

VIRGINIA: IN THE CIRCUIT COURT FOR GREENSVILLE COUNTY

Commonwealth of Virginia

v.

Case No. CR06-9385-00, 01, 02, 03, 04

Jeffrey Keith Winston

Defendant

**MOTION AND MEMORANDUM OF LAW
TO DISMISS INDICTMENTS**

Comes Now, the Defendant, by counsel and moves to dismiss the indictments pursuant to 19.2-243 of the Code of Virginia (1950 as amended), and the 5th, 6th and 14th Amendments of the United States Constitution and in support thereof states as follows:

Facts:

The Defendant was charged with the following felonies:

| | |
|---------------------------|-----------|
| Attempted Capital Murder | 18.2-25 |
| Abduction | 18.2-47 |
| Forcible Sodomy | 18.2-67.1 |
| Aggravated Sexual Battery | 18.2-67.3 |
| Attempted Rape | 18.2-67.5 |

Each offense was alleged to have occurred on April 15, 2006 and the defendant was initially charged by warrant in the General District Court for Greensville County Virginia. The defendant was arrested on April 16, 2006, and has continuously been held

without bail since this date. (A copy of the Bail Order is attached hereto and incorporated herein).

On June 29, 2006, the General District Court for Greensville County Virginia conducted a probable cause hearing and found sufficient evidence to certify each charge to the grand jury having found probable cause to believe the accused committed the felony charged in the warrants. (A copy of each warrant is attached hereto and incorporated herein).

On August 1, 2006, the Grand Jury for Greensville County entered indictments for each charge except changing the aggravated sexual battery charge to a Malicious Wounding charge in violation of 18.2-51 of the Code of Virginia (1950 as amended). (A copy of the indictments are attached hereto and incorporated herein).

The trial date was fixed and set for September 28, 2006. At that hearing, by agreement, the Defendant continued his case to October 5, 2006 for arraignment. (A copy of the September 28, 2006 continuance order is attached hereto and incorporated herein).

On October 5, 2006, the Defendant appeared, requested a jury trial and such matter was set for trial on January 11, 2007 for trial by jury. (A copy of the October 5, 2006 continuance order is attached hereto and incorporated herein).

Discussion:

§ 19.2-243. Limitation on prosecution of felony due to lapse of time after finding of probable cause; misdemeanors; exceptions

Where a general district court has found that there is probable cause to believe that the accused 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.

The Commonwealth has clearly exceed the statute of limitation to bring this matter to trial. The time period attributable to the Commonwealth is as follows:

| | |
|------------------------------------|----------|
| June 29, 2006 – September 28, 2006 | 91 Days |
| October 5, 2006 – January 18, 2007 | 105 Days |

Total Time: 197 Days

The Commonwealth had Five Months to bring this matter to trial. The five-month requirement of this section translates to 152 and a fraction days. The Commonwealth is required to commence trial within that time. [Ballance v. Commonwealth, 21 Va. App. 1, 461 S.E.2d 401 \(1995\)](#); [Robinson v. Commonwealth, 28 Va. App. 148, 502 S.E.2d 704 \(1998\)](#). Under § 1-13.3 [see now [§ 1-210](#)], when a statute or rule of court requires a notice to be given or any other act to be done within a certain time after any event or judgment, that time shall be in addition to the day on which the event or judgment took place; thus here, the five month speedy trial time allowance under this section did not begin to run until the day after defendant's probable cause hearing. [Randolph v. Commonwealth, 22 Va. App. 334, 470 S.E.2d 132 \(1996\)](#). The five-month period begins to run on the day after the preliminary hearing at which probable cause is found. [Robinson v. Commonwealth, 28 Va. App. 148, 502 S.E.2d 704 \(1998\)](#). Accordingly, in this case, the statute began to run on June 30, 2006. The legislative purpose of this limitations statute was to clarify when the right to a speedy trial is infringed and to simplify the courts' application of it. [Holliday v. Commonwealth, 3 Va. App. 612, 352 S.E.2d 362 \(1987\)](#). The speedy trial statute was enacted to clarify and augment the constitutional guarantees of the [Sixth Amendment to the United States Constitution](#) and [Va. Const., Art. I, § 8](#). [Bunton v. Commonwealth, 6 Va. App. 557, 370 S.E.2d 470](#)

[\(1988\)](#). This section must be construed so as to assure both a defendant's constitutional right to a speedy trial and society's interest in swift and certain justice. [Clark v. Commonwealth, 4 Va. App. 3, 353 S.E.2d 790 \(1987\)](#).

