VIRGINA:

IN THE CIRCUIT COURT OF CHESTERFIELD COUNTY

COMMONWEALTH	)	
	)	BRIEF FOR MOTION TO DISMISS
v.	)	
	)	NEXT DATE: 00 AUGUST 2005
JOHN SMITH	)	

I. The Question

On 20 April 2005 was a speedy trial motion required to have been brought in writing seven days prior to trial?

II. Pertinent Facts

On 01 November 2005 Mr. Smith came before the General District Court of Chesterfield County and had a preliminary hearing wherein the judge found probable cause. On 18 April 2005 Mr. Smith came before the Circuit Court facing two felony charges. Prior to trial both counsel for the co-defendant and counsel for defendant moved for dismissal because the defendants had been held longer than the 5 months allowed by statute before they were brought to trial. Va Code secs. 19.2-241 & 243. The prosecution argued that this objection must be raised 7 days prior to the hearing. The Court did its own research and, relying on Rule of the the Virginia Supreme Court 3A:9, ruled against the defendants' motion.

On 24 August 2004 the defendant came back to court for a sentencing hearing. At a point in the proceeding defense counsel rose and moved for an appeal bond based upon a change in the law and a good faith belief that the Court's original decision could be overturned on appeal. The Court decided to treat this motion as an oral motion to rehear argument on the speedy trial point and ordered briefs from both the defendant and the prosecutor.

III. Analysis

A. The Law:

1. Speedy Trial:

A defendant "***shall be*** tried within the time limits fixed in sec. 19.2-243." Va Code sec. 19.2-241. "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 in continuous 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." Va. Code sec. 19.2-243.

2. Rule 3A:9:

"(b)(1) Defenses and Objections That Must Be Raised Before Trial. Defenses and objections based on defects in the institution of the prosecution or the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion made [7 days before the day fixed for trial].

. . . .

(2) Defenses and Objections That May Be Raised Before Trial. In addition to the defenses and objections specified in subparagraph (b)(1) of this Rule, any defense or objection that is capable of determination without the trial of the general issue may be raised by motion before trial. Failure to present any such defense or objection before the jury returns a verdict or the court finds the defendant guilty shall constitute a waiver thereof."

"[I]nstitution of the prosecution or the written charge upon which the accused is to be tried" refers to indictments, warrants, summons, or similar accusatory papers or process which commence the prosecution. See Grier v. Commonwealth, 35 Va.App. 560 (2001) & Evans v. Commonwealth, 226 Va. 292 (1983). When not involved in the institution of the prosecution an objection is not forbidden by this Rule unless it is raised post verdict. See Sargent v. Commonwealth, 5 Va.App. 143 (1987) & Burgess v. Commonwealth, 224 Va. 368 (1982).

3. Virginia Code sec. 266.2:

This code section lays out which objections must be made pre-trial. On 01 July 2005 it was changed (the italicized sections are new law):

"Defense motions or objections seeking (i) suppression of evidence on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth, or Sixth Amendments to the Constitution of the United States or Article I, Section 8, 10, or 11 of

the Constitution of Virginia proscribing illegal searches and seizures and protecting rights against self incrimination; *(ii) dismissal of a warrant, information, or indictment or any count or charge thereof on the ground that : (a) the defendant would be deprived of a speedy trial in violation of provisions of the Sixth Amendment to the Constitution of the United States, Article I, Section 8 of the Constitution of Virginia, or sec. 19.2-243; or (b) the defendant would be twice placed in jeopardy in violation of the provisions of the Fifth Amendment to the Constitution of the United States or Article I, Section 8 of the Constitution of Virginia;* or (iii)dismissal of a warrant, information, or indictment or any count or charge thereof on the ground that the statute which it was based is unconstitutional shall be raised by motion or objection, in writing, before trial. The motions or objections shall be filed and notice given to opposing counsel not later than seven days before trial *or, if made under clause (ii), at such time prior to trial as the grounds for the motion or objection shall arise, whichever occurs last.*"

4. Statutory Construction:

Expressio unius est exclusio alterius: "Expression of one is exclusion of the other. What it means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask if your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other." Scalia, Antonin, A Matter of Interpretation Princeton University Press (NJ 1997).

Farnsworth v. Commonwealth, 43 Va.App. 490 (2004)(affirmed *per curiam* Farnsworth v. Commonwealth, 270 Va. 1 (2005)(multiple quotes and cites omitted)):

"Under the basic rules of statutory construction, we determine the General Assembly's intent from the words contained in the statute. When the language of the statute is unambiguous, courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated."

"We must also assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words when we interpret the statute."

The court cannot "change or amend a statute under the guise of construing it. . . [U]nder the fundamental principal of statutory construction *expression unius est exclusio alterius* – which provides that where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute – when a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way."

B. Application of the Law to the Facts:

1. Required to be Dismissed:

When Mr. Smith, who was held in custody pending trial, was finally brought to trial it was over five months after probable cause was found at the preliminary hearing (01 November 04 - 18 April 05). As such, there is a requirement that the charge be dismissed with prejudice – 19.2-243 commands that after the five month period a prosecution "shall be forever discharged"

2. Rule 3:9 is Not Violated:

There was no challenge to the indictment in this case. Without such a challenge the pertinent section of Rule 3:9 becomes (b)(2). This section allows challenges such as a speedy trial motion to be raised pre-trial but does not demand it. Its only requirement is that the motion must be raised prior to the verdict or it will be deemed to have been waived. The speedy trial motion in this case was raised on the day of trial, prior to the the actual trial. Therefore, it did not violate the requirements of this section.

3. At Time of Trial Va. Code sec. 266.2 Did Not Apply:

This case was tried in April 2005. At that time the law required that the defendant raise claims concerning unconstitutional searches, claims of an unconstitutional denial of the right to remain silent, and claims that a statute is unconstitutional seven days prior to trial. These were the only claims required to be raised prior to trial and the statute contains no generic catch-all phrase.

Prior to 01 July 2005 the statute omitted any mention of the speedy trial statute. By applying the cannon of statutory interpretation *expressio unius est exclusio alterius* it is obvious that speedy trial objections were not a required class of objections on Mr. Smith's trial date. To read this into the statute would not be interpreting the statute, it would be amending the statute.

This is proven out by the act of the General Assembly in amending the statute. After the Fairfax County prosecutor's office was stymied in its attempt to prosecute John Muhammad because it did not follow Virginia's speedy trial laws, the General Assembly made several changes to the law. Among these changes are the manner in which detainers affect the speedy trial statute and the requirement that speedy trial motions be raised seven days before trial. These actions were taken in reaction to case law which the General Assembly was overturning. As such, it is clear that the General Assembly was creating new law rather than codifying existing laws.

Considering all of these factors, it is clear that under Va. Code sec. 19.2-266.2, in April 2005, there was no requirement that a speedy trial objection be raised in writing seven days prior to the trial.