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Thomas v. Commonwealth 559 S.E.2d 652 (Va. 2002)

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I. Facts

On June 26, 2000, Jeffery Allen Thomas ("Thomas") was indicted for capital murder during the commission of, or subsequent to, rape or attempted rape,[1] for rape or attempted rape,[2] and for use of a firearm in the commission of the murder of Tara Rose Munsey ("Munsey").[3] Following the guilt phase of the bifurcated trial, the jury convicted Thomas of all offenses.[4] Thomas did not present mitigating evidence at the penalty phase of the trial. The jury sentenced Thomas to death for capital murder based on the aggravating factor of vileness. Thomas was sentenced to ten years for attempted rape and three years for the use of a firearm in the commission of a felony. Thomas elected to present mitigating evidence at the final sentencing hearing before the judge. On July 16, 2001, Thomas was sentenced to death for the murder of Munsey.[5]

II. Holding

The Supreme Court of Virginia vacated the conviction and remanded the case for further proceedings, because the trial court erred, as a matter of law, in failing to apply the proper test and consider the necessary factors when making its decision to deny Thomas's motion to change venue.[6] Due to the trial court's use of an improper legal standard in exercising its discretionary function, the Supreme Court of Virginia was unable to apply the abuse of discretion principle generally applicable to such decisions.

III. Analysis / Application in Virginia

A. Motion for a Change of Venue

The Supreme Court of Virginia held that the trial court erred in denying Thomas's motion to change venue, but declined to consider most of the other

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1. Thomas v. Commonwealth, 559 S.E.2d 652 (Va. 2002); *see* VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2001) (stating that the "willful, deliberate, and premeditated killing of any person, in the commission of, or subsequent to, rape or attempted rape" shall constitute capital murder).

2. VA. CODE ANN. §§ 18.2-61,-67.5 (Michie 1996 & Supp. 2001). The charge of rape was struck by the trial court on March 8, 2001. Thomas v. Commonwealth, 559 S.E.2d 652, 654 n.1 (Va. 2002).

3. VA. CODE ANN. § 18.2-53.1 (Michie 1996); Thomas v. Commonwealth, 559 S.E.2d 652, 654 (Va. 2002).

4. Thomas v. Commonwealth, 559 S.E.2d 652, 654 (Va. 2002).

5. *Id.*

6. *Id.* at 661, 663.

thirty-eight assignments of error.[7] There are several principles that apply when a challenge to the denial of a motion for change of venue is reviewed. First, the defendant bears the burden of overcoming the presumption that the defendant will receive a fair trial in the jurisdiction where the offense occurred.[8] The defendant must show that the prejudice among the citizenry is widespread and, thus, would be "reasonably certain to prevent a fair trial."[9] In order to demonstrate widespread prejudice, the defendant must show that the volume of the publicity is inaccurate, intemperate, and inflammatory and that the timing of the publicity is harmful.[10] A juror may sit on a jury with knowledge of the case if his opinion can be set aside.[11] However, the difficulty encountered when finding jurors with knowledge who can be impartial is taken into account.[12] In order to evaluate the difficulty of finding enough impartial jurors, it is necessary for the trial court to attempt to seat the jury.[13]

When applying these principles to the instant case, it is necessary to look at the volume of publicity. In support of the motion for change of venue, Thomas presented over 111 articles, appearing in three different newspapers, and 188 television reports relating to the crime.[14] The trial court questioned 104 potential jurors to produce a venire of twenty-nine people.[15] Ninety-five percent of the potential jurors and all of the jurors ultimately seated were aware of the pretrial publicity and knew about the case.[16] Forty-five percent (forty-seven individuals) of the veniremen interviewed indicated that they could not be impartial, and

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7. *Id.* at 656-61. The Supreme Court of Virginia rejected Assignment of Error 11 because no new arguments, regarding the constitutionality of the death penalty statutes, sufficient to warrant a change in prior holdings were presented. *Id.* at 656. The court also rejected Thomas's motion for a bill of particulars, stating that the identification of all the evidence relied on by the Commonwealth to support the death penalty was not required because such a request was an improper attempt to expand the scope of discovery in a criminal case. *Id.* at 656-57 (citing Quesinberry v. Commonwealth, 402 S.E.2d 218, 223 (Va. 1991)). The Supreme Court of Virginia also denied that the trial court had erred in denying Thomas's motion to suppress evidence,

> [B]ecause the affidavit accompanying the request for a search warrant was sufficient to support a finding of probable cause and did not contain deliberately misleading or false information, did not omit information which if included would have defeated a finding of probable cause and was not based on information from a source not shown to be reliable.

Id. at 659.

8. *Id.*

9. *Id.* (quoting Mueller v. Commonwealth, 422 S.E.2d 380, 388 (Va. 1992)).

10. *Id.* at 660.

11. *Id.*

12. *Id.*

13. *Id.* at 660.

14. *Id.* at 659. The three newspapers that serve Pulaski County are *The Roanoke Times*, *The Radford News Journal*, and *The Southwest Times*. *Id.* at 659 n.5.

15. *Id.* at 659.

