IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 00-11,870

VS :

KURTIS NIXON :

OPINION AND ORDER

On December 9, 2003, Defendant Kurtis Nixon was sentenced to undergo incarceration for a minimum of five (5) years and a maximum of ten (10) years on the charge of Delivery of a Controlled Substance, cocaine. The sentence was entered after the Defendant was found guilty following the jury trial held June 19-23, 2003. On December 19, 2003, Defendant filed a Post Sentence Motion alleging that his former defense attorney was ineffective as she failed to recognize and file a Rule 600 motion. Defendant alleges that more than 365 days had elapsed from the filing of the complaint on May 26, 1999; and, a) there is not sufficient excludable time to bring the calculation below 365 days; and, b) the Commonwealth failed to exercise due diligence in attempting to locate him. After a hearing on the Post Sentence Motion on March 26 and 31, 2004, the Court finds the following facts.

Defendant, Kurtis Nixon testified that he resided at 452 Market Street Apartment 8 in the City of Williamsport for approximately 2 years prior to the date the complaint was issued. He was also employed at the time at Lycoming College as a utility supervisor until approximately May 30, 1999. Defendant also presented a copy of an eviction judgment dated January 27, 2000 for the residence on Market Street. After the Defendant was evicted, he testified that he went to live with his daughter's mother at

504 Park Avenue, City of Williamsport. Defendant was arrested on the warrant at the Park Avenue location on November 17, 2000. Defendant further testified that original defense counsel never advised him of the possibility of filing a Rule 600 motion. Defendant did acknowledge that another attorney, Emmanuel Izuogu, Esquire would have been the first attorney to mention the possibility of such a motion having potential merit. Defendant neither hired Izuogu as counsel, nor did he notify his counsel of their discussion.

Trooper Nicholas Madigan of the Pennsylvania State Police testified regarding his attempts to serve the warrant on the Defendant. Madigan testified that he knew Defendant lived at 452 Market Street, but the last drug transaction had occurred at Lycoming College rather than his residence. Madigan attempted to serve the warrant on the Defendant one time prior to entering the Defendant's name into the NCIC/Clean computer. Madigan testified that he entered the information of which he was personally aware: height, weight, operator's number, social security number and date of birth. Madigan also included the fact the Defendant walked with a noticeable limp. Madigan recalled going back to the Market Street address one more time with another officer. He also notified the undercover drug officers of the Williamsport Bureau of Police as well as the US Marshals and the Fugitive Apprehension unit of the PSP in early 2002. Because Madigan was aware of the Defendant's connections to the City of Philadelphia, Madigan felt that an entry into NCIC might result in the Defendant being located more quickly. Madigan was not aware of the Defendant working anywhere other than Lycoming College or having any family in the Williamsport area. In early 2000, Madigan went to the Post Office to locate a mailing address for the Defendant. Trooper Hutson sent

Defendant a certified letter to report to the barracks, which returned as unclaimed in March of 2000. Madigan admitted he did not contact any residents, manager or owner of the Market Street property. He cited the fact that on one occasion an occupant had alerted Defendant that the building was being watched.[1] Therefore, he felt he could not trust anyone associated with the building.

Agent Leonard Dincher of the Williamsport Bureau of Police testified he was working on drug investigations at the time the charges were filed. Madigan told Dincher about the warrant for the Defendant during the summer of 1999. Dincher contacted the head of Security for Lycoming College to determine whether Defendant was still employed; he was not. Dincher further testified he attempted to locate the Defendant often, as the Market Street property was prominently located within Williamsport and that he was "out and about". Had he seen the Defendant, he would have arrested the Defendant on the warrant. Dincher also recalled that one day he was buzzed into the Market Street building. Although he did not know who allowed him inside, he did make contact with a white female who, after hearing Dincher banging on the apartment door of where he believed the Defendant was still living, was told that Defendant no longer lived there. Knowing Defendant wore Muslim garb, Dincher also was certain that had he seen the Defendant at the Muslim Center, he would have picked him up at that location as well.

VIOLATION OF Pa.R.Crim.P. 600

Defendant first asserts that his adjudication of guilt was made in violation of Pa.R.Crim.P. 600. Defendant argues that the time between the filing of the complaint

[1] The building was in fact under surveillance at the time as PSP was attempting to make a controlled purchase from the Defendant.

and the entry of his initial plea was in excess of 365 days. Pa.R.Crim.P. 600 provides that trial in a case in which a written complaint is filed against the defendant, where the defendant is at liberty on bail, shall commence “no later than 365 days from the date on which the complaint is filed.” In the instant case, the criminal complaint was filed against the Defendant on May 26, 1999. The Court accepted his initial plea of guilty April 19, 2002. The total time elapsed was 1055 days.

