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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 160619

MATTHEW FITZGERALD HACKETT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLEE'S RESPONSE TO AMICUS BRIEF

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APPELLEE'S RESPONSE TO AMICUS BRIEF

INTRODUCTION

Hackett challenges his conviction from the Circuit Court of Franklin County. After the Commonwealth, represented by the Office of the Attorney General under Virginia Code § 2.2-511(A), filed the appellee's brief in this Court on February 3, 2017, the Commonwealth's Attorney of Franklin County sought leave to file an amicus brief on Hackett's behalf.

ARGUMENT

I. **The trial judge did not have the "inherent authority" to take a felony possession with intent to distribute marijuana charge "under advisement" in order to consider reducing the charge to a misdemeanor later.**[1]

The trial court entered a written order convicting Hackett of felony possession of marijuana with intent to distribute under Code § 18.2-248.1. The amicus brief appears to argue that the trial judge had the "inherent authority" to take this felony conviction under advisement, require Hackett to comply with certain conditions, then reduce the conviction to a misdemeanor. (Amicus Br. 6, 11-16).

This Court has previously held that a trial court's inherent authority is not unlimited. *See Tauber v. Commonwealth*, 263 Va. 520, 545, 562 S.E.2d 118, 131-32 (2002) (because amount of bond was governed by "plain language of statute" trial judge did not have "inherent authority" to set a bond lower than the statute mandated); *Reid v. Reid*, 245 Va. 409, 413-14, 429 S.E.2d 208, 210 (1993) (rejecting similar claim and stating that "inherent authority" may "be regulated by legislative enactment"). "[W]hatever inherent authority a judge possesses may not be exercised in a manner that is inconsistent with or which contravenes a statute."

[1] Although this was not the basis for the Court of Appeals' ruling below, the Court may affirm the judgment under the "right result, wrong reason" doctrine. *Perry v. Commonwealth*, 280 Va. 572, 578-82, 701 S.E.2d 431, 435-37 (2010).

Los Angeles County Dept. of Children & Family Services v. Superior Court, 77 Cal. Rptr. 3d 52, 60 (Cal. Ct. App. 2008) (internal quotation and citation omitted).

Clearly, "the General Assembly has in some instances given trial courts explicit authority to defer a finding of guilt, notwithstanding the fact that evidence was presented proving guilt beyond a reasonable doubt." *Powell v. Commonwealth*, 36 Va. App. 231, 234, 548 S.E.2d 926, 928 (2001) (*en banc*) (HUMPHREYS, J. concurring) (citing several statutes). In fact, the General Assembly has authorized such deferred dispositions in certain offenses involving ***simple possession*** of unlawful drugs. *See* Virginia Code § 18.2-251. Conversely, neither Code § 18.2-251 nor any other statute in the Code of Virginia provides such authority for the more serious drug offenses of distribution and possession with intent to distribute. "When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (quoted in *Powell*, 36 Va. App. at 235, 548 S.E.2d at 928).

While this Court has not ruled on this precise issue previously, the Court has recognized that it is a "common practice" for trial courts in Virginia to take criminal cases "under advisement" even in the absence of an express statutory grant of authority to do so. *Moreau v. Fuller*, 276 Va. 127, 140, 661 S.E.2d 841, 848 (2008) (KINSER, J., concurring). Although the record in *Moreau* did not

"permit" this Court to decide whether such inherent authority actually exists, the Court did warn that its "inability to address this issue should not be viewed as a tacit approval of the practice." *Id*.[2] In fact, as the Court of Appeals has previously stated, this Court's decision in *Hernandez v. Commonwealth*, 281 Va. 222, 707 S.E.2d 273 (2011), and *Starrs v. Commonwealth*, 287 Va. 1, 752 S.E.2d 812 (2014), did not authorize a trial court to exercise "judicial clemency" in the manner Hackett seeks. *Harris v. Commonwealth*, 63 Va. App. 525, 535-37, 759 S.E.2d 29, 34-35 (2014).

In conclusion, Hackett is not entitled to the relief he seeks.

II. Once the trial court had convicted Hackett of the felony charge in January 2009, it had no discretion to reduce the charge to a misdemeanor.

Under *Hernandez*, the line of demarcation is clearly drawn: "Until the court enters a written order finding the defendant guilty of a crime, the court has the inherent authority to take the matter under advisement or to continue the case for disposition at a later date." 281 Va. at 226, 707 S.E.2d at 275 (applied in *Starrs*, 287 Va. at 12-13, 752 S.E.2d at 819). Once the trial court entered the written order finding Hackett guilty of the felony in January 2009, however, "the question of the

[2] The majority opinion in *Moreau* acknowledged that "[w]hat may in a proper case be reasonably subject to challenge is whether the judge may decline to render judgment and continue the case with or without terms akin to probation status with the promise from the court of a particular disposition at a later date." *Moreau*, 276 Va. at 137 n.4, 661 S.E.2d at 847 n.4.

penalty to be imposed [was] entirely within the province of the legislature, and the court ha[d] no inherent authority to depart from the range of punishment legislatively prescribed" for the felony conviction. *Id*. at 225-26, 707 S.E.2d at 275. Significantly, the General Assembly has made the same distinction, stating that when a trial court takes a simple possession case under advisement, it must do so "without entering a judgment of guilt." Va. Code § 18.2-251.

