In The

Supreme Court of Virginia

RECORD NO. 100912

RONNIE LEE HOWARD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

Seth C. Weston (VSB No. 47523)
LAW OFFICE OF SETH C. WESTON, PLC
1031 1st Street, Southwest
Roanoke, Virginia 24016
(540) 342-5608 (Telephone)
(540) 345-7481 (Facsimile)
Seth@SCWestonlaw.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

NATURE OF CASE, STATEMENT OF FACTS AND MATERIAL PROCEEDINGS 1

ASSIGNMENTS OF ERROR 5

QUESTIONS PRESENTED 6

STANDARD OF REVIEW, ARGUMENT AND AUTHORITIES 6

1. Whether the Court of Appeals erred in holding that the speedy trial period was tolled during the continuance from May 22 to July 03, 2008 6

2. Whether the Court of Appeals erred in not considering whether the speedy trial statute was tolled during the continuance from July 03 to August 14, 2008 17

3. Whether 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 25

CONCLUSION 33

CERTIFICATE 35

TABLE OF AUTHORITIES

Page(s)

CASES

Alger v. Commonwealth,
267 Va. 255, 590 S.E.2d 563 (2004) 13

Arizona v. Evans,
514 U.S. 1, 115 S. Ct. 1185 (1995) 31

Baity v. Commonwealth,
16 Va. App. 497, 431 S.E.2d 891 (1993) 7, 17, 22, 23

Ballance v. Commonwealth,
21 Va. App. 1, 461 S.E.2d 401 (1995) 8, 9

Barker v. Wingo,
407 U.S. 514, 92 S. Ct. 2182 (1972) 28

Brown v. Commonwealth,
8 Va. App. 126, 380 S.E.2d 8 (1989) 26

Commonwealth v. Gregory,
263 Va. 134, 557 S.E.2d 715 (2002) 14

Commonwealth v. Hutchins,
260 Va. 293, 533 S.E.2d 622 (2000) 14

Flanary v. Commonwealth,
184 Va. 204, 35 S.E.2d 135 (1946) 16

Guba v. Commonwealth,
9 Va. App. 114, 383 S.E.2d 764 (1989) 7, 17

Gunn v. Commonwealth,
272 Va. 580, 637 S.E.2d 324 (2006) 13

Harward v. Commonwealth,
229 Va. 363, 330 S.E.2d 89 (1985) 12

Heath v. Commonwealth,
32 Va. App. 176 (2000) 7, 18

Heath v. Commonwealth,
261 Va. 389, 541 S.E.2d 906 (2001).....passim

Holliday v. Commonwealth,
3 Va. App. 612, 352 S.E.2d 362 (1987).....32

Hudson v. Commonwealth,
267 Va. 36, 591 S.E.2d 679 (2004) 14, 29

Kyles v. Whitley,
514 U.S. 419, 115 S. Ct. 1555 (1995).....20

Martin v. Commonwealth,
4 Va. App. 438, 358 S.E.2d 415 (1987).....7, 17, 26

Moore v. Ariz.,
414 U.S. 25, 94 S. Ct. 188 (1973).....28

Robinson v. Commonwealth,
28 Va. App. 148, 502 S.E.2d 704 (1998).....8

Stephens v. Commonwealth,
225 Va. 224, 301 S.E.2d 22 (1983) 15, 30, 32

Stinnie v. Commonwealth,
22 Va. App. 726, 473 S.E.2d 83 (1996) (en banc) 7, 17

Whitlock v. Superintendent of the Virginia State Penitentiary,
213 Va. 429, 192 S.E.2d 802 (1972) 28

Williams v. Commonwealth,
265 Va. 268, 576 S.E.2d 468 (2003) 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI 30, 32

Va. Const. art. I, § 8 ..... 30, 31, 32, 33

STATUTES

Va. Code § 18.2-91 1

Va. Code § 18.2-192 1

Va. Code § 19.2-241 ..... 30, 32

Va. Code § 19.2-243 ..... passim

RULE

Va. Sup. Ct. R. 5A:18 ..... 6, 25, 27, 33

To the Honorable Judges of the Supreme Court of Virginia:

The Appellant, Ronnie Lee Howard, is aggrieved by a final judgment of the Virginia Court of Appeals entered on December 22, 2009.

