



Fall 9-1-2002

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Recommended Citation

Tice v. Commonwealth 563 S.E.2d 412 (Va. Ct. App. 2002), 15 Cap. DEF J. 267 (2002).

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Tice v. Commonwealth

563 S.E.2d 412 (Va. Ct. App. 2002)

I. Facts

On July 8, 1997, William Bosko returned from naval deployment and found his wife, Michelle Moore-Bosko (“Moore-Bosko”), dead in their bedroom. Moore-Bosko died as a result of three penetrating stab wounds to her chest and manual strangulation. Moore-Bosko had been raped and sustained several other stab wounds.¹

Daniel Williams (“Williams”) lived in the apartment across from the Boskos. On the night of Moore-Bosko’s death, appellant Derek Tice (“Tice”), Joseph Dick (“Dick”), Williams and others were in Williams’s apartment. Dick testified that the group discussed going to Moore-Bosko’s apartment. When Moore-Bosko would not let them into her apartment, the group went to the parking lot outside the apartment, where they were joined by Omar Ballard (“Ballard”). On their second attempt to gain entry into Moore-Bosko’s apartment, the men tricked her into opening the door and rushed into the apartment. Dick testified that the men took Moore-Bosko directly to the bedroom where Williams raped her as the other men held her down. Dick also testified that Tice and the other men took turns raping her and that one of the men, after raping Moore-Bosko, went to the kitchen, found a knife, and each person then stabbed her. Based upon Dick’s admissions, the police questioned Tice and he confessed to raping and stabbing Moore-Bosko.²

At trial, testimony revealed that none of the latent fingerprints found at the scene matched Tice’s fingerprints. A forensic scientist testified that DNA tests eliminated Tice as the source of the DNA from the semen stain on a blanket and fingernail clippings sent to the lab. The tests also eliminated Tice as the source of the DNA from Moore-Bosko’s PERK vaginal swabs. The scientist testified that Ballard could not be eliminated as the source of the DNA from those pieces of evidence.³

After both sides presented their evidence, the trial court proceeded with the jury instructions. The relevant portion of Instruction 11 stated, “The defendant is charged with capital murder. The Commonwealth must prove beyond a

1. Tice v. Commonwealth, 563 S.E.2d 412, 414 (Va. Ct. App. 2002).

2. *Id.* at 414-15. Tice’s father asserts that Tice confessed because the detective assigned to the case was aggressive and threatening. Larry Tice, *A Sordid Tragedy of Coerced Confession—The Derek Tice Injustice Story*, JUSTICE: DENIED—THE MAGAZINE FOR THE WRONGLY CONVICTED, at <http://www.texas-justice.com/tice/derektice.htm> (last visited September 6, 2002).

3. Tice, 563 S.E.2d at 415.

reasonable doubt each of the following elements of that crime: (1) That the defendant or someone acting in concert with him, killed Michelle Moore-Bosko."⁴ Tice objected to the addition of the language "or someone acting in concert with him," because *Strickler v. Commonwealth*⁵ held that a determination of guilt for capital murder required proof that the defendant was an "active and immediate participant" in the killing.⁶ The trial court denied the objection and further instructed the jury in Instruction 12:

If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime.⁷

The jury convicted Tice of capital murder and he appealed from the judgment.⁸

II. Holding

The Court of Appeals of Virginia held that Instruction 11 was not an accurate statement of the law and that the trial court erred in overruling Tice's objection to it.⁹ The court found that the error was not harmless because the instruction allowed the jury to convict Tice of capital murder by finding that he acted in concert to rape Moore-Bosko, but without finding that he was an active participant in the murder.¹⁰ As a result, the court reversed Tice's convictions for capital murder and rape and remanded the case for a new trial.¹¹

4. *Id.*

5. 404 S.E.2d 227 (Va. 1991).

6. *Tice*, 563 S.E.2d at 416; see *Strickler v. Commonwealth*, 404 S.E.2d 227, 235 (Va. 1991) (stating that jury instruction requiring proof of "active and immediate" participation was proper because single person could not lift and drop sixty-nine pound rock on victim while simultaneously holding her down).

7. *Tice*, 563 S.E.2d at 415. Instruction 12 was an exact quotation of Criminal Instruction 3.160 of the Virginia Model Jury Instructions. VA. MODEL JURY INSTRUCTIONS, CRIMINAL, 3.160 (1998).

8. *Tice*, 563 S.E.2d at 414. Tice also appealed on the basis that the trial court erred in refusing to admit evidence that Ballard confessed to the crimes. *Id.* The Court of Appeals of Virginia ruled that Ballard's written confessions were inadmissible, but that the trial court properly allowed Tice to question Ballard extensively about the confessions. *Id.* at 417. The court also ruled that a letter from Ballard to a friend, in which Ballard confessed to the crime, was properly considered inadmissible by the trial court, but that the trial court erred by not allowing Tice to question Ballard on whether he confessed to his friend that he committed the crimes. *Id.* at 417-18. The court's evidentiary rulings will not be discussed in further detail in this note.

9. *Id.* at 417.

10. *Id.*

11. *Id.* at 418.

