IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090201

DEMETRIOUS OMAR BROWN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

WILLIAM C. MIMS
Attorney General of Virginia

SUSAN M. HARRIS
Assistant Attorney General
Virginia State Bar No. 30165

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151 (fax)
sharris@oag.state.va.us

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE **1**

ASSIGNMENTS OF ERROR **3**

QUESTIONS PRESENTED **4**

STATEMENT OF FACTS **4**

ARGUMENT **11**

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT IT HAD JURISDICTION TO HEAR THIS CASE **11**

II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT ERRED IN TREATING DEMETRIOUS BROWN AS A JUVENILE PURSUANT TO VIRGINIA CODE § 16.1-272 ..... **14**

CONCLUSION **22**

CERTIFICATE OF TRANSMISSION AND SERVICE **23**

TABLE OF AUTHORITIES

Page

CASES

Ansell v. Commonwealth, 219 Va. 759, 250 S.E.2d 760 (1979) 15, 20

Belmer v. Commonwealth, 36 Va. App. 448, 553 S.E. 2d 123 (2001) 13

Bullock v. Commonwealth, 48 Va. App. 359 ..... passim

Commonwealth v. Chatman, 260 Va. 562, 538 S.E.2d 304 (2000) 15

Conkling v. Commonwealth, 45 Va. App. 518, 612 S.E.2d 235 (2005) 20

Green v. Commonwealth, 28 Va. App. 567, 507 S.E.2d 627 (1998) 18, 19

Griffin v. Commonwealth, 33 Va. App. 413, 533 S.E.2d 653 (2000) 20

Holloman v. Commonwealth, 221 Va. 196, 269 S.E.2d 356 (1980) 16

Jordan v. Town of South Boston, 138 Va. 838, 122 S.E. 265 (1924) 15

LaFleur v. Commonwealth, 6 Va. App. 190, 366 S.E.2d 712 (1988) 21

Lee v. Lee, 12 Va. App. 512, 404 S.E.2d 736 (1991) (en banc) 12

Martin v. Commonwealth, 13 Va. App. 524, 414 S.E.2d 401 (1992) (en banc) 12

OTHER AUTHORITIES

Virginia Code § 8.01-384(A) 12

Virginia Code § 16.1-228 ..... 17, 18

Virginia Code § 16.1-269.1 10

Virginia Code § 16.1-269.1 (B) 14

Virginia Code § 16.1-269.1(C) 2

Virginia Code § 16.1-308 20

Virginia Code § 16.1-270 2

Virginia Code § 16.1-272 ..... 3, 7, 9, 20

Virginia Code § 16.1-272(A) 16, 19

Virginia Code § 16.1-272 (A)(1) 11, 14, 15, 17

Virginia Code § 16.1-272 (A)(2) ..... passim

Virginia Code § 16.1-285.1 ..... 2, 17

Virginia Code § 18.2-53.1 ..... passim

Virginia Code § 18.2-12.1 ..... 16, 19

Virginia Code § 18.2-104 20

Virginia Code § 18.2-308.2 20

Virginia Code § 19.2-398 (C) 1

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 090201

DEMETRIOUS OMAR BROWN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

This is an appeal of a judgment of the Court of Appeals of Virginia on November 25, 2008, reversing a sentence imposed on Demetrious Omar Brown by the Circuit Court of Bedford County on March 28, 2008 for five convictions under Virginia Code § 18.2-53.1. On the Commonwealth's appeal, pursuant to Code § 19.2-398 (C), the Court of Appeals vacated the

sentences imposed on the firearm convictions and remanded the case for imposition of the mandatory sentences.

Demetrious Omar Brown, a juvenile, together with his cousin, Dwayne Jamar Brown, pled guilty in the Circuit Court of Bedford County on January 29, 2008 to burglary with intent to commit robbery, discharging a firearm in an occupied dwelling, 11 counts of robbery, and five counts of using a firearm in commission of robbery. Demetrious Brown was certified for trial as an adult under Code § 16.1-269.1(C) and waived his right to a preliminary hearing in the district court under Code § 16.1-270.