The Appellant will be referred to as "Howard", and the Commonwealth of Virginia will be referred to as the "Commonwealth". References to Howard's Appendix will be indicated as "App. Page #."

NATURE OF CASE, STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

On March 03, 2008, Howard was indicted on one count of Credit Card Theft in violation of Virginia Code § 18.2-192 under indictment number CR08000158, and one count of Breaking and Entering with Intent to Commit Larceny in violation of Virginia Code § 18.2-91 under indictment number CR08000159. (App. Pages 2-3.) Howard was continuously incarcerated during the entire time the case was pending trial.

The original trial date was set for May 22, 2008, in the Circuit Court for Botetourt County. On or about May 21, 2008,

trial of this matter was continued on the court's motion to July 3, 2008, at 1:30 p.m. for a bench trial. (App. Page 8.)

On or about June 11, 2008, Howard's counsel issued a subpoena duces tecum to the Roanoke City Police Department requesting records relating to the arrest and investigation of Howard by the Roanoke City Police Department that were directly related to the charges in Botetourt County, returnable to the Clerk of Circuit Court for Botetourt County on or before July 02, 2008. (App. Pages 9-12.)

On July 03, 2008, a hearing was held concerning another continuance in this case. At that hearing, Howard moved the court to order the continuance on the Commonwealth's motion because at the time he conducted discovery the Commonwealth did not have any records from the Roanoke City Police Department concerning their arrest of Howard, including search warrants that had been issued related to these charges, that Howard's lawyer had issued a subpoena duces tecum in an effort to obtain this information since the Commonwealth did not have

it, and that Howard did not want to waive his right to speedy trial because of this discovery issue. (App. Pages 14-20.)

The Commonwealth informed the court that the Commonwealth was not ready for trial because witnesses were not available, but moved the court to toll speedy trial because Howard stated he was not ready for trial. (App. Page 18.) The Commonwealth never objected or contested in any way the fact that Howard was not ready for trial because the Commonwealth did not provide full discovery that included the subpoenaed documents from the Roanoke City Police Department, or that Howard's attorney caused a subpoena duces tecum to be issued to try to obtain these required documents prior to trial and resolve this discovery problem.

On July 03, 2008, after considering arguments from both parties, the court granted the continuance on the Commonwealth's motion, and preserved Howard's right to speedy trial under Virginia Code Section 19.2-243. (App. Pages 19-20.)

On or about August 04, 2008, Howard motioned the court to dismiss the charges because his right to a speedy trial was

violated. (App. Pages 21-24.) On August 14, 2008, the trial court denied Howard's motion to dismiss the charges, then immediately held a bench trial on the charges. (App. Pages 25-38.) The trial court found Howard guilty of the charges, and set a sentencing date. (App. Pages 39-41.)

On February 12, 2009, after considering sentencing evidence, the court sentenced Howard to ten (10) years incarceration on the Breaking and Entering charge, suspended after serving three (3) years, and three (3) years incarceration on the credit card larceny, suspended after serving one (1) year and six (6) months, for a total active sentence of four (4) years and six (6) months. The court also placed Howard on three years of supervised probation, required Howard to pay restitution in the amount of $1,700.00 to the victim and required Howard to pay all court cost associated with this charge during the probation period. (App. Pages 45-50.)

Howard timely filed a notice of appeal and petition to the Court of Appeals. On July 27, 2009, a judge of the Court of Appeals granted the petition, and a hearing was held on

November 18, 2009. On December 22, 2009, the Court of Appeals issued a published opinion denying Howard the relief he sought. The Court of Appeals held that no speedy trial violation occurred because Howard failed to object when the trial court continued the case on its motion from May 21, 2008 to July 3, 2008, and that this tolled the speedy trial time. Based on this holding, the Court of Appeals refused to consider whether the second continuance tolled the running of this statute. The Court of Appeals also held that Howard failed to preserve for appeal his claim that his constitutional speedy trials were violated, and that it would not consider this argument under the ends-of-justice exception. (App. Pages 51-58.)

On April 09, 2010, the Supreme Court of Virginia granted Howard's request to file a delayed appeal, later granting Howard's petition, and Howard now submits this brief.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that the speedy trial period was tolled during the continuance from May 22 to July 03, 2008. (Error preserved at App. Page 37, 44.)

