

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of June, 2016.

Edward Germaine Saunders, Appellant,

against Record No. 150710
Court of Appeals No. 1692-14-3

Commonwealth of Virginia, Appellee.

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

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no error in the judgment of the Court of Appeals.

Edward Germaine Saunders, Jr. challenges his conviction for aggravated sexual battery, arguing that his double jeopardy rights were violated under the United States and Virginia Constitutions.

The case was docketed for a two-day trial. On the first day, April 29, 2014, a jury was impaneled and the Commonwealth began its presentation of the evidence against Saunders. The following day, the prosecutor informed the court that “necessary witnesses for the Commonwealth ha[d] failed to appear.” Specifically, the alleged victim and her mother were not present, even though both had been personally served with subpoenas. The prosecutor stated that he had spoken to the witnesses the previous night and received assurances from them that they would be present. The prosecution noted that it had made unsuccessful attempts to locate the witnesses and that police officers were actively trying to locate them. The prosecution also represented that it had checked to determine if the underage victim was at school, and confirmed that she was not. The Commonwealth requested a continuance, and the defense opposed this request.

The court granted a brief continuance of several hours and issued a capias. Upon reconvening several hours later, the prosecution reported that the witnesses still had not been found despite the efforts of police and the help of the victim’s family members. The court agreed

to continue the case.

The very next day, May 1, the witnesses were located and arrested.¹ On May 2, the court held another hearing in which the prosecution reported that the witnesses had been found. The victim was present in the courtroom and her mother was in the sheriff's custody. The prosecution reported that it was ready to try the case. The defense requested that the matter be set for May 7, to present authority in support of dismissal or a mistrial. The court continued the case to May 7.

On May 7, 2014, the defendant argued, among other things, that the Double Jeopardy Clause precluded the Court from resuming the trial at a later date. The trial court denied the motion to dismiss.

Saunders' trial resumed on May 20, 2014, with the same judge and jury as before. He was convicted of aggravated sexual battery. He appealed to the Court of Appeals of Virginia, arguing as he does in this Court that his conviction violated his rights under the Double Jeopardy Clause. The Court of Appeals denied his appeal.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. We review de novo the trial court's determination that no double jeopardy violation occurred. Fullwood v. Commonwealth, 279 Va. 531, 539, 689 S.E.2d 742, 747 (2010). The Double Jeopardy Clause has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 795-96 (1969). Article I, Section 8 of the Virginia Constitution provides that no person shall be "put twice in jeopardy for the same offense."²

Saunders' double jeopardy argument is unavailing because he was not *twice* put in jeopardy. Nothing in the Clause prevents a trial court from granting a continuance after jeopardy has attached and the trial has begun. See Lyles v. Commonwealth, 21 Va. App. 187, 189-90, 462

¹ The defendant did not dispute the prosecutor's assertion that the witnesses had been at Saunders' home, arguing instead that this circumstance was irrelevant.

² Saunders assumes that the double jeopardy protections of the Virginia and United States Constitutions are coextensive. Accordingly, we confine our analysis to the double jeopardy protections of the Fifth Amendment.

S.E.2d 915, 916 (1995) (“A trial court is not prevented from granting an appropriate continuance even after jeopardy has attached and the trial has begun.”). For example, in Webb v. Hutto, after “the prosecuting attorney woke up to a perilously large gap in his case,” the trial court granted a continuance for five days to enable the prosecution to obtain additional witnesses to bolster its case against the defendant. 720 F.2d 375, 377 (4th Cir. 1983). Finding no double jeopardy violation, the court observed that the defendant was not twice placed in jeopardy because double jeopardy requires a “second event [that] involves a completely new beginning, *i.e.*, when the second proceeding takes place before a new trier of fact . . . or the same judge starting with a clean slate.” Id. at 379. While the Double Jeopardy Clause does not permit the beginning of a new trial under the guise of a continuance, that is plainly not the situation here. The prosecution requested a continuance based on the unanticipated absence of two key witnesses. Following the continuance, the trial resumed. In addition, there is no dispute that the same jury heard the evidence against Saunders from start to finish.

Saunders attempts to distinguish Webb, observing that the continuance in that case was for five days, whereas the continuance in this case was longer. First, as a factual matter, the Commonwealth located the witnesses on May 1, the day after they initially failed to appear. On May 2, the prosecution stated that it was ready to proceed. It was *Saunders* who asked for additional time to gather authority to present argument to the court. Second, although an extraordinary delay between the commencement of a trial and its resumption may present due process or speedy trial problems, it does not implicate the Double Jeopardy Clause where, as here, all the evidence was heard by the same fact finder.

Saunders also cites State v. O’Keefe, 343 A.2d 509 (N.J. Super. Ct. Law Div. 1975). In that case, the court dismissed a case on double jeopardy grounds based on a two-week continuance. Id. at 516. The court found that this continuance was based on the prosecution’s inexcusable neglect. Id. Although we do not embrace the reasoning in O’Keefe, we note that the basis for dismissal in that case is simply not present here. The prosecution in this case exhibited diligence and professionalism in issuing subpoenas for the missing witnesses, in gaining their verbal promises to appear the day before they were scheduled to appear, in promptly notifying the court when they did not appear, and in diligently locating them thereafter. O’Keefe is both unpersuasive and distinguishable.

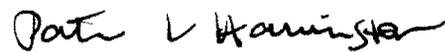
Finally, Saunders argues that the prosecution's failure to have the witnesses produced on the first day of trial somehow implicates double jeopardy. In other words, he contends that the Commonwealth should have subpoenaed the witnesses for both the first and second day of trial, even though the prosecution did not anticipate calling them until the second day of trial. Saunders offers no authority in support of the assertion that the Double Jeopardy Clause mandates such an impractical and cumbersome procedure, and we are aware of none.

Accordingly, we affirm the judgment of the Court of Appeals. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

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

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Patricia L. Haminger". The signature is written in a cursive, flowing style.

Clerk