IN THE

Supreme Court of Virginia

RECORD NO. 092524

RAFAEL HERNANDEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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BRIEF OF APPELLANT

Appellant, Rafael Hernandez, Defendant in the Circuit Court for the City of Alexandria, respectfully represents to this Court that he is aggrieved by the judgment of conviction and sentence imposed by Judge Lisa B. Kemler on June 12, 2008, following his bench trial on the same date.

STATEMENT OF MATERIAL PROCEEDINGS

On April 14, 2008, the grand jury indicted Mr. Hernandez on one count of felony assault and battery on a law enforcement officer (Virginia Code Section 18.2-57(C)). (App. 1) A non-jury trial was held before the Honorable Lisa B. Kemler of the Circuit Court for the City of Alexandria on June 12, 2008. (App. 2)

Following closing arguments, defense counsel asked the Court to withhold a finding of guilt and continue the matter for disposition at a later date. (App. 162-186) The judge stated that the trial court lacked the authority for such a proceeding and denied Mr. Hernandez's request. (App. 165-167, 182-183) Mr. Hernandez was convicted of one felony count of assault and battery on a law enforcement officer. (App. 2, 167-168) Mr. Hernandez was sentenced to eleven months of incarceration, with all but six months suspended, conditioned on eleven months of uniform good behavior, eleven months of supervised probation, and payment of court costs. (App. 3, 185) On June 24, 2008, Defendant submitted a motion for reconsideration and requested that it be placed on the docket for hearing. (App. 4-42) The motion was denied. (App. 4) Mr. Hernandez timely noted his appeal. On December 11, 2008, a *per curiam* opinion granted the

petition in part and denied it in part. (App. 51-55) On June 10, 2009, following oral argument before a panel of the Court of Appeals of Virginia, the remainder of the petition remained denied. (App. 56) Mr. Hernandez' conviction was affirmed by the Court of Appeals of Virginia in a published opinion dated November 17, 2009. (App. 57-68)

ASSIGNMENT OF ERROR

The Court of Appeals of Virginia erred in concluding that the trial court does not have inherent authority to defer judgment upon terms contemplating a future dismissal of criminal charges. (App.162-186)

QUESTION PRESENTED

Whether the trial court erred in concluding that it lacked the inherent authority to continue Mr. Hernandez's case for future disposition. (App.162-186)

STATEMENT OF THE FACTS

On February 3, 2008 at approximately 4:00 a.m., Alexandria Police Officer Nancy Everard was dispatched to Landmark Mall for a call for an unresponsive man inside a vehicle parked in the shopping center's parking lot. (App. 80) When Officer Everard arrived, paramedics had already arrived on the scene. (App. 81) Officer Everard approached the vehicle, and saw Mr. Hernandez on the front passenger seat wearing his seatbelt and appearing to be either asleep or unconscious. (App. 81) The

paramedics were trying to talk to Mr. Hernandez, but he was unresponsive. (App. 81-82) Eventually, they were able to get Mr. Hernandez to wake-up. (App. 82) After the paramedics left, Officer Everard questioned Mr. Hernandez. (App. 83) Mr. Hernandez seemed confused and appeared to be ignoring the police officers. (App. 82-83) He was "uncooperative" and "ignoring [the police]," while at the same time, "go[ing] back and forth between answering [Officer Everard's] questions and acting confused." (App. 83) At this point, Officer Matthew Parker had arrived on the scene. (App. 84) The driver's door of the car was open, and the officers were talking to Mr. Hernandez through that side of the car. (App. 98-99)

At some point, Mr. Hernandez got out of the vehicle and the police officers demanded that he identify himself. (App. 84-85) Mr. Hernandez responded by saying: "I haven't spoken to you;" "I don't know why you are asking me questions?" and "What are you talking about?" (App. 85) Officer Everard testified that when she and Officer Parker tried to get Mr. Hernandez to get away from the vehicle, he told them, at least twice, that he did not know who they were and that he had not talked to them. (App. 110-111) Officer Everard testified that at this point she decided to arrest him for being drunk in public. (App. 85) Officer Everard and Officer Parker

approached Mr. Hernandez in order to arrest him. (App. 86)

A struggle ensued as the officers were trying to place Mr. Hernandez, who already had one handcuff on him, under arrest. (App. 86) Officer Everard stated in court, that as both officers were trying to put Mr. Hernandez under arrest, he hit Officer Parker on the face. (App. 87) Because Mr. Hernandez continued to be unresponsive to the officers' commands and continued to resist, even after he was taken down to the ground, Officer Parker used his OC spray on Mr. Hernandez on two occasions. (App. 88-89)

