IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1419-2006; CR-1421-2006**
	:	
vs.	**:**	
	:	**CRIMINAL**
NONA ARMSTEAD,	**:**	
Defendant	**:**	**Rule 600**

OPINION AND ORDER

This matter came before the Court on December 12, 2006 for an evidentiary hearing on Defendant's motion to dismiss pursuant to Rule 600.

The facts for these cases for Rule 600 purposes are as follows.

Case No. 1421 (Trooper Weltmer)

On September 2, 2000 at 11:45 p.m. Pennsylvania State Trooper Todd Weltmer stopped Defendant for driving under the influence of alcohol and related offences. The trooper was on a DUI patrol in the City of Williamsport. The trooper testified Defendant was highly intoxicated.

Pursuant to policy, Defendant was released after being processed. Blood was drawn for blood alcohol testing. The trooper told Defendant, based on her severe intoxication, that charges would be filed against her at a later date and that she would have to appear to face the charges in the future.

After blood testing confirmed that Defendant was driving while above .10, the trooper filed formal charges on September 22, 2000. A summons was sent to Defendant's address on October 25, 2000. The preliminary hearing in this case was scheduled for November 7, 2000. Defendant failed to appear for the preliminary hearing and a bench warrant was issued for Defendant's arrest on November 7, 2000.

When Defendant failed to appear for the preliminary hearing on November 7, 2000, the trooper made efforts to locate Defendant. He went to her address at 824 Funston Avenue and was told by individuals that she had moved in October 2000 and no longer resided there.

The trooper contacted Sgt. Foresman of the Williamsport City Police Department and was advised they also had a warrant for her. He advised the trooper that Defendant may have moved to the state of Georgia.

On December 19, 2000, Trooper Weltmer entered Defendant's name in the NCIC computer system for wanted persons. He learned The District Attorney's office approved the case for extradition from surrounding states only.

In January 2001, the trooper completed a due diligence report regarding his efforts to locate Defendant. In February 2001, the trooper filed a report in Magisterial District Judge's office for purpose of Rule 600. The trooper reported he checked Defendant's last known address, checked NCIC, contacted county and state probation officials and talked to the Williamsport City police.

Pursuant to Pennsylvania State Police policy, Trooper Weltmer did an update check for Defendant every sixty (60) days. On June 25, 2001, a check of NCIC, CLEAN, and driver's license information revealed a listing for a Pennsylvania license with a Georgia address. The address was 2232 Verbena Street, Northwest, Apt. 26, Atlanta, Georgia 30314. The trooper then checked directory assistance under Defendant's name and he obtained a telephone number of (404) 794-3932. The trooper called this number and asked for Nona Armstead. The speaker confirmed she was Nona Armstead. The trooper explained to Defendant that there was a bench warrant for her arrest in Lycoming County, Pennsylvania.

He asked Defendant to come back to Pennsylvania to resolve the matter. Defendant told the trooper that she had relatives in Georgia and she would not return to Pennsylvania.

Trooper Weltmer then contacted Kenneth Osokow, the First Assistant District Attorney of Lycoming County to speak to him about extraditing Defendant back to Lycoming County. Mr. Osokow responded that they would only extradite Defendant for a DUI case from a surrounding state, but that the trooper should keep the bench warrant active. In light of this response, the trooper did nothing further in Defendant's case until the summer of 2006 when he received a notice from the Magisterial District Judge's (MDJ) office to appear for a preliminary hearing in this case. The MDJ transcript in the court file lists the date of Defendant's preliminary arraignment before MDJ Carn as July 20, 2006. On August 8,2006, Defendant waived her preliminary hearing to bring the case before the Court of Common Pleas.[1]

Case No. 1419 (Officer Aldinger)

On September 30, 2000 Officer Brian Aldinger of the Williamsport Bureau of Police responded to a traffic accident at 3:48 a.m. This response led Officer Aldinger to believe Defendant had driven under the influence and committed related vehicle code offenses. A sample of Defendant's blood was drawn to test for the presence of alcohol. Defendant was then released from police custody.

On October 4, 2000, Officer Aldinger received the results of the blood alcohol test, which confirmed that Defendant was driving while above .10. On October 10, 2000, Officer Aldinger filed charges against Defendant and a summons was sent to her address to

1 Neither the Commonwealth nor defense offered any testimony at the hearing before the Court to explain how Defendant came into the custody of Lycoming County. By letter dated January 8, 2007, the Court asked counsel to provide this information. Counsel responded that Defendant turned herself in to Lycoming County

appear before a MDJ on November 14, 2000. Defendant failed to appear before the MDJ on this date to answer the charges. A bench warrant was issued for Defendant's arrest.

After Defendant failed to appear for her original preliminary hearing on November 14, 2000, Officer Aldinger searched for Defendant by going to her last known address and talking to neighbors. Officer Aldinger learned Defendant had left the area and had gone to Georgia. The officer entered Defendant into the NCIC and CLEAN systems. The officer filed an affidavit of his search efforts on December 1, 2000.

