VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

On remand in William Joseph Burns v. Warden of the Sussex I State Prison, Virginia Supreme Court Record No. 020971

IN RE: WILLIAM JOSEPH BURNS,
Petitioner CR 98-317-A

FINAL ORDER

On September 17, 2008, came the Petitioner, in person and by counsel, and the Respondents, by counsel, to be heard upon the Respondents' Motion For Final Order. The Court has considered: the Notice of intent not to present expert testimony and the declaration of Dr. John Olley which were filed by the Petitioner; the testimony of Dr. Leigh Hagan which was presented by the Respondents; the pleadings filed by the parties; and oral argument of counsel.

Finding for the reasons stated to the record that summary judgment must be granted in favor of the Respondents, the Court hereby GRANTS the Respondents' Motion For Final Order.

The Court ORDERS as follows:

1. Summary judgment shall be, and hereby is, entered in accordance with the Court's findings and rulings made to the record. The objections of the Petitioner are hereby noted for the record;

2. The sentence of death imposed by this Court on May 12, 2000, shall, and hereby does, remain in full force and effect;

3. Counsel for the Petitioner shall be, and hereby are, appointed to represent the Petitioner on appeal in the Supreme Court of Virginia;

4. Transcripts of all proceedings conducted in this Court since the case was remanded to this Court by the Supreme Court of Virginia in its March 11, 2005, opinion shall be prepared and hereby are made a part of the record;

5. The Clerk hereby is directed to combine Case Numbers 98-317 and 98-317-A into one record for purposes of any appeal; and

6. The Clerk hereby is directed to forward a certified copy of this Order to all counsel of Record.

7. Endorsements are waived pursuant to Rule 1:13. Counsel may file written objections within 14 days of the date of entry.

ENTERED ON January 30, 2009

DENNIS L. HUPP, JUDGE

Prepared by:

Paul B. Ebert, Commonwealth's Attorney
James A. Willett, Assistant Attorney General
Katherine B. Burnett, Senior Assistant Attorney General
Counsel for the Respondents

Seen and objected to:

James G. Connell, III, Esquire
Jonathan P. Sheldon, Esquire
Counsel for the Petitioner

granted what it "equate[d] to be a motion for summary judgment." T. 9/17/08 at 87.

This timely appeal follows.[1]

ASSIGNMENTS OF ERROR

I. The trial court erred in granting summary judgment against Burns on the issue of whether he is mentally retarded within the meaning of Code § 19.2-264.3:1.1.

II. The trial court erred in granting summary judgment against Burns because the proceeding below was not a civil proceeding.

III. The trial court erred in granting summary judgment against Burns because the proceeding below was a criminal proceeding, or at least a quasi-criminal proceeding.

IV. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his statutory right to a jury determination of his claim of mental retardation.

V. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his Eighth and Fourteenth Amendment rights to a determination of his mental retardation in accordance with due process and equal protection.

VI. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his Fourteenth

[1] By filing this Petition for Appeal, Burns does not concede that Rule 5:17 rather than Rule 5:22 governs this case. The Clerk did not issue a certificate under Rule 5:22(a), and informed counsel that she did not intend to do so in the future. Rather than waive appellate review, Burns is following the Clerk's indication that he should proceed by Petition for Appeal in the same manner as the appellant did in *Atkins v. Commonwealth*, Record No. 052348.

Amendment right to a jury determination of his claim of mental retardation.

VII. The trial court erred in granting summary judgment against Burns because the summary judgment denied Burns his Eighth and Fourteenth Amendment right against execution of the mentally retarded.

VIII. The trial court erred in granting summary judgment against Burns because the proceedings below denied Burns his right to be present at critical phases of his trial.

IX. The trial court erred in granting summary judgment against Burns because Code § 19.2-264.3:1.1 does not require expert testimony at trial on the issue of intellectual functioning.

X. The trial court erred in granting summary judgment against Burns because the summary judgment violated the mandate of this Court requiring a jury determination of Burns' mental retardation claim.

XI. The trial court erred in granting summary judgment against Burns because the Commonwealth was improperly represented by both the Commonwealth's Attorney and the Attorney General.

XII. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' constitutional and statutory rights to be competent during the proceedings.

XIII. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' constitutional and statutory rights to a hearing on his competence.

XIV. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' constitutional and statutory rights to competence to be tested in conformity with accepted

professional practice pursuant to Code § 19.2-263.3:1.1(B)(1), including administration of a standardized measure of intellectual functioning in conformity with professional practice.

XV. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' Eighth and Fourteenth Amendment right to a mechanism to assert his claim of mental retardation.

XVI. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' due process right to the benefit of Virginia's statutory procedure for asserting a claim of mental retardation.

XVII. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because its actions violated Burns' right to rationally assist his counsel by participating in an intellectual functioning assessment.

XVIII. The trial court erred in refusing to adjudicate Burns incompetent, order a restoration of his competency, or halt the proceedings against him, and in granting summary judgment against Burns, because the Commonwealth aggravated Burns' mental illness and denied him access to professional testing of his intellectual functioning by subjecting Burns to solitary confinement and inadequate medication.

QUESTIONS PRESENTED

I. Whether the trial court erred in granting summary judgment against Burns on the issue of whether he is mentally retarded within the meaning of Code § 19.2-264.3:1.1? This Question relates to Assignments of Error I-XI.