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Wolfe v. Commonwealth 576 S.E.2d 471 (Va. 2003)

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I. Facts

Justin Michael Wolfe ("Wolfe") dealt high-grade marijuana in Northern Virginia. He purchased his marijuana from Daniel Robert Petrole ("Petrole"), who was a well-known supplier in the area. In order to purchase marijuana from Petrole, dealers gave him a down payment and paid off the balance when they had recovered the cost in sales. As a result of this system, Wolfe often owed Petrole tens of thousands of dollars. Early in 2001, Wolfe began plotting to rob and murder Petrole. Wolfe enlisted another associate, Owen M. Barber IV ("Barber"), to carry out the actual crime. After much scheming and several aborted attempts, Barber killed Petrole on March 15, 2001. Barber stood five or six feet away from Petrole and shot him ten times. For his efforts, Wolfe canceled two of Barber's debts, gave him a half-pound of high grade marijuana, and promised to pay him 10,000 dollars in cash.[1]

Wolfe was charged with and convicted of several offenses which included capital murder pursuant to Virginia Code Section 18.2-31(2).[2] During the penalty phase of the capital murder trial, the jury found both vileness and future dangerousness and sentenced Wolfe to death.[3] The Supreme Court of Virginia consolidated the automatic review of Wolfe's death sentence with his appeal of the capital murder conviction and his appeal of the non-capital convictions.[4]

II. Holding

The Supreme Court of Virginia reviewed Wolfe's conviction and death sentence and did not find reversible error.[5] Nor did the court find any reason to commute Wolfe's death sentence; therefore, it affirmed the judgment of the circuit court.[6]

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1. Wolfe v. Commonwealth, 576 S.E.2d 471, 474-78 (Va. 2003).
2. *Id.* at 474 (citing VA. CODE ANN. § 18.2-31(2) (Michie Supp. 2002) (classifying "[t]he willful, deliberate, and premeditated killing" of another person by another for hire as capital murder)).
3. *Id.* at 479.
4. *Id.*
5. *Id.* at 490.
6. *Id.*

III. Analysis[7]

A. Future Dangerousness

Wolfe claimed that there was insufficient evidence to establish future dangerousness as an aggravator during the penalty phase.[8] Virginia Code Section 19.2-264.2 requires that "a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society."[9] Wolfe's prior record included a conviction for simple possession

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7. Wolfe asserted that the circuit court committed a panoply of errors in his case. The court did not even entertain many of Wolfe's claims because they were not properly explained in his brief. *Id.* at 479-80. The first error the court did consider was whether the circuit court should have excused for cause two members of the venire. *Id.* at 480-81. These two members had been exposed to basic media reports about the case, but indicated that they could still act as impartial jurors. *Id.* at 480-82. The court stated that the circuit court was in the best position to gauge prejudice during voir dire and should not be questioned unless there was manifest error. *Id.* at 482.

Wolfe raised two errors that occurred during the presentation of witness testimony, but he did not object to either incident at trial; therefore, the court refused to consider the claims. *Id.* Wolfe then argued that two witnesses who had been excluded from hearing each other's testimony conferred with one another. *Id.* at 483. The court found that the defendant failed to establish that this occurrence was intentional or that it caused him prejudice. *Id.*

The defendant asserted that the Commonwealth did not present enough evidence to prove that the defendant hired Barber to kill Petrole, but the court did not find any merit in this claim. *Id.*

Additionally, two witnesses for the prosecution were facing federal drug charges. *Id.* at 484. Wolfe wanted an attorney to testify as an expert on the Federal Sentencing Guidelines to explain how cooperating with a United States Attorney could result in a lower sentence. *Id.* The circuit court found this testimony to be speculative and would not admit it; the court agreed. *Id.*

Wolfe then argued that the Commonwealth's Attorney presented a misstatement of fact and law to the jury. *Id.* at 487. The Commonwealth's misstatement of law occurred during the closing argument; defense counsel did not object and the issue was procedurally barred. *Id.* at 488. During sentencing, the principal from the school Wolfe had attended testified that he had brought razor blades and syringes to school. *Id.* Months after the sentencing, defense counsel presented an affidavit from the principal in which she recanted her testimony. *Id.* However, the circuit court refused to consider the affidavit. *Id.* Because the affidavits was not part of the record, the court would not consider any arguments based upon them. *Id.* Wolfe tried vaguely to assert that these decisions violated his due process rights, but the court found no merit in this claim. *Id.* at 487.

Finally, Wolfe asserted that his death sentence was imposed under the influence of passion and prejudice. *Id.* at 489. The court reviewed the record and did not find evidence of passion or prejudice. *Id.* at 489-90. These claims will not be discussed further in this case note.

8. *Wolfe*, 576 S.E.2d at 484.

