

COURT OF APPEALS OF VIRGINIA

Record No. 1988-25-3

NOAH BRYAN ERVIN HORN
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Beales, Lorish and Duffan

Argued at Lexington, Virginia

Opinion Issued October 6, 2026

FROM THE CIRCUIT COURT OF THE CITY OF BRISTOL

Sage B. Johnson, Judge

Joshua P. Sutherland, III (Holston Legal Group, on briefs), for appellant.

Israel-David J.J. Healy, Assistant Attorney General (Jay Jones, Attorney General, on brief), for appellee.

PUBLISHED OPINION BY JUDGE LISA M. LORISH

Noah Bryan Ervin Horn argues that the Commonwealth violated his statutory right to a speedy trial. In 2023, Horn was arrested for charges brought by the Commonwealth and was also indicted on federal charges. While he remained incarcerated in the same jail for over two years, he was variously in state and federal custody. Virginia's speedy trial statute can toll the time period for trial for many express, and implied, reasons. But the fact that the Commonwealth did not know a defendant was back in its custody following execution of a federal writ of habeas corpus *ad prosequendum* is not one of those reasons. And the capias for failing to appear in state court (while in federal custody) did not toll the statutory speedy trial clock here. For these reasons, we reverse.

BACKGROUND

The facts are uncontested. On April 11, 2023, Bristol police arrested Horn on an outstanding warrant. After he was arrested, a federal agent from the Drug Enforcement Administration arrived at the scene, served him with a federal search warrant for “areas within his control,” and found a firearm in his bag. Horn was a convicted felon and was thus charged with being a felon in possession of a firearm under Virginia law.

Horn was held on state charges without bond at the Southwest Virginia Regional Jail in Abingdon. He waived a preliminary hearing, and the district court certified his case to the circuit court. On August 31, 2023, the circuit court set a trial date for November 30. Before the trial could occur, the United States Marshal for the Western District of Virginia took custody of him under a writ of habeas corpus *ad prosequendum* on September 21, though he remained in the regional jail. Horn was then federally indicted on October 26 for participating in a conspiracy to sell methamphetamine. The parties agree that he was held in continuous federal custody from at least October 26, 2023 through December 4, 2024. Horn remained at the Southwest Virginia Regional Jail during his time in federal custody. His ultimate indictment for the Virginia state offense of being a felon in possession of a firearm occurred on November 6, 2023 while he was in federal custody.

Horn was also in federal custody on November 30, 2023 when he did not appear for his state trial set for that date. On December 4, 2023, the state trial court issued a capias for his failure to appear.

On April 22, 2024, Horn pleaded guilty to a federal charge of conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine. He remained in federal custody until after his sentencing on December 4, 2024, and received more than 12 years for the conspiracy to distribute. That same day, the U.S. Marshal returned

him to the Commonwealth's custody. The federal writ of habeas corpus *ad prosequendum* that transferred Horn to federal custody was filed on December 5, 2024 as part of Horn's federal case, Case 1:23-cr-00024, ECF No. 474, attests to a "custody assumed" date as September 21, 2023, a "returned" date as December 4, 2024, and includes the statement that "HORN SENTENCED 12/04/2024 TO AN ACTIVE SENTENCE. RETURN TO STATE CUSTODY, DETAINER FORTHCOMING."

Once Horn was back in state custody, he sent letters to the clerk of the trial court in February and April 2025—asking that the court set his state charges for a hearing, asserting his right to a speedy trial, and following up on his application for court-appointed counsel.¹ The clerk forwarded the letters to Horn's attorneys of record. On April 7, 2025, following receipt of the second letter, officers from the Bristol Police Department served Horn with the outstanding *capias* for failing to appear for his state jury trial back in November 2023, when he was in federal custody. On April 9, 2025, the trial court appointed Horn new counsel for his failure to appear and set all pending matters for trial on June 6, 2025.

