

**STATE of West Virginia v. William G. SCHRADER, Jr.**

**Supreme Court of Appeals of West Virginia**

172 W. Va. 1; 302 S.E.2d 70; 1982 W. Va. LEXIS 692

March 5, 1982

COUNSEL: Brent E. Beveridge, Fairmont, West Virginia, Susan K. McLaughlin, Fairmont, West Virginia for Appellant.

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JUDGES: Neely, Justice.

OPINION BY: NEELY

OPINION

The appellant, William Schrader, Jr. was found guilty of murder in the first degree without a recommendation of mercy after a jury trial in the Circuit Court of Marion County. The circuit court then sentenced the appellant to life imprisonment in the West Virginia State Penitentiary at Moundsville.

On the morning of 14 December 1977, the appellant went to Frank Millione's Gun and Coin Shop in Marion County to purchase and trade war souvenirs. The appellant asserts that an argument developed between the appellant and the victim after the appellant questioned the authenticity of a German sword that he had previously purchased. During the course of the argument, the appellant stabbed Frank Millione fifty-one times with a hunting knife. At trial the appellant claimed that he had acted in self-defense. He maintained that the victim was known by him to carry weapons and that the victim had reached into his pocket to draw a gun during the course of the argument. The appellant did testify, however, that Mr. Millione never produced any gun from his pocket. Stab wounds were found on the victim's face, head, neck, back, and chest.

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In its instructions to the jury, the trial court stated . . . [that the] definition of "willful, deliberate and premeditated killing" provided that the state need only show that the intention to kill came "into existence for the first time at the time of such killing, or at any time previously."

On these facts the appellant has made [various] assignments of error for our consideration: [among them, that] the trial court erred in instructing the jury about the meaning of premeditation. Finding [this and the other] assignments to be without merit, we affirm.

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The appellant objects to the portion of the jury charge that read:

I would advise you that to constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist for any set length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously.

The appellant contends that such an instruction takes the "pre" out of "premeditation" and is therefore an inaccurate statement of law. We disagree.

The appellant assumes that premeditation as used in a murder statute has the same meaning as that found in a dictionary. While the meanings of words in a statute are often congruent with their dictionary definitions, this is not necessarily the case when the statute is very old, the language has been unchanged for almost two centuries, and specific words have taken on a particular meaning which is as well known and as much a part of the law as the statute itself.<sup>1</sup> Today we must decide what the Legislature meant when it used the word "premeditated" to describe first degree murder.

The crime of murder was first divided into degrees in the statute passed by the Pennsylvania Assembly in 1794. That statute used the phrase "willful, deliberate and premeditated" to describe one class of first degree murder. The other types of first degree murder were killings by means of poison, killings by lying in wait, and what we now call felony murder. The purpose of this statute was to limit the use of the death penalty, previously the sole punishment for murder, to only the most heinous of murders. Virginia adopted a similar statute in 1796. See Wechsler & Michael, "A Rationale of The Law of Homicide," 37 Colum. L. Rev. 701 (1937).

By the time the West Virginia Legislature adopted the Virginia statute in 1868, the law was settled that in order to constitute a "premeditated" murder an intent to kill need exist only for an instant. The language of that statute, Code of West Virginia, Chapter 144, Section 1 [1868], is identical to that of our present murder statute, W.Va. Code, 61-2-1 [1923].

The first case to construe the meaning of "premeditated" in such a statute was *Republica v.*

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<sup>1</sup> \* \* \* \* We pay particular attention to Justice Marshall's statement that "rather than using terms in their everyday sense, 'the law uses familiar legal expressions in their familiar legal sense.'" *Bradley v. United States*, 410 U.S. 605, 610, 35 L. Ed. 2d 528, 93 S. Ct. 1151 (1973). In a similar vein, though in a non-criminal context, the Pennsylvania Supreme Court concluded "when a term has a well settled meaning within the law of a jurisdiction, it is presumed that the legislature intended to convey such meaning when using the word in a statute." *Commonwealth v. 2101 Cooperative, Inc.*, 408 Pa. 24, 183 A.2d 325, 330 (1962). In these cited cases we find implicit support and encouragement for the historical journey on which we embark in the text in search of the legal meaning of "premeditated" as it is found in W.Va. Code, 61-2-1 [1923].

