

VIRGINIA:

In the Court of Appeals of Virginia on **Tuesday** *the* **19th** *day of* **June, 2018**

Raymond Louis Harvey, Jr., Appellant,

against Record No. 1460-15-3
 Circuit Court Nos. CR14-1774, CR14-1775, CR14-1801 and CR14-1802

Commonwealth of Virginia, Appellee.

Upon a Rehearing En Banc¹

Before Chief Judge Huff, Judges Humphreys, Petty, Beales, Alston, Chafin, Decker,
O'Brien, Russell, AtLee and Malveaux

Suzanne Moushegian (Moushegian Law, P.L.L.C., on brief), for appellant.

Aaron J. Campbell, Assistant Attorney General (Mark R. Herring, Attorney
General, on brief), for appellee.

Raymond Louis Harvey, Jr., (“Harvey”) appeals his conviction by a jury on June 12, 2015, of one count of attempted murder, one count of the use of a firearm in the commission of attempted murder, one count of aggravated malicious wounding, and one count of the use of a firearm in the commission of aggravated malicious wounding. Harvey was sentenced to sixty-three years in prison on August 13, 2015, by the Circuit Court of the City of Roanoke (the “circuit court”).

A three-judge panel of this Court, with one judge dissenting, reversed the judgment of the circuit court and entered final judgment dismissing the charges based upon the failure of the Commonwealth to provide Harvey with a speedy trial pursuant to the provisions of Code § 19.2-243. Harvey v. Commonwealth, 67 Va. App. 336, 796 S.E.2d 428 (2017). By order dated April 11, 2017, we granted the Commonwealth’s petition for a rehearing *en banc*, stayed the mandate of that decision, and reinstated the appeal on our docket.

¹ By direction of the Court, this order is not designated for publication. See Code § 17.1-413.

On appeal, Harvey's single assignment of error combines assertions that the circuit court erred in refusing to dismiss the indictments on the grounds that he has been denied his right to a speedy trial as guaranteed under the Sixth Amendment to the Constitution of the United States and his statutory right to a speedy trial pursuant to Code § 19.2-243.²

On November 3, 2014, a grand jury sitting in the City of Roanoke indicted Harvey for the above offenses. Harvey was arrested on the indictments on November 5, 2014, and remained in custody the entire time prior to his trial. Because Harvey was incarcerated continuously from his indictment, pursuant to Code § 19.2-243 and barring the application of one of the tolling provisions of that statute, the Commonwealth had five months or "152 and a fraction days" to bring him to trial. Wallace v. Commonwealth, 65 Va. App. 80, 89, 774 S.E.2d 482, 486 (2015) (quoting Howard v. Commonwealth, 55 Va. App. 417, 423, 686 S.E.2d 537, 540 (2009)). On November 10, 2014, the circuit court appointed Harvey counsel. At docket call, an initial trial date of February 24, 2015 was set.

On February 23, 2015, the parties appeared before the Honorable David B. Carson and jointly moved for a continuance, which the circuit court granted and continued the case to April 24, 2015. At a hearing on April 23, 2015, before Judge Carson, the prosecutor moved for another continuance because a material witness was unavailable. The circuit court granted the continuance over Harvey's objection. The circuit court then carried over the case to the following day for the purposes of selecting a new trial date and a bond hearing.

The record is clear that the circuit court, again in the person of Judge Carson, began the April 24, 2015 hearing by specifically noting Harvey's objections to the continuance granted during the previous day's hearing and Judge Carson also stated that the continuance order would explicitly reflect that Harvey was not

² Although this assignment of error suggests a violation of his right to a speedy trial under the Sixth Amendment to the Constitution of the United States, Harvey cites no authority and pursues no argument on that point. Therefore, pursuant to Rule 5A:20(e), we consider any constitutional issue in this case as waived. See Coward v. Wellmont Health System, ___ Va. ___, 812 S.E.2d 766 (2018).

waiving his speedy trial rights in connection with the previous day's continuance. However, the record before us of that day's hearing becomes confusing and conflicting after that point.

It appears that in connection with the proposed new trial date, the prosecutor and Harvey's trial counsel were speaking simultaneously and over each other. The Circuit Court of the City of Roanoke uses an audio recording system as its official record. Harvey has not provided this Court with the actual audio recording. Instead, two separate transcriptions of the original recording of the proceedings have been included in the joint appendix submitted by the parties in this case. Both transcriptions reflect that the prosecutor stated to the circuit court that he and Harvey's trial counsel agreed on June 12, 2015 as the trial date and that "[Harvey's trial counsel] and I both have done the math and that is still within the time frame set." Harvey's trial counsel responded "yes" after the prosecutor mentioned the trial date and responded "yes, yes" after the prosecutor finished the entire sentence. After a short discussion concerning Harvey's possible need for the circuit court to appoint a forensic scientist as a defense expert, the prosecutor made the statement that "We both agree that [June 12, 2015] is within the Commonwealth's statutory limit of speedy trial." Significantly, one of the transcripts of the original audio recording of the proceedings indicates that Harvey's trial counsel responded "yes" to this statement by the prosecutor while the other transcript of the same recording indicates that Harvey's trial counsel made no response to the prosecutor's latter statement and instead moved on to the issue of bond for Harvey. The continuance order entered by the circuit court states that "the trial was continued at the request of the Commonwealth, and objected to by counsel for the defense for all the reasons stated on the record." The order further states, "the attorney for the defendant stated that because the continuance is granted at the Commonwealth's request, she is not waiving any of the allowable time under statute, and requested the Court to include that the defendant is not waiving his speedy trial rights with this continuance."

