

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA** :  
 : **CR-735-2012**  
 v. :  
 :  
 **ROBERT GOFF,** : **CRIMINAL DIVISION**  
 **Defendant** :

**OPINION AND ORDER**

On July 29, 2014, the Defendant filed a Motion to Dismiss Pursuant to Rule 600. A hearing on the motion was held on August 21, 2014.

**I. Background**

Pennsylvania Rule of Criminal Procedure Rule 600(A)(2)(a) provides, “Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.” On May 10, 2013, the date by which the Defendant’s trial had to commence, also known as the “adjusted run date,” was January 24, 2014.<sup>1</sup> A pre-trial conference for the case was scheduled for May 10, 2013.<sup>2</sup> The Commonwealth requested a continuance of the pretrial conference because the lead investigators on the case would not be available during the then-upcoming trial term. The Court granted the Commonwealth’s request for a continuance over the Defendant’s objection. The case was continued to August 16, 2013.

On July 16, 2013, in light of the Supreme Court’s decision in Alleyne v. United States, the Commonwealth filed a Motion to Amend the Information. A pre-trial conference was held

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<sup>1</sup> The Deputy Court Administrator of Lycoming County Court of Common Pleas provided this adjusted run date.

<sup>2</sup> In Lycoming County, a case believed to be ready for trial receives a pre-trial conference date. If the case is indeed ready for trial, the case goes to the Call of the List. If the case is called at the Call of the List, it receives a jury selection date and a trial date in the trial term. At the Defendant’s pre-trial conference preceding the May 10, 2013 pre-trial conference, the Defendant requested and was granted a continuance. This continuance meant that the trial could be delayed up to June 21, 2013, the last day of the trial term corresponding with the May 10, 2013 pre-trial conference. In her determination of the adjusted run date, the Deputy Court Administrator excluded the time to June 21, 2013.

on August 16, 2013. On August 27, 2013, the case went to the Call of the List but was not reached. Consequently, a trial was not scheduled. A pre-trial conference was held on September 20, 2013. The case was scheduled to go to the Call of the List on October 1, 2013, but on September 27, 2013, the Commonwealth requested a continuance because of its pending motion to amend the information. The Court granted the Commonwealth's request for a continuance over the Defendant's objection. The case was continued to December 6, 2013.

On November 7, 2013, the Court granted the Commonwealth's motion to amend the information. On November 15, 2013, the Defendant filed a motion requesting the Court to certify the matter for an interlocutory appeal. On December 6, 2013, the Court denied the Defendant's motion for certification. Also on December 6, 2013, the Deputy Court Administrator continued the case to January 14, 2014 because the Defense indicated that he was appealing the Court's November 7, 2013 Order. On January 3, 2014, the Defendant filed a document titled "Petition for Permission to Appeal" with the Superior Court of Pennsylvania. This petition was served on the Commonwealth but was not filed with the Lycoming County Clerk of Court. On January 10, 2014, the Court ordered the Defendant to file a concise statement of matters complained of on appeal. On January 14, 2014, the Deputy Court Administrator continued the case to March 18, 2014 because she believed the appeal issue was ongoing. On January 31, 2014, the Defendant filed his concise statement of matters complained of on appeal. On February 20, 2014, the Superior Court issued an Order denying the Defendant's "Petition for Permission to Appeal." For reasons unknown, this Order was never filed with the Lycoming County Clerk of Court.

On February 28, 2014, the Defendant filed a motion for reconsideration of the Order granting the motion to amend the information. In that motion, Defendant stated that on February

20, 2014, the Superior Court denied the “Petition for an Interlocutory Appeal.” A copy of the motion for reconsideration was served on the Commonwealth. On March 4, 2014, the Court issued an Order granting the defendant’s motion for reconsideration and striking the amendment to the information. The Deputy Court Administrator did not list the case for a pre-trial conference on March 18, 2014 because of “Alleyne/appeal issues.” The Deputy Court Administrator did not list the case for a pre-trial conference on May 6, 2014 again because of “Alleyne/appeal issues.” On July 29, 2014, the Defendant filed a Motion to Dismiss Pursuant to Rule 600. A pre-trial conference was held on August 12, 2014. On August 18, 2014, the Defendant requested a continuance. The Court granted this continuance and indicated that the time from August 26, 2014 to November 14, 2014 was excludable for Rule 600 purposes.

In his motion to dismiss, the Defendant argues that the time from December 6, 2013 to August 18, 2014 is not excludable for the purposes of Rule 600. He argues that the Court did not lose jurisdiction when he filed the “Petition for Permission to Appeal” with the Superior Court. The Defendant argues that Commonwealth did not exercise due diligence in bringing the Defendant’s case to trial, and, therefore, the Defendant’s right to a speedy trial has been violated. He asks that the charges against the Defendant be dismissed with prejudice. In response, the Commonwealth argues that the time from December 6, 2013 to August 18, 2014 is excludable for Rule 600 purposes because the delay was due to administrative errors by court administration and misleading court filings. Therefore, the Commonwealth asks that the Defendant’s motion be denied.

## **II. Discussion**

Pennsylvania Rule of Criminal Procedure 600(C)(1) provides, “[P]eriods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to

exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation.”

“Due diligence is a fact-specific concept that must be determined on a case-by-case basis. Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth.” Commonwealth v. Brown, 875 A.2d 1128, 1138 (Pa. Super. 2005) (quoting Commonwealth v. Hunt, 858 A.2d 1234, 1241-42 (Pa. Super. 2004)). “[T]he Commonwealth should be held to the requirement that it exercise due diligence at all times during the pendency of a case.” Commonwealth v. Hawk, 597 A.2d 1141, 1145 (Pa. 1991).

“The Commonwealth must do everything reasonable within its power to guarantee that a trial begins on time.” Commonwealth v. Matis, 710 A.2d 12, 17 (Pa. 1998). “In the absence of actual misconduct on the part of the Commonwealth specifically calculated to evade the fundamental speedy trial rights of an accused, the applicable speedy trial rule must be construed in a manner consistent with society’s right to punish and deter crime.” Commonwealth v. Preston, 904 A.2d 1, 10 (Pa. Super. 2006) (*en banc*).

#### **A. May 10, 2013 Continuance**

The unavailability of witnesses on trial dates can be a circumstance beyond the control of the Commonwealth. *See* Commonwealth v. Staten, 950 A.2d 1006, 1010 (Pa. Super. 2008) (stating that the unavailability of a necessary witness is beyond the control of the Commonwealth); Commonwealth v. Kearse, 890 A.2d 388, 394 (Pa. Super. 1995) (stating that an affiant being at a funeral is a circumstance beyond the control of the Commonwealth); Commonwealth v. Corbin, 568 A.2d 635, 637-39 (Pa. Super. 1990) (stating that when a witness becomes unavailable due to illness, vacation, or other reason not within the Commonwealth’s

control, the Commonwealth is prevented from commencing the trial within the requisite period despite due diligence, and an extension of time is warranted).

The Commonwealth requested the May 10, 2013 continuance because there was not a time during the then-upcoming trial term when both lead investigators would be available. One of the investigators was unavailable because of a scheduled vacation. The Commonwealth asserted that both of the investigators were necessary witnesses whose absence would severely handicap the prosecution. The Court granted the continuance over the Defendant's objection, and the case was continued to the next pre-trial conference date, August 16, 2013.

The Court finds that the delay resulting from this continuance is excludable for Rule 600 purposes. The Commonwealth does not fail to act with due diligence if factors outside its control prevent a case from going to trial. Here, the unavailability of the lead investigators was outside the control of the Commonwealth. One of the investigators had a vacation scheduled for almost all of the trial term. The Commonwealth cannot control when investigators take vacation. Therefore, the delay was not a result of the Commonwealth failing to exercise due diligence.

As a result of the unavailability of the investigators, the case was continued to the next trial term. On August 27, 2013, during the next trial term, the case went to the Call of the List, but was not reached for trial. The time attributable to the delay for investigator unavailability is June 21, 2013<sup>3</sup> to August 27, 2013. Therefore, 67 days are excludable. On August 27, 2013, the adjusted run date was April 1, 2014.

#### **B. August 27, 2013 Call of the List**

“Judicial delay or scheduling may justify an extension of time within which to commence trial.” Commonwealth v. Lewis, 429 A.2d 721, 723 (Pa. Super. 1981). “Judicial delay may

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<sup>3</sup> See footnote 2.

justify postponing trial beyond the adjusted run date if the Commonwealth was prepared to commence trial prior to the expiration of the mandatory period but the court was unavailable because of ‘scheduling difficulties and the like.’” Commonwealth v. Preston, 904 A.2d 1, 14 (Pa. Super. 2006) (quoting Commonwealth v. Crowley, 466 A.2d 1009, 1011 (Pa. 1983)). A “clogged trial court docket [is a] circumstance[] beyond the control of the Commonwealth.” Commonwealth v. Ramos, 936 A.2d 1097, 1104 (Pa. Super. 2007).

