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Patterson v. Commonwealth 551 S.E. 2d 332 (Va. 2001) Zirkle v. Commonwealth 551 S.E.2d 601 (Va. 2001)

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Patterson v. Commonwealth
551 S.E. 2d 332 (Va. 2001)
Zirkle v. Commonwealth
551 S.E.2d 601 (Va. 2001)

I. Facts

A. Patterson

On the night of October 11, 1987, James Earl Patterson (“Patterson”) broke into the home of Joyce Aldridge (“Aldridge”) and raped and stabbed her. Shortly after the attack, Aldridge placed a call to Prince George County Police reporting the attack. When police arrived, they found the front door of Aldridge’s home open and a screen missing from the bathroom window. On entering the house, police found Aldridge’s lifeless body on the bathroom floor. She had multiple stab wounds; paramedics were unable to revive her. The medical examiner determined that two wounds to the aorta caused Aldridge’s death. Police recovered considerable physical evidence, including semen, from the crime scene.¹

In 1998, Patterson was incarcerated for a different rape conviction. His DNA was stored in a Virginia database and was matched to the DNA from Aldridge’s body. Police obtained a fresh blood sample from Patterson, and the DNA recovered from that test also matched DNA recovered from Aldridge’s body.²

In March 2000, after corrections officials agreed to allow Patterson to see his family at the prison, Patterson confessed to the rape and murder. According to Patterson, he went to Aldridge’s home to steal money for drugs. Although Patterson had planned to break in through the basement, Aldridge let her dog into the yard and Patterson decided to go to the front door instead. He asked to borrow a flashlight, and when Aldridge let him in, Patterson demanded her pocketbook. He then became incensed, tied Aldridge’s hands behind her back and raped her. After raping Aldridge, Patterson decided that he didn’t want to leave a witness behind, and he stabbed her three times in the abdomen. After leaving the house, he went back in to make sure that Aldridge was dead. When he found her on the phone to police, he stabbed her “[four] or [five] more times” and fled.³

1. Patterson v. Commonwealth, 551 S.E.2d 332, 333-34 (Va. 2001).

2. *Id.* at 334.

3. *Id.*

Patterson chose to plead guilty to the rape and capital murder charges. Prior to the entry of the pleas, two psychologists determined that Patterson was competent to make the decision to plead guilty. Despite the contrary advice of defense counsel, Patterson pleaded guilty to capital murder. At the sentencing hearing, the Commonwealth produced evidence of vileness and future dangerousness, but Patterson refused to present any evidence of mitigation. Instead, Patterson requested the death penalty, stating that he could not guarantee that he would not “spark out and ruin more lives.”⁴ The trial court, finding that the Commonwealth had sufficiently established both aggravators, sentenced Patterson to death.⁵

B. Zirkle

In April of 1999, Daniel Zirkle (“Zirkle”) shared a home with Barbara Jo Shifflett (“Shifflett”) and her two children, Jessica L. Shifflett (“Jessica”) and Christina M. Zirkle (“Christina”). Zirkle was Christina’s biological father. On the night of April 3, 1999, Shifflett took her children to stay at her sister’s home, and Zirkle demanded that he wanted his “f-ing girls home now.” Shifflett and Zirkle then had a violent argument and Shifflett called the police. After the police arrived, Shifflett left the home to stay at her sister’s home and obtained a protective order against Zirkle. When Shifflett returned to the home to obtain some of her belongings, Zirkle assaulted her and police obtained a warrant for his arrest. Zirkle was then arrested for the assault and violation of the protective order and confined at the Rockingham County jail.⁶

On August 2, 1999, after Zirkle had been released from jail, he called Shifflett and told her to “live in hell, bitch.” Shifflett in turn obtained another protective order. On returning to work, Shifflett received a phone message from Zirkle’s mother that Zirkle had taken Christina. Shifflett immediately went home to find Jessica’s body on the floor. When police arrived at the home, they determined that Jessica was already dead. Meanwhile, an investigator with the Page County Sheriff’s Department was dispatched to Storybrook Trail in Page County, where he found Zirkle with a self-inflicted stab wound to the neck and Christina lying face down on his chest, dead from a stab wound to the neck. Zirkle was taken to a hospital for treatment.⁷

The medical examiner who performed the autopsy on Christina determined that the fatal stab wound completely penetrated her trachea, went between two cervical vertebrae and severed her spinal cord. The medical examiner opined that the stab wound required “considerable force” and that Christina could have only lived for a few minutes. Jessica had five stab wounds to the neck; the medical

4. *Id.* at 335.

5. *Id.* at 334-35.

