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IN THE

Supreme Court of Virginia

RECORD NO. 180564

RONNIE LEE STONE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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AT RICHMOND

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RONNIE LEE STONE,

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COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

The Appellant, Ronnie Lee Stone (or "the defendant"), respectfully appeals from the judgment of the Court of Appeals of Virginia in an unpublished panel opinion issued on March 27, 2018 by the Honorable Rossie D. Alston,, Jr., Teresa M. Chafin and Mary B. Malveaux, Judges, upholding the decision of the judgment of the

Honorable Stacey W. Moreau, Judge of the Circuit Court of Pittsylvania County, in two final orders, one entered on February 3, 2017, by which he was sentenced upon his convictions for five charges of distribution of cocaine (second or subsequent), one charge of possession of a firearm while possessing cocaine with intent to distribute, and one charge of possession of a firearm after having been convicted of a felony, receiving a total active sentence of twenty (20) years, and the other entered on February 24, 2017, by which his Motion for Modification of Sentence was denied, and he respectfully represents that he is aggrieved by reversible error therein by being incorrectly subjected to certain supposedly "mandatory minimum" sentences.

Pages in the appendix will be referred to by the use of (A/__), with the appropriate page number inserted.

NATURE OF THE CASE & MATERIAL PROCEEDINGS BELOW

Stone pled guilty to five charges of second-offense distribution of cocaine, for five different offense dates: October 9, 2015, October 21, 2015, October 26, 2015, October 28, 2015 and October 30, 2015. He also pled guilty to one charge each of possession of a firearm

while possessing cocaine with intent to distribute, and possession of a firearm after having been convicted of a felony, both involving only the offense date of October 30, 2015.

At sentencing on February 1, 2017, the trial judge sentenced Stone to a 20-year active sentence “on a minimum mandatory”, over the contemporaneous objection of the defense. Various mitigating factors were also brought out in the sentencing hearing.

After the entry of a sentencing order on February 3, 2017, a defense Motion for Modification of Sentence was filed on February 22, 2017 which was overruled by the trial court judge on February 24, 2017.

A judge of the Court of Appeals granted the Petition for Appeal herein on August 25, 2017.

The Court of Appeals appendix was designated by appellant on September 7, 2017, and appellee added no further material thereto, as counsel for appellee indicated in a letter to the Clerk of the Court of Appeals on September 15, 2017.

The above-named panel of the Court of Appeals affirmed the decision of the trial court in this case in an unpublished opinion handed down on March 27, 2018.

A Notice of Appeal to this Honorable Court was filed with the Clerk of the Court of Appeals, and a Petition for Appeal to the Clerk of this Court, both timely, on April 26, 2018.

This Court awarded an appeal on September 19, 2018.

The appendix for this Court was designated by appellant on October 4, 2018, and appellee added no further material thereto, as counsel for appellee indicated in a letter to the Clerk of this Court dated October 11, 2018.

ASSIGNMENT OF ERROR

The Court of Appeals erred in upholding the trial court's imposition of a 20-year active sentence based on the incorrect application of the mandatory minimum waiver provisions of Va. Code § 18.2-248, subsection C, thus making the defendant's sentence constitutionally disproportionate to the crimes for which he was convicted (preserved at A/115,122-26,250-53).

STATEMENT OF FACTS

The facts of this case are not in dispute. On November 21, 2016, Stone pled guilty to five charges of second-offense distribution of cocaine, for five different offense dates: October 9, 2015, October 21, 2015, October 26, 2015, October 28, 2015, and October 30, 2015. He also pled guilty to one charge each of possession of a firearm while possessing cocaine with intent to distribute, and

possession of a firearm after having been convicted of a felony, both involving only the offense date of October 30, 2015 (A/214-32). However, at the sentencing hearing held on February 1, 2017, the trial judge sentenced Stone to a 20-year active sentence "on a minimum mandatory" (A/248), over the contemporaneous objection of the defense which was acknowledged as being a contemporaneous objection by the Commonwealth's attorney and the trial judge (A/250-54). Various mitigating factors were also brought out in the sentencing hearing. *See* Argument, *infra*.

The sentencing order was entered on February 3, 2017 (A/113-15).

On February 22, 2017 a defense Motion for Modification of Sentence was filed (A/122-26) which was overruled by the trial court judge on February 24, 2017 (A/127).

Appeal to the Court of Appeals ensued therefrom, followed by further appeal to this Court. *See* Nature of the Case & Material Proceedings Below, *supra*.

ARGUMENT

THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S IMPOSITION OF A 20-YEAR ACTIVE SENTENCE BASED ON THE INCORRECT APPLICATION OF THE MANDATORY MINIMUM WAIVER PROVISIONS OF VA. CODE § 18.2-248, SUBSECTION C, THUS MAKING THE DEFENDANT'S SENTENCE CONSTITUTIONALLY DISPROPORTIONATE TO THE CRIMES FOR WHICH HE WAS CONVICTED.
(preserved at A/115,122-26,250-53).

