

SUPREME COURT OF MISSOURI
en banc

Constitution. Because the circuit court had authority to retry the case, this Court affirms the circuit court's judgment.

Factual and Procedural History

In October 2017, Officers Bryan Lemons (hereinafter, "Officer Lemons") and Jonathan Senf (hereinafter, "Officer Senf") were in their patrol car in south St. Louis when they heard "shots fired," including a description of a person "waving a firearm in the street." Defendant was identified as the person in the street.

As the officers approached the area, they observed Defendant waving a gun, yelling obscenities, and pacing in the street. The officers took evasive maneuvers for their safety after their vehicle's windshield was shot. Officer Lemons identified himself as "police" and ordered Defendant to put down the firearm. Defendant refused and fired shots toward Officer Lemons. Defendant fled from the area on foot.

The SWAT team responded to secure the area. Defendant was located in a residence. Officers entered the residence and seized Defendant without incident.

Defendant was charged in December 2017 with two counts of first-degree assault of two law enforcement officers, two counts of armed criminal action, and one count of unlawful possession of a firearm. The circuit court committed Defendant to the custody of the department of mental health in April 2018 for a competency determination.

Defendant's trial proceedings were delayed until he was deemed competent to stand trial.

Prior to trial, Defendant testified before the circuit court that he was a convicted felon. The circuit court took judicial notice of Defendant's court file and found him to be a prior offender.

Defendant's first jury trial began in July 2019. Officers Lemons and Senf testified Defendant discharged a firearm in their direction. Additionally, another officer testified he saw Defendant discharge his firearm. Following all of the evidence, the jury retired to deliberate.

During its deliberations, the jury notified the circuit court it "unanimously decided three counts" and was deadlocked on the remaining two counts. The jury foreperson stated further deliberation would not be productive. The circuit court accepted the jury's not guilty verdicts on two counts and its guilty verdict for unlawful possession of a firearm. The circuit court declared a mistrial on the two remaining charges.

On July 25, 2019, the circuit court filed its "Trial Minutes." The circuit court indicated the jury was hung regarding the two counts of first-degree assault and armed criminal action involving Officer Lemons. Defendant was remanded into custody, and the parties were directed to arrange a new trial date to retry the remaining counts. On August 5, 2019, the docket sheets reflect Defendant's second trial was scheduled for October 7, 2019.

While there is no docket entry requesting a continuance, on October 10, 2019, Defendant filed an objection to continuing his trial. Defendant argued that should his case fail to proceed to retrial before the November 2019 term of court, the circuit court would no longer have authority or jurisdiction to proceed pursuant to article I, section 19 of the Missouri Constitution. The circuit court continued Defendant's retrial until the week of November 4, 2019.

On November 4, 2019, the circuit court heard argument on Defendant's "notice of objection" to trial continuance and request for dismissal with prejudice. The circuit court overruled Defendant's motions. Defendant's retrial was continued until January 6, 2020.

Trial on the first-degree assault of a law enforcement officer and armed criminal action charges involving Officer Lemons began on January 6, 2020. Following all of the evidence, the jury found Defendant guilty on both counts. Defendant was sentenced as a prior offender to twelve years' imprisonment for first-degree assault of a law-enforcement officer, twelve years' imprisonment for armed criminal action, and four years' imprisonment for being a felon in unlawful possession of a firearm, to be served concurrently.

Defendant appeals. After issuing an opinion, the court of appeals transferred the case to this Court on its own motion under Rule 83.02 due to the general interest and importance of the issue presented. Defendant only challenges article I, section 19's temporal provision. This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution.

Standard of Review

"Constitutional interpretation is a question of law and is subject to *de novo* review." *State v. Jackson*, 384 S.W.3d 208, 211 (Mo. banc 2012) (quoting *Akers v. City of Oak Grove*, 246 S.W.3d 916, 919 (Mo. banc 2008)). "Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning." *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012).

Constitutional Claim

Defendant asserts the circuit court erred in overruling his motion to dismiss with prejudice the counts of first-degree assault and armed criminal action involving Officer Lemons. Defendant believes the circuit court did not have authority to retry his case because it was not held within the same or next term of court, which he asserts violated article I, section 19. Defendant argues article I, section 19 requires retrial during the same or next term of court and, because the circuit court failed to comply with this mandate, this Court must reverse the judgment resolving the latter two charges and remand the case with directions to the circuit court to enter a judgment of acquittal.

Article I, section 19 provides, in relevant part:

That no person shall be ... put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but *if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court*; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.

(Emphasis added).

Waiver of double jeopardy claim

Defendant admits he explicitly waived a claim of double jeopardy in the circuit court at the beginning of his second trial. Defendant's only argument is that the circuit court violated the time limitations for his retrial. He asserts article I, section 19 creates a substantive right to speedy trial.

Article 1, section 19 is titled, “Self-incrimination and double jeopardy.” The provision prevents an individual from being compelled to testify against oneself and sets forth when a prisoner may be retried after a mistrial or reversal. The constitutional protections for speedy trial do not appear in the constitutional provision Defendant asserts is being violated.

