In the

Supreme Court of Virginia

At Richmond

Record No. 100906

SHANDRE T. SAUNDERS,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF VIRGINIA

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SHANDRE TRAVON SAUNDERS

APPELLANT

v.

COMMONWEALTH OF VIRGINIA

APPELLEE

BRIEF OF APPELLANT

The appellant, Shandre Travon Saunders, respectfully represents that he is aggrieved by the judgment of the Circuit Court for the City of Lynchburg rendered on March 13, 2009 whereby he was convicted of aggravated malicious wounding; use of a firearm in the commission of a felony; and participation in an act of violence in association with a criminal street gang and received sentences of forty (40) years, three (3) years and ten (10) years, respectively, on said convictions.

STATEMENT OF THE CASE

A. PROCEEDINGS

On May 21, 2008, the defendant, Shandre Travon Saunders, whose date of birth is October 5, 1991, was charged in the Lynchburg Juvenile and Domestic Relations District Court with aggravated malicious wounding and use of a firearm in the commission of a felony. On May 27, 2008 the Commonwealth filed a notice of its intent to have the charges certified to the Lynchburg Circuit Court in accordance with §16.1-269.1 of the Code of Virginia. On June 11, 2008 a preliminary hearing on the charges was held in the Lynchburg Juvenile and Domestic Relations District Court and the charges were certified to the Lynchburg Circuit Court for trial.

On July 7, 2008 a Lynchburg Circuit Court Grand Jury indicted the defendant on the existing charges of aggravated malicious wounding, use of a firearm in the commission of a felony and the additional charge of participation in an act of violence in connection with a criminal street gang activity in violation of §18.2-46.2 of the Code of Virginia. On September 19, 2008 the defendant's prior counsel was relieved upon his own motion and the undersigned was appointed to represent the defendant on the charges. On October

14, 2008 the defendant filed a motion objecting to Commonwealth's assertion that it was entitled to have jury try the case and sentence the defendant if it found him guilty of one or more of the charges. A hearing on the motion was held on October 17, 2008 before the Honorable J. Leyburn Mosby. The Court took the matter under advisement and on October 24, 2008 reconvened the hearing and denied the defendant's motion.

The cases were tried before a jury on January 26, 2009 and January 28, 2009. The jury returned verdicts finding the defendant guilty of all three charges. After hearing additional evidence the jury returned sentences of forty (40) years imprisonment on the charge of aggravated malicious wounding; three (3) years on the charge of use of a firearm in the commission of a felony; and ten (10) years on the charge of participation in a criminal street gang for an aggregate sentence of fifty-three (53) years. A pre-sentence report was ordered. A sentencing hearing was held on March 13, 2009 at which time the Court imposed the sentences recommended by the jury and sentenced the defendant to fifty-three (53) years in the penitentiary.

B. FACTS

On September 7, 2007 at approximately 10:22 o'clock p.m. Officer Jonathan Walker of the Lynchburg Police Department was dispatched to the intersection of Garfield and Twelfth Streets in the City of Lynchburg. (App. p. 132) When he arrived, he saw an Allied Cab had crashed into a tree. He saw an individual get out of the drivers seat and collapse in the street. Paramedics arrived on the scene and showed Officer Walker that the victim has suffered a gunshot wound to the right side of his face. (App. p. 135) Officer Walker identified the victim as Greg Powell and later took photographs of his injuries at the hospital. The photos showed that Powell had a bullet entrance wound in the front of his right ear and a bullet exit wound behind his left ear. (App. pp 136-137)

Dr. Aaron Dumond, a neurosurgeon at the University of Virginia Medical Center, testified that Powell suffered an injury to his left carotid artery which caused surgeons to block the artery. This surgery was performed on September 8, 2007, the day after the shooting. (App. pp 240-241) On September 19, 2007, the defendant suffered a stroke as a result of a blood clot cutting off the blood flow to the left side of his brain. (App. p. 242) According to Dr. Dumond,

