any spectator's display of a button.[42] The court specifically noted the absence of any

---

reasons for each of the peremptory strikes exercised. To make such a prima facie case, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has used peremptory strikes to remove potential jurors who are members of the defendant's racial group. The defendant must demonstrate that the prosecutor's actions along with any other relevant circumstances raise an inference that the peremptory strikes were used to exclude potential jurors on the basis of their race. *Batson*, 476 U.S. at 96.

32. *Johnson*, 529 S.E.2d at 780.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 780-81.
39. *Id.* at 781.
40. *Id.*
41. *Id.* at 781-82.
42. *Id.* at 782.

evidence in the record that any juror saw the buttons or could tell what they depicted.[43] The court's ruling on this issue underscores the importance of noting objections for the record and following up on them each time an objectionable event occurs. An objection to the display of buttons of this type should state what the buttons depict and that spectators are wearing them in the presence of jurors who could be improperly influenced by such displays.

E. Evidence of Other Crimes Admitted to Prove Identity

Johnson argued that the trial court erred in admitting the testimony of two women Johnson had raped prior to the rape and murder of Hall.[44] Johnson maintained that the three cases were not so similar as to permit an inference that he committed all three rapes.[45] The Supreme Court of Virginia rejected his argument and held that the testimony of the two victims was properly admitted to show Johnson's identity.[46]

In general, evidence of prior crimes is inadmissible to prove a defendant's guilt of a subsequent crime for which he is on trial.[47] One of the ways to skirt the general rule is to offer evidence of other crimes for the purpose of showing a perpetrator's identity, including showing proof of modus operandi to prove identity, so long as the probative value of the evidence offered outweighs the potential prejudicial effect of the evidence.[48] The court relied on *Chichester v. Commonwealth*[49] for the standard of admissibility of modus operandi evidence: "it is sufficient if the other crimes bear a 'singular strong resemblance to the pattern of the offense charged.'"[50]

The court concluded that the two prior rapes and the rape in the present case bore "a singular strong resemblance to one another, based on common incidents that are sufficiently idiosyncratic to establish the probability of a common perpetrator."[51] Some of the similarities of the crimes included the similar status of the victims as young African-American women who knew Johnson, the use of steak knives procured in each of the victims' homes and the fact that there were no signs of forced entry into the homes in which the rapes occurred. The court also pointed to the fact that a broken bloodstained glass was found in Hall's kitchen, while Johnson

43. *Id.* at 781.
44. *Id.* at 782.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. 448 S.E.2d 638 (Va. 1994).
50. *Johnson*, 529 S.E.2d at 782 (quoting Chichester v. Commonwealth, 448 S.E.2d 638, 649 (Va. 1994)) (internal citations omitted).
51. *Id.*

asked the other two victims for a glass of water before he attacked them. Finally, all three rapes were committed within a sixty day period.[52] The court concluded that the probative value of such evidence outweighed its prejudicial effect.[53]

F. Review of Death Sentence

Virginia Code section 17.1-313(C) requires the Supreme Court of Virginia to review death sentences to determine whether they are (1) imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) excessive or disproportionate to the penalty imposed in similar cases.[54] Johnson argued that the admission of certain victim impact evidence caused the jury to impose the death sentence under the influence of passion.[55] The Supreme Court of Virginia held that the victim impact testimony was admissible and that the evidence of the other rapes was admissible as evidence of future dangerousness.[56] The court also reviewed the entire record and found "no evidence that the death sentence was 'imposed under the influence of passion, prejudice or any other arbitrary factor.'"[57]

The Supreme Court of Virginia reviewed Johnson's death sentence to determine whether it was proportionate to the sentences given in similar cases with similar defendants.[58] The court gave "particular consideration" to similar cases in which the death sentence was imposed under both aggravating factors, vileness and future dangerousness.[59] Other factors that the court considered included the following: (1) Johnson's age at the time of the offense; (2) the fact that Johnson committed five rapes within seven months; (3) the beating and stabbing of one of Johnson's other rape victims; and (4) an "escalating pattern of violence" culminating in the stabbing of Hall.[60] The court stated that juries "generally, with some exceptions, have imposed the death sentence for convictions of capital murder based on findings of future dangerousness and vileness in which the underlying predicate crimes

52. *Id.* at 782-83.

53. *Id.* at 782.

54. VA. CODE ANN. § 17.1-313 (C) (Michie 2000).

55. *Johnson*, 529 S.E.2d at 785. Hall's mother, the father of Hall's son, and two other women that Johnson raped were allowed to testify. *Id.*

56. *Id.*

57. *Id.* at 785-86.

58. *Id.* at 786; *see* VA. CODE ANN. § 17.1-313 (Michie 2000) (requiring the Supreme Court of Virginia to review the record of a case resulting in a sentence of death for error at trial, imposition of sentence under the influence of passion, prejudice or any other arbitrary factor, and excessiveness or disproportionality of the sentence in comparison to the sentences imposed in other cases with similar crimes and defendants).

59. *Johnson*, 529 S.E.2d at 786.

60. *Id.*

involved violent sexual offenses and the defendant had committed violent offenses on other occasions."[61] The court found that Johnson's death sentence was neither disproportionate nor excessive.[62]

Melissa A. Ray

61. *Id.*
62. *Id.*

STATUTE NOTE:

Amendments to the Virginia Code