IN THE

SUPREME COURT OF VIRGINIA

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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

Record No. 160619

MATTHEW FITZGERALD HACKETT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMMONWEALTH'S ATTORNEY OF FRANKLIN COUNTY

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I. SYNOPSIS

Prior to this Court's decisions in *Moreau v. Fuller*, *Hernandez v. Commonwealth*, and *Starrs v. Commonwealth*, it was not unusual for the Circuit Court of Franklin County in its discretion to propose or approve deferred dispositions in appropriate cases similar to the continued proceedings in Hackett's case. The Commonwealth's Attorney of Franklin County, elected by the citizens of Franklin County to prosecute criminals, pursue justice for victims, and to vindicate the interests of the community, often agreed with the Court's deferral of cases under advisement. It was the consensus of the Court and the parties that rehabilitating law violators by continuing appropriate cases was preferable to a uniform and unyielding insistence on lifelong felony convictions for every single person who was charged with a felony.

Typically in those continued deferred disposition cases, like Hackett's case, the records contained a conviction order and a sentencing order. Following those standardized and form orders, the Court would conduct periodic reviews in the continued case under advisement and render dispositions as the nature of the case and the interests of justice required. Many defendants had their felony charges reduced to misdemeanors or dismissed outright. Others who were unwilling or unable to comply with the

Court's conditions concluded their continued cases with felony convictions. Regardless of the eventual outcomes, however, the trial court achieved the criminal law's goals of retribution, incapacitation, deterrence, and rehabilitation.

In Hackett's case, Judge William N. Alexander, II sought to ensure that the practice of his Court conformed to applicable law as it emerged from opinions issued by this Court. Upon the Court's review of *Moreau*, *Hernandez*, and *Starrs*, Judge Alexander concluded that the prior entry of conviction and sentencing orders in Hackett's continued case created an immutable and irreversible outcome that could not be altered by any means. However, because the Court had determined and implemented the law of Hackett's case that it continued for further review and final disposition, Code § 8.01-428 provided the Court with statutory authority to conform the previously entered orders to the actual actions of the Court.

II. STATEMENT OF THE CASE

Indicted in October 2008 by the Grand Jury of the Circuit Court of Franklin County for possession with the intent to distribute more than one half ounce but less than five pounds of marijuana in violation of Code § 18.2-248.1, the Appellant, Matthew Fitzgerald Hackett, pled guilty and was found guilty as charged on January 20, 2009 in the Circuit Court of Franklin

County, the Honorable William N. Alexander, II, presiding. J.A. 9-10. A presentence investigation report was prepared, with sentencing guidelines that recommended probation and no incarceration. J.A. 11, 39, 123.

Before sentence was pronounced on April 24, 2009, counsel for Hackett requested the Court to keep the adjudicatory and penalty aspects of the case under advisement on terms and conditions deemed appropriate by the Court, and to later to reduce the felony conviction to a misdemeanor conviction if Hackett complied with all requirements. J.A. 39-40. The Commonwealth agreed with Hackett's request. The Court approved and granted the request.

The Court offered Hackett a choice: either he could accept the felony conviction on his record and walk away from the sentencing hearing with no active incarceration imposed, or Hackett could go the extra mile and serve an active jail sentence of nine (9) months, successfully complete periods of supervised probation and good behavior, and comply with all conditions required of him, and then he would receive fulfillment of the Court's promise of reducing the felony conviction to a misdemeanor. J.A. 40. The Commonwealth also agreed with the terms of the Court's offer to Hackett to achieve his request. J.A. 39. The Court and the parties agreed that the Court had inherent authority and discretion to reduce the felony

conviction to a misdemeanor conviction if Hackett fulfilled his end of the bargain that the Court offered him. J.A. 136-137.

Hackett accepted the Court's offer requiring him to serve nine (9) months in jail and to successfully complete periods of supervised probation and good behavior. Hackett fully and successfully performed his part of the bargain by serving the required active nine (9) month jail term and by successfully completing periods of supervised probation and good behavior. J.A. 40.

