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2023 MAR 13 AM 8:27

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

V.

FE-2022-920

TROY WESLEY REYNOLDS

COMMONWEALTH'S RESPONSE TO MOTION TO DISMISS

STATEMENT OF FACTS

1. The Commonwealth stipulates that Troy Wesley Reynolds was arrested on the pending charges on October 27, 2022, and has been continuously detained.
2. A preliminary hearing was held on December 1, 2022. The Juvenile and Domestic Relations Court certified nine counts of Child Endangerment to the Grand Jury of Fairfax County. Defendant's speedy trial rights on those nine charges attached on December 1, 2022.
3. On December 19, 2022, the Commonwealth proceed by direct indictment on the charges of Driving Under the Influence, Driving a Commercial Vehicle while Disqualified, and Operating a School Bus Without Endorsement on License. Defendant's speedy trial rights attached on December 19, 2022 on those charges.
4. The Commonwealth stipulates that a 3A:11 Response was initially due on February 4, and the Defense Motion has accurately recited what was provided. The Motion also correctly recites the other deadlines and when items were received, including that the witness list was due 30 days before trial, currently February 19, 2023; and that it was provided on March 6, 2021, and that additional 11 photographs were provided on March 6, 2023.

6. The Commonwealth does not agree that it is currently staffed at 54 attorneys and a total of 84 employees. There are 36 attorneys and 31 support staff currently employed by our office based on the internal phone list circulated on March 7, 2023.

LAW AND ARGUMENT

7. §19.2-243 of the Code of Virginia, 1950 as amended, requires that trial must be commenced in circuit court within five months after a district court has found probable cause, or if no such preliminary hearing occurred, the commencement of the five months shall be from the date of indictment. “The Speedy Trial Statute sets a five-month period within which the Commonwealth must bring a defendant ‘held continuously in custody’ to trial within five months from the date of her indictment—that is, 152 days plus “a fraction” of a day.” *See, e.g., Herrington v. Commonwealth*, 291 Va. 181, 186 n.6 (2016). *Commonwealth v. Gregg* (Va. Cir. 2019) (Letter Opinion issued from Fairfax Circuit Court in FE-2017-288).

To calculate speedy trial on the certified charge,

152 and fraction of days

- 30 days in December after certification = 122

- 31 days in January = 91

- 28 days in February = 63

- 31 days in March = 32

- 30 days in April = 2

MAY 2, 2023

8. THEREFORE, speedy trial requires dismissal of the child endangerment charges if trial has not commenced by May 2, 2023. Using the same calculation, the deadline for the direct indictments is May 21, 2023.

9. Discovery is an on-going obligation. The obligation to provide discovery does not cease because a deadline in an order has passed. According to the Motion to Dismiss, there are three items that were provided late: photographs, copies of convictions, and a witness list.

10. The photographs are physical items covered by 3A:11(5), which states that “The Commonwealth shall permit the Defendant to inspect or copy or photograph books, papers, documents, data, photographs, . . . which are in the possession custody or control of the Commonwealth, that may be material to the preparation of his/her defense, or that the Commonwealth intends to introduce into evidence at trial.”

11. The undersigned attorney is the third Assistant Commonwealth Attorney who has been assigned to prosecute this case. The first resigned effective January 20, 2023, and the second effective February 24, 2023. Upon taking responsibility for this case on Monday, February 27, this Commonwealth began by reviewing the evidence and re-interviewing the officers and witnesses.

12. Presumably neither the first nor the second Assistant intended to use these photographs in their case in chief, as they did timely respond to discovery and did not include these photos (which were admittedly in the possession of the officer who took them since October 27, 2022). This Assistant does intend to use some of them, but not all. All images taken by MPO Ragen were provided to comply with the doctrine of completeness. The doctrine of completeness requires that both parties have the full context to ensure that all items which should in fairness be considered together be provided together to prevent confusion. The Commonwealth does not intend to offer the photograph of the bus seat or the photograph with the Rome Charter LLC name identified on the bus.

13. This leaves a photograph of an emergency handle, a photograph of a wheel with the hood of the bus up, a photograph of a wheel with a dented rim, two photographs of window latches, photographs of the front and back of the Defendant's driver's license, and a photograph and a zoomed copy of the Defendant's Medical Examiner's Certificate. This Assistant intends to offer all these photographs as evidence as they are relevant to the charges pending before the Court.

