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Commonwealth v. Smith
557 S.E.2d 223 (Va. 2002)

I. Facts

On November 20, 1994, Timothy Frazier ("Frazier") and appellant, Melvin Smith ("Smith"), went to a store in Richmond intending to kill Tyrone Reed ("Reed"). The killing was meant to be in retaliation for the earlier murder of appellant's friend, Michael Atkins. Frazier and Smith began firing their guns when they reached the store, killing two bystanders, Bruce Ross ("Ross") and Irvin Doughty ("Doughty"). Four months later, Smith told Frazier that he had shot and killed Kenneth "Randy" Smith ("Randy"). At trial, Smith testified that he killed Randy in self-defense.[1] On August 19, 1996, over one year after Randy's murder, Smith told Frazier that he had shot and killed Warrick Ray ("Ray") in a rooming house in Richmond.[2]

The Commonwealth charged Smith with first degree murder for the killing of Ross and capital murder for the killing of Doughty in the same transaction as the killing of Ross.[3] It also charged Smith with first degree murder for the killing of Randy and capital murder for the killing of Ray within three years of the killing of "Irving Doughty and/or Bruce Ross and/or Kenneth 'Randy' Smith."[4] The Commonwealth also charged Smith with four counts of use of a firearm in the commission of murder. The trial court denied Smith's motion to sever the charges, and all of the charges were submitted to the same jury. On September 24, 1999, a jury found Smith not guilty of the murders of Ross and Doughty, and not guilty of the related firearm charges. The jury found Smith guilty of the murder of Randy; the court declared a mistrial as to the murder of Ray and the related firearm charge because the jury deadlocked on those charges. Smith appealed his conviction for the murder of Randy, contending that the trial judge committed reversible error in denying Smith's motion to sever the murder charges. The Court of Appeals of Virginia held that the joinder of the four

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1. Smith v. Commonwealth, 557 S.E.2d 223, 225 (Va. 2002) (Smith testified that he killed Randy when Randy reached for a gun, because he "thought Randy was being paid to kill" him.).

2. *Id.*

3. *See also* VA. CODE ANN. § 18.2-31(7) (Michie Supp. 2001) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction").

4. *See also* VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2001) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of more than one person within a three-year period").

murder charges was improper and reversed Smith's convictions for the murder of Randy and the related firearm charge.[5]

II. Holding

The Supreme Court of Virginia, finding that the trial court properly denied Smith's motion for separate trials, reversed the holding of the court of appeals.[6] The supreme court reinstated the judgment of the trial court and remanded the case for enforcement of the sentencing order.[7]

III. Analysis / Application in Virginia

The Supreme Court of Virginia stated that "the sole question for decision is whether the trial court erred in denying the defendant's motion for separate trials."[8] The court relied on *Cheng v. Commonwealth*[9] to establish that it must give considerable deference to the trial court's ruling on whether the different offenses should have been tried separately.[10] Under this standard of review, the court found that the trial court had not abused its discretion in denying Smith's motion to sever the charges of the four murders.[11]

In order to fulfill the joinder requirements of Rule 3A:6(b),[12] the Commonwealth sought to prove that the four murders were part of a "common scheme or plan."[13] The Commonwealth maintained that the charges were joined properly because the motive for the murders was drug and gang-related.[14] Smith asserted that joinder was improper because the four murders were not connected by "a common scheme or plan," as required by Rule 3A:6(b). To define the term "connected," as used in Rule 3A:6(b), Smith turned to *Kirkpatrick v. Commonwealth*.[15] In *Kirkpatrick*, the court held that two crimes may be joined when there is such an "intimacy and connection" between them that they make up a chain of events that should not be broken.[16] Smith argued that the court of appeals

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5. *Smith*, 557 S.E.2d at 224-27.
6. *Id.* at 227.
7. *Id.*
8. *Id.* at 225.
9. 393 S.E.2d 599 (1990).
10. Cheng v. Commonwealth, 393 S.E.2d 599, 603 (Va. 1990) (stating that the decision of whether to grant a defendant's motion to sever charges is within the trial court's discretion, and may not be disturbed unless this discretion was abused).
11. *Smith*, 557 S.E.2d at 227.
12. VA. SUP. CT. R. 3A:6 (stating that "[t]wo or more offenses . . . may be charged in separate counts of an indictment . . . if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan").
13. *Smith*, 557 S.E.2d at 225.
14. *Id.*
15. *Id.*; *see* Kirkpatrick v. Commonwealth, 176 S.E.2d 802 (Va. 1970).
16. *Kirkpatrick*, 176 S.E.2d at 807.

correctly found that there was no evidence that the murders were gang-related or that he was involved in a drug ring.[17] Thus, he asserted, his crimes were not "connected."[18]

The Supreme Court of Virginia rejected Smith's argument and dismissed the issue of Smith's possible involvement in a gang or drug trade as "irrelevant."[19] Instead, the supreme court accepted the Commonwealth's position and based its analysis on the language of Virginia Code Section 18.2-31(8) itself.[20] The Commonwealth stated that in order for a murder to be classified as capital murder, there must be an aggravating circumstance as required in the various subsections of Virginia Code Section 18.2-31.[21] Here, the Commonwealth asserted, the required aggravating circumstance was the gradation crime of Smith's killing of more than one person within a three-year period.[22] The supreme court held that this gradation murder provided the necessary "connection" to make joinder of Smith's charges permissible.[23] The court stated that "'gradation' equates with 'connection,'" and thus, the joinder requirements of Rule 3A:10 were met.[24] In so holding, the court stated that its previous definition of "connected crimes," as stated in *Kirkpatrick*, no longer applies.[25] The court held that Rule 3A:10(c) no longer requires a factual connection between the different offenses; but rather, for the purposes of Virginia Code Section 18.2-31(8), it requires the connection of the principal and gradation murders occurring within a three-year period.[26]

The Supreme Court of Virginia stated that the court of appeals incorrectly assumed that the analysis followed by the supreme court would take the place of the joinder test.[27] Instead, the court declared that its analysis still made use of the joinder test, but that the General Assembly had acted within its authority by modifying the joinder rule.[28] The court cited Virginia Code Section 8.01-3(D), which states that "[t]he General Assembly may, from time to time, by the enactment of a general law, modify, or annul any rules adopted or amended [by this Court]."[29] The court found that the General Assembly implicitly modified Rule

17. *Smith*, 557 S.E.2d at 225.

