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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 170586

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

CARROLL EDWARD GREGG, JR.,

Appellee.

REPLY BRIEF OF THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

VIRGINIA B. THEISEN
Senior Assistant Attorney General
Virginia State Bar No. 23782

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 phone
(804) 371-0151 fax
oagcriminallitigation@oag.state.va.us

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS

In the Nature of the Case and Material Proceedings section of his brief, Gregg contends that the trial court did not address legislative intent but instead ruled that the two punishments at issue here did not violate the Double Jeopardy Clause solely based on the application of the Blockburger test. (Def. Br. at 1-2).[1]

In fact, however, the trial court stated at the September 28, 2015 hearing, that "first, you have to look to the intent of the legislature and see whether it was their intent under the statutes to have two punishments or not." (App. 339). The

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[1] Blockburger v. United States, 284 U.S. 299 (1932).

court commented that defense counsel had argued the legislative intent issue "in some detail" in a memorandum. (App. 339). The court noted that the offenses in question were not subsections of the same statute. (App. 339-40).

The court referenced legislative intent again at that hearing and further noted that where the intent of the legislature cannot be determined because it was not explicitly stated, "you go to the Blockburger test, and that's where we sort of start out here today." (App. 341). Thus, the trial court, at least implicitly, determined that the legislature had not intended to *prohibit* separate punishments for the two offenses, but since the legislative intent was not explicitly stated, the court necessarily relied on Blockburger.

At the hearing on November 18, 2015, the court distinguished Holley v. Commonwealth, 64 Va. App. 156, 765 S.E.2d 873 (2014) (en banc), on which Gregg had relied; cited the Court of Appeals of Virginia decision in Bomber v. Commonwealth, No. 2451-11-3, Unp., 2013 Va. App. LEXIS 75 (March 5, 2013), aff'd No. 130572 Unp., 2014 Va. Unpub. LEXIS 11 (February 27, 2014), cert. denied, 135 S. Ct. 240 (2014); and re-affirmed its reasoning from the earlier hearing. The court denied Gregg's motion to reconsider. (App. 363).

ARGUMENT

A. Legislative history does not establish that the General Assembly intended to prohibit punishments for both crimes in a single trial.

Gregg argues at length on brief that the legislative development of Virginia Code § 18.2-154 establishes that the Virginia General Assembly did not intend for a defendant to be punished cumulatively for common law involuntary manslaughter and the statutory involuntary manslaughter offense included in Code § 18.2-154.

Gregg contends that it is significant that in 1975 the legislature both enacted Code § 18.2-53.1, use of a firearm in the commission of certain felonies, and re-codified and amended the Code sections prohibiting shooting at buildings and vehicles. The statute prohibiting shooting at an occupied vehicle was severed from the statute concerning shootings at occupied buildings. And the legislature addressed for the first time its intent regarding the offense applicable where a death results from the *unlawful* shooting at an occupied vehicle. The 1975 statute provided that in that circumstance the shooter was "deemed" guilty of involuntary manslaughter.

Gregg argues that the legislature's inclusion of specialized language in Code § 18.2-53.1 expressly allowing for conviction of use of a firearm and the underlying felony, while no such explicit language was included in Code § 18.2-

154, demonstrates the legislature's intent to prohibit conviction and punishment for both common law involuntary manslaughter and Code § 18.2-154's statutory involuntary manslaughter. (Def. Br. at 15, 26). His conclusion, however, is incorrect.

Code § 18.2-53.1 does not stand alone. Rather, it prohibits use of a firearm, *in the commission of another crime*. That is, there must always be *another* crime -- *i.e.,* one of the specified predicate felonies-- in order for there to be a violation of Code § 18.2-53.1. Thus, it follows that the legislature would address explicitly in the use of firearm statute itself the intent that a conviction for that charge may stand in addition to conviction for a necessary predicate felony.

A similar analysis applies regarding Code § 18.2-108.01. The offense of larceny with intent to sell, in violation of Code § 18.2-108.01(A), is simply grand larceny with the added element of an intent to sell. A violation of § 18.2-108.01(A) and common law grand larceny would not pass the Blockburger test and thus the legislature had cause to explicitly state its intent for multiple punishments. See Code § 18.2-108.01(C); see also Tharrington v. Commonwealth, 58 Va. App. 704, 710, 715 S.E.2d 388, 391 (2011). Here, however, the elements of the offenses indeed pass the Blockburger test.

It is not necessary, however, for the legislature to explicitly state its intent in order for the Court to find that cumulative punishments are permissible. See Dalo

v. Commonwealth, 37 Va. App. 156, 164 n.4, 554 S.E.2d 705, 709 n.4 (2001), aff'd 264 Va. 431, 570 S.E.2d 840 (2002).[2] For example, in King v. Commonwealth, 56 Va. App. 133, 692 S.E.2d 249 (2010), for a single act, the defendant was convicted of felony child abuse, in violation of Code § 18.2-371.1(A), and felony child endangerment, in violation of Code § 40.1-103(A). Neither statute contained any language explicitly expressing a legislative intent that convictions and punishments for both offenses, based on the same act, would be permissible in a single trial.