14. The second item provided after the deadline is the witness list. However, the name, address and telephone number of the kindergarten teacher and the name of Officer Huynh are on the police report provided timely, and both testified and were subject to cross-examination by the public defender. The identity of the breath tech operator Charles Nagy is clearly on the certificate provided to defense timely, and the identify of every other officer present is clearly identified tied to videos of everything they observed and said at the scene on the body worn camera links provided timely. Below is a screen shot which shows how every Officer is listed and which video is connected to him, and at what time the video was created.

<input type="checkbox"/> ID	Title	Owner	Uploaded By	Uploaded On	Recorded On ↓
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Hirshy, Andrew...	Oct 27, 2022 7:39 PM	Oct 27, 2022 4:17 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Gibson, Jacob ...	Oct 27, 2022 7:29 PM	Oct 27, 2022 4:16 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Stewart, David (...)	Oct 27, 2022 9:58 PM	Oct 27, 2022 3:55 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Bond, Daniel (3...	Nov 1, 2022 6:13 AM	Oct 27, 2022 3:50 P
<input type="checkbox"/> E223001737	AXON Fleet 2 IR Video 2022-...	Inbox, Inbox (cwainbox)	Nagy, Charles (...)	Oct 27, 2022 5:16 PM	Oct 27, 2022 3:31 P
<input type="checkbox"/> E223001737	AXON Body 2 Video 2022-10...	Inbox, Inbox (cwainbox)	Nagy, Charles (...)	Oct 27, 2022 6:26 PM	Oct 27, 2022 3:31 P
<input type="checkbox"/> E223001737	AXON Fleet 2 Video 2022-10...	Inbox, Inbox (cwainbox)	Nagy, Charles (...)	Oct 27, 2022 5:17 PM	Oct 27, 2022 3:31 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Huynh, Jessey (...)	Nov 1, 2022 12:04 PM	Oct 27, 2022 3:00 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Huynh, Jessey (...)	Nov 1, 2022 12:11 PM	Oct 27, 2022 3:00 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Thur, James (30...	Nov 4, 2022 8:21 AM	Oct 27, 2022 2:56 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Gibson, Jacob ...	Oct 27, 2022 7:27 PM	Oct 27, 2022 2:46 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Bond, Daniel (3...	Nov 1, 2022 6:12 AM	Oct 27, 2022 2:41 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Stewart, David (...)	Oct 27, 2022 9:57 PM	Oct 27, 2022 2:37 P
<input type="checkbox"/> E223001737	DRIVING WHILE INTOXICAT...	Inbox, Inbox (cwainbox)	Huynh, Jessey (...)	Oct 27, 2022 11:54 PM	Oct 27, 2022 2:37 P

15. This leaves the certified copies of the convictions for which the Commonwealth has filed a Motion *in Limine*, also to be argued today. Considering that the Office of the Public Defender was appointed to represent the Defendant on or about November 7, 2022, it is unfathomable that they are unaware that their client appeared in court on February 16, 2023, and entered pleas of guilty to the referenced charges. The cases are identified by jurisdiction, case number, charge listed, and date of conviction. The original records are kept in the possession of the Court.

16. A truly inspiring description of the special responsibilities of a prosecutor can be found in Tuma v. Commonwealth, 60 Va.App. 273, 726 S.E.2d 465 (Va.App. 2012).

The role of public prosecutor, an attorney who represents the interests of the sovereign in criminal cases, has evolved in parallel with that of the Common Law of England and traces its pedigree back more than 750 years . . . He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence; he is to judge the circumstances, and according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either...

I include this quote to acknowledge that I am keenly aware of the heavy burden on the Office of the Commonwealth Attorney to seek justice, not simply to win a case at all costs. Trial tactics which deprive a defendant of his liberty without due process are unconscionable.

17. I humbly suggest that the role of the Court is no less inspiring, although limited.

The limited role of the court is part of an adversarial system of adjudication in which: [W]e follow the principle of party presentation. As this Court stated in Greenlaw v. United States, 554 U.S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.*, at 243. . . . [A]s a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." [Castro v. United States, 540 U.S. 375 (2003)] at 386 (Scalia, J., concurring in part and concurring in judgment).