Once Mr. Hernandez became aware of what had occurred he repeatedly apologized to Officer Parker, and told Officer Parker "I can't believe I did this." (App. 121) Furthermore, Mr. Hernandez later sent Officer Parker a letter of apology. (App. 121) In booking, Mr. Hernandez also apologized to Officer Everard, and told her that he did not remember "anything after or before [he] got sprayed." (App. 91)

In closing argument, defense counsel asked the court to defer a finding of guilt and continue the disposition to another date. (App. 162) Judge Kemler did not think the court had "the inherent authority to essentially find that there are sufficient facts to convict the Defendant but

continue the case under probationary like conditions for future disposition." (App. 165-166) Judge Kemler pointed out that she was not saying that Mr. Hernandez' case would not be an appropriate case for such a deferred disposition. (App. 167) Rather, she stated she did not think she had the authority. (App. 167) Defense counsel specifically asked the court to "suspend deposition of sentence and if [he] complies say with community service or whatever he has to do and after six months or a year, he return[s] and if he's complied with every condition you may impose on him that the you dismiss the case." (App. 177) The Commonwealth attorney did not agree to the defense request. (App. 165, 180-181) Judge Kemler reiterated "I don't think the Court has the authority. If I did, I might consider it, but I don't think I have the authority." (App. 183)

STANDARD OF REVIEW

The inherent authority of the Court is a constitutional question and therefore a question of law. The appellate courts review questions of law de novo. Moreau v. Fuller, 276 Va. 127, 133, 661 S.E.2d 841 (2008) (citations omitted).

ARGUMENT

This case presents the question of whether a trial court has the inherent authority, in the absence of statutory authority, to decline to render judgment in a criminal case, and continue the case with or without probationary type terms with the understanding or promise that the court will ultimately render a particular disposition after a specified period of time.

In Moreau v. Fuller, the Virginia Supreme Court found that the disposition by Judge Moreau of the Juvenile and Domestic Relations District Court, finding that there was sufficient evidence to convict defendant and that it was appropriate to defer judgment, was within the discretionary authority of the court, and as such, was not subject to mandamus. 276 Va. 127, 138 661 S.E.2d 841, 847-48 (2008). In Moreau, the defendant was an adult charged with contributing to the delinquency of a minor. Id. at 131, 661 S.E.2d at 843. At the conclusion of the trial, Judge Moreau ruled that the evidence was sufficient for a finding of guilt, but further ruled that the case would be continued to a later date for final disposition. Id. The Commonwealth obtained a writ of mandamus on the

basis that the court lacked the statutory authority to make such a deferred finding. Id. at 132, 661 S.E.2d at 844. The Supreme Court of Virginia reversed, holding that entry of a judgment of guilt is a discretionary rather than a ministerial function. See id. at 139, 661 S.E.2d at 847-48 ("We hold that the act of rendering judgment is within the inherent power of the court and that the very essence of adjudication and entry of judgment by a judge involves discretionary power of the court."). Thus, Moreau expressly overruled Gibson v. Commonwealth, 50 Va. App. 285, 649 S.E.2d 214 (2007), to the extent that it is inconsistent with the holding in Moreau. Id. at 138 n. 5, 661 S.E.2d at 847 n. 5.

The decision in Moreau clearly suggests that a trial court is not limited to statutory authority in rendering judgment. In Moreau, the court concluded that "the act of rendering judgment is within the inherent power of the court and that the very essence of adjudication and entry of judgment by a judge involves discretionary power of the court." Moreau, 276 Va. at 139, 661 S.E.2d at 847-48. Although the record did not present the larger and more significant question of whether the legislature could limit a court's exercise of its judicial power to take cases under advisement, the Court's reasoning in Moreau suggests how it would address such a case:

> [A]lthough the subject matter of the judiciary's power may, in some ways be limited by legislative action, the essential function of the judiciary—the act of rendering judgment in matters properly before it—may not be abridged by either the executive or legislative branches.
>
> The judiciary's inherent power derives from its existence as an institution entrusted with the function of rendering judgment. To deny this function is to deny the very institution itself. The court's inherent power has been recognized to extend to matters "incident to the exercise of the judicial power which is vested" in it.

