

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

COMMONWEALTH	:	No. CR-35-2013; CR-17-2013
v.	:	CR-63-2013; CR-1382-2013
	:	
REUBEN McDOWELL,	:	Motion to Dismiss
Defendant		:

OPINION AND ORDER

This matter came before the court on Defendant’s motion to dismiss pursuant to Rule 600. The relevant facts follow.

Information 17-2013 filed on January 31, 2013 charges Defendant with assault, burglary, robbery, criminal trespass, stalking, theft, receiving stolen property, simple assault, recklessly endangering another person and harassment. The crimes were alleged to have occurred on December 12, 2012. The criminal complaint was filed against Defendant on January 7, 2013.

Information 35-2013 filed on February 8, 2013 charges Defendant with forgery, identity theft, theft from a motor vehicle, access device fraud and theft by unlawful taking. The crimes were alleged to have occurred as well on December 12, 2012. The criminal complaint was filed against Defendant on January 11, 2013.

Information 63-2013 filed on February 15, 2013 charges Defendant with robbery, theft by unlawful taking, receiving stolen property, recklessly endangering another person, simple assault and theft from a motor vehicle. These crimes were alleged to have occurred on December 7, 2012. The criminal complaint was filed against Defendant on January 22, 2013.

Finally, Information 1382-2013 filed on September 13, 2013 charges Defendant with robbery, stalking, theft by unlawful taking or disposition, receiving stolen property, harassment, burglary, criminal trespass, access device fraud and theft from a motor vehicle. These crimes were alleged to have occurred between December 9, 2012 and December 16, 2012. The criminal complaint was filed against Defendant on August 27, 2013.

An order was entered in case 63-2013 on February 19, 2013, upon the request of the defense and without objection from the Commonwealth, continuing the status conference to April 5, 2013 and the pretrial conference to May 7, 2013.

On April 5, 2013, another order was entered upon the request of the defense and without objection from the Commonwealth, continuing the matter to May 31, 2013 for a status conference and continuing the pretrial from May 7, 2013 to August 13, 2013.

On August 19, 2013, the Commonwealth filed a motion to consolidate cases 17-2013, 25-2013 and 63-2013. A hearing and argument on the motion was scheduled for September 16, 2013.

On August 27, 2013, upon request of the defense and without objection by the Commonwealth, an order was entered continuing these matters to September 16, 2013.

On September 16, 2013, upon request of the defense and without objection from the Commonwealth, an order was entered continuing these matters to October 11, 2013.

On October 11, 2013, the court granted Defendant's motion to continue the hearing on the Commonwealth's motion to consolidate. The order noted that the Commonwealth had recently provided a global offer to defense counsel and he needed time to discuss the offer and perhaps renegotiate the terms. Defense counsel also requested additional

time to discuss the consolidation motion with his client. The court indicated that it would reschedule the consolidation motion on the request of either the Commonwealth or Defendant. On November 25, 2013, the Commonwealth made such a request and the motion was argued on December 11, 2013. The court granted the Commonwealth's motion in an opinion and order entered on January 8, 2014.

A status conference was held on March 7, 2014. These cases were scheduled for a pretrial conference and it was noted as a three-day trial.

On March 19, 2014, the Commonwealth requested a continuance from the April/May trial term, because there were not enough consecutive days to hold the trial due to the lack of availability of all the officers involved. Defense counsel was not opposed to the continuance request. The case was continued to a pretrial conference on May 7, 2014. The order noted that it included excludable time against Defendant from March 18, 2014 to June 20, 2014, end of term.

On May 27, 2014, Defendant filed a "Pro Se Motion to both Relieve Public Defender and Appoint New Defense Counsel." This motion was followed by a July 11, 2014 document also filed by the Defendant which the court construed as a "Waiver of Appointed Counsel." In the waiver document, Defendant requested that he be permitted to defend the charges against him pro se with the assistance of "a counselor as an advisor only." Following a hearing on August 12, 2014, which included an extensive colloquy of Defendant, the court permitted the Defendant to proceed pro se, but appointed Robert Cronin, Esquire of the Lycoming County Public Defender's office, as standby counsel.