16. *Id.*

thirty-three of those people had a fixed opinion that Thomas was guilty.[17] Thomas did not challenge the accuracy of any of the television reports, but he did claim that three of the reports were intemperate or inflammatory.[18] The court found that some newspaper articles contained inaccuracies which were prejudicial to Thomas.[19]

The Supreme Court of Virginia stated that the trial court was correct to attempt to seat the jury, and that the error that occurred was a result of the trial court's failure to recognize that the issue is the ease with which the jury is selected.[20] It was not enough that the trial court was ultimately able to seat an impartial jury.[21] The court stated that it has never "held the impartiality of the seated jury to be a factor in considering whether a motion for change of venue should be granted, much less found it dispositive."[22] Rather, the relevant consideration is the ease with which the jury was seated.[23] In *Irvin v. Dowd*,[24] the United States Supreme Court held that the trial court's finding of impartiality failed to make it reasonably certain that the defendant would receive a fair trial because of the difficulty of impaneling a jury and the obvious influence that publicity had on the jury pool.[25] Measuring the ease with which the jury is impaneled allows the trial court to keep in mind that "justice must not only be fair, it must also be above suspicion."[26] Difficulty in seating a jury causes the public to be more likely to believe that the judicial process is tainted by prejudice.[27] Because the trial court failed to apply the proper test when deciding to deny Thomas's motion to change venue, the Supreme Court of Virginia vacated the judgment.[28]

The Supreme Court of Virginia has only vacated a judgment based on the trial court's change of venue decision in one other case, *Newcomer v. Commonwealth*.[29] In *Newcomer*, the defendant was tried twice in Buena Vista for the murder of Vernon Staton; both trials resulted in hung juries.[30] Following the second trial, the Commonwealth made a motion for a change of venue. The

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17. *Id.*

18. *Id.* at 660.

19. *Id.* at 661.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; *see generally* Mueller v. Commonwealth, 422 S.E.2d. 380, 388-89 (Va. 1992).

24. 366 U.S. 717 (1961).

25. Irvin v. Dowd, 366 U.S. 717, 727-28 (1961) (holding that the trial court's finding of impartiality failed to show that the defendant would receive a fair trial in spite of the obvious influence that publicity had on the jury pool).

26. *Thomas*, 559 S.E.2d at 661 (citing Breeden v. Commonwealth, 227 S.E.2d 734, 735 (1976)).

27. *Id.*

28. *Id.*

29. *See* Newcomer v. Commonwealth, 255 S.E.2d 485, 490 (Va. 1979) (holding that the Commonwealth should not have been granted a change of venue motion because the Commonwealth failed to show that a fair trial could not be obtained).

30. *Id.* at 486.

motion was granted and in a subsequent trial in the Circuit Court of Rockbridge County, the defendant was convicted of second-degree murder and sentenced to seven years in the state penitentiary.[31] The Supreme Court of Virginia, stating that the Commonwealth failed to demonstrate by affirmative evidence that either it or the defendant could not obtain a fair trial in Buena Vista, overturned the verdict.[32] The court's decision to vacate in the instant case is the first time it has done so based on the trial court's failure to grant a motion of change of venue upon the request of the defendant.

B. Victim Impact Testimony

The Supreme Court of Virginia rejected Thomas's claim that the trial court violated Virginia Code Section 19.2-264.4(A1) when it allowed Ella Buchanan, a cousin of the victim, and Nicholas Ryan Zaroba, the victim's fiancé, to testify during the penalty phase of Thomas's capital murder trial.[33] Thomas asserted that Section 19.2-264.4 allows only "victims" to testify about the impact of the offense upon them.[34] "Victim" is defined in Section 19.2-11.01(B) to include only a "spouse, parent, sibling, or legal guardian" of the murder victim.[35] Thomas argued that the new subsection added in 1998, following *Beck v Commonwealth*,[36] limits "victims" to those included in the definition found in Section 19.2-11.01.[37] The Supreme Court of Virginia rejected this argument stating that subsection (A1) does not preclude those not falling within that definition from testifying in a capital murder proceeding regarding the impact of the crime on their life.[38] Nothing in the subsection supports the proposition that others who may have relevant victim impact testimony may not testify.[39] As was stated in *Beck*:

> [The statutes] do not limit evidence of victim impact to that received from the victim's family members. Rather, the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn. In a capital murder trial, as in any other criminal proceeding, the determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion.[40]

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31. *Id.*

32. *Id.* at 490-91.

33. *Thomas*, 559 S.E.2d at 662-63; *see also* VA. CODE ANN. § 19.2-264.4 (Michie 2000) (stating that "the court shall permit the victim, as defined in § 19.2-11.01 . . . to testify in the presence of the accused regarding the impact of the offense upon the victim").

34. *Thomas*, 559 S.E.2d at 662; *see* VA. CODE ANN. § 19.2-264.4 (Michie 2000).

35. *Thomas*, 559 S.E.2d at 662-63; VA. CODE ANN. § 19.2-11.01(B) (Michie Supp. 2001).

36. 484 S.E.2d 898 (Va. 1997).

37. *Thomas*, 559 S.E.2d at 662; *see* Beck v. Commonwealth, 484 S.E.2d 898, 905 (Va. 1997) (holding that non-family victim impact evidence was admissible during the sentencing phase).

38. *Thomas*, 559 S.E.2d at 662.

39. *Id.* at 663.

40. Beck v. Commonwealth, 484 S.E.2d 898, 905 (Va. 1997).

The Supreme Court of Virginia ruled that the term "victim" is not limited to just spouses, parents, siblings, or legal guardians, at least not in relation to victim impact testimony.[41]

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41. *Thomas*, 559 S.E.2d at 662-63.