IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-299-2011**
vs.	**:**	
	:	**Opinion and Order re**
RONALD GROBES,	**:**	**Defendant's Motion to Dismiss Pursuant to**
Defendant	**:**	**Rule 600**

OPINION AND ORDER

This matter came before the Court on February 7, 2012 for a hearing and argument on Defendant's motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. The relevant facts follow.

On November 19, 2010, troopers discovered methadone tablets on Defendant's person during the course of a traffic stop. The police arrested him, took him to the state police barracks and processed him, but he was released pursuant to Rule 519(B).

On November 30, 2010, Defendant received a sentence of 1to 2 years incarceration in a state correctional institution followed by 5 years supervision for possession with intent to deliver heroin at Lycoming County case number CR-1131-2010. See Defendant's Exhibit 1. On December 21, 2010, Defendant was transported from the Lycoming County Prison to SCI-Camp Hill for classification. After classification, Defendant was transferred to SCI-Waymart, where he remained until he was released on parole on December 19, 2011.

On January 19, 2011, a criminal complaint was filed against Defendant, charging him with possession of methadone, a controlled substance, arising out of the November 19, 2010 incident and arrest. The affiant noted in his affidavit of probable cause, as well as in his police report (see Defendant's Exhibit 2), that he was familiar with

Defendant from a heroin buy-bust operation that occurred earlier in the year, where Defendant was arrested inside his residence following a heroin delivery.

A preliminary hearing was scheduled for March 1, 2011. A summons was sent to Defendant's home address by certified mail and regular mail. The certified mail was returned unclaimed, but the regular mail was not returned. When Defendant failed to appear for the hearing, it was held in his absence, and a bench warrant was requested for Defendant's apprehension.[1] The Court issued the bench warrant on March 7, 2011.

On December 21, 2011, the bench warrant was vacated and bail was set at $5,000 unsecured, but a condition of Defendant's release was acceptance on the Intensive Supervised Bail program. Defendant has remained incarcerated, because he has not been placed on the Intensive Supervised Bail program.

Defendant's formal court arraignment occurred on January 23, 2012. On January 25, 2012, Defendant filed his motion to dismiss pursuant to Rule 600, because more than one year has elapsed since the filing of the criminal complaint and this case has never been called or listed for trial.

The Commonwealth argued that the period of time between the date Defendant failed to appear for his preliminary hearing and the date the bench warrant was vacated is excludable time under Rule 600. Counsel for defendant asserted this was not excludable time, because the Commonwealth knew Defendant was incarcerated in a state

[1] The assistant district attorney that appeared for the preliminary hearing in this case was the prosecutor who was assigned to prosecute the heroin charges. This prosecutor negotiated the terms of the plea agreement and participated in Defendant's plea hearing, but was not present at Defendant's sentencing hearing on November 30, 2010.

correctional institution since it was the one who prosecuted him and put him there a few months earlier.

Rule 600 states, in relevant part:

> (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.
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> (C) In determining the period for commencement of trial, there shall be excluded therefrom:
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> (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;
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> (2) any period of time for which the defendant expressly waives Rule 600;
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> (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.
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> (G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon.
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> 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. If, on any successive listing of the case, the Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine

> whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant.

Pa.R.Cr.P. 600.

The question in this case is whether the time between the date of the preliminary hearing on March 1, 2011 and the date the bench warrant was vacated on December 21, 2011 can be considered delay resulting from the unavailability of the defendant.

An accused who is unaware that process has been issued against him will not be considered unavailable absent a showing of due diligence by the Commonwealth. Commonwealth v. Taylor, 489 A.2d 853, 859-860 (Pa. Super. 1985). Conversely, once an accused who has been subject to process of court, has notice of a scheduled court proceeding, and fails to appear, the Commonwealth's duty of due diligence is suspended until either the accused voluntarily surrenders or is apprehended. Commonwealth v. Vesel, 751 A.2d 676, 680 (Pa. Super. 2000); Taylor, supra.

Mere incarceration in another jurisdiction does not excuse the Commonwealth from exercising due diligence in bringing a defendant to trial. Taylor, supra; see also Commonwealth v. Pichini, 454 A.2d 609 (Pa. Super. 1982). Furthermore, "the mere issuance of a bench warrant does not establish due diligence." Commonwealth v. Snyder, 421 A.2d 438, 441 (Pa. Super. 1980).

Here, Defendant was not subject to process of court or aware of his

preliminary hearing; therefore, Defendant cannot be found unavailable unless the Commonwealth exercised due diligence.

The Commonwealth relies heavily on the Snyder case in its brief and it cites this case for the proposition that it need not show Defendant had actual notice, but merely that proper notice was sent. The Commonwealth also argues that it must have actual notice that Defendant did not receive the preliminary hearing notice. The Commonwealth, however, conveniently ignores aspects of Snyder that undercut its position.

