IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 100912

RONNIE LEE HOWARD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

In this appeal from the Court of Appeals of Virginia's decision affirming Ronnie Lee Howard's convictions of breaking and entering and credit card theft from the Circuit Court of Botetourt County, Howard alleges that his statutory and constitutional rights to a speedy trial were violated because he was tried more than five months from the date of his indictment. After a bench trial, the court convicted

Howard of those charges and sentenced him, pursuant to a final order of February 12, 2009, to a total of 10 years in prison, with 7 years suspended. (App. 48). The Court of Appeals of Virginia held that the statutory speedy trial period was tolled during a continuance from May 22, to July 3, 2008 and, further, that Howard failed to preserve for appeal his argument that his constitutional speedy trial rights had been violated. Howard v. Commonwealth, 55 Va. App. 417, 686 S.E.2d 537 (2009). Howard now appeals that decision.

ASSIGNMENTS OF ERROR

This Court granted Howard an appeal on the following assignments of error:

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SPEEDY TRIAL PERIOD WAS TOLLED DURING THE CONTINUANCE FROM MAY 22 TO JULY 3, 2008.

II. THE COURT OF APPEALS ERRED IN NOT CONSIDERING WHETHER THE SPEEDY TRIAL STATUTE WAS TOLLED DURING THE CONTINUANCE FROM JULY 3, TO AUGUST 14, 2008.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT HOWARD FAILED TO PRESERVE FOR APPEAL HIS CLAIM OF A VIOLATION OF HIS CONSTITUTIONAL SPEEDY TRIAL RIGHTS, AND

THAT THE ENDS-OF-JUSTICE EXCEPTION TO RULE 5A:18 DOES NOT APPLY.

STATEMENT OF FACTS

A grand jury directly indicted Howard on March 3, 2008 for credit card theft and breaking and entering. (App. 1-4). The original trial date was set for May 22, 2008; however, on May 21, 2008 the case was continued on the circuit court's own motion until July 3, 2008. (App. 8, 28). Howard did not object to this continuance and provided the circuit court with available dates. (App. 28, 31-32).

On July 3, 2008, the case was continued on the Commonwealth's motion until August 14, 2008. (App. 20, 37). The Commonwealth's Attorney advised the trial court that he was not prepared to go forward at that time because a witness was unavailable. (App. 14). The Commonwealth's Attorney also represented to the court that, when he had spoken to defense counsel about the continuance, counsel had responded that he was also not prepared to go forward because he had not received a response to a subpoena duces tecum he had served on the Roanoke Police Department for certain records in that jurisdiction that he felt were necessary for his defense. (App. 15).

When the court asked defense counsel if he wanted to enter into a joint continuance, defense counsel said that he wanted the "continuance to be on the Commonwealth" because he had not received a response to the subpoena duces tecum, and therefore was not prepared to go forward because of "discovery issues." (App. 15). The response to the subpoena was supposed to be returned July 2, 2008 at noon, but was received by the clerk's office on the morning of July 3, 2008, prior to the hearing. (App. 15-16).

The defendant said he did not wish to "waive his right to [a] speedy trial" and argued that it was unfair to make him do so because the Commonwealth had not complied with its discovery obligations. (App. 16). The trial court stated that it would continue the case on the Commonwealth's motion and would not charge the continuance to the defendant. (App. 19).

On August 4, 2008, the defendant filed a motion to dismiss the indictment "due to a violation of Virginia Code Section 19.2-243," Virginia's speedy trial statute. (App. 21-23). At a hearing on the issue on August 14, 2008, the defendant argued that the indictment should be dismissed based on a violation of the speedy trial statute. After noting that the May 21, 2008 continuance was on the court's

own motion, the court asked defense counsel if he had objected to that continuance. (App. 28). Defense counsel agreed that he had not objected to the May 21, 2008 continuance. (App. 28).

