



COMMONWEALTH of VIRGINIA

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The Honorable David B. Albo
Member, House of Delegates
Chairman, Virginia State Crime Commission
1111 East Broad Street, Suite B036
Richmond, Virginia 23219

Dear Delegate Albo:

The Supreme Court of Virginia recognizes that construction of the Constitution and statutes of the Commonwealth by the Attorney General under § 2.2-505 of the *Code of Virginia* "is of the most persuasive character and is entitled to due consideration."¹ The same status and weight, however, is not afforded informal opinions and advice rendered by deputy and assistant attorneys general. The views expressed herein do not constitute an opinion of the Attorney General under the provisions of § 2.2-505. Consequently, this response to your inquiry represents only the individual views of one of the counsel to the Attorney General.²

Issue Presented

You ask whether § 16.1-298 is constitutional because it provides for suspension of some, but not all, judgments imposed by a juvenile and domestic relations district court pending an appeal to the circuit court.

Response

It is my view that § 16.1-298 is constitutional and does not violate the rights of a juvenile defendant to due process or equal protection.

Applicable Law and Discussion

You note that ordinarily when an appeal is taken from a general district court, such proceedings are heard de novo by the circuit court. You state that during a de novo appeal, the defendant is presumed innocent. Therefore, you question how a sentence may be handed down pending appeal pursuant to § 16.1-298.

¹Barber v. City of Danville, 149 Va. 418, 424, 141 S.E. 126, 127 (1928); *see also* Va. Beach v. Va. Rest. Ass'n, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986); Bd. of Supvrs. v. Marshall, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975).

²*See* VA. CODE ANN. § 2.2-501 (2008) (permitting Attorney General to appoint such deputy and assistant attorneys general as may be necessary).

Virginia courts “have ‘consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution.’”³ Thus, federal constitutional principles of equal protection and due process subsume any analysis of parallel provisions in the Constitution of Virginia. Further, “[a]ll legislative acts are ‘presumed to be constitutional.’”⁴ “This presumption is ‘one of the strongest known to the law.’”⁵ “Under it, courts must ‘resolve any reasonable doubt’ regarding the constitutionality of a law in favor of its validity.”⁶ “‘To doubt is to affirm.’”⁷

The Supreme Court of the United States has held that the right to appellate review is not itself a necessary element of due process.⁸ Because appellate review is not constitutionally guaranteed, the General Assembly is free to specify the limits and mechanisms of appellate review by statute so long as its laws do not otherwise offend the Constitution.

[T]he Fourteenth Amendment’s equal protection and due process clauses invalidate only those laws that offend principles of minimum rationality. Minimum rationality requires only that “a rational relationship exists between the disparity of treatment [among similarly situated persons] and some legitimate governmental purpose,” and classifications reviewed under it are “accorded a strong presumption of validity.”

Under the minimum rationality standard, the General Assembly need not “actually articulate at any time the purpose or rationale supporting its classification.” To be sure, the legislative classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”^[9]

Further, the minimum rationality test “‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’”¹⁰ Sections 16.1-132 through 16.1-137 govern the procedure for appeals of adult criminal convictions from a general district court to the circuit court. Section 16.1-136 expressly provides that such appeals “shall be heard *de novo*” by the circuit court. “Once the trial *de novo* commences in the circuit court, the district court *judgment* is annulled, and is not thereafter available for any purpose.”¹¹

³Rowley v. Commonwealth, 48 Va. App. 181, 187 n.2, 629 S.E.2d 188, 191 n.2 (2006) (citations omitted), *quoted in* Lilly v. Commonwealth, 50 Va. App. 173, 184, 647 S.E.2d 517, 522 (2007).

⁴Boyd v. County of Henrico, 42 Va. App. 495, 506, 592 S.E.2d 768, 774 (2004) (en banc) (quoting *In re Phillips*, 265 Va. 81, 85, 574 S.E.2d 270, 272 (2003)).

⁵*Id.* at 507, 592 S.E.2d at 774 (quoting *Harrison v. Day*, 200 Va. 764, 770, 107 S.E.2d 594, 598 (1959)).

⁶*Id.* (citations omitted).

⁷Peery v. Va. Bd. of Funeral Dirs. & Embalmers, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961) (quoting *City of Roanoke v. Elliott*, 123 Va. 393, 406, 96 S.E. 819, 824 (1918)), *quoted in* Boyd, 42 Va. App. at 507, 592 S.E.2d at 774.

⁸Griffin v. Illinois, 351 U.S. 12, 18 (1956); McKane v. Durston, 153 U.S. 684, 687 (1894).

⁹*Lilly*, 50 Va. App. at 181-82, 647 S.E.2d at 521 (citations omitted).

¹⁰Heller v. Doe, 509 U.S. 312, 319 (1993) (citation omitted) (holding that different treatment in commitment statutes of mentally retarded persons and mentally ill persons does not violate equal protection).

¹¹Turner v. Commonwealth, 49 Va. App. 381, 386, 641 S.E.2d 771, 773 (2007) (emphasis in original).

Article 11, Chapter 11 of Title 16.1, §§ 16.1-296 through 16.1-298, governs appeals from a juvenile and domestic relations district court (“juvenile court”). Further, § 16.1-229 provides that “[w]henver any specific provision of [Chapter 11] differs from or is in conflict with any provision or requirement of any other chapters of [Title 16.1] relating to the same or a similar subject, then such specific provision shall be controlling with respect to such subject or requirement.”