On June 5, 2015, Harvey moved to dismiss the indictments, arguing the agreed upon trial date of June 12, 2015, was beyond the statutory speedy trial period.³ A hearing on this motion was held on June 9, 2015. Because of a family emergency, Judge Carson was not available on June 9, 2015, and the Honorable Clifford Weckstein, a retired circuit judge sitting by designation, presided over the hearing on Harvey's motion to dismiss. The prosecutor argued that Harvey's trial counsel agreed to both the trial date and the fact that the date agreed upon satisfied the speedy trial provisions of Code § 19.2-243 and by doing so, had waived, on behalf of Harvey, any statutory right to a speedy trial. Harvey's trial counsel responded that, while she had indeed agreed to the trial date, she asserted that her "yes" responses were nothing more than that and vigorously contended that her responses were not an agreement that the June 12, 2015 trial date satisfied the requirements of Code § 19.2-243. Judge Weckstein noted that he had not been present at the earlier hearing and ordered that the audio recording of the hearing be played. After listening to the recording, Judge Weckstein ruled that Harvey's counsel had "conceded" that the June 12, 2015 trial date satisfied the speedy trial requirements of the statute and that Harvey could not "approbate and reprobate" by taking inconsistent positions. He then denied the motion to dismiss.

This Court has held that "the accused has no duty to request that a trial date be set within the prescribed period in order to preserve his or her statutory right to a speedy trial." Baker v. Commonwealth, 25 Va. App. 19, 22-23, 486 S.E.2d 111, 113 (referencing Baity v. Commonwealth, 16 Va. App. 497, 501, 431 S.E.2d 891, 893 (1993)), aff'd en banc, 26 Va. App. 175, 493 S.E.2d 687 (1997); see also Cantwell v. Commonwealth, 2 Va. App. 606, 611, 347 S.E.2d 523, 525 (1986). We have also made clear that "[i]t is the responsibility of the trial court, not the prosecutor or the accused, to control the court's docket and schedule criminal cases for trial." Baker, 25 Va. App. at 23, 486 S.E.2d at 113 (citing Baity, 16 Va. App. at 501, 431 S.E.2d at 893); see also Williams v. Commonwealth, 2 Va. App. 566, 569, 347 S.E.2d 146, 148 (1986).

³ As previously noted, the five-month mandate to commence a trial of an incarcerated defendant translates to "152 and a fraction days." Harvey was served with his indictments on November 5, 2014. After accounting for the sixty-day extension of the deadline as a result of the continuance that was jointly requested by the parties, it appears that June 5, 2015 represented the 152nd day.

Additionally, “[p]roviding available dates and agreeing to a trial date that is outside the statutory period are not actions constituting a waiver of the statutory speedy trial requirement.” Baker, 25 Va. App. at 24, 486 S.E.2d at 114 (referencing Taylor v. Commonwealth, 12 Va. App. 425, 429-30, 404 S.E.2d 86, 88 (1991)). Furthermore, no waiver may be implied. A knowing, intelligent, and voluntary waiver of the application of Code § 19.2-243 is required. See Norton v. Commonwealth, 19 Va. App. 97, 99-100, 448 S.E.2d 892, 893 (1994).

Unfortunately, on the record before us, we are unable to resolve the issue raised on appeal. The joint appendix submitted by the parties in this case, contains two separate transcriptions of the audio recording of the April 24, 2015 hearing before Judge Carson, but Harvey did not provide us with the actual audio record. These transcriptions are not identical and differ on the key point of what Harvey’s trial counsel was agreeing to when she responded to the statements of the prosecutor. Judge Carson, who was in the best position to interpret his own order and the context of the statements made to him by counsel when the trial date was set, was not available to do so. Harvey assigns error to Judge Weckstein’s conclusions regarding the prior hearing before Judge Carson but failed to provide us with the actual record Judge Weckstein was attempting to construe. See Salahuddin v. Commonwealth, 67 Va. App. 190, 213, 795 S.E.2d 472, 484 (2017) (“[T]he appellant ‘has the burden to preserve an adequate record on appeal to allow [the appellate court] to consider the propriety of the trial court’s actions.’” (quoting Davis v. Commonwealth, 35 Va. App. 533, 537, 546 S.E.2d 252, 254 (2001))).

In the final analysis, we must presume the circuit court knew the law and applied it correctly. “The judge is presumed to know the law and to apply it correctly in each case.” Crest v. Commonwealth, 40 Va. App. 165, 172 n.3, 578 S.E.2d 88, 91 n.3 (2003) (citing Starks v. Commonwealth, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983)). This presumption of regularity requires that we affirm the judgment below unless and until an appellant demonstrates error on the part of the circuit court. Given the infirmities in the record that prevent us from determining if what was actually said supports the judgment of the circuit court, we conclude that the record provided to us in this appeal is insufficient to overcome the presumption of regularity

and allow us to conclusively determine that the judgment of the circuit court denying Harvey's motion to dismiss was error. Accordingly, we withdraw the opinion and mandate of the three-judge panel previously entered and affirm the judgment of the circuit court by order. The appellant shall pay to the Commonwealth of Virginia \$150 damages.

It is ordered that the trial court allow counsel for the appellant a total fee of \$925 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

The Commonwealth shall recover of the appellant the amount paid court-appointed counsel to represent him in this proceeding, counsel's costs and necessary direct out-of-pocket expenses, and the fees and costs to be assessed by the clerk of this Court and the clerk of the trial court.

This order shall be certified to the trial court.

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

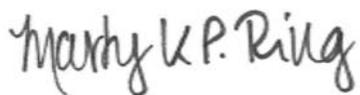
Attorney's fee \$925.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:



Deputy Clerk