

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**ERICA BLAIR,
Defendant**

:

: **No. CR-466-2011**

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OPINION AND ORDER

Before the Court is an Omnibus Pretrial Motion filed on June 22, 2011.

By way of a Criminal Complaint filed on October 7, 2010, Defendant was charged with Attempted Possession of a Controlled Substance in violation of 18 Pa. C.S.A. § 901 (a). On November 4, 2008, the Defendant, then an active heroin user, arranged over a cell phone to purchase heroin from an individual who she believed to be a cousin of an individual known to her as Chris Demilio. The alleged cousin, however, was in reality a trooper with the Pennsylvania State Police (PSP) who had recently arrested Mr. Demilio and who had answered Mr. Demilio's cell phone after it was seized from Mr. Demilio.

The trooper met the Defendant outside of the Turkey Hill mini-market in Montoursville, PA. According to the Affidavit of Probable Cause, the trooper approached Defendant's vehicle from the driver's side, obtained money from the Defendant and handed to her a folded paper towel. Immediately, the Defendant was taken into custody by other Pennsylvania State Police personnel who were conducting surveillance. She was placed in a PSP cruiser and transported to the PSP barracks. She was placed in an interview room. She was read her Miranda warnings and admitted that she had a drug addiction, started using again and attempted to purchase heroin.

At the hearing in this matter held on July 13, 2011, Defendant testified on her own behalf. She admitted arranging a deal with an individual to purchase heroin. When she

arrived at the Turkey Hill, however, she immediately recognized Trooper Havens as a member of the Pennsylvania State Police. She had previously worked at the Turkey Hill and knew Trooper Havens as a customer of the Turkey Hill.

Trooper Havens approached her from the passenger side and put his hand in the car. He had a tissue in his hand. Defendant knew that Trooper Havens was not the person he claimed to be and immediately told him to remove his hand from her vehicle. She did not pay to him any monies and denied that he gave anything to her.

She admitted being taken into custody, Mirandized, giving a statement as set forth in the Affidavit of Probable Cause and being released.

She did not hear anything regarding the incident until approximately two years later when she received the charges by certified mail.

Because of the “late” filing of the charges, Defendant claimed she was prejudiced. More specifically, as a prior employee, she knows that the Turkey Hill has a surveillance system which would have videotaped the incident. That videotape is no longer available. Had she been charged within five (5) days, she would have been able to secure the videotape from the manager Wendy Fuller. Ms. Fuller is the Defendant’s aunt’s sister-in-law. Ms. Fuller has managed the Turkey Hill Uni Mart from at least 2001 to the present.

Defendant also claims she is prejudiced because she is now in a “weakened position to defend against the charges” due to her completing a one and one-half year Methadone Clinic and twenty-eight (28) days of inpatient treatment, completing her education in social work, obtaining employment and giving birth to a baby girl who is now nine (9) months old.

Defendant's first Omnibus Pretrial Motion consists of a Motion to Dismiss pursuant to Rule 519 (B) (2) of the Pennsylvania Rules of Criminal Procedure. Inexplicably, and despite the clear mandate of Rule 579 of the Pennsylvania Rules of Criminal Procedure which requires that Omnibus Pretrial Motions be filed within thirty (30) days of the date of arraignment except under limited circumstances, the Commonwealth did not object to the late filing of Defendant's Omnibus Pretrial Motion. The arraignment in this matter was held on April 25, 2011 but Defendant did not file her Omnibus Pretrial Motion until June 22, 2011, well after the thirty days. The Commonwealth's failure to raise a timeliness objection, however, constitutes a waiver of that argument.

Rule 519 (B) (2) of the Pennsylvania Rules of Criminal Procedure requires that a Criminal Complaint be filed against the Defendant within five (5) days of the date that Defendant is released from custody following an arrest without a warrant. In defense of the Motion, the Commonwealth argues only that the Defendant was not "arrested" on November 4, 2008 but rather, was arrested when the charges were filed in October of 2010.

The Commonwealth's argument, however, begs logic. An "arrest" as used in the Rule includes either a formal arrest or its functional equivalent such as a custodial detention. Commonwealth v. Douglass, 372 Pa. Super. 227, 539 A.2d 412, 418 (Pa. Super. 1988), appeal denied, 520 Pa. 595, 552 A.2d 250 (Pa. 1988).

The only evidence in the case at bar is Defendant's testimony that she was taken into custody. The Commonwealth did not present **any** evidence in this case, let alone evidence to show that Defendant was merely the subject of an investigative detention.¹ Based on the

¹ Although the Douglass Court found the defendant was not subject to an arrest or custodial detention, Douglass is

record created in this case, Defendant was clearly arrested when she was taken into custody by the police following the alleged transaction, transported to the barracks, placed in an interview room, Mirandized and then interrogated. Accordingly, the Commonwealth's argument fails.

