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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 180564

RONNIE LEE STONE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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Under Virginia Code § 18.2-248(C), the sentence for a conviction for second-offense cocaine distribution is "imprisonment for life or for any period not less than five years, three years of which shall be a mandatory minimum term of imprisonment . . . ." The mandatory minimum term of imprisonment, however, "shall not be applicable if the court finds" certain facts, including that the defendant did not "possess a firearm . . . in connection with the offense." Va. Code

§ 18.2-248(C)(b). The issue in this appeal is whether the trial court erred in imposing the mandatory minimum term of imprisonment after finding that the defendant had possessed a firearm in connection with his cocaine distribution offenses.

STATEMENT OF THE CASE

Appellant Ronnie Lee Stone pleaded guilty in the Circuit Court of Pittsylvania County to five charges of second-offense distribution of cocaine, in violation of Virginia Code § 18.2-248(C); one charge of possession of a firearm while possessing cocaine with intent to distribute, in violation of § 18.2-308.4(C); and one charge of possession of a firearm by a convicted felon, in violation of § 18.2-308.2(A). The cocaine distribution charges had offense dates of October 9, 21, 26, 28, and 30 of 2015. Both firearm charges had an offense date of October 30, 2015.

At sentencing, Stone argued that his sentence on the four distribution charges with offense dates prior to October 30, 2015 were not subject to the mandatory minimums. (App. 250). The trial court, however, found that Stone had not met the requirements of Code § 18.2-248(C)(b) because he possessed a firearm in connection with all of his distribution offenses. (App. 253).

On each distribution conviction, the trial court sentenced Stone to eight years in prison, with five years suspended. In other words, Stone received the

three-year mandatory minimum term of imprisonment on each distribution offense. (App. 113-14).

Following the sentencing hearing, Stone filed a motion to modify his sentence on the ground that his sentence was constitutionally disproportionate to the stipulated facts. (App. 123). The trial court denied that motion. (App. 127).

On appeal, Stone argued that the trial court erred in imposing the mandatory minimum sentence. After granting review, the Court of Appeals of Virginia affirmed Stone's conviction by unpublished opinion. *See Stone v. Commonwealth*, Record No. 0347-17-3, 2018 Va. App. LEXIS 78 (Va. Ct. App. Mar. 27, 2018). This Court subsequently granted review of the issue.

ASSIGNMENT OF ERROR

The Court has granted review of the following 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.

STATEMENT OF FACTS

A. Stipulation of Facts

The stipulation of facts established that four times during the month of October of 2015 a confidential informant went to Stone's residence and purchased

cocaine from him. (App. 256). After the controlled buys, police executed a search warrant at Stone's residence on October 30, 2015. (App. 259).

During the search, police found cocaine on Stone's person. (App. 259). In the master bedroom, police found cash totaling $12,456.00, marijuana, scales, a clear plastic bag with crack cocaine, and a Crown Royal bag containing crack cocaine. (App. 259). The cocaine recovered from Stone's person and residence weighed about one ounce. (App. 259). Stone told police at the scene that he could obtain six or seven more ounces of cocaine. (App. 259).

In addition to the drugs and large sums of cash in the master bedroom, police discovered a "loaded Romanian AK-47 assault rifle" propped up against the bed. (App. 259). A loaded AK-47 magazine was located in the nightstand immediately adjacent to the firearm. (App. 259).

B. Sentencing Hearing

During the sentencing hearing, the Commonwealth proffered that the assault rifle was located in a bedroom that contained items belonging to Stone. (App. 238). The Commonwealth further proffered a statement from Stone's wife. (App. 238). She had stated that, about two months prior to the execution of the search warrant, Stone had "obtained the firearm from a relative and had it in the house for protection" because they had been "robbed previously." (App. 238).