Powell suffered permanent injuries and permanent disability as a result of the stroke and that the stroke was caused by the injuries he suffered from the gunshot wound. (App. pp. 243-244)

Alonzo Clark testified that he saw Powell drive the cab past him on Twelfth Street. He saw the defendant fire two or three shots from a .380 handgun towards the Sunoco. Clark saw Powell grab his neck and accelerate the cab into the tree. According to Clark, the defendant fired the shot that hit Powell. (App. pp. 155-158) A week later Clark was charged with shooting Powell. Clark did not tell the police that he saw the defendant shoot Powell until January of 2008. (App. pp. 159-160)

On October 3, 2007, Investigator Ann Riley of the Lynchburg Police Department went to 1314 Garfield Avenue in Lynchburg where she discovered the defendant sleeping on some cushions under which she discovered a firearm, magazine and bullets. (App. pp. 199-201) After the defendant was taken into custody, Investigator Riley took a buccal swab and obtained a saliva sample from the defendant, which was forwarded to the state lab for DNA analysis. (App. p. 202) Officer John Carey testified that he found a spent bullet on the floor of the cab that the victim was driving when he was shot

located just inside the drivers side door. (App. p. 180) Carey also swabbed the grip on the pistol that Investigator Riley had found and sent the swab to the lab for DNA analysis. (App. pp. 183-184)

David Gibbs, a firearms expert from the Department of Forensic Science in Roanoke, testified that the spent bullet recovered from the cab had been fired from the gun discovered under the defendant by Investigator Riley. (App. p.220) Nicole Harold, a forensic DNA analyst from the Department of Forensic Science in Roanoke testified that the DNA profile obtained from the swab of the grip of the pistol discovered under the defendant was consistent with the defendant's DNA profile. (App. pp. 226-229) Officer Kevin Poindexter, a Lynchburg Police Officer and regional director of the Virginia Gang Investigators Association, testified that the defendant had been identified as a member of the Garfield Avenue Blood Street Gang. (App. p. 256)

Investigator Colin Byrne of the Lynchburg Police Department interviewed the defendant the day after the shooting when the defendant admitted being on the scene of the shooting but denied having anything to do with it. Investigator Byrne interviewed the defendant again on July 1, 2008 when the defendant admitted being

on the scene when the cab driver was shot but claimed he had unsuccessfully tried to fire a gun. At this interview the defendant admitted the shooting was gang related and that he was a member of the Garfield Bloods; that he was the only person in the area from which the shot was fired that hit the victim; that he ran from the scene after the cab hit a tree; that he had used the gun seized by Investigator Riley on October 3, 2007 in an altercation on Campbell Avenue on September 21, 2007; and that he had obtained that gun the day after the cab driver was shot. (App. pp. 288-291)

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO SENTENCE THE JUVENILE DEFENDANT. (Preserved at pp. 44-45 of the Appendix)

ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO SENTENCE THE DEFENDENT.

STANDARD OF REVIEW – The assignment of error involves statutory construction and is reviewed de novo.

The defendant submits that the trial court erred in overruling his motion objecting to his being sentenced by the jury. At issue is the proper interpretation and reconciliation of the Sections 16.1-271 and 16.1-272 of the Code of Virginia. Under Section 16.1-271 the

conviction of a juvenile as an adult precludes the juvenile courts from taking jurisdiction over any future criminal charge against the juvenile or any pending charges not disposed of at the time of the adult conviction. The statute states that any juvenile convicted as an adult in a Circuit Court shall thereafter be "considered and treated" as an adult in pending or future criminal proceedings. The third paragraph of the statute enumerates a number of adult criminal procedures which shall apply in such cases including "trial and sentencing as an adult." The Commonwealth argues that since the defendant's charges had not been disposed of at the time of his conviction in Circuit Court as an adult on unrelated charges, he becomes an adult for purposes of the prosecution of these charges, which includes being sentenced by the jury which found him guilty.