Dismissal, however, is only available as a remedy if the Defendant can prove that she was prejudiced by the delay. See Commonwealth v. Revtai, 516 Pa. 53, 532 A.2d 1 (Pa. 1987); Commonwealth v. Wolgemuth, 737 A.2d 757, 759 (Pa. Super. 1999); Commonwealth v. Schimelfenig, 522 A.2d 605, 613 (Pa. Super. 1987); see also Pa. R. Cr. P. 109.

Defendant, as set forth above, argues that she is prejudiced by the delay in the filing of the charges because she no longer has available to her a videotape of the incident which would corroborate her version of the events. Furthermore, Defendant argues that she is prejudiced because of her weakened ability to defend against the charges because of the positive changes in her life over the past few years which include completing her education, obtaining a job, successfully completing drug treatment, staying drug free and having a child.

Preliminarily, in that the Defendant has raised prejudice, it was incumbent upon her to raise said defect before the conclusion of the preliminary hearing. Pa. R. Cr. P. 109. Defense counsel represented that said defect was in fact raised prior to the conclusion of the preliminary hearing. The Commonwealth could not confirm or deny such and the Court accepts the representation of defense counsel as credible.

Actual prejudice is required before dismissal of charges because of defects in procedure. Commonwealth v. McGinley, 386 Pa. Super. 547, 563 A.2d 518, 521 (1989).

distinguishable because the Commonwealth created a record that showed the defendant was only the subject of an

Under the facts and circumstances of this case, the Court finds that the defendant has not suffered actual prejudice. Defendant is charged with criminal attempt to possess a controlled substance. The Crimes Code defines criminal attempt as follows: “A person commits an attempt when, with the intent to commit a specific crime he does any act which is a substantial step toward the commission of that crime.” 18 Pa.C.S. §901(a). In her testimony Defendant admitted that she made a phone call to purchase heroin and arranged to meet the seller at the Turkey Hill; she then drove to the Turkey Hill to make the purchase. A jury could find that the act of driving to the Turkey Hill constituted a substantial step toward the commission of the crime.

Although Defendant testified that she did not give Trooper Havens the money, because she recognized him to be a trooper with the PSP, such would not be a defense. In order for an abandonment to be a defense, it must be a voluntary and complete renunciation. See 18 Pa.C.S. §901(c)(1). A renunciation is not “voluntary and complete” if it is motivated in whole or in part by a belief that circumstances exist which increase the probability of detection or apprehension of the defendant. 18 Pa.C.S. §901(c)(2)(ii). Therefore, any alleged videotape from the Turkey Hill would not exculpate the Defendant.

The Court also questions whether a videotape would depict what Defendant contends it would. First, such surveillance tapes typically are of poor quality. Second, the alleged attempted transaction occurred in the parking lot while Defendant was seated in the driver’s seat of her vehicle. According to Defendant’s testimony, Trooper Havens approached the passenger side. Therefore, any attempt by Trooper Havens to hand Defendant a tissue or

investigative detention.

paper towel or any alleged payment of funds by Defendant to Trooper Havens likely would have occurred through the passenger window (inside the vehicle) and likely would not have been clearly visible on any videotape. Furthermore, the view of the surveillance camera also could have been obscured by Trooper Haven's body. There is nothing in the record to suggest that anyone actually viewed the videotape from the Turkey Hill. Thus, Defendant's testimony regarding what would be depicted thereon is speculative.

Although the changes that have occurred in Defendant's life may make serving a sentence more inconvenient if she is found guilty, such changes do not prejudice her ability to present a defense. She can still take the stand and testify to her version of the facts, just as she did at the hearing on her motion to dismiss. If anything, the fact that she has undergone treatment so that she is no longer addicted to heroin may make her a better witness.

Defendant also claims the charge against her should be dismissed pursuant to Rule 600. This claim is without merit. Rule 600 applies to post-complaint delay. It does not address delay that occurs prior to the filing of the criminal complaint. See Pa.R.Cr.P. 600(A)(3) ("Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed"). After the expiration of 365 days, the defendant may apply for an order dismissing the charges with prejudice. Pa.R.Cr.P. 600(G). Here, the criminal complaint was filed on October 7, 2010. It has not yet been 365 days since the filing of the complaint. Therefore, Defendant is not entitled to dismissal pursuant to Rule 600.

ORDER

AND NOW, this ___ day of August 2011, following a hearing and argument,
Defendant's Motion to Dismiss is **DENIED**.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: CA
DA
Bradley S. Hillman, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File