

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of July, 2017.

Archie Lavance Simmons,

Appellant,

against

Record No. 170073

Court of Appeals No. 1078-15-2

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Richmond shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee

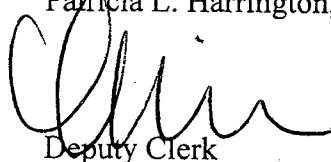
\$850.00 plus costs and expenses

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday the 8th day of April, 2016.

Archie Lavance Simmons,

Appellant,

against

Record No. 1078-15-2

Circuit Court No. CR14F-3576

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Richmond

Before Judges Humphreys, Chafin and Senior Judge Clements

This petition for appeal is granted in part and denied in part. And an appeal is awarded to the appellant from a judgment of the Circuit Court of the City of Richmond, dated May 7, 2015, with respect to the following assignment of error:

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 [Code §] 19.2-243.

No bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal in this case remains denied for the reason set forth in the order of this Court dated January 20, 2016.

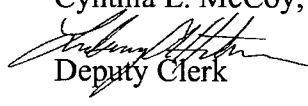
This Court's records reflect that Christopher M. Bradshaw, Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

By:

Cynthia L. McCoy, Clerk


Deputy Clerk

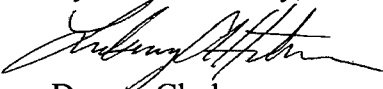
CERTIFICATE OF CLERK

I, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, do hereby certify that on April 8, 2016 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day sent to the trial court indicated in the order and to all counsel of record.

Given under my hand this 8th day of April, 2016.

By:

Cynthia L. McCoy, Clerk



Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 20th day of January, 2016.

Archie Lavanace Simmons,

Appellant,

against

Record No. 1078-15-2

Circuit Court No. CR14F-3576

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Richmond

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant contends the trial court erred in denying his motion to dismiss. He claims his trial, which commenced on February 10, 2015, violated his statutory right to a speedy trial under Code § 19.2-243. Code § 19.2-243 provides 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; and if the accused is not held in custody but has been recognized for his appearance in the circuit court to answer for such offense, he shall be forever discharged from prosecution therefor if no trial is commenced in the circuit court within nine months from the date such probable cause was found.

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.

If an indictment or presentment is found against the accused but he had 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.

In Robinson v. Commonwealth, 28 Va. App. 148, 152, 502 S.E.2d 704, 706 (1998) (quoting Ballance v. Commonwealth, 21 Va. App. 1, 6, 461 S.E.2d 401, 403 (1995)), we held, “Under Code § 19.2-243, the Commonwealth must commence trial within five months, which ‘translates to 152 and a fraction days.’”

Appellant was arrested upon a direct indictment on August 8, 2014. Thus, the statutory clock to try appellant began to run August 9, 2014. See Jiron-Garcia v. Commonwealth, 48 Va. App. 638, 646, 633 S.E.2d 744, 748 (2006).

Counsel was appointed for appellant on August 18, 2014, and the matter was continued to the September docket call. The matter was set for a jury trial on November 7, 2014. However, at a hearing on October 31, 2014, the trial court granted the Commonwealth’s motion for a joint trial for appellant and his co-defendant, Saunders Lockley.

At a pretrial hearing on November 12, 2014, the trial court addressed the setting of a joint jury trial for appellant and Lockley. The trial court indicated it had available December 8, 2014, January 12, 13, and 27, 2015, and February 9, 10, and 17, 2015. Appellant’s attorney indicated he was available on February 10, 2015, but said that “[w]e may run into speedy trial issues on that date.” The December 8, 2014 date was proposed, but Lockley’s attorney was unavailable that day. The January dates and February 9 were unavailable either for Lockley’s attorney or the prosecutor. As a result, the trial was set for February 10, 2015. The trial court stated that if there were speedy trial issues defense counsel should file a motion. The order containing the November 12, 2014 continuance does not reflect an objection by appellant or his attorney.

On January 20, 2015, appellant filed a motion to dismiss, claiming a violation of his statutory speedy trial right. The trial court denied the motion, finding that appellant had failed, at the November 12, 2014 hearing, to object to the trial date of February 10, 2015. Thus, the trial court concluded, the period of delay from November 12, 2014 to February 10, 2015 was not chargeable to the Commonwealth for the speedy trial calculation.

Under Code § 19.2-243(4), the five-month limitation period does not apply to such periods of time that the failure to try appellant 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 for the Commonwealth

In Howard v. Commonwealth, 281 Va. 455, 460-61, 706 S.E.2d 885, 888 (2011), the Supreme Court of Virginia found:

Once the initial trial date is set, every continuance postpones the trial date regardless of the reason for the continuance or the identity of the moving party. This is true whether or not the postponement extends the trial date beyond the statutorily required date. The provisions of paragraph 4 of Code § 19.2-243 relevant in this case clearly demonstrate that in order to avoid the tolling provision, the defendant must be adverse to the granting of the continuance and must affirmatively express his objection even when a new trial date is set within the speedy trial time limits for the commencement of the trial.

Because the defendant did not affirmatively express an objection to the trial court's setting of the trial date, the resulting continuance was not chargeable to the Commonwealth. See id. at 461, 706 S.E.2d at 888.

The record does not reflect that appellant made an affirmative objection to the matter being continued on November 12, 2014 to a trial date on February 10, 2015. Thus, the period of this delay was not chargeable to the Commonwealth and the trial court did not err in finding appellant was not denied his statutory right to a speedy trial.

II. In a jury trial, appellant was tried for distributing heroin as a third or subsequent offense. A confidential informant, who was paid for assisting the police, testified regarding making a controlled purchase of drugs from appellant. At the conclusion of the evidence, the trial court granted Instruction 1, a model jury instruction regarding the jury's determination of witness credibility in general. See Va. Model Jury Instr. Criminal No. 2.500. The trial court denied defendant's proposed jury instruction stating:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the

informer's testimony has been affected by interest or by prejudice against a defendant.

Appellant challenges this ruling on appeal.

"A reviewing court's responsibility in reviewing jury instructions is 'to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.'" Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988) (quoting Swisher v. Swisher, 223 Va. 499, 503, 290 S.E.2d 856, 858 (1982)). "If the principles set forth in a proposed instruction are fully and fairly covered in other instructions that have been granted, a trial court does not abuse its discretion in refusing to grant a repetitious instruction." Joseph v. Commonwealth, 249 Va. 78, 90, 452 S.E.2d 862, 870 (1995).

Asserting federal court authority, appellant maintains that it was error for the trial court to reject an instruction specifically addressing credibility of a confidential informant. However, the Supreme Court of Virginia has found that "the law of this Commonwealth does not require a fact finder to give different consideration to the testimony of a government informant than to the testimony of other witnesses." Lovitt v. Warden, 266 Va. 216, 252, 585 S.E.2d 801, 822 (2003).

In this case, the jury was properly instructed regarding judging the credibility of witnesses. We find no abuse of discretion in the trial court's decision to refuse the proffered instruction regarding the credibility of a confidential informant.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Christopher M. Bradshaw, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee \$400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Mary K. P. Ring

Deputy Clerk