A defendant’s right to a speedy trial is protected by article I, section 18(a) of the Missouri Constitution and section 545.780.¹ Had Defendant wished to invoke either his constitutional or statutory right to a speedy trial, he needed to do so. *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 727-28 (Mo. banc 2007); section 545.780. Defendant neither invoked article I, section 18(a), nor did he file a motion for speedy trial. There is no need for this Court to craft a constitutional right to speedy trial in article I, section 19, when it already exists in another provision.

Timeliness of retrial

Yet, Defendant believes the language of article I, section 19 imposes a time limitation upon when his retrial must be commenced. Defendant maintains he was required to be retried within “the same or the next term of court.”

This Court previously examined article I, section 19’s temporal provision for retrial following a hung jury. In *State v. Berry*, 298 S.W.2d 429, 430 (Mo. 1957), the defendant was tried in September 1951, but the jury was unable to agree upon a verdict. The circuit court scheduled the defendant’s second trial to begin one week later, in the

¹ All statutory references are to RSMo 2016 unless otherwise indicated.

same term of court. *Id.* The defendant’s case then was continued “from term to term” for more than two years before the case was finally tried. *Id.* On appeal, the defendant argued the temporal limitation in article I, section 19 required the circuit court to conduct a trial in the same or next term of court. *Id.* at 431.

This Court found the circuit court followed the procedure in article I, section 19 in that it scheduled the defendant’s trial for the same term, and even though the trial then was continued consistently until January 1954, there was no constitutional violation. *Id.* The Court noted “this particular provision is not inconsistent with and does not specifically abolish other statutory and common-law procedure incident to the prosecution and trial of criminal causes.” *Id.*

Similarly, in this case, the circuit court scheduled Defendant’s retrial within the next term of court. The state filed two motions for continuances; the second of which extended the start of Defendant’s retrial beyond “the next term of court.” Defendant’s retrial occurred in January 2020. The circuit court engaged in the same procedure as did the circuit court in *Berry*.²

² Defendant acknowledges *Berry*’s interpretation of setting an initial retrial date within the prescribed period complies with article I, section 19’s temporal provision. However, Defendant asserts this Court implicitly refuted *Berry*’s interpretation in dicta in *State v. Pierce*, 433 S.W.3d 424 (Mo. banc 2014). In *Pierce*, the defendant claimed the circuit court lacked authority to retry him because the trial did not begin within the same or next term of court as required by article I, section 19. *Id.* at 428. This Court determined the defendant waived his right to assert any violation of article I, section 19 because he failed to assert it at the first opportunity. *Id.* at 429. The Court noted, in dicta, the purpose of article I, section 19’s “deadline is to ensure that neither the defendant nor the state is disadvantaged by stale evidence or fading memories when the only reason for the retrial is the first jury’s failure to reach a verdict.” *Id.* at 429. The Court also stated there is no constitutional language explicitly imposing the defendant’s assumption that the charges

This Court is vested with the power to “establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law.” Mo. Const. art. V, sec. 5. The circuit court has “inherent authority, and an inherent responsibility, to manage [its] dockets in a way that respects the rights of the defendant, the public and the [s]tate and that respects the obligation of public defenders to comply with the rules governing their representation.” *State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 598 (Mo. banc 2012).

Accordingly, a circuit court may grant a continuance or postpone a trial for good cause and sufficient reasons. Section 545.710; Rule 24.08. “The decision to sustain a continuance is within the sound discretion of the trial court.” *State v. Chambers*, 481 S.W.3d 1, 8 (Mo. banc 2016). Notably,

[t]he period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any criminal proceedings pending before it, which it is otherwise by law authorized to do or take.

Rule 20.01(c). While the circuit court is considered to be in continual session, to “the extent that a term of a circuit court may be required or specified by any provision of law,

against him were required to be dismissed if he were not retried in the same or next term of court. *Id.* at 430. This Court never reached the merits of this argument because the defendant’s claim was waived. “Generally, this Court presumes, absent a contrary showing, that an opinion of this Court has not been overruled *sub silentio*.” *Watson v. State*, 520 S.W.3d 423, 443 n.7 (Mo. banc 2017) (quoting *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. banc 2013)). *Berry* was not overruled *sub silentio*.

terms of each circuit court of the state shall be considered as commencing on the second Mondays in February, May, August and November of each year” Section 478.205.

Defendant’s first trial began in July 2019, which fell within the May 2019 term. The next term of court began on August 12, 2019, and ended on November 10, 2019. Defendant’s retrial originally was set on October 7, 2019, within the next term of court. His retrial was continued but still would have allowed the retrial to occur within the next term. The second continuance, however, placed Defendant’s retrial beyond the last day of the next term following his first trial.

Defendant’s assertion the circuit court was required to dismiss the charges against him when his retrial did not occur prior to the November 2019 term of court is without merit. Article I, section 19 does not require the dismissal of charges if the retrial is delayed beyond the same or next term of court. *Berry*, 298 S.W.2d at 431; *Pierce*, 433 S.W.3d at 430. The circuit court scheduled his retrial to begin within the next term of court as required. The circuit court exercised its authority to manage its docket, and for good cause shown by the state, Defendant’s retrial was continued until January 2020. Defendant never asserted his constitutional or statutory right to a speedy trial. The circuit court followed the procedure approved in *Berry*, which is dispositive. Defendant’s retrial did not violate article I, section 19.

Conclusion

The circuit court's judgment is affirmed.

GEORGE W. DRAPER III, JUDGE

All concur.