III. Analysis / Application in Virginia

Tice contended on appeal that the language of Instruction 11 “impermissibly lowered the standard of proof for capital murder.”¹² He argued that the language “or someone acting in concert with him,” when considered with Instruction 12, allowed the jury to convict him of capital murder if he acted in concert to rape Moore-Bosko even if, as a consequence of the rape, some or all of the other members of the group killed her without his direct involvement in the killing.¹³ The Commonwealth, relying on Rule 5A:18 of the Supreme Court of Virginia, asserted that Tice failed to state this ground in his objection and therefore waived this issue.¹⁴ The court found that Tice met the requirements of Rule 5A:18 and that he preserved the issue for appeal.¹⁵

Section 18.2-18 of the Virginia Code and prevailing case law firmly establish that, with specific statutory exceptions,¹⁶ only an actual slayer may be found guilty of capital murder.¹⁷ The court, without specifically saying so, found that the combined effect of Instruction 11 and Instruction 12 created an unacceptable exception to Virginia’s “triggerman rule.”¹⁸ The court stated that only in the case

12. *Id.* at 416.

13. *Id.*

14. *Tice*, 563 S.E.2d at 416; *see* VA. SUP. CT. R. 5A:18 (stating that no ruling will be considered basis for reversal unless objection was stated together with grounds).

15. *Tice*, 563 S.E.2d at 416. The court stated, “The primary function of Rule 5A:18 is to alert the trial judge to possible error so that the judge may consider the issue intelligently and take any corrective actions necessary to avoid unnecessary appeals, reversals and mistrials.” *Id.* (citing *Martin v. Commonwealth*, 414 S.E.2d 401, 404 (Va. Ct. App. 1992) (en banc)). Because Tice specifically identified the alleged error in Instruction 11 and cited cases in support of his position, the court found that Tice preserved the issue for appeal. *Id.*

16. *See* VA. CODE ANN. § 18.2-31(2) (Michie Supp. 2002) (defining willful, deliberate, and premeditated killing of any person by another for hire as capital murder); VA. CODE ANN. § 18.2-31(10) (Michie Supp. 2002) (defining willful, deliberate, and premeditated killing of any person by another pursuant to direction or order of one who is engaged in continuing criminal enterprise as capital murder); VA. CODE ANN. § 18.2-31(13) (Michie Supp. 2002) (defining willful, deliberate, and premeditated killing of any person by another in commission of or attempted commission of act of terrorism as capital murder); *see also* *Remington v. Commonwealth*, 551 S.E.2d 620, 630 (Va. 2001) (finding that defendant who stabbed victim eight to ten times jointly participated in fatal stabbing where medical examiner testified that victim sustained sixty-eight separate stab wounds, all of which contributed to victim’s death); *Coppola v. Commonwealth*, 257 S.E.2d 797, 806 (Va. 1979) (finding that two defendants may be immediate perpetrators when evidence indicates joint participation in fatal beating).

17. *See* VA. CODE ANN. § 18.2-18 (Michie Supp. 2002) (stating that, with exceptions, principals in the second degree and accessories before the fact to capital murder may be indicted, tried, convicted and punished only for first-degree murder).

18. *Tice*, 563 S.E.2d at 417. *Compare* *Cheng v. Commonwealth*, 393 S.E.2d 599, 607-08 (Va. 1990) (finding that only actual perpetrator, or “triggerman,” may be convicted of capital murder), *with* *Strickler*, 404 S.E.2d at 234-35 (stating that defendant may be found guilty of capital murder if evidence establishes that defendant jointly participated in act of murder only if it is established beyond reasonable doubt that defendant was “active and immediate participant” in act or acts causing victim’s death).

of "murder for hire" or in a *Strideler* finding of joint participation could any defendant other than the actual perpetrator be convicted of capital murder.¹⁹ The trial court's instructions allowed the jury to convict Tice of capital murder even if it did not believe that Tice had any active involvement in killing Moore-Bosko.²⁰ This instruction was a clear misstatement of the law because the trial court treated "concert of action" as if it was a form of criminal liability separate from accomplice liability. The court found that the error was not harmless.²¹ On these grounds, the court reversed and remanded the case for a new trial.²²

IV. Conclusion

Prosecutors decided not to appeal the case to the Supreme Court of Virginia.²³ A special prosecutor, instead, will retry Tice in Circuit Court because the Norfolk Commonwealth's Attorney has a conflict of interest in the case.²⁴ As of the publication date for this journal, no date has been set for the new trial.

The Court of Appeals of Virginia indicated in this decision that it will narrowly confine the "triggerman exceptions" to those that are defined by Section 18.2-18 and its developed caselaw. The Virginia General Assembly created a new exception to the "triggerman rule" when it added a terrorism provision to Section 18.2-31 of the Virginia Code after the court reversed and remanded this case.²⁵ That legislative action, however, is not authority for judicial expansion of the exceptions in Section 18.2-18. A defendant may be guilty of capital murder if found to be only an accomplice in an underlying felony as long as he is found to be the "triggerman" in the homicide. The court's ruling, however, was consistent in that proof of the defendant's involvement in the homicide, and not in the underlying felony, is of primary importance in convicting a defendant of capital murder. Defense counsel should refer to *Tice* to ensure that jury instructions require the jury to consider the defendant's role in the murder itself.

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19. *Tice*, 563 S.E.2d at 416-17. The court neglected to include among the exceptions killings pursuant to the direction or order of one who is engaged in a continuing criminal enterprise. § 18.2-18. After July 1, 2002, Section 18.2-18 made an additional exception for killings pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism. *Id.*; see *supra* note 17 (listing statutory exceptions to "triggerman" rule).

20. *Tice*, 563 S.E.2d at 417.

21. *Id.*

22. *Id.* at 418.

23. See Lou Misselhorn, *Reversal of Man's Convictions to Bring Retrial, Not an Appeal*, VA. PILOT, June 4, 2002, at B7.

24. *Id.*

25. § 18.2-31(13); see also Philip H. Yoon, Statute Note, 15 CAP. DEF. J. 273 (2002) (analyzing amendments to § 18.2-31).

STATUTE NOTES:

Code of Virginia