Referring to the July 3, 2008 continuance, the court found that the defendant did not object to that continuance because he was not ready for trial. (App. 37). Accordingly, the court denied the defendant's motion. The defendant was tried on the same day, August 14, 2008.

ARGUMENT

Summary of Argument

Howard argues that his statutory and constitutional rights to speedy trial were violated when he was not tried within the time frame specified by Virginia Code § 19.2-243. (Def. Brf. at 1-3). This Court should affirm the Court of Appeals decision, however, because Howard failed to object to the circuit court's continuance.

Further, the Court of Appeals correctly held that it did not need to rule on the merits of the second continuance, because it could affirm the convictions based on the merits of the first continuance.

Finally, the petitioner did not properly preserve his constitutional speedy trial claim. Nonetheless, his constitutional right to a speedy trial was not violated under the facts of this case.

I. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE STATUTORY SPEEDY TRIAL PERIOD WAS TOLLED DURING THE CONTINUANCE FROM MAY 22, TO JULY 3, 2008.

Standard of Review

"In assessing the merits of appellant's statutory speedy trial claim, [appellate courts] 'review . . . the whole record and . . . consider[] . . . the trial court'[s] orders in the context of the record that comes before [it].'" Jiron-Garcia v. Commonwealth, 48 Va. App. 638, 645-46, 633 S.E.2d 744, 748 (2006) (quoting Baity v. Commonwealth, 16 Va. App. 497, 503, 431 S.E. 2d 891, 895 (1993)).

"On appeal, the constitutional arguments are questions of law that [an appellate court] review[s] de novo." Shivaee v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005) (citing Wilby v. Gostel, 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003); Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002)).

No Statutory Speedy Trial Violation Occurred

Where there is no preliminary hearing, a criminal defendant held in custody must be tried within five months of the date of his direct indictment. See Code § 19.2-243. If the Commonwealth fails to meet this burden, the statute requires that the defendant be "forever discharged from prosecution" for that offense. Id.

The delay is excused, however, if one or more of the tolling provisions of Code § 19.2-243(4) applies. That section states that the speedy trial time limits do not apply if the failure to try the accused was caused:

> by continuance granted on the motion of the accused or his counsel, or by concurrence of the accused or his counsel in such a motion by the attorney for the Commonwealth, or by the failure of the accused or his counsel to make a timely objection to such a motion by the attorney.

Code § 19.2-243(4).

When a defendant requests or agrees to a continuance, the time period from the request through the continuance is excluded in the calculation of the statutory speedy trial provisions. See Hudson v. Commonwealth, 267 Va. 36, 41-42, 591 S.E.2d 679, 682 (2004); see also Heath v. Commonwealth, 261 Va. 389, 392, 541 S.E.2d 906,

908 (2001); Commonwealth v. Hutchins, 260 Va. 293, 297-98, 533 S.E.2d 622, 625 (2000); Code § 19.2-243(4). Similarly, when a defendant acquiesces in the entry of an order within the five month period setting the trial date beyond the statutory period, that agreement "'constitute[s] a continuance of the trial date within the intendment of Code § 19.2-243(4).'" Hudson, 267 Va. at 42, 591 S.E.2d at 682 (quoting Hutchins, 260 Va. at 397-98, 533 S.E.2d at 625). Finally, a defendant's failure to timely object to a motion to set the trial date outside the statutory speedy trial period tolls the time. Code § 19.2-243(4); Hudson, 267 Va. at 41, 591 S.E.2d at 681.

