

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 856-2004
 :
 JANA STURDIVANT, : CRIMINAL ACTION - LAW
 :
 Defendant :
 :
 : RULE 600 MOTION

DATE: June 6, 2006

OPINION and ORDER

Before the court for determination is the Motion to Dismiss for Violation of Rule 600 filed by Defendant Jana Sturdivant (hereafter “Sturdivant”) on March 1, 2006. The motion will be granted.

I. BACKGROUND

A. Facts

An evidentiary hearing was held on April 20, 2006. The following facts were determined from the evidence and uncontested statements of counsel presented at the hearing, as well as, the documents filed of record in this matter of which the court takes notice. The essential facts presented to the court are not in dispute.

On May 3, 2004, a criminal complaint was filed against Sturdivant charging her with Forgery¹, Theft by Unlawful Taking or Disposition², and Receiving Stolen Property³. At that time,

1 18 Pa.C.S.A. § 3921(a).

2 18 Pa.C.S.A. § 4101(a)(2).

3 18 Pa.C.S.A. § 3925(a).

Sturdivant was incarcerated in the Clinton County Prison. This fact was known by the Commonwealth. Sturdivant remained incarcerated in either the Clinton County Prison or the Muncy State Correctional Institution until April or May of 2006.

Sturdivant was arrested at the Clinton County Prison and taken by the prosecuting officer from the Clinton County Prison to District Justice Schriener's office in Lycoming County, where she was preliminarily arraigned on May 3, 2004. Bail was set at \$5,000. Bail was never posted. Sturdivant was returned to the Clinton County prison the same day.

A preliminary hearing in the matter was scheduled for May 17, 2004. On that date, Sturdivant was again transported by unknown means to District Justice Schriener's office from the Clinton County Prison. Sturdivant waived the preliminary hearing. Sturdivant was represented at that time by a public defender. A tentative plea agreement was reached. A case scheduling form was completed in which formal arraignment was set for June 14, 2006 and was waived by the public defender who entered his appearance for Sturdivant. The case scheduling form directed Sturdivant to appear in court on September 9 or 10, 2004 for criminal monitoring, October 7, 2004 for pretrial conference, October 11 or 12, 2004 for jury selection and trial during the term of October 14-27, 2004. Sturdivant, her attorney, and the Assistant District Attorney signed the form. Sturdivant was then returned to the Clinton County Prison by unknown means the same day.

Between May 17, 2004 and September 9, 2004 Sturdivant was transferred to the State Correctional Institution at Muncy (hereafter "SCI Muncy").

Sturdivant failed to appear for the criminal case monitoring conference that was to be held on September 9 or 10, 2004. On September 13, 2004, a bench warrant was issued for her apprehension.

On December 7, 2004, the Lycoming County District Attorney's Office (hereafter "the District Attorney's Office") submitted a proposed *Habeas Corpus ad Testificandum* to this court, which was issued the same day. It directed that troopers of the Pennsylvania State Police proceed to SCI Muncy and take into custody Sturdivant for the purpose of fingerprinting. Upon completion, the troopers were to return Sturdivant to SCI Muncy.

Sturdivant was scheduled for a pretrial conference on March 1, 2005. There is no evidence of record as to how Sturdivant was notified of this conference and date. Again, Sturdivant failed to appear. On March 2, 2005, a bench warrant was issued for her apprehension.

Sturdivant was next scheduled for a pretrial conference on September 20, 2005. On September 14, 2005, a *Habeas Corpus ad Testificandum* was issued directing the Lycoming County Sheriff's Department to proceed to SCI Muncy and take Sturdivant into custody for purposes of that pre-trial. The record does not reflect who requested this order. On September 20, 2005, at 9:00 a.m., the Lycoming County Sheriff's Department transported Sturdivant from SCI Muncy and placed her in the custody of the Lycoming County Prison. Sturdivant's case was continued to a case monitoring day to be held on November 1, 2005. The record does not reflect why the case was continued. The Lycoming County Sheriff's Department transported Sturdivant back to SCI Muncy at 3:40 p.m. on September 14, 2005.

Sturdivant requested a continuance of the November 1, 2005 case monitoring conference. The stated reason for the continuance request was that she was incarcerated at SCI Muncy. The continuance request was granted and a conference was scheduled for December 6, 2005 at 9:00 a.m. There is no record as to what if anything occurred on December 6, 2005.