Amicus argues that the trial judge erred by refusing to fix a variety of problems in this case via *nunc pro tunc* order. (Amicus Br. 9, 15-16). But

> the purpose of a *nunc pro tunc* entry is to correct mistakes of the clerk or other court officials, or to settle defects or omissions in the record so as to make the record show what actually took place. It is not the function of such entry by a fiction to antedate the actual performance of an act which never occurred, to represent an event as occurring at a date prior to the time of the actual event, or to make the record show that which never existed.

Council v. Commonwealth, 198 Va. 288, 293, 94 S.E.2d 245, 248 (1956) (internal quotation and citations omitted).

A party seeking entry of a *nunc pro tunc* order must show by "clear and convincing" evidence that "prove[s] beyond all doubt" that the clerical error occurred. *Id*.[3]

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[3] To permit a trial court, either under the statute or by its inherent power, to consider at any time **what judgment it might have rendered while it still retained jurisdiction over a case** and then to enter that judgment *nunc pro tunc* would render meaningless the

Regardless of any "agreement" about the possibility of reducing the felony charge to a misdemeanor the Commonwealth's Attorney and Hackett's counsel may have discussed prior to the January 2009 guilty plea hearing, nothing in the record establishes that this "understanding" was ever communicated to the trial judge. In fact, the record suggests the opposite.[4] The guilty plea form that Hackett and his counsel signed and submitted to the trial court acknowledged that Hackett could receive a prison sentence of up to ten years (the maximum penalty for the felony) and averred that no one, including the Commonwealth's Attorney, had made any "promises" to him. (App. 6-8). Conspicuously absent from the agreed statement of facts is any recitation that the parties communicated any contrary "agreement" ***to the trial court***. (App. 39 ¶ 1; *see also* App. 29-30, stating "nothing was mentioned at the hearing about any type of plea agreement."). In the absence of clear evidence that the trial court actually agreed to consider reducing the felony charge to a misdemeanor prior to entering the January 2009 written order, the

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> mandate of Rule 1:1 and would do great harm to the certainty and stability that the finality of judgments brings.

Davis v. Mullins, 251 Va. 141, 150, 466 S.E.2d 90, 94 (1996) (emphasis added).

[4] Thus, contrary to amicus's suggestion, the record does not show that the trial judge created the "law of the case" by agreeing to consider reducing the felony charge to a misdemeanor ***prior*** to the entry of the January 2009 written conviction order. (Amicus Br. 16). Given this Court's holding in *Hernandez*, this fact is dispositive because the trial court cannot now create the fiction via *nunc pro tunc* order that it took the felony charge "under advisement" prior to entry of the written conviction order.

Court should reject amicus's invitation to allow the trial court to enter a *nunc pro tunc* order creating the fiction that it did so.

While amicus places great weight on the trial court's practice of deferring disposition in cases such as this one, he ignores one significant distinction upon which the trial court relied in rejecting Hackett's request to enter a *nunc pro tunc* order. In "several" other cases, the parties presented a written plea agreement articulating the arrangement, whereas in this case, no such agreement was proffered. (App. 150-52).

Based on the totality of the circumstances, even if Hackett could overcome the other formidable barriers on appeal, the trial judge did not err in refusing Hackett's request to enter a *nunc pro tunc* order under these facts.

III. The Court should reject amicus's request for the Court to ignore settled principles of finality under Rule 1:1.

The trial court entered a final written sentencing order imposing a sentence of three years, with two years and three months suspended, on April 28, 2009. (App. 12-15; Appellee's Br. 11). While amicus correctly states that the trial judge made ***oral comments*** at the April 24 sentencing hearing about the possibility of later reducing the charge to a misdemeanor if Hackett met certain conditions, the final judgment order entered on April 28 makes no mention of this.

"In order to toll the time limitations of Rule 1:1 . . . , it is not sufficient for the trial judge merely to express a desire to consider action or take the issue under

advisement; rather, the trial judge must issue an order modifying, vacating or suspending the sentenc[ing order] within twenty-one days of the entry of sentence." *D'Alessandro v. Commonwealth*, 15 Va. App. 163, 167, 423 S.E.2d 199, 201 (1992) (citing *In Re: Department of Corrections*, 222 Va. 454, 463, 281 S.E.2d 857, 862 (1981)). In this case, "the record contains no indication that [Hackett] requested the trial judge to modify, vacate, or suspend the [2009] sentencing order [or that the trial judge did so *sua sponte*] pending the trial judge's decision on the motion." *Id*.[5] Thus, "[b]ecause the trial judge [denied] [Hackett's] motion [nearly six years] after the entry of the sentencing order, the sentencing order, which is the final judgment, was no longer under the control of the trial judge" when he entered the order from which Hackett seeks relief. *Id*.[6] *See also Wagner v. Shird*, 257 Va. 584, 587-88, 514 S.E.2d 613, 614-15 (1999) (applying Rule 1:1 and stating that neither pendency of post-trial motion on last day of stay nor even trial judge's oral ruling on the motion during the stay was adequate to extend the stay and finding that written order entered after stay had run was a