Section 16.1-298(A) provides that in an appeal by a juvenile from a juvenile court to the circuit court, the judgment of the juvenile court “*shall not [be] suspend[ed]*,” except under certain circumstances. (Emphasis added.) In the past, Virginia courts have held that appeals from juvenile delinquency proceedings in a juvenile court were held de novo in the circuit courts, apparently relying on pre-1993 language in § 16.1-296, which incorporated the same de novo standard of review used in criminal appeals from the general district courts.¹² The 1993 Session of the General Assembly amended § 16.1-296(A):

From any final order or judgment of the juvenile court ... an appeal may be taken in accordance with the provisions of Chapter 7 (§ 16.1-123.1 et seq.) of this title *within ten days from the entry of a final judgment, order or conviction.*^[13]

Although the reference to a de novo appeal was deleted from § 16.1-296(A), Virginia courts have continued to hear appeals from a juvenile court de novo.¹⁴ However, the Supreme Court of Virginia recently stated that “*except as altered by the provisions of Code § 16.1-298 regarding the status of the judgment of the [juvenile] court upon the filing of a petition or during the pendency of an appeal, we are of opinion that the appeal is to be heard de novo in the circuit court.*”¹⁵

Thus, instead of the *annulment* of the judgment that occurs upon the appeal from a criminal conviction in general district court, on an appeal from a juvenile court, the judgment is *suspended only as provided by* § 16.1-298. Where specific provisions of statutes conflict with a more general statute, the more specific statutes control.¹⁶

The fact that § 16.1-298 suspends the judgment of the juvenile court for some juveniles, but not for others, does not violate due process or equal protection because the statute addresses *dissimilarly situated juveniles*. Thus, there is no equal protection issue. However, assuming the equal protection

¹² See, e.g., *Grogg v. Commonwealth*, 6 Va. App. 598, 606-07, 371 S.E.2d 549, 552-53 (1988) (holding that § 16.1-136, incorporated by reference into 16.1-296, mandates de novo review in appeals from juvenile delinquency matters); see also VA. CODE ANN. § 16.1-296 (Supp. 1992).

¹³ 1993 Va. Acts ch. 790, at 1589, 1589. However, I note that § 16.1-296(E) still provides for a de novo appeal where “an appeal is taken by an adult on a finding of guilty of an offense within the jurisdiction” of a juvenile court.

¹⁴ See, e.g., *Austin v. Commonwealth*, 42 Va. App. 33, 38-39, 590 S.E.2d 68, 71 (2003) (holding that when circuit court heard appeal de novo, it divested lower court of its exclusive jurisdiction over those proceedings; noting appeals from juvenile court are heard de novo).

¹⁵ *Sasson v. Shenhar*, 276 Va. 611, 626 n.10, __ S.E.2d __, __ n.10 (2008) (emphasis added).

¹⁶ See *Gilman v. Commonwealth*, 275 Va. 222, 230, 657 S.E.2d 474, 477 (2008) (holding that where specific code provisions dealing with appeals from contempt cases conflicted with general trial de novo provisions of § 16.1-136, specific statutes prevailed).

analysis were applicable, § 16.1-298 is constitutional provided a rational relationship exists between the disparity of treatment and some legitimate governmental purpose.¹⁷

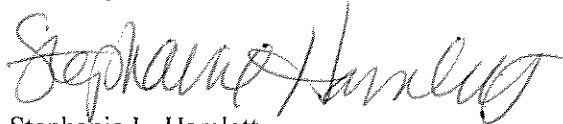
The General Assembly has established a rational basis for suspending some, but not all, juvenile court judgments pending appeal under § 16.1-298. Where the penalties or conditions generally are punitive in nature, but do not involve serious safety concerns, § 16.1-298 suspends the penalty. For example, where the judgment involves fines, suspension of driver's license, or is for crimes that do not involve substance abuse or guns, restitution, incarceration for violation of a traffic offense, commitment to the Department of Juvenile Justice, or incarceration in jail where the juvenile has reached the age of majority after committing the offense, the judgment is suspended pending appeal. However, when the judgment is more rehabilitative in nature, or addresses serious safety concerns, the judgment is not suspended. Thus, § 16.1-298 does not suspend the juvenile court's ability to order participation in public service projects, participation in gang activity prevention programs, transfer of custody, post dispositional detention in a local facility, commitment to the Department of Juvenile Justice as a serious offender, or suspension or denial of a driver's license where the offense involved illegal drugs, alcohol, or illegal use of a handgun.

Conclusion

Accordingly, it is my view that § 16.1-298 is constitutional and does not violate the rights of a juvenile defendant to due process or equal protection.

With kindest regards, I am

Sincerely,



Stephanie L. Hamlett
Senior Counsel to the Attorney General

3:44; 3:1233; 1:941/08-107i

¹⁷See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). "The primary function of the juvenile courts ... is not conviction or punishment for crime; but crime prevention and juvenile rehabilitation." *Kiracofe v. Commonwealth*, 198 Va. 833, 844, 97 S.E.2d 14, 21 (1957).