2. The Court of Appeals erred in not considering whether the speedy trial statute was tolled during the continuance from July 03 to August 14, 2008. (Error preserved at App. Page 37, 44.)

3. 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. (Error preserved at App. Page 37, 44.)

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the speedy trial period was tolled during the continuance from May 22 to July 03, 2008. (Assignment of Error 1.)

2. Whether the Court of Appeals erred in not considering whether the speedy trial statute was tolled during the continuance from July 03 to August 14, 2008. (Assignment of Error 2.)

3. Whether 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. (Assignment of Error 3.)

STANDARD OF REVIEW, ARGUMENT AND AUTHORITIES

1. Whether the Court of Appeals erred in holding that the speedy trial period was tolled during the continuance from May 22 to July 03, 2008. (Assignment of Error 1.)

Under appellate review, this Court "examine[s] the evidence in the light most favorable to the Commonwealth, granting to it

all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). Also, in order to assess whether speedy trial was tolled during a case, this Court looks "to the [trial] court's orders explaining the delays in proceeding to trial. See Guba v. Commonwealth, 9 Va. App. 114, 118, 383 S.E.2d 764, 767 (1989). We may also look to the rest of the record to assess the responsibility for delay that caused 'the failure to try the accused,' Stinnie v. Commonwealth, 22 Va. App. 726, 729, 473 S.E.2d 83, 84 (1996) (en banc), within the time frame mandated by statute. See Baity v. Commonwealth, 16 Va. App. 497, 503, 431 S.E.2d 891, 894-95 (1993) ("Although [the court's] orders facilitate the assessment of responsibility for delay and the determination of the merits of a Code § 19.2-243 claim, such orders do not and should not limit the scope of appellate review."). Heath v. Commonwealth, 32 Va. App. 176, 181-182 (Va. Ct. App. 2000).

In order to do so properly, one must consider Virginia Code Section 19.2-243, which states, in part, "Where a district court

has found that there is probable cause to believe that an adult has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court. … If there was no preliminary hearing in the district court, or if such preliminary hearing was waived by the accused, the commencement of the running of the five and nine months periods, respectively, set forth in this section, shall be from the date an indictment or presentment is found against the accused." Va. Code Ann. § 19.2-243 (2008).

The Court of Appeals has held that the five-month requirement of this section translates to 152 and a fraction of a day. See Ballance v. Commonwealth, 21 Va. App. 1, 461 S.E.2d 401 (Va. App. 1995); Robinson v. Commonwealth, 28 Va. App. 148, 502 S.E.2d 704 (Va. App. 1998). The trial date of August 14, 2008, is 164 days after March 03, 2008. Therefore, if there are no delays attributable to the Howard, then Howard's speedy trial rights were violated.

It is settled law that the setting of an initial trial date from the date on which probable cause was found "even though the accused concurs in the trial date, is not a continuance within the contemplation of subsection (4) of [Va. Code § 19.2-243], but counts against the Commonwealth in a calculation of compliance." Ballance v. Commonwealth, 21 Va. App. 1, 6, 461 S.E.2d 401, 403 (Va. App. 1995). Therefore, seventy-nine (79) days already counted towards speedy trial from the date of indictment on March 03, 2008, to the original trial date of May 21, 2008.

The Court of Appeals erred by effectively rewriting Virginia Code Section 19.2-243 to find that Howard waived his speedy trial rights when it wrote that in order "to preserve his speedy trial rights under Code § 19.2-243 when the court requires a continuance, a defendant must object to the continuance *even if the new trial date is within the applicable time limit set out in the statute.* See [Heath v. Commonwealth, 261 Va. 389, 393, 541 S.E.2d 906, 908 (2001).]" (Emphasis added) (App. Page 56.)

The Heath case is distinguishable from this case. It is most readily distinguishable by the fact that in Heath the defendant motioned the court for a competency evaluation, which then required an evaluation to be performed, and which the Supreme Court held tolled the statute. Heath v. Commonwealth, 261 Va. 389, 393, 451 S.E.2d 906, 908 (2001). The Supreme Court noted that 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. In this case, unlike in Heath, Howard did not request a continuance, or agree to, or acquiesce in an order based on a motion from the attorney for the commonwealth; rather this was solely a court ordered continuance that required nothing more than setting a new trial date. Moreover, Howard's case was set for trial within the speedy trial time requirements counting from the date of indictment, and one simply cannot object to a violation that does not occur.