The May 21, 2008 Continuance

In this case, this Court, like the Court of Appeals, need not decide whether the Commonwealth's July 3, 2008 continuance triggered the statutory tolling provisions because the May 21, 2008 continuance plainly did so.[1] That is, if the statutory speedy trial clock

[1] Without statutory tolling, the time period from the indictment on March 3, 2008 to the date of trial, August 14, 2009, was 165 days. The time period from May 21, 2008 until July 3, 2008 is 42 days. Assuming tolling occurred during that continuance, the time from indictment to trial that could be counted against the Commonwealth was 122 days. The time period from July 3, 2008 until August 14, 2008 is 43 days. If that period alone was tolled, then the number of days that could be counted against the Commonwealth from

was tolled by the court's continuance from May 21, 2008 to July 3, 2008, the defendant was plainly tried within the time prescribed by Code § 19.2-243.[2] Here, although the August 14, 2008 trial date was more than five months from the date of the indictment, the period of time from May 21, 2008 until July 3, 2008 was tolled because Howard did not raise a timely objection to the circuit court's sua sponte continuance of the case. (App. 8).

The defendant conceded at the hearing on his motion to dismiss that he had not objected to the circuit court's own continuance from May 22, 2008 to July 3, 2008. (App. 28). On appeal, however, he maintains that Code §19.2-243 requires that he object to a continuance only if made on the motion of the Commonwealth's Attorney. (Def. Brf. at 11-13).

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indictment to trial would be 123 days. Thus, if either continuance triggered statutory tolling, then the defendant was tried within the time frame prescribed by statute.

[2] Although not in the joint appendix, the record shows that the defendant was arrested on March 4, 2008. Code § 19.2-243 provides that, "if an indictment or presentment is found against the accused but he has not been arrested for the offense charged therein, the five and nine months periods, respectively, shall commence to run from the date of his arrest thereon." Code § 19.2-243. In this case the one day difference between the date of indictment and the date of arrest would not alter the result.

The Court of Appeals correctly held that "although the statute specifically refers only to continuances granted at the request of the defendant or the Commonwealth, . . . acquiescence in the entry of any order that continues a case—whether at the request of the Commonwealth *or on the court's own motion*—even where the new date is within the speedy trial limit, effectively tolls the running of the speedy trial statute." Howard, 55 Va. App. at 423, 686 S.E.2d at 540 (emphasis in original)

This Court has long held that "the exceptions in the speedy trial statute are not meant to be all-inclusive," and "others of a similar nature" may be implied. Stephens v. Commonwealth, 225 Va. 224, 230, 301 S.E.2d 22, 25 (1983).

In keeping with this principle, this Court has upheld a conviction where the continuance was on the circuit court's own motion. In Heath v. Commonwealth, the Court held "defendant's failure to object to the ***court's action*** in fixing the [initial] trial date is an acquiescence in the fixing of a trial date beyond the five-month speedy trial period and constitutes a continuance of the trial date under Code § 19.2-243(4)." 261 Va. at 394, 541 S.E.2d at 909. (emphasis added). "When a defendant requests, agrees to, or 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." Id. at 393, 541 S.E.2d at 908; see also Hutchins, 260 Va. at 297, 533 S.E.2d at 625 (involving parties who "acquiesced" in an initial trial date beyond the five month period); Hudson, 39 Va. App. 249 572 S.E.2d at 490 (holding, based on Heath, that there is no difference between a waiver of a defendant's right to be tried within the statutory period by agreeing to a . . . continuance beyond the time period permitted under the statute, and the defendant initially agreeing to . . . a trial date beyond the statutory period").

In light of Heath, Hudson, and Hutchins, Howard's failure to object to the court's motion to continue the case tolled the period of time during that continuance for speedy trial purposes.

In addition, to limit the defendant's obligation to object only to continuances requested by the Commonwealth, but not the by trial court, would not further the purpose of the speedy trial statute. It would be absurd to construe the statute in this manner when the trial court had to continue a case for scheduling problems, a situation over which the Commonwealth had no control, while potentially rewarding

the Commonwealth for delays that were arguably within its control. See Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) ("a statute should never be construed in a way that leads to absurd results").

In the instant case, an initial trial date had been set for May 22, 2008, well within the statutory period, but the trial court, for scheduling reasons, had to continue the trial date. Howard acquiesced to that continuance by failing to object to it.

