

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

JEREMY WADE SMITH,

Appellant,

v.

Record No. 121579

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT’S PETITION FOR REHEARING

Comes now Appellant Jeremy Wade Smith, and pursuant to Rule 5:37, petitions this court to rehear this matter, stating as follows.

Argument and Authorities

- I. The Court’s Opinion of June 6, 2013, erroneously asserts that Smith was required to petition for expungement, while Former Code § 19.2-298(b) (1995 & Supp. 1999) provides that Smith would be automatically removed from the registry.**

The Court’s Opinion of June 6, 2013, in its recitation of facts states, “As a non-violent sex offender, Smith was required to register with the State Police annually for 10 years, *after which he could petition for expungement*. Former Code §§ 19.2-298.2, -298.3(A) (1995 & Supp. 1999).” (Op. at 2 (footnote omitted) (emphasis added)). This assertion overlooks the import of Former Code § 19.2-298.3(B), which provides that Smith was to be automatically removed from the Registry by the

Department of State Police at the expiration of his ten-year registry obligation.

Under then-existing Code § 19.2-298.2 (1995 & Supp. 1999), Smith's registration requirements continued only for ten years from the date of the initial registration, as the Court acknowledges. (Op. at 2). While Former Code §§ 19.2-298.3(A) (1995 & Supp. 1999) provided a procedure and right for expungement from the registry, it was not the sole provision on the issue. Under then-existing Va. Code § 19.2-298.3(B) (1995 & Supp. 1999), "The name of any person required to register under § 19.2-298.1 and all identifying information shall be removed from the Registry by the Department of State Police . . . at the end of the period for which the person is required to register under § 19.2-298.2." Under then-existing Code § 19.2-298.2 (1995 & Supp. 1999), Smith's registry obligations were to last for ten years, unless those obligations were tolled as a result of incarceration, which they were not. Therefore, § 19.2-298.3(B) mandated the Department of State Police to remove Mr. Smith from the registry ten years following his initial registration.¹

¹ The confusion may arise because the petition process seems pointless if the removal is indeed automatic. It is not pointless. Because the "period for which the person is required to register under § 19.2-298.2" is tolled by "confinement in a state or local correctional facility, hospital or institution or facility during the otherwise applicable ten-year period," Former Code §

This is significant because it means that through this plea agreement, the Commonwealth accepted an affirmative duty to remove Smith from the registry. This is particularly relevant to the vested rights analysis, because no act of Smith or the Commonwealth could have made Smith's right to be removed from the registry more secure once he had registered. While the Court has here ruled that the Commonwealth had an implied contract right to exercise its police powers to alter the plea agreement, the fact that the Commonwealth had an affirmative legal is significant. It means that this Court is not only accepting an alteration to the statutory scheme related to the contract or an elimination of a procedural remedy existing at the time of the contract. It is in fact allowing the Commonwealth to use its police powers to renege on one of its affirmative implied duties under the contract. This amounts to an affirmative, unilateral alteration by the Commonwealth of the consideration the Commonwealth promised to Smith under the implied provisions of the plea agreement. As argued below, this constitutes a violation of due process.

19.2-298.2 (1995 & Supp. 1999), a person incarcerated during the continuation of his registry obligations would have those obligations tolled and would not be automatically removed from the registry after ten years. Under the petition process, however, he could petition for the termination of his registration obligations after ten years. Former Code § 19.2-298.3(A) (1995 & Supp. 1999).

Even if this Court permits the Commonwealth to use its police powers to abandon an affirmative duty implied in the plea agreement, the Court should correct its misstatement as to Smith's obligation to petition for expungement, as the misstatement may be used as precedent in future cases reviewing the former statutory scheme.

II. The unprecedented rule announced by the Court, namely that plea agreements include an implied term permitting alterations by the Commonwealth through the exercise of the Commonwealth's police powers, violates Smith's rights guaranteed to him under the Contract Clause and the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

This Court's holding, namely that plea agreements between a criminal defendant and the Commonwealth contain an implicit term allowing the Commonwealth to alter the agreements at will in the exercise of its police powers, is an unprecedented and troubling assertion of state authority implicating and contravening the Due Process protections guaranteed in the Fourteenth Amendment and the Contract Clause.

