

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-259-2011
vs. :
 :
JOSEPH COLEMAN, :
Defendant :

OPINION AND ORDER

This matter came before the Court on August 11, 2011 for hearing and argument on Defendant's Motion for Nominal Bail pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. The relevant facts follow.

1. On January 28, 2011, the police filed the criminal complaint in this case and arrested Defendant Joseph Coleman.
2. Defendant has been continuously incarcerated since January 28, 2011.
3. On July 10, 2011, Defendant completed and signed an application for Drug Court.
4. The District Attorney's Office received Defendant's Drug Court Application on July 11, 2011.
5. The District Attorney did not recommend the Defendant for the Drug Court Program.
6. Unlike the ARD Program, which requires approval by the District Attorney, the Drug Court Committee can accept a defendant onto the Drug Court Program even if the District Attorney does not recommend the applicant.
7. On July 22, 2011, the Drug Court Committee denied the Defendant's Drug Court Application.

8. Neither the Defendant nor his counsel requested a continuance or expressly waived Rule 600 for the period that the Drug Court Application was pending.

9. A pre-trial conference was held in this case on or about June 30, 2011, as this case was on the July/August criminal trial list.

10. The jury selection dates for the July/August criminal trial term were July 19 through July 21, 2011. The trial dates for that term were/are August 1-5, 2011, August 8-12, 2011, and August 15-19, 2011.

11. At the pre-trial conference, defense counsel indicated that this case would be a 2-day trial and he reported that he was unavailable for trial August 3-5, 2011, August 8, 2011, and August 15-18, 2011. The Commonwealth reported that it or its witnesses were unavailable August 1-5, 2011 and August 8-12, 2011.

12. Due to other cases having earlier mechanical Rule 600 run dates, the Deputy Court Administrator (DCA), who is in charge of the criminal trial list, listed this case as a back up trial.

13. Although the (DCA) controls the trial list and scheduling of criminal cases for trial, on occasion the Commonwealth will request that a case be given special attention or be moved up on the list due to Rule 600 issues.

14. The DCA will accommodate such a request by the Commonwealth if it is brought to her attention and if a trial date can be found that fits everybody's schedule.

15. At some point prior to jury selection, the case tentatively scheduled for August 15-16 resolved and those trial dates became available.

16. If it were not for defense counsel's unavailability on August 15-16, 2011, this case would have been moved off the back up list and scheduled for trial on those dates, with jury selection occurring on either July 19, 20 or 21.

17. Defendant's Motion for Nominal Bail was filed on July 26, 2011.

DISCUSSION

Rule 600(E) states: "No defendant shall be held in pre-trial incarceration on a given case for a period exceeding 180 days excluding time described in paragraph (C) above. Any defendant held in excess of 180 days is entitled upon petition to immediate release on nominal bail." Pa.R.Cr.P. 600(E). Paragraph (C) states:

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.

Pa.R.Cr.P. 600(C). The only issue in this case is whether there are any periods of delay as a result of the unavailability of the defendant or his attorney.

The Commonwealth contends there are two overlapping periods of delay in this case. First, the Commonwealth asserts that Defendant was unavailable from July 11, 2011, the date he submitted his Drug Court Application to the District Attorney's Office,

until July 22, 2011 when the Application was denied by the Drug Court Committee. The Commonwealth further alleges that this period of unavailability resulted in delay until the jury selection dates of the September criminal trial term because Defendant was unavailable for jury selection July 19-21, rendering him unable to be tried during the August term.

Defense counsel argues such time should not be excludable unless the defendant expressly waives Rule 600 for that time period. There is nothing on the Drug Court Application or anywhere else in the record indicating that Defendant has waived his speedy trial rights.

After reviewing Rule 312 and the comment to Rule 600 regarding ARD, as well as the cases of Commonwealth v. Bowes, 839 A.2d 422 (Pa. Super. 2003), Commonwealth v. Graham, 394 Pa. Super. 453, 576 A.2d 371 (Pa. Super. 1990), and Commonwealth v. Knupp, 512 Pa. 614, 518 A.2d 252 (Pa. 1986), the Court finds that, like an ARD application, the time period while a Drug Court Application is being considered would not be excludable time unless the Defendant expressly waives his speedy trial rights.

