

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Archie Lavance Simmons — PETITIONER
(Your Name)

vs.
Harold W. Clarke, Director
Virginia Dept. of Corrections — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Virginia Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Archie Lavance Simmons
(Your Name)
Haynesville Correctional Center, Unit 17
363 Camp 17 Road
(Address)

Haynesville, VA 22472
(City, State, Zip Code)

(804) 333-3577
(Phone Number)

QUESTION(S) PRESENTED

Did the Supreme Court of Virginia
Commit reversible error, and violate
Petitioner's Constitutional Due process
rights, when it denied Petitioner's
habeas Corpus alleging violation
of Petitioner's right to effective
assistance of Counsel because
of a failure to assert defendant/
petitioner's right to a fair and
speedy trial?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ~~A~~ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 07/07/2017.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amendment Right to effective representation of counsel

4th & 14th Amendment Right to Due Process of Law

STATEMENT OF THE CASE

Statement of the Case and Material Proceedings Below

On August 4, 2014, a grand jury sitting for the City of Richmond directly indicted Archie Lavance Simmons, appellant, charging that on - About September 17, 2013, he did distribute heroin, a schedule I controlled substance, after having been previously convicted of a like offense, in violation of Va. Code § 18.2-248. On August 28, 2014, the case was scheduled for a trial by jury by defense and the Commonwealth through the Court's secretary on November 7, 2014.

On October 8, 2014, the Commonwealth filed a motion for joinder of the instant case with that of Simmons' co-defendant. On October 31, 2014 after hearing argument from counsel, the Honorable Richard D. Taylor, Jr. granted said motion. The court also vacated the instant case's existing trial date of November 7, 2014 from the Honorable Gregory L. Rupe's docket; and instructed counsel to schedule a pretrial conference with the Honorable Margaret P. Spencer's secretary. Accordingly, a pretrial conference to schedule a jury trial of both co-defendants was set for November 12, 2014. A trial date of February 10, 2015 was selected at the pretrial conference.

On January 20, 2015, defense counsel filed a motion to dismiss the indictment against Simmons on the grounds that his speedy trial rights were violated pursuant to Va. Code § 19.2-243. On February 6, 2015, after hearing evidence and argument of counsel, the Honorable Joi J. Taylor denied said motion. On February 10, 2015, defense counsel renewed his motion to dismiss the indictment against Simmons.

REASONS FOR GRANTING THE PETITION

Please see attached "Argument"
for Petitioner's Reasons for
Granting the Petition.

ARGUMENT

- I. The trial court erred in denying Simmons' motion to dismiss his indictment with prejudice, as his statutory right to a speedy trial was violated pursuant to Va. Code §19.2-243.

Standard of Review

"[T]he burden of demonstrating that a delay in commencing trial is excused under Code §19.2-243 lies upon the Commonwealth." Robinson v. Commonwealth, 28 Va. App. 148, 153 (1998). Proper assessment and determination of the merits of a statutory speedy trial 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" the court. Baity v. Commonwealth, 16 Va. App. 497, 503 (1993) (*en banc*). This Court gives deference to the trial court's findings of fact, but reviews the trial court's "statutory interpretations and legal conclusions *de novo*." Sink v. Commonwealth, 28 Va. App. 655, 658 (1998).

Analysis

Where "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..." Va. Code §19.2-243. The

commencement of the running of the five month period shall be from the date an indictment is found against the accused. Id. The five-month period translates "to 152 and a fraction days." Ballance v. Commonwealth, 21 Va. App. 1, 6 (1995).

If the accused is not tried within the requisite statutory time period, the burden is on the Commonwealth to explain and excuse the delay. Heath v. Commonwealth, 32 Va. App. 176, 181 (2000) (*en banc*), *aff'd*, 261 Va. 389 (2001). "[I]t is the prosecution which has the responsibility of vindicating society's interests in swift and certain justice." Fowlkes v. Commonwealth, 218 Va. 763, 766 (1978). To avoid the statutory remedy of permanent discharge from prosecution, "[t]he Commonwealth must prove that the delay was based on 'one of the reasons enumerated in [Va. Code §19.2-243] or on [the accused's] waiver, actual or implied, of his right to be tried within the designated period.'" Powell v. Commonwealth, 29 Va. App. 745, 748 (1999) (quoting Baker v. Commonwealth, 25 Va. App. 19, 22, *aff'd on reh'g en banc*, 26 Va. App. 175, 493 S.E.2d 687 (1997)). One of the aforementioned circumstances which tolls the running of the speedy trial period is when the delay is caused by 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...” Va. Code §19.2-243(4). In determining whether the accused or his counsel made, concurred in, or failed to object to a motion for a continuance, this Court must confine its review to the record that comes before it. Godfrey v. Commonwealth, 227 Va. 460, 464 (1984).

