

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-188-2007  
:   
vs. :   
:   
: CRIMINAL  
ANTHONY PARSONS, :   
Defendant : Motion to Dismiss Pursuant to Rule 600

**OPINION AND ORDER**

After hearing and argument on Defendant's Motion to Dismiss Pursuant to Rule 600 and review of the case file and the transcript from the hearing on Defendant previous Rule 600 motion, the Court makes the following findings of fact:

The criminal complaint was filed in the above-captioned matter on January 19, 2007. On May 31, 2007, defense counsel asked for a continuance to the next status conference date. The continuance was granted and the case was scheduled for July 25, 2007. See Application for Continuance docketed June 1, 2008. However, on June 4, 2007 Judge Gray rescheduled the case from the July 25, 2007 status conference date to the August 7, 2007 pre-trial conference date. See Order docketed June 5, 2007.

On June 26, 2007, the Court continued the pre-trial conference from August 7 to October 2, 2007, because there were too many cases on the pre-trial list so that list was limited to cases with Rule 600 dates prior to December 18, 2007. See Order docketed June 26, 2007.

On September 13, 2007, defense counsel filed a motion to withdraw from the case.<sup>1</sup> The Court granted the motion on October 1, 2007. While counsel was present for the motion to withdraw, the Court conducted a status conference, scheduled the case for a pre-

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<sup>1</sup> In the transcript of the previous Rule 600 hearing, the Court misspoke when it stated the motion was filed

trial on December 18, 2007, and requested counsel send Defendant an application for the public defender's office for representation. See Order docketed October 8, 2007.

The case was scheduled for jury selection on January 8, 2007. Defendant and the Commonwealth appeared, but Defendant's attorney James Cleland did not because he was hospitalized. The next morning the Court discussed Defendant's options with him and he requested a continuance in light of his counsel being unavailable. See Order dated January 9, 2008 and docketed January 11, 2008. The case was placed on the February 14 pre-trial list. The Court also noted that the next jury selection dates were February 27, 28 and 29 and the Court would endeavor to select a jury in this case during that three-day period.

On February 13, 2008 Defendant filed a document in which he asserted that he was firing Attorney Cleland and he would proceed without counsel. On February 22, 2008, Defendant filed a pro se Rule 600 motion. The Court needed to ensure that Defendant was knowingly waiving his right to counsel, so it scheduled a hearing/conference on February 27, 2008. On that date, Defendant appeared with Mr. Cleland and withdrew his request to proceed without counsel. See Order docketed March 5, 2008. The Order also indicated that Mr. Cleland should assist in having his motions heard. As a result of this Order, the Rule 600 motion was scheduled for March 10, 2008.

On March 10, 2008, Attorney Cleland was at the hospital again and could not appear, so the motion was rescheduled for March 20, 2008. By March 20, 2008 Defendant had applied for a public defender due to concerns about Mr. Cleland's ability to continue to represent him. Defendant appeared at the March 20 hearing with Assistant Public Defender

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September 20, 2007. The motion was filed September 13 and the order scheduling the motion was filed on September 20, 2007.

Robert Cronin. The Court entered an order appointing the Public Defender's office to represent Defendant. The Court held a hearing on Defendant's Rule 600 motion and denied it.

There was a special trial term set up for the Durrant homicide trial for the week of March 24, 2008. Defendant's case was scheduled as a back-up trial for that week in the event the Durrant case resulted in the entry of a guilty plea or was otherwise did not go to trial that week. Durrant pled guilty and Defendant's case was called. Defendant requested a continuance, which was granted, and the case was placed on the April 15, 2008 pre-trial list, for the May 5-23 criminal trial term.<sup>2</sup> Shortly thereafter, the public defender's office requested that a conflict attorney be assigned to this case. On March 31, 2008 the Court appointed Gregory Drab to represent Defendant.

At the April 15, 2008 pre-trial conference, Attorney Drab indicated he was only available May 5, 7, 8, 20, 21, and 23.<sup>3</sup> Counsel for Defendant consistently indicated the length of time need for this trial would be 1 ½ or 2 days. In light of the length of the case and defense counsel's unavailability, the only days this case could have tried were May 7-8 or May 20-21. Although the case was on the call of the list, it did not get reached during the May trial term. The term of Mr. Drab's contract to be a conflict attorney going to expire on May 31, 2008, so when the case did not get selected for the May trial term another conflict attorney, James Protasio, was appointed to represent Defendant, and a pre-trial conference was scheduled for June 3, 2008 at 9:00 a.m.

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<sup>2</sup> The jury selection dates were April 29, April 30, and May 1.

<sup>3</sup> Mr. Drab also indicated he was available May 26 and 27, but these dates were outside the May criminal trial term.

At the June 3 pre-trial conference, the case was reported as a 1 ½ day trial. Defense counsel was unavailable June 17, the afternoon of June 18, and June 23 through June 25. Immediately after the conference, defense counsel filed the current Rule 600 motion. The Deputy Court Administrator, however, was not aware the motion had been filed and the case was placed on the call of the list for June 11 and June 19 and 20 were set aside for trial dates. At the call of the list on June 11, defense counsel requested a continuance so that the Rule 600 motion would not be heard after the trial.

### **Discussion**

Although the mechanical run date in this case was January 19, 2008, there are numerous periods of excludable time.