On his five convictions for using a firearm in commission of robbery in violation of Code § 18.2-53.1, the trial judge committed Demetrious Brown to the Department of Juvenile Justice as a serious juvenile offender pursuant to Code § 16.1-285.1 for three years.[1] (App. 146-148) (Case Nos. CR0700849-02, 03, 04, 05, 06) (App. 146). As for the other convictions, Demetrious Brown was sentenced to a 25-year term in prison, all suspended. (App. 148).

On motion of the Commonwealth, four indictments charging Demetrious Brown with using a firearm in commission of robbery, along

[1] Although Demetrious Brown was not sentenced to an adult correctional facility, the trial court incorrectly gave him credit for time served. See Code § 53.1-187.

with an indictment charging him with robbery, were *nolle prosequi*. (CR07008499-07, 08, 09, 10, 18) (App. 150-151).

Since the sentences on the firearm convictions were contrary to the mandatory minimum sentencing terms under Code § 18.2-53.1, the Commonwealth, on April 15, 2008, challenged the legality of the sentence imposed by the Circuit Court. As mentioned above, the Court of Appeals granted the Commonwealth's appeal on August 14, 2008, reversed the judgment of the Circuit Court of Bedford County on November 25, 2008, and vacated Brown's sentence on the firearm convictions. On June 1, 2009, this Court awarded Demetrious Brown an appeal.

ASSIGNMENTS OF ERROR

Demetrious Brown makes two assignments of error quoted below verbatim:

> **I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT IT HAD JURISDICTION TO HEAR THIS CASE.**
>
> **II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT ERRED IN TREATING DEMETRIOUS BROWN AS A JUVENILE PURSUANT TO VIRGINIA CODE § 16.1-272.**

QUESTIONS PRESENTED

I. DID THE COMMONWEALTH PROCEDURALLY DEFAULT THE CLAIM THAT THE TRIAL COURT LACKED DISCRETION TO SENTENCE DEMETRIOUS BROWN UNDER CODE § 16.1-272(A)(2) RATHER THAN IN ACCORDANCE WITH THE MANDATORY SENTENCING PROVISIONS OF CODE § 18.2-53.1?

II. DID THE TRIAL JUDGE ERR BY REFUSING TO SENTENCE DEMETRIOUS BROWN TO THE MANDATORY MINIMUM PUNISHMENT UNDER CODE § 18.2-53.1?

STATEMENT OF FACTS

On March 9, 2007, 16-year-old Demetrious Omar Brown, armed and wearing a mask, entered Sidney Brawley's apartment where eleven people were playing cards. (App. 113). Accompanying Demetrious Brown were his two cousins, Dwayne Jamar Brown,[2] a juvenile, and Tyrell Donshey Spinner,[3] an adult. (App. 110). The cousins were also armed and wore masks.

[2] The appeal of Dwayne Jamar Brown, Brown's juvenile co-defendant, was granted by this Court on June 1, 2009, and is pending in Record 090161. The brief of the Commonwealth for both Demetrious and Dwayne Brown was filed in this Court on August 6, 2009.

[3] The appeal of Tyrell Donshey Spinner, Brown's adult co-defendant, is pending in this Court in Record 091118.

At the guilty plea proceeding in the Circuit Court of Bedford County on January 29, 2008, the evidence established that the three cousins, Demetrius Brown, Dwayne Brown, and Tyrell Spinner, herded some of the card players into a bedroom and ordered others to lie on the floor. (App. 113, 491).

At the sentencing hearing on March 25, 2008, the prosecutor recounted a card player's encounter with the three culprits. Specifically, while Sheila Coles was on her knees, a gun barrel was pressed to the back of her head. (App. 113). The prosecutor stated the home invasion robbery was "beyond the normal robbery" and "people thought they were going to be shot any minute." (App. 115).

At co-defendant Dwayne Brown's sentencing hearing two weeks later on April 8, 2008, Sheila Coles testified that, as she waited on her knees, one of the masked men called out to his cohorts, "Do you think we need to kill one of the these motherfuckers?" (App. 239). According to Coles, she was forced to crawl to the bed on her knees with the gun at the back of her head the "whole time." (App. 239). While the gun was at her head, Coles was "thinking that this was going to be the last minute for me." (App. 239).

Before leaving, one of the robbers fired a shot inside Brawley's apartment. (App. 113). Because the card players were related to each

other, the crime was particularly frightening as people restrained in the bedroom had to guess whether any relative had been shot in the living room. (App. 115).

