

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 02-11,483
	:
vs.	: CRIMINAL DIVISION
	:
BRIAN LEE GREENAWALT,	:
Defendant	: Motion to Dismiss

OPINION AND ORDER

Before the Court is Defendant's Renewed Motion to Dismiss, filed May 5, 2004. The original motion to dismiss, to which Defendant refers by captioning the instant motion as a "renewed" motion, was filed January 5, 2004. That motion sought to have the charges dismissed based on an alleged violation of Rule 600, and was originally granted by the Honorable Nancy L. Butts, by Order dated February 10, 2004. The Commonwealth did not appear at the hearing on February 10, 2004, but then filed a motion for reconsideration on February 13, 2004. After granting the Commonwealth's request for reconsideration, and considering the additional evidence presented at the second hearing, held March 9, 2004, Judge Butts vacated her Order of February 10, 2004, and denied the motion to dismiss, by Order dated March 15, 2004, finding only 302 days had elapsed from the filing of the complaint through the filing of the motion to dismiss, not counting excludable time. In the instant motion, Defendant claims 406 days have now passed, and again seeks to have the charges dismissed.

A review of the file shows Defendant has miscalculated the Rule 600 run period, by including time which the Court finds excludable under the rule. Specifically, in calculating his total of 406 days, Defendant has added to the finding of 302 days mentioned above almost all of the time from the date of the original motion, January 5, 2004, through May 5, 2004, the date of trial, specifically, a period of 104 days,¹ but it appears only twenty-nine (29) days of that time should be counted.

¹ Defendant does exclude the period from March 22, 2004, when he asked for a continuance of the trial, through April 6, 2004, the date of a pre-trial conference.

First, the motion filed by Defendant on January 5, 2004, caused a delay in trial, rendering Defendant unavailable for purposes of Rule 600. Commonwealth v. Hill, 736 A.2d 578 (Pa. 1999). While the Court finds the period from February 10, 2004, through March 9, 2004, 28 days, to have been a delay caused by the Commonwealth's lack of due diligence and thus not excludable,² the remainder of the period from the date of the motion through the date on which it was ultimately denied, March 15, 2004, is excludable, as is the time from the denial of the motion through the next possible trial date. The Order of March 15, 2004, placed the matter back on the trial list; the next call of that list was scheduled to take place on March 22, 2004. Thus, from March 15 through March 22 is also excludable.

Second, on March 22, when the case was called to trial, Defendant requested a continuance and the matter was continued to the next trial term, the call and the first possible day for jury selection for which was scheduled to take place on April 15, 2004. Thus, the time from March 22, 2004 through April 15, 2004, is also excludable.³ Jury selection, "commencement of trial" for purposes of the instant motion,⁴ took place on April 16, 2004. Therefore, only one (1) day is counted toward the Rule 600 run period, resulting in only 331 days, not 406 days having elapsed between the filing of the complaint and the commencement of trial.

² While a defendant's pre-trial motion will render that defendant unavailable for trial if the filing of the motion causes a delay in the commencement of trial, the Commonwealth must show due diligence in responding to the motion, and any delay caused by the Commonwealth's lack of due diligence will not be excludable for purposes of Rule 600. Commonwealth v. Hill, 736 A.2d 578 (Pa. 1999). In the instant matter, Judge Butts found that "had the Commonwealth timely attended [the February 10, 2004, hearing] and presented its evidence, [the March 9, 2004] hearing would not have been needed." Judge Butts also noted the assistant district attorney's only explanation for his failure to appear on February 10, 2004, as his "confusion regarding the Court schedule." This Court finds a lack of due diligence in responding to the motion to dismiss.

³ While Defendant argues the excludable time caused by the continuance request should extend only through the date of pre-trial, the Court cannot say the Commonwealth fails to exercise due diligence in not bringing Defendant to trial until there is actually trial time available, that is, until the date available for jury selection.

⁴ See Comment to Rule 600 ("trial commences when the trial judge determines that the parties are present and directs them to proceed to voir dire...or to some other such first step in the trial"). Pa.R.Crim.P. 600. See also, Commonwealth v. Lynn, 815 A.2d 1053 (Pa. Super. 2003)(trial deemed to commence for purposes of Rule 600 at jury selection).

ORDER

AND NOW, this 6th day of May 2004, for the foregoing reasons, Defendant's Renewed Motion to Dismiss is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Matthew Zeigler, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson