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Zirkle v. Commonwealth

553 S.E.2d 520 (Va. 2001)

I. Facts

In early 1999, Daniel Lee Zirkle ("Zirkle") lived in Rockingham County with Barbara J. Shifflett ("Barbara"), their four-year-old child Christina Zirkle ("Christina"), and Barbara's other daughter, fourteen-year-old Jessica Shifflett ("Jessica"). In April, Barbara sought and obtained a protective order against Zirkle. In May, Zirkle was convicted and incarcerated for violating the order. On August 2, while Jessica was watching Christina, Zirkle placed a harassing phone call to Barbara at her work place. Shortly thereafter Zirkle's mother phoned Barbara to inform her that Zirkle had taken Christina. After hearing this information, Barbara went home and Zirkle's mother called 911.¹

At her home in Rockingham County, Barbara found Jessica on the floor, stabbed in the throat; unable to determine her condition, Barbara endeavored to resuscitate her. A sheriff's investigator was sent to a location in Page County given by Zirkle's mother as Zirkle's possible location with Christina. The investigator found Zirkle wounded and a knife in close proximity to him. Further, Christina was found laying on Zirkle's chest with a fatal neck wound.²

A Rockingham County grand jury issued two capital indictments against Zirkle for the murder of Jessica.³ After his arrest, Zirkle consistently asserted to his attorneys and the court his desire to plead guilty and be sentenced to death. After several thorough examinations by the court to elucidate Zirkle's true intentions, the court permitted him to plead guilty to the charges. Further, Zirkle did not allow his attorneys to introduce any evidence in mitigation during the penalty phase of his trial. The court sentenced Zirkle to death based on evidence of future dangerousness and vileness. Zirkle directed that no appeals be taken on his behalf and the Supreme Court of Virginia ordered the circuit court to ascertain whether this decision was made intelligently. The circuit court held a

1. *Zirkle v. Commonwealth*, 553 S.E.2d 520, 523 (Va. 2001). For a more complete description of the facts of this case, see Damien P. DeLaney, Case Note, 14 CAP. DEF. J. 167 (2001) (analyzing *Patterson v. Commonwealth*, 551 S.E.2d 332 (Va. 2001) and *Zirkle v. Commonwealth*, 551 S.E.2d 601 (Va. 2001)). The first Zirkle case originated in Page County and was for the capital murder of Zirkle's daughter Christina. *Zirkle v. Commonwealth*, 551 S.E.2d 601 (Va. 2001).

2. *Zirkle*, 553 S.E.2d at 523.

3. *Id.* at 521. Zirkle was indicted under Virginia Code Section 18.2-31(7) and (8), for "the killing of one or more persons as part of the same act or transaction," and the "killing of more than one person within a three year period." VA. CODE ANN. § 18.2-31(7), (8) (Michie Supp. 2001); *Zirkle*, 553 S.E.2d at 521. Zirkle was indicted, pleaded guilty and was sentenced to death for capital murder in Page County as well, for the capital murder of Christina. *See Zirkle*, 551 S.E.2d at 601.

hearing at which it determined that Zirkle freely chose not to pursue any appeals and signed a waiver to this effect under oath. Despite Zirkle's desire not to appeal his convictions and sentence, the Supreme Court of Virginia was required to review his death sentence pursuant to Virginia Code Section 17.1-313.⁴

II. Holding

The court found that Zirkle's sentence was not improperly motivated by passion or prejudice.⁵ Furthermore, it found that the penalty imposed was proportional to the penalties imposed in similar cases.⁶ Thus, the sentence was affirmed in a single page without any in-depth analysis of proportionality review.⁷ However, the court described excellently the procedures to follow when a defendant does not desire a defense.⁸

III. Analysis / Application in Virginia

This opinion raises two important issues. First, the question of whether proportionality review is a valid means by which a defendant's sentence is scrutinized is raised. Second, the case displays proper procedures for dealing with a defendant who does not wish to defend himself and in fact wants death. The opinion, through its detailed description, is helpful as to the latter issue. However, because the court deals minimally with its proportionality review, the following analysis will focus on the comments and criticisms from the Joint Legislative Audit and Review Commission ("JLARC") study.⁹

A. Proportionality Review Reviewed

The court assessed the proportionality of Zirkle's death sentence in three paragraphs.¹⁰ The test applied by the court was "whether 'juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.'"¹¹ The court failed to explain the nature of the word "generally," or what a comparable crime might be, leaving the standard empty for one seeking guidance as to how the court conducts proportionality review. The court then stated, in a

4. *Zirkle*, 553 S.E.2d at 521-522; VA. CODE ANN. § 17.1-313(A), (C) (Michie 1999) (requiring that "[a] sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court" for passion, prejudice and proportionality "considering both the crime and the defendant").