At Demetrious Brown's sentencing proceeding on March 25, 2008, the prosecutor stated:

> There are five use of firearm charges before the Court that carry a total mandatory minimum sentence of 23 years and as the Court of Appeals has noted on numerous occasions, the purpose of the firearm statute [§ 18.2-53.1] is not to rehabilitate, but to deter violent criminal conduct rather than reform the most dangerous criminals. Most recently, in Bullock v. Commonwealth, 48 Va. App. 359, the Court did deal with the situation where there was a request for a juvenile disposition in that case and there was a conflict in the statutes as to whether or not the broad discretion in the juvenile sentencing statute could override the mandatory provisions of the use of a firearm statute. The Court of Appeals [held] that it [the broad discretion in the juvenile sentencing statute] could not, in fact, override that.

(App. 113-114).

In response, defense counsel stated she "wasn't aware of this case," but argued the prosecutor was nevertheless "wrong on the basis of what I see here." (App. 119). Counsel also stated:

> We ask the Court to consider treating [Brown] as a serious juvenile offender. There is a provision that will allow a specific sentence. He's already spent a year and then the time that he would be incarcerated would

> bring him to, within reason of the guidelines, the guidelines are 5 years and 3 months to 9 years, but it's certainly consistent with the time that he would be incarcerated including the time that he's spent so far, would be consistent with that. And, like I said, I wasn't aware of this case, but I think they are still wrong on the basis of what I see here [and would ask] for the Court to make the final sentence [to] allow him to be treated as a juvenile offender…

(App. 119-120).

In announcing he would "take a recess and review this case," the trial judge added:

> The Court has a lot of authority in this [and] can try to do what the Court thinks is in the best interest of the child. Now without reading this statute, if the trial judge, excuse me, without reading that case [Bullock], if the trial judge in that case came along and imposed adult punishment on the firearm charge and then suspended that, in my opinion, the trial court can't do that. But now that is not to say that in accordance with the statute I just referenced, § 16.1-272, that on a firearm charge, on transfer, that the Court does not have authority to treat the juvenile as a juvenile. Otherwise, if you were to say that on every conviction of § 18.2-53.1, that a mandatory penitentiary sentence has to be imposed by any Court, any time, any way, if you had a 14 year old juvenile treated in the lower Court as a juvenile and found guilty on that offense, and you said you've got to go, this 14 year old child has to go to the penitentiary for three years or five years on a subsequent offense, that's not my interpretation and I doubt seriously that's going to be my interpretation. If there is juvenile treatment, there's juvenile treatment. If there is adult treatment, there's got to be adult treatment. You can't combine the two. Well, on adult treatment, I think you cannot suspend

> mandatory time, and I think that's probably what happened in that other case [Bullock], but I am going to read it and see what they said and then I'm going to come back with my ruling in this matter and hearing anything further. A[fter] a ten minute recess, we will resume.

(App. 123-123).

Following the recess, the prosecutor stated:

> Your Honor, I would just be relying on Bullock. I think the facts are pretty similar here. It was two robbery charges in that case that were certified for trial as an adult, which is what happened in this case. Two robberies and two firearm charges. And in [that], some of the same issues were raised in that case. I would just rely on that case. Thank you.

(App. 125).

Defense counsel then argued there were "clear distinctions" between Brown's case and Bullock's case. Specifically, according to defense counsel, the

> Judge in that case, determined right out from the beginning she did not treat him as a juvenile. She said clearly, that she was treating him as an adult and giving him an adult sentence. That confined the sentence to strictly § 53.1. The intent of the legislature in providing alternative sentences is to deal with cases such as Mr. Brown. In the Bullock case, the Judge had the opportunity to determine whether this, that child or that juvenile should be treated as an adult or as a juvenile, clearly determined that. In this case, we believe that the facts of his situation and circumstances such as the alternative sentence should

> be considered and the court has not rejected the provisions of the § 16.1.

(App. 126).