Stone did not contest that he possessed a firearm in connection with the October 30, 2015 cocaine distribution offense. (App. 252). Stone argued, however, that the Commonwealth's proffer did not show that he possessed a firearm in connection with his other distribution charges. (App. 252). Stone thus argued that the mandatory minimum sentence on his other distribution charges did not apply. (App. 250, 252). The prosecutor responded that Stone did not meet the statutory requirements because he had possessed a firearm in connection with his drug dealing. (App. 250-51).

The trial court found that Stone did satisfy the requirements to negate the mandatory minimum terms of imprisonment because he possessed a firearm in connection with the offenses. (App. 253). The trial court found that Stone purchased the AK-47 prior to the controlled buys. (App. 253). The court pointed out that, although Stone said he had the firearm for protection because he had been robbed previously, there was no indication that he had reported the robbery to police. (App. 253). The court concluded that, based on the circumstances, the firearm was solely for Stone's business of drug dealing. (App. 253).

ARGUMENT

The Court of Appeals correctly held that the trial court did not err in finding that Stone possessed a firearm in connection with his cocaine distribution charges and thus did not err in applying the mandatory minimum sentences of Virginia Code § 18.2-248(C).

A. Standard of Review

Sentencing decisions "are vested in the sound discretion of trial judges, not appellate judges." *Minh Duy Du v. Commonwealth*, 292 Va. 555, 563, 790 S.E.2d 493, 498 (2016). "'[A circuit] court by definition abuses its discretion when it makes an error of law.'" *Porter v. Commonwealth*, 276 Va. 203, 260, 661 S.E.2d 415, 445 (2008) (citation omitted). However, "[a]n abuse of discretion cannot be shown merely because '[r]easonable trial judges and even some members of this Court, had they been sitting as trial judges in this case,' might have reached a different conclusion than the one under review." *Minh Duy Du,* 292 Va. at 563, 790 S.E.2d at 499 (quoting *Coe v. Commonwealth*, 231 Va. 83, 88, 340 S.E.2d 820, 823 (1986)). An exercise of discretion presupposes "'that, for some decisions, conscientious jurists could reach different conclusions based on exactly the same facts—yet still remain entirely reasonable.'" *Id*. at 564. 790 S.E.2d at 499 (quoting *Thomas v. Commonwealth*, 62 Va. App. 104, 111, 742 S.E.2d 403, 407 (2013)). "Only when reasonable jurists could not differ can [an appellate court] say an abuse of discretion has occurred." *Grattan v. Commonwealth*, 278 Va. 602, 620, 685 S.E.2d 634, 644 (2009).

To the extent the Court must interpret the statute at issue, that interpretation is a legal question that this Court reviews *de novo*. *See Scott v. Commonwealth,* 292 Va. 380, 382, 789 S.E.2d 608, 609 (2016). When construing a statute, the "primary objective" is "to ascertain and give effect to legislative intent" from the words of the statute. *Lawlor v. Commonwealth*, 285 Va. 187, 236, 738 S.E.2d 847, 875 (2013). Thus, this Court construes a statute "with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it; the provisions should receive a construction that will render it harmonious with that purpose rather than one which will defeat it." *Esteban v. Commonwealth*, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003). "Sentencing statutes are to be liberally construed to give the trial court broad discretion." *Bazemore v. Commonwealth*, 25 Va. App. 466, 468, 489 S.E.2d 254, 255 (1997).

Finally, when reviewing the trial court's findings of fact, the Court must view all evidence in the light most favorable to the Commonwealth, the prevailing party at trial. *See Perry v. Commonwealth*, 280 Va. 572, 578, 701 S.E.2d 431, 435 (2010). This Court reviews such "factfinding with the highest degree of appellate deference." *Bowman v. Commonwealth*, 290 Va. 492, 496, 777 S.E.2d 851, 854 (2015).