After the Hackett completed his voluntary nine month jail term offered to him by the Court, the Court reviewed the case and Hackett requested that the Court reduce the felony to a misdemeanor. J.A. 105. The Court agreed that Hackett's behavior had been exemplary, but the Court wanted the Hackett to complete an additional period of twelve months of supervised probation. J.A. 112. Judge Alexander said:

> Now, this is what I'm going to do, I'm going to place you on probation for a period of twelve months today, from today. I will suspend all the time on the condition that you be on probation for a period of twelve months. At the end of twelve months I'm going to review it and at that time, Mr. Stanley, you can ask that it be reduced. And I'll do one of two things, I will either reduce it or extend your probation for a period of another twelve months and if you do extremely well for the whole twenty-four months then I still will consider reducing it. Mr. Allen [Commonwealth's Attorney] I don't think has any objection to it being reduced. J.A. 111.

After Hackett had fully and successfully performed his part of the bargain, Hackett again requested the Court to review the case and fulfill its promise to Hackett by reducing the felony conviction to a misdemeanor conviction. Upon review of Hackett's complete performance of his obligations under the agreement, the Commonwealth agreed that Hackett had fully and successfully performed his part of the bargain. The Court also acknowledged and agreed that Hackett had fully and successfully performed his obligations under the agreement the Court made with him. J.A. 161. The Court and the Commonwealth agreed that Hackett deserved to receive the fulfillment of the Court's promise to him. J.A. 129. However, the Court hesitated to fulfill its promise to Hackett because of its uncertainty regarding recently developing case law dealing with issues regarding the power of a trial court to reduce a felony conviction to a misdemeanor conviction. The Court continued the review hearing to conduct additional research. J.A. 128.

Upon final review of the case, the Court concluded that it did not have the authority to fulfill its previous promise to Hackett on which Hackett had relied to his significant detriment, even though the Court acknowledged that it had made promises to Hackett to induce him to perform certain conditions, including Hackett's voluntary loss of his liberty for nine (9)

months. J.A. 29-33. The Court also recognized that Hackett had fully and successfully performed his part of the contract the Court offered him, and that Hackett deserved to receive the benefit of the bargain the Court made with him.

Specifically, even though the Court acknowledged that it had continued the final determination of the rights of the parties in the case that it continued under advisement on terms and conditions placed upon Hackett, the Court felt it was restricted by certain language in this Court's *Starrs*, *Hernandez*, and *Moreau* opinions because it had entered a conviction order finding Hackett guilty, and it had also entered a sentencing order that imposed sentence. J.A. 33. The Court recognized what it viewed as an irreconcilable dichotomy between the orders it had entered and the law of the continued case it established for further review and consideration of possible reduction of the felony to a misdemeanor. JA. 155-156. The Court refused the parties' request to enter *nunc pro tunc* orders that correctly stated what actually transpired in the case. J.A. 151. Hackett appealed the trial court's decision to the Court of Appeals of Virginia. J.A. 42.

The Court of Appeals of Virginia, by Per Curiam opinion dated September 14, 2015, and by Order of a three-judge panel dated December

15, 2015, denied the Petition for Appeal, from which Orders Hackett appealed to this Court. J.A. 77-82; 94.

III. ASSIGNMENTS OF CROSS-ERROR

A. The trial court and the Court of Appeals of Virginia erred in concluding that the trial court was precluded by language in this Court's holdings in *Starrs v. Commonwealth*, *Hernandez v. Commonwealth*, and *Moreau v. Fuller* from reducing the felony conviction to a misdemeanor conviction where the trial court ordered the conditions of the continued case without rendering a final judgment that determined the rights of the parties. (Good cause shown and ends of justice exceptions to Rules 5:25 and 5A:18).

B. The Court of Appeals of Virginia erred in concluding that Rule 1:1 precluded the trial court from rendering its final determination of the rights of the defendant and the Commonwealth in the matters properly before it in the continued case. (Good cause shown and ends of justice exceptions to Rules 5:25 and 5A:18).