Although not dispositive of the issue in the present case, it should be noted that the first two paragraphs of Section 16.1-271 appear contradictory. The first paragraph indicates that a conviction of a juvenile as an adult precludes juvenile courts from taking jurisdiction of "subsequent offenses" allegedly committed by the juvenile. This paragraph thus indicates that it applies to offenses occurring after the date of the adult conviction. The second

paragraph of 16.1-271 purports to expand the statute's applicability beyond offenses committed after the initial adult conviction to those pending but not disposed of by the juvenile court at the time of the adult conviction. The first paragraph of 16.1-271, standing alone, thus would not have precluded the juvenile court from taking jurisdiction over the present offenses as they allegedly occurred on September 7, 2007 prior to, rather than subsequent to, the date of the offense for which the defendant was first sentenced as an adult which was September 21, 2007. Presumably the prosecution could have sought to have the charges transferred to Circuit Court under the procedures set forth in Section 16.1-269.1.

On the other hand the charges involved in this appeal clearly fall within the ambit of the second paragraph of Section 16.1-271 as these charges were pending and undisposed of in the juvenile court at the time of the defendant's conviction as an adult on an unrelated charge. It is unclear what the statute contemplates that the juvenile court is to do with such undisposed cases when they are "precluded from taking jurisdiction" by the adult conviction. In the present case, the juvenile court retained jurisdiction of the cases and conducted a preliminary hearing on June 11, 2008 five days after the defendant's

initial conviction as an adult. The defendant's subsequent indictment of the charges in the Circuit Court mooted any irregularity in the juvenile court proceedings under the language of Section 16.1-269.1 of the Code.

Section 16.1-272 of the Code states that any juveniles indicted by a Circuit Court Grand Jury shall, if convicted, be sentenced by the court "without the intervention of a jury." The Commonwealth argues that this statute is wholly inapplicable to the defendant because he is considered an adult under 16.1-271 and is consequently not a juvenile. Yet the language of the statutes fails to support this position in two respects. First, the language of 16.1-271 describes the procedures applicable under it to include "sentencing as an adult" but not "jury sentencing as an adult". The statute does not clarify whether "sentencing as an adult" means merely receiving an adult sentence or that a jury would also sentence a defendant to whom the statute applied. Secondly, Section 16.1-272 does not specifically exclude persons falling under the preceding statute when it mandates that juveniles indicted in Circuit Court shall be sentenced by the Court.

The first two paragraphs of Section 16.1-271 are also contradictory with respect to what juveniles fall under it as well as what offenses. The first paragraph precludes juvenile courts from taking jurisdiction over juveniles who have previously been tried or treated as an adult. The second paragraph requires treatment as an adult of any juvenile who has previously been tried and convicted as such. Thus a juvenile who has been tried and acquitted as an adult would appear to fall under the first but not the second paragraph of Section 16.1-271.

In Ballard v. Commonwealth, 228 Va 213,321 SE 2d 284 (1984) the Virginia Supreme Court held that denying jury sentencing to juveniles did not violate their constitutional right to the equal protection of the law. The defendant in the present case is making the opposite argument: that allowing him to be sentenced by a jury deprives him of the sentencing flexibility intended for youthful offenders by the General Assembly in enacting Section 16.1-272. The Virginia Supreme Court noted that…

> "… in enacting Code §16.1-272 the General Assembly obviously opted for judge sentencing for transferred juveniles because it perceived the inability of juries to adequately comprehend the differences in the sentencing of a juvenile defendant as an adult and the treatment of that same child within the framework of the juvenile court laws" 228 Va. at 218.

In short the statute reflects the General Assembly's recognition that judge-sentencing was preferable for youthful offenders in that it gave trial judges latitude and relied on their experience in dealing with young offenders rather than have a jury panel unfamiliar with sentencing options and procedures simply set a sentence in the range of adult punishments. The Commonwealth's position that it is entitled to jury sentencing of young offenders falling under Section 16.1-271 would result in a fundamental procedural difference in the treatment of the first and subsequent adult convictions for offenders aged under eighteen. If that is what the General Assembly intended, it should be made explicit that Sections 16.1-271 and 16.1-272 are mutually exclusive.