6. *Zirkle v. Commonwealth*, 551 S.E.2d 601, 602-03 (Va. 2001).

7. *Id.* at 603-04.

examiner could not determine which caused death, but opined that either of the wounds on the side of her neck would have caused death within seconds.⁸

Zirkle was indicted in Page County for capital murder for the death of Christina.⁹ Zirkle decided, against the advice of counsel, that he wanted to plead guilty to the charge. After the trial court was satisfied that Zirkle was competent and was able to plead "freely, intelligently and voluntarily," it accepted his plea of guilty. The Commonwealth put on evidence showing vileness and future dangerousness, but Zirkle refused to present evidence in mitigation. The trial court found that the Commonwealth established both aggravators and sentenced Zirkle to death.¹⁰

II. Holdings

The Supreme Court of Virginia reviewed the death sentences in both cases pursuant to Virginia Code Section 17.1-313.¹¹ The court unanimously affirmed the sentence imposed on Zirkle.¹² The court also affirmed unanimously the sentence imposed on Patterson.¹³

III. Analysis / Application in Virginia

Although the Supreme Court of Virginia handed down these two decisions on the same day, the court's inconsistent approach to the proportionality analysis is worthy of note. In *Patterson*, Justice Lacy, writing for the court, compared the facts of the case with several other analogous capital murder cases in which the death penalty was imposed.¹⁴ Similarly, in *Zirkle*, Justice Hassell's opinion for the court compared the facts with those of other capital murder cases in which the death penalty was imposed.¹⁵ Both cases reached the same result – that the imposition of the death sentence was commensurate with the crime.¹⁶

The court failed, however, to set forth a clear and consistent test for proportionality. Justice Hassell explained that the proportionality test was an inquiry as to "whether juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes."¹⁷ Although Justice Lacy did not specifically

8. *Id.* at 604.

9. See generally VA. CODE ANN. § 18.2-31(12) (Michie Supp. 2001) (defining capital murder as "the willful, deliberate and premeditated killing of a person under the age of fourteen by a person twenty-one or older").

10. *Zirkle*, 551 S.E.2d at 601.

11. *Id.*; *Patterson*, 551 S.E.2d at 335.

12. *Zirkle*, 551 S.E.2d at 606.

13. *Patterson*, 551 S.E.2d at 336.

14. *Id.*

15. *Zirkle*, 551 S.E.2d at 605.

16. *Id.* at 606; *Patterson*, 551 S.E.2d at 336.

17. *Zirkle*, 551 S.E.2d at 605 (citing *Smith v. Commonwealth*, 389 S.E.2d 871, 886 (Va. 1990)).

state a test to apply, both justices seemed to agree that the proper analytical method was to consider all the capital murder cases reviewed by the court.¹⁸ According to Justice Lacy, the court in *Patterson* reviewed not only cases in which the death penalty was imposed, but also cases in which the defendant was sentenced to life and appealed to the Supreme Court of Virginia.¹⁹

A. "Juries" or "Sentencing Bodies"?

One notable inconsistency in the proportionality test is the identity of the decision-maker in the original imposition of the death sentence. In *Zirkle*, Justice Hassell's analysis refers only to juries.²⁰ Justice Lacy's analysis in *Patterson* considers the decisions of both trial courts and juries.²¹

The court took another approach in *Beck v Commonwealth*.²² On proportionality review, Justice Koontz, writing for a unanimous court stated that "we have examined the records of all capital murder cases reviewed by this Court . . . including those cases in which a life sentence was imposed . . . [and based] on this review, we conclude that Beck's death sentences are not excessive or disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for comparable crimes."²³ The language used by the *Beck* court is imprecise and suggests that the court may be using a larger data set than simply the body of cases in which the death sentence is imposed by a jury.

Although the court does not define clearly the term, "sentencing bodies" appear to be trial judges and juries. In *Lenz v Commonwealth*,²⁴ the court explained that the chief executive is not a "sentencing body."²⁵ In that case, Lenz, an inmate at Augusta Correctional Center, was sentenced to die for the capital murder of a fellow inmate.²⁶ Lenz argued that because the Governor commuted the sentence of the one individual sentenced to die for inmate-on-inmate murder under the current statute, sentencing bodies in the jurisdiction had not seen fit to impose the death penalty in this type of case.²⁷ The court replied that "we do

18. *Id.* at 605; *Patterson*, 551 S.E.2d at 336 (citing VA. CODE ANN. § 17.1-313(E) (Michie 1996)).

19. *Patterson*, 551 S.E.2d at 336.

20. *Zirkle*, 551 S.E.2d at 605.

21. *Patterson*, 551 S.E.2d at 336.

22. *Beck v. Commonwealth*, 484 S.E.2d 898, 907 (Va. 1997) (holding that death sentence was not disproportionate based on prior decisions of other sentencing bodies in the jurisdiction).

23. *Id.* at 907.

24. 544 S.E.2d 299 (Va. 2001).

25. *Lenz v. Commonwealth*, 544 S.E.2d 299, 311 (Va. 2001) (holding that for sentence review, the Governor is not deemed to be a "sentencing body").

26. *Id.* at 301; see also VA. CODE ANN. § 18.2-31(3) (Michie Supp. 2001) (defining capital murder as "the willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof").

27. *Lenz*, 544 S.E.2d at 311.

not consider the actions of the executive branch when making our statutory determination of proportionality."²⁸ *Lertz* is the only case in which the Supreme Court of Virginia has taken up the question of whether the Governor, in exercising executive clemency, may be considered a "sentencing body."

Lertz makes it clear that "sentencing bodies" exist only within the judicial branch; nevertheless, it is unclear whether the court uses the term to refer to juries, trial judges or both, and it is unclear as to which data set the court is applying to each individual case. In some instances, the language the court uses is consistent with the decision-maker in the case being reviewed. In *Hoke v Commonwealth*,²⁹ the court reviewed the death sentence of Ronald Hoke, who was convicted of capital murder and sentenced to die by a jury.³⁰ There the court defined the test as "whether 'juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.'"³¹ In other instances, however, the language does not follow logically from the decision under consideration. In *Davidson v Commonwealth*,³² the court reviewed a death sentence which had been imposed by a trial judge following a guilty plea to capital murder.³³ Despite the fact that the death sentence was fixed by the trial judge, the court stated that the test was "whether 'juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.'"³⁴ In *Payne v Commonwealth*,³⁵ the court similarly explained that "from these cases, we determine whether 'juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes,'" even though it was called upon to review two death sentences, one of which was imposed by a trial judge.³⁶

Because it is unclear with which prior cases the defendant's case is being compared, it is virtually impossible for a defendant to argue persuasively that a sentence is inconsistent with prior sentencing practices. In *Clagett v Commonwealth*,³⁷ the defendant argued that the imposition of the death penalty in his case was disproportionate because his crime "paled by comparison" with

28. *Id.*

29. 377 S.E.2d 595 (Va. 1989).

30. *Hoke v. Commonwealth*, 377 S.E.2d 595, 596-97 (Va. 1989) (stating that, after consideration of cases in which juries have approved death, the death sentence was "neither excessive nor disproportionate").

31. *Id.* at 604 (quoting *Stamper v. Commonwealth*, 257 S.E.2d 808, 824 (Va. 1979)).

32. 419 S.E.2d 656 (Va. 1992).

33. *Davidson v. Commonwealth*, 419 S.E.2d 656, 657-58 (Va. 1992) (stating that imposition of death sentence by trial judge was not excessive or disproportionate in comparison to actions of juries in prior capital cases).

34. *Id.* at 660 (citing *Smith v. Commonwealth*, 389 S.E.2d 871, 886 (Va. 1990)).

35. 509 S.E.2d 293 (Va. 1999).

36. *Payne v. Commonwealth*, 509 S.E.2d 293, 298 (Va. 1999) (quoting *Stamper*, 257 S.E.2d at 824).

37. 472 S.E.2d 263 (Va. 1996).

other cases in which the defendant received a death sentence.³⁸ The court stated the rule to be "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant," but reached the conclusion that "juries in Virginia customarily impose the death sentence for conduct similar to Clagett's."³⁹ This inconsistency in language exemplifies the difficulty in isolating a body of cases which a defendant may cite to show that the application of the death penalty in his case is disproportionate.

B. *The Body of Cases*

Virginia Code Section 17.1-313(E) requires that the Supreme Court of Virginia, in reviewing for proportionality, consider the available records of capital cases compiled.⁴⁰ Once the court reviews all the compiled cases, the court then compares those cases with the case at bar to determine whether the ruling is consistent with death sentences imposed by prior sentencing bodies.⁴¹ This analysis is problematic, however, because the Supreme Court of Virginia has never reversed a death sentence on proportionality grounds.

In *Walker v Commonwealth*,⁴² in which the court undertook for the first time review of a death sentence under the provision of the capital murder statute making the commission of multiple murders within a three-year period punishable by death,⁴³ the court explained that the lack of prior comparative cases did not prevent the court from taking up proportionality review.⁴⁴ If the lack of cases did prevent substantive proportionality review, the court explained, then it would be impossible to sustain any sentence of death.⁴⁵ This reasoning belies the fundamental flaw of the proportionality test as the court now conducts it. Because the court has never overturned a death sentence for disproportionality, the court has before it no cases illustrative of an instance in which the imposition of the death penalty was disproportionate.

