

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2011-2012
:
vs. : **Opinion and Order re**
: **Defendant's Motion to Dismiss**
JON CRAIG, :
Defendant :

OPINION AND ORDER

This matter came before the court on March 20, 2013 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 December 9, 2009, Officer Norman Hager of the Penn College Police Department¹ took a report of harassment which identified Defendant as the perpetrator. Shortly after December 9, 2009, Defendant left Penn College as a student and returned to his mother's residence in Kansas, which was the permanent address that he utilized in his dealings with Penn College. On March 16, 2012, Officer Hager filed a criminal complaint against Defendant, charging him with three counts of terroristic threats and twelve counts of harassment for purportedly sending numerous threatening and/or harassing text messages to the alleged victim on December 9, 2009. Officer Hager also sought and obtained a warrant for Defendant's arrest. Defendant's address on the criminal complaint was 14113 West 88th Street, Lenexa, Kansas. Although the police were aware that Defendant was residing at his mother's address in Kansas, Defendant was never arrested on the warrant that Officer Hager obtained from the Magisterial District Judge.

¹ Officer Hager is presently employed by the Duboistown Police Department.

On December 24, 2012, Defendant filed his motion to dismiss pursuant to Rule 600, because he had not been brought to trial within 365 days from the date on which the criminal complaint was filed.

At the hearing on Defendant's motion, the Commonwealth presented the testimony of Officer Hager and Lieutenant David Mauck.

Officer Norm Hager testified that, in December of 2009, when he was employed as a police officer for the Penn College Police Department, he took a report of harassment which identified the Defendant as the perpetrator. He had very little if any information concerning Defendant. He did, however, have Defendant's cell phone number.

He called Defendant's cell phone number on numerous occasions. On occasion, he left a message but he never actually spoke with Defendant. He did recall having telephone contact with Defendant's mother confirming her address, which was the same address that Defendant utilized as his permanent address in connection with his registration as a student at Penn College. Officer Hager became aware that, shortly after the alleged incident, Defendant relocated to his mother's address in Kansas.

Officer Hager filed a criminal complaint on March 16, 2010 and requested an arrest warrant. He did not mail the complaint, affidavit or arrest warrant to Defendant at his Kansas address and took no further action to contact Defendant.

Lieutenant David Mauck of the Penn College Police Department next testified on behalf of the Commonwealth. He is responsible for what he characterized as the "due diligence on all warrants." He confirmed that Defendant left Penn College as a student on or

about December 10, 2009.

Following the filing of the charges in March of 2010 until mid-June of 2011, he made phone calls to Defendant at his known telephone number. On occasion, he left messages, but he never actually spoke with Defendant.

On June 15, 2011, he left a message for Defendant on Defendant's cell phone. On June 20, 2011, he spoke with Defendant. He advised Defendant that there were charges pending against him and that he needed to address them. He also indicated that there was a warrant for Defendant's arrest. During the conversation, Defendant indicated to Lieutenant Mauck that he thought the charges were dropped based upon his conversations with the victim.

As a result, Lieutenant Mauck contacted the victim on June 22, 2012. The victim indicated to Lieutenant Mauck that she was not willing to drop the charges and wanted the charges to proceed. Lieutenant Mauck called Defendant back and advised him that the victim wanted the charges to proceed. He also informed Defendant that if he did not return to Pennsylvania, the warrant would remain and should the Defendant be stopped for even a traffic ticket, he would be detained on the warrant. Defendant indicated that he did not have the funds to return to Pennsylvania and would not be doing so in the immediate future.

On June 23, 2011, Lieutenant Mauck obtained a fugitive declaration from Magisterial District Court. Surprisingly, when questioned on the veracity of the statements set forth on the docket in connection with the fugitive declaration, Lieutenant Mauck conceded that the information was wrong. Specifically, and despite the fact that the docket indicates that Lieutenant Mauck made certain steps to contact Defendant, Lieutenant Mauck confirmed that: he never contacted Defendant at his last known address, he never attempted to find Defendant

at his place of business or usual habitat, he never contacted neighbors and friends of the Defendant, he never verified Defendant's name on NCIC/CLEAN, and he did not make any other efforts to serve the warrant.

