

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-153-2015  
 :  
 DURWARD ALLEN, :  
 Defendant : Motion to Dismiss/Nominal Bail/Additional Time

**OPINION AND ORDER**

By Information filed on February 13, 2015, Defendant was charged with Possession with Intent to Deliver Heroin and Cocaine as well as related criminal offenses. The incident giving rise to the charges allegedly occurred on December 3, 2012 in the City of Williamsport. According to the docket transcript, the complaint was filed on December 6, 2012. As well, the arrest warrant that was issued on December 6, 2012 was not served on the Defendant until January 7, 2015.

On August 21, 2015, Defendant filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. Defendant submits that the charges should be dismissed against him and/or that he is entitled to nominal bail. An argument and hearing was first held on September 9, 2015. At that hearing, Sergeant Chris Kriner of the Old Lycoming Police Department testified as did Emily Alexander. At the second hearing on September 16, 2015, Deputy Marshal Alex Fils-Aime, Officer Gregory Stevens of the Philadelphia police and Defendant's mother Tara Griffin all testified.

The court will first address Defendant's nominal bail issue.

Rule 600 (B) of the Pennsylvania Rules of Criminal Procedure mandates that no defendant be held in pretrial incarceration on a given case for a period exceeding 180 days

excluding time described in Paragraph (C)(2) of Rule 600. Any defendant held in excess of 180 days is entitled to immediate release on nominal bail. PA. R. CRIM. P. 600(D)(2).

According to subsection (C)(2), periods of delay caused by the defendant are excludable from the computation of the length of time of any pretrial incarceration. As with former Rule 600, delay caused by the defendant includes the period of time between the filing of the written complaint and 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 waived Rule 600; and (3) any period of delay that resulted from the availability of the defendant or the defendant's attorney, or any continuance granted at the request of the defendant or the defendant's attorney. PA. R. CRIM. P. 600, comment.

Defendant has been held in pretrial incarceration from January 7, 2015 to the date of this Opinion, September 23, 2015. This is 260 days. However, 165 days are excludable pursuant to Rule 600.

Specifically, from January 13, 2015 to January 20, 2015, the Defendant requested a continuance of the preliminary hearing. From March 31, 2015 to April 15, 2015, Defendant requested an extension of time to file an Omnibus Pretrial Motion. Finally, from April 15, 2015 to June 22, 2015 and from July 10, 2015 to the present and continuing, the Defendant filed an omnibus pretrial motion and a hearing was held and a decision is outstanding. The court notes that the time between June 23, 2015 and July 9, 2015 is not excludable because the Commonwealth requested a continuance of the omnibus pretrial

motion hearing because of the unavailability of a witness.

Accordingly, only 95 days have passed and Defendant is not entitled to nominal bail.

Defendant's next argument centers on the period of time between the filing of the complaint and Defendant's arrest and if the charges should be dismissed because of an alleged violation of Rule 600 (A). Both parties concede that if this time is includable against the Commonwealth, the charges against Defendant must be dismissed.

Specifically, Rule 600 notes that trial in a court case in which a written complaint is filed against a defendant shall commence within 365 days from the date on which the complaint is filed. PA. R. CRIM. P. 600 (A) (2) (a). For the purposes of determining what periods of delay are included in this computation, Rule 600 (C) (1) notes that those periods of delay at any stage of the proceeding caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included. Any other periods of delay shall be excluded. PA. R. CRIM. P. 600 (C)(1).

Thus, the issue is clearly defined. Defendant argues that between the time that the complaint was filed on December 6, 2012 to the date that Defendant was arrested on the warrant on January 7, 2015, should be included because the Commonwealth failed to exercise due diligence in apprehending him. To the contrary, the Commonwealth contends that all of the time should be excluded, because it exercised due diligence in attempting to apprehend the Defendant.

Sergeant Kriner testified that the incident giving rise to the charges set forth in

the criminal complaint occurred on December 3, 2012. He noted that after Defendant was taken into custody and processed, Defendant was released.

