

**IN THE COURT OF COMMON PLEAS
LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH	:	
	:	
v.	:	No.: 02-11,483
	:	
BRIAN GREENAWALT, JR.,	:	
Defendant	:	

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Reconsider this Court's Order of February 10, 2004, docketed in the record on February 18, 2004, which granted Defendant's request for dismissal of his case because of a Rule 600 violation.

On February 10, 2004, this Court held a hearing in the above-captioned matter to determine whether Defendant's Rule 600 rights had been violated as the Defendant alleged that more than 365 non-excludable days had passed from the date of the filing of the complaint in this case and trial had not yet begun. The Court and the Defendant and his attorney, Matthew Zeigler, were present and prepared to proceed. No representative of the Commonwealth appeared, nor did any member of the Lycoming County District Attorney's Office contact the court to explain their absence. The Court began the hearing, reviewed Defendant's Motion to Dismiss and took judicial notice of the various continuances granted in the case, which were documented by orders in the file. The Court calculated the non-excludable time to be somewhat less than the

defense calculation of 417 days but still in excess of the 365 days allowed by Rule 600. At the conclusion of this discussion, there was still no representative of the District Attorney's Office in court to concur or object to the calculations of either the Court or the Defendant. Consequently, the Court granted the Defendant's Motion to Dismiss, using the number of days calculated by the Court, finding that more than 365 days had passed since the filing of the complaint and that due diligence on the part of the Commonwealth in bringing the case to trial had not been shown. The Court placed on the record its intention to grant the Defendant's motion and issue a written order to that effect.

Approximately one hour following the conclusion of the February 10, 2004 hearing, the Assistant District Attorney who had been assigned to represent the Commonwealth at the Rule 600 hearing contacted a member of the Court's staff and inquired as to whether the hearing had been held and, if so, its outcome. He was informed of the Court's decision to grant the Defendant's motion and that a copy of the written order memorializing this decision would be provided to him when it was available. On February 13, 2004, the Commonwealth filed a Motion to Reconsider, requesting that the Court revisit its decision in the case and permit the Commonwealth to provide evidence to the Court to support its contention that additional time should be excluded, bringing the number of non-excluded days for Rule 600 purposes to a total of less than 365.

On March 9, 2004 the Commonwealth's Motion to Reconsider was heard. At the time of that hearing, Lycoming County Assistant District Attorney Charles Hardaway appeared for the Commonwealth and informed the Court that he took personal responsibility for the absence of the Commonwealth at the February 10, 2004 hearing on the Defendant's Rule 600 motion and that he had failed to appear on that date because he was "confused regarding the Court schedule". No additional reason for the Commonwealth's failure to appear was offered, nor was there any explanation as to why the same Assistant District Attorney had appeared at a hearing for another matter scheduled earlier on February 10 and again at another hearing for a separate matter scheduled later in that same afternoon.

Without ruling on the merits of the Reconsideration Motion, the Court permitted the Commonwealth to offer its evidence regarding Rule 600. The Commonwealth then offered the same information which the Court had used in its original computation of excludable time. However, Ms. Eileen Dgien, Lycoming County Deputy Court Administrator, was called to testify. Ms. Dgien was present in court at the time of each pre-trial in this case and contemporaneously kept notes regarding statements by counsel as to availability during each ensuing trial term. She testified as to her recollections of the continuances in this case. Based upon a review of the court file and the testimony of Ms. Dgien, and the 2002, 2003 and 2004 court calendars as to scheduled trial terms, of which the

Court also takes judicial notice, the Court makes the following findings of fact:

The complaint in this case was filed on May 28, 2002 and preliminary hearing was originally set for July 17, 2002. On that date, the preliminary hearing was continued at the request of the Defendant to July 24, 2002, resulting in 7 days of excludable time. On July 24, 2002 the preliminary hearing was again continued at the request of the Defendant to August 21, 2002, resulting in 28 additional days of excludable time, for a total of 35 days excluded. The period beginning August 22, 2002 through and including November 7, 2002 is not excluded time for purposes of Rule 600. On November 8, 2002 the Defendant filed a Motion to Dismiss and on December 5, 2002 he filed a request that the pre-trial hearing in his case be continued because of the pending motion. Defendant's continuance request was granted over the objection of the Commonwealth and the Motion to Dismiss was heard and decided on February 7, 2003. All parties agree that the time from November 8, 2002 through and including February 7, 2003 was excludable time for Rule 600 purposes. Accordingly, another 91 days are excluded from the Rule 600 calculation in this case, for a total of 126 days of excludable time up to this point. The Court additionally finds that after February 7, 2003, the first possible date for trial followed criminal jury selection, which began on March 4, 2003. Ordinarily, the time between February 7, 2003 and the first possible date for trial would also be excludable from a Rule 600

calculation. However, in this case, on March 4, 2003 the Commonwealth filed for a continuance of this case through April 10, 2003, which was granted over the objection of the Defendant. Therefore, the Court will exclude the time between February 7, 2003 through and including March 3, 2003, a total of 24 days, but will not exclude the time from the Commonwealth's continuance request to April 24, 2003, the date that the Defendant failed to appear for jury selection and a bench warrant was issued for him. The total excludable time through April 23, 2003 is therefore 150 days. On April 24, 2003, the Defendant failed to appear for jury selection in his case and a bench warrant was issued for his arrest. The warrant was vacated on May 1, 2003. However, by the time the warrant was vacated, the Defendant had missed the entire jury selection period for the May trial term and his opportunity to go to trial during that term. The next possible trial date was June 10, 2003, or 40 days after his bench warrant was vacated. The Court notes on May 29, 2003, the Defendant's case was listed as a back-up trial for the June, 2003 trial term. Ms. Dgjen's testimony related that Defendant's attorney then telephoned the Court Administrator's Office and indicated that they were not ready to proceed because of witness unavailability. The case was removed from the back-up list and placed on the list for the next trial term beginning on August 14, 2003. Therefore, the time between the Defendant's bench warrant of April 24, 2003 and the next possible trial date, August 14, 2003, should be excluded from Rule 600 calculations, a