The Fourteenth Amendment provides in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law" Article I, Section 10 of the United States Constitution also provides in relevant part, "No state shall . . . pass any . . . law impairing the obligation of contracts"

The lead case on the Constitutional implications of plea agreements and the safeguards that must accompany the plea agreement process is Brady v. United States, 397 U.S. 742 (1970). Therein the Supreme Court wrote:

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so -- hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Id. at 748 (footnote omitted).

In light of these Constitutional guarantees and the fundamental Constitutional rights a citizen surrenders through a plea of guilt to a criminal offense, the U.S. Supreme Court has insisted that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Santobello v. New York, 404 U.S. 257, 262 (1971); id. at 264 (Douglas, J., concurring). In 2009, the U.S. Supreme Court reaffirmed

this proposition, stating, “When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy.” Puckett v. United States, 556 U.S. 129, 137 (2009). The Supreme Court has also recognized that the prosecutor acts in the place of the state,² such that the Constitutional regulations imposed on the prosecutor are in fact the Constitutional regulations on the state.

The statutory limitations on Smith’s registration obligations, and the affirmative duty of the Commonwealth to remove Smith from the Registry under Former Code § 19.2-298.2 (1995 & Supp. 1999), are significant

² See Puckett, 556 U.S. at 137. Cf. Santobello, 404 U.S. at 263 (Douglas, J., concurring) (“I agree both with THE CHIEF JUSTICE and with MR. JUSTICE MARSHALL that New York did not keep its ‘plea bargain’ with petitioner and that it is no excuse for the default merely because a member of the prosecutor’s staff who was not a party to the ‘plea bargain’ was in charge of the case when it came before the New York court.”); Moore v. Illinois, 408 U.S. 786, 809-10 (1972) (Marshall, J., concurring in part and dissenting in part) (“Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. ‘A citizen has the right to expect fair dealing from his government, see Vitarelli v. Seaton, 359 U.S. 535, and this entails . . . treating the government as a unit rather than as an amalgam of separate entities.’ S&E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972). ‘The prosecutor’s office is an entity and as such it is the spokesman for the Government.’ Giglio v. United States, 405 U.S. 150, 154 (1972). See also Santobello v. New York, 404 U.S. 257, 262 (1971); Barker v. Wingo, 407 U.S. 514 (1972).”).

implicit promises supporting Smith's agreement to plead guilty. They were clearly part of the valuable consideration Smith was to receive for his plea. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello, 404 U.S. at 262. The Court's decision that the Commonwealth is free to alter promises implicit in a plea agreement using its police powers therefore implicates and contravenes the Due Process and Contract clauses of the U.S. Constitution in addition to those of the Constitution of Virginia.

While the United States Supreme Court has recognized the *qualified* right of a state to alter contracts in the exercise of its police powers, it has never applied this rule to plea agreements. This Court, however, has asserted that Virginia may do so, fundamentally altering the balance of power between the Commonwealth and the criminal defendant in the plea agreement process. While this ruling will not affect the vast majority of criminal defendants, as most criminal defendants receive their consideration from the Commonwealth promptly, this rule is fundamentally unfair. It allows the General Assembly to alter implicit contractual terms that had induced criminal defendants into surrendering fundamental constitutional rights. This is a violation of Fourteenth Amendment Due

Process and the Contract Clause of the U.S. Constitution in addition to Virginia's Constitution.

Moreover, the right to use the police power to alter contracts is a *qualified* right. The fact that this Court has found that the alteration of the law in this case serves a legitimate public purpose (Op. at 7-8) does not end the inquiry. As the U.S. Supreme Court stated in Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 412-413 (1983):

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." United States Trust Co., 431 U.S., at 22.

Accord Working Waterman's Ass'n. v. Seafood Harvesters, Inc., 227 Va. 101, 110 (1984). Cf. Citizens Mut. Bldg. Ass'n v. Edwards, 167 Va. 399 (1937) (requiring the alteration of contracts under the police powers to be "limited by reasonable conditions appropriate" to the situation). While the Court may defer to the legislature's judgment in contracts between private parties, greater scrutiny is required when, as here, the state is a party to the contract. Energy Reserves Group, 459 U.S. at 412-413 & n.14.

As argued in the Reply Brief, at 10-11, the alteration of Smith's plea agreement was unconditional. Moreover, given the significant