1. *May 31, 2007-July 25, 2007* - Defense counsel requested a continuance on May 31, 2008 which was granted and the case was rescheduled for July 25, 2008. The Court finds these 55 days are excludable under Rule 600(C)(3)(b).<sup>4</sup>
2. *September 13, 2007-October 1, 2007* – Defense counsel filed a motion to withdraw from this case on September 13, 2007. That motion was heard and granted on October 1, 2007. This amounts to 18 days of excludable time.
3. *January 9, 2008-March 20, 2008* – This case was scheduled for jury selection on January 9, 2008, but a jury was not selected because Defendant’s attorney James Cleland was in the hospital. Although the case was placed on the February 14, 2008 pre-trial

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<sup>4</sup> At the hearing on Defendant’s first Rule 600 motion the Court indicated that **at least** from May 31 to June 4 would be a defense continuance and beyond that would be subject to argument and comment. The Court finds the amount attributable to the continuance was May 31 to July 25. The June 4 revised scheduling order moved the case back even further to August 7. However, the Court will not attribute this additional delay to Defendant, as it is not clear that this move was made at the request of Defendant or his counsel.

list so the Court could obtain information about attorney and witness availability, the next jury selection dates were February 27, 28, and 29. The period of excludable time includes not only the time that counsel was unavailable but any delay that results from counsel's unavailability. Therefore, the Court finds the time excludable due to Mr. Cleland's hospitalization in January would extend from the jury selection day of January 9, 2008 to the next jury selection date of February 27, 2008.

In this case whether the cut-off date for the delay resulting from Mr. Cleland's unavailability for the January jury selection is the pre-trial date of February 14 or the next jury selection date of February 27 is immaterial, because Defendant filed several documents that further delayed this case. On February 13 Defendant filed a document indicating he was firing Mr. Cleland and wanted to represent himself. On February 22 Defendant filed a pro se Rule 600 motion. On February 27, 2008, the Court conducted a colloquy with Defendant regarding his request to represent himself. At that time, Defendant chose to continue with Mr. Cleland as his attorney. The Rule 600 motion was scheduled for March 10. On that date, Mr. Cleland was in the hospital again. The motion was rescheduled for March 20. Due to Mr. Cleland's illness, Defendant applied for a public defender. Mr. Cronin of the public defender's office represented Defendant at the Rule 600 hearing on March 20. Shortly after the hearing, the Court denied the motion. These motions were not deferred to the start of trial and the Commonwealth was prepared for and diligently responded to these motions; therefore this time is excludable. *Commonwealth v. Hill*, 558 Pa. 238, 736 A.2d 578 (Pa. 1999); *Commonwealth v. Hyland*, 875 A.2d 1175, 1191 (Pa. Super. 2005).

January 9, 2008 to March 20, 2008 is 71 days of excludable time.

4. *March 24, 2008 – April 29, 2008* – A jury could have been selected in

this case on March 24, 2008 and the case tried during that week, but the defense requested a continuance. The next jury selection dates were April 29, April 30 and May 1. Although a pre-trial conference was held on April 15, the case could not be tried on that date. Since jury selection constitutes the commencement of trial under Rule 600, the earliest date trial could commence after the continuance was April 29. March 24 to April 29 is 36 days of excludable time.

5. *Defense counsel unavailability during the May 5-23 trial term-*

Defense counsel reported that he was only available for trial in this term on May 5, 7, 8, 20, 21, and 23. In other words, he was unavailable May 6, May 9, May 12, May 13, May 14, May 15, May 16, May 19 and May 22. However, since this was reported as a 1 ½ to 2 day trial, defense counsel's unavailability on May 6 meant the case couldn't be scheduled on May 5 and his unavailability on May 22 meant the case couldn't be scheduled on May 23. Therefore, the Court finds 11 excludable days as a result of defense counsel's unavailability.

6. *June 3, 2008 to present –* The current Rule 600 motion was filed on

June 3, 2008. Defendant and his counsel did not wish to go to trial without the motion being heard prior thereto. Although defense counsel did not formally request a continuance until June 11, the reason for the continuance was the outstanding motion. June 3 to August 25 is 83 days. The court will reduce this by 2 days to account for the time from August 19 to August 21, because the Commonwealth was not prepared to address the motion on the date it was originally scheduled and it had to be rescheduled to August 21. See Hill, 558 Pa. at 256-57, 736 A.2d at 588. Therefore, the current motion resulted in 81 excludable days.

The Court finds the total number of excludable time is 272 days. While it has been 603 days since the filing of the criminal complaint on January 19, 2007, when the

excludable time has been deducted 331 days have elapsed up until today's date. Therefore, Rule 600 has not been violated.

Even if the Court miscalculated the number of excludable days, Defendant would not be entitled to dismissal of the charges. The Commonwealth has always been ready to try this case. This case was scheduled for jury selections on January 9, 2008, March 24, 2008, and June 11, 2008. Were it not for numerous instances of delays attributable to defense counsel's unavailability and defense continuance requests, this case would have been tried months ago. Due diligence does not require perfect vigilance and punctilious case, but a showing by the Commonwealth that reasonable effort has been put forth. *Hill*, 558 Pa. at 256, 736 A.2d at 588. Clearly, a reasonable effort has been made to bring this case to trial. Therefore, even if rule 600 had been violated, Defendant would not be entitled to dismissal; he would only be entitled to have his case scheduled for a date certain. Pa.R.Cr. 600(G) ("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"). This case is scheduled for jury selection on August 27, 2008 at 1:30 p.m. and trial on September 18-19, 2008.

**ORDER**

**AND NOW**, this 25<sup>th</sup> day of August 2008, the Court DENIES Defendant's Motion to Dismiss pursuant to Rule 600. This case is scheduled for jury selection on August 27, 2008 at 1:30 p.m. and trial on September 18-19, 2008.

By The Court,

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Kenneth D. Brown, P.J.

cc: James Protasio, Esquire  
Henry Mitchell, Esq. (ADA)  
Anthony Parsons, % Lyc. County Prison  
Gary Weber, Esquire (Lycoming Reporter)  
Work File