Id. at 138, 661 S.E.2d at 846 (quoting Button v. Day, 204 Va. 547, 553, 132 S.E.2d 292, 296 (1963)). Therefore, under the court's rationale in Moreau, a trial court's power to continue a case with or without probationary type terms with the understanding or promise that the court will ultimately render a particular disposition after a specified period of time is a natural and incidental extension of the judiciary's inherent power to defer findings of guilt.

In enacting Virginia Code Section 18.2-57, the General Assembly failed to expressly proscribe the exercise of deferring findings of guilt. Because the statute does not contain an express statutory direction proscribing the exercise of deferring findings of guilt, the trial court retains the inherent power to so. Furthermore, the trial court retains those powers incidental to the judiciary's inherent power to defer findings of guilt, including the power to continue a case with or without probationary type terms with the understanding or promise that the court will ultimately render

a particular disposition after a specified period of time. See Va. Const. art. VI, § 5 ("The Supreme Court shall have the authority to make rules governing . . . the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall . . . be established by the General Assembly.").

In the instant case, counsel for Defendant argued to the Circuit Court judge that the trial court does have inherent authority to defer disposition of this case. Further, counsel asked the Court to exercise its inherent power as a judge and allow Mr. Hernandez the benefit of a deferred disposition. The trial court judge stated "I think that it's not a matter of inherent authority. I think it's a matter of statutory authority and I don't think that I have the authority." (App. 167) .

The Court of Appeals of Virginia erred in concluding that defense counsel sought "to add, in effect, a provision granting deferral and dismissal from [Virginia Code Section 18.2-57.3] to [Virginia Code Section 18.2-57(C)]." Hernandez v. Commonwealth, 55 Va. App. 190, 203, 684 S.E.2d 845, 852 (2009). Judgment, including deferring judgment, is within "the essential function of the judiciary." Moreau, at 136, 661 S.E.2d at 846. "The judiciary's inherent power derives from its existence as an institution *entrusted* with the function of rendering judgment. To deny this function is

to deny the very institution itself." Moreau, at 136, 661 S.E.2d at 846 (emphasis added). Judgment is within the discretionary power of the court.

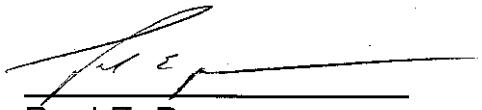
Judgment is not a mathematical exercise. "No one contends that the judge must immediately render judgment upon the instant that the presentation of evidence has been concluded." Moreau, at 137, 661 S.E.2d at 847. Judgment is not an act creating a crime or determining its range of punishment. And deferring judgment is not an act in "disregard" of legislative discretion. Hernandez, at 197, 684 S.E 849.

CONCLUSION

The Court of Appeals of Virginia erred in concluding that the trial court does not have inherent authority to defer judgment upon terms contemplating a future dismissal of criminal charges. The trial court erred in concluding that its authority in this matter is governed only by statute. Appellant respectfully requests that this Court reverse the erroneous rulings of the trial court, and remand the case for disposition pursuant to this Court's decision.

Respectfully Submitted,

RAFAEL HERNANDEZ



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CERTIFICATE OF SERVICE

1. The appellant's name is Rafael Hernandez. He has served his sentence at the Alexandria Adult Detention Center, and is now residing at 7403 Tarfside Lane, Gaithersburg, Maryland 20879. His telephone number is (240) 398-9469. The appellee is the Commonwealth of Virginia.

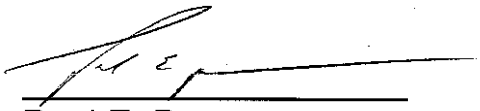
2. Counsel for the appellant is Paul E. Pepper, Deputy Public Defender, 132 North Royal Street, Suite 200, Alexandria, Virginia 22314. His telephone number is (703) 746-4477. His fax number is (703) 838-6483. His email address is paul.pepper@alexandriava.gov. Counsel for the appellee is Eugene Murphy, Senior Assistant Attorney General. His address is: Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219. His telephone number is (804) 786-2071.

3. Counsel filed fifteen copies (and one electronic copy) of this Brief of Appellant and Joint Appendix, with the Clerk of the Court, Supreme Court of Virginia, 100 North Ninth Street, Richmond, VA, 23219, and mailed three copies (and one electronic copy) of the Brief of Appellant and two copies (and one electronic copy) of the Joint Appendix to Eugene Murphy, Senior Assistant Attorney General. His address is: Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 7th day of September, 2010.

4. Counsel for the Appellant is appointed by the court.

5. Counsel does wish to present oral argument.

6. Counsel certifies that this Brief of Appellant complies with the word count limit of 8,750 words, and that the actual word count is 2231.



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