Standard of Review

"A trial court 'by definition abuses its discretion when it makes an error of law.'" *Mughrabi v. Commonwealth*, 38 Va.App. 538, 567 S.E.2d 542 (2002). This is the standard for violation of the statutory mandatory minimum waiver provisions of Va. Code § 18.2-248, subsection C, and for violation of federal constitutional proportionality of sentence requirements. *See also* C. Friend & K. Sinclair, *The Law of Evidence in Virginia* (7th ed. 2012), §1-8 [a] (Appeal of Evidence Rulings) (p. 79). The error here was "structural error" affecting the framework of the trial, defying harmless error review, *cf. Morrisette v. Warden*, 270 Va. 188, 613 S.E.2d 551 (2005), and subject to *de novo* review on appeal. *See Washington v. Commonwealth*, 272 Va. 449, 634 S.E.2d 310 (2006). Moreover, statutory interpretation is a

pure question of law to be resolved *de novo*. *See Ainslie v. Inman*, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003).

The Merits

"The province of [statutory] construction lies wholly within the domain of ambiguity." 17 M.J., Statutes, § 31 (quoting *Almond v. Gilmer*, 188 Va. 1, 14, 49 S.E.2d 431, ___ (1948)). Courts apply the plain language of a statute unless the terms are ambiguous, *see Tiller v. Commonwealth*, 193 Va. 418, 420, 69 S.E.2d 441, 442 (1952). *See also* 17 M.J., Statutes, § 34 ("Construction Improper Where Language Plain"), and cases cited therein. (Assuming *arguendo* that this penal statute did need to be construed, any such construction would of course have to be done against the Commonwealth, *see* 17 M.J., Statutes § 67).

It is respectfully submitted that here is no ambiguity with regard to the waiver-of-mandatory-minimum sentencing provisions. The statute in question, § 18.2-248(C), states in relevant part:

> **§ 18.2-248 …**
>
> C. … [A]ny person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years …. Upon a second conviction of such a violation, …, any such person may … be

sentenced to imprisonment for life or for any period not less than five years, three years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence ….

The mandatory minimum of imprisonment to be imposed for a violation of this subsection shall not be applicable if the court finds that:

a. The person does not have a prior conviction for an offense listed in subsection C of § 17.1-805;

b. The person did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense or induce another participant to do so;

c. The offense did not result in death or serious bodily injury to any person;

d. The person was not an organizer, leader, manager, or supervisor of others in the offense, and was not engaged in a continuing criminal enterprise as defined in subsection I; and

e. Not later than the time of the sentencing hearing, the person has truthfully provided to the Commonwealth all information and evidence the person has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the person has no relevant or useful other information to provide or that the Commonwealth already is aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Here, the trial judge clearly imposed several mandatory minimum sentences which did not actually apply to the relevant charges.

Even under the Commonwealth's stipulated version of the statute, a gun was only used on one of the five offense dates. Thus there can be no mandatory minimums for the other four dates.

At the guilty plea hearing, the Commonwealth referred to the five drug incidents as "distinct separate buys" (A/226). Thus there can be no inferring that perhaps the gun was used in connection with the other four offenses.

At the sentencing hearing, the Commonwealth rightly focused solely on the gun factor under paragraph B – the only one of the factors on which there was a disagreement – as supposedly disqualifying the defendant from the waiver-of-mandatory-minimum sentencing provisions:

> Our position on that, Your Honor, is that .. paragraph B, the person did not possess a firearm or other dangerous weapon in connection with the offense is what kicks him out …

(A/250-51).

But the gun factor, according to the Commonwealth's own stipulated evidence, does not in fact apply to all the offenses for

which a “mandatory minimum” sentence was imposed by the trial court.

The Commonwealth offered two separate documents, both entitled “Commonwealth’s Summary of Evidence”: one for the cases with an offense date of October 30th, 2015 (CR16-176 through 16-178) (A/259-60) (hereinafter “the October 30th summary’) and the other for the cases with offense dates of October 9th, 21st, 26th and 28th, 2015 (CR16-279 through 282) (A/256-58) (hereinafter “the other cases summary”) . Only the October 30th summary mentions a firearm – namely a Romanian AK-47 – but the other cases summary contains no mention of a firearm at all.

Thus, of the “mandatory minimum” sentences imposed in the sentencing order (A/113-15), eight years were valid (the five for CR16-176 and the three for CR16-178), but the remaining 12 years (three each for CR16-279, 280, 281 & 282) were invalid.

The trial judge’s intent to sentence Stone to a 20-year active sentence “on a minimum mandatory” is clear from the record (R/262), and in itself constitutes reversible error as to the defendant’s sentence as to 12 of the “mandatory minimum” years of that sentence.

Since incorrect mandatory minimums have been imposed, the total 20-year sentence as imposed in violation of statute also results in a sentence which is constitutionally disproportionate. *Cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted" according to Eighth Amendment). *Accord*, *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (holding that juvenile offenders may not receive life in prison without parole for a nonhomicidal crime) and *Miller v. Alabama*, ___ U.S.___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding that mandatory life without parole sentence for a juvenile convicted of homicide violated Eighth Amendment). *But see also Abdo v. Commonwealth*, 218 Va. 473, 479, 237 S.E.2d 900, 903 (1977) (sentence not exceeding statutory maximum not abuse of discretion).