On September 10, 2002 Officer Aldinger received a teletype from the Chamblee Police Department in Georgia. The teletype noted Defendant was not in custody, but that she had applied for employment, which resulted in a criminal history check revealing Officer Aldinger's bench warrant. Officer Aldinger then faxed his arrest warrant and affidavit to the Chamblee Police so they could take her into custody. However, this produced no additional response from the Chamblee Police department.

The next contact Officer Aldinger had in regard to this case occurred on April 19, 2006, when Officer Aldinger received a teletype from the Department of Housing and Urban Development indicating that Defendant had applied for Federal housing assistance. The teletype supplied an address for Defendant at 1054 Vine Avenue, Williamsport, Pennsylvania. Officer Aldinger went to this address to see if he could find Defendant, but he could not locate her at this address.

Officer Aldinger's next contact with the case occurred in the summer of 2006 when he received notice from MDJ Carn that the preliminary hearing in this case was now scheduled for August 8, 2006. The MDJ's transcript reports that the case was waived to

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authorities..

Court on August 8, 2006. Officer Aldinger first learned of the State Police DUI case at the preliminary hearing in 2006.

Discussion

Rule 600 of the Pennsylvania Rules of Criminal Procedure requires that a case be brought to trial with 365 day from date on which the Complaint is filed. See Pa.R.Cr.P. 600(A)(3). Excluded from this time period is "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." Pa.R.Cr.P. 600(C)(1).

The Complaint was filed in Trooper Weltmer's case on September 22, 2000. The Complaint was filed in Officer Aldinger's case on October 10, 2000.

It is clear that Defendant was stopped for DUI on both of these cases in September 2000 (September 2 and September 30, 2000) and she was aware these incidents would lead to formal charges. Thus, in October 2000 she left the state of Pennsylvania and went to the state of Georgia to live.

Trooper Weltmer used all due diligence in trying to locate Defendant and on June 25, 2001, his diligence paid off when he obtained her Georgia address and telephone number. He then called Defendant on the telephone and made contact with Defendant, advised her of the arrest warrant and requested she return to Lycoming County to face this matter. Defendant refused to do this. The trooper then consulted with the Lycoming County District Attorney's office to see if they would approve extradition of Defendant and they would not because Defendant was not located in a surrounding state to Pennsylvania.

Clearly, under Rule 600 (C) (1), the time a defendant could not be

apprehended because her whereabouts were unknown and can not be determined by due diligence should be excluded from the Rule 600 computation. The Court finds that the time frame from September 2, 2000 to June 25, 2001, when the trooper located Defendant on the telephone, would not count in computing the Rule 600 timeframe.

The more difficult issue is whether the time frame from June 25, 2001, when the District Attorney would not extradite, until July 20, 2006 when Defendant was arraigned on these charges, should be excluded from the Rule 600 calculations. Regretfully, the Court believes it must construe this time against the Commonwealth. The Court cannot criticize Trooper Weltmer for lack of diligence. Through his diligence he found Defendant in Georgia as of June 25, 2001. However, he could not proceed to arrest Defendant as a fugitive from justice in Georgia because he did not have the ability to follow up an arrest with extradition. Thus, he could do noting further. Since Rule 600 would be running as of late June 2001, and the 365-day deadline in this case has clearly ran, the Court must dismiss this case pursuant to Rule 600.[2] See Commonwealth v. Kubin, 432 Pa.Super. 144, 637 A.2d 1025 (1994)

The Commonwealth urges the Court to adopt the reasoning of the of Commonwealth v. Vesel, 751 A.2d 576, (Pa.Super. 2000) to deny Defendant's rule 600 Motion. In the Vesel case, a defendant charged with DUI had been formally arraigned in court and was scheduled to appear on date certain to be placed on the ARD program.

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2 Likewise, the Court does not mean to be critical of the District Attorney's office in deciding not to extradite Defendant. It may not be economically feasible for a county such as Lycoming County to extradite misdemeanor cases such as DUI when a defendant has fled to a different part of the country. The costs of extradition are significant and are very difficult to collect from a defendant. Understandably, a case like this would be treated differently than a felony case where extradition in all probability would have been pursued. However, once a defendant is located and the Commonwealth refuses to extradite, the Court cannot exclude this time on the basis that Defendant is unavailable pursuant to Rule 600(c)(1).