5. *Zirkle*, 553 S.E.2d at 525.

6. *Id.*

7. *See id.*

8. *See id.* at 521-523.

9. *See generally* J. LEGIS. AUDIT AND REVIEW COMM'N, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT (2002) (reviewing and analyzing accumulated data on the Virginia capital system in three primary areas: prosecutorial discretion, judicial review, and executive clemency).

10. *Zirkle*, 553 S.E.2d at 525.

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

conclusory fashion that "the sentence of death imposed upon Zirkle is neither excessive nor disproportionate."¹² In the entire proportionality analysis, the court never mentioned Zirkle's crime or any specific parts of it, nor did the court mention a case with a similar factual basis, or even statistics involving child killings. Neither did the court consider the defendant in its proportionality review as is required by statute.¹³ Furthermore, the test enunciated by the court, when strictly read, does not require comparison of the defendant with other defendants sentenced to death, despite the statute's requiring such a comparison.

The Supreme Court of Virginia received substantial comment and criticism about its proportionality review process in the recently released Joint Legislative Audit and Review Commission of the Virginia General Assembly ("JLARC") report.¹⁴ JLARC conducted a study of Virginia's capital punishment scheme; the study assessed several areas of the capital system and the report dealt with the statistical results and the implications of these statistics. JLARC's assessment of proportionality review emphasizes what many have suspected: it is a virtually meaningless review because the court has too narrowly defined its scope.¹⁵ The raw numbers alone reveal the inadequacy of proportionality review: "[T]he Virginia Supreme Court ruled that each of the death sentences that have been meted out by the lower courts since 1977 were generally consistent with the verdicts imposed by juries" in other similar cases.¹⁶

The main focus of the evaluation was the court's methods in reviewing capital sentences for proportionality. Specifically the commission criticized the court for the cases which it chose to use in the comparisons.¹⁷ The study looked at all cases reviewed for proportionality from 1978 to 2001 and found that in forty-five percent of the cases the court compared the case under review with only other death sentence cases, and in fifty-five percent of the cases compared life and death sentence cases.¹⁸ However, in the fifty-five percent of cases in which both judgments were used for comparison, the court "[g]ave] a particular emphasis to the death cases."¹⁹ Notably, this practice does not violate the statutory mandate of proportionality review.²⁰ The study criticized the fact that while the statute provides the court with the ability to collect records to use in review, it does not specifically require collection or designate which records the court should accumulate and use in its analysis.²¹ The study also focused on the

12. *Id.*

13. *Id.*; see also VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999).

14. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 9.

15. *Id.* at 55.

16. *Id.*

17. *Id.* at 68.

18. *Id.* at 69 fig.26.

19. *Id.* at 68-69.

20. *Id.* at 70.

21. *Id.* at 67; see also VA. CODE ANN. § 17.1-313(E) (Michie 1999) (permitting that the court

inadequate use of life cases; the court does not include life cases which were not appealed, which indicates that the cases used for review are not a true representation of how juries sentence capital crimes.²² The Commission was not, however, able to compile data to determine the true effect of this problem.²³ Even so, it determined that this issue "limits the reliability of the [c]ourt's review."²⁴

Zirkle's case represents the exact type of review criticized by the study. The court enunciated the test and in a conclusory fashion determined that Zirkle's sentence was proportionate.²⁵ Hopefully, the court in the future will elaborate upon the proportionality review test and make true comparisons to cases and defendants akin to the one under review while considering *all* factually similar cases and defendants.