In Heath, the Supreme Court also held that, after the report was received and the case needed to be set for trial, the time from that docket day to the trial date was tolled, noting that the "record does not disclose, and the defendant does not claim, that the defendant objected to the action of the court in fixing the trial date." Heath v. Commonwealth, 261 Va. 389, 392, 451 S.E.2d 906, 908 (Va. 2001). The setting of a new trial date in Heath was required as a direct result of a motion for a competency evaluation by the defendant, and during which time the terms of the court's order must be fulfilled before the case could proceed in court again. In direct contrast, in Howard's case the court continued the case on its own motion, and there were no terms to carry out. Therefore, speedy trial should not be "tolled during the time reasonably specified by the court to carry out the terms of its order," as there were no terms, such as the competency evaluation required in Heath, to carry out.

Moreover, Howard need not object to a continuance by the court because the clear and unambiguous language in Virginia Code 19.2-243 does not require it. The continuance on May 21,

2008, clearly was not a "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 for the Commonwealth*, or by reason of his escaping from jail or failing to appear according to his recognizance." (Va. Code Ann. § 19.2-243) (2008) (emphasis added).

By twice writing the words "such a motion by the attorney for the Commonwealth" in Virginia Code § 19.2-243, the General Assembly clearly did not intend for this exception to apply where the court, and not the attorney for the Commonwealth or the defendant, motioned for the continuance. This Court has stated that "[a]lthough penal statutes are to be strictly construed against the Commonwealth, Harward v. Commonwealth, 229 Va. 363, 365, 330 S.E.2d 89, 90 (1985), courts are nevertheless bound by the plain meaning of unambiguous statutory language and 'may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated.'"

Gunn v. Commonwealth, 272 Va. 580, 587, 637 S.E.2d 324, 327 (Va. 2006) (quoting Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); accord Alger v. Commonwealth, 267 Va. 255, 259, 590 S.E.2d 563, 565 (2004). The General Assembly clearly and unambiguously meant for the exceptions listed in Virginia Code § 19.2-243 to apply when the attorney for the Commonwealth or for the defendant motion for the continuance, and not when the continuance is by motion of the court.

This case is distinguishable from Heath and other cases considering the speedy trial statute, and appears to be a case of first impression, because Howard could not find a reported case wherein a trial date was continued solely upon the court's own motion without objection and the new trial date was set within the speedy trial requirements.

The prior decisions by the Virginia Supreme Court considering this statute, while having similar aspects to this case as does Heath, are distinguishable because they involved agreements to set the trial date outside of speedy trial, delays

were attributable to the defendant because of a motion submitted by the defendant requiring some out of court action to be accomplished before trial could commence, or the defendant failed to object to or acquiesced in a continuance motion by the attorney for the Commonwealth. See Hudson v. Commonwealth, 267 Va. 36, 591 S.E.2d 679 (2004) (the original trial date was set outside speedy trial by agreement of counsel); Commonwealth v. Hutchins, 260 Va. 293, 533 S.E.2d 622 (2000) (defendant's statutory right to a speedy trial was not violated because he affirmatively agreed to the trial date that was set beyond the time period prescribed by the statute); Commonwealth v. Gregory, 263 Va. 134, 557 S.E.2d 715 (2002) (because defendant agreed to a continuance of the trial date or failed to object to the Commonwealth's request for a continuance, the period of time involved does not count in the computation of time for compliance with the requirements of Code § 19.2-243).

It is true, as the Court of Appeals noted, that this Court has held "that the exceptions in the speedy trial statute are not meant to be all-inclusive, but that others of a similar nature were

implied." Stephens v. Commonwealth, 225 Va. 224, 230, 301 S.E.2d 22, 25 (1983). However, just as in the cases noted above, Stephens is distinguishable from Howard's case.

As this Court noted in Stephens, the "dispositive issue here is whether the order continuing defendant's case to give the trial court an opportunity to study the issues raised by defendant's motion to suppress, and to consider the arguments advanced by counsel, was in fact an 'agreed' continuance, 'concurred in' by both the defendant and the attorney for the Commonwealth. We decide that it was." Id. at 233, 27. In Howard's case, there were no such motions filed, the trial court simply continued the case, and then it was set within the speedy trial requirements from the date of indictment.

