In The

Supreme Court of Virginia

RECORD NO. 090201

DEMETRIOUS OMAR BROWN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF VIRGINIA

DEMETRIOUS OMAR BROWN,

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v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF

The Petitioner, Demetrious Omar Brown, submits the following Brief. For purposes of clarity, the respondent will be identified as either Brown or as the "defendant" and the petitioner will be referred to as the "Commonwealth." References to the Joint Appendix will be abbreviated (J.A.) followed by the page number.

The petitioner, Demetrious Omar Brown by counsel, respectfully represents that the March 25, 2008 sentencing order and April 8, 2008, amended sentencing order, wherein Demetrious Omar Brown was committed to the Department of Juvenile Justice until his twentieth birthday and ordered on supervised probation for a period of five years from the date of his release from confinement on charges of discharging a firearm

with intent to commit robbery and use of a firearm in commission of felonies, was proper. Demetrious Brown seeks to have the judgment of the Circuit Court of Bedford County upheld and reverse the opinion of the Court of Appeals of Virginia in this case.

ASSIGNMENTS OF ERROR

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 Va. Code § 16.1-272.

STATEMENT OF THE CASE

Demetrious Omar Brown, along with one other juvenile, was charged on petitions in the Bedford County Juvenile Domestic Relations District Court on twenty-four counts of robbery, use of a firearm in the commission of robbery, statutory burglary, and maliciously discharging a firearm in an occupied dwelling for an incident that occurred on the evening of March 9, 2007. Two adults were also charged in connection with the incident.

In exchange for the nolle prosse of four counts of using a firearm to commit a felony and one count of robbery, Demetrious Brown waived the

transfer of the charges from the Bedford County Juvenile and Domestic Relations District Court to the Bedford County Circuit Court though his criminal history consisted of one curfew violation conviction and one possession of marijuana conviction. Demetrious Brown pleaded guilty to charges of robbery, use of a firearm in commission of a felony, discharge of a firearm and entering a dwelling with intent to commit a felony with a deadly weapon on January 29, 2008. Four counts of use of a firearm and one count of robbery were nolle prossed in the circuit court.

Prior to Demetrious Brown's sentencing hearing on March 25, 2008, counsel moved for a juvenile sentence pursuant to Virginia Code Sections 16.1-278.8(17) and 16.1-285.1. At the conclusion of the hearing, Mr. Brown was sentenced as a serious juvenile offender committed to the Department of Juvenile Justice until his twentieth birthday under Virginia Code Section 16.1-285.1. Mr. Brown's juvenile co-defendant also pled guilty and was committed to the Department of Juvenile Justice until his twentieth birthday and ordered on supervised probation for a period of five years under Virginia Code Section 16.1-285.1.

The Commonwealth failed to note an objection to the court's ruling.

The final order of the trial court was entered on April 8, 2008. The Commonwealth filed a Notice of Appeal followed by a timely Petition of Appeal. The Court of Appeals granted review. After the Court of Appeals received briefs and heard oral arguments of counsel, the decision of the trial court was reversed by unpublished opinion written by Judge Larry Elder. Senior Judge Annunziata concurred in the majority opinion, and Judge Humphries dissented. The petition for a rehearing of this appeal en banc pursuant to Virginia Supreme Court Rule 5A:34A was denied.

Demetrious Brown timely filed his Notice of Appeal and submits this Opening Brief accompanied by the Joint Appendix.

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS HAD JURISDICTION TO HEAR THIS CASE. (See Assignment of Error 1).

II. WHETHER THE TRIAL COURT ERRED IN TREATING DEMETRIOUS BROWN AS A JUVENILE PURSUANT TO VA. CODE § 16.1-272. (See Assignment of Error 2).

