

COURT OF APPEALS OF VIRGINIA

Present: Judges Bray, Bumgardner and Senior Judge Hodges
Argued at Chesapeake, Virginia

EDWARD LEE CHERRY

v. Record No. 0468-00-1

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE RUDOLPH BUMGARDNER, III
APRIL 17, 2001

FROM THE CIRCUIT COURT OF THE CITY OF SUFFOLK
Rodham T. Delk, Jr., Judge

S. Jane Chittom, Appellate Defender (Public
Defender Commission, on brief), for
appellant.

Steven A. Witmer, Assistant Attorney General
(Mark L. Earley, Attorney General, on brief),
for appellee.

The trial court convicted Edward Lee Cherry of robbery and use of a firearm during the commission of a felony. It sentenced him to twenty-five years for robbery but suspended eighteen years of the sentence for an indefinite period conditioned on good behavior.¹ The trial court placed the

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

¹ The sentencing order provides:

The Court SUSPENDS EIGHTEEN (18) YEARS of the Twenty-Five (25) years sentence, for an indefinite period, upon the following conditions: that the defendant attend mental health counseling.

defendant on supervised probation for an indefinite period.² He contends the trial court erred in suspending his sentence and placing him on probation for "an indefinite period." Finding no error, we affirm.

The defendant did not raise his objection in the trial court; Rule 5A:18 bars consideration of it on appeal unless the sentence is void. Nesbit v. Commonwealth, 15 Va. App. 391, 394, 424 S.E.2d 239, 240 (1992). The defendant concedes in argument that he made no objection to the sentence imposed at trial and that he can prevail on this appeal only if the sentencing order is void. If the sentence exceeds the statutory limits, the excessive portion is invalid, and objection can be raised at any time. Deagle v. Commonwealth, 214 Va. 304, 305, 199 S.E.2d 509, 510-11 (1973).

Good Behavior: The defendant shall be of good behavior for an indefinite period from the defendant's release from confinement.

Supervised Probation: The defendant is placed on probation on his release from incarceration, under the supervision of a Probation Officer for an indefinite period, or unless sooner released by the court or by the probation officer. The defendant shall comply with all the rules and requirements set by the probation officer. Probation shall include substance abuse counseling and/or testing as deemed necessary by the Probation Officer.

(Emphasis in original).

² The trial court sentenced the defendant to three years on the firearm offense and suspended none of that sentence.

A trial court may suspend a sentence and place the defendant on probation. If no period of suspension or probation is fixed, the maximum sentence authorized for the crime defines the maximum period of suspension or of probation. If a period is specified, the limitation on the trial court's discretion in fixing the maximum period is that it be reasonable. Dyke v. Commonwealth, 193 Va. 478, 484, 69 S.E.2d 483, 486 (1952).

The trial court "may fix the period of suspension for a reasonable time, having due regard to the gravity of the offense, without regard to the maximum period for which the defendant might have been sentenced." Code § 19.2-303.1. "The court may, for any cause deemed by it sufficient which occurred at any time within the probation period, or if none within the period of suspension fixed by the court, or if neither, within the maximum period for which the defendant might originally have been sentenced to be imprisoned, revoke the suspension of sentence and any probation" Code § 19.2-306.

The trial court convicted the defendant of robbery for which the maximum sentence permitted is life in prison. Indefinite suspension or indefinite probation could not exceed a sentence for life. The trial court did not impose a period of suspension or probation that exceeded the maximum sentence authorized. An indefinite period was reasonable given the gravity of the offense, robbery. The sentencing order is not void. Accordingly, we do not consider an objection the

defendant raises on appeal but which he never addressed to the sentencing judge.

Affirmed.