While acknowledging that mandatory sentencing under Code § 18.2-53.1 for a juvenile tried and treated as an adult in the circuit court was an "interesting issue," the judge nevertheless sentenced Brown to a three year commitment to the Department of Juvenile Justice on the five firearm convictions instead of 23 years in the penitentiary, observing:

> I have viewed the evidence and your age and I don't care what anybody says or what anybody thinks. As presiding judge of this Court, I do not, under all the circumstances, find it appropriate to send you, at this time, to the penitentiary for 25 [23] years and I will not do so...

Further, the judge ruled:

> [I]f you are dealing with a violent juvenile felony as to disposition, the statute [§ 16.1-272] gives the circuit court three options. Either do a portion of it as a juvenile and a portion of it as an adult, which you cannot do with § 18.2-53.1. Or, the second option, just give the mandatory time that you would give an adult. Or, three, suspend it all upon the condition of juvenile treatment which the Court of Appeals has said in Bullock, you ordinarily do, but you can't do [it] with mandatory time. So when I stopped there, well a juvenile, a violent juvenile felony, you're going to have to impose the penitentiary time. The Court has no authority. But then my mind changed again in my thought process, because I was thinking, I'm dealing here with Use of a Firearm During the Commission of

> Robbery. Now that's most certainly a violent offense, isn't it? So because subsection 2 [§ 16.1-272(A)(2)] says, if a juvenile is convicted of any other felony, the court may sentence or commit the juvenile offender in accordance with the criminal laws of this Commonwealth, as it may treat with a juvenile. So I was reading that to say, I can only do juvenile treatment if I am dealing with a felony other than a violent juvenile felony, and certainly use of a firearm [in commission of robbery] qualifies as that, I would think. Until you start reading the statutes, then it doesn't.
>
> Because violent juvenile felony is defined in § 16.1 at the beginning of the section [16.1-228], we got definitions, and it's defined: Violent juvenile felony means any of the delinquent acts enumerated in subsection B or C of § 16.1-269.1, when committed by a juvenile 14 years of age or older. So you go to § 16.1-269.1 and you look at subsection B and subsection C and subsection B, its got § 18.2-31 listed, 32 listed, 40 listed, 51.2, but 53.1 is not there. And you go to subsection C and they got a number of statutes, one, two, three, four, five, six, seven, eight, nine, ten, eleven, about a dozen statutes in subsection C, but § 18.2-53.1 is not there.
>
> As a consequence, section, as I see it, § 18.2-53.1, is not defined by statute as a violent juvenile felony, even though, as a matter of practical common sense, it most certainly is, but by statute it's not. Therefore, in my view, the Court still has the authority under § 16.1-272(A)(2) to treat, on a [use of] a firearm conviction, [for] a juvenile transferred to this Court, as a juvenile and impose juvenile punishment if the court feels that appropriate, because of the statutory definition and for those reasons.

(App. 131-133).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED THE COMMONWEALTH PRESERVED FOR APPEAL ITS CLAIM THAT THE TRIAL COURT LACKED DISCRETION TO SENTENCE BROWN UNDER CODE § 16.1-272(A)(2).

Demetrious Brown contends the Court of Appeals wrongly held the Commonwealth preserved its argument that the trial court lacked discretion to sentence him as a juvenile under Code § 16.1-272(A)(2) rather than pursuant to Code § 16.1-272(A)(1) and the mandatory sentencing provisions of Code § 18.2-53.1. According to Brown, the prosecutor's objection to Brown's sentence and his reference to Bullock was too "general" and "abstract" to avoid the preclusive effect of Rule 5A:18. (Def. Br. 11, 12). Thus, says Brown, the Court of Appeals lacked "jurisdiction" to review the Commonwealth's appeal. (Def. Br. 10).

The record, however, plainly confirms the correctness of the Court of Appeals's ruling rejecting Brown's argument that the Commonwealth is barred from appellate review. "The primary function of Rule 5A:18 is to alert the trial judge to possible error so that the judge may consider the issue intelligently and take corrective actions necessary to avoid unnecessary appeals, reversals, and mistrials." Commonwealth v. Dwayne Jamar Brown, Commonwealth v. Demetrious Omar Brown, 08 Vap UNP

0919083, Record No. 0919-08-3, Record No. 0920-08-3, slip op. p. 3, (quoting Martin v. Commonwealth, 13 Va. App. 524, 530, 414 S.E.2d 401, 404 (1992) (*en banc*)).[4]

Importantly, as the Court of Appeals noted, a "party may meet the mandates of Rule 5A:18 in many ways." Id. (quoting Lee v. Lee, 12 Va. App. 512, 515, 404 S.E.2d 736, 738 (1991) (*en banc*)). And, "[f]ormal exceptions to rulings are not necessary as long as the party 'makes known to the court the action he desires the court to take or his objections to the action of the court and his grounds therefor.'" Id. (quoting Code § 8.01-384(A)).