STATEMENT OF FACTS

On March 9, 2007, Demetrious Brown, who was sixteen years old at the time, along with another juvenile and an adult entered the apartment of

Sidney Brawley where a card game was being held and robbed him and others at gunpoint. Co-defendants Dwayne Brown, who was fifteen years old at the time, and Tyrell Spinner are Demetrious Brown's cousins (J.A. 110). Demetrious Brown, whose juvenile record consisted of one curfew violation conviction and one possession of marijuana conviction, waived any objections to the transfer of the charges from the Bedford Juvenile and Domestic Relations Court and nineteen of the twenty-four charges were certified to the grand jury. Demetrious Brown pled guilty to fourteen of the remaining charges on January 29, 2008. At the time of the March 25, 2008 sentencing hearing, Demetrious Brown had resided in the Lynchburg Juvenile Detention Center for slightly over a year (J.A. 94). Mr. Brown currently resides at Culpepper Juvenile Center, where he was placed to serve his sentence on these charges.

Prior to the sentencing hearing, the defense filed a motion for juvenile sentence (J.A. 4, 211-212). Accompanying this motion was the custody agreement for Demetrious Brown, some of his medical records, his psychological evaluation, his neurological evaluation, his current educational records, and a letter of apology from Demetrious Brown (J.A. 176-177). Demetrious Brown's medical records document that he had

gained over 20 pounds in the year after his grandfather's death without growing any taller, and the request from Mrs. Lipscomb, Demetrious' paternal grandmother, asking the physician to write a note for Demetrious to miss school so that he could help his grandmother load wood in the wood stove (J.A. 206-208). The report of Demetrious Brown's psychological evaluation indicated that he is "functioning in the range of Mild Mental Retardation" (J.A. 189). At the time of his psychological evaluation, Demetrious Brown's academic achievement measured predominately at the fourth and fifth grade level (J.A. 188-189). This level of functioning was stated to make it difficult for Demetrious Brown to function independently without the considerable assistance of his grandmother or other caretakers (J.A. 188). Demetrious Brown was also diagnosed as having a significant problem with marijuana and alcohol abuse and with depression (J.A. 1898). It was recommended in the psychological evaluation that Demetrious "be given access to Mental Retardation and vocational/rehabilitation services with an emphasis on job skill training and job coaching as well as independent living skills. Reports from his time in detention and his participation in the G.E.D. program suggest that Demetrious is receptive and responds well to structure and

guidance. It is possible that a supervised living situation with supportive services that assist in limiting involvement with negative influences is in his best interest" (J.A. 190).

Mrs. Nancy Lipscomb, Demetrious Brown's paternal grandmother, testified that Demetrious has lived with her and her husband for most of his life (J.A. 102). Mrs. Lipscomb testified that Demetrious Brown came to live with her and her husband when both his parents were incarcerated when he was about six (J.A. 103). Demetrious Brown's father has been incarcerated since 1995 (J.A. 104). Mrs. Lipscomb also stated that Demetrious became close to an uncle who died in an automobile accident in 2005 (J.A. 103-104). Demetrious Brown's grandfather, to whom he was also very close, suddenly died in February of 2006 (J.A. 104-105). Mrs. Lipscomb testified that two of Demetrious Brown's co-defendants are also his cousins, and that when Mr. Lipscomb was alive he forbade them from coming to the Lipscomb home (J.A. 110-111). Mrs. Lipscomb testified that this changed when Mr. Lipscomb died (J.A. 111). Mrs. Lipscomb also testified that there were other children living in the house and that Demetrious helped her with the household chores after Mr. Lipscomb died (J.A. 107). Mrs. Lipscomb even asked her physician to prepare an excuse

for Demetrious because he had been out of school so that he could get wood for the house when she was sick (J.A. 107-108).