Another Virginia Supreme Court case dealing with sentencing of persons under eighteen is instructive in this regard. Is Thomas v. Commonwealth, 244 Va. 1, 419 SE 2d 606 (1992) the Court was faced with reconciling the Section 16.1-272 provision for judge-sentencing of transferred juvenile offenders with the Code sections providing for jury sentencing of persons convicted of capital murder. In ruling that jury sentencing was appropriate, the Court noted that the language of the capital sentencing statute permitted no

exceptions, even for transferred juveniles. The Court noted that when statutes conflict, the more specific statute prevails over the less specific (or more general) statute. In the present case, neither statute can be said to be more specific than the other as both contain language referring to "any". Section 16.1-271 refers to "any" juvenile convicted in Circuit Court as an adult. Section 16.1-272 refers to "any" case in which a juvenile is indicted. Both statutes thus speak in general terms of procedures regarding treating juveniles as adults and neither can be said to be more specific with respect to such procedure.

Sections 16.1-271 and 16.1-272 are penal statutes and, as such, strictly interpreted against the Commonwealth and the accused is entitled to the benefit of any reasonable doubt in the construction thereof. Stevenson v. Falls Church, 243 Va. 434, 416 SE 2d 690 (1992). The Commonwealth's argument that Section 16.1-272 does not apply to youthful offenders who fall within the scope of 16.1-271 is one plausible interpretation of the General Assembly's intent but the defendant submits that the result that only judges would sentence juveniles on their first conviction as an adult but juries could sentence

on any later convictions, regardless of the severity of the offenses, is not clearly evoked in the language of these sections.

Although not argued in the trial court, the defendant would request that the exception set forth in Rules 5A:18 and 5:25 be applied to enable this Court to attain the ends of justice and allow it to consider the argument that any procedure for jury sentencing of persons under the age of eighteen must include a requirement that the jury be instructed to consider the defendant's youth in mitigation. In Roper v. Simmons, 543 U.S. 551 (2005) the United States Supreme Court, in holding that the execution of persons who committed a capital offense prior to their eighteenth birthday violated the Eighth Amendment prohibition of cruel and unusual punishment, recognized that juvenile offenders were fundamentally different than adults and should be treated as such in the criminal justice system. In her dissent in Roper, Justice O'Connor opined that the execution of a person who committed a capital offense between their sixteenth and eighteenth birthdays would not violate the Eighth Amendment if sentencing juries were required to consider the defendant's youth in mitigation of the offense. If the Virginia statutory scheme is deemed to contemplate the jury sentencing of offenders under the age of

eighteen, it violates the youthful defendant's due process rights by not instructing the jury that his or her age should be considered in mitigation of the offense. If the fact that an offender is under the age of eighteen is as significant as the Supreme Court indicated in Roper then any jury sentencing procedures that fails to take age into account violates due process.

In summary, the defendant submits that the language contained in Sections 16.1-271 and 16.1-272 with respect to the treatment of juvenile offenders as adult criminals are ambiguous, contradictory and confusing. If the legislature intended the result the Commonwealth advocates in this case – that juveniles appearing in Circuit Court as adults a second time be sentenced by juries – these statutes should be recodified to make that clear.

CONCLUSION

For the foregoing reasons, the appellant prays that the sentencing order entered in the Lynchburg Circuit Court on March 13, 2009 be set aside and the case remanded to said Court for resentencing.

Respectfully Submitted,
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CERTIFICATE

On this day October 22, 2010, in compliance with Rule 5:26 of the Rules of the Supreme Court of Virginia, the undersigned certifies as follows:

(1) Fifteen printed copies and one electronic copy of the Opening Brief and Appendix have been hand delivered to the Clerk of the Virginia Supreme Court.

(2) Three copies of the Brief and two copies of the Appendix have been mailed or delivered to Counsel for the Appellee at the following address:

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