The Defendant was arraigned on October 5, 2006 at which time the Court continued the trial to January 18, 2007. There were no efforts that tolled the statute from October 5, 2006 to January 18, 2007. Accordingly, each day is chargeable against the Commonwealth totally 105 days. The affirmative duty to act in bringing about a speedy trial rests with the Commonwealth, and the accused may stand mute without waiving his right so long as his actions do not constitute a concurrence in or necessitate the delay. [Cantwell v. Commonwealth, 2 Va. App. 606, 347 S.E.2d 523 \(1986\)](#). An accused may remain silent, making no demands, without forfeiting the right to have the charges against him or her timely heard. [Bunton v. Commonwealth, 6 Va. App. 557, 370 S.E.2d 470 \(1988\)](#). "The failure ... of ... [appellant] to insist at the docket call on [February 22, 1994], to set the trial within the prescribed period did not extend the period within which [appellant] must be brought to trial." [Stinnie v. Commonwealth, 21 Va. App. 610, 466 S.E.2d 752 \(1996\)](#). "[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." [Stinnie v. Commonwealth, 21 Va. App. 610, 466 S.E.2d 752 \(1996\)](#). Proof that the accused remained silent or that he did not demand a trial is not sufficient to overcome the prima facie case made by accused when he has established the fact that three regular terms of the circuit court have been held without trial of an indictment for a felony pending therein. [Flanary v. Commonwealth, 184 Va. 204, 35 S.E.2d 135 \(1945\)](#). The mere silence of the accused or his failure to demand that his case be submitted to a jury within the time prescribed by this section does not estop him from claiming its benefits. [Howell v. Commonwealth, 186 Va. 894, 45 S.E.2d 165 \(1947\)](#). The silence of the defendant except to request separate trials is not sufficient to preclude defendant from availing himself of the protections of this section or the constitutional guarantee of a speedy trial. [Walker v. Commonwealth, 225 Va. 5, 301 S.E.2d 28 \(1983\)](#). 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 v. Commonwealth, 227 Va. 460, 317 S.E.2d 781 \(1984\).](#)

The defendant's attorney's failure to insist on a trial date within the statutory limit does not dispense with the requirements of this section. [Nelms v. Commonwealth, 11 Va. App. 639, 400 S.E.2d 799 \(1991\).](#) The accused does not waive his right to a speedy trial simply by failing to oppose a motion for a continuance made by the Commonwealth. When the accused and his attorney do not object to a continuance, it is not the same as the accused being a proponent of the continuance. [Pittman v. Commonwealth, 10 Va. App. 693, 395 S.E.2d 473 \(1990\).](#)

In this case, the Order of the Circuit Court from October 5, 2006 clearly violated the speedy trial rights, even if the date was not objected to by the Defendant or his counsel. The Defendant has remained in continuous custody since April 16, 2006, and the Commonwealth had 152 days to try the Defendant from June 30, 2006. That date has passed, the Defendant's Sixth amendment rights have now been violated, and the only remedy available to the Court is to dismiss with prejudice the indictments pending against him.

WHEREFORE, the Defendant prays that this Court dismiss the indictments against him and to grant him any further relief as may be appropriate under the circumstances.

Respectfully Submitted,

Jeffrey Winston

By: _____

Counsel

Timothy V. Anderson
Anderson & Associates, PC
2396 Court Plaza Dr, Ste 200
Virginia Beach, VA 23456
(757) 301-3636
VSB 43803

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15th day of February 2007 to:

Patricia Watson, Commonwealth's Attorney, 202 Hickford Ave, Emporia, VA 23487.

Timothy V. Anderson