While Defendant was initially in custody, Sergeant Kriner determined that Defendant's address was 576 Tyson Avenue, Glenside, PA 19038. He conceded that the criminal complaint lists the Defendant's address as 576 Tyson Avenue, Philadelphia, PA 19038. He asserted that this was a difference without a distinction because the zip code is the same.

Once the charges were filed against Defendant, a warrant was issued and entered into the NCIC system. When Defendant was in custody, he told Sergeant Kriner that he worked at Walmart in King of Prussia. In his efforts to locate Defendant, Sergeant Kriner contacted said Walmart but was advised that Defendant did not, and had not, worked there. Sergeant Kriner did not contact Walmart "in general" or any other specific Walmart stores.

Sergeant Kriner then contacted the US Marshal's Service to request assistance in locating Defendant. The US Marshall's Service has a Fugitive Task Force which assists local law enforcement agencies in apprehending individuals who are "wanted."

He then contacted the Social Security Administration to determine if there were any leads as to Defendant's whereabouts.

He also "attempted to develop local sources" with respect to locating not only Defendant but his co-defendant. One of these sources was Ms. Emily Alexander.

Sergeant Kriner interviewed Ms. Alexander on two occasions prior to Defendant's arrest.

He also followed up with the Marshal's Service, speaking with a representative on at least two separate occasions. He inquired as to their efforts in the Philadelphia area and through any relatives or other sources.

After apprehending Defendant, Sergeant Kriner determined that Defendant may have been attempting to evade apprehension by using an alias. He became aware that in March of 2013, Defendant was actually arrested but used an alias and was released. This explains why there was no "hit" on Sergeant Kriner's outstanding arrest warrant when Defendant was arrested in Philadelphia.

Ms. Alexander confirmed that she spoke with Sergeant Kriner on two occasions in 2013. She did not, however, specifically recall discussing Mr. Allen. She did confirm that sometime in 2013 she spoke with Defendant and specifically advised him "not to come up" because "he was in the newspaper."

On September 16, 2015, Deputy Marshal Alex Fils-Aime testified. He has been employed by the U.S. Marshal's Service for the over 22 years. During the time period in question, he was "in charge" of the Marshal's Fugitive Task Force.

The Task Force handles over 600 cases a year for state and local entities.

In December of 2012, he first became involved in this case. The Task Force was involved in locating a co-defendant. Defendant was identified as an associate. In attempting to locate the co-defendant, the Task Force started identifying information about Defendant's whereabouts.

In February of 2013, Deputy Marshal Fils-Aime was contacted by Sergeant

Kriner to assist in apprehending Defendant. He received the relevant information from Sergeant Kriner and assigned the case to investigators working with the Task Force.

As the case was being “worked up”, addresses were identified in both Chester, PA and Glenside, PA. It was “believed” that these addresses were those of Defendant’s mother and/or sister. He directed investigators to visit the identified addresses to determine if Defendant was present and to conduct any necessary interviews of the occupants. He was informed that the investigators visited the addresses on March 27, 2013.

This date was significant because a few weeks earlier, Deputy Marshal Fils-Aime was advised that Defendant had been arrested in the Philadelphia area and had actually given a false name and then released on bail.

While Deputy Marshal Fils-Aime did not direct the investigators to return to the residences after March 27, 2013, he did direct that the case be kept open. On two different occasions, he had contact with Sergeant Kriner. The investigators were directed to maintain contact with Deputy Marshal Fils-Aime and periodically provide information regarding the status of their continuing investigation. In May of 2013, Investigator Matt Persun provided updated reports that were “entered into” the electronic system.

As well, Deputy Marshal Fils-Aime had periodic contact with the Philadelphia Marshal’s office which was “developing confidential sources” in an attempt to locate Defendant.

Officer Greg Stevens of the Philadelphia Police Department next testified on behalf of the Commonwealth. On March 7, 2013, he and other members of a gang and drug

task force executed a search warrant at a residence in Philadelphia. They took Defendant into custody on March 14, 2013 as a result of the evidence obtained via the search. At the time Defendant was taken into custody, he said his name was Allen Kaiser and gave his date of birth as October 10, 1991. At the time Defendant was arrested he did not have any identification on him. Officer Stevens ran a records check on Defendant under the false name and no record was found.

