IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 100906

SHANDRE T. SAUNDERS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

KENNETH T. CUCCINELLI, II
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

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STATEMENT OF THE CASE

This appeal originates from a final judgment entered in the Circuit Court of the City of Lynchburg on March 13, 2009. Shandre Travon Saunders, a juvenile, was convicted in a jury trial of aggravated malicious wounding in violation of Virginia Code § 18.2-51.2, use of a firearm in

the commission of aggravated malicious wounding, in violation of Code § 18.2-53.1, and participation in a criminal street gang in violation of Code § 18.2-46.2. Pursuant to Code § 16.1-271, a jury fixed his sentence at a total term of 53 years in prison. The trial court sentenced Saunders in accordance with the jury's sentencing verdict. (App. 507-509).

Saunders appealed his convictions to the Court of Appeals of Virginia, which affirmed on April 27, 2010. Saunders v. Commonwealth, 56 Va. App. 139, 692 S.E.2d 252 (2010). (App. 511-517). The Court of Appeals concluded that the trial court properly allowed the jury to fix Saunders's sentence under Code § 16.1-271. On September 15, 2010, this Court awarded Saunders an appeal on one assignment of error, quoted below:

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO SENTENCE THE JUVENILE DEFENDANT.

STATEMENT OF FACTS

At about 10:00 p.m. on September 7, 2007, Greg Powell, a cabdriver and part-time football coach, was driving along Garfield

Avenue and Twelfth Street, headed toward downtown Lynchburg. (App. 115). As he drove past a gas station, Shandre Travon Saunders, the defendant, shot him in the right side of his face with a .380 caliber gun. (App. 115, 119, 374-375). Powell lost control of the cab and crashed into a tree. (App. 157). Saunders, a leader in a gang known as the Garfield Avenue Bloods, "one small subset of the Nine Trey Bloods," had been firing at "teenage types" on the other side of the street when he shot Powell. (App. 114, 153, 250-251).

At trial on January 26, 2009, Aaron Dumont, a physician taking care of Powell, testified that Powell sustained facial fractures and an injury to the left carotid artery in his neck. (App. 241). Twelve days after being shot, Powell suffered a stroke and permanent damage to his brain. (App. 242-243). He cannot speak, process speech, or move the right side of his body. (App. 243, 246).

On September 14, 2007, one week after Powell was shot, Lynchburg police arrested Alonzo Clark. (App. 159). Two weeks later on September 28, 2007, however, "all charges against Alonzo Clark involving the cabdriver shooting were dropped." (App. 117, 160, 306-307).

Meanwhile, on September 21, 2007, Saunders went to an

apartment on Campbell Avenue carrying the same .380 caliber gun used in the Powell shooting. He fired at men inside the apartment, they returned fire, and everyone fled. (App. 451). Bullet holes in the wall "were consistent with coming from the doorway where Mr. Saunders entered the doorway to the apartment." (App. 451). The incident was "drug related." (App. 451).

After that, on January 22, 2008, the juvenile and domestic relations district court issued petitions charging Saunders with shooting into an occupied building on September 21, 2007 in violation of Code § 18.2-279. (App. 20, 34-35). On February 13, 2008, Saunders waived the jurisdiction of the juvenile court under Code § 16.1-270. (App. 20, 34-35). Next, on March 21, 2008, Saunders pled guilty to the apartment shooting offense in the circuit court. (App. 20, 34-35). On June 6, 2008, the trial judge sentenced Saunders to an active two-year term in prison under Code § 16.1-272(2). (App. 21, 34-35).

In the meantime, on May 21, 2008, the juvenile district court issued new petitions charging Saunders with shooting cabdriver Powell on September 7, 2007. (App. 20, 34- 35). After that, Saunders was certified for trial as an adult on June 11, 2008 under Code § 16.1-

269.1(C). (App. 34-35). He was convicted by the jury on January 26, 2009. (App. 436-437).