However, on the date the defendant was to be placed on ARD, the defendant failed to appear and a bench warrant was entered on August 6, 1991. The defendant was not apprehended on the bench warrant. The defendant was arrested on unrelated charges in February 1999. In March 1999, the outstanding bench warrant on the DUI was discovered and the prosecution resumed. The defendant sought dismissal of the 1991 DUI case on the basis of a then Rule 1100 speedy trial violation. The trial court denied the defendant's motion to dismiss and the defendant appealed the issue to Pennsylvania Superior Court. The Superior Court upheld the denial of the Rule 1100 motion noting that when the defendant failed to appear for the scheduled ARD hearing he violated his conditions of bail. The Superior Court, citing Commonwealth v. Byrd, 325 Pa. Super. 325, 329, 471 A.2d 1141, 1143-1144 (1984) held that a defendant who failed to appear in court at an appointed time violates his conditions of bail and the Commonwealth is entitled to count any period of delay as excusable time under Rule 1100. Further, the court noted a defendant who fails to appear in court at his appointed time will be considered unavailable for Rule 1100 purposes from the time of the proceeding for which he failed to appear, until he or she voluntarily surrenders or is subsequently apprehended. The Superior Court went on to hold that in such a case the Commonwealth is entitled to the exclusion without a requirement of showing due diligence efforts to find the defendant in his period of absence.

If this precedent applied to the case at bar, it could be held that Defendant was unavailable from time of the first scheduled preliminary hearing until her arrest on July 20, 2006.

The problem with applying the Vesel concept to the instant case is that Defendant was not formally charged with DUI offenses and given bail and a date to appear in

court on the charges. It cannot be said that she violated her condition of bail as she was not out on bail. Thus, it appears to the Court that in light of these circumstances, the Court cannot make an automatic finding of unavailability and the Commonwealth would have to satisfy Pa.R.Cr.P. 600 (C)(1). Therefore, the Court does not believe it can apply the standard of Vesel to this case.

The Court believes an even more difficult issue is presented regarding Officer Aldinger's case. Pennsylvania appellate authority makes it clear that a court must be realistic in judging the efforts made by law enforcement officials in finding defendants who have absented themselves from an area where they have been charged with a crime. It must be remembered that police officials dealing with significant caseloads and sometimes scant resources of time and manpower cannot always turn every stone to locate an absent defendant. This is particularly true when the crime involved is a misdemeanor case.

Several Pennsylvania appellate decisions have discussed the issue of whether the police have used due diligence in trying to locate an absent defendant. In Commonwealth v. Mitchell, 472 Pa. 553, 566, 372 A.2d 826, 832 (1972) the Pennsylvania Supreme Court stated: "It is not the function of our courts to second guess the methods used by the police to locate accused persons…. Deference must be afforded the police officer's judgment as to which avenues of approach will be fruitful." Further, the "due diligence" required of the police does not demand perfect vigilance and punctilious case, but rather, a reasonable effort." Commonwealth v. Polsky, 493 Pa. 402, 407, 426 A.2d 610, 613 (1981). In the case of Commonwealth v. Branch, 337 Pa. Super. 22, 26, 486 A.2d 460, 462 (1984), the Superior Court noted, in considering whether the police used due diligence in finding an absent defendant, that "this determination must be based on a common sense approach to law

enforcement, which recognizes that the police department, not the court is the best judge of how to deploy limited police personal."

While the Court would acknowledge that there were other things Officer Aldinger could have done to find Defendant in Georgia, he did respond to the contact from the Chamblee Police in Georgia by faxing them the arrest warrant and affidavit for Defendant. The local Georgia Police Department, however, did not pick up Defendant or further respond to Officer Aldinger. It is reasonable to assume that at that point he believed the trail of Defendant was lost.[3] Further, Defendant in the instant case is not blameless. When Trooper Weltmer was able to reach her on the telephone she refused to return to Pennsylvania. The evidence of Defendant leaving Pennsylvania after second DUI arrest also would tend to show she was fleeing this jurisdiction to avoid answering these charges.

The Court also notes that when Officer Aldinger received a lead in April 2006 that Defendant had local housing he went to this location looking for her. This evidence shows that even years after his bench warrant for Defendant he maintained an attempt to find her upon receipt of new information.

Thus, the Court finds Defendant unavailable in Officer Aldinger's case from October 10, 2000 when he filed his charges against Defendant until July 20, 2006 when she was preliminarily arraigned. Since the Court finds Rule 600 has not run in Officer Aldinger's case, the Court will deny Defendant's Motion to Dismiss in this case.

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3 The Court also notes in the Branch, case that the police officer, who was trying to find the defendant for two years, was transferred to another division and he discontinued his search for the defendant. The defendant was picked up approximately a year later. The Superior Court in Branch held that the police need not show that they continually and actively pursued the defendant for the entire three-year period stating; "We hold Rule 1100 (now Rule 600) contains no such continuous search requirement. 337 Pa.Super. at 26, 486 A.2d at 462.

O R D E R

AND NOW, this day of January 2007, the Court GRANTS Defendant's Motion to Dismiss case number 1421-2006, but DENIES Defendant's motion with respect to case number 1419-2006.

By The Court,

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Kenneth D. Brown, P.J.

cc: Brian Manchester, Esquire
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Mary Kilgus, Esq. (ADA)
Work File