

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1715-2012
	:
vs.	: CRIMINAL DIVISION
	:
TERENCE D. FORSHYTE,	: Opinion and Order re Defendant's
Defendant	: Motion for Nominal Bail Pursuant
	: to Pa.R.Cr.P. 600

OPINION AND ORDER

Before the Court is Defendant's motion for nominal bail in accordance with Rule 600 of the Pennsylvania Rules of Criminal Procedure. The Court held a hearing and argument on Defendant's motion on July 19, 2013. The relevant facts follow.

On June 25, 2012, a criminal complaint was filed against Defendant charging him with theft, simple assault, and conspiracies to commit burglary, robbery and several lesser included offenses with Kenneth Martin and Michael Wills. On September 14, 2012, the Honorable Nancy L. Butts ruled that the victim's statements could be admitted at the co-defendants' preliminary hearing without the victim testifying due to forfeiture by wrongdoing pursuant to Pa.R.E. 804(b)(6). Defendant's preliminary hearing was scheduled for September 26, 2012. The Commonwealth, however, requested a continuance because attorneys were out of the office due to a Jewish holiday and the remaining attorneys were attending a seminar. The continuance was granted, and the preliminary hearing was held on October 16, 2012. As at the co-defendant's preliminary hearing, the victim's statements were admitted against Defendant without the victim testifying.

Former defense counsel requested a continuance at the pretrial conference on December 4, 2012. This continuance was granted, and Defendant's case was rescheduled for

a pretrial conference on February 1, 2013. On December 5, 2012, current defense counsel was appointed to represent Defendant due to a conflict.

On February 1, 2013, current counsel requested a continuance, and the case was rescheduled for a pretrial conference on May 10, 2013.

On May 10, 2013, the Commonwealth requested a continuance because the crime victim's whereabouts were still unknown. The co-defendants were not opposed to the Commonwealth's continuance request due to the fact that their attorneys were involved in murder trial in other counties. Defendant, however, was opposed to the continuance request, because he was prepared to go to trial and he was unable to post bail so he remained incarcerated. Nevertheless, the Commonwealth's continuance was granted and the pretrial conference was rescheduled for August 16, 2013.

On July 1, 2013, Defendant filed his motion for nominal bail.¹

The current version of Rule 600 states in relevant part:

(B) Pretrial Incarceration

Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of

(1) 180 days from the date on which the complaint is filed....

(C) Computation of Time

...

(2) For purposes of paragraph (B), only periods of delay caused by the defendant shall be excluded from the computation of the length of time of any pretrial incarceration. Any other periods of delay shall be included in the computation.

(D) Remedies

(2) Except in cases in which the defendant is not entitled to release

¹Defendant's motion states that it was filed pursuant to Pa.R.Cr.P. 600(E), but effective July 1, 2013, the nominal bail provisions are contained in Rule 600(D)(2).

on a bail as provided by law, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail subject to any nonmonetary conditions of bail imposed by the court as permitted by law.

Pa.R.Cr.P. 600.

At the argument, the parties agreed that the periods of time covered by defense counsel's continuance requests would be excludable, and, if these were the only periods of excludable time, Defendant was incarcerated in excess of 180 days. The Commonwealth, however, argued that the time periods attributable to its continuances also were excludable for purposes of determining Defendant's eligibility for nominal bail. The Court cannot agree.

The Commonwealth's first continuance postponed the preliminary hearing from September 26, 2012 to October 16, 2012, a period of twenty (20) days. The reason for this continuance was two of its attorneys were celebrating a Jewish holiday and the remaining attorneys were attending a seminar. The prosecutor argued that since this delay was not attributable to a lack of due diligence on the part of the Commonwealth, this period of time is excludable. Unfortunately, the prosecutor is attempting to utilize a standard that applies when a defendant seeks dismissal in the context of a motion for release on nominal bail.

Rule 600 clearly states that only periods of delay caused by the defendant are excluded from the computation of pretrial incarceration. Defendant played no part in the continuance of his preliminary hearing; therefore, the Commonwealth's argument that the

period from September 26 to October 16, 2012 is somehow excludable for nominal bail purposes is meritless.

The Commonwealth also contends that the period from the May 10, 2013 pretrial until the August 16, 2013 pretrial is excludable. First, the Commonwealth argues that Defendant agreed to have his case consolidated with his co-defendants' cases and his co-defendants requested a continuance. According to the Commonwealth, if this time period is not excluded it will be forced to sever Defendant's case and try it separately, which would be duplicative and prejudicial to the Commonwealth and its witnesses. The Commonwealth relies on the cases on Commonwealth v. Kimbrough, 872 A.2d 1244 (Pa. Super. 2005) and Commonwealth v. Long, 532 A.2d 853 (Pa. Super. 1987).

The Court cannot accept the Commonwealth's argument. The co-defendants did not request a continuance;² the Commonwealth requested a continuance, which the co-defendants did not oppose. Furthermore, the co-defendants are not incarcerated on this case. Moreover, the cases cited by the Commonwealth are inapposite. All the cases cited by the Commonwealth during the hearing and argument on this matter involved motions to dismiss, not motions for nominal bail. In Kimbrough and Long, the co-defendants had requested continuances and the defendant was seeking dismissal. Under those circumstances, if the defendant's argument prevailed the Commonwealth would be faced with either severing the cases for trial or the defendant's case would be dismissed, despite the fact that the delay was not due to a lack of due diligence by the Commonwealth. In the context of a nominal bail petition, the Commonwealth is not faced with such a choice and its due diligence is not

² At the hearing, the Commonwealth argued that Co-defendant Michael Wills requested a continuance on April 18, 2013. There is nothing in the record, though, to support this contention.

relevant; the only issue is whether the delay was caused by the defendant. If the defendant is granted nominal bail, the Commonwealth will have several months to locate the victim and bring all three cases to trial. Defendant simply will not be required to languish in jail as a result of continuance requests by other parties that are granted over his objection.

In the alternative, the Commonwealth contends that the delay is attributable to Defendant, despite the fact that the Commonwealth requested the continuance, because the victim's unavailability was caused by Defendant. The Commonwealth argues that Defendant's wrongdoing caused the victim's unavailability as evidenced Judge Butts' ruling which allowed the police officers to testify about the victim's statements at Defendant's preliminary hearing pursuant to Pa.R.E. 804(b)(6) (related to forfeiture by wrongdoing). Again, the Court cannot agree.

There is nothing in Judge Butts' ruling that expressly finds that Defendant caused the victim's unavailability. In fact, at Defendant's preliminary hearing former defense counsel noted an objection because Defendant was not a party to that proceeding and Judge Butts simply stated, "Okay, and if you want to add anything else so that your record's protected you're welcome to do that, but at this point I'm going to proceed with that same ruling as it relates to the evidence, if it relates to the evidence that's presented in this case as well." Commonwealth's Exhibit 3 (N.T., October 16, 2013, at 2-3).

In addition to allowing evidence of an unavailable declarant's statements when a party engages in wrongdoing that procured the unavailability of the declarant as a witness, Rule 804(b)(6) also permits the introduction of such statements against a party that has merely **acquiesced** in the wrongdoing.

Trooper Tyson Havens testified that when he spoke to the victim about testifying at the preliminary hearing, the victim refused because “Snoop” and others threatened him. “Snoop” allegedly is the street name for Kenneth Martin, one of the co-defendants. The victim did not tell Trooper Havens who the “others” were and he refused to provide Trooper Havens with any details regarding the threats. The evidence presented to this Court was insufficient to establish that Defendant caused the victim’s unavailability. For nominal bail purposes, Rule 600 only excludes delays **caused** by the defendant; therefore, the Commonwealth’s request to continue the May 10, 2013 pretrial conference is not attributable to Defendant and is not excludable for nominal bail purposes.

The Court also does not believe Rule 804(b)(6) was meant to serve as a justification for delaying a trial indefinitely, but rather to give the Commonwealth a way to actually proceed to trial despite the unavailability of certain witnesses.

Finally, the Court notes that if the Commonwealth’s position were accepted a defendant could be held in pretrial incarceration indefinitely. Such a result would be contrary to both the letter and the spirit of Rule 600.

ORDER

AND NOW, this ___ day of July 2013, the Court GRANTS Defendant’s motion for nominal bail. Bail is set at \$1. The Commonwealth requested the nonmonetary condition that Defendant be precluded from possessing a firearm. Since a firearm was possessed by at least one of the participants of this incident and was used to beat the victim, the Court grants the Commonwealth’s request. As a condition of bail, Defendant is

precluded from possessing any firearms.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Donald Martino, Esquire
Work file