On January 9, 2006, the Honorable Kenneth D. Brown, President Judge, issued an order directing the Lycoming County Sheriff's Department to proceed to SCI Muncy and take Sturdivant into custody for the purpose of a guilty plea on January 18, 2006 in Courtroom No.2 of the Lycoming County Courthouse. On January 12, 2006, Sturdivant filed a *pro se* motion seeking to have the charges against her dismissed for a violation of Pennsylvania Rule of Criminal Procedure 600 (hereafter "Rule 600"). On January 18, 2006, when she appeared for her scheduled guilty plea, Sturdivant orally raised a Rule 600 motion.

On January 18, 2006, the Honorable Dudley N. Anderson issued an order regarding Sturdivant's oral Rule 600 motion. Judge Anderson could not find a satisfactory explanation for the Commonwealth's delay in bringing Sturdivant to trial. Judge Anderson reduced Sturdivant's bail to \$1,500 R.O.R. Judge Anderson directed Sturdivant to appear for a pre-trial conference on March 2, 2006.

On February 7, 2006, a *Habeas Corpus ad Testificandum* was issued directing the Lycoming County Sheriff's Department to proceed to SCI Muncy and take Sturdivant into custody for the purpose of the pre-trial conference scheduled for March 2, 2006. The order also directed that Sturdivant was to be housed at the Lycoming County prison until completion of her trial. Following her trial, Sturdivant was to be transported back to SCI Muncy.

On March 1, 2006, Sturdivant filed the present Motion to Dismiss for Violation of Rule 600. At 11:30 a.m., on March 2, 2006, the Lycoming County Sheriff's Department transported Sturdivant from SCI Muncy and placed her in the custody of the Lycoming County Prison. At the pre-trial conference, the court conferenced the Rule 600 motion and determined it was opposed by the Commonwealth. A hearing on the motion was scheduled for April 20, 2006. This court also vacated the September 10, 2004 and March 2, 2005 bench warrants and reaffirmed Sturdivant's bail as \$1,500 R.O.R. At 4:00 p.m., on March 2, 2006, the Lycoming County Sheriff's Department transported Sturdivant back to SCI Muncy.

At the April 20, 2006 hearing, it was determined that the foregoing facts, which were all supported by documents of record, were uncontested by the Commonwealth. The Commonwealth did not present any evidence which would have indicated what steps, if any, it took to determine Sturdivant's whereabouts following the issuance of the September 13, 2004 bench warrant. Nor did the Commonwealth introduce any evidence from which this court could determine what information, if any, the Commonwealth possessed as to Sturdivant's whereabouts at or after the filing of the criminal complaint.

In ascertaining the full set of facts that are available from the documents filed in this case, the court has taken judicial notice of the following:

1. The affidavit of probable cause was completed and filed May 3, 2004. It recited that the prosecuting officer had interviewed Sturdivant about these charges at the Clinton County Prison on March 9, 2004 and that she had no further address.

2. The criminal complaint issued as a result of the affidavit of probable cause was signed as “approved” by First Assistant District Attorney Kenneth Osokow, Esquire on May 3, 2004. This complaint states Sturdivant’s address as being the Clinton County Prison.
3. The court further notes that it is common knowledge that the Clinton County Prison, as well as SCI Muncy are both located within 25 miles of the Lycoming County Courthouse, or, within a 30 minute drive.
4. Sturdivant appeared at Magisterial District Justice Schriener’s office on May 17, 2004 for a preliminary hearing, which was waived. The district justice transcript of May 17, 2004, filed May 21, 2004, stated Sturdivant’s address as being the Clinton County Prison. The transcript further verifies Sturdivant was arrested and preliminarily arraigned on May 3, 2004 and that she did not post bail, which had been set in the amount of \$5,000.00.
5. The May 17, 2004 magisterial district justice’s transcript further states that Sturdivant was then committed to the Lycoming County Prison, although all parties agree she was returned to the Clinton County Prison that day.
6. Between the dates of September 9, 10, 2004 (the first criminal monitoring date when a bench warrant was first issued for Sturdivant) and September 20, 2005 (when Sturdivant next appeared at a pretrial conference) the 2004, 2005 Court calendar provided for criminal monitoring, or criminal pre-trials followed by a trial term on the following dates:

| CRIMINAL MONITORING | CRIMINAL PRETRIALS | TRIAL TERM |
|-----------------------|--------------------|-------------------------------|
| October 28, 29, 2004 | October 7, 2004 | October 8-27, 2004 |
| December 9, 10, 2004 | November 4, 2004 | November 16-December 17, 2004 |
| February 17, 18, 2005 | January 6, 2005 | January 25-February 3, 2005 |
| April 11, 12, 2005 | March 1, 2005 | March 14-31, 2005 |
| May 31, 2005 | April 21, 2005 | May 10-25, 2005 |
| June 2, 2005 | June 9, 2005 | June 21-July 1, 2005 |
| July 11, 12, 2005 | July 28, 2005 | August 22-30, 2005 |
| September 8, 9, 2005 | | |