In a prior speedy trial case, this Court noted that it "is the duty of the court to construe the language of the statute and not to pass upon its wisdom. To read into the statute a meaning which is contrary to the ordinary definition of the words used is judicial legislation and not judicial construction. If the statute, as written, permits guilty parties to escape justice, this fact should

be brought to the attention of the General Assembly which alone has the authority to legislate." Flanary v. Commonwealth, 184 Va. 204, 212, 35 S.E.2d 135, 138 (Va. 1946).

The Court of Appeals erred by effectively engaging in such judicial legislating. According to the Court of Appeals, Virginia Code Section 19.2-243 should now read: "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." Such broad language cannot be found anywhere in the statute as written by the General Assembly. Moreover, the ruling in Heath v. Commonwealth, 261 Va. 389, 451 S.E.2d 906 (2001), which the Court of Appeals relied upon to create this language, is distinguishable from Howard's case as set forth above, and does not stand for the proposition expressed by the Court of Appeals.

Since the initial continuance in this case is not attributable to Howard or the attorney for the commonwealth, the statute does not require Howard to object, and the Court of Appeals erred in

attributing the May continuance to Howard and holding that Howard's speedy trial rights were not violated.

2. Whether the Court of Appeals erred in not considering whether the speedy trial statute was tolled during the continuance from July 03 to August 14, 2008. (Assignment of Error 2.)

Under appellate review, this Court "examine[s] the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). Additionally, the same standard of review as set forth above applies, requiring this Court to look "to the [trial] court's orders explaining the delays in proceeding to trial. See Guba v. Commonwealth, 9 Va. App. 114, 118, 383 S.E.2d 764, 767 (1989). We may also look to the rest of the record to assess the responsibility for delay that caused 'the failure to try the accused,' Stinnie v. Commonwealth, 22 Va. App. 726, 729, 473 S.E.2d 83, 84 (1996) (en banc), within the time frame mandated by statute. See Baity v. Commonwealth, 16 Va. App. 497, 503, 431 S.E.2d 891, 894-95 (1993) ("Although [the court's] orders facilitate the assessment of responsibility for delay and the

determination of the merits of a Code § 19.2-243 claim, such orders do not and should not limit the scope of appellate review."). Heath v. Commonwealth, 32 Va. App. 176, 181-182 (Va. Ct. App. 2000).

As set forth above, the Court of Appeals erred in holding the first continuance was attributable to Howard, and therefore it erred in not considering the second continuance. Indeed, there are novel issues involved in this case, and it appears to be a case of first impression.

In reviewing speedy trial related case law, Howard could find no case exactly on point under Virginia law wherein an original trial date was continued on motion of the court, a trial date was set again within speedy trial requirements, counsel was not afforded full discovery from the Commonwealth so that counsel issued a subpoena duces tecum to try to obtain the information that the Commonwealth did not provide, that counsel still did not receive the information prior to trial nor did the Commonwealth provide it and therefore defendant's attorney could not provide proper legal advice as to what plea to enter prior to trial, that a

trial court considered these issues on the date set for trial and continued the case on the Commonwealth's motion with speedy trial requirements still in effect, that the Commonwealth stated it would set a trial date that is outside speedy trial requirements, that a trial date is then set outside of speedy trial requirements, and that the trial court then ruled that speedy trial requirements were not violated because Howard did not object to the continuance that caused the speedy trial violation.

During the hearing on July 03, 2008, Howard's counsel stated he had conducted discovery, but the Commonwealth did not have records relating to the arrest and subsequent search warrants obtained by the Roanoke City Police Department and issued for an address related to Howard, which were directly related to these charges, and that Howard's attorney caused a subpoena duces tecum to be issued in an effort to obtain the information and cure the lack of discovery prior to trial. (App. Page 15.) Howard's counsel informed the court that Howard was not prepared for trial due to this discovery issue, and he could

not advise his client how to plead until he obtained all the discovery information. (App. Page 17.)

While cases concerning issues of undisclosed evidence generally hold that the undisclosed evidence must have been material to the defense in order for there to be a discovery violation, which is not directly related to this case, they also clearly set forth that "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. *This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.*" Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 (1995) (emphasis added). Moreover, "the prosecutor remains responsible for gauging [the] effect [of undisclosed evidence] regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Id., at 421. In particular to this case, the trial court's discovery order plainly

mandated disclosure of information in the possession of the Roanoke City Police Department. (App. Pages 5-7.)

