

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Moon, Judges Benton, Coleman, Willis,  
Elder, Bray, Fitzpatrick, Annunziata and Overton  
Argued at Richmond, Virginia

JAMES THOMAS STINNIE, JR.

v. Record No. 0706-94-2

COMMONWEALTH OF VIRGINIA

OPINION BY  
JUDGE ROSEMARIE ANNUNZIATA  
JULY 23, 1996

UPON A REHEARING EN BANC

FROM THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE  
Jay T. Swett, Judge

Richard A. DeLoria for appellant.

Michael T. Judge, Assistant Attorney General  
(James S. Gilmore, III, Attorney General, on  
brief), for appellee.

By opinion issued February 6, 1996, a panel of this Court reversed the conviction for statutory burglary of James Thomas Stinnie, Jr. on the ground that the Commonwealth failed to commence the trial of his case within five months of finding probable cause, in violation of Code § 19.2-243. Stinnie v. Commonwealth, 21 Va. App. 610, 466 S.E.2d 752 (1996). A rehearing en banc was granted to determine whether the delay in the commencement of Stinnie's case is properly attributable to Stinnie under the speedy trial statute. We conclude that the delay was attributable to Stinnie and affirm his conviction.

Code § 19.2-243 provides, in part:

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 . . . .

\* \* \* \* \*

The provisions of this section shall not  
apply to such period of time as the failure  
to try the accused was caused:

\* \* \* \* \*

4. By continuance granted on the motion  
of the accused or his counsel . . . .

The district court determined probable cause existed on October 14, 1993. Stinnie's original trial date was set for February 9, 1994. In late January, Stinnie requested additional time to prepare his case after he was permitted to dismiss his court-appointed counsel. At that time, he did not request a specific trial date or a continuance for any particular period of time. On February 2, 1994, the trial court heard argument on Stinnie's motion and continued the case until docket call on February 22, 1994, which was the court's term day. On term day, the trial court scheduled Stinnie's new trial date for April 7, 1994.

Both parties agreed that the time between Stinnie's original trial date of February 9 and the date of the docket call, February 22, 1994, was chargeable to Stinnie and that the critical time for the purpose of deciding the speedy trial issue is the period from February 22 to April 7. If that time period

is not considered for speedy trial purposes, Stinnie was brought to trial within the five-month period required by the statute. If that period is considered, on the theory that the continuance lasted only until February 22, Stinnie's trial was held twelve days beyond the last possible day to try him under the speedy trial statute.

Under the facts of this case, we hold that the period between February 9 and April 7 is properly excluded from the provisions of Code § 19.2-243. We are not persuaded by the argument that Stinnie's motion for continuance lasted only until term day, February 22, a day on which the trial court clearly would not have intended to conduct trial.

The delay in the commencement of trial was provided solely for Stinnie's benefit. The failure to try Stinnie in accordance with Code § 19.2-243 resulted from his motion for time to prepare for trial pro se after dismissing counsel. Unlike a continuance granted to an individual accused of a felony to initially obtain counsel, a continuance of a trial previously set, requested by the accused to prepare for trial, benefits only him. Such delays are not inherent in the orderly process of fixing a trial date and will extend the statutory time limitation for the commencement of the trial. See Baity v. Commonwealth, 16 Va. App. 497, 507, 431 S.E.2d 891, 897 (1993) (citing Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987), cert. denied, 485 U.S. 971 (1988)); Nelms v. Commonwealth, 11 Va. App. 639,

641-42, 400 S.E.2d 799, 800-01 (1991); Cantwell v. Commonwealth, 2 Va. App. 606, 609-13, 347 S.E.2d 523, 524-27 (1986).

Stinnie contends that, notwithstanding his motion for a continuance, he did not waive his right to a speedy trial and that any delay in rescheduling the trial to a date beyond that imposed by the requirements of Code § 19.2-243 is a violation of that right. However, adoption of Stinnie's position would effectively nullify the principle of law that delay caused by the defendant is excluded from the requirements of Code § 19.2-243, and would place upon the Commonwealth a continuing duty to ensure a trial within the appropriate time limitations to a defendant whose motion for a continuance has been granted. This position is supported neither by the statute nor the relevant case law. Code § 19.2-243 expressly excludes the application of its provisions to "such period of time as the failure to try the accused was caused . . . [b]y continuance granted on [the accused's] motion." Based on that statute, both the Supreme Court of Virginia and this Court have held that where the accused affirmatively acts and invites the delay in the commencement of trial by such motion, there is no violation of his speedy trial right. O'Dell v. Commonwealth, 234 Va. 672, 681, 364 S.E.2d 491, 496, cert. denied, 488 U.S. 871 (1988); Shearer v. Commonwealth, 9 Va. App. 394, 402, 388 S.E.2d 828, 832 (1990).

Accordingly, Stinnie's conviction is affirmed.

Affirmed.

Elder, J., with whom Benton, J., joins, dissenting.

For the reasons stated in the majority opinion of the panel decision I would reverse appellant's conviction.