B. Defendants Wanting Death

This case provides an elaborate description of the process which must be followed when a defendant does not wish to present a defense, and chooses to plead guilty and have a death sentence imposed.²⁶ The court detailed the acts of counsel, the circuit court and the defendant in this process. In August of 2000, Zirkle informed his counsel, that he wanted to plead guilty, over their advice, and receive death as his penalty.²⁷ The court, in response, "examined Zirkle extensively" regarding these representations.²⁸ The court then heard the Commonwealth's proffer of its guilt phase evidence, to which Zirkle agreed.²⁹ Zirkle was permitted to plead guilty to the charges against him.³⁰ The court then conducted a second inquiry of Zirkle, this time probing whether he was mentally competent, understood the proceedings, understood the effect of his guilty pleas, and made the pleas "freely, intelligently, and voluntarily."³¹ This assessment by the court appears to be the probable cause determination under Virginia Code Section 19.2-169, which requires an evaluation be performed if "there is probable cause to believe that the defendant lacks substantial capacity to understand the proceedings."³² Thus, counsel in a position similar to Zirkle's counsel, in order to best serve the client should request, as soon as the defendant begins discussing pleas

"may accumulate the records of all capital felony cases").

22. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 9, at 71.

23. *Id.* at 72.

24. *Id.*

25. *Zirkle*, 553 S.E.2d at 525.

26. For a more in-depth look at this dilemma see generally Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (2001).

27. *Zirkle*, 553 S.E.2d at 521.

28. *Id.* at 522.

29. *Id.*

30. *Id.*

31. *Id.*

32. VA. CODE ANN. § 19.2-169.1(A) (Michie 2000).

and death, a competency evaluation under the statute to ensure that the defendant is competent to request death for himself.

Not only did Zirkle enter guilty pleas to the charges, he ordered his attorneys to refrain from presenting any mitigation evidence during the penalty phase of the trial.³³ Despite this instruction, the court requested Zirkle's counsel to make preparations for presenting mitigation evidence and repeatedly questioned Zirkle about his intentions not to present evidence during the penalty phase.³⁴ Not only did this refusal allow the court to find the aggravating factors beyond a reasonable doubt and thus impose death, it precluded any meaningful proportionality review as well.³⁵

After sentencing, Zirkle persisted in his death wish and requested that no appeals be taken.³⁶ His counsel then filed a motion seeking direction from the Supreme Court of Virginia.³⁷ That court ordered the circuit court to hold a hearing to determine the voluntariness of this request and obtain a signed oath as to the request.³⁸ Zirkle was deemed to have intelligently waived his appeals.³⁹ The methods used by Zirkle's counsel, the circuit court, and the Supreme Court of Virginia were thorough in their attempts to ensure Zirkle's wishes and his competency. Any attorney faced with a defendant who is desirous of death should not only follow these examples, but should at every step attempt to preserve any possible appeal for the occasion of the defendant changing his mind.⁴⁰

IV. Conclusion

This opinion sheds light on two important issues in the Virginia capital system today: proportionality review and defendants wanting death. First, this case and the JLARC study highlight the reality that proportionality review is at this point meaningless. However, the criticisms raised in the study may inspire the court to be more diligent in its future reviews. This means that practitioners must put more material, on which the court can rely, in their briefs. Second, when a defendant insists on a guilty plea and death sentence, the practitioner

33. *Zirkle*, 553 S.E.2d at 522.

34. *Id.* The practitioner should note that the court was correct to request Zirkle's counsel to continue preparing mitigation evidence for sentencing. However, the request was unnecessary; counsel should always continue to prepare for every aspect of the capital trial in case the defendant changes his mind at the last minute.

35. *Id.* Furthermore, the Supreme Court of Virginia specifically stated in the opinion "counsel state that since they were prevented from presenting any evidence in mitigation, [they] cannot point to any evidence in the record that would indicate that the sentence of death is excessive." *Id.* at 525 (alterations in original); see also Eisenberg, *supra* note 26, at 62-63.

36. *Zirkle*, 553 S.E.2d at 522.

37. *Id.*

38. *Id.*

39. *Id.*

40. See Eisenberg, *supra* note 26, at 75.

must be painstakingly careful to save any possible relief for the defendant in case he changes his mind at a later time.

Kathryn Roe Eldridge

CASE NOTES:

Cases of Interest
