

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1643-2010  
vs. :  
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MARKALE A. SOWELL, : **Opinion Explaining the Denial of**  
Defendant : **Defendant's Motion for Nominal Bail**  
 : **Pursuant to Rule 600**

**OPINION**

On June 1, 2011, the Court held a hearing and argument on Defendant's Motion for Nominal Bail Pursuant to Pa.R.Cr.P. 600, which was filed on May 17, 2011. The relevant facts follow.

On September 26, 2010, a criminal complaint was filed against Defendant charging him with fleeing and eluding, receiving stolen property, two counts of recklessly endangering another person, simple assault, two firearm offenses and two traffic summary offenses. Defendant also was arrested on that date. He did not post bail and was committed to the Lycoming County Prison where he has continuously remained.

Defendant's preliminary hearing was scheduled for October 5, 2010, but had to be continued to November 2, 2010, because he could not be represented by the public defender's office, as that office had a conflict due to representing the alleged victim in an unrelated matter. On October 11, 2010, the Court appointed conflict's counsel, Joel McDermott, to represent Defendant, and his preliminary hearing was held on November 2, 2010.

On December 8, 2010, Defendant filed a pro se motion to dismiss the complaint, in which he also complained that his attorney not only refused to file motions or

raise issues he wanted to be raised but also allegedly told Defendant he was “like a cancer searching for a cure.” On December 14, 2010, Defendant filed a pro se motion to suppress raising several of the same issues he asserted in his motion to dismiss the complaint. On December 15, 2010 and December 16, 2010, the Court issued Orders explaining to Defendant that because he was represented by an attorney, he could not file motions on his own behalf. However, given Defendant’s attempts to represent himself by filing his own motions and his complaints and allegations regarding his attorney in his motion to dismiss, the Court scheduled a hearing for January 5, 2011 to determine whether Defendant wished to represent himself.

On January 5, 2011, the Court granted Defendant’s request to represent himself and appointed Mr. McDermott as standby counsel. In light of this ruling, the Court scheduled a hearing for February 9, 2011 to hear argument on the pro se motions Defendant had filed in December.

On January 21, 2011, the Court granted Defendant’s request to continue the pre-trial conference scheduled for February 3, 2011 and rescheduled the case for a pre-trial conference on March 18, 2011. The jury selection days for cases on the March 18 pre-trial list were March 29-31 and the trial term was April 12-29.

On January 24, 2011, Defendant filed a motion to compel discovery and a second motion to suppress. These motions were heard on February 9, 2011.

In an Order dated February 24, 2011 the Court granted in part and denied in part Defendant’s motion to compel discovery.

In an Opinion and Order dated February 28, 2011 and docketed March 2, 2011, the Court denied Defendant's motion to dismiss filed on December 8, 2010, and his motions to suppress filed on December 14, 2010 and January 24, 2011.

On March 11, 2011, Defendant filed a "Motion of Evidence Weighed Hearing" that challenged the sufficiency of the evidence, which the Court treated as a petition for habeas corpus relief. He also filed a motion to dismiss based on prosecutorial misconduct on March 18, 2011. These motions were scheduled for hearing and argument on March 24, 2011 after which the Court dictated Orders denying the motions. At the hearing, Defendant requested a continuance of his case. The Court granted the request and continued the case to the May 10, 2011 pre-trial list and the May 24, 2011 call of the list.

On April 5, 2011, Defendant filed a motion to dismiss and a motion to compel discovery. On April 19, 2011, Defendant filed a motion in limine. He filed an additional motion in limine and another motion to compel on May 6, 2011.

On May 5, 2011, the Court denied the motion to dismiss filed on April 5, 2011. The Court disposed of the motions to compel and motions in limine in an order dated May 9, 2011.

On May 25, 2011, Defendant filed a motion to dismiss claiming the police tampered with the evidence when they test-fired the firearm, which the Court denied on the record on June 1, 2011, when Defendant was in court regarding this motion for nominal bail.

Defendant claims he is entitled to nominal bail under Rule 600 of the Pennsylvania Rules of Criminal Procedure because he has been continuously incarcerated on

these charges since September 26, 2011, which is more than 180 days. Defendant, however, fails to take into account excludable time under Rule 600(C).

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 excludes the following:

- (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).

In this case, there is more excludable time than time that would count toward the 180 days, primarily due to Defendant requesting continuances that the Court granted and Defendant filing meritless motions that the Court denied.

The first period of excludable time is from October 5, 2010 to November 2, 2010 when Defendant’s preliminary hearing was continued because of a conflict with the public defender’s office representing him. This period of time would be excludable under Rule 600(C) as delay resulting from the unavailability of the defendant’s attorney.