In a pre-trial proceeding on October 17, 2008, the prosecutor argued that Saunders was not entitled to judge-sentencing under the plain language of Code § 16.1-271. (App. 21). The prosecutor pointed out that Saunders pled guilty to the apartment shooting offense and was convicted in the circuit court of March 21, 2008. He was sentenced on June 6, 2008.

> So when [Saunders] appeared before Judge Perrow on June 6th [2008], Judge Perrow decided to treat the defendant as an adult and sentenced him as an adult for shooting into the occupied dwelling and gave him a two-year active sentence. On June 6th [2008] . . . [Saunders] had pending allegations of delinquency in the juvenile system as he had the pending aggravated malicious wounding and the pending use of a firearm [cabdriver shooting].
>
> So Code Section 16.1-271 I think is very clear. Once a juvenile has been adjudicated and sentenced as an adult in circuit court, he is forever an adult in two situations. Situation number one is for any future criminal conduct. Now, what we have here is not for future criminal conduct because he shot the cab driver on September 7th [2007], [and] . . . shot the house on September 21st [2007]. So what he's in circuit court for now actually happened prior. So this is not for future criminal conduct.
>
> But the second provision [of § 16.1-271] does ring true here. This was a pending allegation of delinquency. It was pending in the juvenile court at the time he was sentenced as an adult. So the relevant thing is what happened on June 6th [2008]. [On] June 6th [2008] he was sentenced as an adult and he had pending charges in the J & D system.

> Mr. Embrey [defense counsel] talks about § 16.1-272. I agree with everything that statute says, but the title of the statute is Power of Circuit Court over a Juvenile Offender. As of June 6th of this year [2008], this defendant is no longer a juvenile offender. He is now considered an adult. So nothing in 272 is applicable for this defendant anymore. From here out after June 6th of this year, he is an adult. Anything that happens from here on out will occur in the General District and Circuit Court level.

(App. 21-22).

In agreeing with the prosecutor and ruling that Saunders should be sentenced by a jury in conformance with Code §§ 16.1-271 rather than a judge under Code § 16.1-272, the trial judge observed:

> And on May 21, 2008, [Saunders] was charged with juvenile petitions of aggravated malicious wounding, use of a firearm, for an offense that was alleged to have occurred on September 7, 2007. That's the charge we have before the Court now. On June 6th, 2008, Judge Perrow in the circuit court sentenced Mr. Saunders on a charge of shooting into an occupied dwelling to five years with three years suspended. On June 11th [2008] of this year, the defendant appeared in J and D Court, which at the time the aggravated malicious wounding and use of a firearm charges, which we have before the Court today, were certified to this court for trial. So that matter was pending in the juvenile court at the time Mr. Saunders was treated as an adult by Judge Perrow.
>
> And Section 16.1-271 says that a juvenile shall be treated as an adult for any future criminal acts. This is not really a future act because it existed before the other charge and . . . any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the

> criminal conviction. Well, it does fall squarely into that category. This matter was pending at the time he was treated [as] an adult, disposed of as an adult by Judge Perrow.

(App. 40-41).

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THE JUVENILE DEFENDANT WAS SUBJECT TO JURY SENTENCING UNDER CODE § 16.1-271, NOT JUDGE SENTENCING UNDER CODE § 16.1-272.

On brief, as he did at the pre-trial proceeding in the instant case, Saunders argues he was entitled to judge-sentencing under Code § 16.1-272. He asserts Code § 16.1-271 does not apply to his sentencing because the first two paragraphs of § 16.1-271 are "ambiguous" and "appear contradictory." (Def. Br. 8). Any ambiguity, according to Saunders, "resolves in favor of the defendant." (App. 25, 27).

Code § 16.1-271 states:

> Conviction of a juvenile as an adult pursuant to the provisions of this chapter [11] shall preclude the juvenile court from taking jurisdiction of such juvenile for subsequent offenses committed by that juvenile.
>
> Any juvenile who is tried and convicted in a circuit court as an adult under the provisions of this article shall be considered and treated as an adult in any criminal proceeding resulting from any alleged future criminal act and

> any pending allegations of delinquency which have not been disposed of by the juvenile court at the time of the criminal conviction.
>
> All procedures and dispositions applicable to adults charged with such a criminal offense shall apply in such cases, including, but not limited to, arrest, probable cause determination by a magistrate or grand jury; the use of a warrant, summons, or capias instead of a petition to initiate the case; adult bail; preliminary hearing and right to counsel provisions; trial in a court having jurisdiction over adults; and trial and sentencing as an adult. The provisions of this article regarding a transfer hearing shall not be applicable to such juveniles.