On August 27, 2013, the case went to the Call of the List but was not reached. Therefore, it was not given a trial date. This delay was the result of court scheduling and beyond the control of the Commonwealth. Therefore, the delay was not a result of the Commonwealth failing to act with due diligence. Such a delay is excludable for Rule 600 purposes.

As a result of the case not being reached during the Call of the List, the case was continued to the next trial term. The case was scheduled for the Call of the List on October 1, 2013, but on September 27, 2013, the Commonwealth requested a continuance because of the pending motion to amend the information. The Court granted the Commonwealth’s request over the Defendant’s objection. The delay attributable to court scheduling is from August 27, 2013 to October 1, 2013. Therefore, 35 days are excludable. On October 1, 2013, the adjusted run date became May 6, 2014.

### **C. September 27, 2013 Continuance**

As a result of the September 27, 2013 continuance, the case was continued to the next pre-trial conference date, December 6, 2013. The Commonwealth concedes that the delay resulting from this continuance is not excludable for Rule 600 purposes. Therefore, the time from October 1, 2013 to December 6, 2013 is not excludable.

#### **D. December 6, 2013 Continuance**

Before beginning Rule 600 analysis for the December 6, 2013 continuance, the Court must determine what the Defendant filed in the Superior Court. The Defendant named the document “Defendant’s Petition for Permission to Appeal.” The filing of a petition for permission to appeal does not “stay the proceedings before the lower court . . . unless the lower court . . . or the appellate court or a judge thereof shall so order.” Pa. R.A.P. 1313. Therefore, if the Defendant filed a permission to appeal, the Commonwealth should have proceeded with its case in the absence of an order staying the proceedings.

However, a petition for permission to appeal cannot be sought unless the interlocutory order contains a statement that the trial court is “of the opinion that [the] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.” See Pa. R.A.P. 1311(b); 42 Pa. C.S. § 702(b); Commonwealth v. McMurren, 945 A.2d 194, 195-96 (Pa. Super. 2008). Here, the Defendant requested that the Court certify the November 7, 2013 Order by amending the Order to include the required statement. The Court denied the Defendant’s request and declined to include the statement required for the Defendant to file a petition for permission to appeal. Therefore, the Defendant could not have filed a petition for permission to appeal.

In Commonwealth v. McMurren,<sup>4</sup> the Superior Court discussed the option if a trial court refuses to include the requisite statement in its interlocutory order:

If the amendment request to include the section 702(b) language is denied or deemed denied because it was not ruled upon within thirty days, the litigant is not left without an option. In that instance, the second step to obtain appellate review is contained in the comment to Pa. R.A.P. 1311(d), which provides that recourse must be sought pursuant to chapter fifteen of the Rules of Appellate Procedure. That comment states that if the trial

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<sup>4</sup> 945 A.2d 194 (Pa. Super. 2008).

court “refuses to amend its order to include the prescribed statement [of section 702(b)], a petition for review under Chapter 15 of the unappealable order of denial is the proper mode of determining whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal.” Thus, after being denied certification, the litigant’s second step would be to petition this Court under chapter fifteen and establish the reason the case is so egregious as to require immediate correction of the trial court’s ruling.

945 A.2d at 196.

Because the Court denied the Defendant’s request to include the section 702(b) language, the Defendant’s filing with the Superior Court was a petition for review. As the Defendant notes, “the trial court . . . may . . . proceed further in any matter in which a non-appealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order.” Pa. R.A.P. 1701(b)(6).

On December 6, 2013, the Deputy Court Administrator continued the case to the pre-trial conference date of January 14, 2014 because Defense Counsel indicated he was appealing the Court’s Order of November 7, 2013. The Defendant argues that this continuance is not excludable for Rule 600 purposes because the Court still had jurisdiction of the case pursuant to Pennsylvania Rule of Appellate Procedure 1701(b)(6). This Court agrees that the Defendant’s filing of the petition for review did nothing to disrupt this Court’s jurisdiction of the case. However, Rule 1701(b)(6) puts the decision of whether to proceed in the hands of the trial court. Under Rule 1701(b)(6), “the trial court may proceed further.” The Commonwealth is, therefore, left waiting on the decision of the trial court concerning whether to proceed. The Commonwealth could have reasonably believed that the Deputy Court Administrator’s continuance of the case to next pre-trial conference date was an indication that the Court wanted to wait for an appellate decision before proceeding further.