At the conclusion of the April 20th hearing, this court issued an order that recited the relevant dates (referenced in detail herein) and directed briefs be filed, with Sturdivant's brief being due May 4, 2006 and the Commonwealth's brief due May 18, 2006. Sturdivant filed a brief on May 4, 2006. The Commonwealth has yet to file a brief. As a result of the lack of evidence presented by the Commonwealth and its failure to file a brief, this court has been handicapped in attempting to evaluate all the legal principals which govern the determination of this case. Nevertheless, we will give full analysis to the merits of the motion rather than simply grant it due to this failure by the Commonwealth. The court cannot determine if the failure is because of the Commonwealth's nonchalance or lackadaisical attitude or if the failure is because the Commonwealth's staffing is so inadequate that nothing more could be done to salvage this prosecution.

B. Arguments

Sturdivant contends that the Commonwealth has violated her speedy trial rights under Rule 600 because it has failed to bring her to trial within 365 days of the criminal complaint in her case having been filed. Sturdivant argues that there is no excludable time because she cannot be

considered to have been unavailable for trial at any time during the period of May 3, 2004 to May 3, 2005. Sturdivant asserts that there is no excludable time for Rule 600 purposes because the Commonwealth failed to exercise due diligence in determining her location for that time period. Sturdivant contends that if the Commonwealth had exercised due diligence in bringing her to trial it could have easily discovered her location at SCI Muncy. In fact, Sturdivant contends that as of December 7, 2004 the Commonwealth was aware of her location at SCI Muncy when the *Habeas Corpus ad Testificandum* for fingerprinting was issued and has known of her location at that facility ever since. Accordingly, Sturdivant contends that the charges against her must be dismissed.

The Commonwealth's contentions in this matter were asserted at oral argument at the April 20, 2006 hearing. The Commonwealth asserted the following:

1. Sturdivant knew of the criminal monitoring date of September 9, 10, 2004 and had an obligation to appear.
2. When Sturdivant failed to appear for criminal monitoring in September 2004 it was proper to issue a bench warrant.
3. The issuing of the bench warrant relieved the Commonwealth from any further obligations to attempt to locate Sturdivant and bring her to trial with all time from the issuance of the bench warrant until she was brought before the court and the bench warrant vacated excludable time for Rule 600 purposes.
4. The Commonwealth had no obligation to locate defendants who may be incarcerated nor to take steps to bring them before the court for trial.

5. Sturdivant's incarceration automatically made her unavailable for trial.

II. ISSUE

There is one main issue before the court with two subparts. It is:

Whether the charges alleged against Sturdivant in the criminal complaint filed May 3, 2004 must be dismissed because the Commonwealth has failed to bring her to trial within 365 days of that date?

- (a) Whether Sturdivant may be considered unavailable for the period of time during which she was incarcerated at the Clinton County Prison and SCI Muncy, thereby excluding that time period from the Rule 600 calculation?
- (b) Whether the Commonwealth has exercised due diligence in attempting to bring Sturdivant to trial within 365 days of the complaint having been filed?

III. DISCUSSION

The discussion section of this opinion will be divided into three parts. The first part will set forth the applicable general rules and principles regarding Rule 600. The second part will set forth why Sturdivant may not be considered unavailable for the time period during which she was incarcerated at the Clinton County Prison and SCI Muncy. The third part will set forth why the Commonwealth has failed to establish that it has exercised due diligence in attempting to bring Sturdivant to trial within 365 days of the complaint having been filed.

A. Rule 600 General Rules and Principles

Rule 600 serves two functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. *Commonwealth v. Hunt*, 858 A.2d 1234, 1239 (Pa. Super. 2004), *app. denied*, 875 A.2d 1073 (Pa. Super. 2005).

‘In determining whether an accused’s right to a speedy trial has been violated, consideration must be given to society’s right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of *Rule [600]* was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.’

Ibid. (quoting *Commonwealth v. Aaron*, 804 A.2d 39, 42 (Pa. Super. 2003)) (change in original).