In short: "[C]ourts are essentially passive instruments of government." United States v. Samuels, 808 F.2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

Cited at Commonwealth v. Sangha MI 2020-565 (Va. Cir. Ct. Mar. 29, 2021)

18. This Court's limited role is to decide the issues framed as a neutral arbiter and based on the premise that both parties are represented by competent counsel. In this case, the Commonwealth has the burden of offering sufficient evidence to persuade a jury beyond reasonable doubt that Troy Wesley Reynolds did driver a commercial vehicle, specifically a school bus, without a proper endorsement on his license; whether he did drive the bus while disqualified to do so; and whether or not he drove the school bus while under the influence of alcohol and with an enhanced Blood Alcohol Content of .15 - .20.

19. The number of prosecutors in either the Office of the Commonwealth Attorney or the Office of the Public Defender is irrelevant, as is their budgets. The issue is what is the appropriate remedy for providing the witness list and the photographs after the discovery deadline. The Defense Motion correctly cites the possible remedies: permitting the inspection, granting a continuance, prohibiting the Commonwealth from introducing the evidence not disclosed, or entering such other order as the Court deems just. The Defense urges that the only appropriate remedy is dismissal in order to deter the Commonwealth from inappropriate tactics.

14. Reviewing the timeline, there is no evidence of inappropriate tactics in the prosecution of this case. There is also no suggestion that the photographs are exculpatory or could lead to exculpatory material. The Defense doesn't even argue that the photographs are material to their own case, they simply want those images excluded from the Commonwealth's case in chief. In this case, the reality is that a third prosecutor would present the case differently from the first two.

15. Regarding the photographs, the remedy of permitting inspection achieves nothing as the Defense now has copies. The Commonwealth is not seeking a continuance, although it does not object to one if the Defense believes they need additional time to be prepared to cross-examine

the officer who took the photographs. Prohibiting the Commonwealth from introducing the photographs is a draconian measure which the Commonwealth urges the Court not to take without additional evidence that there is some prejudice to the Defendant's ability to be prepared for trial.

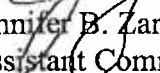
16. As for the witness lists, the Commonwealth has to admit her office's fault. This was not filed timely. The expansion of discovery under Rule 3A:11 of the Rules of the Virginia Supreme Court effective July 2020 has proved to be a tremendous burden for this Office of the Commonwealth Attorney, and she has failed in meeting this burden. However, the purpose of providing discovery is to ensure that the Defendant has sufficient notice of the charges and evidence against him so that due process can be satisfied and he can receive a fair trial. In the case at hand, the Defense received a tape of a body camera worn by every officer present at the scene, recording what they saw, where they stood, what they said, and linked to their name. The arresting officer, the kindergarten teacher, and the breath tech are all identified by name and employment, and in the case of the teacher, by address and phone number. The first two were subject to a 2 hour preliminary hearing with cross-examination by defense counsel. There should be no surprise as to these persons testifying at trial, and the Commonwealth moves this Court to allow the officers and teacher to testify.

17. The remaining names are those of the parents of the children on the bus, and this is new information to the Defense. This Commonwealth intended to call the parents to establish the precise age of the kindergarten children on the bus. The Commonwealth takes the Defense Attorney at her word that she is unable to be prepared to cross-examine the parents as to whether they remember when their children are born without only 15 days notice.

17. This leaves the Certified Copies of the convictions for which the Commonwealth has filed a Motion *in Limine*, also to be argued today. Considering that the Office of the Public Defender was appointed to represent the Defendant on or about November 7, 2022, it is unfathomable that they are unaware that their client appeared in court on February 16, 2023, and entered pleas of guilty to the referenced charges. The cases are identified by jurisdiction, case number, charge listed, and date of conviction. The original records are kept in the possession of the Court, not the Commonwealth. The Commonwealth is only obligated to provide items within its possession, and at the time of filing the Motion, these documents were not. Should the Court rule in the Commonwealth's favor on the Motion in Limine, then the Commonwealth will provide copies of certified records to the Defendant.

THEREFORE, the Commonwealth moves that the Motion to Dismiss be denied and that the Court enter such other Orders as it deems just.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I emailed a true copy of the foregoing to Amy Jordan and EB McCready this 13th day of March, 2023.