On August 26, 2014, Defendant filed a pro se omnibus pretrial motion. In a

letter, however, Defendant requested time to file additional motions. On September 9, 2014, an order was entered which granted Defendant's request and directed that any such motion must be filed on or before October 12, 2014.

On October 9, 2014, Defendant filed an extensive amended omnibus pretrial motion. Hearings were held in connection with Defendant's omnibus motion on November 17, 2014; December 30, 2014; February 6, 2015; March 18, 2015; March 25, 2015; and May 4, 2015. The hearings have yet to be concluded.

On April 14, 2015, Defendant filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. Defendant alleges that because he is incarcerated and that he has not been brought to trial within 180 days within the filing of his criminal complaint, dismissal of the charges is warranted.

Defendant contends that with respect to the 180 days, "there are no excludable days or period of delay attributed to the Defendant by the Defendant or with the consent of the Defendant." (Motion, paragraph 16).

At the most recent hearing on May 4, 2015, the court accepted some evidence in connection with Defendant's Rule 600 claim. As well, stipulations were reached and argument was made in connection with preliminary matters. The court indicated following the hearing that it would consider the evidence and the respective arguments of the parties to determine if a further hearing was necessary in connection with Defendant's claims.

Initially, the court notes that Defendant misstates the applicable law with respect to Rule 600. Defendant contends that Rule 600(A)(2) requires that a defendant be tried no later than 180 days from the date on which the complaint is filed when the defendant is

incarcerated. To the contrary, Rule 600(A)(2) requires that trial commence within 365 days from the date on which the complaint is filed. Pa.R.Cr.P. 600 (A)(2)(a). With respect to Defendant's 180-day claim, depending upon the circumstances, a defendant may be entitled to release on nominal bail subject to non-monetary conditions as permitted by law. Pa.R.Crim.P. 600(B)(1), (D)(2). Accordingly and because Defendant requests dismissal, the determinative time period is 365 days and not 180 days.¹

At a Rule 600 hearing, the Commonwealth bears the burden to demonstrate, by a preponderance of the evidence, that the defendant was tried within the prescribed time period or that the Commonwealth exercised due diligence and the delay was beyond the Commonwealth's control. Commonwealth v. Bradford, 616 Pa. 122, 46 A.3d 693, 701 (Pa. 2012); Commonwealth v. Thompson, 93 A.3d 478, 488 (Pa. Super. 2014). "[D]ue diligence is fact specific to be determined case by case; it does not require perfect vigilance or punctilious care, but merely a showing the Commonwealth has put forward a reasonable effort." Bradford, 46 A.3d at 701-702 (quoting Commonwealth v. Selenski, 994 A.2d 1083, 1089 (Pa. 2010)).

As Rule 600(C)(1) makes clear, the only time that is included for purposes of a motion to dismiss the charges is when the proceedings have been delayed because of a lack of due diligence by the Commonwealth. All other periods of delay are excluded.

At the May 4, 2015 hearing in this matter, Defendant stipulated that certain

¹ It appears that Defendant was relying on former Rule 600(A)(2), which was rescinded effective July 1, 2013. Even under the former rule, however, a defendant was only entitled to dismissal after the expiration of 365 days, see former Rule 600(G). Instead, a defendant held in pre-trial incarceration in excess of 180 days would be entitled upon petition to release on nominal bail, see former Rule 600(E).

periods of time are excludable in the Rule 600 calculation. First, Defendant agreed that all days including and past May 27, 2014, the date that Defendant filed his motion to remove counsel, are excludable. Secondly, Defendant agreed that the time period from October 11, 2013 to January 8, 2014 was excludable because Defendant specifically requested a continuance.

Based on Defendant's admissions alone, it is clear that 365 days have not passed under Information 1382-2013. As noted above, the complaint was filed on August 27, 2013. Through May 26, 2014, there are 273 days. Excluding the additional 89 days from October 11, 2013 to January 8, 2014 results in only 184 days having passed.