II. THE COURT OF APPEALS DID NOT ERR IN FAILING TO CONSIDER WHETHER THE SPEEDY TRIAL STATUTE WAS TOLLED DURING THE CONTINUANCE FROM JULY 3 TO AUGUST 14, 2008.

Standard of Review

The question of whether the Court of Appeals of Virginia should have reached an issue is a legal question. Legal questions and mixed questions of law and fact are reviewed by this Court *de novo*. Muhammad v. Commonwealth, 269 Va. 451, 479, 619 S.E.2d 16, 31 (2005).

No Error in Failing to Reach Unnecessary Issue

The Court of Appeals did not err in failing to decide whether the July 3, to August 14, 2010 continuance tolled Code § 19.2-243 because, as previously argued, if the earlier continuance tolled the statute, no violation of Howard's statutory speedy trial right occurred. "An appellate court decides cases 'on the best and narrowest ground available.'" Luginbyhl v. Commonwealth, 48 Va. App. 58, 64, 628 S.E.2d 74, 77 (2006) (quoting Air Courier Conference v. American Postal Workers Union, 498 U.S. 517, 531 (1991) (Stevens, J., concurring)).

Having properly decided that the statute was tolled from May 22, until July 3, 2008, the Court of Appeals was not required to render what would have amounted to an advisory opinion regarding the July 3, to August 14, 2008 continuance. "The Court does not have the power to render a judgment that is only advisory." Appalachian Voices v. State Corp. Comm'n, 277 Va. 509, 515, 675 S.E.2d 458, 460 (2009); Martin v. Ziherl, 269 Va. 35, 40, 205 S.E.2d 367, 369 (2005). See also Commonwealth v. Cary, 271 Va. 87, 102, 623 S.E.2d 906, 914 (2006) (applying same rule in a criminal case).

Should the Court agree with Howard that the May 22 to July 3, 2010 continuance did not toll Code § 19.2-243, the Court should remand the case to the Court of Appeals to decide whether the July 3, to August 14, 2008 continuance tolled the statute. See Commonwealth v. King, 265 Va. 576, 582, 570, S.E.2d 863, 866 (2002) (remanding case to the Court of Appeals to decide issue that Court of Appeals did not reach).

In any event, during the August 14, 2008 hearing on the defendant's motion to dismiss the indictment, the trial court properly found that the defendant failed to object to the Commonwealth's motion on July 3, 2008 for a continuance.[3] Under Virginia law, a criminal defendant must raise a timely objection to the Commonwealth's continuance to avoid the tolling provisions of Code § 19.2-243(4). In this case, the defendant conceded he was unprepared for trial on July 3, 2008. (App. 17, 37).

The defendant, who had requested a subpoena duces tecum to be returned at noon on July 2, 2008, the day before trial, was

[3] Admittedly, the court's statements were somewhat ambiguous. The court, referring to the July 3, 2008 continuance, stated, "As a result of that continuance I suppose the time did run against the Commonwealth but there was no objection made by the defendant to the continuance itself." (App. 37).

unprepared to go forward because the subpoena had not been returned until the morning of July 3, 2008. (App. 23). While the defendant asked the trial court to make the continuance on the Commonwealth's motion, the trial court found that he failed to object to the continuance as required by statute because he was unprepared to go forward himself. (App. 37). Thus, he acquiesced in the continuance.

If Howard had wanted to avoid the tolling provisions, he could have objected to the continuance as required by statute and insisted upon going to trial on July 3, 2008, or asked for a short recess to review the subpoenaed materials. Instead, the defendant wanted two incompatible things, a continuance with no tolling.

Having failed to object to the continuance because he too was unprepared to go forward, the defendant cannot now assert that the tolling provisions do not apply.

III. THE COURT OF APPEALS PROPERLY HELD THAT HOWARD FAILED TO PRESERVE HIS CONSTITUTIONAL CLAIM FOR APPEAL AND THAT THE ENDS OF JUSTICE EXCEPTION DID NOT APPLY.