Code § 16.1-272 states, in pertinent part:

> A. In any case in which a juvenile is indicted, the offense for which he is indicted and all ancillary charges shall be tried in the same 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 the intervention of a jury.

Code § 19.2-295.1 states, in pertinent part:

> In cases of trial by jury, upon a finding that the defendant is guilty of a felony . . . a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury. . . .

Importantly, Saunders does not dispute he was properly tried, convicted, and sentenced by a judge under Code § 16.1-272 in the apartment shooting case on June 6, 2008. He also does not contest the

fact that the offenses in the instant case were pending at that time. Nevertheless, Saunders contends that the language of § 16.1-271 stating that a juvenile previously tried and convicted as an adult will be subject to "trial and sentencing as an adult" for subsequent offenses, means merely that Saunders should receive an adult sentence, not that he be subject to jury sentencing as an adult would pursuant to Code § 19.2-295.1 (requiring that a defendant's sentence be ascertained by the jury when a jury determines guilt). (Def. Br. 10).

According to Saunders, upon conviction in this case, he should have been sentenced by the judge, just as he was upon conviction for the apartment shooting case. Further, Saunders says the legislature did not intend that he be treated as an adult in "all respects," nor should his status as a juvenile be "lost," regardless of his having been previously tried and convicted as an adult in the circuit court. (App. 19).

As the Court of Appeals correctly ruled, under the "clear language" of § 16.1-271,

> if a juvenile is convicted in a trial court as an adult, a procedure permitted under Code § 16.1-272 after a JDR court has certified the charge(s) pursuant to Code § 16.1-269.1, that juvenile is thereafter "considered and treated as an adult in any criminal proceeding" that involves crimes that are committed after his adult conviction or crimes that are

> pending at the time of his adult conviction. Indeed, Code § 16.1-271 states that "[c]onviction of a juvenile as an adult pursuant to the provisions of this chapter *shall preclude* the juvenile court from taking jurisdiction of such juvenile for subsequent offenses committed by that juvenile."

(App. 514). (Emphasis added).

Certain principles of statutory construction underscore the correctness of the Court of Appeals's conclusion in this case. First, "'[c]ourts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied.'" Barr v. Town & Country Properties, Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

"'Where the legislature has used words of a plain and definite import, the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.'" Weinberg v. Given, 252 Va. 221, 225-226, 476 S.E.2d 502, 504 (1996) (quoting Barr v. Town & Country, 240 Va. 292, 295, 396 S.E. 2d 674 (1990)). Finally, "[u]nder the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected homogeneous system, or

a single and complete statutory arrangement." Lillard v. Fairfax County Airport Auth., 208 Va. 8, 13, 155 S.E.2d 338, 342 (1967) (other citation omitted).

On March 21, 2008, after waiving the jurisdiction of the juvenile court, Saunders was tried and convicted as an adult in the circuit court for shooting into an apartment on Campbell Avenue. Later, on June 6, 2008, the circuit court judge sentenced Saunders to two years in prison under Code § 16.1-272. As a juvenile transferred to the circuit court for trial, Saunders enjoyed a "privileged status in the law, a status not enjoyed by adults." Ballard v. Commonwealth, 228 Va. 213, 217, 321 S.E.2d 284, 286 (1984). Although Saunders was sentenced to a two year term in prison on June 6, 2008, the judge, under Code § 16.1-272, could have "treat[ed] him in all respects as a juvenile, with [the] full panoply of beneficient alternatives available in juvenile court, including the use of a juvenile probation officer." Id.