The Court of Appeals determined that the legislature intended to create distinct offenses and that the two statutes proscribed different conduct. And the offenses did not constitute the same offense under the abstract analysis Blockburger requires. The Court, therefore, affirmed King's convictions and sentences for both offenses against King's double jeopardy challenge. See King, 56 Va. App. at 137-39, 692 S.E.2d at 251-52.[3]

Gregg also relies on the 2005 amendment to Code § 18.2-154, which deleted the term "deemed" and amended the statute to read that one who unlawfully shoots at an occupied vehicle and death results "is" guilty of involuntary manslaughter.

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[2] See Commonwealth's Opening Br. at 14.

[3] It should be noted as well that no specialized language appeared in the statutes governing the attempted murder or malicious wounding offenses at issue in Coleman v. Commonwealth, 261 Va. 196, 539 S.E.2d 732 (2001).

He contends that the amendment supports his argument that the legislature does not intend to permit multiple punishments in this case. Gregg argues that the term "deem," which he contends is rooted in larceny law (Def. Br. at 11), signifies a "legal fiction." (Def. Br. at 12).

He argues that when one formerly was convicted of a crime "deemed" involuntary manslaughter, he was not actually convicted of involuntary manslaughter. But under the current version of the statute, Gregg reasons, one is literally convicted of involuntary manslaughter when convicted under the pertinent portion of Code § 18.2-154. (Def. Br. at 19-20). Gregg concludes that one may not be punished for that statutory involuntary manslaughter and another involuntary manslaughter offense, namely, common law involuntary manslaughter. His conclusion, however, is not correct.

The amendment from "deemed" to "is" guilty of involuntary manslaughter in Code § 18.2-154 did not constitute the significant alteration that Gregg suggests. It should be noted, for example, that the current version of the abduction statute, Virginia Code § 18.2-47, lists the various ways in which the statute may be violated and states that one committing such an act is "deemed" to have committed abduction. Contrary to Gregg's theory, such an offender actually is guilty of abduction. See, e.g., Commonwealth v. Herring, 288 Va. 59, 73-74, 758 S.E.2d 225, 233 (2014).

1. The history of Virginia's embezzlement statute does not support Gregg's argument that the legislature did not intend multiple punishments for the crimes at issue in this case.

Gregg relies on an amendment to Virginia's embezzlement statute to support his argument (Def. Br. at 12-13, 17-19), but that reliance is misplaced. For many years, the embezzlement statute permitted the Commonwealth to indict an embezzlement charge as simple larceny. In 1994, however, the legislature amended Code § 18.2-111 to omit the provision permitting indictment for simple larceny in an embezzlement prosecution.

In Commonwealth v. Bruhn, 264 Va. 597, 570 S.E.2d 866 (2002), this Court, in affirming an en banc decision of the Court of Appeals, addressed the amendments to the embezzlement statute. In that case, the defendant had been indicted for grand larceny, "in violation of Virginia Code § 18.2-95," and was convicted. See id. at 600, 570 S.E.2d at 867. After trial, but before sentencing, in response to a motion to set aside the verdict, the Commonwealth argued for the first time that the evidence at trial proved embezzlement under Code § 18.2-111. See id. at 600, 570 S.E.2d at 868.

The Court of Appeals reversed the conviction, and this Court affirmed that judgment. This Court stated that prior to 1994, the statute expressly provided that proof of embezzlement would sustain a conviction under a grand larceny

indictment. See id. at 601, 570 S.E.2d at 868. The Court noted, however, that in 1994 the legislature had

> deleted the language that permitted a defendant who had committed embezzlement to be "indicted as for larceny." The amendments further eliminated the phrase that made proof of embezzlement "sufficient to sustain the charge" of larceny and the requirement that the Commonwealth elect, upon motion of the defendant, the specific statutory theory of the crime of larceny it intended to rely upon for a conviction.

Id. at 602, 570 S.E.2d at 868-69. The Court concluded that the "elimination of the permissive provision" allowing the Commonwealth to indict embezzlement simply as larceny evinced "a clear legislative intent to prohibit that former practice and require specificity in the indictment." Id. at 602, 570 S.E.2d at 869. The Court further noted that the "continued association of embezzlement and larceny" was limited to ascertainment of punishment. Id. at 602-03, 570 S.E.2d at 869.

The amendments to the embezzlement statute and the Bruhn decisions focus on the proper indictment for embezzlement, even though for purposes of punishment, a court still looks to the petit larceny or grand larceny statutes to determine the appropriate sentence for one convicted of embezzlement. Thus, the critical amendment was unrelated to the use of the term "deem" and does not support Gregg's argument regarding the significance of the deletion of "deem" in Code § 18.2-154.

2. The strict punishment provisions added to Code § 18.2-154 for shooting at law enforcement and emergency responder vehicles does not demonstrate a legislative intent to prohibit cumulative punishments in this case.

Gregg also relies on amendments to Code § 18.2-154 that specify mandatory punishment where the occupied vehicle shot at is a police, fire, or medical emergency vehicle. He argues that the legislature's provision for a mandatory consecutive sentence for the shooting at such vehicles is the only cumulative punishment the legislature intended to allow. (Def. Br. at 20-21).