From June 23, 2011 to August 27, 2012, Lieutenant Mauck called Defendant approximately three to four more times. He believed that he spoke with Defendant on one occasion and advised Defendant that the charges were still pending. Defendant responded, however, that he did not have the money to return.

On August 27, 2012, written correspondence was sent to Defendant at his Kansas address. Defendant eventually responded to the letter by turning himself in on November 7, 2012.

Lieutenant Mauck acknowledged that Defendant's Kansas address was the same address as set forth on the criminal complaint and he conceded that the police took no efforts to secure Defendant's return other than to call Defendant's cell phone number and then send the one letter on August 27, 2012. While he was aware that he could contact law enforcement officials in Kansas and proceed with extradition, given his years of experience he had no faith that Defendant would be extradited. Indeed, Lieutenant Mauck remarked that in the past, there were DUI charges pending against individuals who were only in Philadelphia or New Jersey that were not extradited.

Defendant testified on his own behalf. He confirmed that he resided at the Kansas address from the date he left Penn College until early October of 2012. He was aware shortly after December 9, 2009 that charges were filed against him but he believed that the charges were dropped based upon conversations he had with both his mother and the victim.

He denied having any telephone conversations or receiving any telephone calls from anyone regarding the charges until June 20, 2011 when he spoke with Lieutenant Mauck. He confirmed that he had two telephone conversations with Lieutenant Mauck over the next two days. He was informed that the charges were not dropped and that they were being pursued. He was also informed that there was a warrant out for his arrest.

Defendant denied receiving any other phone calls or contacts whatsoever until he received a certified letter in September of 2012. As a result, he quit his employment, “bought a bus ticket” and decided to return to Pennsylvania to “take care of it.” He turned himself in November 7, 2012.

Defendant also confirmed that his telephone number was the same from at least December of 2009 until the “summer of 2012.” He verified that his voicemail was “set up” the entire time and that he never received any voicemail or message prior to June of 2011.

DISCUSSION

“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.” Pa.R.Crim.P. 600(A)(3).

In determining the period for commencement of trial, the court must exclude:

(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.Crim.P. 600 (C).

After more than 365 days have passed from the date the complaint is filed, a defendant may apply to the court for an order dismissing the charges. Pa.R.Crim.P. 600(G). If the court determines that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the court must deny the motion and list the case for trial on a date certain. Id. A defendant, however, is entitled to dismissal of the charges when the Commonwealth has failed to exercise due diligence. Id.

The Commonwealth bears the burden of proving due diligence by a preponderance of the evidence. Commonwealth v. Selenski, 606 Pa. 51, 994 A.2d 1083, 1089 (2010); Commonwealth v. Johnson, 825 A.2d 315, 317 (Pa. Super. 2004). Due diligence is fact specific and determined on a case by case basis. While it does not require perfect diligence or punctilious care, it does require a reasonable effort. Selenski, supra.

Clearly, the time between the filing of the criminal complaint and Defendant's return on November 7, 2012 is not excludable under Rule 600 (C)(1) because Defendant's whereabouts were not unknown; the police knew exactly where Defendant was residing. Indeed, within days after the incident, the police were aware that Defendant withdrew from Penn College and returned to his mother's address in Kansas. The criminal complaint filed on March 16, 2010 specifically listed Defendant's address in Kansas where he, in fact, was residing at the time the complaint was filed.

The Commonwealth argued that this period of time was excludable because Defendant was unavailable under Rule 600(C)(3)(a) or that the circumstances were outside of the Commonwealth's control because Defendant removed himself from the jurisdiction. The Court cannot agree. The mere fact that a defendant leaves the jurisdiction prior to the charges being filed does not relieve the Commonwealth of its obligation to exercise due diligence to locate the defendant and secure his return.