Standard of Review

The question of whether the Court of Appeals of Virginia properly applied Rule 5A:18 or properly applies the ends of justice exception is a legal question. Legal questions and mixed questions of law and fact are reviewed by this Court *de novo*. Muhammad, 269 Va. at 479, 619 S.E.2d at 31.

The Court Of Appeals Did Not Err

On August 4, 2008, the defendant filed a motion seeking to dismiss all charges against him for violating his statutory and constitutional speedy trial rights. (App. 21-23). In that motion, he stated:

> The Virginia Supreme Court has written, "the defendant's right to a speedy trial is one accorded him under the sixth amendment of the United States Constitution and under article I, section 8 of the Virginia Constitution. This right has been supplemented by Code §§ 19.2-241 and 19.2-243, held to be a legislative interpretation of what constitutes a speedy trial." Stephens v. Commonwealth, 225 Va. 224, 229-30, 301 S.E.2d 22, 25 (1983) (footnote omitted).

(App. 21).

On August 14, 2008, the trial date, the circuit court held a pretrial hearing on the defendant's motion. (App. 27-38). During the argument, the defendant never alleged that his constitutional rights to

a speedy trial had been violated, or asked the trial court to rule on that issue. (App. 27-38).

The Court of Appeals properly concluded that Howard's failure to request a ruling on this issue prohibited him from asserting the constitutional issue on appeal. Howard's brief reference to the Constitution in his written motion was insufficient to preserve the issue; he neither argued it to the trial court nor asked the trial court to rule on the issue. Riner v. Commonwealth, 268 Va. 296, 309-10, 601 S.E.2d 555, 562 (2004); Commonwealth v. Hilliard, 270 Va. 42, 53, 613 S.E.2d 579, 586 (2005) (holding party failed to preserve issue concerning Sixth Amendment right to counsel where he mentioned it in his written motion to suppress, but did not raise it in his argument on the motion; in argument he referred only to his Fifth Amendment right to counsel claims, and did not ask the trial court to rule on any Sixth Amendment claim). See Rule 5:25; Rule 5A:18.

The provisions of Rule 5:25, in relevant part, state: "Error will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling." Rule 5:25; see also Rule 5A:18. Furthermore, the purpose of the rule is to "afford the trial court an opportunity to rule intelligently

on the issues presented, thus avoiding unnecessary appeals and reversals." Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991).

Howard was required to state his grounds for an objection "so that the trial judge [could] understand the precise question or questions he [was] called upon to decide." Jackson v. Chesapeake & Ohio Ry. Co., 179 Va. 642, 651, 20 S.E.2d 489, 492 (1942).

Howard's passing reference to his constitutional speedy trial right in his written motion to the trial court failed to preserve the argument he now raises: namely, that the Court should overrule longstanding precedent and find the Virginia Constitution imposes the same speedy trial requirements as Virginia Code §19.2-243. (Def. Brf. at 32). Thus, the Court of Appeals did not err in holding that Howard's constitutional claim was barred by Rule 5A:18. Howard, 55 Va. App. at 425, 686 S.E.2d at 541.

The Court of Appeals also did not err in holding that the ends of justice exception did not apply. Id. A criminal defendant may properly invoke an exception to the contemporaneous objection rule when consideration of the defaulted issue is necessary to attain the ends of justice. However, "'[t]he ends of justice exception is narrow

and is to be used sparingly' and only when an error at trial is 'clear, substantial and material.'" Benton v. Commonwealth, 40 Va. App. 136, 144, 578 S.E.2d 74, 77 (2003) (citations omitted); see also Jimenez v. Commonwealth, 241 Va. 244, 248-51, 402 S.E.2d 678, 679-81 (1991) (noting Rule 5A:18 is virtually identical to Rule 5:25 and the Court will not notice unpreserved errors except in rare instances when necessary to attain the ends of justice). "In order to avail oneself of the exception, a defendant must affirmatively show that a miscarriage of justice has occurred, not that a miscarriage *might* have occurred." Legette v. Commonwealth, 33 Va. App. 221, 224, 532 S.E.2d 353, 354 (2000).