By failing to obtain any police reports, search warrants, or any other documents from the Roanoke City Police Department, as the prosecution in this case does not deny it failed to do, the prosecution clearly failed in its duty to "learn of any favorable evidence" before the trial date and clearly violated the discovery order entered in this case. Since the prosecution failed in its discovery obligation, Howard's counsel issued a subpoena duces tecum to try to obtain the documents from the Roanoke City Police Department. Although it was required to be returned before trial, it was not returned until the day of the trial, and Howard's counsel told the court he did not want to waive Howard's right to a speedy trial because of this discovery violation. (App. Page 16.)

After considering all this information, the trial court stated "I'll grant the motion [to continue] but it's going to be on the Commonwealth's motion. Do you have a date now?" (App. Page 18.) The Commonwealth then stated, "Well, yes sir. Judge we

don't have a date. We'll get one. I'll have to ask that the matter be set after August fourth. The question is is the [defendant] going to be able to post an objection to a case for which he is not prepared to go forward. To the continuance of a case for which he is not prepared to go forward. That's my concern at this point." (App. Page 18.) It is important to note that August 4, 2008, is one hundred and fifty-four days after Howard was indicted on March 03, 2008, which is outside the speedy trial requirements if there was no tolling of the statute. The trial court answered this concern by stating "Since it was a discovery issue, that he had no part in not getting discovery I don't see any reason why he could, why we should charge it to him." (App. Page 19.)

The Court of Appeals has stated that "the proper assessment and determination of the merits of a Code § 19.2-243 claim involve a review of the whole record and a consideration of the trial court orders in the context of the record that comes before us." Baity v. Commonwealth, 16 Va. App. 497, 503, 431 S.E.2d 891, 895 (Va. App. 1993). In keeping with the Baity requirement

for a “review of the whole record and a consideration of the trial court orders in the context of the record”, the facts clearly reveal that on July 03, 2009, the trial court ruled that the continuance was chargeable against the Commonwealth, that the speedy trial requirement was not tolled, and that the Commonwealth would ask for a trial date after August 4, 2008, knowing it was outside the speedy trial time frame. Baity, at 503. Given that Howard was arguing for the continuance to be charged to the Commonwealth with his speedy trial rights reserved, which the court granted, the Commonwealth ought not to be able to then require the case be set outside what was understood to be the speedy trial date. Allowing this would effectively nullify the trial court’s ruling preserving Howard’s speedy trial rights.

Of particular concern to Howard in the Court of Appeals refusing to rule on the second continuance is the lack of review of the trial court ruling on August 14, 2008, wherein the trial court denied Howard’s motion to dismiss because he had not objected to the prior continuance. (App. Page 37.) This ruling directly contradicts the prior court ruling on July 03, 2008, that preserved

speedy trial and attributed the continuance to the Commonwealth. The only fair import of the hearing and court ruling on July 03, 2008, is that the continuance was not attributed to Howard, rather it was attributable to the Commonwealth and Howard's right to a speedy trial was preserved, even though Howard did not state the word "Objection" to the continuance. Indeed, preserving speedy trial because of the Commonwealth's lack of providing discovery, an assertion that the Commonwealth did not object or refute in any manner during the hearing, was the whole point of the hearing as set forth in the record.

This Court need look no further than how the Commonwealth framed the issue before the court on July 03, 2008. The Commonwealth never stated to the court that it provided full discovery as required. Rather, the Commonwealth's position was that Howard "asks both that he be not prepared to go forward and that he object to the matter being set over…," causing the court to make the observation to Howard's counsel that "I think it is kind of trying to take two bites of the apple

there counsel," although the court then ruled in favor of the Howard. (App. Page 16.) However, should this court uphold the Court of Appeals decision, it would be the Commonwealth that gets two bites at the apple by preventing Howard from being ready for trial by not providing discovery, then forcing Howard to stand trial outside of speedy trial because Howard could not object to a continuance since he was not ready for trial due to the lack of discovery.