‘So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, *Rule[600]* must be construed in a manner consistent with society’s right to punish and deter crime. In considering [these] matters ..., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well. Strained and illogical judicial construction adds nothing to our search for justice, but only serves to expand the already bloated arsenal of the unscrupulous criminal determined to manipulate the system.’

Ibid. (quoting *Commonwealth v. Corbin*, 568 A.2d 635, 638-39 (Pa. Super. 1990)) (change in original).

Rule 600 provides in pertinent part:

(A)(3) Trial in court cases 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.

(C) 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;
- (2) any period of time for which the defendant expressly waives Rule 600;
- (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;
 - (b) any continuance granted at the request of the defendant or the defendant's attorney.

(G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth who shall also have the right to be heard thereon.

If the court upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, the Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant.

Generally, Rule 600 requires the Commonwealth to bring a defendant on bail to trial within 365 days of the date the complaint was filed. *Hunt*, 858 A.2d at 1210. “A defendant on bail after 365 days, but before trial, may apply to the court for an order dismissing the charges with prejudice.” *Id.* at 1240-41.

In determining a Rule 600 motion, a court must engage in a two step analysis. The court must determine whether there is excludable time and whether there is excusable delay. *Commonwealth v. Malgieri*, 889 A.2d 604, 607 (Pa. Super. 2005). “Excludable time” is defined as

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 whereabouts were unknown and could not be determined by due diligence; any period of time for which the defendant **expressly waives** Rule 600; and/or such period of delay at any stage of the proceedings as results from: (a) the unavailability of the defendant or the defendant’s attorney; (b) any continuance granted at the request of the defendant or the defendant’s attorney.

Hunt, 858 A.2d at 1241 (citing Pa.R.Crim.P. 600(c)) (emphasis in original). A defendant should be deemed unavailable:

... for the period of time during which the defendant contested extradition, or a responding jurisdiction delayed or refused to grant extradition; or during which the defendant was physically incapacitated or mentally incompetent to proceed; or during which the defendant was absent under compulsory process requiring his or her appearance elsewhere in connection with other judicial proceedings.

Pa.R.Crim.P. 600, cmt. Rule 600 does not define “excusable delay”, however, it has been interpreted to mean “... delays which occur as a result of circumstances beyond the Commonwealth’s control and despite its due diligence.” *Hunt*, 858 A.2d at 1241.

B. Sturdivant's Incarceration at the Clinton County Prison and SCI Muncy is not Excludable Time

The period of time during which Sturdivant was incarcerated at the Clinton County Prison and SCI Muncy is not excludable from the Rule 600 calculation. A defendant may be considered “unavailable” when he is incarcerated within the Commonwealth only for that period of time during which his presence could not be secured despite due diligence by the Commonwealth. *Commonwealth v. Pichini*, 454 A.2d 609, 610 (Pa. Super. 1982). This rule is modified when the defendant has been incarcerated after having been free on bail.

A defendant on bail who fails to appear at a court proceeding of which he has been properly notified is unavailable from the time of that proceeding until he is subsequently apprehended or voluntarily surrenders, and the Commonwealth is entitled to exclude this period without a showing of due diligence. (citations omitted). [The Superior Court has] held that this principle applies even where the defendant is incarcerated, and therefore can not appear, if he has not complied with the notice requirement of Rule 4013(c).

Commonwealth v. Gorham, 491 A.2d 1368, 1370 (Pa. Super. 1985) (Pa.R.Crim.P. 526(A)(3) encompasses the current notification requirement.). Thus, a defendant who is out on bail has an obligation to notify the Commonwealth of his incarceration and failure to do so results in him being unavailable for Rule 600 purposes. Here, Sturdivant was not free on bail when she was incarcerated, and consequently, she had no obligation to notify the Commonwealth of her incarceration. Also, since Sturdivant was not free on bail when she was incarcerated, the Commonwealth was not relieved of its duty to exercise due diligence in trying to locate Sturdivant.

The Commonwealth has failed to present evidence which would show that Sturdivant's presence could not have been secured between May 3, 2004 and May 3, 2005. The criminal

complaint and the May 17, 2004 magisterial district justice transcript demonstrate that the Commonwealth knew that Sturdivant had not made bail and was incarcerated at the Clinton County Prison during May 2004. The December 7, 2004 *Habeas Corpus ad Testificandum* submitted by the Commonwealth demonstrates that the Commonwealth knew that Sturdivant was then incarcerated at SCI Muncy. The evidence demonstrates that the Commonwealth knew that Sturdivant was incarcerated at all times from May 3, 2004 at one of two prisons, both within a twenty-five mile radius of the Lycoming County Courthouse. The evidence, however, fails to demonstrate how the Commonwealth was prevented from securing Sturdivant's presence from these locations of incarceration. The Commonwealth presented no evidence regarding its efforts to bring Sturdivant from her place of incarceration to court and how those efforts were thwarted. There is simply just no evidence before the court that the Commonwealth made any effort during the period of May 3, 2004 to May 3, 2005 to bring Sturdivant from her place of incarceration to the court. As such, Sturdivant cannot be deemed to have been unavailable while she was incarcerated at the Clinton County Prison and SCI Muncy.