Mullato Bob, 4 U.S. 145, 4 Dall. 145, 1 L. Ed. 776 (Pa. 1795). In that case, Pennsylvania Chief Justice M'Kean noted:

It has been objected, however, that the amendment of our Penal Code renders premeditation an indispensable ingredient, to constitute murder of the first degree. But still, it must be allowed, that the intention remains as much as ever, the true criterion of the crimes, in Law as well as in Ethics; and the intention of the party can only be collected from his words and actions . . . . But, let it be supposed, that a man, without uttering a word, should strike another on the head with an ax, it must, on every principle by which we can judge human actions, be deemed a premeditated violence.

This holding became the foundation for Virginia's law on the issue of premeditation. The note to *Commonwealth v. King*, 2 Va. Cas. 78 (1826) discussed with approval *Mulatto Bob's Case* and a host of other Pennsylvania cases which held essentially that the intent to kill is the essence of first degree murder and that "no time is too short for a wicked man to frame in his mind a scheme for murder, and to contrive the means of accomplishing it." 2 Va. Cas. at 85.

In turn this note was cited as authority by the Virginia Supreme Court when it fashioned the doctrine of *Hunter Hill's Case*. In *Hill v. Commonwealth*, 2 Gratt. 594, 606-07 (Va. 1845), the Virginia court wrote that "a mortal wound given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is, prima facie, wilful, deliberate, and premeditated killing." In leading up to that conclusion the court noted that proof of deliberation is often difficult for the state to show because a "homicide rarely declares his intention." Recognizing this difficulty the court brandished the rule "that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act." *Id.* at 599. Armed with such a rule it was a simple step to conclude that someone's aiming at a victim and then shooting the victim would be evidence that he intended to shoot the person. The court then held that such a shooting would constitute wilful, deliberate, and premeditated killing. *Id.* at 600.

Hence, when the West Virginia Legislature adopted the Virginia murder statute in 1868, the meaning of "premeditated" as used in the statute was essentially "knowing" and "intentional." Since then, courts have consistently recognized that the mental process necessary to constitute "willful, deliberate and premeditated" murder can be accomplished very quickly or even in the proverbial "twinkling of an eye." E.g., *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528, 17 S. Ct. 154 (1896). In fact, Justice Cardozo recommended that the mere exercise of choice by a defendant would justify the inference of deliberation and premeditation necessary to constitute first degree murder. B. Cardozo, "What Medicine Can Do for Law" in *Law and Literature*, 70, 99 (1931). The achievement of a mental state contemplated in a statute such as ours can immediately precede the act of killing. Hence, what is really meant by the language "willful, deliberate and premeditated" in W. Va. Code, 61-2-1 [1923] is that the killing be intentional.

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In a homicide trial the jury is usually presented with a smorgasbord of verdicts with their statutorily prescribed punishments. These various verdicts correspond to different levels of culpability. The lines between the verdicts are thin and hard to distinguish even after centuries of legal scholarship. They are all the more difficult to explain to a jury in one set of instructions. As Justice Cardozo explained while discussing a New York statute similar to the West Virginia homicide statute: "What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy." Cardozo, "What Medicine Can Do for Law" in *Law and Literature*, 70, 100 (1931).

Unfortunately, all of the considerations to which Justice Cardozo alluded that can be subsumed under the category of "culpability" cannot be reduced to neat, pre-packaged, jury instructions. The traditional instructions on the subject of murder are continually repeated not because they succeed in converting subjective considerations to objective considerations, but rather because they have always been given and they do about as well in this regard as any other attempt. The instruction objected to in this case has been given for years and has withstood our scrutiny before. [citations omitted]

Since the instruction to which the appellant objects is a correct statement of law . . . we find that the court did not err by giving this instruction. In so ruling we reaffirm Justice Miller's recent opinion in *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402, (1982) in which he wrote that an instruction similar to that in the present case was adequate when supplemented with instructions which accurately define the other degrees of homicide. We further caution that nothing in this opinion should be taken to mean that the state is relieved of any burden of proof. To convict a defendant of wilful, deliberate and premeditated murder under W.Va. Code, 61-2-1 [1923], the state must still prove that the defendant had a conscious intent to kill at the time he executed that intent.

Accordingly, for the reasons set forth above the judgment of the Circuit Court of Marion County is affirmed.

Affirmed.