The Court of Appeals correctly held that Howard was required to affirmatively show that he suffered a miscarriage of justice. In finding that he failed to meet this burden, the Court of Appeals stressed that Howard "made no allegation that he was prejudiced by the fact that, assuming no tolling of the statute, his trial occurred 12 days beyond the statutory limit." Howard, 55 Va. App. at 425-26, 686 S.E.2d at 541-42. Howard has cited no authority, either in this Court or in the Court of Appeals, that he would have been entitled to a

dismissal on constitutional speedy trial grounds because his trial occurred more than 12 days past the statutory limit.[4]

Howard's End of Justice Argument is not Properly Before this Court

Moreover, Howard failed to present the same "ends of justice" argument on brief in the Court of Appeals that he presents to this Court.[5] Howard now argues that this Court should find, in

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[4] Howard wrongly suggests that the Court of Appeals held that in order to satisfy the factors recited in Barker v. Wingo, 407 U.S. 514 (1972) he would have had to make a threshold showing of prejudice. (Def. Brf. at 28). Instead, the Court of Appeals' discussion of prejudice related to the ends of justice exception and Howard's failure to demonstrate a miscarriage of justice. Howard, 55 Va. App. at 425-26, 686 S.E.2d at 541-42.

[5] On brief in the Court of Appeals, Howard stated:

> The Virginia Supreme Court has written, "the defendant's right to a speedy trial is one accorded him under the sixth amendment of the United States Constitution and under article I, section 8 of the Virginia Constitution. This right has been supplemented by Code §§ 19.2-241 and 19.2-243, held to be a legislative interpretation of what constitutes a speedy trial." Stephens v. Commonwealth, 225 Va. 224, 229-30, 301 S.E.2d 22, 25, (1983) (footnote omitted). Therefore the failure to commence the trial within the proper time constraint not only violates Virginia Code § 19.2-243, but also violates the defendant's U.S. and Virginia Constitutional rights to a speedy trial.

(Def. Brf. CAV at 21-22).

contravention of existing precedent, that the Virginia Constitution is the functional equivalent of Code § 19.2-243, offering the same protections as the statute. (Def. Brf. at 29).

In Folkes v. Commonwealth, 218 Va. 763, 240 S.E.2d 662 (1978) this Court addressed the issue of whether a delay that preceded the preliminary hearing violated the Sixth Amendment or the Virginia Constitution. Id. at 764, 240 S.E.2d at 663. The Court specifically stated that Code § 19.2-243 was not at issue and applied the test in Barker v. Wingo, 407 U.S. 514 (1972). Similarly, in Holliday v. Commonwealth, 3 Va. App. 612, 615, 352 S.E.2d 362, 364 (1987), the Court of Appeals stated that speedy trial claims under the state and federal constitutions were "without distinction" and found the statutory speedy provisions in Code §19.2-243 were inapplicable. Id.

Howard never asked the Court of Appeals to overrule its holding in Holliday, or to find that the Virginia Constitution subsumes the more stringent protections of Code § 19.2-243. In fact, Howard's brief in the Court of Appeals contained virtually no discussion of the law dealing with constitutional violations of speedy trial, other than to conclude, without further explanation, that his federal and state

constitutional rights had been violated by the court's failure to try him within the time constraints prescribed by Code § 19.2-243.

Therefore, Howard's invitation to this Court to "overturn" Holliday and hold that the "Virginia Constitution affords the defendant an independent speedy trial right greater the United States Constitution," is not properly before this Court because he did not present it to the Court of Appeals. "The arguments of the parties on appeal . . . must be limited to issues preserved in the trial court and to issues presented to the appellate courts." McDonald v. Commonwealth, 274 Va. 249, 255, 645 S.E.2d 921 (2007) (refusing to consider arguments made for the first time in amicus brief presented to the Supreme Court of Virginia). See also Rule 5:25, Rule 5:17.