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[5] As the Commonwealth has argued previously, "it is not enough for the Court to find that the trial judge intended to consider a later motion to modify at the time he entered the final sentencing order in April 2009." Rather, "Hackett must also show that the trial court agreed ***at that time*** to enter an order retaining jurisdiction to do so." (Appellee's Br. 13-14).

[6] Of course, the Court of Appeals correctly noted that if the final order in this case had contained both a felony sentence and a provision taking the charge "under advisement" it would have been void *ab initio*. (App. 81-82, citing *Burrell v. Commonwealth*, 283 Va. 474, 480, 722 S.E.2d 272, 275 (2012)).

nullity). And again, because the trial judge took no action to retain jurisdiction in a timely fashion, he did not later err in refusing to enter a *nunc pro tunc* order pretending that he had done so. (App. 153-54, trial judge stating he did not believe he could "get around the fact" that Hackett had been "found guilty and sentenced").

Similarly, amicus's reliance on the Commonwealth Attorney's agreement to the lengthy "under advisement" period below is misplaced. (Amicus Br. 14) The parties may not, in contravention of Rule 1:1, "confer jurisdiction" by agreement. *Wagner*, 257 Va. at 587, 514 S.E.2d at 615.[7]

Like Hackett, amicus asks this Court to ignore established procedural rules based on an argument that it would be equitable to do so.

> Selectively suspending procedural rules in the hope of achieving some abstract notion of as-applied fairness in every case ends up devolving into an ad hoc exercise of subjective justice and places our sometimes conscious, sometimes not, result-oriented predispositions into open conflict with neutral principles of law. As Blackstone warned, "the liberty of considering all cases in an equitable light must not be

[7] Amicus also claims that Hackett is not asking this Court to order the trial court to enter a "second" conviction or sentencing order under the guise of a *nunc pro tunc* order (Amicus Br. 15). This claim is belied in part by Hackett's own assertion in his petition for rehearing in the Court of Appeals in which he contended that "the [trial] court should not have entered the Sentencing Order in the first place, and that was the error that needed to be corrected through a subsequent order *nunc pro tunc*." (App. 85). The record establishes that Hackett did not timely object to entry of the written sentencing order or its content, so there is no basis for this Court to find that the circuit court "should not have entered [the written sentencing order] in the first place."

> indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge." 1 William Blackstone, Commentaries *62.

Umana-Barrera v. Commonwealth, 2015 Va. Unpub. LEXIS 24, at *19-21 (Aug. 21, 2015) (KELSEY, J., concurring).[8]

If the amicus Commonwealth's Attorney believes a grave injustice is perpetrated by this Court enforcing its rules, he may agree that Hackett is entitled to clemency and join in any petition Hackett files with the Governor. Amicus has admitted his willingness in an appropriate case to support the reduction of felony charges "to misdemeanors" or for the felony charges to be "dismissed outright." (Amicus Br. 4).

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[8] This Court and others have routinely rejected the notion that procedural defaults must yield to such "equitable" concerns. *See*, *e.g.*, *Alexandria Redevelopment & Hous. Auth. v. Walker*, 290 Va. 150, 160-61, 772 S.E.2d 297, 302 (2015) (stating that "[i]t is never enough for [a litigant who has procedurally defaulted a claim] to merely assert a winning argument on the merits - for if that were enough procedural default would never apply, except when it does not matter.") (internal quotation and citation omitted); *Van Dam v. Gay*, 280 Va. 457, 463, 699 S.E.2d 480, 482-83 (2010) (recognizing that absence of a "discovery rule" to toll statute of limitations may "produce inequities by triggering a statute of limitations when the injury or damage is unknown or difficult or even incapable of discovery," but holding that Court would not invoke such a rule in the absence of express statutory authority to do so). "Any invocation of equity to relieve the strict application of a statute [or rule] must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes [or rules]. *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000).

CONCLUSION

This case does not warrant contorting the rule of law to achieve a "just" result, even if this Court gets past the threshold issue of whether a circuit court can take a case under advisement in the absence of a specific statute authorizing this relief. The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On April 6, 2017, the required copies of this brief were filed electronically with this Court and hand delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was emailed to William M. Stanley, Esquire and Aaron B. Houchens, counsel for appellant, at bstanley@shg-law.com and ahouchens@shg-law.com; and to Dwight G. Rudd, Assistant Commonwealth's Attorney, at dwight.rudd@franklincountyva.gov. I certify that this document contains 2,743 words.

The Commonwealth desires to present oral argument in this case.

By: S/_____
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