In the ARD context, prior to accepting a defendant into the program, the Court must ascertain on the record whether the defendant understands that if he fails to complete the program he waives his right to a speedy trial during the period of his enrollment in the program. Pa.R.Cr.P. 312(2). The period of time spent in processing and considering the defendant's inclusion into the ARD program, however, is not excludable absent an express waiver. See Rule 600, comment ("the attorney for the Commonwealth may request that the defendant waive Rule 1100 for the period of time spent in processing and considering the

defendant's inclusion into the ARD program");¹ Commonwealth v. Knupp, 512 Pa. 614, 518 A.2d 252 (Pa. 1986).

Unlike a defendant entering the ARD program, a defendant who is accepted to the Drug Court Program must enter a guilty plea. Therefore, the Court reviewed the Graham and Bowes cases to determine whether a defendant's Drug Court Application should be considered akin to the tender of a guilty plea.

In Graham, supra, the appellant was incarcerated and his trial was scheduled for November 1988. On November 29, 1988, Defendant notified the court that he intended to plead guilty and asked that his sentencing occur on the same day as the guilty plea colloquy. A pre-sentence investigation was ordered, so the guilty plea and sentencing were scheduled for January 11, 1989. On that date, however, the appellant changed his mind and decided to take his case to trial. The Superior Court found the forty-three (43) days between November 29, 1988 and January 11, 1989 were chargeable to the appellant under Rule 1100.

In Bowes, supra, the criminal complaint was filed on June 5, 2001 and the appellant was released on bail. The appellant signed a guilty plea agreement and colloquy form on April 18, 2002, which the Superior Court found constituted the commencement of trial under Rule 600(B) even though the guilty plea had not yet been accepted by the Court. When the appellant withdrew his guilty plea on June 25, 2002, the Superior Court treated the withdraw like a grant of a new trial under Rule 600(D)(1), which resulted in a new 120-day time period for trial to commence.

If the Drug Court Committee had approved the Defendant's application, the

¹ Rule 1100 was renumbered Rule 600 and amended March 1, 2000, effective April 1, 2001.

Court likely would have found the Defendant tendered a guilty plea as of the date of the approval and, if the Defendant subsequently decided to go to trial, the Commonwealth would have a new 120-day period within which to bring the Defendant's case to trial. Here, however, the Drug Court Committee did not approve the Defendant's application. Since there was no meeting of the minds for a disposition of this case, the Court finds the Defendant's Drug Court Application should be treated in the same manner as an ARD application and the time spent in processing and considering it should not be excludable unless the Drug Court Application contained an express waiver of Rule 600. The Application was admitted as Joint Exhibit #2 and it does not even mention Rule 600. Therefore, the Court will not consider the time between July 11, 2011 and July 22, 2011 as excludable against the Defendant.

The Commonwealth asserts that even if this period is excludable, Defendant is not entitled to nominal bail, because defense counsel's unavailability for trial on August 15-16, 2011 results in excludable time from the first day of jury selection on July 19, 2011 until the jury selection days for the next trial term.

Defense counsel argues that the Commonwealth or its witnesses were unavailable for the first two weeks of the trial term and there were other cases that were tried instead of this case; thus the delay was due to the Commonwealth's unavailability and the trial schedule.

While the Court is sympathetic to defense counsel's frustration that he was available for fewer days during the trial term than the Commonwealth, the Court only

examines the Defendant's and defense counsel's unavailability and other excludable time under Rule 600 (C) when deciding a motion for nominal bail under Rule 600 (E). Therefore, the Court is constrained to agree with the Commonwealth.

Defense counsel was unavailable when the case could have been tried on August 15-16, which prohibited jury selection from occurring on July 19-21, 2011. At the time of jury selection, the case that was originally scheduled for August 15-16 no longer needed those trial dates and a jury would have been selected in this case if it were not for defense counsel's unavailability. Therefore, the Court finds the time period from July 19, 2011 through at least September 20, 2011 is excludable due to defense counsel's unavailability on August 15-16, 2011. Defendant's 180-day period is tolled and stuck at 172 days until at least September 20, 2011.

Accordingly, the following Order is entered:

ORDER

AND NOW, this ____ day of August 2011, the Court DENIES Defendant's
Motion for Nominal Bail.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Kyle Rude, Esquire
Jeana Longo, Esquire
Work file