Given these facts and arguments as set forth, Howard requests this Court hold that the Court of Appeals erred in not considering whether Howard's speedy trial rights were violated by the second continuance, to additionally hold that Howard's right to speedy trial under the statute was violated, and dismiss this case due to this violation.

3. Whether 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. (Assignment of Error 3.)

In considering whether to grant this petition under the ends-of-justice exception, the Supreme Court of Virginia has stated

"we must evaluate the nature and effect of the error to determine whether a clear miscarriage of justice occurred. We must determine whether the error clearly had an effect upon the outcome of the case." Brown v. Commonwealth, 8 Va. App. 126, 131, 380 S.E.2d 8, 10 (Va. App. 1989). Also, under appellate review, this Court "examine[s] the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987).

The Court of Appeals denied Howard's request to dismiss the case based on a violation of his Constitutional rights, writing that "[s]ettled principles provide that Howard's brief reference to the constitutional issue in his written motion was insufficient to preserve this aspect of the claim for appeal." (Citations omitted.) (App. Page 56.)

However, Howard did more than briefly reference the issue by in fact arguing in his brief that the "court ought to allow the appeal under this exception because if Howard's motion to dismiss is granted, Howard could not be convicted of these

charges…" Although Howard's point is not verbose, it is axiomatic that there is a miscarriage of justice when one is convicted and sentenced rather than having the charges dismissed. Indeed, there are few more serious consequences than a conviction and prison sentence.

The Court of Appeals also noted that "Howard's only basis for his claim of *constitutional* speedy trial error is that, assuming no tolling, his trial occurred 12 days beyond the limit of the speedy trial *statute* and, thus, that it violated not only the statute but also his constitutional speedy trial rights," and that "Howard has made no allegation that he was prejudiced by the fact that, assuming no tolling of the statute, his trial occurred 12 days beyond the five-month statutory limit." (Emphasis in original.) (App. Page 57.) Based on this, the Court of Appeals then concluded that "Howard has failed to prove a miscarriage of justice, and the ends-of-justice exception to Rule 5A:18 does not apply." (Id.)

The Court of Appeals properly drew a distinction under the current case law between a statutory violation of speedy trial

rights as set forth by the Virginia legislature, and a constitutional violation as set forth by the U.S. Supreme Court. This distinction is based on the U.S. Supreme Court requirement to balance four factors in determining whether a constitutional violation of a defendant's right to speedy trial under the Sixth Amendment as occurred, which are the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (U.S. 1972). The Virginia Supreme Court adopted this four point test in Whitlock v. Superintendent of the Virginia State Penitentiary, 213 Va. 429, 192 S.E.2d 802 (1972), and subsequent cases. The Court of Appeals erred, however, in refusing to consider Howard's constitutional claims because he failed to prove he was prejudiced. "Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." Moore v. Ariz., 414 U.S. 25, 26, 94 S. Ct. 188, 189 (U.S. 1973).

This federal constitutional balancing test, however, is in stark contrast to what need be proven for a violation of Virginia Code Section 19.2-243. The Virginia Supreme Court has directly dealt with the issue of prejudice in terms of the Virginia speedy trial statute, and wrote that the "issue whether a defendant's statutory right to a speedy trial has been violated does not rest, even in part, on the existence of prejudice from any delay in his trial date, or on his failure to make an affirmative demand for a speedy trial. Instead, the statute, subject to the exceptions stated therein, focuses strictly on the length of time that has passed from the date of the defendant's preliminary hearing in the district court or, if there was no preliminary hearing, from the date of indictment or presentment in the circuit court." Hudson v. Commonwealth, 267 Va. 36, 41, 591 S.E.2d 679, 681-682 (Va. 2004). Therefore, under the current case law, a defendant is afforded more protection by Virginia's speedy trial statute than by the Virginia Constitution, which distinction Howard moves this Court to overturn.

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). Howard submits that being forced to stand trial, convicted and sentenced when the charges should have been dismissed due to a violation of the speedy trial statute is the very prejudice the statute was enacted to avoid. Since the General Assembly did not require that a defendant prove any other prejudice when it enacted the statute, Howard submits to this Court that the ends-of-justice exception does apply, and that the Virginia Supreme Court ought to fashion a simple, straightforward speedy trial standard based on Virginia Code § 19.2-243, the Virginia Constitution and the U.S. Constitution.