It is undisputed that the Commonwealth bears the burden of proving by a preponderance of the evidence that the police exercised due diligence in trying to find appellee. Commonwealth v. Mitchell, 472 Pa. 553, 372 A.2d 826 (1977); Commonwealth v. Dorsey, 294 Pa.Super. 584, 440 A.2d 619 (1982). "The 'due diligence' required of the police does not demand perfect vigilance and punctilious care, but rather a reasonable effort." Commonwealth v. Polsky, 493 Pa. 402, 407, 426 A.2d 610, 613 (1981); see also Commonwealth v. Fanelli, 292 Pa.Super. 100, 436 A.2d 1024 (1981). Moreover, it is not the function of our courts to second-guess the methods used by police to locate accused persons. The analysis to be employed is whether, considering the information available to the police, they have acted with diligence in attempting to locate the accused. Deference must be afforded the police officer's judgment as to which avenues of approach will be fruitful. Commonwealth v. Mitchell, supra, 472 Pa. at 566, 372 A.2d at 832. In considering "the information available to the police," we do not ask whether the police had available all the information they *might* have had available -- in other words, whether they did all they *could* have done. Instead, we ask whether what they *did* do was enough to constitute due diligence**.** Commonwealth v. Dorsey, supra, 294 Pa.Superior Ct. at 588, 440 A.2d at

621. *See also* Commonwealth v. Winn, 327 Pa.Super. 296, 475 A.2d 805 (1984); Commonwealth v. Faison, 324 Pa.Super. 406, 471 A.2d 902 (1984). "It is simply not required that the Commonwealth exhaust every conceivable method of locating a defendant. Rather, reasonable steps must be taken." Commonwealth v. Jones, 256 Pa.Super. 366, 373, 389 A.2d 1167, 1170 (1978). The Court is satisfied that the Commonwealth took reasonable steps and made a reasonable effort to locate the Defendant. Madigan's use of his agency (PSP) as well as the Williamsport Bureau of Police and the US Marshals he enlisted the widest group of law enforcement agencies to locate Defendant. Therefore, 537 days shall be subtracted from the total time elapsed of 1055 days, leaving 518 days[2].

Excluded from the total elapsed time, however, also are delays resulting from the unavailability of the Defendant, and any continuances granted at the request of the Defendant or the Defendant's attorney Pa.R.Crim.P. 600(C) (3) (b), and times between the filing and disposition of pre-trial motions if the filing of the pretrial motion causes the delay in the commencement of trial. Commonwealth v. Hill, 558 Pa. 238, 736 A.2d 578, (1999). In the instant case, there were several continuances and motions filed on behalf of the Defendant that resulted in the delay of the commencement of trial.

The Defendant was arrested November 14, 2000 and his preliminary hearing was scheduled and held on November 17, 2000. Defense Counsel asked for a continuance on February 27, 2001 until April 16, 2001 stating that the Defendant was "cooperating" (48 days excludable). Next, Defense Counsel asked for another continuance on April 16, 2001 until May 25, 2001 as he had a Drug Court application

[2] 537 days represents the time from the filing of the complaint on May 26, 1999 to the Defendant's arrest date on November 14, 2000.

pending (39 days excludable). Defendant then asked for another continuance on May 25, 2001 until July 31, 2001, as his Drug Court application was still pending (67 days excludable). Defendant was required to appear for case monitoring and failed to appear. A bench warrant was requested July 31, 2001 and the Defendant was picked up on the warrant on October 24, 2001. (85 days excludable) Again Defendant requested his case be continued from December 18, 2001 to February 14, 2002 to enable him to be placed onto the Drug Court program. (58 days excludable). The case was then continued from February 14th to 27th, 2002 to be placed onto the Drug Court program. (14 days excludable) The Defendant entered a plea of guilty on April 19, 2002, once it turned out he was not going to be placed into the Drug Court program.

After subtracting the total amount of excludable time of 311 days from the total time elapsed of 518, a balance of 207 days count toward the expiration of 365 days under Rule 600. The Court therefore finds this argument without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next alleges that his trial counsel was ineffective. In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; and (3) counsel's ineffectiveness prejudiced defendant. Commonwealth v. Beasley, 544 Pa. 554, 678 A.2d 773, 778, (1996). *See also*, Commonwealth v. Jefferson, 2001 Pa.Super 151, 777 A.2d 1104, 1106-07 (Pa. Super. (2001). Thus, the mere allegation that trial counsel pursued a wrong course of action will not make out a finding of ineffectiveness. Commonwealth v. Savage, 529 Pa. 108, 112, 602 A.2d 309, 311 (1992).

Defendant alleges that his counsel was ineffective for failing to file a motion to Dismiss based on a violation of Pa.R.Crim.P. 600. Although Defendant's claim of a Rule 600 violation may have been of arguable merit, his claim fails. Based upon the discussion in the previous section, calculating excludable time, Defendants case was disposed of within the time required under Rule 600. Since the Defendant was not prejudiced by the failure to file the Rule 600 dismissal motion, this claim is without merit.

ORDER

AND NOW, this 12th day of April, 2004 after hearing and based upon the foregoing analysis, the Defendant's Post Sentence Motion is hereby DENIED.

By The Court,

_____
Nancy L. Butts, Judge

DA
William Kovalcik, Esquire
Gary Weber
Law Clerk
Judges
Honorable Nancy L. Butts