On May 21, 2008, however, petitions charging Saunders with the aggravated malicious wounding of cabdriver Powell were filed in the juvenile district court. Then, on June 11, 2008, a certification proceeding under Code § 16.1- 269.1(C) was conducted. On a

finding of probable cause, the charges were certified to the grand jury.[1] After that, Saunders was convicted in a jury trial on January 28, 2009. (App. 436). Thereafter, under Code § § 16.1-271 and 19.2-295.1, he was sentenced to a term of years by the same jury. (App. 479-481).

Under the plain terms of Code § 16.1-271, the juvenile court was completely divested from exercising jurisdiction in the aggravated malicious wounding case of cabdriver Powell. Saunders was properly punished as an adult in a separate proceeding by the same jury convicting him of grievously wounding Powell in a gang-related shooting. "[T]reatment as a juvenile is not an inherent right, but one granted by the state legislature, [and] therefore, the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary discrimination is involved." Woodword v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977), cert. denied, 434 U.S. 1088 (1978).

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[1] The prosecutor acknowledged at the pre-trial proceeding on October 17, 2008 that the probable cause proceeding on June 11, 2008 for the aggravated malicious wounding of cabdriver Powell should have been conducted in the general district court, not the juvenile district court. (App. 23). Nevertheless, the error was cured upon the return of the indictments against Saunders by the grand jury on July 7, 2008. See § 16.1-269.1(E).

The Commonwealth notes that Saunders mistakenly relies on a pre-1997 version of Code § 16.1-271 as one basis for the argument that the "first two paragraphs of § 16.1-271 are also contradictory." (Def. Br. 11). To the extent his argument complaining of ambiguity has been defeated by a 2007 amendment substituting "conviction of a juvenile" for "trial and treatment of a juvenile" at the beginning of the first paragraph, he never raised this argument in the trial court or assigned error to the Court of Appeals for not addressing the argument. This argument is clearly barred from appellate review. See Rule 5:25.

Similarly, Saunders argues on brief that the trial court erred in not instructing the jury that 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." (Def. Br. 15). On brief in the Court of Appeals, however, Saunders admitted he had not raised this argument at trial.

Consequently, the Court of Appeals correctly ruled that this argument was not preserved under Rule 5A:18, noting further that Saunders had not requested that the Court of Appeals apply any exception to Rule 5A:18. Not surprisingly, Saunder's brief now requests that this Court apply the "exception set forth in Rules 5A:18 and 5:25. . . 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." (Def. Br. 14). His brief is otherwise devoid of any argument that the equivalent limitations upon Rule 5:25 permit review by this Court.

Additionally, Saunders's petition for appeal in this Court did not even address the application of his procedural default by the Court of Appeals. Indeed, he has not mentioned that the Court of Appeals applied Rule 5A:18 to this issue in his assignment of errors. In the absence of an assignment of error to the Court of Appeals's holding that the claim is procedurally barred, consideration of his constitutional claim is further barred in this Court. See 5:17(c); See also Williams v. Commonwealth, 270 Va. 580, 583, 621 S.E.2d 98, 100 (2005).

In sum, Code § 16.1-271 clearly conveys the legislature's intent to subject Saunders to "all procedures and dispositions applicable to adults," including jury sentencing, once he was convicted as an adult and sentenced by a judge in the apartment shooting on June 6, 2008. The Court of Appeals properly ruled the trial court did not

err when it allowed the jury to fix Saunders's sentence.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia affirming the judgment of the Circuit Court of the City of Lynchburg should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

By: _____
Counsel

Kenneth T. Cuccinelli, II
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
phone (804) 786-2071
fax (804) 371-0151
sharris@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On November 16, 2010, the required copies of this brief, paper and electronic, were hand-delivered to the Clerk's Office of this Court for filing and an electronic copy was sent to the Court at scvbriefs@courts.state.va.us. Three copies were mailed to David D. Embrey, Esquire, P.O. Box 679, Lynchburg, VA 24505, counsel for the appellant, and an electronic copy of this brief was sent to counsel at his e-mail address: ddeesq@aol.com . The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 3264 words.

The Commonwealth desires to present oral argument in this case.

_____

Susan M. Harris
Assistant Attorney General