At the start of trial, on June 6, Horn moved to dismiss the indictments against him, arguing that the Commonwealth had violated his statutory and constitutional speedy trial rights. The Commonwealth then moved to continue the trial, and Horn did not object. The trial court held a hearing on the motion to dismiss the indictment on June 24, 2025. At the hearing, the

¹ In particular, Horn's February 24, 2025 letter stated that he

need[ed] to be placed back on the docket [sic] at your earliest convenience, as I am stuck in limbo in this county jail and cannot be transferred to federal prison until these issues are resolved. Upon receiving [sic] my federal sentence, I was immediately placed back in state custody and filled out another court appointed council application although I never went for arraignment. . . . [I] have currently been incarcerated in Abingdon Regional Jail for almost 2 years. Any assistance in getting this matter resolved in a speedy fashion would be greatly appreciated.

Commonwealth agreed that Horn’s statutory speedy trial clock began on the date of his state indictment. They argued, however, that it was paused when he went into federal custody, and did not resume until the capias was served on him on April 7, 2025.

The trial court denied Horn’s motion to dismiss his indictment. In an opinion letter, the court found that while Horn had been in custody in excess of the statutory speedy trial period, he was responsible for all but 84 days of that time. Relevant here, it found that the time ranging from his first trial date until his arrest on the capias—November 30, 2023 to April 7, 2025—was tolled because of Horn’s failure to appear at his state trial and the resulting capias. The court found that the period from April 7, 2025 until June 6, 2025 ran against the Commonwealth. Horn ultimately entered a conditional plea, reserving the right to appeal the denial of his motion to dismiss.

ANALYSIS

A defendant charged with a felony who is “held continuously in custody [after a probable cause finding], shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months.” Code § 19.2-243. “The five-month requirement of Code § 19.2-243 translates to 152 and a fraction days.” *Turner v. Commonwealth*, 68 Va. App. 72, 78 (2017) (quoting *Moten v. Commonwealth*, 7 Va. App. 438, 441 (1988)). If no trial takes place within that time period, a defendant “shall be forever discharged from prosecution for such offense.” Code § 19.2-243. “On appeal, a statutory speedy trial challenge presents a mixed question of law and fact. The Court reviews legal questions de novo, while giving deference to the trial court’s factual findings.” *Young v. Commonwealth*, 297 Va. 443, 450 (2019).²

² Horn separately argued that his right to speedy trial under the United States Constitution was violated here. Because we agree that his statutory speedy trial right was violated, we do not address the constitutional question. See *Taylor v. Commonwealth*, 78 Va. App. 147, 157 (2023) (“[I]f a case can be decided on either of two grounds, one involving a constitutional question, the

The parties agree that Horn was in exclusive state custody as of December 4, 2024 and that more than 152 days passed before he appeared in court on June 6, 2025 and moved to dismiss.³ The question is whether any exceptions to the speedy trial statute excuse the Commonwealth’s delay in trying Horn during this period.⁴ “[T]he burden of demonstrating that a delay in commencing trial is excused under Code § 19.2-243 lies upon the Commonwealth.” *Heath v. Commonwealth*, 32 Va. App. 176, 181 (2000) (alteration in original) (quoting *Robinson v. Commonwealth*, 28 Va. App. 148, 153 (1998)).

“In the speedy trial statute, which was last amended in 2025, the General Assembly identified eight periods of time that are excluded from the speedy trial clock.” *McCalla v. Commonwealth*, 87 Va. App. 564, 574 (2026). We have explained that “the speedy trial time frame is ‘not absolute’ and can be tolled in several enumerated circumstances.” *Wingate v. Commonwealth*, 88 Va. App. 298, 308 (2026) (quoting *Young*, 297 Va. at 451). The tolling occurs for delay caused:

1. By evaluations or restoration related to his competency or insanity pursuant to Chapter 11 (§ 19.2-167 et seq.) or by reason of his confinement in a hospital for care and observation;
2. By the witnesses for the Commonwealth being enticed or kept away, or prevented from attending by sickness or accident;

other a question of statutory construction or general law, the Court will decide only the latter.” (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

³ The federal writ of habeas corpus *ad prosequendum* that transferred Horn to federal custody in the first place lists the “custody assumed” date as September 21, 2023 and the “returned” date as December 4, 2024.

⁴ Horn also argues that the statutory speedy trial clock began to run from the time of his state indictment—November 6, 2023—and was never tolled while he was under federal custody. We need not reach the question of whether the Commonwealth retained “continuous custody” over Horn for speedy trial purposes between November 6, 2023 and December 4, 2024 since we find a clear statutory violation after the December 4 period.