The Snyder Court stated:

> Although notice by certified mail addressed to the defendant may be a sufficient *form* of notice under *Cohen*, it remains for us to determine whether under the facts of this case the defendant was in fact 'properly notified.' Although *Cohen* speaks of 'receipt of reasonable notice,' 'willful failure to appear,' and 'where the defendant is on bail and has notice,' we do not interpret it as requiring *actual* notice to appear. However, we also do not interpret *Cohen* as automatically allowing an exclusion under Pa.R.Crim.P. 1000 whenever the Commonwealth employs a reasonable form of notice. For example, actual notice would not be required when a person on bail failed to notify the authorities of a change of address as required by Pa.R.Crim.P. 4013(c), and notice was sent to his last known address. On the other hand when the Commonwealth employs a reasonable form of notice, knows or should know that the defendant did not receive the notice and the defendant was not at fault for not receiving the notice, the Commonwealth may not exclude time merely because it sent the notice. Such is the instant case.
>
> Here, the judge made findings of fact or there was uncontradicted evidence that, although notice was sent by certified mail and it was correctly addressed, the defendant never received it, he never received the postal notice that stated there was an unsuccessful attempt to deliver the notice and that it was waiting for him at the post office, and he never refused the delivery of the notice. Moreover, the Commonwealth knew he had not received the notice since it was returned to the Commonwealth. Thus, although the Commonwealth employed a reasonable form of notice, since it knew the defendant did not receive the notice and the defendant was not at fault for not receiving the notice, *Cohen* does not allow the

> Commonwealth an exclusion of time merely because it sent the notice.
>
> ….Having found that proper notice was not given under *Cohen*, the lower court should have determined whether the Commonwealth exercised due diligence. For example, the Commonwealth may have exercised due diligence through its efforts to execute the bench warrant. We note, however, that the mere issuance of a bench warrant does not establish due diligence…..

Snyder, 421 A.2d at 441 (underlined emphasis added).

Here, as in Snyder, although the notice of the preliminary hearing was sent via certified and regular mail that was correctly addressed to Defendant's home address, the defendant did not receive any forms of mailing or a postal notice that stated there was an unsuccessful attempt to deliver the notice and that it was waiting for him at the post office, because he was incarcerated in a state correctional facility. Defendant also never refused the delivery of the notice. Although the regular mail was not returned to the Magisterial District Judge's (MDJ's) office, under the unique facts and circumstances of this case, the Commonwealth should have known that Defendant did not receive the notice. Not only was the same prosecuting attorney assigned to handle both this case and the heroin charges that sent Defendant to state prison, but the affidavit of probable cause in this case, which both the affiant and the prosecuting attorney would have had in their possession at the time of the preliminary hearing, mentions the heroin charges. Since the Commonwealth knew or should have known that Defendant did not receive notice of the preliminary hearing and the defendant was not at fault for not receiving the notice, the Commonwealth is not entitled to exclusion of time merely because notice was sent.[2]

[2] The Court is not asking the Commonwealth to be omnipotent or imposing an undue burden on the Commonwealth; it is simply not allowing the Commonwealth to turn a blind eye to relevant information in its

Ironically, the Commonwealth argues that it did not have sufficient notice that Defendant was incarcerated in a state correctional facility despite the fact that its prosecution of the previous heroin charges against Defendant resulted in his incarceration, the same assistant district attorney was assigned to both the heroin case and this case,[3] and the affiant specifically mentioned the heroin charges in his police report and the affidavit of probable cause in this case. Yet, at the same time, the Commonwealth asserts Defendant had sufficient notice of the preliminary hearing to render him unavailable, because the summons was sent by regular mail to his home address and not returned to the MDJ's office and a bench warrant was issued for his arrest, even though the Commonwealth stipulated that Defendant was incarcerated before the charges were filed and when the summons was sent.

From the facts of this case, it is patently clear that Defendant did not have notice of the preliminary hearing, he did not willfully fail to appear, and he was not avoiding the efforts to provide him with notice. In fact, he was unaware that criminal charges had been filed against him in this case.

It is equally clear that the Commonwealth knew about Defendant's heroin

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possession. See Commonwealth v. Clark, 374 A.2d 1380 (Pa. Super. 1977)(although the appellant was aware of his trial date, Superior Court still remanded for an evidentiary hearing to determine the extent of the District Attorney's knowledge that the appellant had been rearrested and was in the county jail). The Commonwealth negotiated a plea agreement for a sentence of 1-2 years incarceration in a state correctional institution in the heroin case, and the Court imposed that sentence on November 30, 2010. The Commonwealth wants the Court to excuse its failure to remember this knowledge at the time of the preliminary hearing in this case due to its caseload. There is nothing in the record to support these arguments. Furthermore, this argument ignores the reference in the affidavit of probable cause and the police report that Defendant had been arrested earlier in the year for a heroin delivery. These references could refresh a prosecutor's recollection about that case or at least would cause a reasonable prosecutor to check to see if Defendant's failure to appear for the preliminary hearing was due to his incarceration on those other charges. Although such a check may have been cumbersome in the past, computer technology has made such information accessible within a matter of minutes.

[3] That individual is no longer assigned to this case, because she left the District Attorney's office and entered private practice.

charges, knew or should have known that Defendant was incarcerated on those charges, and thus knew or should have known that Defendant did not receive the notice of the preliminary hearing that was sent to his home address. The Commonwealth also did not present any evidence to show what efforts, if any, were made to execute the bench warrant.

Based on the facts and circumstances of this case, the Court cannot find that Defendant was unavailable for trial or that the Commonwealth exercised due diligence.

Accordingly, the following Order is entered:

O R D E R

AND NOW, this ___ day of February 2012, the Court GRANTS the Defendant's motion to dismiss pursuant to Rule 600. Defendant's bail is modified to $1,500 unsecured and he is hereby released from incarceration upon signing his bail sheet. Bail shall continue for thirty (30) days from the date of this Order. If the Commonwealth appeals this Order, bail shall continue. If no appeal is filed, Defendant shall be discharged.

While Defendant is on bail, he has an obligation to notify the District Attorney and the Prothonotary in writing of any change of address.

By The Court,

_____
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Trisha Hoover, Esquire
Gary Weber, Esquire (Lycoming Reporter)