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Kelly v. South Carolina

122 S. Ct. 726 (2002)

I. Facts

In 1996, William Kelly (“Kelly”) was indicted for, and subsequently convicted of, capital murder, kidnapping, armed robbery and possession of a knife during the commission of a violent crime in connection with the death of Shirley Shealy. During the sentencing phase of Kelly’s trial, the prosecution introduced as evidence of aggravation the fact that Kelly had previously used a shank to attempt a prison escape and that Kelly exhibited sadistic behavior at an early age. The prosecutor also told the jury that he hoped they would “never in [their] lives again have to experience . . . [b]eing some thirty feet away from such a person.”¹

Prior to closing arguments, defense counsel, relying on *Simmons v. South Carolina*,² asked the court to instruct jurors that Kelly would be ineligible for parole were he to receive a life sentence.³ The prosecution objected to the *Simmons* instruction on the grounds that he did not intend to argue future dangerousness. Although the defense responded that the prosecution had already introduced evidence of future dangerousness, the court nevertheless refused the instruction.⁴

During his closing argument, the prosecutor characterized Kelly as “the butcher of Batesburg,” and “Bloody Billy.” He further argued to the jury that Kelly was not mentally ill, but rather: “[H]e’s intelligent . . . he’s quick-witted. Doesn’t that make a person a little more dangerous . . . ?” Although defense counsel objected to this commentary, the prosecution persisted and the court never ruled on the objection. The judge instructed the jury that “death sentence” and “life imprisonment” were to be “understood in this ordinary and plain meaning,” but he did not instruct the jury that Kelly would be ineligible for parole were he to be sentenced to life imprisonment. Defense counsel objected again to the court’s denial of a *Simmons* instruction, but her objection was overruled. The jury subsequently sentenced Kelly to death.⁵ The Supreme Court of South Carolina held that the State’s evidence did not implicate future dangerous-

1. Kelly v. South Carolina, 122 S. Ct. 726, 729 (2002).

2. 512 U.S. 154 (1994).

3. Kelly, 122 S. Ct. at 729; see *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (holding that “[when] the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible”).

4. Kelly, 122 S. Ct. at 729-30.

5. *Id.*

ness as an aggravator, and even if the State had relied on future dangerousness, the *Simmons* instruction has no application to the South Carolina sentencing scheme.⁶ The death sentence was affirmed.⁷

II. Holding

The United States Supreme Court reversed Kelly's death sentence. It held that: (1) under the South Carolina sentencing scheme, the *Simmons* instruction is mandatory when future dangerousness is implicated; and (2) that the State did put future dangerousness at issue.⁸

III. Analysis / Application in Virginia

A. The Simmons Instruction

This case has no direct application in Virginia because the "life-means-life" instruction was mandated in all capital prosecutions by the Supreme Court of Virginia in *Yarbrough v Commonwealth*.⁹ In *Kelby*, the United States Supreme Court gave short shrift to South Carolina's argument that its capital sentencing scheme did not require a *Simmons* instruction.¹⁰ Explaining that its ruling required little more than a citation to *Shafer v South Carolina*,¹¹ the Court noted that South Carolina juries make sentencing recommendations only after a finding of aggravating circumstances; at that point, the only choices available to the jury are life without parole and death.¹² Therefore, the Court reversed the Supreme Court of South Carolina on identical grounds as its ruling in *Shafer*.¹³

B. The Court's Analysis of Future Dangerousness Evidence

The remainder of the majority opinion dealt with the question of whether the State actually put future dangerousness at issue during the sentencing phase of the trial. The majority concluded that the State, both through evidence and

6. *Id.* at 730. The Supreme Court of South Carolina relied on its own ruling in *State v. Shafer*, 531 S.E.2d 524, 528 (S.C. 2000), *rev'd Shafer v. South Carolina*, 532 U.S. 36 (2001). For a complete discussion of the United States Supreme Court's treatment of *Shafer*, see Kathryn Roe Eldridge, Case Note, 14 CAP. DEF. J. 89 (2001) (analyzing *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001)).

7. *Kelby*, 122 S. Ct. at 730.

8. *Id.* at 730-31.

9. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (providing for the life-means-life instruction at defendant's request); *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999) (holding that the trial court, upon the defendant's request, must instruct the jury that life imprisonment means life imprisonment without parole).

10. *Kelby*, 122 S. Ct. at 730-31; *see also Simmons*, 512 U.S. at 156.

11. 532 U.S. 36 (2001).

12. *Kelby*, 122 S. Ct. at 730-31.

13. *Id.* at 733-34; *see Shafer*, 532 U.S. at 49-50.

argument, had done so.¹⁴ The Court dealt first with the State's evidence of Kelly's violent conduct in prison.¹⁵ In response to the State's argument that the evidence only went to Kelly's inability to behave himself while incarcerated, the Court explained that the evidence would also have the effect of giving the defendant a characterization of "generalized future dangerousness."¹⁶ The Court held more generally that evidence which is relevant to a finding of future dangerousness does not lose that characterization simply because the State uses it to support other inferences.¹⁷ The import of this holding is that nearly any evidence that the State introduces that would tend to support an inference as to the future dangerousness of the defendant will require the life-means-life instruction.

The Court then addressed the prosecutor's descriptions of Kelly at trial.¹⁸ Although the Supreme Court of South Carolina found that the prosecution's language merely constituted "a call for retribution," the majority agreed that this language also would support the conclusion "that petitioner is a vicious predator who would pose a continuing threat to the community."¹⁹ Because of the inference that Kelly's violent tendencies made him a continuing danger, the Court found that the State implicated future dangerousness through its argument to the jury.²⁰

Finally, the Court evaluated the State's claim that the life-means-life instruction was not required because the jurors never indicated explicitly that they were concerned with Kelly's possible release from prison.²¹ Stating that the trial judge has an affirmative duty to instruct the jury on the relevant points of law, regardless of whether or not the jurors ask for instruction, the Court dismissed this argument.²² The Court cited prior cases to illustrate that merely because a jury fails to manifest confusion on a point does not excuse the trial judge from properly instructing it on the law.²³

The dissenters parted from the majority's view generally on the grounds that the rule announced was too broad. Chief Justice Rehnquist, who concurred in the *Simmons* case, argued that the majority in *Kelly* took *Simmons* far beyond its due process justification.²⁴ The Chief Justice maintained that the justification for the *Simmons* rule lies in the fact that fairness requires that the defendant be permitted

14. *Kelby*, 122 S. Ct. at 731.

15. *Id.*

16. *Id.*

17. *Id.* at 732.

18. *Id.* at 732-33.

19. *Id.* (quoting *Simmons v. South Carolina*, 512 U.S. 154, 176 (1994) (O'Connor, J., concurring)).

20. *Kelby*, 122 S. Ct. at 733.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 734 (Rehnquist, C.J., dissenting).

to rebut the State's contention when it directly places the defendant's future dangerousness at issue.²⁵ The new rule, however, requires a *Simmons* instruction at any point that the jury could *infer* the defendant's future dangerousness from the prosecution's evidence.²⁶ In the Chief Justice's view, this would likely apply to any evidence of aggravation and therefore would require a *Simmons* instruction in every case.²⁷

Justice Thomas, however, held the view that there is no due process justification for a *Simmons* instruction.²⁸ In Justice Thomas's view, the majority's opinion was a broad expansion of a rule that was already unmanageable and vague.²⁹ Justice Thomas perceived a fundamental federalism problem with the rule because it ostensibly "preserve[d] in most cases the State's role in determining whether to instruct a jury regarding a defendant's eligibility for parole."³⁰ Further, Justice Thomas argued that the rule "seriously diminished the State's discretion in this area" by holding that the defendant should be permitted to raise parole ineligibility every time the State introduces evidence of future dangerousness.³¹ By expanding this rule to require a life-means-life instruction whenever the State *implies* future dangerousness, the Court, according to Justice Thomas, simply interferes "further in a State's sentencing proceedings under the guise that the Constitution requires us to do so."³²