9. *Id.* (quoting VA. CODE ANN. § 19.2-264.2 (Michie 2000)). *But see* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (stating that "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society"). Section 19.2-264.2 states that a sentence of death based on future dangerousness cannot occur until "after consideration" of the defendant's past

of marijuana, possession of false identification, and the underage purchase of alcohol.[10] The defendant argued that these convictions for non-violent crimes were insufficient to prove that he would continue to commit criminal acts of violence.[11] The court did not respond to this precise point. Rather, the court stated, "[c]ontrary to the defendant's assertion, it is not necessary that he have a prior criminal record as a predicate on which the jury must rely before it can sentence him to death based on future dangerousness."[12] Not only does this statement seem contrary to Section 19.2-264.2, but it ignores the fact that the defendant *did* have prior convictions. The court then shifted away from the troublesome language of the statute and focused on Wolfe's career as a dealer, his affinity for planning robberies, and the manner in which he had the victim killed.[13] The court concluded that these facts were enough to support a finding of future dangerousness. In effect, the court relied solely on Section 19.2-264.4(C) without citing to that statute.[14]

B. Vileness

Wolfe also argued that the vileness aggravator could not be vicariously attributed to the hirer because of the manner in which the hitman carried out the crime.[15] The court chose not to decide this issue.[16] Because it upheld the finding of future dangerousness, the vileness element was not necessary to justify Wolfe's sentence of death and vicarious applicability of vileness remains an open question.[17]

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criminal record. §19.2-264.2. Section 19.2-264.4(C) does not repeat this requirement. § 19.2-264.4(C). However, the court held in *Barnes v. Commonwealth* that "the tests required by Code § 19.2-264.2 are the sole criteria governing the application of the death penalty." Barnes v. Commonwealth, 360 S.E.2d 196, 202 (Va. 1987).

10. *Wolfe*, 576 S.E.2d at 484-85.

11. *Id.*

12. *Id.* at 485. The court has been consistent in its refusal to merge the language of §19.2-264.2 with §19.2-264.4(C) and it cited four cases in which it concluded that prior criminal convictions are not a predicate for a finding of future dangerousness. *Id.* (citing Kasi v. Commonwealth, 508 S.E.2d 57, 66 (Va. 1998) (concluding that prior criminal convictions are not a prerequisite for a finding of future dangerousness); Goins v. Commonwealth, 470 S.E.2d 114, 130-131 (Va. 1996) (supporting the same); Breard v. Commonwealth, 445 S.E.2d 670, 681 (Va. 1994) (supporting the same); Murphy v. Commonwealth, 431 S.E.2d 48, 53 (Va. 1993) (supporting the same)). On appeal, the United States Supreme Court denied certiorari in each of these cases. *See Wolfe*, 576 S.E.2d at 485 (clarifying that the Supreme Court denied certiorari in all four mentioned cases).

13. *Wolfe*, 576 S.E.2d at 485.

14. *Id.* at 485-86; *see* § 19.2-264.4(C) (explaining that the prior history of the defendant and the nature in which the crime was committed can be used to prove future dangerousness to the jury).

15. *Wolfe*, 576 S.E.2d at 485.

16. *Id.*

17. *Id.* at 485-86.

C. *Life Means Life*

During the sentencing deliberations, the jury asked the court about the limits of life imprisonment: "Does life imprisonment mean that the defendant will never be released from prison by *any* means?"[18] The circuit court already had given the jury a proper instruction under *Yarbrough v. Commonwealth*.[19] Wolfe argued that the circuit court's response should have been that imprisonment for life meant the rest of Wolfe's natural life.[20] The circuit court explained that it could not give such a response because there is a possibility of clemency or geriatric release.[21] Nevertheless, the circuit court did not want the jury to consider either of these two possibilities because it could have led to unfair speculation and a harsher penalty.[22] Instead, the circuit court instructed the jury that it must continue to deliberate under the initial instructions.[23] The court relied on *Bell v. Commonwealth*[24] to determine that the circuit court responded appropriately because a more detailed response to these types of jury questions would either have been inaccurate or would have led to unnecessary speculation.[25]

D. *Effect of* Ring v. Arizona

Next, Wolfe challenged the sufficiency of his indictment because it did not specify the aggravators.[26] The United States Supreme Court held in *Ring v. Arizona*[27] that aggravators are elements of the offense.[28] Virginia case law has held that elements of the offense must be charged in the indictment.[29] However,

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18. *Id.* at 486 (emphasis in the original).

19. *Id.*; *see* Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that, upon the defendant's request, the trial court must instruct the jury that life imprisonment means life imprisonment without parole).

20. *Wolfe*, 576 S.E.2d at 486.

21. *Id.* Geriatric release would not, however, have been available to Wolfe. Geriatric release is not available to defendants convicted of a class one felony and Wolfe had been convicted of capital murder at the time of sentencing. *See* VA. CODE ANN. § 53.1-40.01 (Michie 1999) (allowing geriatric conditional release except for class one felony offenses).

22. *Wolfe*, 576 S.E.2d at 487.

