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2000) Overton v. Commonwealth 539 S.E.2d 421
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Akers v. Commonwealth
535 S.E.2d 674 (Va. 2000)
Overton v. Commonwealth
539 S.E.2d 421 (Va. 2000)

I. Facts

A. Akers v. Commonwealth

The Commonwealth charged Thomas Wayne Akers (“Akers”) and his cousin Timothy Martin (“Martin”) with the 1998 beating death of Wesley B. Smith (“Smith”). Authorities in New York apprehended Akers and Martin several days after Smith’s death. Akers pleaded guilty to the charge of capital murder during the commission of a robbery. Akers offered written confessions for the murder of Smith and the robbery of two hundred dollars from Smith’s home. A psychologist found Akers competent to enter a guilty plea, but Akers prevented his attorneys from presenting evidence at either the guilty plea hearing or the sentencing hearing. The Commonwealth presented evidence at sentencing of Akers’s violence in prison, his criminal history, and details of the murder to support findings of vileness and future dangerousness. Because Akers forbade his attorneys from actually presenting any evidence, his attorneys proffered mitigation evidence to the court. Not surprisingly, the trial court sentenced Akers to death.¹

Akers acted belligerently toward his attorneys and the judge; he asked for the death penalty and threatened that, if he was sentenced to life in prison, he would escape and commit capital murder again.² Although Akers directed his attorneys not to file a brief arguing for commutation of his death sentence, the Supreme Court of Virginia directed his attorneys to file a brief limited to the scope of mandatory review of the sentence.³ The court required Akers’s attorneys to participate in the review process because “the purpose of the review process is to assure the fair and proper application of the death penalty statutes in this Commonwealth and to instill public confidence in the administration of justice.”⁴ The court undertook manda-

1. Akers v. Commonwealth, 535 S.E.2d 674, 674-76 (Va. 2000).

2. *Id.* at 676.

3. *Id.* at 677.

4. *Id.*

tory review of Akers's death sentence pursuant to Virginia Code Section 17.1-313.⁵

B. Overton v. Commonwealth

David Leston Overton, Jr. ("Overton") confessed to the murder of Edgar Allen Williams ("Williams") and pleaded guilty to the charge of capital murder. Police officers found Williams's body on February 26, 1999 with twenty-one stab wounds to the chest and neck. After the trial court heard testimony presented by the Commonwealth to show vileness and heard defense counsel present as mitigating evidence Overton's remorse and psychological problems, the court sentenced Overton to death. The Supreme Court of Virginia conducted mandatory review of the death sentence.⁶

II. Holdings

In both cases, the Supreme Court of Virginia found no error in the imposition of the death penalty and affirmed the judgments of the circuit courts.⁷

III. Analysis / Application in Virginia

These brief cases demonstrate the Supreme Court of Virginia's method of applying Virginia Code Section 17.313(C)(2) proportionality review.⁸ The court emphasized that proportionality review does not ensure "complete symmetry among all death penalty cases."⁹ In *Akers*, the court compared Akers's case to other capital murder/robbery convictions in which the jury imposed the death penalty based upon vileness and future dangerousness.¹⁰ The court found that "the evidence of vileness of the crime and

5. *Id.*; see VA. CODE ANN. § 17.1-313(A) (Michie 2000) (requiring the Supreme Court of Virginia to review each sentence of death imposed).

6. *Overton v. Commonwealth*, 539 S.E.2d 421, 422-23 (Va. 2000); see § 17.1-313(A).

7. *Akers*, 535 S.E.2d at 677-78; *Overton*, 539 S.E.2d at 425.

8. See VA. CODE ANN. § 17.1-313(C)(2) (Michie 2000) (requiring the Supreme Court of Virginia, upon mandatory review of a death sentence, to consider "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

9. *Akers*, 535 S.E.2d at 677 (quoting *Orbe v. Commonwealth*, 519 S.E.2d 808, 817 (Va. 1999)); *Overton*, 539 S.E.2d at 425 (quoting *Orbe*, 519 S.E.2d at 817).

