

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-751-2011  
vs. :  
ATHENIA L. SMITH, :  
Defendant :

**OPINION AND ORDER**

Before the Court is Defendant's motion to dismiss, which was filed pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. The relevant facts follow.

On November 8, 2010, a criminal complaint was filed against Defendant, charging her with various drug offenses. The preliminary hearing was continued multiple times at the request of the Commonwealth. The defense requested one continuance from December 14, 2010 to December 21, 2010. On or about January 25, 2011, the Commonwealth withdrew the criminal complaint.

On March 17, 2011, the Commonwealth re-filed the charges against Defendant. Again, the preliminary hearing was continued multiple times at the request of the Commonwealth. The preliminary hearing was held on May 31, 2011, and the charges were held for court.

On June 20, 2011, Defendant waived her formal court arraignment and entered a plea of not guilty. The Court scheduled the case for a status conference on September 9, 2011 and a pre-trial conference on October 7, 2011. Although there were earlier status and pre-trial conference dates, the Commonwealth did not request that the case be scheduled for any of those dates or alert the Court that there may be Rule 600 issues at some point due to the delay in holding the preliminary hearing. Neither the status nor the

pre-trial conference date, however, was more than 365 days from the filing of the original complaint.

The case was listed for trial during the November trial term, which ran from November 1, 2011 to November 17, 2011. The Commonwealth was ready for trial. At the call of the list held on the first day of jury selections on October 26, 2011, defense counsel requested a continuance, which the Court granted. As a result of this continuance, the case was moved to the January trial term, which ran from January 18 through February 1, 2012.

On January 11, 2012, the defense requested another continuance. The case was continued to the February/March trial term, and a pre-trial conference was scheduled for February 1, 2012. On that date, the Commonwealth requested a continuance due to the unavailability of a necessary Commonwealth witness, Agent Sproat, who was the individual that discovered the controlled substances during the search that was conducted in this case. The Court, over Defendant's objection, granted the Commonwealth's request. The case was continued to the next trial term, and a pre-trial conference was scheduled for March 21, 2012.

On March 21, 2012, Defendant filed her motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure, and requested a continuance, which was granted.

On April 20, 2012, the Court held a hearing and argument on Defendant's motion. The parties stipulated to the dates of the defense continuance requests, and the Commonwealth presented evidence regarding the unavailability of Agent Sproat.

The Commonwealth presented testimony from Agent Howe regarding his and

Agent Sproat's availability for trial in February 2012. Agent Howe testified that he and Agent Sproat assisted with the search in this case, and Agent Sproat found heroin in a nightstand. In late January 2012, the entire State College region was put on special assignment, including Agent Howe and Agent Sproat. The agents were instructed to inform all the counties where they had pending cases that they would be unavailable to testify at hearings or trials. A week or two before the special assignment began, Agent Howe advised the District Attorney's office of their impending unavailability for a period of thirty days, the length of a typical special assignment. Agent Howe also testified that, although they anticipated this assignment to last thirty days, it ended on February 10, 2012 after approximately 2 ½ weeks.

### **DISCUSSION**

When a defendant is at liberty on bail trial shall commence within 365 days from the date the criminal complaint is filed. Pa.R.Cr.P. 600(A)(3). When determining the period for commencement of trial, the Court excludes any delay that results from the unavailability of the defendant or her attorney, or any continuance granted at the request of the defendant or her attorney. Pa.R.Cr.P. 600(C). After the expiration of the 365-day period, a defendant may apply to the Court for an order dismissing the charges at any time before trial. Pa.R.Cr.P. 600(G). Dismissal, however, is not automatic. The Commonwealth has a right to be heard on the motion and, if the Court determines that the Commonwealth exercised due diligence and the circumstances occasioning postponement were beyond its control, the Court must deny the motion and schedule the case for trial on a date certain.

Pa.R.Cr.P. 600(G).

When deciding a motion filed pursuant to Rule 600, the Court must keep its dual purposes in mind. As the Pennsylvania Superior Court recently reiterated in Commonwealth v. Peterson, 19 A.3d 1131 (Pa. Super. 2011):

Rule 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's rights to a speedy trial have been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule 600 was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.

So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule 600 must be construed consistent with society's right to punish and deter crime. In considering these matters..., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective rights of the community to vigorous law enforcement as well.

Id. at 1135 (citations omitted). Furthermore, “[d]ue diligence does not require perfect vigilance and punctilious care, but merely a showing that the Commonwealth has put forth a reasonable effort.” Id. at 1137.

