

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. 03-10,929  
 :  
 vs. : CRIMINAL  
 :  
 NAFIS FAISION, :  
 Defendant :

**ORDER**

AND NOW, this \_\_\_ day of July 2004, the Court GRANTS the Defendant's Motion to Dismiss as a result of a violation of Rule 600. Based on the evidence presented at the hearing held on July 20, 2004, the Court is constrained to find that Commonwealth did not meet its burden of proof to show it acted with due diligence to bring this case to trial.

Both sides agreed that the criminal complaint in this matter was filed on May 30, 2003, and there were no defense requests for a continuance or any other instances where the Defendant or his attorney was unavailable. The Defendant's 180-day run date was November 26, 2003, but his case was not tried by that date so he was released on nominal bail pursuant to an Order entered by the Honorable Nancy L. Butts on December 22, 2003. The Defendant's 365-day run date was May 30, 2004. The Defendant's case was not brought to trial by that date. On July 9, 2004, defense counsel filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure.

At the hearing held on July 20, 2004, defense counsel pointed out twelve cases that allegedly had later run dates than the Defendant's case.<sup>1</sup> One case that clearly had a later run date than the Defendant's was Commonwealth v. Robert Hall, No. 99-11,041. Although this case was initiated in 1999, Mr. Hall had absconded and then been incarcerated

as a result of a bench warrant. Thus, his adjusted 180-day run date was June 22, 2004. See Defendant's Exhibit #2, a three-page list of trial terms and the trials selected that was utilized by Deputy Court Administrator Eileen Dgien during her testimony. As previously stated, the Defendant's 365-day run date was May 30, 2004, almost a month earlier than Mr. Hall's.

At the April 6, 2004 pre-trial conferences, both the Defendant's case and Mr. Hall's case were indicated to have an estimated length of 2 days. See Defendant's Exhibit #2, page 3. The April/May trial term consisted of the following days: April 20-23, April 26-30, and May 4-7. Id.; see also Defendant's Exhibit #1, the Lycoming County court calendar. The next criminal trial term was June 8-18 and June 22. See Defendant's Exhibit #1. Despite the fact that the Defendant's 365-day run date was earlier than Mr. Hall's 180-day run date, Mr. Hall's trial was scheduled for May 3-4, 2004. The Defendant's case was not reached.

The Deputy Court Administrator, Eileen Dgien, testified that the District Attorney's Office calculated the 180-day run dates. She did not calculate 365-day run dates and she did not know if the District Attorney's office performed such a calculation. She did not adjust the 180-day run dates and the only time she knew that the District Attorney's office would do so was when the Defendant was picked up on a bench warrant. She testified that the District Attorney's Office has input in the scheduling of case and has given her input on other cases. She also testified, however, that the District Attorney's Office did not give her any input on the scheduling of this case or notify her that this case was getting close to its Rule 600 run date. From this testimony, it appears that the District Attorney's Office simply lost track of this case. The Commonwealth also did not present any evidence at the hearing

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1 Defense counsel, however, was utilizing the Defendant's 180-day run date, even after he was released from prison.

on the Defendant's motion as to why Mr. Hall's case could not be tried in the June criminal trial term. All the dates of that term were on or before Mr. Hall's 180-day run date.

The burden of seeing that trial is commenced in a timely fashion so as to avoid a violation of Rule 600 rests on the Commonwealth, not the Defendant.

Commonwealth v. Matis, 551 Pa. 220, 230, 710 A.2d 12, 17 (Pa. 1998); Commonwealth v. Lynn, 815 A.2d 1053, 1059 (Pa.Super. 2003); Commonwealth v. Lewis, 804 A.2d 671, 673 (Pa.Super. 2002). Based on the evidence presented, the Court finds the Commonwealth has not shown it acted with due diligence nor has it shown that the postponement of this case was beyond its control as required by Rule 600(G).

For the foregoing reasons, the Court GRANTS the Defendant's Motion to Dismiss.<sup>2</sup>

By The Court,

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Kenneth D. Brown, P.J.

cc: Jason Poplaski, Esquire  
William Simmers, Esquire (ADA)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)

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<sup>2</sup> The Court notes it finds defense counsel's overly vigorous arguments that the Court should cancel other non-criminal matters, such as miscellaneous motions, argument days, opinion writing days, Children and Youth terminations and the like, are not supported by the case law. See Commonwealth v. Crowley, 502 Pa. 393, 400-401, 466 A.2d 1009, 1013 (Pa. 1983). The Court also does not believe it is inappropriate to give weight to factors such as whether a defendant is incarcerated. See Crowley, supra; Commonwealth v. Briggman, 325 Pa.Super. 333, 339, 472 A.2d 1145, 1149 (Pa.Super. 1984). However, the Court believes it is inappropriate to give preference to incarcerated defendants who could be tried in the next trial term over defendants on bail whose 365-day run date will expire before the next trial term.