During Brown's sentencing on March 25, 2008, the prosecutor never wavered from his position that Brown's sentence was controlled by Bullock, that he relied on Bullock, and that the facts in Brown's case were "pretty similar" to those of Bullock. (App. 125). And, he consistently urged the application of Bullock even when the trial judge announced he would take a short recess to review Bullock, but "doubted seriously" the prosecutor's interpretation. (App. 134).

[4] On motion of the Commonwealth, the appeals of Demetrious and Dwayne Brown were consolidated in the Court of Appeals for purposes of argument and decision.

Under these facts and circumstances, it is hard to imagine what more the prosecutor could have done to alert the trial judge to the issue of mandatory sentencing and "whether or not the broad discretion in the juvenile sentencing statute could override the mandatory provisions of the use of a firearm statute." (App. 114). Indeed, from no more than a cursory review of the trial court's three page, single-spaced sentencing order describing his rejection of the Commonwealth's position, it is obvious the trial judge was alert to the issue, considered it intelligently, but nevertheless ruled he had the discretion to fashion a "juvenile disposition" because Brown's firearm convictions were "any other felony" under Code § 16.1-272(A)(2). (App. 146-148).

Finally, as the Court of Appeals also observed, the Commonwealth was not required to "except to the court's denial of its request to impose the mandatory minimum sentences based on Bullock." (citing Belmer v. Commonwealth, 36 Va. App. 448, 453-54, 553 S.E. 2d 123, 125 (2001)(issue on appeal was not precluded by Rule 5A:18 when argument was presented in the trial court, judge denied motion to suppress, and defense counsel simply said, "Yes, sir")). (App. 383).

II. THE COURT OF APPEALS CORRECTLY VACATED THE SENTENCE IMPOSED BY THE TRIAL COURT FOR FIVE CONVICTIONS OF USING A FIREARM IN THE COMMISSION OF ROBBERY.

An assessment of the lawfulness of Brown's sentence involves the application of Code §§ 18.2-53.1 and 16.1-272. In ruling that the trial court erred in concluding it had the authority to craft a "juvenile disposition" in lieu of the mandatory minimum penalty under Code § 18.2-53.1, the Court of Appeals was faithful to basic rules of statutory construction and the case law.

Importantly, the trial judge did not dispute that a juvenile convicted of a violent juvenile felony in the circuit court under Code § 16.1-269.1(B) or (C) must be sentenced under Code § 16.1-272(A)(1). (App. 131). By prescribing a "mandatory sentence, the General Assembly has divested trial judges of all discretion respecting punishment." In Re: Commonwealth of Virginia, 229 Va. 159, 163, 326 S.E.2d 695, 697 (1985) (writ of mandamus granted directing trial judge to impose mandatory sentence under Code § 18.2-53.1 rather than defer sentence to allow defendant's rehabilitation).

Nevertheless, the trial judge ruled that the penalty did not apply to Brown because Code § 18.2-53.1 was not a violent juvenile felony under

Code § 16.1-269.1(B) or (C). Thus, according to the trial judge, he had "leeway" under Code § 16.1-272(A)(2) to substitute a sentence he determined was in Brown's "best interest" rather than the mandatory firearm penalty under Code § 18.2-53.1. (App. 122). "Courts 'cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself.'" Commonwealth v. Chatman, 260 Va. 562, 571, 538 S.E.2d 304, 308 (2000) (quoting Jordan v. Town of South Boston, 138 Va. 838, 844, 122 S.E. 265, 267 (1924) (other citations omitted)).

The Court of Appeals confirmed that Code § 16.1-272(A)(1) "requires sentencing pursuant to that subsection not only for the violent juvenile felony, but also for all ancillary crimes." (App. 401). In addition, the Court of Appeals ruled that Brown's "convictions for using a firearm in the commission of robbery were clearly ancillary crimes for which the trial court was required to sentence [him] pursuant to subsection (A)(1) rather than subsection (A)(2)." (App. 401).