10. *Akers*, 535 S.E.2d at 678. The Supreme Court of Virginia's reasoning defies explanation. In choosing to review the proportionality of Akers's death sentence by comparing it *only* to cases in which the jury imposed the death penalty, the defendant could never make a showing of disproportionality because all of the robbery cases considered imposed the death penalty.

Section 17.1-313(C)(2) provides that for proportionality review, the court must consider "both the crime and the defendant." § 17.1-313(C)(2). The court properly considered the

the defendant's future dangerousness to society [in other cases of a robbery/murder conviction and a jury finding both aggravating factors] is equaled or exceeded by the evidence presented by the Commonwealth on these issues in [Akers's] case."¹¹

Similarly, in *Overton*, the court compared the defendant's sentence to cases which convicted the defendant of the same predicate crime and "cases in which the death penalty was imposed solely on the basis of the 'vileness' factor."¹² The court offered five citations to cases in which a jury convicted the defendant of robbery/murder and imposed the death penalty for vileness.¹³ Immediately following the citations of cases reviewed, the court explained in a footnote that "from our accumulated records [of sentences reviewed by the court], we determine whether juries in the Commonwealth generally approve the death penalty for comparable crimes."¹⁴ In the same footnote, the court quotes *Stamper v. Commonwealth*¹⁵ to explain that proportionality review asks "whether generally juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant."¹⁶

The court's current method of proportionality review betrays its stated purpose of assessing jury decisions in the jurisdiction. The court's own language reveals that the Supreme Court of Virginia reviews proportionality according to "all capital murder cases reviewed by this Court."¹⁷ The

predicate crime of robbery. However, by comparing only cases in which the jury found both aggravators and sentenced the defendant to death, the court ignores the robbery/murder cases in which defendant was sentenced to life.

11. *Akers*, 535 S.E.2d at 678 (recognizing that although defense counsel filed a brief on Akers's behalf, counsel raised no argument of disproportionality of the death sentence).

12. *Overton*, 539 S.E.2d at 424. This approach to proportionality review also contradicts statutory mandate by necessarily considering only those cases in which the jury imposed the death penalty. See *supra* note 10.

13. *Overton*, 539 S.E.2d at 425.

14. *Id.* at 425 n.5. The court's statement contradicts itself because the court considers only sentences that it has reviewed and excludes all jury sentences not appealed to the Supreme Court of Virginia. Every death sentence must be reviewed by the court, but the court is not required to consider life sentences imposed by juries. See VA. CODE ANN. § 17.1-313(A) (Michie 2000).

15. 257 S.E.2d 808 (Va. 1979).

16. *Overton*, 539 S.E.2d at 425 n.5 (quoting *Stamper v. Commonwealth* 257 S.E.2d 808, 824 (Va. 1979) (holding that defendant's sentence of death for armed robbery and three murders was not excessive or disproportionate)); cf. *Johnson v. Commonwealth*, 529 S.E.2d 769, 786 (Va. 2000) (directing the proportionality inquiry to whether "other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes" (quoting *Jenkins v. Commonwealth*, 423 S.E.2d 360, 371 (Va. 1992))). The *Johnson* court looked to "sentencing bodies" which presumably included juries and judges. If the sentences imposed by judges were considered for proportionality review, it would potentially increase the number of life sentences reviewed.

17. *Akers*, 535 S.E.2d at 677; *Overton*, 539 S.E.2d at 424. The Supreme Court of Virginia's language that has identified the body of cases considered for proportionality review has been inconsistent. Compare *Johnson*, 529 S.E.2d at 786 (considering "records of other

exclusive use of cases reviewed by the Supreme Court of Virginia for proportionality review not only belies its purported inquiry into sentences imposed by juries, but contradicts the language of Code Section 17.1-313(E).¹⁸ The statute provides that for the purpose of proportionality review, the court may accumulate the records of "all capital felony cases tried."¹⁹ Although the decision of whether to accumulate records of capital cases tried remains within the court's discretion, once the records are accumulated, the court "shall consider such records . . . as a guide in determining whether the sentence imposed in the case under review is excessive."²⁰ The court decided to accumulate records and the statute mandates that the records consist of all capital cases tried.²¹ The court does not possess the discretion to determine which cases to consider upon proportionality review.²² The cases comprising the record under Section 17.1-313(E) must include all sentences imposed for a conviction of a capital crime.²³