23. *Id.*

24. 563 S.E.2d 695 (Va. 2002).

25. *Wolfe*, 576 S.E.2d at 487 (citing Bell v. Commonwealth, 563 S.E.2d 695, 718 (Va. 2002) (concluding that the circuit court did not err when it instructed the jury to rely on the original instructions in order to avoid inaccuracy and speculation)); *see* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 231 (2002) (analyzing *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002)).

26. *Wolfe*, 576 S.E.2d at 488-89.

27. 122 S. Ct. 2428 (2002).

28. *See* Ring v. Arizona, 122 S. Ct. 2428, 2441 (2002) (explaining that a factor " 'used to describe an increase beyond the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense' " (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000))).

29. Hagood v. Commonwealth, 162 S.E. 10, 12 (Va. Ct. App. 1932) (stating that it "is of

Wolfe did not raise this contention until several months after trial. The court found this claim to be untimely.[30]

E. Proportionality Review

Finally, Wolfe claimed that his sentence was excessive and disproportionate.[31] The court quoted *Hedrick v. Commonwealth*[32] and stated that the test for proportionality is whether "juries in this jurisdiction *generally* approve the supreme penalty for comparable or similar crimes."[33] In its application of this standard, the court stated that "[w]e have examined the records of *all capital murder cases reviewed* by this Court when, as here, *the death penalty* was based upon murder for hire."[34] When a defendant is found guilty of capital murder and is sentenced to life in prison, and if he or she appeals, the appeal is heard by the Virginia Court of Appeals.[35] Such cases are rarely reviewed by the Supreme Court of Virginia.[36] When a defendant is found guilty of capital murder and is sentenced to death, his or her sentence is automatically reviewed by the Supreme Court of Virginia.[37] Because the Supreme Court of Virginia is a repository for death sentences and only rarely reviews life sentences, its proportionality review systematically ignores capital murder cases that result in a life sentence. Even if the court has reviewed life sentence cases, it states in *Wolfe* that it compared his case only with death sentence cases. Comparison of the instant case solely with other death cases simply cannot reveal what juries *generally* do in cases similar to the instant case.

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course necessary for an indictment to set forth all of the essential elements of the crime, and, if any of them are omitted, it is fatally defective").

30. *Wolfe*, 576 S.E.2d at 489. For a copy of the Motion to Dismiss Capital Murder Indictments for Failure to Allege Aggravating Elements, please contact the Virginia Capital Case Clearinghouse at (540) 458-8557.

31. *Wolfe*, 576 S.E.2d at 490; *see* VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999) (requiring the Supreme Court of Virginia to consider and determine if a sentence of death is proportionate to similar crimes and defendants).

32. 513 S.E.2d 634 (Va. 1999).

33. *Wolfe*, 576 S.E.2d at 490 (quoting Hedrick v. Commonwealth, 513 S.E.2d 634, 642 (Va. 1999) (emphasis added)).

34. *Id.* (emphasis added).

35. *See generally* VA. CODE ANN. § 17.1-406(A)(i) (Michie 1999) (giving jurisdiction to the Virginia Court of Appeals to hear an appeal of any crime except those in which a sentence of death has been handed down).

36. *See* Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 CAP. DEF. J. 265, 268 (2002) (explaining that very few appeals of life sentences arrive before the Supreme Court of Virginia because defendants given a life sentence can receive no lower sentence; therefore, they never appeal on sentencing issues).

37. *See generally* VA. CODE ANN. § 17.1-406(B) (Michie 1999) (granting the Supreme Court of Virginia jurisdiction over all appeals from a sentence of death).

IV. Application in Virginia

The Supreme Court of Virginia is quite adamant that the future dangerousness aggravator need not be triggered by a history of prior convictions.[38] Each time the court has reached this conclusion the United States Supreme Court has denied certiorari.[39] In light of this fact, attorneys should continue to argue that under Section 19.2-264.2 juries may not consider future dangerousness in cases in which the defendant has no prior criminal convictions.[40] Attorneys should also continue to argue that vileness cannot be attributed to a defendant charged with murder for hire based upon the manner in which the crime was committed. Finally, attorneys should request that proportionality review be conducted with prior cases heard by the Supreme Court of Virginia *and*, at least, prior cases heard by the Virginia Court of Appeals. Attorneys should contact the Virginia Capital Case Clearinghouse for a copy of the Life Sentence Project which lists defendants who have been convicted of capital murder, but were sentenced by a jury to life imprisonment.

Janice L. Kopec

38. *See supra* note 12 (noting four cases in which the Supreme Court of Virginia has stated that prior convictions are not a prerequisite for a finding of future dangerousness).

39. *Id.*

40. For a copy of the Motion To Bar Commonwealth From Seeking A Death Sentence Based on Future Dangerousness and a memorandum in support contact the Virginia Capital Case Clearinghouse at (540) 458-8557.

STATUTE NOTES:

Code of Virginia