B. The trial court did not err in sentencing Stone to the mandatory term of imprisonment.

Under Virginia Code § 18.2-248(C),[1] a trial court shall not impose a mandatory sentence under certain circumstances. The portion of the statute at issue in this case states that the mandatory minimum sentence "shall not be applicable if the court finds" that the defendant did not "possess a firearm . . . in connection

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[1] The statute states:

> The mandatory minimum term 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 in the offense 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.

with the offense." Va. Code § 18.2-248(C)(b).[2] Stone argues that the record did not support the trial court's finding that he possessed a firearm on four of the five offense dates. He contends that the evidence demonstrated only that he possessed a firearm on October 30, 2015—the date of the execution of the search warrant and discovery of the AK-47 in his home.[3] Thus, Stone contends that the mandatory minimum sentence of Virginia Code § 18.2-248(C) does not apply to his first four drug deals.

Virginia Code § 18.2-248(C) is modeled after the "safety valve" provision of the federal sentencing guidelines, U.S.S.G. § 5C1.2(a). *See Sandidge v. Commonwealth*, 67 Va. App. 150, 160 n.4, 793 S.E.2d 836, 841 n.4 (2016) (recognizing that "numerous federal courts" have interpreted nearly identical language). Under that provision, a federal district court may sentence a defendant without regard to the mandatory minimum if the court finds that the defendant meets the criteria of 18 U.S.C. § 3553(f). Like Virginia's statute, one of those

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[2] It should be noted that the record does not show that Stone put forth evidence that he had met any of the requirements of Virginia Code § 18.2-248(C)(a) through (e).

[3] In the Court of Appeals of Virginia, Stone made no argument concerning whether the possession was not "in connection with the offense." Thus, the Court of Appeals specifically declined to address that portion of the statute. *Stone*, 2018 Va. App. LEXIS 78, at *5 n.5. Because Stone has not assigned error to the Court of Appeals not addressing this issue, he has waived any argument that his possession of firearm was not connected to his drug dealing. *See* Rule 5:17(c)(ii).

criteria is that the "defendant did not . . . possess a firearm . . . in connection with the offense." 18 U.S.C. § 3553(f).

The federal courts have consistently held that, in order to the gain the benefit of the safety valve provision, the defendant carries the burden to prove by the preponderance of the evidence that he did not possess a firearm in connection with his drug offenses. *See United States v. Bolton*, 858 F.3d 905, 914 (4th Cir. 2017); *United States v. Anderson*, 452 F.3d 87, 90 (1st Cir. 2006); *United States v. Bolka*, 355 F.3d 909, 914 (6th Cir. 2004). This Court should affirm that Stone has failed to carry his burden that he did not possess a firearm in connection to his cocaine dealing from his home.

With regard to criminal prosecutions, this Court has held that possession of a firearm may be actual or constructive. *See Smallwood v. Commonwealth*, 278 Va. 625, 629-30, 688 S.E.2d 154, 156 (2009); *Bolden v. Commonwealth*, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008); *Rawls v. Commonwealth*, 272 Va. 334, 349, 634 S.E.2d 697, 705 (2006). The "issue [of what constitutes constructive possession] is largely a factual one and must be established by evidence of the acts, declarations and conduct of the accused." *See Smallwood*, 278 Va. at 630, 688 S.E.2d at 156 (quoting *Ritter v. Commonwealth*, 210 Va. 732, 743, 173 S.E.2d 799, 807 (1970)). Generally, that is established by "evidence of acts, statements, or conduct by the defendant or other facts and circumstances proving that the defendant was aware of

the presence and character of the firearm and that the firearm was subject to his dominion and control." *Bolden,* 275 Va. at 148, 654 S.E.2d at 586.