The next period of excludable time is from December 8, 2010 to May 10,

2011. This period of time is excludable for several overlapping reasons.

First, Defendant filed several pretrial motions that delayed his case from December 8, 2010 to February 28, 2011. On December 8, 2010, Defendant filed a pro se motion to dismiss, in which he also made complaints and allegations against his attorney that led the Court to question whether Defendant wished to represent himself. After a hearing and colloquy on January 5, 2011, the Court allowed Defendant to represent himself and appointed Mr. McDermott to act only as standby counsel. Since Defendant was now representing himself, the Court scheduled an argument on the motion to dismiss and the motion to suppress Defendant filed on December 8, 2010 and December 14, 2010, respectively. Defendant filed a second motion to suppress on January 24, 2011. The argument on all three motions was heard as scheduled on February 9, 2011. The Court denied the motions in an Opinion and Order dated February 28, 2011, which was docketed on March 2, 2011. A defendant is considered unavailable under Rule 600(C) if a delay in the commencement of trial is caused by the filing of pre-trial motions. Commonwealth v. Hill, 558 Pa. 238, 736 A.2d 578, 587 (1999). Therefore, the period of time from December 8, 2010 to at least February 28, 2011 is excludable under Rule 600(C).

Next, Defendant requested a continuance on January 21, 2011, which was granted and his case was continued from the February 3, 2011 pre-trial conference date to March 18, 2011. Rule 600(C)(3)(b) excludes any time attributable to defense continuance requests. Therefore, January 21, 2011 through at least March 18, 2011 is excludable time.<sup>1</sup>

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<sup>1</sup> The Commonwealth argued that the excludable time would extend beyond March 18, because that was merely the pretrial conference date and Defendant could not go to trial on that date. At the earliest Defendant's trial

Defendant filed a motion on March 11, 2011, which the Court construed as a motion for habeas corpus relief and a motion to dismiss due to prosecutorial misconduct on March 18, 2011. The Court held an argument on these motions on March 24, 2011 and issued rulings from the bench denying them. Therefore, the period of time from March 11, 2011 through March 24, 2011 is excludable time. Hill, supra.

At the hearing on March 24, 2011, Defendant requested another continuance. The Court granted the request and scheduled this case for a pre-trial conference on May 10, 2011 and call of the list on May 24, 2011. See Continuance Order dated March 24, 2011 and docketed March 28, 2011. Therefore, at a minimum March 24 through May 10 is excludable time under Rule 600(C)(3)(b).<sup>2</sup>

On May 25, 2011, Defendant filed a motion to dismiss the charges based on the police allegedly tampering with evidence. The Court did not become aware of this motion until after the Memorial Day holiday. It denied the motion on the record on June 1, 2011 when Defendant was in court for the argument on this motion. The Court would not consider this time excludable time because it does not appear that it resulted in a delay of trial. The motion was not filed until after the May 24 call of the list. There is nothing in the

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could commence for purposes of Rule 600 at jury selection. See Rule 600, Comment (“A trial commences when the trial judge determines that the parties are present and directs them to proceed to voir dire...”) The jury selection days for cases on the March 18 pre-trial list were March 29, 30 and 31. The Commonwealth argued that by requesting a continuance to the March 18 pretrial list, Defendant was agreeing his case would not be reached until the April trial term, which ran from April 12-29, 2011. Therefore, according to the Commonwealth, the Court should consider all the time from January 21 through April 29 as excludable time. The Court does not need to address this argument because this time is excludable due to other pre-trial motions being filed and Defendant requesting another continuance.

<sup>2</sup> As with the previous continuance request, the case could not be tried on May 10, 2011. The May 24, 2011 call of the list date was the first of three consecutive jury selection days. The trial term for cases where jury selections occurred in those three days is June 7-24, 2011.

record before the Court to indicate that a jury was not selected in this case because Defendant indicated he was filing this motion or anything of that nature. Instead, it appears this case simply was not reached.

Excluding the time periods from October 5, 2010 to November 2, 2010, and December 8, 2010 to May 10, 2011, the number of days Defendant has been held in pre-trial incarceration for Rule 600 purposes from the date the charges were filed on September 26, 2010 until the hearing on his nominal bail motion on June 1, 2011 was only 67 days.

DATED: \_\_\_\_\_

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)  
Joel McDermott, Esquire (standby counsel)  
Markale Sowell, c/o Lycoming County Prison  
Work file  
Gary Weber, Esquire (Lycoming Reporter)