Defendant was subsequently properly identified upon being fingerprinted and processed, but Officer Stevens opined that the processing center did not run a warrants check. As a result, Defendant was released. He subsequently failed to appear for his preliminary hearing.

Tara Griffin testified on behalf of Defendant. She indicated that from approximately 2006 to 2013 she lived at 576 North Tyson Avenue in Glenside, PA 19038. Around of June of 2013, she moved to 1215 Peterson Street in Chester, PA.

She explained that her son, Defendant, resided with her in Glenside and at the Chester residence. She indicated that at no time whatsoever was she interviewed by any Deputy U.S. Marshals. She claimed as well that at no time did she have any contact with any U.S. Marshals.

She had no knowledge of Defendant being arrested in Philadelphia or being incarcerated prior to being released on bail. At the time of this Philadelphia arrest, however, she wasn't in the Country; she was on a cruise.

She did recall being contacted by the Philadelphia police after Defendant was

arrested in December of 2014. She recalled no other contact with law enforcement officials.

The “due diligence” required of law enforcement does not demand “perfect vigilance and punctilious care, but rather a reasonable effort.” *Commonwealth v. Laurie*, 334 Pa. Super. 580, 483 A.2d 890, 892 (1984) (quoting *Commonwealth v. Polsky*, 493 Pa. 402, 407, 426 A.2d 610, 613 (1981)). The issue is not whether “they did all they could have done” but rather “whether what they did do was enough to constitute due diligence.” *Id.* (citing *Commonwealth v. Dorsey*, 294 Pa. Super. 584, 588 440 A.2d 619, 621 (1982)); see also *Commonwealth v. Collins*, 266 Pa. Super. 340, 404 A2d 1320 (1979); *Commonwealth v. Mitchell*, 472 Pa. 553, 372 A.2d 826 (1977).

In this particular case, the court concludes that the Commonwealth acted with due diligence. Sergeant Kriner obtained biographical and employment information from Defendant before releasing him. Once the charges were filed and the arrest warrant was issued, the warrant was automatically entered into NCIC. He then went to check the employment location of where Defendant indicated he worked. He then contacted the Fugitive Task Force for assistance. While Defendant remained on the streets, Sergeant Kriner attempted to develop local sources who might better inform him as to Defendant’s whereabouts. He even checked with the Social Security Administration in the hope that Defendant may have been receiving funds which would then lead to Defendant’s location. He followed up with the Marshal’s Service on at least two occasions.

The Fugitive Task Force opened a case and actively investigated Defendant’s whereabouts. Investigators were directed to search for Defendant and to interview the



residents of the addresses in Glenside and Chester. Contact and follow-up contacts were made between the Task Force and Sergeant Kriner as well as between the Task Force and the Philadelphia Marshal's office. Confidential sources were developed both in the Williamsport and Philadelphia areas.

Finally, the court cannot ignore the circumstances which prove that Defendant knew that he was wanted and took steps to evade arrest. When he was arrested in Philadelphia, he gave a false name. After being released, he absconded from bail.

Defendant argues that the Commonwealth failed to exercise due diligence asserting that it "almost did nothing except make phone calls." Defendant asserts that the Commonwealth knew exactly where the Defendant resided yet failed to have someone "personally look for him."

Defendant suggests that the Commonwealth's efforts were essentially a comedy of errors starting with an improper address on the complaint, looking for the Defendant at the wrong Walmart store, not calling the residences, not contacting the IRS or subpoenaing tax records, not having any written or duplicate electronic reports, not checking for warrants on Defendant once he was properly identified and remained in custody in Philadelphia and claiming that sources were developed yet having a witness testify who had little if any knowledge about providing information to law enforcement regarding Defendant's whereabouts.

Following Defendant's argument and rather surprisingly, it was only then that the Commonwealth made an oral motion to continue the hearing and to keep the record open

so that the Commonwealth could secure the attendance of an individual by the name of Chad Grant, who was represented as being the investigator who visited the Defendant's residences and failed to locate him. The Commonwealth indicated that it did not subpoena Mr. Grant, that he is stationed in the Philadelphia area, and that he would testify as to statements made by the Defendant's family members to U.S. Marshals in the Philadelphia area.