The misconstruing of the mandatory minimum provisions described above resulted in a total sentence that was illegally imposed without jurisdiction to do so. Stone also submits that the interests of justice would have been served by a lesser sentence in this case for several other reasons shown in the sentencing phase of

the case, namely, *inter alia*, that he has accepted responsibility in these matters (A/247); that he had a grim childhood with no parental involvement from his father (A/240); that he has only an eight-grade education which left him with few options in life (A/240-41); that his record of only two prior felonies from 1999 and 2000 was not overly horrible and contained no violent offenses; that selling drugs was something Stone apparently did only to support his family in hard times; that the total weight of the cocaine was only 27.214 grams (A/228); that his own random drug tests were all negative; that he neither committed perjury in the case nor did he come up with the typical ridiculous lies and excuses that many defendants seem to thrive on; and that he is a family-oriented and church-going man (A/241); and that, therefore, a sentence of considerably less severity would still enable him to pay a proper debt to society. *See* Pre-Sentence Report.

The reliance of the Court of Appeals on the co-defendant wife's statement about the firearm was misplaced (See A/238), because even the addition to the Pre-Sentence Report which stipulated that the couple had been robbed previously and that the defendant had obtained the firearm about two months previously for protection did

not prove it was continuously possessed thereafter "in connection with the offense" as required by § 18.2-248(C). It was not shown here that the common law right of the defendant and his wife to possess a firearm for self-protection was being exercised to protect them from other drug dealers, or that the possession was in any way "in connection" with the drugs. This "connection" requirement contrasts with the mere requirement of Code § 18.2-308.4 which punishes possession of a firearm "while" possessing drugs without any nexus requirement. *Cf. Wright v. Commonwealth*, 278 Va. 754, 760, 685 S.E.2d 655, 658 (2009). Here, a nexus must be shown, and no such showing has been made.

The statute in question states no burden of proof in order to invoke to opting-out exceptions to the mandatory minimums, nor who has whatever burden of proof standard there is. This is in contrast to the accommodation provision of the same statute, which has been held by this Court to impose a preponderance burden on the defense. *See* § 18.2-248(D) and *Stillwell v. Commonwealth*, 219 Va. 214, 224-26, 247 S.E.2d 360, 366-67 (1978). Stone submits that the rule of lenity therefore requires whatever this burden is to be imposed on the Commonwealth. *See Hood v. Commonwealth*, 280 Va. 526,

540, 701 S.E.2d 421, 429 (2010), (*quoting Townes v. Commonwealth*, 269 Va. 234, 240, 609 S.E.2d 1, 4 (2005) and discussing rule of lenity applied in criminal proceedings and even to other proceedings initiated by the Commonwealth such as involuntary commitment / sexually violent predator cases). *Cf*. *also* North Carolina General Statutes ("NCGS") § 15A-1340.14(f) (explicitly assigning preponderance burden of proof to State in the complex "structured" sentencing-range-combined-with-sentencing-guidelines scheme of NCGS §§ 15A-1340.13 *et seq*.). Assuming *arguendo* that this Court should hold that the defense has a burden of proof here, such a burden of proof has been met by the fact that the defense has and is pointing out that there is no evidence at all to show a connection between the firearm and the drugs as to the charges in question.

Stone thus respectfully submits that 12 years of the "mandatory" sentence in the case at bar, as applied, is contrary to statute for the reasons stated above. As violative of the statute it is also an abuse of discretion, cruel and unusual and constitutionally disproportionate to the facts of the case, and violates the Eighth

Amendment to the U.S. Constitution and Art. I, § 9 of the Virginia Constitution, in addition to Va. Code § 18.2-248, subsection C.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the sentence here should be reversed, and the case should be remanded for re-sentencing as a non-mandatory-minimum case, to the extent argued above.

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CERTIFICATE OF TRANSMISSION & SERVICE

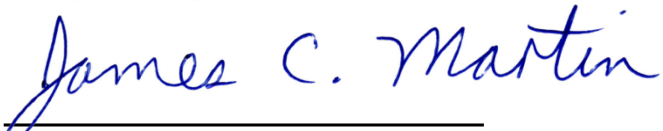
I, James C. Martin, Counsel for Appellant, hereby certify that on the 29th day of October, 2018, three copies of this brief were hand-delivered to the Clerk of this Court, and that a PDF copy was sent on

that day, by email, in compliance with Rule 5:26(e), to Aaron J. Campbell, Assistant Attorney General, Office of the Attorney General, 202 North Ninth Street, Richmond, VA 23219, Telephone number (804) 786-2071, facsimile number (804) 786-1991, emails acampbell@oag.state.va.us & oagcriminallitigation@oag.state.va.us

The undersigned certifies that this brief, excluding the cover page, table of contents, table of authorities and certificate, contains 2,726 words.

Appellant desires to present oral argument in person in this case.

Respectfully submitted,



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