

SUPREME COURT OF VIRGINIA

Commonwealth v. Jerman, 263 Va. 88

556 S.E.2d 754 (2002) · No. Record No. 010883 · Decided January 11, 2002

SUMMARY

The Supreme Court of Virginia held that the defendant's failure to timely object to the circuit court's response to jury questions about parole barred appellate review under Rule 5:25. The court reversed the Court of Appeals and reinstated the circuit court's judgment on the abduction conviction, concluding that the prospective application of *Fishback v. Commonwealth* did not override the procedural default rule.

CASE DETAILS

COURT	Supreme Court of Virginia
WRITING FOR THE COURT	Justice Barbara Milano Keenan; Barbara Milano Keenan; All the Justices
JURISDICTION	Virginia
DECIDED	January 11, 2002
DOCKET	Record No. 010883
DISPOSITION	reversed
PROCEDURAL POSTURE	The Commonwealth appealed the Court of Appeals of Virginia's decision vacating Jerman's sentence and remanding for a new sentencing proceeding based on the circuit court's failure to instruct the jury regarding the abolition of parole.
STANDARD OF REVIEW	De novo review of the procedural-bar issue and application of Rule 5:25 to the unpreserved jury-instruction challenge.
PRECEDENTIAL VALUE	Published precedential decision of the Supreme Court of Virginia
PARTIES	Commonwealth of Virginia v. Timothy Jerman

TOPICS

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QUESTIONS PRESENTED

1. Whether Rule 5:25 barred Jerman's challenge to the circuit court's response to the jury's parole-related question because he failed to make a timely objection or request an alternative instruction.
2. Whether the fact that Coward was still controlling at the time of trial, and that Fishback later required parole-abolition instructions in certain pending cases, excused Jerman's failure to preserve the instructional issue.
3. Whether Fishback's limitation to cases not yet final on June 9, 2000, required a new sentencing hearing despite Jerman's procedural default.

HOLDINGS

1. Jerman's failure to state a timely objection to the circuit court's response to the jury's parole question barred his appellate challenge under Rule 5:25.
2. The fact that Coward was still in effect at the time of trial did not excuse Jerman's failure to object or request a different instruction.
3. Fishback's statement that its new parole-instruction rule applied to cases not yet final on June 9, 2000, did not displace or limit Rule 5:25 and did not require a new sentencing hearing in Jerman's procedurally defaulted case.

KEY QUOTATIONS

"Thus, we hold that Jerman's failure to state a timely objection to the circuit court's instruction bars his present challenge to that instruction." (757)

"The perceived futility of an objection does not excuse a defendant's procedural default at trial." (757-58)

FACTUAL BACKGROUND

Jerman was indicted for second-degree murder and abduction and was convicted of both offenses in the Circuit Court of Fairfax County. During sentencing deliberations, the jury asked about parole eligibility and whether the sentences would run concurrently. The court responded that the jury should impose punishment under the evidence and instructions and should not concern itself with what might happen afterward; Jerman agreed to that response and did not timely request an instruction on the abolition of parole. The jury imposed five years for murder and ten years for abduction, for a total of fifteen years.

PROCEDURAL HISTORY

Jerman was convicted in the Circuit Court of Fairfax County of second-degree murder and abduction and received consecutive sentences totaling fifteen years. He did not timely object to the court's response to the jury's parole-related questions and agreed to the response given. The circuit court denied his posttrial motion, but the Court of Appeals vacated the sentence and remanded under *Fishback v. Commonwealth*. The Supreme Court of Virginia reversed the Court of Appeals and reinstated the circuit court's judgment on the abduction conviction.

DISPOSITION

reversed

REMAND INSTRUCTIONS

No remand was ordered; the Supreme Court reversed the Court of Appeals' judgment and reinstated the circuit court's judgment on the abduction conviction, entering final judgment.

CASES CITED

- Fishback v. Commonwealth, 260 Va. 104, 532 S.E.2d 629 (2000)
- Coward v. Commonwealth, 164 Va. 639, 646, 178 S.E. 797, 800 (1935)
- Hartigan v. Commonwealth, 31 Va. App. 243, 522 S.E.2d 406 (1999)
- Jerman v. Commonwealth, 34 Va. App. 323, 541 S.E.2d 307 (2001)
- Whaley v. Commonwealth, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973)
- Cherrix v. Commonwealth, 257 Va. 292, 310-12, 513 S.E.2d 642, 654 (1999), cert. denied, 528 U.S. 873 (1999)
- Reid v. Boyle, 259 Va. 356, 372, 527 S.E.2d 137, 146 (2000)
- Buck v. Jordan, 256 Va. 535, 545-46, 508 S.E.2d 880, 885-86 (1998)
- Yarborough v. Commonwealth, 247 Va. 215, 221, 441 S.E.2d 342, 345 (1994)
- Lenz v. Commonwealth, 261 Va. 451, 467, 544 S.E.2d 299, 308 (2001), cert. denied, 122 S. Ct. 481 (2001)
- Breard v. Commonwealth, 248 Va. 68, 83, 445 S.E.2d 670, 679 (1994), cert. denied, 513 U.S. 971 (1994)
- Quesinberry v. Commonwealth, 241 Va. 364, 380, 402 S.E.2d 218, 228 (1991), cert. denied, 502 U.S. 834 (1991)
- Engle v. Isaac, 456 U.S. 107, 130 (1982)
- Epperly v. Booker, 235 Va. 35, 44, 366 S.E.2d 62, 67 (1988)
- Mueller v. Murray, 252 Va. 356, 361, 478 S.E.2d 542, 546 (1996)