The purpose of Code § 18.2-53.1 is to "deter violent criminal conduct," not rehabilitate a dangerous class of criminals like Brown. Ansell v. Commonwealth, 219 Va. 759, 763, 250 S.E.2d 760, 762 (1979). For this

reason, the mandatory penalty is "inflexible by design." Holloman v. Commonwealth, 221 Va. 196, 198, 269 S.E.2d 356, 358 (1980).

Code § 18.2-53.1 provides, in pertinent part:

> It shall be unlawful for any person to use any...firearm...or display such weapon in a threatening manner while committing...robbery.... Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a mandatory minimum term of imprisonment of three years for a first conviction, and to a mandatory minimum term of five years for a second or subsequent conviction under the provisions of this section. Such punishment shall be made separate and apart from and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

Additionally, Code § 18.2-12.1 states:

> 'Mandatory minimum' wherever it appears in this Code means, for purposes of imposing punishment upon a person convicted of a crime, that the court shall impose the entire term of confinement, the full amount of the fine, and the complete requirement of community service prescribed by law. The court shall not suspend in full or in part any punishment described as mandatory minimum punishment.

Concerning the power of the circuit court over a juvenile convicted as an adult in the circuit court, Code § 16.1-272(A) states:

> In any case in which a juvenile is indicted, the offense which is indicted and all ancillary charges, shall be tried in the manner as provided for in the trial of adults, except as otherwise provided with regard to sentencing. Upon a

> finding of guilty of any charge, the court shall fix the sentence without intervention of the jury.

Further, Code § 16.1-272(A)(1) states:

> If a juvenile is convicted of a violent juvenile felony, for that offense and for all ancillary crimes, the court may order that (i) the juvenile serve a portion of the sentence as a serious juvenile offender under § 16.1-285.1 and the remainder of such sentence in the same manner as provided for adults; (ii) the juvenile serve the entire sentence in the same manner as provided for adults, or (iii) the portion of the sentence to be served in the same manner as provided for adults be suspended conditioned upon successful completion of such terms and conditions as may be imposed in a juvenile court upon disposition of a delinquency case including, but not limited to, commitment under subdivision 14 of § 16.1-278.8 or § 16.1-285.1.

Additionally, Code § 16.1-272(A)(2) states:

> If the juvenile is convicted of any other felony, the court may sentence or commit the juvenile offender in accordance with the criminal laws of the Commonwealth or may in its discretion deal with the juvenile in the manner prescribed in this chapter for the hearing and disposition of cases in the juvenile court, including, but not limited to, commitment under §16.1-285.1 or may in its discretion impose an adult sentence and suspend the sentence conditioned upon successful completion of such terms and conditions as may be imposed in a juvenile court upon disposition of a delinquency case.

Finally, under the definitional section of Code § 16.1-228, ancillary crime or ancillary charge

> means any delinquent act committed by a juvenile as a part of the same act or transaction as, or which constitutes a part of a common scheme or plan with, a delinquent act which would be a felony if committed by an adult.

And, a violent juvenile felony under Code §.16.1-228

> means any of the delinquent acts enumerated in subsection B or C of § 16.1-269.1 when committed by a juvenile 14 years of age or older.

In Bullock v. Commonwealth, 48 Va. App. 359, 631 S.E.2d 334 (2006), the juvenile defendant argued on appeal the circuit court had wrongly imposed the mandatory penalty under § 18.2-53.1 when the judge did not consider imposing a "blended" sentence of a juvenile and adult penalty. Bullock also argued the circuit court judge erred in concluding she lacked authority to run his two use of a firearm convictions concurrently.

According to Bullock, the circuit court judge erred because prior precedent, specifically Green v. Commonwealth, 28 Va. App. 567, 507 S.E.2d 627 (1998), was no longer controlling as Code § 18.2-53.1 was amended in 2004 to omit the phrase "Notwithstanding any other provision of law." As a result, Green had supposedly been superseded by the legislative amendment and the circuit court now had discretion to suspend

the mandatory sentence imposed for the defendant's firearm convictions. Bullock, 48 Va. App. at 373, 631 S.E.2d at 341.