In any event, this Court should decline to hold, as Howard requests, that a violation of Code § 19.2-243, "with nothing more," also violates the Virginia Constitution. (Def. Brf. at 33). Such an interpretation of the Virginia Constitution, as previously argued, conflicts with the prior precedent of this Court and the Court of Appeals of Virginia. Our appellate courts have repeatedly held that the protections of the Virginia Constitution are "coextensive" with

related provisions of the United States Constitution. See Shivavee v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005) (due process) (citations omitted); Elliott v. Commonwealth, 267 Va. 464, 473, 593 S.E.2d 263, 269 (2004) (First Amendment); Kenyon v. Commonwealth, 37 Va. App. 668, 672, 561 S.E.2d 17, 19 (2002) (double jeopardy) (citation omitted); Henry v. Commonwealth, 32 Va. App. 547, 551, 529 S.E.2d 796, 798 (2000) (Fourth Amendment) (citations omitted).

Moreover, if the statutory protections and the Virginia constitutional protections are the same, this Court has no reason to reach the constitutional question and make such a sweeping change to Virginia jurisprudence. In other words, if the constitutional and statutory protections are equivalent, the entire question turns on the merits of the statutory claim. "Court's do not refuse to pass upon the constitutionality of a statute in a proceeding in which its determination is essential, but they do refuse to determine such an issue when it is not necessary to a decision of the case." Wood v. Quillen, 167 Va. 255, 261, 186 S.E.2d 216 (1936).

Howard Has Failed to Establish a Constitutional Violation

Assuming, *arguendo*, that Howard preserved the constitutional issue, he has not established a constitutional speedy trial violation. "In Barker, the Supreme Court stated four factors that must be considered and balanced in determining whether a speedy trial violation has occurred under the Sixth Amendment. Those factors are length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Hudson, 267 Va. at 41, 591 S.E.2d at 682.

The length of the delay between indictment and trial was 165 days, or 12 days over, the statutory limit, assuming the statutory tolling provisions did not apply. Such a delay, patently, cannot be considered extraordinarily long. "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530.

Furthermore, as previously argued, no statutory violation occurred. "A process which results in a trial on the merits within the statutorily described time does not support a presumption of prejudice." Sheard v. Commonwealth, 12 Va. App. 227, 231, 403

S.E.2d 178, 180 (1991). The delay was not presumptively prejudicial and Howard's argument does not activate "the triggering mechanism" to require this Court to inquire into the other factors. Barker, 407 U.S. at 530.

In any event, the defendant has not demonstrated a violation of the other Barker factors. The second factor to be considered is the cause for the delay in bringing the defendant to trial. In this case no "deliberate attempt to delay the trial in order to hamper the defense" occurred. The defendant also failed to timely object to either continuance. Thus, the third factor, the defendant's assertion of his right to speedy trial, weighs against his constitutional claim. As to the fourth factor, the defendant asserts no prejudice from the brief delay in his trial.

On these facts, the Barker balancing test weighs against a finding that the defendant's state and federal constitutional rights to a speedy trial were violated.

CONCLUSION

The Court of Appeals did not err in holding that Howard's statutory rights to a speedy trial were not violated. The Court of Appeals correctly held that Howard had failed to preserve his arguments his constitutional speedy trial rights were violated, and correctly held that the ends of justice exception did not apply. Accordingly, the judgment appealed from the Circuit Court for Botetourt County should be affirmed.

Respectfully submitted,

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COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 22, 2010, the required copies of this Brief were hand-filed with this Court, and three copies were mailed to Seth C. Weston, Law Office of Seth C. Weston, Esq. 1031 1st Street, SW, Roanoke, Virginia 24016. An Electronic copy was sent to the Court at scvbriefs@courts.state.va.us and an electronic copy was sent to counsel at his e-mail address: Seth@SCWestonlaw.com.

The Commonwealth desires to present oral argument in this case.

_____
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