The Court is not convinced that the Commonwealth has met its burden of proof to show due diligence by a preponderance of the evidence. From the moment the police filed the criminal complaint against Defendant, they knew where he was residing in Kansas. Nevertheless, it appears that the only efforts taken by the police to notify Defendant of the charges against him and secure his return between March 16, 2010 and June 14, 2011 consisted of calling his cell phone number occasionally but rarely, if ever, leaving a message. Lieutenant Mauck's method of documenting his "due diligence" efforts was to write them down on sticky notes and put them on the warrant. He only had sticky notes, though, for his contacts with Defendant in June of 2011. Lieutenant Mauck did not have any of his sticky notes for the time periods between March 16, 2010 and June 14, 2011 and between June 24, 2011 and August 27, 2012. During the latter period, there may have been another officer who also was trying to contact Defendant, but the Commonwealth did not call that officer as a witness.

Lieutenant Mauck's answers to questions regarding the time period from March 16, 2010 to June 15, 2011 were vague. He did not know the dates when he called Defendant or how often he tried to call him. He indicated that sometimes he would leave messages, if voicemail was active. Defendant, however, testified that he had the same cell phone number

until the summer of 2012, his voicemail was set up, and he did not receive any telephone calls from the police until June of 2011. Lieutenant Mauck also did not have any set schedule or habit for attempting to contact defendants about outstanding warrants that could assist him in filling in the blanks caused by the missing sticky notes.

Lieutenant Mauck conceded that never verified that Defendant's name was entered into NCIC/CLEAN. He also never mailed a copy of the criminal complaint, affidavit or arrest warrant to law enforcement officials in Lenexa, Kansas or otherwise sought their assistance in contacting Defendant.

It also did not appear to the Court that Defendant was trying to evade the police. Although Lieutenant Mauck initially testified that he thought an attempt had been made to send the complaint to Defendant in the mail, further questioning showed that he was assuming that the Magisterial District Judge had sent the complaint to Defendant. Lieutenant Mauck then eventually admitted that Defendant probably had not received a copy of the criminal complaint, affidavit or arrest warrant prior to the letter being sent on August 27, 2012. It also is not surprising that Defendant was under the impression that the victim decided not to pursue the charges when the police never sent him any paperwork about the charges until August 27, 2012. On the occasions in June 2011 when Lieutenant Mauck actually spoke to Defendant, he never refused to return to Pennsylvania; he just consistently said he did not have the money to do so. Defendant's claim that he had limited financial resources is supported somewhat by the fact that Defendant qualified for and is represented by a public defender in this case. Defendant also turned himself in on November 7, 2012 in response to the letter about the charges.

A defendant is entitled to dismissal when the Commonwealth fails to exercise due diligence. A defendant's motion only gets denied and the case is set for a date certain when the Commonwealth establishes both due diligence and that the circumstances causing the delay were beyond its control. Pa.R.Crim.P. (G). Based on the record as a whole, the Court finds that the Commonwealth has failed to satisfy its burden of proof to show that it acted with due diligence in this case. Therefore, Defendant is entitled to dismissal.

In the alternative, the circumstances occasioning postponement were not beyond the Commonwealth's control. The police could have contacted law enforcement officers in Lenexa, Kansas, sent them the warrant, and asked them to take Defendant into custody. The Commonwealth then could have initiated extradition proceedings. Lieutenant Mauck was aware that these avenues were available but, due to the relatively minor nature of the charges, he did not seek to utilize them because he did not think the Commonwealth would choose to extradite Defendant. This is not a situation where law enforcement officials in Kansas were contacted but they refused to apprehend or extradite Defendant, because Kansas authorities were never contacted in any manner. In fact, Defendant never had any idea that there was a warrant for his arrest until more than a year after the charges were filed. The police had Defendant's address in Kansas from the moment the criminal complaint was filed, but they never sent him the complaint and arrest warrant, or any correspondence for that matter, until over two years later.

Based on the foregoing, Defendant's Motion will be granted.

ORDER

AND NOW, this ____ day of April 2013, following a hearing and argument on

Defendant's Motion to Dismiss, said Motion is **GRANTED** and the charges against the Defendant are dismissed. If an appeal is not filed within 30 days, the Prothonotary is directed to return to Defendant any and all bail that was posted in this matter less poundage. If a timely appeal is filed, Defendant shall remain on bail and he will continue to have the obligation to notify the Commonwealth, the Prothonotary, and his attorney of any change in his address.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (MW)
PD (RC)
Prothonotary
Gary Weber, Esquire (Lycoming Reporter)
Work file