total of 113 days. The total number of excludable days calculated by the Court through August 14, 2003 is 263 days. At the pre-trial held on July 17, 2003, Defendant's attorney indicated that he was unavailable for trial from August 14, 2003 through and including August 29, 2003 and also unavailable on September 2, 2003 and September 4, 2003, totalling 18 excludable days, bringing the overall total to 281 days. On November 6, 2003, yet another pre-trial was held, where Defendant's attorney indicated he was unavailable for trial on November 14, 2003, November 18, 2003, December 3, 2003 and December 4, 2003, bringing the grand total number of excludable days to 285. The Court calculates a total of 587 days from the filing of the complaint in this case on May 28, 2002 through the filing of the Defendant's Rule 600 motion on January 5, 2004. Subtracting the 285 excludable days noted above, the Court finds that only 302 days had passed for Rule 600 purposes at the time that the Defendant filed his motion.

Despite the Rule 600 calculations, this Court must determine if valid reasons exist to justify the Reconsideration of this Court's decision, when it is clear, had the Commonwealth timely attended and presented its evidence, this additional hearing would not have been needed.

In this matter, the Defendant is charged with Aggravated Assault by Motor Vehicle. The facts reveal the Defendant is alleged to have operated his vehicle under the influence of alcohol in such a manner as to have seriously injured a citizen of Lycoming County. The Court cannot

comprehend why a representative of the District Attorney's Office would not have made any attempt to appear for a motion which could ultimately result in the dismissal of the charges filed. Despite the Commonwealth's apparent lack of concern for the consequences for its failure to appear, this Court believes it finally has the correct information regarding the calculation of excludable time for Rule 600 purposes. As a result, this Court must vacate its prior Order granting Rule 600 dismissal and enter the following.

ORDER

AND NOW, this _____ day of March, 2004, the Commonwealth's Motion to Reconsider filed February 13, 2004 is GRANTED. The Court hereby VACATES its previous Order granting dismissal under Rule 600. For the reasons stated above, the Defendant's Motion to Dismiss filed January 5, 2004 is DENIED. It is ORDERED and DIRECTED that this matter be placed on the next trial list so that a trial may be held without delay.

By the Court,

_____J

xc: DA (CH)
Matthew Zeigler, Esquire
Court Scheduling
Court Administrator
Hon. Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire

The Court notes that Ms. Djien further testified that during the trial terms following the July, September and November, 2003 pre-trials of this case, the Court scheduled other cases for trial during those dates that the Defendant and his attorney were available. She testified that these cases had earlier Rule 600 dates than the Defendant's case. However, the Court specifically declines to analyze the status of these other cases and whether they affect the due diligence of the Commonwealth with respect to the Defendant's case because the computation of excludable time already made clearly shows that with the additional evidence provided by Ms. Djien there has been no violation of the Defendant's speedy trial rights under Rule 600.

The issue now becomes whether the Commonwealth's Motion to Reconsider should be granted, resulting in the Court reversing its previous order docketed February 18, 2004 and issuing a new order based upon the calculation of the Defendant's Rule 600 date which takes into account the testimony of Ms. Djien. First, the Court expressly notes its grave displeasure with the Commonwealth's failure to appear at the date and time set for the Rule 600 hearing in this matter. Evidence provided by the Commonwealth at the subsequent proceeding through the testimony of the Deputy Court Administrator requires the Court to reach the conclusion that no Rule 600 violation has occurred. However, the Court specifically rejects the reason given by the Commonwealth for

its failure to provide this evidence at the hearing on Defendant's motion and finds that confusion as to the scheduling of the Defendant's Motion to Dismiss is inadequate to excuse the appearance of the Assistant District Attorney assigned to this matter on February 10, 2004. This is particularly so in light of the same Assistant District Attorney's appearance at other, unrelated hearings scheduled both before and after this case in the same afternoon.

The Court is additionally cognizant of the Defendant's right to have an order dismissing his case be a final order which remains unchanged and the injustice to the Defendant to have to defend himself against these charges after they had been dismissed following the February 10, 2004 hearing. Nevertheless, the Court is also very aware that the charges filed in this case are very serious felony charges and that a manifest injustice would result to the victim in this case and also to the residents of Lycoming County in general should the defendant be discharged by erroneous application of a rule of criminal procedure which resulted solely from the lack of attention given to this case by the District Attorney's Office. The Court has very carefully weighed this injustice to the victim and the citizens of Lycoming County against the rights of the Defendant. While the Court is gravely disappointed with the Commonwealth's lack of attention to the seriousness of the facts alleged in this case, the Court cannot and will not ignore this aspect of the instant matter and finds that the manifest injustice to those whom the District

Attorney's Office purports to protect outweighs the Defendant's interest in maintaining an order which was based upon an erroneous calculation of excludable time for purposes of Rule 600. The Court will therefore grant the Commonwealth's Motion to Reconsider, vacate its Order of February 18, 2004, and issue a second order denying the Defendant's Motion to Dismiss under Rule 600 of the Pennsylvania Rules of Criminal Procedure.

ORDER

AND NOW, this _____ day of March, 2004, the Commonwealth's Motion to Reconsider filed February 13, 2004 is GRANTED. The Court hereby VACATES its previous Order docketed on February 18, 2004 and, for the reasons stated above, the Defendant's Motion to Dismiss filed January 5, 2004 is DENIED.

By the Court,

_____J

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