3. By the granting of a separate trial at the request of a person indicted jointly with others for a felony;
4. 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, or by reason of his escaping from jail or failing to appear according to his recognizance;
5. By continuance ordered pursuant to subsection I or J of § 18.2-472.1 or subsection C or D of § 19.2-187.1;
6. By the inability of the jury to agree in their verdict; or
7. By a natural disaster, civil disorder, or act of God.

Code § 19.2-243.

We recently outlined the history of this statute in *McCalla*, along with the many appellate decisions that have interpreted the statute to include textual, and extratextual, exceptions to the speedy trial clock. *See* 87 Va. App. at 576-81. “[T]he exceptions stated in the statute are not meant to be all-inclusive, and other exceptions of a similar nature are implied.” *Hudson v. Commonwealth*, 267 Va. 36, 41 (2004). The statute’s purpose is to “provide for speedy trial exceptions in circumstances ‘beyond the control of the trial judge and the parties,’ when delays are warranted to ‘ensure a fair trial to both the accused and the Commonwealth.’” *Wallace v. Commonwealth*, 65 Va. App. 80, 94 (2015) (quoting *Schwartz v. Commonwealth*, 45 Va. App. 407, 426 (2005)). Thus, “[t]he exceptions, both express and implied, often look to the defendant’s actions that tend to delay the trial.” *Moten*, 7 Va. App. at 442.

That exclusions for periods of delay caused by the defendant count against the defendant is clear in the statute’s text. For example, if a defendant’s mental state requires a competency evaluation, that time does not count against the Commonwealth. Code § 19.2-243(1). Likewise, if the defendant asks for a continuance, that time counts against the defendant. Code § 19.2-243(4); *see also Wingate*, 88 Va. App. at 310-11. So too, if the “failure to try the accused was caused . . .

by reason of his escaping from jail,” the five-month period that would ordinarily apply when the accused is held continuously in custody is understandably tolled. Code § 19.2-243(4). Similarly, the statute tolls the normal nine-month deadline for defendants released on their own recognizance if they fail to appear for court. *Id.*

While the statute explicitly refers to delays caused by a defendant “failing to appear according to his recognizance,” the trial court concluded that the statute effectively carved out delays relating to any failure to appear. The trial court thus determined that any delay up to April 7, 2025, when the capias for his failure to appear was served on Horn, counted against him. Because the exceptions in the statute are not all-inclusive, and “other exceptions of a similar nature are implied,” we must consider whether a capias issued for a failure to appear while in federal custody is similar to a defendant’s failure to appear while on bond. *Hudson*, 267 Va. at 41.

Ultimately, we disagree that the statute’s exclusion for a defendant on bond who fails to appear can be extended to apply when a capias is issued to a defendant in custody. The nature and purpose of the statute’s exclusion preclude such a broad reading. The statute sets out two different speedy trial clocks—one for defendants in custody, and one for defendants released on bond. A defendant who escapes from custody is unable to claim the benefit of the shorter timeline that applies to defendants in custody. That would allow “practical mischief” and potential gamesmanship on the part of the defendant,” things the speedy trial statute has long been interpreted to prevent. *McCalla*, 87 Va. App. at 576 (quoting *Commonwealth v. Adcock*, 49 Va. (8 Gratt.) 661, 675 (1851)). Likewise, if a defendant released on bond fails to show up for court—the primary obligation placed on every defendant released on recognizance—he should be unable to claim the benefit of the timeline that applies to bonded defendants if they fail to show up for court. It would be the epitome of practical mischief if a defendant could abscond

from pretrial release and then be “forever discharged from prosecution” after the speedy trial deadline expired. Code § 19.2-243.

Here, however, the defendant did not escape or abscond from release. It is uncontested that he remained at the Southwest Virginia Regional Jail in Abingdon from April 11, 2023 through his final state trial date on July 30, 2025. The Commonwealth bears the burden of “demonstrating that a delay in commencing trial is excused under Code § 19.2-243.” *Heath*, 32 Va. App. at 181. Yet the Commonwealth did not put on any evidence at the hearing on Horn’s motion to dismiss to show that it was in any way Horn’s fault that he was not transported from jail to the court for his November 30, 2023 trial date. So, we cannot say that the capias issued here was of a similar nature to the exclusions in the statute that contemplate delay caused by the defendant.