It is clear that holding that a violation of the statute is a violation of the Virginia Constitution does not implicate the federal constitutional rights or balancing test set forth the U.S. Supreme Court since states "are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." Arizona v. Evans, 514 U.S. 1, 8, 115 S. Ct. 1185, 1190 (U.S. 1995). This is not to say that this Court is free to impose a new federal constitutional speedy trial standard in Virginia. Indeed, "[s]tate courts, in appropriate cases, are not merely free to – they are bound to – interpret the United States Constitution. In doing so, they are not free from the final authority of [the U.S. Supreme] Court. Arizona v. Evans, 514 U.S. 1, 8, 115 S. Ct. 1185, 1190 (U.S. 1995). Howard does not argue that this Court ought to reinterpret the U.S. Constitution, rather this Court ought to interpret the Virginia Constitutional standard set forth in Article I, Section 8 of the Virginia Constitution in light of the Virginia Code.

It is true that the Court of Appeals wrote that the Virginia Code Section 19.2-243 is "subordinate to the constitutional right to a speedy trial guaranteed by both the federal and state constitutions." Holliday v. Commonwealth, 3 Va. App. 612, 615, 352 S.E.2d 362, 364 (Va. Ct. App. 1987.) Therefore, this Court would clearly be required to overturn this ruling if it holds as Howard requests. However, since this Court recognized in Stephens that a right to speedy trial under the U.S. Sixth Amendment and Article I, Section 8 of the Virginia Constitution has "been supplemented by Code §§ 19.2-241 and 19.2-243, and held to be a legislative interpretation of what constitutes a speedy trial", (Stephens at 229-230), Howard submits that the Virginia Constitution does afford him a state constitutional right greater than the U.S. Constitutional right, and to the extent that Holliday or its progeny hold otherwise, Howard requests this Court overturn those cases.

Therefore, Howard requests this Court, under its authority to interpret the Virginia Constitution, to hold that the Virginia Constitution affords defendants an independent speedy trial right

greater than the U.S. Constitution, and to hold that a violation of the time frame set forth in Virginia Code § 19.2-243, with nothing more, is a constitutional violation of a right under Article I, Section 8 of the Virginia Constitution requiring that the case be dismissed. Howard further moves this Court to hold that 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. Howard requests this Court to hold that Virginia Code § 19.2-243 was violated in this case, that this is a violation of the Virginia Constitutional right to speedy trial, and to dismiss the charges against him due to a violation Article I, Section 8 of the Virginia Constitution right to speedy trial.

CONCLUSION

WHEREFORE, for the reasons stated above, the Court of Appeals committed reversible error for all the reasons set forth above, and the Virginia Supreme Court should hold that Howard's speedy trial rights were violated, and dismiss this case for the reasons stated.

RESPECTFULLY SUBMITTED,

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Seth C. Weston, Esq.
VSB# 47523
Law Office of Seth C. Weston, PLC
1031 1st Street, SW
Roanoke, Virginia 24016
(O) (540) 342-5608
(F) (540) 345-7481
Email: Seth@SCWestonlaw.com
Counsel for Howard

CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, Counsel for Appellant certifies as follows:

(1) The name and address of Appellant is Ronnie Lee Howard, whose counsel is Seth C. Weston, Esq., Bar #47523, Law Office of Seth C. Weston, PLC, 1031 1st Street, SW, Roanoke, Virginia 24016, (O) (540) 342-5608, (F) (540) 345-7481, email: seth@scwestonlaw.com. The name and address of Appellee is the Commonwealth of Virginia, whose counsel is Assistant Attorney General Rosemary V. Bourne, Bar #41290, 900 East Main Street, Richmond Virginia 23219, (O) (804) 786-4820, (F) (804) 371-0151.

(2) Counsel for defendant has been appointed.

(3) Counsel wishes to state orally in person his position on this brief.

(4) Fifteen paper copies of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of this Court this 26th day of October, 2010. An electronic copy of the brief and appendix was also filed with the clerk contemporaneous with

the brief. Three paper copies of the Brief and two paper copies of the Appendix along with one electronic copy on CD of the Brief and Appendix have been served, via UPS Ground Transportation, upon Counsel for Appellee this 26th day of October, 2010.

(5) Counsel has complied with Rule 5:26(h).

Seth C. Weston, Esq.