The Court of Appeals rejected all of the defendant's arguments, ruling that the decision in Green was "undisturbed" by the 2004 amendment to Code § 18.2-53.1.

> To the contrary, when read in conjunction with Code § 18.2-12.1, Code § 18.2-53.1 still provides that the trial court 'shall impose the entire term of confinement' required by the statute for a firearm conviction and that the court 'shall not suspend in full or in part any' of that term of confinement.
>
> Plainly, the aforementioned purpose ascribed to Code § 18.2-53.1 in Ansell, LaFleur, and Green – 'to deter violent criminal conduct rather than to reform the most dangerous class of criminals'—remains unchanged, despite the 2004 amendment. To read the amended statute as Bullock urges would undermine that purpose.

Bullock, 48 Va. App. at 375, 631 S.E.2d at 342.

In Green v. Commonwealth, 28 Va. App. 567, 507 S.E.2d 627 (1998), the Court of Appeals noted that the language in Code § 16.1-272(A)(1)(iii), providing for a sentence on a violent juvenile felony conviction to "be suspended conditioned upon successful completion of such terms. . . as may be imposed in a juvenile court," appears to allow what Code § 18.2-53.1 prohibits, at least at "first blush." Id. at 569, 507 S.E.2d at 627.

Nevertheless, the Court of Appeals also stated that the terms of Code § 18.2-53.1 are "easily understood" and "impart an equally clear meaning." Id. at 569, 507 S.E.2d at 627. Specifically, Code § 18.2-53.1 directs that a trial court "shall" impose its mandatory penalty. In contrast, Code § 16.1-272 contains no such mandatory language. More importantly, application of the juvenile sentencing provision under Code § 16.1-272 in place of a mandatory sentence under Code § 18.2-53.1, "would substitute a discretionary penalty for an inflexible one." Id. (quoting Ansell, 219 Va. at 763 250 S.E.2d at 763). See also Griffin v. Commonwealth, 33 Va. App. 413, 429, 533 S.E.2d 653, 661 (2000) (any ambiguity between juvenile protections under Code § 16.1-308 and a conviction under Code § 18.2-308.2 must be resolved in favor of Code § 18.2-308.2). Cf. Conkling v. Commonwealth, 45 Va. App. 518, 612 S.E.2d 235 (2005) (legislature did not intend to include juvenile larceny adjudications as predicate offenses for enhanced punishment under Code § 18.2-104 because it makes no reference to juvenile adjudications).

In the instant case, the trial judge agreed that sentencing Brown under Code § 16.1-272(A)(1) gave him "no authority" to suspend mandatory time. (App. 131). Further, the trial judge correctly noted that

using a firearm in the commission of robbery was not a *per se* violent juvenile felony under either Code § 16.1-269.1 (B) or (C).

Regardless, as the Court of Appeals held, using a firearm in the commission of robbery is clearly ancillary to the primary felony of robbery pursuant to Code § 16.1-272 (A)(1). (App. 401). Thus, in holding he had authority under Code § 16.1-272 (A)(2) to consider the firearm convictions as "any other felony" and commit Brown to the Department of Juvenile Justice for three years, the trial judge wrongly substituted a discretionary penalty for a mandatory one. "The General Assembly has directed a contrary policy which courts must follow." LaFleur v. Commonwealth, 6 Va. App. 190, 192, 366 S.E.2d 712, 713 (1988)(error to sentence defendant to indeterminate commitment pursuant to Code § 16.1-311 rather than mandatory sentence under Code § 18.2-53.1).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals reversing the judgment of the Circuit Court of Bedford County should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

By: _____
Counsel

William C. Mims
Attorney General of Virginia

Susan M. Harris
Assistant Attorney General
Virginia State Bar No. 30165

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(FAX) (804) 371-0151
sharris@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On August 6, 2009 the required copies of this brief were hand-delivered to the Clerk of this Court for filing and three copies were mailed to Rena G. Berry, Esquire, 130 West Campbell Avenue, Roanoke, VA 24011. A copy was sent electronically to this Court at scvbriefs@courts.state.va.us.

The Commonwealth does not waive oral argument.

_____

Susan M. Harris
Assistant Attorney General