When the parties made their arguments, the Commonwealth conceded that the period for commencement of trial would start from the filing of the original complaint on November 8, 2010. Although more than 365 days have elapsed since the filing of that complaint, the Commonwealth argued that it exercised due diligence and the February 1, 2012 continuance was due to circumstances beyond its control, specifically the unavailability of Agents Howe and Sproat due to their special assignment.

Defense counsel argued that since the Attorney General's office and the District Attorney's office both represent the Commonwealth, the unavailability of Agent Sproat was not beyond the Commonwealth's control.

The Court finds that 499 days have elapsed between the filing of the initial complaint and the filing of Defendant's motion to dismiss. The mechanical run date in this case was November 8, 2011. The Court finds that the time periods from December 14, 2010 to December 21, 2010 and from October 26, 2010 to February 1, 2011 constitute 105 days of excludable delay which resulted from continuance requests made by Defendant or her counsel. Therefore, for Rule 600 purposes, 394 non-excludable days have passed since the filing of the initial complaint.<sup>1</sup>

This, however, does not end the inquiry. The Court must next determine whether there is any delay that is excusable because such delay was beyond the control of the Commonwealth and occurred despite its due diligence. The Commonwealth contends there are several periods of excusable delay.

Initially, the Commonwealth asserts there was excusable delay when the case was originally scheduled for status and pre-trial conferences. The Court rejects the Commonwealth's assertions, in its brief and in oral argument, respectively, that the period of time from September 20 to October 26, 2011 was either excludable or excusable delay due to the appointment of new defense counsel or that the period from June 20, 2011 to September 9, 2011 was excusable delay resulting from a crowded court schedule. Attorney James

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<sup>1</sup> Adding these 105 days to the mechanical run date of November 8, 2011, results in an adjusted run date of February 21, 2012.

Protasio testified that the September 9, 2011 status conference date and October 7, 2011 pre-trial date were set by the Court at arraignment in accordance with the typically assigned dates for that arraignment date and had nothing to do with his subsequent withdrawal as counsel and the appointment of Ms. Rexroth as Defendant's attorney. The Court then explained its procedure at arraignment that, if the Commonwealth wanted earlier status or pre-trial conference dates because the typical dates were either beyond or too close to the run date for Rule 600, all the Commonwealth had to do was ask and the Court would give an earlier date no matter how many cases were already scheduled for the requested dates.

The Commonwealth also contends the time period from February 1, 2012 to March 25, 2012 is excusable delay. This time period represents the delay occasioned by the Commonwealth's request for a continuance due to the unavailability of Agent Howe and Agent Sproat.

Defense counsel argues this time should not be excusable, because those individuals are part of the "Commonwealth" and therefore, not outside of the Commonwealth's control. Furthermore, this was "blanket" unavailability for the entire trial term, not just a particular date, and the Commonwealth did not make any inquiries to see if the Agents could be available for a short period of time to testify.

The Court finds the period from February 1, 2012 to March 21, 2012 was excusable delay. The Commonwealth subpoenaed the Agents to testify at trial, but they were unavailable. The Agents do not work for the Lycoming County District Attorney's office; therefore, the District Attorney did not have any control over their special assignment and

resulting unavailability. See Peterson, 19 A.3d at 1138 (officers' unavailability due to training excusable delay beyond Commonwealth's control); Commonwealth v. Staten, 950 A.2d 1006, 1010 (Pa. Super. 2008)(delay occasioned by unavailability of officer who had been assigned to serve warrants on the day of trial held to be excusable delay). At the time the Commonwealth requested its continuance on February 1, 2012, it had been informed that the agents would be unavailable for a period of thirty days. Neither the agents nor the Commonwealth could have anticipated on February 1 that the agents would complete their special assignment on February 10, 2012. Therefore, the Court finds that there were 50 days of excusable delay.

“A period of delay that is excusable pursuant to Rule 600(G) results in an extension to the adjusted run date.” Commonwealth v. Ramos, 936 A.2d 1097, 1103 (Pa. Super. 2007), citing Commonwealth v. Matis, 551 Pa. 220, 710 A.2d 12, 16-17 (1998). Clearly, such an extension would make the adjusted run date later than March 21, 2012, the date when Defendant filed her motion to dismiss and requested another continuance.<sup>2</sup>

Accordingly, the following Order is entered:

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<sup>2</sup> According to the Court's calculations, there would have been 21 days of excusable time still remaining when Defendant filed her motion to dismiss and request for another continuance.

**ORDER**

**AND NOW**, this \_\_\_\_ day of May 2012, the Court DENIES Defendant's motion to dismiss based on Rule 600. The Court directs the Deputy Court Administrator to schedule this case for jury selection and a date certain trial and notify the parties of these dates at the pre-trial conference scheduled for May 10, 2012.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Lori Rexroth, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file