capital cases, including those in which a life sentence has been imposed . . . reviewed by this court" for proportionality review), *with* *Bailey v. Commonwealth*, 529 S.E.2d 570, 580, 586 (Va. 2000) (identifying the record considered upon proportionality review as "all appeals of [capital murder] convictions whether the sentence imposed was death or life imprisonment, filed in this Court . . . and . . . capital cases resulting in a sentence of life imprisonment first reviewed in the Court of Appeals of Virginia" and "all capital murder cases reviewed by this Court") (emphasis added). *Bailey* may indicate that the Supreme Court of Virginia considered Court of Appeals cases in the record for proportionality review. However, later in the *Bailey* decision, the court stated that "[w]e have examined the records of all capital murder cases reviewed by this Court." *Bailey*, 529 S.E.2d at 586. The court handed down the *Johnson* and *Bailey* decisions on the same day.

The court also refused to consider the cases in which the defendant was convicted of capital murder, sentenced to life imprisonment, and did not appeal. *Bailey*, 529 S.E.2d at 580 n.3. The court speculated that most of those cases involved guilty pleas in which the Commonwealth agreed not to seek the death penalty. Two examples contradict the court's assumption. See *Commonwealth v. May*, No. CR 95-278 (Va. Cir. Ct. July 31, 1995) (Circuit Court for the City of Roanoke) (sentencing a defendant to life imprisonment who pleaded guilty to multiple murder of five individuals without a plea agreement for life imprisonment); *Commonwealth v. Hefelfinger*, No. CR00000109 (Va. Cir. Ct. Dec. 12, 2000) (Circuit Court for the City of Norfolk) (sentencing the defendant to life imprisonment after a guilty plea, but without a plea agreement, for the rape, abduction, and dismemberment of a twelve-year-old girl).

18. See VA. CODE ANN. § 17.1-313(E) (Michie 2000).

19. *Id.*

20. *Id.*

21. See *id.*

22. See *id.* (mandating that the Supreme Court of Virginia "shall consider" records of "all capital felony cases tried").

23. *Id.* Subsection (A) also provides that "[a] sentence of death . . . shall be reviewed on the record by the Supreme Court." § 17.1-313(A). The court retains discretion to review a life sentence but could feasibly never review a life sentence for a capital murder conviction. This problem of mandatory review of death sentences and discretionary review of life sentences tips the scales unreasonably toward the imposition of the death sentence.

IV. Conclusion

The practitioner on direct appeal cannot stand idly by while the Supreme Court of Virginia misreads the statute passed by the Virginia General Assembly. True proportionality review must compare *all* capital cases tried, regardless of the sentence imposed.

V. Epilogue

Two attorneys from the Virginia Capital Representation Resource Center filed appeals against Akers's wishes.²⁴ The Supreme Court of Virginia and the United States Supreme Court denied the appeals.²⁵ The Commonwealth executed Akers, age thirty-one, on March 1, 2001.²⁶ Akers apologized to his victim's family and asked for forgiveness.²⁷ Akers was the eighty-second inmate executed in Virginia since 1976.²⁸

Early on the morning of March 1, 2001, prison officials found Overton, age twenty-one, dead in his prison cell.²⁹ The cause of death was not known and the body was sent to the Richmond medical examiner for an autopsy.³⁰

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24. Matt Chittum, *Killer Fights for Chance to Die*, ROANOKE TIMES & WORLD NEWS, Feb. 26, 2001, at A1, available in 2001 WL 5358324.

25. Frank Green, *Appeals Rejected, Akers Executed*, RICH. TIMES-DISPATCH, Mar. 2, 2001, at B1, available in 2001 WL 5316936.

26. *Id.*

27. *Id.*

28. *Id.*

29. Frank Green, *Death Row Inmate Dies in His Cell*, RICH. TIMES-DISPATCH, Mar. 2, 2001, at B2, available in 2001 WL 5316980.

30. *Id.*