IV. STANDARD OF REVIEW, AUTHORITIES, AND ARGUMENT

Standard of Review

This Court employs a *de novo* standard of review to address the questions of law raised by the issues and the cross-errors assigned in this

case. *Starrs v. Commonwealth*, 287 Va. 1, 7, 752 S.E.2d 812, ____ (2014), *citing Hernandez v. Commonwealth*, 281 Va. 222, 224, 707 S.E.2d 273, 274 (2011).

A. Because the trial court had not rendered a final determination of the continued matters in Hackett's case, the court had inherent authority to render a final judgment to complete its actions in the continued case pursuant to the agreement the court made with Hackett.

In its final order entered December 30, 2014 that denied and dismissed Hackett's request to reduce the felony conviction to a misdemeanor conviction, the trial court relied on principles set forth by this Court in the *Starrs* and *Hernandez* cases cited above, and *Moreau v. Fuller*, 276 Va. 127, 661 S.E.2d 841 (2008). The principles as applied to the specific facts of those cases, however, are not dispositive of the issues presented in the case at bar.

In *Starrs*, this Court held that the circuit court erred by concluding that it did not have discretion and inherent authority to continue a criminal case for consideration of a future dismissal where the circuit court had not entered an order that formally adjudicated the defendant's guilt. *Starrs*, 287 Va. at 13. This Court held that before entry of an order formally adjudicating guilt, a trial court "has not yet exercised its essential function of rendering judgment." *Id.* at 14.

With respect to the judicial practice of taking cases under advisement to consider outcomes other than those provided by statute, this Court in *Starrs* restated and clarified the power of the judiciary. Until a court formally renders judgment in a case that makes a final determination of the rights of the parties in the matters properly before it, the court has not conducted and concluded the final exercise of its essential function. *Starrs*, at 7, *citing Moreau v. Fuller*, 276 Va. 127, 136, 661 S.E.2d 841, 846 (2008).

The principles this Court applied to the facts in *Starrs*, *Hernandez*, and *Moreau*, however, are nonetheless subject to recognized exceptions allowing lawful actions a trial court may and sometime must take even beyond twenty-one days after entry of a formal order adjudicating a defendant's guilt. For example, it is well established that before a trial court loses jurisdiction over the defendant in a case, it may consider a variety of motions that can and often do alter the outcome or nature of a previously entered judgment. *See* Code § 19.2-303. Upon a motion for reconsideration of a verdict or judgment while the trial court has continuing jurisdiction, a court in the sound exercise of its discretion may dismiss a charge or reduce the level of the offense or the amount of the punishment. Under Code § 8.01-428, court has power to vacate a judgment for fraud upon the court, or to correct clerical errors. A court may also vacate a

judgment and order a new trial because of newly discovered evidence. And under Rule 3A:15, it a trial court sets aside a verdict for any reason other than a motion to strike the Commonwealth's evidence, the court shall grant a new trial.

Based on the entire record in the instant case, even though the Court had entered conviction and sentencing orders, it is clear that the trial court had not rendered a final judgment that concluded its determination of the rights and responsibilities of Hackett and the Commonwealth. The trial court's entry of conviction and sentencing orders were part of the overall actions the Court took in Hackett's case that was continued for further review and final disposition. The trial court had not concluded the exercise of its essential function of completing the judicial action that it established as the law of the case. Indeed, the trial court acknowledged that it had devised and offered to Hackett the very procedure in the case whereby the defendant could achieve his objective to reduce the felony conviction to a misdemeanor in the continued case.

The ongoing judicial actions of the Court continued Hackett's case for further review and a final disposition that promised a reduction of the felony to a misdemeanor. Therefore the trial court was not limited by the holdings that were applied to the facts in *Starrs*, *Hernandez*, or *Moreau* from

rendering its judgment in making a final determination of Hackett's rights in view of the law of the case it established. Nothing in the *Starrs* case required the trial court to abandon the very procedures it employed to furnish Hackett with the opportunity to receive the Court's promised final determination of his rights in the continued case. By denying and dismissing the motion because of perceived limitations required by *Starrs*, *Hernandez*, and *Moreau*, the trial court erroneously divested itself from the exercise of its essential function and obligation to render a final determination of Hackett's rights and responsibilities "as those rights presently exist[ed]" in the continued case. *Id.* at 7.

