

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-2018-2012  
:   
:   
vs. :   
:   
TYRONE R. GARRETT, :   
Defendant :

**OPINION AND ORDER**

This matter came before the Court on May 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 19, 2011, a trooper with the Pennsylvania State Police (PSP) filed a criminal complaint that charged Defendant with committing a retail theft offense at TJ Maxx on April 13, 2011. On December 22, 2011, the Trooper contacted Defendant’s Philadelphia parole officer to try to locate Defendant. The parole officer told the Trooper that Defendant was incarcerated in a prison in Philadelphia County. The Trooper contacted the prison, but was informed that Defendant had been released the day before, December 21, 2011.

On or about March 29, 2012, the Trooper left messages with Defendant’s parole officer and the parole officer’s supervisor, but he did not speak to anyone from that office until April 2, 2012, when he was told that Defendant was incarcerated in the state correctional institution at Rockview.

The Trooper did not do anything to arrest Defendant or take him into custody from SCI-Rockview until November 20, 2012, when he got a writ and brought Defendant to

the Magisterial District Judge's office for his preliminary arraignment.

Defendant's preliminary hearing was scheduled for November 26, 2012. On that date, Defendant waived his preliminary hearing and signed a guilty plea recommendation. The guilty plea recommendation, however, was not binding on either party. In fact, that document specifically advises Defendant that by signing the plea recommendation he understands and agrees that "it is subject to final approval of the District Attorney, and may be subject to being withdrawn by the Commonwealth at any time prior to the entry of the guilty plea" and "should he/she fail to enter his/her guilty plea at the time of the scheduled arraignment, this plea recommendation is subject to being revoked."

Defendant's formal court arraignment date was December 24, 2012. No guilty plea was entered, and the case was scheduled for a status conference on April 19, 2013 and a pre-trial conference on May 7, 2013.

Defendant filed his motion to dismiss on May 15, 2013, in which he asserts that there were no continuances or motions that would cause time to be excluded under Rule 600(C), due diligence was not exercised in bringing him to trial, more than 365 days have elapsed since the filing of the complaint, and he is entitled to dismissal of the charges with prejudice. The Commonwealth argued that by signing the guilty plea recommendation Defendant tendered a guilty plea, which was not withdrawn or rejected until December 24, 2012 and restarted the 365 day period for Rule 600 purposes.

## **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 Commonwealth has not met its burden of proof to show that any time between the filing of the complaint and Defendant's preliminary arraignment on November 20, 2012 is excludable under Rule 600(C)(1) or that it exercised due diligence in locating Defendant, securing his return and bringing him to trial. The Commonwealth did not present any evidence to show what efforts were made to locate Defendant between December 22, 2011 when the Trooper realized Defendant was no longer incarcerated in Philadelphia County and March 29, 2012 when the Trooper telephoned Defendant's parole officer and his supervisor. Similarly, no efforts were made to have Defendant brought to Lycoming County to face these charges between April 2, 2012 when the Trooper discovered Defendant was incarcerated at SCI-Rockview and November 20, 2012.

Relying on Commonwealth v. Bowes, 839 A.2d 422 (Pa. Super. 2003), the Commonwealth argues that Defendant "tendered" a guilty plea on November 26, 2012 when he signed the guilty plea recommendation in the Magisterial District Judge's office. The Court cannot agree.

The Court finds that Bowes is distinguishable. In Bowes, the charge was filed on June 5, 2001. The defendant appeared at criminal call on April 18, 2002 and signed a guilty plea agreement and completed a written guilty plea. The plea and colloquy were filed with the clerk of courts on April 22, 2002. The defendant was scheduled for plea and sentencing court on June 25, 2002. At that time, he appeared and requested permission to withdraw the plea and proceed to a jury trial. The court permitted the withdrawal of the plea

and directed that the matter be scheduled for a jury trial. The issue was whether Rule 600 required the plea to be accepted by the court before it could be considered “tendered.”

Here, there was no agreement; there was only a recommendation that was not binding on the Commonwealth. The District Attorney fairly routinely rejects the plea recommendations made at the preliminary hearing. It would be patently unfair to consider the “recommendation” as a tender of a guilty plea that would waive a defendant’s speedy trial rights under Rule 600 when the Commonwealth is not bound by it and neither the Commonwealth nor the Court relies on it when it comes to scheduling matters for pre-trial conferences or trial. In Lycoming County, a case is not scheduled for any type of pre-trial conference or trial list until the formal court arraignment date. If, for whatever reason, the guilty plea recommendation does not ripen into an agreement binding on both parties at arraignment, the case is placed on the next available pre-trial conference date just like the cases that did not have guilty plea recommendation.

The Court recognizes that the Bowes court stated that it “has interpreted a ‘tender’ to be any good faith offer by the defendant stating his intent to enter a plea.” 839 A.2d at 425, citing Commonwealth v. Graham, 394 Pa. Super. 453, 576 A.2d 371 (Pa. Super. 1990). However, when one examines the factual background of those cases, the defendant’s good faith offer occurred under circumstances where the Commonwealth had reached an agreement and could not renege on its end of the bargain, the Commonwealth had relied on the defendant’s offer to enter a plea to its detriment such that the case was not called to trial or both. For example, the defendant in Bowes proceeded to a criminal call before he

indicated his intent to enter a plea. He had reached a plea agreement with the Commonwealth and the case was scheduled for a guilty plea hearing, instead of a trial. Similarly, in Graham, the defendant was scheduled for trial, which did not proceed because the defendant indicated a willingness to plead guilty but he requested that the sentencing be held at the time of the guilty plea colloquy.

Here, the recommendation was not binding on the Commonwealth and it also did not affect the scheduling of this case for trial in any way; therefore, none of the reasons that support restarting the 365 day period under Rule 600 are present in this case.

Based on the foregoing, the Court finds that there is no excludable time under Rule 600(C), the Commonwealth cannot avail itself of the provisions of Rule 600(B) and (D)(1) and the comment thereto relating to the tender and withdrawal or rejection of a guilty plea, and Defendant is entitled to dismissal of the charge.

**ORDER**

**AND NOW**, this \_\_\_ day of May 2013, the Court GRANTS Defendant's motion to dismiss.

By The Court,

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Marc F. Lovecchio, Judge