

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 355 - 2005
	:	
vs.	:	CRIMINAL DIVISION
	:	
DONALD EUGENE FISHER, JR.,	:	
Defendant	:	Motion to Dismiss

OPINION AND ORDER

Before the Court is Defendant's Motion to Dismiss, filed August 10, 2006. A hearing on the motion was held August 11, 2006, just prior to jury selection. Defendant claims that more than 365 days have passed since the filing of the complaint and he has yet to be brought to trial.

Defendant has been charged with theft, access device fraud and driving under suspension. The Complaint was filed February 1, 2005. When Defendant failed to appear for a pre-trial conference on June 9, 2005, the Commonwealth requested the issuance of a bench warrant. That warrant was issued on June 16, 2005. Apparently, Defendant was arrested and placed in the Clinton County jail on or about July 18, 2005,¹ but according to a representation made by the assistant district attorney, the Commonwealth was unaware of this fact.² Defendant sent a letter, dated November 8, 2005, to the Honorable Nancy L. Butts, notifying the Court that he was incarcerated in the Clinton County jail, that there was a Lycoming County bench warrant and that he would like to resolve the Lycoming County charges. According to a handwritten note on that letter (which the Court found contained in the court file), the letter was forwarded on December 14, 2005, from Judge Butts to the Honorable Kenneth D. Brown who then apparently sent a copy to both the District Attorney's office and the Public Defender's office and placed the original in the court file. The assistant district

¹ In a subsequent letter to the Court, referenced *infra*, Defendant claims he was picked up on July 22, 2005.

attorney who argued this matter represented to the Court that the Commonwealth did not receive the letter until December 15, 2005. On December 19, 2005, the Commonwealth caused a *Habeas Corpus Ad Prosequendum* to be issued, directing that Defendant be brought from the Clinton County jail on January 3, 2006, for the purpose of a bench warrant hearing and status conference. That hearing was held as scheduled, and the bench warrant was vacated as of that date.

The matter then proceeded through a February 22, 2006, monitoring conference, a March 30, 2006 status conference, and a May 4, 2006 pre-trial conference and was scheduled for jury selection on May 11, 2006. At that time, Defendant appeared late and/or under the influence of some substance and as such condition constituted a violation of the probation he was serving in Clinton County, he became unavailable for jury selection and the matter was continued to a June 1, 2006, pre-trial conference. Jury selection was again scheduled for June 6, 2006, and a jury was picked that date. Trial was scheduled for June 14, 2006, but defense counsel fell ill and the matter was continued at his request. Further pre-trial conference was thus set for August 3, 2006, and at that time, jury selection set for August 11, 2006. As noted above, a jury was selected on August 11, 2006, and trial has been set for August 16, 2006.

Defendant concedes that the periods from June 9, 2005, through July 18, 2005, and from May 11, 2006, to present are excludable time. At issue is the period from July 18, 2005, through December 15, 2005, the time during which Defendant was incarcerated in the Clinton County jail, unbeknownst to the Commonwealth.³

In determining whether the Commonwealth has exercised due diligence in bringing Defendant to trial, the Court first notes the reasoning and holding of the Supreme Court in Commonwealth v. Cohen, 392 A.2d 1327 (Pa. 1978):

Where a defendant undertakes to accept the status of bail during the pendency of court proceedings he assumes the responsibility of making himself available for any court appearances required of him in connection with the action, upon

² It is unclear to the Court *why* Defendant was arrested and placed in the Clinton County jail. It seems logical to conclude, however, that it was *not* as a result of the bench warrant issued in Lycoming County, considering the Clinton County charges to which Defendant refers in his November 8, 2005, letter to the Court.

³ It is of no moment whether the Court looks to the date the bench warrant was vacated, January 3, 2006, or the date the Commonwealth became aware of Defendant's location, December 15, 2005, since the period between those dates does not alter the result. Only if the time between July 18, 2005, and December 15, 2005, is not excludable, does Defendant have a valid claim.

receipt of reasonable notice. To focus solely upon the conduct of the Commonwealth not only ignores the defendant's dereliction of an obligation, but also places him in the position of possibly benefiting from his own wrongdoing. Where the delay results from the *defendant's willful failure to appear at the appointed time* it is obviously not the type of harm envisioned in the protections sought to be afforded by the speedy trial guarantee. To the contrary, the delay is directly attributable to the fact that he was in a bail status, and not in custody, and that he deliberately abused that prerogative.

....

Where the defendant is on bail and has notice of his obligation to appear and fails to do so, a concept of due diligence in apprehending the fugitive is misplaced in a speedy trial analysis. To rule otherwise would permit a defendant who intentionally absented himself from a scheduled court hearing to have the charges against him dismissed if the Commonwealth's efforts to locate him did not measure up to a court's standard of due diligence. Such a result is obviously absurd.

....

We therefore hold that 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 until he voluntarily surrenders himself. In such a case the Commonwealth is entitled to an exclusion of this period under section (d)(1) without the requirement of a showing of its efforts to apprehend the defendant during the period of his absence.

Commonwealth v. Cohen, *supra* at p. 1330 (emphasis in original). It is further noted that “[i]n contemplation of the rule, due diligence is not so demanding as to require perfect vigilance or punctilious care; the test is one of reasonableness under the prevailing circumstances and information at hand.” Commonwealth v. Mitchell, 372 A.2d 826 (Pa. 1977). The Court therefore concludes that because Defendant failed to appear on June 9, 2005, he became unavailable at that time, and even though he was incarcerated in Clinton County as of July 18, 2005, it cannot be said that he was “apprehended” within the meaning of the rule in Cohen as of that time, as the Commonwealth was unaware of his arrest and incarceration. To automatically reinstate the requirement of due diligence at that point in time, such requirement having been suspended by Defendant’s failure to appear, would run contrary to the reasoning of Cohen.

Accordingly, there having elapsed 141 days from the date of the Complaint until the date of Defendant's failure to appear, and 147 days from the date the Commonwealth learned of Defendant's location until the date Defendant once again became unavailable on May 11, 2006, for a total of 288 days, the remainder of the time excludable, the Court finds no violation of Rule 600.

ORDER

AND NOW, this 11th day of August 2006, for the foregoing reasons, Defendant's Motion to Dismiss is hereby denied.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley Anderson