Unlike the prosecutors involved in *Starrs*, *Hernandez*, and *Moreau*, who all opposed the requests of the defendants to defer judgment, continue the cases under advisement, and consider outcomes other than felony or misdemeanor convictions, the Commonwealth agreed with Hackett's request. *Cf. Maldonado-Mejia v. Commonwealth*, 286 Va. 49, 51, 752 S.E.2d 833, 834 (2013). Moreover, the trial court here not only approved and accepted Hackett's request for consideration of a future possible reduction of the felony to a misdemeanor, the trial court devised and ordered implementation of the procedure whereby Hackett could achieve the result he sought.

B. Rule 1:1 did not prevent the trial court from rendering a final determination of the rights of the parties in this case that the court continued under advisement.

Although not specifically referenced, the trial court's final order denying Hackett's request implicitly relied on the final order principles in Rule 1:1. The Court of Appeals of Virginia held that Rule 1:1 and cases applying it precluded the trial court from exercising its *nunc pro tunc* power to correct the incorrectly stated conviction and sentencing orders of the trial court. J.A. 79.

The trial court recognized that its orders did not accurately reflect the entirety of what actually transpired in the case that it had continued under advisement. "Generally, a court has 'the inherent power, based upon any competent evidence, to amend the record at any time, when "the justice and truth of the case requires it," so as to cause its acts and proceedings to be set forth correctly.' *Netzer v. Reynolds*, 231 Va. 444, 449, 345 S.E.2d 291, 294 (1986) (quoting *Council v. Commonwealth*, 198 Va. 288, 292, 94 S.E.2d 245, 248 (1956))." *Dixon v. Pugh,* 244 Va. 539, 542, 423 S.E.2d 169, ___ (1992).

Hackett did not request the trial court to enter "second" conviction or sentencing orders in contravention of Rule 1:1. Hackett requested a *nunc pro tunc* order to correct errors that were manifest by competent evidence

in the Court's own records, not to create a new order that reflected action that the Court did not take. It is clear from the record that the orders of the trial court, specifically the January 20, 2009 order that purported to render a final order adjudicating the defendant's guilt, did not reflect the entirety of the actions the trial court took pursuant to the law of the case it established. Therefore, just as the trial court had authority over the undetermined issues in the continued case, it had continuing jurisdiction and authority to correct the orders through which it had incorrectly spoken.

V. STATEMENT OF RELIEF SOUGHT

WHEREFORE, for all the foregoing reasons, and for such other reasons as this Honorable Court may deem meet, your *Amicus* respectfully requests this Honorable Court to remand the case to the Circuit Court of Franklin County for any further proceedings it deems appropriate that are not inconsistent with the arguments advanced herein.

Respectfully submitted,

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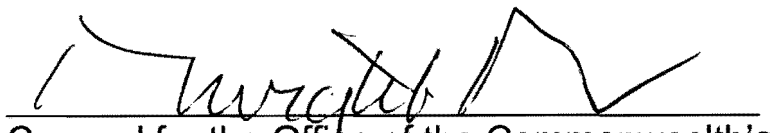
VI. CERTIFICATE

Counsel for *Amicus Curiae* hereby certifies pursuant to Rule 5:26 that:

1. In compliance with the applicable word count limitation pursuant to Rules 5:18 (b) and 5:26 (b), the length of the Brief *Amicus Curiae* of the Office of the Commonwealth's Attorney of Franklin County is 2,829 words; and
2. Counsel for *Amicus Curiae* hereby certifies that true copies of the foregoing Brief *Amicus Curiae* of the Office of the Commonwealth's Attorney of Franklin County were mailed with first-class U.S. postage prepaid to William M. Stanley, Esquire, to Aaron B. Houchens, Esquire, counsel for Appellant, and to Donald E. Jeffrey, III, Senior Assistant Attorney General, counsel for Appellee, on this 29th day of March, 2017.



Counsel for the Office of the Commonwealth's Attorney of Franklin County, *Amicus Curiae*