

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 18th day of May, 2017.

Gregory Perry, Appellant,

against Record No. 160530
Court of Appeals No. 0497-15-2

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 reversible error in the judgment of the Court of Appeals of Virginia.

Although the Court awarded three assignments of error, Perry affirmatively abandons two of these arguments in his opening brief. Accordingly, this appeal now solely concerns whether the Court of Appeals erred in finding that Perry was not denied his statutory right to a speedy trial under Code § 19.2-243.

I.

Perry was charged with malicious wounding. At his arraignment, he waived his right to counsel. Although Perry waived a preliminary hearing on June 14, 2014, the general district court held a preliminary hearing on July 28, found probable cause, and certified the charge to the grand jury. On August 13, Perry filed a motion in circuit court for the appointment of counsel, and Charles J. Homiller, Jr., was appointed to represent Perry on August 29. A grand jury subsequently indicted Perry on the malicious wounding charge, and the trial court set a November 5 hearing date.

On September 17, 2014, the trial court entered a consent order granting a continuance of the November 5 hearing until December 4. The order indicated that Homiller and the Commonwealth agreed to the continuance anticipating that a five-day bench trial would begin at that time. The order states that “Counsel represents . . . that the defendant agrees to the requested

date and manner of trial.” Approximately a month later, Perry wrote the Commonwealth’s Attorney and the trial court advising that he “recently became aware of the continuance,” but had not consented to it, and sought to reinstate the November 5 hearing date. Perry also stated his intent to discharge Homiller and proceed pro se.

The trial court convened a hearing on November 26, 2014, and granted Homiller’s motion to withdraw. Perry again expressed his intent to represent himself. He stated that he did not want a continuance, and the trial court set the next hearing date for December 4, stating it would consider motions and proceed to trial if time allowed.

On December 4, 2014, Perry requested a jury trial but objected to any continuance. The trial court granted the request for a jury trial but determined that a continuance was necessary to empanel a jury. After consulting the trial court’s calendar and the Commonwealth, the trial was set for February 9, 2015. Perry maintained his objection to any continuance after his statutory speedy trial deadline of December 29, 2014. Also on December 4, Perry offered sixteen pro se motions. Perry again declined counsel, requesting stand-by counsel instead. The court appointed T. Noel Brooks, who was present at the courthouse, to serve as stand-by counsel, and the court then proceeded to hear Perry’s motions. After these motions were concluded, Perry requested appointed counsel, and Brooks agreed to continue as counsel.

On January 30, 2015, Brooks moved to withdraw citing “irreconcilable differences.” Brooks further explained that the motion for withdrawal was due to ethical considerations and his refusal to file motions desired by Perry that he did not believe were warranted. The court granted the motion to withdraw and refused Perry’s request to have new counsel appointed, noting that he had been unable to work with two attorneys and had twice offered to represent himself.

The jury trial was held on February 9, 2015. Perry moved to dismiss on speedy trial grounds, which the trial court denied. The jury convicted Perry of the lesser-included offense of unlawful wounding.

The Court of Appeals denied Perry’s petition for appeal, finding that Perry, by counsel, had agreed to the continuance to December 4, 2014, and concluding that the trial court correctly held that the delay from December 4, 2014, to February 9, 2015, was chargeable to Perry. Perry appealed to this Court, where three assignments of error were granted. The other two

assignments of error were affirmatively abandoned on brief, leaving as the sole issue to be resolved whether Perry's statutory right to a speedy trial under Code § 19.2-243 was denied.

II.

On appeal, a statutory speedy trial challenge presents a mixed question of law and fact: the law as set forth in Code § 19.2-243, and the facts concerning pretrial delays. The Court reviews legal questions de novo, while giving deference to the trial court's factual findings. *Harris v. Commonwealth*, 266 Va. 28, 32, 581 S.E.2d 206, 209 (2003).

Virginia's speedy trial statute provides for, in the case of an incarcerated individual, a trial within five months of the date the general district court finds probable cause to believe the defendant has committed a felony, or five months from the indictment in the case of waiver of the preliminary hearing. Code § 19.2-243. As an initial matter, because a preliminary hearing was convened despite Perry's waiver, we accept Perry's calculation of the speedy trial deadline from July, as of the finding of probable cause, rather than from the date of the later September indictment.

The provisions of Code § 19.2-243 do not apply to a "continuance granted on the motion of the accused or his counsel, or by concurrence of the accused or his counsel." Code § 19.2-243(4). As to the first continuance, the sole record memorializing the continuance is a consent order signed by Homiller on Perry's behalf, entered without objection. This alone is sufficient to toll the five-month speedy trial period for the purposes of the statute. Code § 19.2-243(4); *see also Commonwealth v. Gregory*, 263 Va. 134, 144, 557 S.E.2d 715, 720-21 (2002) ("[W]hen a defendant . . . acquiesces in an order that effectively continues a case, the five-month speedy trial period of Code § 19.2-243 is tolled during the time reasonably specified by the court to carry out the terms of its order.") However, as the original trial date of December 4, 2014, was in any case within the five-month period, the more relevant objection pertains to the second continuance.

Any delay in the trial which is attributable to the defendant will not be counted in determining whether the Commonwealth complied with the statutory speedy trial mandate. *O'Dell v. Commonwealth*, 234 Va. 672, 681, 364 S.E.2d 491, 496 (1988). Accordingly, it has long been the law in the Commonwealth that tolling applies not only to explicitly requested continuances but also continuances that are necessitated by other motions by or actions of the defendant. *Stephens v. Commonwealth*, 225 Va. 224, 233, 301 S.E.2d 22, 27-28 (1983) (finding

that, by filing a motion to suppress, the defendant agreed to the time needed for a judge to fully consider a motion and such time was not attributable to the Commonwealth); *see Health v. Commonwealth*, 261 Va. 389, 392-93, 541 S.E.2d 906, 908 (2001) (finding no speedy trial violation when defendant sought a psychological evaluation, delaying trial and implicitly requesting a continuance). Perry's original counsel expressed intent to proceed with a bench trial. The trial court became aware of the request for a jury trial on the day of the planned bench trial. Once aware of Perry's request to exercise his right to a jury trial, the trial court had no choice but to extend the requisite time to empanel a jury and provide notice to witnesses to appear on a different date. Perry's objection to a continuance does not alter the "act which necessitated a slowdown of the judicial process," and is fairly attributable to the defense. *Stephens*, 225 Va. at 233, 301 S.E.2d at 27. Furthermore, on the date originally set for trial, Perry asked for new counsel after previously stating he would proceed pro se. Again, this change in tactics fairly requires time for new counsel to prepare for a jury trial, and newly appointed counsel did not object to the February 9, 2015 trial date.

Delays necessitated by the defense are not attributable to the Commonwealth and thus cannot violate the statute. *O'Dell*, 234 Va. at 681, 364 S.E.2d at 496. Here, the actions of Perry and his various defense counsel caused the trial to commence outside the statutorily mandated period.

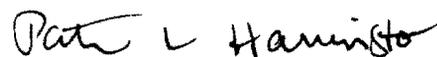
For the aforementioned reasons, the judgment of the Court of Appeals is affirmed. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

Justice McCullough took no part in the consideration of this case.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Chesterfield County.

A Copy,

Teste:



Clerk