18. *Id.*

19. *Id.*

20. *Id.* at 226.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*; *see also* VA. SUP. CT. R. 3A:10(c) (stating that "[t]he court may direct that an accused be tried at one time for all offenses then pending against him, if justice does not require separate trials and . . . the offenses meet the requirements of Rule 3A:6(b)").

25. *Smith*, 557 S.E.2d at 226.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; *see also* VA. CODE ANN. § 8.01-3(D) (Michie 2000) (stating that "[i]n the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed

3A:6(b) for the purposes of Virginia Code Section 18.2-31(8) by no longer requiring the Commonwealth to establish an intimate factual connection between the crimes in order to permit joinder.[30] Thus, if the principal murder and the gradation murder were committed within three years of each other, they will be deemed to be "connected," satisfying the requirement of Rule 3A:6(b).[31] According to the court's holding, Rule 3A:10 still triggers Rule 3A:6(b), but if the two murders were committed within a three-year period, Rule 3A:6(b)'s requirement that the two acts must be "connected" is met per se by the gradation offense.

Even before the court's holding in *Smith*, the Commonwealth's charge of a capital murder under Virginia Code Section 18.2-31(8) would read: "Count 1 - the killing of A within 3 years of the killing of B." There is no joinder question in the preceding count. What is at stake in *Smith* is the joinder of the first degree murder of B in the same indictment as the capital murder of A. After *Smith*, the Commonwealth may charge a defendant as follows: "Count 1- the killing of A within 3 years of the killing of B. Count 2 - the first degree murder of B."

Joinder of the first degree gradation murder has always been permissible when the capital murder is charged under Virginia Code Section 18.2-31(7). Virginia Code Section 18.2-31(7) requires the two offenses charged to be committed in the "same act or transaction." This requirement is narrower than that of Rule 3A:6(b), which requires only that the two offenses be part of a "common scheme or plan." Because proper joinder under Rule 3A:6(b) will always be present in such cases, Rule 3A:10(c) will permit the counts to be simultaneously tried "if justice does not require separate trials."[32] Because the capital murder and first degree murder are necessarily alleged to be part of the same transaction, it is extremely unlikely that the defendant will be able to show that he will be prejudiced by the trial on the joined events–i.e., the defendant will not be able to show that justice requires separate trials.

The same is not true of cases charged under Virginia Code Section 18.2-31(8). In those cases, after *Smith*, the capital murder and first degree murder counts are joinable under Rule 3A:6(b) because they are "connected."[33] Because this "connection" satisfies Rule 3A:10(c), the counts may be tried together "if justice does not require separate trials."[34] The two killings may have no relationship to each other except the three-year time span. Thus, it is far more likely that trying the capital murder and first degree murder together will prejudice the defendant–i.e., justice will require separate trials.

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so as to give effect to such enactment").

30. *Smith*, 557 S.E.2d at 226.
31. *Id.*
32. VA. SUP. CT. R. 3A:10(c).
33. VA. SUP. CT. R. 3A:6(b).
34. VA. SUP. CT. R. 3A:10(c).

Smith did not specifically rely on Rule 3A:10(c) to argue that justice required separate trials.[35] Although Smith did argue that joining the four murders before the jury would be prejudicial, he asserted that this prejudice would be "violative of due process."[36] The court rejected this argument and found that it had acted within its scope of authority in setting a "precise condition" that the murders must have been committed within a three-year period in order to be joined under Virginia Code Section 18.2-31(8), "despite the prejudice that may result thereafter."[37] It is unclear whether the court would have accepted Smith's assertion of unfair prejudice if the argument had been made pursuant to Rule 3A:10(c).[38] Showing that the prejudice caused by joinder violated Smith's due process rights is more difficult than showing that this prejudice violated the requirement of justice under Rule 3A:10(c). Thus, it is possible that Smith might have been successful in arguing under Rule 3A:10(c) that unfair prejudice should have precluded joinder.

IV. Example

Alex killed his wife to collect from her life insurance. Eight months later, Alex killed his girlfriend because he discovered that she was having an affair. The Commonwealth charges Alex with first-degree murder under Virginia Code Section 18.2-32 for the murder of his girlfriend.[39] In the same indictment the Commonwealth seeks to charge Alex with capital murder for the murder of his wife within three years of the murder of his girlfriend under Virginia Code Section 18.2-31(8).[40] Before the Supreme Court of Virginia's holding in *Smith*, the Commonwealth would not have been permitted to join the two murders because they were not part of the same act or transaction. However, applying the rule in *Smith*, the indictment charging the first degree murder of the girlfriend can now be joined, because the Rule 3A:6 requirement of "connection" is satisfied. Rule 3A:10(c) may, however, still require separate trials.

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35. *Smith*, 557 S.E.2d at 225 n.2.
36. *Id.*
37. *Id.* at 227.
38. *See* VA. SUP. CT. R. 3A:10(c).
39. VA. CODE ANN. § 18.2-32 (Michie Supp. 2001).
40. VA. CODE ANN. § 18.2-31(8) (Michie Supp. 2001).