C. Independent Characterization of Trial Events

The aspect of *Kelly v. South Carolina* that is of particular interest to practitioners in Virginia is the United States Supreme Court's willingness to dispense with the state supreme court's interpretation of events at trial and to apply its own interpretation instead. The Supreme Court of South Carolina was of the opinion that the prosecution in *Kelly* did not raise the issue of future dangerousness, and adopted the view that the prosecution introduced evidence merely "designed to show that Kelly would not adapt to prison life."³³ In reversing, the United States Supreme Court explained: "[I]t is not that the state court failed to pose the legal issue accurately . . . [t]he error was rather on the facts: the evidence and the argument cited by the state court are flatly at odds with the view that 'future dangerousness was not an issue in this case.'"³⁴ The Court explained further that the legal error of the Supreme Court of South Carolina resulted from its errone-

25. *Id.* at 735.

26. *Id.* at 731, 735.

27. *Id.* at 735-36.

28. *Id.* at 736 (Thomas, J., dissenting).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 737.

33. *Id.* at 730.

34. *Id.* at 731 (quoting *State v. Kelly*, 540 S.E.2d 851, 857 (S.C. 2001)).

ous portrayal of facts in that “[t]he error in trying to distinguish *Simmons* this way lies in failing to recognize that evidence of dangerous ‘character’ may show ‘characteristic’ future dangerousness.”³⁵

The Court’s handling of *Kelly* may set a precedent for future recharacterizations of facts emerging from cases decided in the Supreme Court of Virginia. In past cases, the Supreme Court of Virginia has adopted convenient characterizations of facts in order to affirm death sentences. In *Vinson v Commonwealth*,³⁶ the defendant called two mental health experts who testified as to the defendant’s mental health condition.³⁷ The experts were of the opinion that the defendant suffered from “intermittent explosive disorder,” which prevented him from conforming his behavior to law.³⁸ The Commonwealth presented its own mental health expert to rebut *Vinson*’s experts, who testified that nearly all violent criminals suffer from “intermittent explosive disorder” and that the chances of *Vinson* committing another violent crime within five years were “at least fifty percent.”³⁹ On appeal of his death sentence, *Vinson* argued, inter alia, that the trial court permitted the Commonwealth’s expert to testify to the issue of future dangerousness on rebuttal although the defense mental health experts never directly addressed the issue.⁴⁰ The Supreme Court of Virginia, however, succinctly rejected this claim, explaining that because the defense mental health experts “offered excuses for defendant’s behavior,” it was proper for the Commonwealth’s expert to express opinions on the defendant’s future conduct.⁴¹

The characterization of *Vinson*’s mental health evidence as going to the issue of future dangerousness, not only gave the Commonwealth a free pass at offering its expert’s opinion on the defendant’s future dangerousness, but also robbed the defendant of a statutory mitigator under Virginia’s capital sentencing scheme.⁴² This characterization is analogous to the fact characterization which occurred in *Kelly*, in that the court in that case characterized evidence which clearly addressed future dangerousness as evidence showing that “Kelly would not adapt to prison life.”⁴³ *Kelly* suggests that the United States Supreme Court will no longer be as accepting of the fact characterizations of state supreme courts when those fact characterizations appear to be convenient artifices to affirm death sentences. Although the immediate effect of *Kelly v South Carolina* is to

35. *Id.* at 732.

36. 522 S.E.2d 170 (Va. 1999).

37. *Vinson v. Commonwealth*, 522 S.E.2d 170, 175 (Va. 1999).

38. *Id.*; see VA. CODE ANN. § 19.2-264.4(B)(iv) (Michie 2000) (providing that “[the fact that] the capacity of the defendant to . . . conform his conduct to the requirements of law was significantly impaired” may be considered as a fact in mitigation).

39. *Vinson*, 522 S.E.2d at 175.

40. *Id.* at 178.

41. *Id.*

42. See VA. CODE ANN. § 19.2-264.4(B)(iv).

43. *Kelly*, 122 S. Ct. at 730.

constitutionalize the life-means-life instruction, it can also be seen as a warning shot directed at the state supreme courts to conduct genuine, substantive review of capital trials rather than to gloss over the facts.

Damien P. DeLaney

CASE NOTES:

**United States Court of Appeals
for the Fourth Circuit**
