

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Friday the 8th day of October, 2010.*

Dominic Adrian Bennett, Appellant,

against Record No. 092085
Court of Appeals No. 1825-08-1

Commonwealth of Virginia, Appellee.

Upon an appeal from a
judgment rendered by the Court
of Appeals of Virginia.

Upon consideration of the briefs, record, and argument of
counsel, the Court affirms the judgment of the Court of Appeals.

The Circuit Court of the City of Norfolk tried Dominic Adrian
Bennett upon indictments charging attempted robbery, use of a
firearm in the commission of attempted robbery, malicious wounding,
use of a firearm in the commission of malicious wounding,
conspiracy, receiving stolen property, and eluding the police.
Bennett pled guilty to the charge of eluding the police and was
found guilty of the remaining charges.

During the sentencing hearing, Bennett objected to the
calculation of the guidelines in the presentence report and argued
that the circuit court should not impose a mandatory minimum
sentence of eight years for the two offenses of use of a firearm.
Pursuant to Code § 18.2-53.1, the court must impose a minimum term
of five years for a "second or subsequent conviction" of use of a
firearm in the commission of a felony. Bennett argued that each
conviction for use of a firearm should carry a sentence of three

years because Bennett had not been found guilty of use of a firearm in the commission of a felony before this proceeding.

The circuit court noted Bennett's objection during the sentencing hearing and sentenced Bennett to three years for the first verdict of guilty for use of a firearm in the commission of the attempted robbery and five years for the second verdict of guilty for use of a firearm in the commission of malicious wounding pursuant to Code § 18.2-53.1. Bennett was sentenced to a total of 18 years' imprisonment and 12 months in jail, with 5 years suspended.

In an unpublished per curiam order, the Court of Appeals denied Bennett's appeal and held that the circuit court did not err in applying the enhanced sentencing provision because Bennett's second firearm conviction in the same proceeding qualified as a "subsequent" conviction pursuant to Code § 18.2-53.1. Bennett v. Commonwealth, Record No. 1825-08-1 (September 18, 2009).

Bennett argues that the Court of Appeals erred in holding that the Commonwealth proved at least one prior conviction for use of a firearm pursuant to Code § 18.2-53.1. According to Bennett, Code § 18.2-53.1 requires proof of a prior conviction and not merely a prior verdict of guilty before the trial court may impose an enhanced penalty for a prior firearm conviction.

This Court strictly construes a statute that is penal in nature such as Code § 18.2-53.1 and "any ambiguity or reasonable doubt as to its meaning must be resolved in [the defendant's] favor." Ansell v. Commonwealth, 219 Va. 759, 761, 250 S.E.2d 760, 761 (1979). However, a defendant is not "entitled to a favorable result based upon an unreasonably restrictive interpretation of the

statute." Id.

Additionally, this Court has stated:

In Virginia, courts are required to apply the plain meaning of statutes, and this Court is not free to add language, or ignore language, contained in statutes. Signal Corp. v. Keane Federal Systems, 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003); Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 99, 546 S.E.2d 696, 702 (2001).

In re: Hannett, 270 Va. 223, 233-34, 619 S.E.2d 465, 469 (2005) (emphasis added).

Code § 18.2-53.1 states:

It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, forcible sodomy, inanimate or animate object sexual penetration as defined in § 18.2-67.2, robbery, carjacking, burglary, malicious wounding as defined in § 18.2-51, malicious bodily injury to a law-enforcement officer as defined in § 18.2-51.1, aggravated malicious wounding as defined in § 18.2-51.2, malicious wounding by mob as defined in § 18.2-41 or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a mandatory minimum term of imprisonment of three years for a first conviction, and to a mandatory minimum term of five years for a second or subsequent conviction under the provisions of this section. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

(Emphasis added).

In Flythe v. Commonwealth, 221 Va. 832, 834-35, 275 S.E.2d 582, 583-84 (1981), this Court held that Code § 18.2-53.1 (1980)* required that a defendant receive an enhanced, mandatory sentence for the use of a firearm in the commission of a felony when the defendant's second conviction for use of a firearm arose from the same act as the first conviction for use of a firearm in the same proceeding. The Court in Flythe, relied on this Court's holding in Ansell v. Commonwealth, supra, and stated:

In Ansell we held that the purpose of Code § 18.2-53.1 is to deter violent criminal conduct and that the application of the increased penalty provision of the statute to a subsequent offense without an intervening conviction was proper. We rejected Ansell's argument for the same reason that we now reject Flythe's. Both cases involved separate indictments for separate crimes which were tried jointly with the defendant receiving successive sentences. Any conviction that follows a first conviction is a subsequent conviction within the purview of Code § 18.2-53.1.

* The current Code § 18.2-53.1 is substantially similar to Code § 18.2-53.1 (1980) which states:

It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction, and for a term of three years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony.

Flythe, 231 Va. at 835, 275 S.E.2d at 584.

We hold that a second finding of guilty for use of a firearm in the same proceeding constitutes "a second or subsequent conviction" for sentencing purposes pursuant to Code § 18.2-53.1. Only a subsequent offense and not an intervening conviction is required for a defendant to receive an increased penalty. Flythe, 221 Va. at 835, 275 S.E.2d at 584.

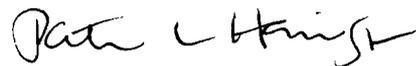
Additionally, Code § 18.2-53.1 does not require that the Commonwealth charge a defendant with a prior conviction for use of a firearm in the indictment to increase a defendant's sentence. The Commonwealth charged Bennett with two counts of use of a firearm in the commission of two successive felonies. The circuit court found Bennett guilty of these two offenses and properly increased Bennett's sentence.

Accordingly, the judgment appealed from is affirmed. Appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Norfolk.

A Copy,

Teste:



Clerk