Even if this capias did toll the statute, however, it would have only been for the period that Horn was out of state custody. When a defendant released on his own recognizance failed to appear, we explained that the statute was tolled “until at least the time of his arrest on [] capias.” *McCray v. Commonwealth*, 44 Va. App. 334, 345 (2004). At this point, the defendant was back in state custody. Likewise, the Supreme Court reasoned that the speedy trial clock restarts after a bonded defendant who fails to appear is rearrested on capias, because rearrest begins a period of “second confinement.” *Robbs v. Commonwealth*, 252 Va. 433, 434-35 (1996). In this unusual scenario, Horn’s second confinement for the felon in possession offense began when he was back in state custody, on December 4, 2024, and not when he was served with the capias on April 7, 2025, while already in state custody. Thus, even if the capias tolled the speedy trial clock, the tolling would have only lasted until December 4, 2024 when Horn was back in state custody.

On appeal, the Commonwealth also suggests that the *capias* tolled the speedy trial clock. But here, they suggest that the speedy trial clock was tolled because Horn was ultimately responsible for all subsequent delays because he committed a federal crime. But Horn’s federal prosecution, however, was complete by December 4, 2024, at which point he was back in state custody. So even assuming he was responsible for delays from his federal prosecution, that would not toll the clock after December 4, 2024.

The Commonwealth finally suggests that the December 4, 2024 date does not control because they did not have knowledge that Horn was returned to state custody at that point. Therefore, they should not be responsible for the delay between December 4, 2024 and when they were ultimately “made aware” that Horn was in state custody on April 7, 2025 (after Horn twice wrote to the court asking for his case to be resolved). We disagree that the statute contemplates tolling based on the Commonwealth’s lack of knowledge. To the contrary, the overarching point of the speedy trial statute is “to assure the defendant’s right to a speedy trial and society’s interest in ‘swift and certain justice.’” *Clark v. Commonwealth*, 4 Va. App. 3, 5-6 (1987) (quoting *Fowlkes v. Commonwealth*, 218 Va. 763, 766-67 (1978)). There are exceptions, to be sure, to avoid gamesmanship by the defendant (discussed above) and for circumstances “‘beyond the control of the trial judge and the parties,’ when delays are warranted to ‘ensure a fair trial to both the accused and the Commonwealth.’” *Wallace*, 65 Va. App. at 94 (quoting *Schwartz*, 45 Va. App. at 426). But awareness that Horn was sitting in state custody, waiting for trial on his state offenses, was not beyond the parties’ control.

Dual prosecutions are not uncommon. And our caselaw is clear that “[p]rinciples of comity require that when the federal *ad prosequendum* writ is satisfied, the receiving federal jurisdiction return the incarcerated accused to the sending sovereign.” *Jiron-Garcia v. Commonwealth*, 48 Va. App. 638, 647-48 (2006). Moreover, “[o]nce the terms of the federal *ad*

prosequendum writ have been fulfilled, the incarcerated accused's unavailability by reason of the federal writ ends, and the statutory clock resumes running." *Id.* at 650. Thus, the Commonwealth was on general notice that in cases with federal writs, the statutory speedy trial clock starts running after the prisoner returns to state custody. And the Commonwealth was on specific notice here that Horn was returned to state custody given the federal writ of habeas corpus *ad prosequendum* filed in Horn's federal case on December 5, 2024, which stated a "returned" date as December 4, 2024 (as signed by the United States Marshal) and which further notes in all capital letters, "HORN SENTENCED 12/04/2024 TO AN ACTIVE SENTENCE. RETURN TO STATE CUSTODY." The burden was not on Horn to take any action to start up the speedy trial clock. In fact, even after Horn first took the initiative to write to the court and ask for this case to proceed, his trial date was not scheduled for another five months.

More than 152 days expired between December 4, 2024 and when Horn appeared in court on June 6, 2025 and moved to dismiss the indictment. Under the speedy trial statute, he was not timely tried for his offense of being a felon in possession of a firearm. He is therefore discharged from prosecution for this offense under Code § 19.2-243. This ruling has no impact on Horn's federal conviction for conspiracy to distribute methamphetamine.

CONCLUSION

For these reasons, we reverse the judgment of the circuit court and dismiss the indictment.

Reversed and final judgment.