Sturdivant was incarcerated for the entire 365 day period between May 3, 2004 and May 3, 2005. Since Sturdivant was not unavailable during her incarceration, there is no excludable time that needs to be entered in the Rule 600 calculation. Thus, the Commonwealth had until May 3, 2005 to bring Sturdivant to trial unless there was an excusable delay.

C. The Commonwealth has Failed to Present Evidence Establishing an Excusable Delay

The Commonwealth has failed to present evidence establishing an excusable delay justifying its failure to bring Sturdivant to trial within 365 days of the complaint having been filed. ““Even where a violation of Rule [600] has occurred, the motion to dismiss the charges should be denied if the Commonwealth exercised due diligence and ... the circumstances occasioning the postponement were beyond the control of the Commonwealth.”” *Hunt*, 858 A.2d 1241. The concept of due diligence is fact-specific and must be determined on a case-by-case basis. *Malgieri*, 889 A.2d at 607. ““Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth.”” *Ibid.* (quoting *Commonwealth v. Brown*, 875 A.2d 1128, 1138 (Pa. Super. 2005)).

The evidence fails to demonstrate that the Commonwealth exercised due diligence in bringing Sturdivant to trial before May 3, 2005. The Commonwealth has presented no evidence of its attempts to locate and secure Sturdivant’s presence for trial. On the September 2004 bench warrant application, the Commonwealth asserted that Sturdivant resided in Altoona, Pennsylvania. The record does not disclose the Commonwealth’s source of that information. However, at that time and since her arrest, Sturdivant had been incarcerated at the Clinton County Prison or SCI Muncy. Subsequent to the September 2004 bench warrant application, the District Attorney’s Office must have received information that Sturdivant was located at SCI Muncy, although the Commonwealth did not disclose how it became aware of that information, as it then sought the *Habeas Corpus ad Testificandum* to obtain Sturdivant’s fingerprints. The proposed order submitted by the Commonwealth specifically identified SCI Muncy as Sturdivant’s location. Thus, as of at least December 7, 2004, the Commonwealth knew that Sturdivant was located at SCI

Muncy. The court does not understand why the Commonwealth also did not seek to have Sturdivant brought before it on December 9 or 10, 2004 for criminal monitoring at the same time it sought her transportation for fingerprinting.

The Commonwealth failed to act on its knowledge and bring Sturdivant before the court, despite multiple dates being available including criminal monitoring on December 9, 10, 2004 which was the event Sturdivant had missed in September. There were also two trial terms held between January 1, 2005 and May 3, 2005. The record does disclose Sturdivant failed to appear at a March 1, 2005 pre-trial conference and a bench warrant was subsequently issued. There is no evidence Sturdivant was given notice of this event. The bench warrant issued on March 2, 2005 recites Sturdivant as residing at 616 Wilson Street, Williamsport, Pennsylvania. The record does not disclose the source of this information. As with the September 2004 bench warrant application, the address listed for Sturdivant was an error. The Commonwealth presented no evidence documenting its efforts to secure Sturdivant's presence at the March 1, 2005 pre-trial conference despite its knowledge that Sturdivant was incarcerated at SCI Muncy.

Sturdivant could have easily been located and made available for trial. The Commonwealth could have obtained a *Habeas Corpus ad Testificandum* and had Sturdivant brought before the court any time it chose for trial or any other proceeding. In fact, this is what occurred in September 2005. The Commonwealth requested the issuance of a *Habeas Corpus ad Testificandum* on September 14, 2005, which this court issued and filed that day directing the Lycoming County Sheriff's Department to transport Sturdivant from SCI Muncy to the courthouse for a pre-trial conference on September 20, 2005. On September 20, 2005, the Lycoming County Sheriff's

Department transported Sturdivant from SCI Muncy to the Lycoming County Prison and then returned Sturdivant to SCI Muncy that same day.