Ms. Terry Campbell, a therapist with Central Virginia Community Services, testified as to Demetrious' psychological evaluation during his sentencing hearing (J.A. 71-72). Demetrious Brown's psychological report stated that he had significant cognitive limitations, particularly in the areas of reading, listening and comprehension (J.A. 76). Ms. Campbell testified that this was consistent with what was determined to be Demetrious Brown's level of functioning (J.A. 76). Despite his limitations, Ms. Campbell also testified that during his time at the Lynchburg Detention Home, Demetrious was achieving grades from 79% to 94% and was actively participating in making progress within the G.E.D. program at the Lynchburg Juvenile Detention Center (J.A. 75).

Mr. J.T. Smith, III, assistant superintendent of the Lynchburg Juvenile Detention Center, testified that Demetrious Brown came to him to address peer conflicts and other issues in his daily life (J.A. 78-79). Mr. Smith indicated that Demetrious was concerned about his grandmother and her well-being (J.A. 80). Mr. Smith also testified that when Demetrious had conflicts with others in the detention center, that he would try to remove

himself from the situation and that he made himself “almost like a big brother” to the younger children in the center (J.A. 81). Mr. Smith stated that some of the children that Demetrious reached out to include kids that would be considered “very limited” (J.A. 84).

Ms. Sheila Halsey, Demetrious’s probation officer, stated that Demetrious mainly had incidents relating to school fights and one possession of marijuana charge prior to the current incident (J.A. 89). She also testified that Demetrious came under supervised probation in June 2006 and that in the two years she has noticed progress with his attitude from belligerent to very humble (J.A. 88).

Mr. Ted P. Slater, Sr. also testified as to the change in Demetrious’s attitude towards authority and understanding that he has to respect authority (J.A. 97). Mr. Slater is employed by the Power of Praise Center and is a volunteer chaplain at the Lynchburg Juvenile Detention Center (J.A. 95). Mr. Slater testified that Demetrious has also experienced spiritual growth since he has known him and has the potential to “become a very outstanding young man” (J.A. 98).

The trial court sentenced Demetrious Omar Brown as a serious juvenile offender under Virginia Code Section 16.1-285.1 and committed

him to the Department of Juvenile Justice until his twentieth birthday on these charges. On the charge of discharge a firearm in an occupied dwelling, Demetrious was sentenced to ten years, suspended. On the remaining charges, Demetrious was sentenced to twenty-five years concurrent. Upon his release, Demetrious Omar Brown will be placed on supervised probation for a period of five years on the discharge a firearm in an occupied dwelling, burglary with intent to commit robbery and robbery.

ARGUMENT AND AUTHORITIES

I. WHETHER THE COURT OF APPEALS HAD JURISDICTION TO HEAR THIS CASE.

The defendant challenges the Commonwealth's position that this appeal was preserved and consequently challenges the Court of Appeal's jurisdiction. Rule 5A:18. The Commonwealth's Attorney did not object to the Court's imposition of a juvenile disposition.

The majority opinion by Judge Elder, quoting from Belmer v. Commonwealth, 36 Va. App. 448, 453-454, 553 S.E.2d 123, 125 (2001) quoting from Martin v. Commonwealth, 13 Va. App. 524, 530, 414 S.E.2d 401, 404 (1992) (*en banc*) states, at page 6, that "[r]equiring the Commonwealth to 'except' to the court's denial of it's request to impose the mandatory minimum sentences based on Bullock 'would, in effect, recreate

the requirement of noting an exception to a final adverse ruling of the trial judge.'" However, the majority opinion also states on page 6 that the trial judge "ruled Bullock prevented him from sentencing Demetrious as a serious juvenile offender under Code § 16.1-272(A)(1) but that it did not prevent him from sentencing Demetrious as a juvenile under Code § 16.1-272(A)(2)." The trial court's ruling was not solely adverse to the Commonwealth's Attorney. In fact, the trial court agreed with the Commonwealth with regard to Code § 16.1-272(A)(1), and decided to sentence Demetrious under a different Code section. This does not satisfy the Commonwealth Attorney's obligation to object under Virginia Supreme Court Rule 5A:18.