That portion of Code § 18.2-154, however, simply ensures that one who shoots at an emergency vehicle actually will serve a year-long term of incarceration for that specific offense. The requirement of a mandatory, consecutive sentence demonstrates a concern for law enforcement and other emergency responders from the perils of gunfire aimed at their vehicles while they are serving the public. This concern is consistent with other statutes, such as Code § 18.2-57(C), which provides for a greater penalty when assault or battery is committed upon a police officer or emergency services worker, among others, in the course of their duties.

B. Holley v. Commonwealth does not mandate reversal here.

Gregg cites Holley v. Commonwealth, 64 Va. App. 156, 765 S.E.2d 873 (2014) (en banc) in his brief. To the extent he is arguing that the common law

unitary homicide theory mandates that "the units of prosecution are dead bodies, not theories of aggravation" (Def. Br. at 9), that holding of Holley is not applicable here.

As is clear from this Court's decisions in Payne v. Commonwealth, 277 Va. 531, 674 S.E.2d 835 (2009); Winston v. Commonwealth, 268 Va. 564, 604 S.E.2d 21 (2004); and Payne v. Commonwealth, 257 Va. 216, 509 S.E.2d 293 (1999), this Court has upheld multiple homicide convictions and punishments for the death of a single victim where statutory homicide offenses are included in the charges.

In Holley, by contrast, the defendant was convicted of both first-degree felony murder and second-degree murder, both common law offenses, made punishable in the Code of Virginia under § 18.2-32. See Holley, 64 Va. App. at 165, 765 S.E.2d at 877. The Court of Appeals concluded that in enacting Code § 18.2-32, the General Assembly had not intended to "displace the common law's conception of homicide as a unitary crime with regard to murder and felony murder." Id. at 164, 765 S.E.2d at 877. But the unitary homicide principle is not applicable where, as here, one conviction is solely a statutory violation.

To the extent that Gregg relies on Holley for the proposition that where legislative intent is clear, "resort to the Blockburger test" is not necessary, Holley, 64 Va. App. at 165, 765 S.E.2d at 877, his legislative intent arguments are addressed above.

C. Neither West v. Director, Dept. of Corrections nor Ellis v. Commonwealth mandates reversal in this case.

Gregg also compares the convictions in this case with the statutory manslaughter offenses contained in Code §§ 18.2-36.1 and 18.2-36.2. He argues that one could not be convicted of common law involuntary manslaughter and statutory involuntary manslaughter under subsections (A) or (B) of those statutes. (Def. Br. at 30). This contention is incorrect.

While this Court ruled that common law involuntary manslaughter and statutory aggravated involuntary manslaughter under Code § 18.2-36.1(B), "do not qualify as separate offenses within the meaning of the Blockburger test," West v. Director, Dept. of Corrections, 273 Va. 56, 63, 639 S.E.2d 190, 195 (2007), convictions for both common law involuntary manslaughter and statutory involuntary manslaughter under Code § 18.2-36.1(A) would pass the Blockburger test. Criminal negligence is not an element of statutory vehicular involuntary manslaughter under Code § 18.2-36.1(A), and DUI is not an element of common law involuntary manslaughter. And, in light of the explicit language in Code § 18.2-36.1(C), a single act would support punishments for each offense.

Finally, Gregg's reliance on Ellis v. Commonwealth, 281 Va. 499, 706 S.E.2d 849 (2011), is misplaced. In Ellis, the defendant was convicted of unlawfully shooting at an occupied building in violation of Code § 18.2-279.

When Ellis fired a gun at a victim, he was only a short distance from a convenience store located behind the target. See id. at 502, 706 S.E.2d at 850. On appeal, Ellis argued that the Commonwealth failed to prove Ellis had a specific intent to fire at or against the convenience store. See id. at 504, 706 S.E.2d at 851.

This Court rejected that argument and held that to sustain a conviction for shooting at an occupied building the Commonwealth need not prove that the defendant had the specific intent to shoot at or against a particular building. See id. at 506, 706 S.E.2d at 852. The Ellis Court determined that shooting at an occupied building was not a specific intent crime. See id. at 508, 706 S.E.2d at 853. The Court did not examine the elements of Code § 18.2-279 in the abstract or conduct any double jeopardy analysis.

CONCLUSION

For the foregoing reasons, and those stated in the Opening Brief of the Commonwealth, the judgment of the Court of Appeals should be reversed and the judgment of the Circuit Court of Fauquier County should be reinstated.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

By: /s/
Counsel

Mark R. Herring
Attorney General of Virginia

Virginia B. Theisen
Senior Assistant Attorney General
Virginia State Bar No. 23782

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
phone (804) 786-2071
fax (804) 371-0151
email oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On January 5, 2018, this reply brief was filed electronically with this Court and the required paper copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy of the brief was emailed to Blair D. Howard, Esq., at bdh@hchlawva.com, and T. Brooke Howard, Esq., tbh@hchlawva.com, counsel for the appellee.

This brief complies with the page limit of Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

By: /s/
Virginia B. Theisen
Senior Assistant Attorney General