Additionally, by seeking certification and filing a petition for review, the Defendant indicated his belief that (1) the Court's November 7, 2013 Order "involve[d] a controlling question of law as to which there [was] substantial ground for difference of opinion and that an immediate appeal from the order [would] materially advance the ultimate termination of the matter" and (2) "the case [was] so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal." *See* 42 Pa. C.S. § 702(b); McMurren, 945 A.2d at 196. It is difficult to believe that the Defendant would have been willing to go to trial without the Superior Court's decision of whether to review.

Since the decision of whether to proceed further in the case was not in the hands of the Commonwealth, it did not fail to act with due diligence. Therefore, the time is excludable from December 6, 2013 to the last day of the trial term corresponding with the next pre-trial conference date. The last day of that trial term was February 4, 2014. Therefore, 60 days are excludable. On December 6, 2013, the adjusted run date was July 5, 2014.

#### **E. January 14, 2014 Continuance**

On January 14, 2014, the Deputy Court Administrator continued the case to the next pre-trial conference date because she believed the appeal issue was ongoing. Once again, the Commonwealth could have reasonably believed that the continuance was an indication that the Court wanted to wait for the Superior Court decision before proceeding further. This reasonable belief was strengthened by the Court's request for a concise statement of matters complained of on appeal. Such a request typically means that the Court intends to address the appeal. Furthermore, the Superior Court had not yet decided whether to grant the Defendant's petition for review, so it is again difficult to believe that the Defendant would have been willing to go to trial at that time. Since the decision of whether to proceed further in the case was not in the

hands of the Commonwealth, it did not fail to act with due diligence. Therefore, time is excludable from February 4, 2014 to the last day of the trial term corresponding with the next pre-trial conference date. The last day of that trial term was May 2, 2014. Therefore, 87 days are excludable. On January 14, 2014, the adjusted run date was September 30, 2014.

**F. March 18, 2014 and May 6, 2014 Pre-trial Conferences**

The delays caused by the case not being listed for the pre-trial conferences on March 18, 2014 and May 6, 2014 are not excludable. These delays were caused by the Commonwealth's failure to exercise due diligence. By March 18, 2014, the Commonwealth had been given notice of the Superior Court Order denying the Defendant's petition for an interlocutory appeal. In his February 28, 2014 motion for reconsideration, the Defendant stated that the Superior Court had denied his petition. The Commonwealth was served with this motion. Additionally, the Commonwealth was aware of the Court's March 4, 2014 Order striking the amendments to the information, which was the Defendant's ultimate aim in seeking review by the Superior Court. Through these documents, the Commonwealth was alerted that an appeal issue was no longer pending. In not moving forward with the case after receiving such documents, the Commonwealth has failed to exercise due diligence.

**G. August 18, 2014 Continuance**

On August 18, 2014, the Defendant requested a continuance. This Court granted the continuance and stated that the time from August 26, 2014 to November 14, 2014 was excludable. Therefore, 80 days are excludable. As of the date of this Opinion, the adjusted run date is December 19, 2014.

### **III. Conclusion**

The delays caused by the following are excludable for Rule 600 purposes: (1) the May 10, 2013 continuance, (2) the case not being reached on August 27, 2013 Call of the List, (3) the December 6, 2013 continuance, and (4) the January 14, 2014 continuance. The Defendant filed his Motion to Dismiss Pursuant to Rule 600 on July 29, 2014. On July 29, 2014, the adjusted run date was September 30, 2014.

Stated another way, on May 10, 2013, 106 days of non-excludable time had elapsed. Therefore, the Commonwealth had 259 days to commence the trial in order to comply with Rule 600. May 10, 2013 to July 29, 2014 encompasses 445 days. Of the 445 days, 249 are excludable, and 196 are not excludable. The Court finds that adding 196 days to the 106 days in the case equals 302 days elapsed leaving the Commonwealth with 63 days to commence the trial in order to comply with Rule 600. Therefore, the Defendant's Motion to Dismiss Pursuant to Rule 600 is denied.

### **ORDER**

AND NOW, this \_\_\_\_\_ day of September, 2014, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Dismiss Pursuant to Rule 600 is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge