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Gregory v. Commonwealth No. 1671-99-2, 2001 WL 242227, at *1 (Va. Ct. App. March 13, 2001)

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I. Facts

On December 31, 1997, James Michael Lambrecht ("Lambrecht") was found dead in a parked vehicle. The victim had been shot twice in the right side of the head. Lambrecht's wife informed the police that he sold marijuana and provided the police with an address book that contained the names of the people with whom the victim made drug transactions. Jason Wayne Gregory ("Gregory") was among those listed in the address book. The police questioned Gregory on January 4, 1998. He was not advised of his *Miranda* rights prior to the interview. Gregory claims that he asked for an attorney during the interview. The detectives who questioned the appellant stated that Gregory's comment about an attorney sounded like a question about the need for an attorney rather than a request for an attorney, so the police continued the interview. It was during this interview that Gregory informed the police that he had been with Jeff Able ("Able") on the night of December 30, 1997. The detectives then interviewed Able, whose name also appeared in the address book. Comments made by Able led the police to search Gregory's backyard where they discovered three casings and two bullets.[1]

On January 15, 1998, the Redeemer Lutheran Church in Chesterfield County was burglarized, and $60,000 worth of church property was stolen or vandalized. An employee of a nearby convenience store identified Gregory as the man who tried to buy batteries for a radio that matched the description of one that had been stolen from the church. Gregory was later identified on the security camera videotape.[2]

On January 16, 1998, Jeff Able informed the police that Gregory said that he broke into the church and that he, along with Michael Sammons, killed the victim. Sammons was arrested and implicated himself and the appellant. Gregory was arrested and advised of his *Miranda* rights. He admitted to the homicide during a videotaped interview.[3]

During a hearing on October 19, 1998, Gregory appeared with Mr. Tondrowski, co-counsel on the murder charge. The lead attorney on the murder

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1. Gregory v. Commonwealth, No. 1671-99-2, 2001 WL 242227, at *1-2 (Va. Ct. App. March 13, 2001) (This case is an unpublished opinion).

2. *Id.*, at *2.

3. *Id.*

case and the only attorney on the charges resulting from the church burglary, Mr. Morgan, was not present at the hearing. Gregory agreed, with the advice of his attorney, at this hearing to waive his right to a speedy trial on the murder charges. His right to a speedy trial on the burglary case was also waived, but without the explicit consent of the appellant.[4]

Gregory was convicted at bench trials for capital murder, robbery, two counts of use of a firearm, burglary, grand larceny, and vandalism.[5] On appeal, he contended that the trial court erred in:

> 1) denying his motion to dismiss the burglary, grand larceny, and vandalism charges because of a speedy trial violation pursuant to [Virginia] Code Section 19.2-243; 2) finding he was not in custody for the purposes of *Miranda* when he was interviewed by police on January 4, 1998; 3) finding he did not invoke his right to counsel during the January 4, 1998 interview; 4) denying his motion to suppress his statement and all evidence derived from interviews on January 4, 1998 and January 16, 1998; 5) finding he made a knowing, intelligent, voluntary waiver of his *Miranda* rights prior to the January 16, 1998 interview; 6) denying his motion for a mistrial based on the Commonwealth's failure to comply with Rule 3A:11; and 7) denying his motion to strike the admission of his statements as a sanction for the Commonwealth's failure to comply with Rule 3A:11.[6]

II. Holding

The Court of Appeals of Virginia held that Gregory did not make a knowing, intelligent, and voluntary waiver of his right to a speedy trial with respect to the burglary, grand larceny, and vandalism charges in violation of Virginia Code Section 19.2-243.[7] Gregory's convictions for burglary, grand larceny, and vandalism were therefore reversed.[8] The Court affirmed the convictions for capital murder, robbery, and the use of a firearm because the evidence obtained at the

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4. *Id.*

5. *Id.* at *3; *see also* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2001) (allowing for a murder committed during the commission of a robbery to be elevated to a capital murder).

6. *Gregory*, 2001 WL 242227, at *1.

7. *Id.*, at *3. Sentencing Code Section 19.2-243 regarding the right to a speedy trial provides:

> Where a general district court has found that there is probable cause to believe that the accused has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court; and if the accused is not held in custody but has been recognized for his appearance in the circuit court to answer for such offense, he shall be forever discharged from prosecution therefore if no trial is commenced in the circuit court within nine months from the date such probable cause was found.

VA. CODE ANN. § 19.2-243(4) (Michie 2000).

8. *Gregory*, 2001 WL 242227, at *8.

interview would have been inevitably discovered and the statements made by the appellant at the interview did not contain inculpatory information.[9]

III. Analysis / Application in Virginia

A. Denial of Gregory's Appeal

The Court of Appeals of Virginia denied all of the appellant's claims except the speedy trial claim relevant to the convictions of burglary, grand larceny, and vandalism.[10] Virginia Code Section 19.2-243 states that a defendant must be tried within five months of finding probable cause.[11] In this case the district court found probable cause on the burglary, grand larceny, and vandalism charges on June 8, 1998.[12] Virginia Code Section 19.2-243 required that Gregory be tried on these charges by November 7, 1998.[13] Gregory was not tried until February 5, 1999.[14] The Court of Appeals of Virginia has held that the right to a speedy trial may be waived by a defendant,[15] but only if it is done so knowingly, intelligently, and voluntarily.[16] In this case, the attorney who represented the appellant on the burglary-related charges was not present at the hearing to postpone the trial.[17] The trial court set the trial for the burglary charge for February 5, 1999, without asking Gregory if he waived his right to a speedy trial.[18] The appellate court reversed the conviction on the burglary, vandalism, and grand larceny charges due to the failure of the trial court to properly seek a waiver and its failure to provide a speedy trial.[19]