The court believes that the facts of this case bring the matter squarely within the decision of the Pennsylvania Superior Court in *Commonwealth v. Pichini, supra*. In that case, the defendant was in prison when the criminal complaint was filed. The defendant remained in one or more different prisons with the record disclosing lengthy periods of time in which there was no communication between the representatives of the Commonwealth and the defendant. The defendant was sent notices of different dates when in prison. The court held that although the Commonwealth showed that the defendant had been held continuously in prison such was not equivalent to showing the Commonwealth was entitled to an extension and without a showing as to why defendant could not have been scheduled and promptly tried, the Rule 1100 (predecessor of our current Rule 600) time expired.

The court cannot conclude that the Commonwealth put forth a reasonable effort in trying to bring Sturdivant to trial before May 3, 2005. The evidence presented demonstrates that the Commonwealth put forth no effort to try and bring Sturdivant to trial before May 3, 2005, never mind a a reasonable one. Accordingly, the Commonwealth has failed to establish an excusable delay justifying its failure to bring Sturdivant to trial within 365 days of the complaint having been filed. Sturdivant's Rule 600 time expired May 3, 2005.

Although the Commonwealth has submitted no case authority to this court, we might presume that it would argue the general propositions that (1) when a defendant fails to appear and a bench warrant is issued, the time from the issuance of the warrant until the first trial listing after

withdrawal of the warrant is excludable and (2) if incarcerated and fails to appear the defendant is deemed unavailable and the time excludable. *See, e.g., Commonwealth v. Derrick*, 469 A.2d 111 (Pa. Super 1983); *Commonwealth v. Colon*, 464 A.2d 388 (Pa. Super 1983). To the best of this court's knowledge those principles enunciated in cases such as *Derrick* and *Colon* involved cases where defendants were not incarcerated at the time of arrest, but instead were out on bail, subsequently became arrested and failed to notify the Commonwealth of their arrest or place of incarceration in violation of their bail conditions. In addition, it appears that at least in the *Derrick* case the Commonwealth did locate the defendant in prison and brought the defendant to court for various appearances.

This court also recognizes that the Superior Court has held that the mere issuance of a bench warrant for the defendant's arrest does not establish due diligence when a defendant on bail fails to appear. *See, Commonwealth v. Snyder*, 421 A.2d 438 (1980). Instead, it appears to be the law of the Commonwealth that mere incarceration, even in another jurisdiction, does not make a defendant unavailable within the meaning of Rule 600, but instead the defendant is considered unavailable only for the period of time during which his presence could not be secured despite due diligence by the Commonwealth. *See, Commonwealth v. Stang*, 428 A.2d 226 (Pa. Super 1981); *Commonwealth v. Bass*, 393 A.2d 1012 (Pa. Super 1978).

There certainly is no disputing that the Commonwealth is entitled to an unavailability exclusion if it establishes by preponderance of the evidence that the Commonwealth acted with due diligence in attempting to secure the defendant's appearance at a criminal proceeding. *See, Commonwealth v. Polski*, 426 A.2d 610 (Pa. Super 1981); *Commonwealth v. Mitchell*, 372 A.2d

826 (Pa. Super 1977). In this case, the Commonwealth has offered no evidence other than the issuance of a bench warrant and such clearly does not amount to due diligence.

The Commonwealth might at best argue that it is entitled to exclude the time between September 9, 2004 and December 7, 2004, a period of 89 days. This would extend the May 3, 2005 deadline to July 31, 2005. The next trial term was August 22-30, 2005. Sturdivant was not brought to trial in that term either.

Furthermore, a trial was not scheduled at the September 20, 2005 pre-trial conference. The pre-trial conference preceded a trial term that began on September 29, 2005 and ended October 28, 2005. Instead of a trial being scheduled, the case was moved to a conference on November 1, 2005. There was no testimony presented as to why a trial was not scheduled or why the case was scheduled for a conference on November 1, 2005. The Rule 600 date certainly had run by that time.

IV. CONCLUSION

Sturdivant's Motion to Dismiss Charges for Violation of Rule 600 is granted.

ORDER

It is hereby ORDERED that the Motion to Dismiss for Violation of Rule 600 filed by Defendant Jana Sturdivant on March 1, 2006 is GRANTED. The charges against Defendant Sturdivant, as set forth in the Information filed June 9, 2004, are DISMISSED WITH PREJUDICE.

BY THE COURT,

William S. Kieser, Judge

cc: Gregory D. Drab, Esquire
District Attorney (HM)
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Christian J. Kalas, Esquire