"As a precondition to appellate review, Rule 5A:18 requires a contemporaneous objection in the trial court to preserve the issue on appeal. Not just any objection will do. It must be both specific and timely." Thomas v. Commonwealth, 607 S.E.2d 738, 742, 44 Va. App. 741, 750, *adopted upon reh'g en banc*, 613 S.E.2d 870, 45 Va. App. 811 (2005). "Under this rule, a specific argument must be made to the trial court at the appropriate time, or the allegation of error will not be considered on appeal. A general argument or an abstract reference to the law is not sufficient to

preserve an issue. Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." Edwards v. Commonwealth, 589 S.E.2d 444, 448, 41 Va. App. 752, 760 (2003) (*en banc*).

In Luck v. Commonwealth, 531 S.E.2d 41, 32 Va. App. 827, (2000), the defendant argued that the trial court had erred in considering a letter written to the court by a member of the defendant's family. Though the defense counsel did not object to the trial court's consideration of the letter at trial, the defense counsel nevertheless argued that the failure to object was excused because the trial court had already considered the letter before he had an opportunity to object. Id. The Court of Appeals held that Rule 5A:18 still barred consideration of the issue because the appellant had the opportunity to object at trial but elected not to do so. Id at 44, 32 Va. App. 827 at 834.

Rule 5A:18 requires that the error be stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. Rule 5A:18. In Redman v. Commonwealth, 487 S.E.2d 269, 272-273, 25 Va. App. 215, 221-22 (1997), the Court of Appeals stated that the application of the ends of

justice exception is ordinarily appropriate where the accused "was convicted for conduct that was not a criminal offense" or where "the record ... affirmatively prove[s] that an element of the offense did not occur." In Edwards, the Court of Appeals, quoting from Redman v. Commonwealth, 487 S.E.2d 269, 272, 25 Va. App. 215, 221 (1997), also noted that "'[i]n order to avail oneself of the exception, a *defendant must affirmatively show* that a miscarriage of justice has occurred, not that a miscarriage might have occurred.' (emphasis added)). We will not consider, *sua sponte*, a "miscarriage of justice" argument under Rule 5A:18." Edwards v. Commonwealth, 589 S.E.2d 444, 448, 41 Va. App. 752, 761 (2003) (*en banc*). Proof that the error was "clear, substantial and material" must also be shown in order for the ends of justice exception to be applied. Brown v. Commonwealth, 380 S.E.2d 8, 11, 8 Va. App. 126, 132 (1989). As the Commonwealth did not present any objection to the Trial Court's ruling, and did not show either good cause or a miscarriage of justice, the Commonwealth's argument on appeal should have been barred by Rule 5A:18.

II. WHETHER THE TRIAL COURT ERRED IN TREATING DEMETRIOUS BROWN AS A JUVENILE PURSUANT TO VA. CODE § 16.1-272.

Demetrious Brown pleaded guilty to charges of robbery, use of a firearm in commission of a felony, discharge of a firearm and entering a dwelling with intent to commit a felony with a deadly weapon. The trial court sentenced Demetrious Brown as a serious juvenile offender for violating Virginia Code Section 18.2-53.1, use or display of a firearm in commission of a felony (J.A. 135). The Commonwealth asserted at the sentencing hearing that it was required for the trial court to impose the mandatory minimum twenty-three years carried by the five violations of Virginia Code Section 18.2-53.1 (J.A. 113-114). At the sentencing hearing and without prior notice, the Commonwealth produced Bullock v. Commonwealth, 631 S.E.2d 334, 48 Va. App. 359 (2006), in support of this interpretation (J.A. 114).

In Bullock, the defendant received consecutive terms of three and five years for his two convictions of use of a firearm. The defendant was sixteen years old at the time of the incident, but was tried as an adult in the circuit court. Id. The defense argued that Virginia Code Section 16.1-272 allowed the defendant to serve all or part of his sentence as a serious

juvenile offender with the balance of the sentence served as an adult. Id at 363. The prosecutor argued that mandatory minimum provision of Virginia Code Section 18.2-53.1 required that the two mandatory minimum sentences be served consecutively by the defendant as an adult. Id at 363, 364. At the end of the sentencing hearing the trial court sentenced the defendant to the mandatory minimum sentences. Id at 364.

The defendant asked the trial court to allow him to serve part of the time as a serious juvenile offender. Id. The trial court denied the request, stating that it was "sentencing him as an adult." Id. The Court of Appeals ruled that because the defendant was a juvenile tried and convicted as an adult of a "violent juvenile felony" under Virginia Code Section 16.1-269.1 for two counts of robbery and two ancillary counts of use of a firearm, both Virginia Code Sections 18.2-53.1 and 16.1-272(A)(1) were applicable. Id at 365. The Court of Appeals, for the purposes of that appeal, assumed, "without deciding, that the underlying contention implicit in Bullock's claim of error- that the trial court was required, in determining the sentences for Bullock's use of a firearm convictions, to specifically consider the sentencing alternative set forth in Code § 16.1-272(A)(1)(i)- is correct." Id at 366. The Court of Appeals, however, found that the error did not exist

as the trial court clearly stated that it was going to treat the defendant as an adult, the sentencing alternative available under Virginia Code Section 16.1-272(A)(1)(ii). Id at 366, 367.

In ruling on Bullock, the Court of Appeals held that Green v. Commonwealth, 507 S.E.2d 627, 28 Va. App. 567 (1998), still controlled and would preclude the suspension of the defendant's firearm sentences under Virginia Code Section 16.1-272(A)(1). Bullock v. Commonwealth at 370.

In Green, the Court of Appeals held that the trial court did not err in determining that the mandatory sentence imposed by Virginia Code Section 18.2-53.1 took precedence over the Virginia Code Section 16.1-272(A)(1). Green v. Commonwealth, 507 S.E.2d 627, 28 Va. App. 567 (1998). However, in Green, unlike the present case, the defense requested that the defendant be given a suspended sentence under Virginia Code Section 16.1-272(A)(1), which provides that the defendant will be sentenced as an adult.

In distinguishing Demetrious Brown from Bullock, the trial court noted that the trial court in Bullock determined that she was treating the defendant as an adult and would be giving him an adult sentence, which

confined the sentence to the violation of Virginia Code Section 18.2-53.1 (J.A. 125). Also, in Bullock, the defendant was sentenced in accordance to Virginia Code Section 16.1-272(A)(1), for juveniles convicted of a violent juvenile felony (J.A. 129-131). In this case, the trial court decided that it would treat Demetrious Brown as a juvenile and would sentence him under its authority pursuant to Virginia Code Section 16.1-272(A)(2) (J.A. 133). This treatment was requested by the defense in its motion for a juvenile sentence pursuant to Virginia Code Sections 16.1-278.8(17) and 16.1-285.1 (J.A. 69). In Rivas v. Commonwealth, Record No. 0655-07-4 (April 15, 2008), the Court of Appeals stated that "[i]n the case of a juvenile found to be delinquent, the J&DR or circuit court is authorized to 'make any' of the numerous types of 'orders of disposition for the juvenile's supervision, care and rehabilitation' set out in Code 16.1-278.8(A)."

Virginia Code Section 16.1-272(A)(1) provides the circuit court with options for sentencing juveniles that are convicted of a "violent juvenile felony". These alternative sentences may be given for both that conviction and for all ancillary crimes. Virginia Code Section 16.1-272(A)(2) provides the circuit court with options for sentencing juveniles that have been convicted of any other felony. Virginia Code Section 16.1-228 defines

"violent juvenile felonies" as the delinquent acts that are enumerated in Virginia Code Section 16.1-269.1(B) and (C), when committed by a juvenile 14 years of age or older. As noted by the trial court, Virginia Code Section 18.2-53.1, use of a firearm, is not enumerated in Virginia Code Section 16.1-269.1(B) and (C). As such, the trial court determined that it was in its authority under Virginia Code Section 16.1-272(A)(2) to impose a juvenile punishment upon Demetrious Brown (J.A. 133).