38. *Clagett v. Commonwealth*, 472 S.E.2d 263, 273 (Va. 1996) (concluding that, despite defendant's arguments to the contrary, death sentence is customarily imposed by juries in cases factually similar to defendant's).

39. *Id.* (citing *Jenkins v. Commonwealth*, 423 S.E.2d 360, 371 (Va. 1992)).

40. VA. CODE ANN. § 17.1-313(E) (Michie 2000) (providing that the "Supreme Court may accumulate" records of capital cases and that the court "shall consider such records . . . as a guide in determining whether the sentence . . . is excessive").

41. *Patterson v. Commonwealth*, 551 S.E.2d 332, 336 (Va. 2001).

42. 515 S.E.2d 565 (Va. 1999).

43. *See also* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2001) (providing for "the willful, deliberate and premeditated killing of more than one person in a three-year period").

44. *Walker v. Commonwealth*, 515 S.E.2d 565, 576 (Va. 1999) (stating that "the lack of directly comparable crimes does not prevent our consideration of whether the sentence imposed in this case was disproportionate . . .").

45. *Id.*

In order, then, to have a sample set from which the court can determine instances in which the death penalty is disproportionate, it may look at all capital murder convictions resulting in a life sentence which were later reviewed by the court on appeal.⁴⁶ Defendants convicted, however, of capital murder and sentenced to life cannot appeal their sentences as life is the only available alternative penalty to a death sentence.⁴⁷ Therefore, the appeals of life sentences considered in the Supreme Court of Virginia are appeals of trial error rather than disproportionate sentencing. Moreover, because capital defendants sentenced to life do not have an appeal of right, at least some of the cases in which a life sentence is imposed are never considered by any appellate court and only a few have reached the Supreme Court of Virginia.⁴⁸

The lack of a bright line standard for proportionality is problematic for capital defendants because it is nearly impossible for a defendant to show that a death sentence was disproportionate. The inquiry into whether juries or sentencing bodies have imposed death in similar cases simply means that the court has a myriad of cases in which a trial court or jury has found the death sentence appropriate and few in which life was found to be appropriate. Moreover, since life cases percolate through the Court of Appeals of Virginia and only reach the court on discretionary appeals of trial error, the court often will lack a full set of facts to compare with the case at bar.⁴⁹

Not only does the comparative approach used by the Supreme Court of Virginia in proportionality review raise a prohibitively high bar for defendants, but because the proportionality test only requires a consideration of what past juries *generally* have done,⁵⁰ defendants almost never will be able to show that the death penalty is practically disproportionate. Even if a defendant could point out a case with substantially similar facts in which the jury imposed life, the court would most certainly locate several other cases with substantially similar facts in which the jury imposed death. Therefore, in nearly every instance, the defendant seeking proportionality review faces any number of cases with facts substantially similar to his in which the death sentence was affirmed, and conversely, no cases in which death is reversed.

46. See *Patterson*, 551 S.E.2d at 336.

47. See VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (providing that "in case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life").

48. See VA. CODE ANN. § 8.01-670 (Michie 2000) (setting forth the causes which may be brought before the Supreme Court of Virginia on appeal); VA. CODE ANN. § 17.1-313(A) (providing for automatic review of death sentences in the Supreme Court of Virginia).

49. See, e.g., *Johnson v. Commonwealth*, 273 S.E.2d 784, 786-87 (Va. 1981). In *Johnson*, the defendant appealed his conviction on double jeopardy grounds. *Id.* at 786. Because the defendant was appealing a question of trial error, the court offered a very limited statement of facts and did not conduct proportionality review of defendant's sentence. See *id.* at 786-87.

50. *Zirkle v. Commonwealth*, 551 S.E.2d 601, 605 (Va. 2001).

IV. Conclusion

The statutorily mandated proportionality review appears to be an exercise in futility. As the court continues to state in every case that it has reviewed the records of prior capital cases and found that the death sentence was "neither excessive nor disproportionate," it becomes apparent that proportionality review in the Supreme Court of Virginia is not genuine, substantial appellate review, but a pro forma exercise. The Supreme Court of Virginia has yet to reverse a death sentence on proportionality, and it is unlikely that it will do so anytime soon. Thus, it remains crucial that defense counsel preserve all its trial objections so that the defendant has issues other than those guaranteed by statute on which to appeal.

Damien P. DeLaney