The Commonwealth conceded that this "evidence" was omitted based on a mistaken belief by the Commonwealth's attorney that such evidence could be admitted through the testimony of Deputy Marshal Fils-Aime, as well as "complete ignorance by the Commonwealth" as to the content of defense witness testimony. The Commonwealth argued then, as well as in a recently filed written motion for reconsideration, that to preclude it from re-opening the record to present this evidence would adversely affect the Commonwealth's ability to meet its burden of proof and result in serious prejudice to the Commonwealth "up to and including the potential dismissal of charges."

In its written motion, the Commonwealth is requesting to introduce the testimony of Deputy U.S. Marshal Rodger, who allegedly conducted interviews of Defendant's family members and is expected to testify that he conveyed the information gleaned from his interviews to Deputy U.S. Marshal Grant. The purported testimony is to rebut the testimony of the Defendant's mother.

Although the court denied the Commonwealth's request to keep the record open and its written motion for reconsideration, the court finds nonetheless that the Commonwealth exercised due diligence.

As the Commonwealth noted in its memorandum, the court must examine the activities of the police and balance them against the interest of the accused in receiving a fair trial. The actions of the police must be judged by what was done, not by what was not done, and the officers' efforts need only be reasonable. A lack of due diligence should not be found simply because other options were available or in hindsight would have been more productive. *Commonwealth v. Ingram*, 591 A.2d 734, 737 (Pa. Super. 1991). Deference must be afforded the police officers' judgement as to which avenues of approach will be fruitful. *Commonwealth v. Mitchell*, 372 A.2d 826, 832 (Pa. Super. 1977). Moreover, Defendant's attempts to evade capture by providing a false name and not appearing in court on another matter caused the delay.

Defendant was arrested in this case on January 7, 2015. He was preliminarily arraigned on the Philadelphia charges on March 15, 2013. Bail was set on that same date. Defendant's preliminary hearing was scheduled for April 2, 2013. Defendant failed to appear and a bench warrant was issued.

At the very minimum, all of the time from April 2, 2013 to the date of Defendant's arrest on January 7, 2015 must be excluded because of the Defendant's misconduct. If Defendant had appeared, he would have been arrested and taken into custody on these charges.

However, Defendant also provided a false name on March 14, 2013, when he was arrested. Had he not provided that false name, Officer Stevens would have realized that there was an outstanding arrest warrant from Lycoming County when he ran Defendant's

name and he would have detained Defendant. But for this misconduct by Defendant, the additional time would not have run. Accordingly, the court holds that the 665 days from March 14, 2013 to January 7, 2015 are excludable for Rule 600 purposes.

Defendant's Rule 600 motion was filed on August 21, 2015. The total numbers of days from December 6, 2012 to August 21, 2015 is 988 days.<sup>1</sup> Subtracting the 665 days leaves 323 days. Accordingly, under Defendant's best case scenario, Rule 600 has not been violated.

Additionally, as set forth previously, 165 days between Defendant's arrest and the date of this decision are excludable. Adjusting this time period back to the date Defendant's motion to dismiss was filed results in 132 days between Defendant's arrest and the date of the motion. Excludable time will continue to accumulate until the court renders a decision on Defendant's omnibus pretrial motion.

In sum, Defendant's best case scenario results in only 191 days of includable time for Rule 600 dismissal purposes.

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<sup>1</sup> The court stopped the clock at the filing of Defendant's motion to dismiss because the period of time between Defendant's motion and the court's decision on the motion also is excludable. *Commonwealth v. Williams*, 726 A.2d 389, 392 (Pa. Super. 1999). If the court included the number of days to the date of this decision it would increase the total days to 1021, but the excludable days would total 830 (665 +165) so that there still would only be 191 days of includable time for dismissal purposes.

**ORDER**

**AND NOW**, this \_\_\_\_ day of September 2015, following a hearing and argument, Defendant's motion to dismiss and/or to set nominal bail is **DENIED**.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Michael J. Rudinski, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file