

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 02-11,706
	: 02-11,618
	:
vs.	: CRIMINAL DIVISION
	: Motion to Dismiss
MELVYNE JAYPHINE DAVIS,	:
Defendant	:

OPINION AND ORDER

Defendant has been charged in No. 02-11,706 with delivery of a controlled substance, possession with intent to deliver a controlled substance, and possession of a controlled substance, and in No. 02-11,618, with receiving stolen property, retail theft and possession of drug paraphernalia. In the instant Motion to Dismiss, filed November 25, 2002, Defendant seeks to dismiss all charges for a violation of Rule 600. A hearing on the motion was held December 24, 2002.

The complaint in No. 02-11,706 was filed October 4, 2000 and in No. 02-11,618, September 21, 2000. Defendant argues that as more than 365 days have passed since the filing of the complaints, the charges must be dismissed.

Rule 600 provides, in pertinent part, that trial in a court case in which a written complaint is filed against the Defendant, when the Defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed. Pa.R.Crim.P. Rule 600 (3). The Rule further provides that in determining the period for commencement of trial, there shall be excluded therefrom ... (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence; and ... (3) such period of delay at any stage of the proceedings as results from (a) the unavailability of the defendant or the defendant's attorney.

The Commonwealth seeks to exclude the time between the filing of the complaint and Defendant's arrest, including the period of time Defendant was incarcerated in a New Jersey Prison.

With respect to the period of time between the filing of the complaint and the Defendant's arrest, which occurred September 9, 2002, the Court finds that at least until Defendant was transported to a New Jersey Prison on October 20, 2000, such time is chargeable to the Commonwealth. It appears from the evidence offered at the hearing that on September 13, 2000, Defendant was apprehended with respect to the retail theft charge and due to outstanding bench warrants, was at that time taken to the Lycoming County Prison where she remained until October 20, 2000. On October 20, 2000, she was then transported to the Edna Mahan Correctional Facility for women in Clinton, New Jersey. Since during this time, Defendant was in the Lycoming County Prison, the Court cannot conclude that her whereabouts were unknown and could not be determined by due diligence.

As of October 20, 2000, it appears the Commonwealth seeks to have Defendant declared unavailable based on her incarceration in another jurisdiction. The fact that Defendant was incarcerated in another jurisdiction does not in and of itself deem her unavailable, however. Defendant is considered unavailable only for that period of time during which she could not be retrieved or the responding jurisdiction, in this case, New Jersey, delayed extradition. Commonwealth v Woods, 663 A.2d 803 (Pa. Super. 1995). The Commonwealth has the burden of proving by a preponderance of the evidence that it exercised due diligence in seeking Defendant's return before it can establish that she was unavailable in the context of Rule 600. Id. The evidence offered by the Commonwealth in the instant matter does not support a finding of due diligence.

According to the testimony of several state police troopers, at some unknown time the cases were given to Trooper Beddel, who then asked an intelligence officer, Trooper Patton, to locate Defendant. Trooper Patton testified that he located Defendant by checking NCIC, finding her at the correctional facility in New Jersey, some time between May and October 2001. According to Trooper Patton, he contacted the prison in New Jersey and was told that Defendant was expected to be paroled on October 30, 2001. Trooper Patton was requested by the New Jersey Prison authorities to fax the warrant as a detainer and informed that New Jersey authorities would call the

Pennsylvania State Police when Defendant could be picked up. On November 7, 2001 an Order was entered in New Jersey accepting Defendant's waiver of extradition and directing Defendant to be turned over and delivered to representatives of Lycoming County so that she might be returned to Pennsylvania. The Order also provided that a copy of the Order was to be delivered to Lycoming County. Trooper Patton testified that he called New Jersey on June 18, 2002 to learn of Defendant's status and was told that he would be called when she was ready to be picked up. It appears the Lycoming County District Attorney's Office was notified of Defendant's imminent release on September 5, 2002, and directed to pick her up on her release date of September 9, 2002. Defendant was returned to Lycoming County at that time. It thus appears there is no evidence of any effort by the Commonwealth to locate Defendant until possibly October 2001, approximately one year after attempts to arrest her failed. Even after locating her, no further efforts were made, in spite of an Extradition Order, until June 2002. This clearly evidences a lack of due diligence. See e.g. Commonwealth v Kubin, 637 A.2d 1025 (Pa. Super. 1994) (failing to make any inquiries between September 16, 1991 and April 1992 clearly evidences a lack of due diligence). Thus, the Court finds chargeable against the Commonwealth that time period from the date of the complaint, September 21, 2000, through at least June 18, 2002. It further notes that the Commonwealth made no effort under the Agreement on Detainers Act to retrieve Defendant, in spite of the New Jersey Order expressly authorizing her extradition to Pennsylvania.¹

Considering the time chargeable to the Commonwealth, the Court agrees with Defendant that the Commonwealth has failed to bring her to trial within the requisite 365 days, in either matter. Dismissal of the charges is thus appropriate.

¹ According to the Agreement on Detainers, the Commonwealth may make a written request for custody of Defendant in order to have her returned to Pennsylvania. 42 Pa.C.S. Section 9101, Article IV (a).

ORDER

AND NOW, this 7th day of March, 2003, for the foregoing reasons, Defendant's Motion to Dismiss is hereby granted and the charges filed to both No. 02-11,618 and 02-11,706 are hereby dismissed.

By the Court,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley N. Anderson