

Thursday, March 15, 2007

Beware having the accused testify in Virginia.

This blog entry provides another reason to live outside Virginia. (Image from Virginia Forestry Dept's website.) Beware having the accused testify in Virginia state court. When the accused testifies there, the prosecutor has appellate authority enabling the trial judge to permit cross examination of the defendant beyond the scope of direct examination. The case is *Drumgoole v. Commonwealth*, 26 Va. App. 783 (1998). In *Drumgoole*, the Virginia Court of Appeals affirmed a conviction where the prosecutor cross-examined the defendant beyond the scope of his cross examination. In reaching this holding, the Court of Appeals relied on two cases from the days of Virginia's fully-entrenched Jim Crow culture: "Cross-examination . . . entitles the Commonwealth to bring out . . . facts relating to the guilt or innocence of the accused . . ." *Thaniel v. Commonwealth*, 132 Va. 795, 806, 111 S.E. 259, 262 (1922). *Drumgoole*, 26 Va. App. at 786. Worse: "When the accused voluntarily takes the stand he 'loses his character as a party, becomes a mere witness, and may be examined as fully as any other witness. He may be examined and must answer concerning all matters which are relevant to the case, whether testified to on the direct examination or not.'" *Smith v. Commonwealth*, 182 Va. 585, 598, 30 S.E.2d 26, 31 (1944) (citation omitted) (quoted in *Drumgoole*, 26 Va. App. at 786). *Drumgoole* quotes further from *Smith v. Commonwealth*, 182 Va. 585: "To confine the cross-examination of the accused to such matters as have been brought out on direct examination is 'palpably unfair to the prosecution,' for since it can not call him as a witness or compel him to testify on direct examination, unless it could develop relevant facts on his cross-examination it might be deprived of all means of proving them, and this, too, although the accused, by voluntarily taking the stand, had waived the privilege of self-incrimination. [*Smith v. Commonwealth*, 182 Va.] at 600-01, 30 S.E.2d at 32." *Drumgoole*, 26 Va. App. at 786-87. There you have it, the Virginia Supreme Court in 1944 -- long before so many critical Supreme Court decisions on criminal defendants' rights, including *Miranda*, saying that "To confine the cross-examination of the accused to such matters as have been brought out on direct examination is 'palpably unfair to the prosecution.'" *Id.* A fellow criminal defense lawyer has a good idea for handling this conundrum: If at the arraignment the defendant was told s/he would be subject to cross examination the same as any witness if the defendant testified, then it is impermissible to permit cross examination beyond the scope of direct examination, because the defendant at arraignment was not put on notice that cross examination could go beyond the scope of direct examination. Consequently, it is a good idea for defense lawyers to bring the arraignment transcript to trial. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:30

Jon, this is nothing new here in Texas. Cross-examination of any witness is not limited to the scope of the direct.

I'm not sure Virginia is even a contender for "most oppressive criminal justice system" with Texas in the race.

Mark.

Anonymous on Mar 16 2007, 22:34