Simmons was indicted on August 4, 2014. Thus, the Commonwealth had until January 2, 2015 to commence Simmons’ trial. At no point during the proceedings against Simmons did either he, or defense counsel, request, concur to, or acquiesce to any action which constituted a waiver of his statutory speedy trial rights. While a trial date was initially scheduled for November 7, 2014, the Commonwealth moved for joinder of Simmons’ case with that of his co-defendant. When said motion was granted over defense counsel’s objection on October 31, 2014, defense counsel clearly stated his objection to “any continuance” resulting from said action. Concerned about a potential speedy trial issue, the trial court inquired about the ramifications of its ruling following defense counsel’s objections. However, the Commonwealth assured the trial court that there were no

such issues.²³ Consequently, the trial court instructed counsel to schedule a pretrial conference with Judge Spencer's secretary.

Said pretrial conference, whereby the parties would schedule a trial date, was held on November 12, 2014. The only date suggested by the trial court within the statutory speedy trial period for Simmons was December 8, 2014. Defense counsel stated his availability for trial on said date.²⁴ When co-defendant's counsel stated that he was unavailable, the trial court suggested several other dates which were beyond Simmons' speedy trial deadline; and ultimately selected a trial date of February 10, 2015. Under no obligation to do so, defense counsel initially suggested to the trial court that "[w]e may run into speedy trial issues on that date."²⁵ However, the trial court instructed counsel to "file a motion" to address any such issues.²⁶ Accordingly, defense counsel timely filed a "Motion to Dismiss" on such grounds January 20, 2015.

The Commonwealth argued that because defense counsel did not say "I object to that [February 10, 2015] date" at the pretrial conference, he

²³ October 31 Tr. at 14.

²⁴ Id. at 3-4.

²⁵ Id. at 4.

²⁶ Id. at 6.

was acquiescing to a tolling of his speedy trial period.²⁷ However, “[a] defendant does not waive his right to a speedy trial merely because he remains silent or does not demand that a trial date be set within the prescribed period.” Godfrey, 227 Va. at 463 (quoting Walker v. Commonwealth, 225 Va. 5, 10 (1983)). “An accused may ‘stand mute without waiving his rights so long as his actions [do] not constitute a concurrence in or necessitate a delay of the trial.’” Baker, 25 Va. App. at 23 (quoting Baity, 16 Va. App. at 501).

In Baker, this Court held that even when defense counsel suggested a trial date beyond his client’s speedy trial parameters, he was not precluded from seeking a dismissal; as he had previously objected to the Commonwealth’s motion for a continuance. Id. at 21. In the instant case, defense counsel not only objected to any continuance beyond Simmons’ initial trial date, but also tried to alert the trial court to the imminent speedy trial concerns regarding the February 10, 2015 trial date. Ultimately, “[p]roviding available dates and agreeing to a trial date that is outside the statutory period are not actions constituting a waiver of the statutory speedy trial requirement.” Id. at 24 (citing Taylor v. Commonwealth, 12 Va. App. 425, 429-430 (1991)).

²⁷ February 6 Tr. at 7.

The Commonwealth also argued that defense counsel's objection to a continuing Simmons' case at the October 31, 2014 hearing was insufficient to preserve his statutory speedy trial rights. Instead, the Commonwealth suggested that defense counsel was required to state his objection to the continuance at the November 12, 2014 hearing as well.²⁸ However, Simmons' case was not scheduled for a trial, or a hearing on a motion to continue that day. The trial court had already ruled that Simmons' trial date would be continued on October 31, 2014, over defense counsel's objection. Thus, defense counsel did not fail to timely object to the Commonwealth's motion to continue at the pretrial conference, as no such motion was before the trial court. See Va. Code §19.2-243(4). Nor was defense counsel under any obligation to "demand that a trial date be set within the prescribed period" when the trial court selected the February 10, 2015 trial date. Godfrey, 227 Va. at 463. Ultimately, the Commonwealth cannot point to any action or inaction on the part of Simmons or defense counsel which constitutes a waiver of speedy trial.

²⁸ February 6 Tr. at 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ansley Summers

Date: 11/09/2017