Here, the Court of Appeals correctly held that the trial court was not plainly wrong in rejecting Stone's argument that he did not possess a firearm during his drug deals. *Stone*, 2018 Va. App. LEXIS 78, at *9. All of the controlled buys occurred at Stone's home during the month of October 2015. During this time, Stone kept a loaded AK-47 assault rifle in his home for "protection," even though he could not legally own a firearm because of a previous conviction for felony cocaine distribution. Mere days after the controlled buys, police searched Stone's residence and discovered in the same bedroom where he kept cocaine and over $12,000 in cash the AK-47 propped up against the bed and an extra magazine within reach on the nightstand. Stone's choice to keep the weapon at hand was not surprising given that, because of his illegal activity, Stone could not call the police if someone tried to take the drugs and cash. In short, the trial court could reasonably, and did, conclude that Stone possessed the AK-47 in connection with his business of dealing cocaine from his home in October 2015. *See Wright v. Commonwealth*, 278 Va. 754, 757, 685 S.E.2d 655, 656 (2009) (finding that the evidence was sufficient that the defendant constructively possessed firearm located at his bedroom).

The trial court's conclusion is buttressed by the manner in which federal courts have applied the safety valve provision of U.S.S.G. § 5C1.2(a). The Sixth Circuit in *Bolka* held that the defendant was not entitled to "safety valve relief" where the evidence showed he—like Stone—kept three firearms in home where he sold and manufactured drugs. *Bolka*, 355 F.3d at 915-16. Several other courts have reached similar results where the defendant kept a firearm in proximity to the drugs he was dealing. *See, e.g., United States v. Herrera*, 446 F.3d 283, 287-88 & n.5 (2d Cir. 2006) (denying safety valve reduction where defendant kept a weapon under his personal dominion and control in stash houses); *United States v. Payton*, 405 F.3d 1168, 1170-71 (10th Cir. 2005) (affirming denial of § 5C1.2 reduction where defendant's apartment contained five firearms stored in close proximity to substantial amounts of methamphetamine); *United States v. McLean*, 409 F.3d 492, 501 (1st Cir. 2005) ("a defendant who, for example, has a concealed weapon strategically placed in a room where he conducts his drug business is no less dangerous than a defendant who conducts his business with a weapon on his person.").

Like in these federal decisions, Stone's possession of the AK-47 had the tendency to facilitate and aid in his drug dealing. *See, e.g., Logan v. Commonwealth*, 19 Va. App. 437, 445, 452 S.E.2d 364, 369 (1994) (en banc) ("The relationship between the distribution of controlled substances . . . and the

possession and use of dangerous weapons is now well recognized."); *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002) (explaining how a firearm can further drug trafficking and listing factors suggesting a connection between a firearm and drug trafficking, including whether the gun is loaded and in proximity to the drugs). Indeed, the trial court recognized that the AK-47 was solely to protect Stone's drug dealing business. (App. 253). Given the totality of the circumstances, the trial court was not plainly wrong in finding that Stone had not met the requirements to dispense with the mandatory minimum term of imprisonment under Code § 18.2-248(C).[4]

CONCLUSION

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

Respectfully submitted,

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[4] Stone also argues that the trial court's application of the mandatory minimums resulted in a constitutionally disproportionate sentence that violated the Eighth Amendment's prohibition against cruel and unusual punishment. The Court of Appeals specifically refused to consider this argument and Stone has not assigned error to that ruling. *See Stone*, 2018 Va. App. LEXIS 78, at *3 n.2. Thus, he has waived that argument. *See* Rule 5:17(c)(ii). Nevertheless, his argument is without merit because he was sentenced within the statutory range of punishment. Numerous cases have held that "[w]hen a statute prescribes a maximum imprisonment penalty and the sentence does not exceed that maximum, the sentence will not be overturned as being an abuse of discretion." *Minh Duy Du*, 292 Va. at 563, 790 S.E.2d at 499.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 26, 2018, the required print and electronic copies of the Commonwealth's Brief were transmitted to the Clerk of this Court and to James C. Martin, Esq., MARTIN & MARTIN LAW FIRM, 410 Patton Street, Suite A, Post Office Box 514, Danville, Virginia 24543, martinlawva@verizon.net. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 3,624 words.

The Commonwealth desires to present oral argument in this case.

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