Under this authority the trial court sentenced Demetrious Brown as a serious juvenile offender under Virginia Code Section 16.1-285.1 and committed him to the Department of Juvenile Justice until his twentieth birthday (J.A. 135-137). At that time, Demetrious Omar Brown will be placed on supervised probation for a period of five years from the date of his release from confinement (J.A. 135-137).

The majority opinion by Judge Larry Elder states on page 10 that

> [b]ecause the trial court was required to sentence defendants pursuant to subsection (A)(1), our holding in Bullock applies. Bullock like the defendants' cases, involved the guilty pleas of a juvenile over fourteen on charges that he committed multiple robberies and used a firearm in the commission of those robberies. 48 Va. App. at 363, 631 S.E.2d at 336.

However, Bullock is substantially different than the present case in that the trial court in Bullock specifically stated that it was sentencing him

as an adult. Id at 364. Under Virginia Code Section 16.1-272(A)(2), the trial court was not required to sentence Demetrious Brown "in accordance with the criminal laws of this Commonwealth," but could, 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." The trial court here determined that Demetrious Brown should be treated as a juvenile under Virginia Code Section 16.1-272(A)(2) and did so.

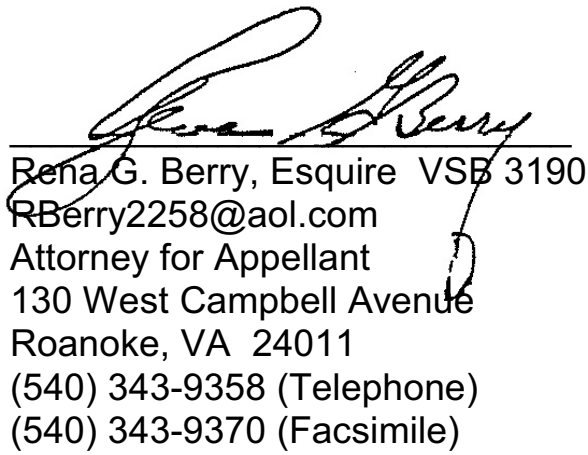
CONCLUSION

The trial court properly imposed a juvenile sentence under Virginia Code Section 16.1-285.1 when it committed Demetrious Omar Brown to the Department of Juvenile Justice until his twentieth birthday. Demetrious Omar Brown prays that the decision of the Circuit Court for the County of Bedford be upheld.

Respectfully submitted,

DEMETRIOUS OMAR BROWN

By Counsel



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CERTIFICATE PURSUANT TO RULE 5:26(d) OF THE RULES OF THE SUPREME COURT OF VIRGINIA

I, Rena G. Berry, of P.O. Box 132, Roanoke, VA 24002-0132, counsel for the appellant, Demetrious Omar Brown, do hereby certify that fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Brief of Appellant and Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and three (3) copies of the same were served, via U.S. Mail, postage prepaid, to the Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219, ATTN: Susan M. Harris, Esquire, on this 13th day of July, 2009.

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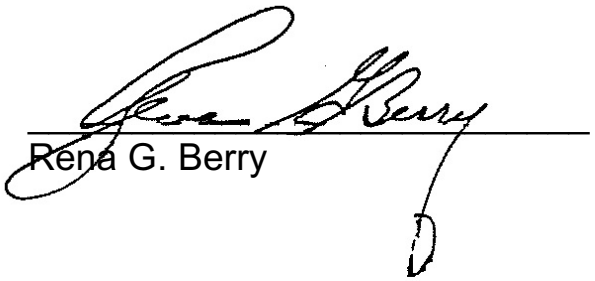
There are no parties to this action not represented by counsel.



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