The Court of Appeals of Virginia did not reverse the convictions on the charges of capital murder, robbery, and use of a firearm despite Gregory's claims that the Commonwealth failed to inform him of his *Miranda* rights.[20] Thus, all information from his statement and all evidence discovered from that statement was admissible.[21] The court relied on the inevitable discovery rule found in *Nix*

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9. *Id.*, at *6-7.
10. *Id.*, at *8.
11. *Id.*, at *3; *see* § 19.2-243(4).
12. *Id.*, at *4.
13. *Id.*
14. *Id.*
15. Mitchell v. Commonwealth, 518 S.E.2d 330, 334 (Va. Ct. App. 1999) (holding that "[a] defendant may agree to a general waiver of his or her statutory speedy trial rights, in which instance the accused foregoes his or her rights granted by Code Section 19.2-243").
16. Peterson v. Commonwealth, 363 S.E.2d 440, 444 (Va. Ct. App. 1987) (stating that "[a] waiver of any constitutional right must be knowingly, intelligently, and voluntarily made") (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
17. *Gregory*, 2001 WL 242227, at *4.
18. *Id.*
19. *Id.*
20. *Id.*, at *5.
21. *Id.*, at *6.

v. Williams[22] in denying the appellant's claim that the trial court erred in denying the motion to suppress the statements and all evidence derived from both the January 4, 1998, and the January 16, 1998, interviews.[23] The only evidence obtained in the interview that may have been incriminating was the statement that Gregory had spent the evening of December 30, 1997 with Jeff Able.[24] However, since both Gregory's and Able's names appeared in the victim's address book, the court determined that the evidence would inevitably have been obtained due to the police's initial strategy of contacting everyone who was mentioned in the address book.[25]

The Court also denied the appellant's claim that his invocation of his right to counsel during the January 4, 1998 interview prohibited the police from initiating the second interview on January 16, 1998.[26] Gregory claimed that the police violated the "*Edwards* Rule."[27] If the police initiate interrogation of a defendant after he has invoked his *Miranda* right to counsel and before his counsel is present "a valid waiver of that right cannot be established . . . even if he has been advised of his rights."[28] However, the court pointed out that "[t]he *Edwards* rule has not been expanded to include non-custodial demands for an attorney or to interrogation after an accused has been released from custody."[29] Gregory was released from custody following his invocation of his *Miranda* right to counsel, so *Edwards* does not bar subsequent interrogation.[30]

B. Inadequacy of State Proportionality Review

It is interesting to note, with regard to the issue of proportionality review, that this is an unpublished opinion in a capital murder case in which the appellant

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22. 467 U.S. 431 (1984).

23. Nix v. Williams, 467 U.S. 431, 447 (1984) (holding that "if the government can prove that the evidence [obtained by illegal means] would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury . . .").

24. *Gregory*, 2001 WL 242227, at *4.

25. *Id.*, at *5.

26. *Id.*

27. *Id.*, at *6; *see also* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (holding that once a defendant invokes his *Miranda* right to counsel on the charged crime, all police initiated interrogation regarding any criminal investigation must cease unless the defendant's counsel is present at the time of questioning); *see also* Jackson v. Commonwealth, 417 S.E.2d 5, 6-7 (Va. Ct. App. 1992) (holding that pursuant to *Edwards* and its progeny, once a defendant's *Miranda* right to counsel is invoked, all police-initiated interrogation must cease unless the defendant's counsel is present at the time of questioning).

28. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that a valid waiver of a right to counsel cannot be established in a police interrogation of a defendant outside the presence of counsel after *Miranda* right to counsel has been invoked).

29. Tipton v. Commonwealth, 447 S.E.2d 539, 540 (Va. Ct. App. 1994) (holding that the *Edwards* rule only applies to periods of continuous custody).

30. *Gregory*, 2001 WL 242227, at *6; *see also Tipton*, 447 S.E.2d at 540.

received a life sentence. The General Assembly of Virginia, in Section 17.1-313 of the Virginia Code, has mandated proportionality review.[31] The statute states that a sentence of death must be reviewed by the Supreme Court of Virginia.[32] It further provides that "[i]n addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[33] In order effectively to carry out this requirement, the Supreme Court of Virginia must compare, following sentencing, all capital murder cases involving similar crimes and defendants to ensure that the death penalty is not disproportionate.[34] The cross-section of cases in which the defendant received a life sentence for the conviction of a capital murder are significantly under-represented.[35] Without having life sentence cases available for comparison, the purpose of proportionality review is not served. Failure of the proportionality review is due in large part to situations such as the case at hand. It is a life sentence case, but because the opinion is unpublished it probably will not be included in the comparison. Without life sentence cases being included, the proportionality review is necessarily skewed toward death. It should also be noted, however, that even if this case were included in the proportionality review, it would not be of much use due to its lack of factual detail, such as background of the defendant, details of the crime, and failure of the opinion to even reference the sections of Virginia Code under which the defendant was convicted.[36] Nevertheless, if the proportionality review is going to accomplish the goal of the General Assembly it will be necessary for the life sentence cases like this one to be weighed equally with the death sentence cases.

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

32. VA. CODE ANN. § 17.1-313(A).

33. VA. CODE ANN. § 17.1-313(C).

34. *See generally* Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 106-07 (1999).

35. *Id.* at 107.

36. The court of appeals did not include information on these issues because the issues on appeal were denial of *Miranda* rights and denial of a speedy trial, and the omitted information was not needed to decide these issues.