Accordingly, Defendant's motion to dismiss with respect to Information 1382-2013 will be denied.

Prior to proceeding with the respective arguments of the parties regarding the remaining Informations, the court will set forth the number of day calculations in light of the stipulations.

Under Information 17-2013, the criminal complaint was filed on January 7, 2013. Through February 26, 2014, 505 days have passed. Reducing this figure by 89 days, the time period from October 11, 2013 to January 8, 2014 leaves 416 days.

With respect to Information 35-2013, the criminal complaint was filed on January 11, 2013. The number of days through May 26, 2014 is 501 days. Subtracting 89 days equals 412 days.

Finally, under Information 63 of 2013, the criminal complaint was filed on January 22, 2013. Through May 26, 2014, 490 days have passed. Subtracting 89 days leaves 401 days.

The first time period that the court will discuss is the time period from March 1, 2013 through May 31, 2013. Introduced as Commonwealth's Exhibit 5 was an email from Defendant's then attorney Robert Cronin, Esquire to a representative of the District Attorney's office. In response to an inquiry regarding waiving Rule 600, Mr. Cronin wrote a written response indicating that his office would be filing "a Habeas Corpus on one of the charges." He further noted that the filing of such "would negate the Commonwealth's issues associated with Rule 600." Mr. Cronin advised the District Attorney that "Defendant waives the issue surrounding Rule 600 for the time period of March 1, 2013 through May 31, 2013."

Defendant contends that this time period is not excludable because Mr. Cronin never filed a petition for writ of habeas corpus, never discussed any waiver with Defendant and Defendant did not authorize or expressly waive Rule 600 for this time period.

Initially, the court notes that Defendant's argument is based on a faulty premise that counsel cannot validly obtain continuances and waivers of his Rule 600 rights. See Commonwealth v. Wells, 513 Pa. 463, 5221 A.2d 1388, 1391 (1987)("trial counsel may, at times, be in a position to make strategic or tactical decision for his client concerning the start of trial. While such decisions may implicate the requirements of Rule 1100, we see no reason why counsel cannot exercise his discretion, weigh the alternatives available, and make an intentional informed choice for his client. The actions of counsel in this regard are imputed to the defendant who is bound thereby."); Commonwealth v. Walley, 396 Pa. Super. 1280, 1283 (1978)("We have held inferentially that counsel may request continuances that postpone trial commencement ... without the specific signed consent of his client....Continuances are a matter of trial strategy within the reasonable purview of counsel. To hold that counsel cannot

unilaterally request continuances that delay the start of trial past the Rule 1100 limit would severely hamper his ability to effectuate trial strategy.”).²

While defense counsel may not have discussed his tactics with Defendant and may not have discussed the Rule 600 waiver, this does not provide a basis for including the time against the Commonwealth. As noted previously, the applicable issue in a Rule 600 dismissal is whether the delay is attributable to the Commonwealth. Under these circumstances, the delay between March 1, 2013 and May 31, 2013 is clearly not attributable to the Commonwealth. Accordingly, it will be excluded from the Rule 600 calculation.

There are 92 days from March 1, 2013 through May 31, 2013. Accordingly, with respect to 17-2013, at this point the calculation of includable days is 416 minus 92 or 324 days.

Under 35-2013, the includable days are 412 minus 92 or 320 days.

Under Information 63-2013, the includable days are 401 minus 92 which equals 309 days.

In light of the fact that none of the cases include time of 365 days or more against Defendant, the court need not consider the Commonwealth’s claims that there are additional periods of time that should be excluded. The Commonwealth has met its burden and accordingly, Defendant’s Rule 600 Motion shall be dismissed.

ORDER

AND NOW, this ____ day of May 2015, the Court DENIES Defendant’s motion to dismiss on Rule 600 grounds.

²Rule 1100 was renumbered Rule 600, effective April 1, 2001.

By the Court,

Judge Marc F. Lovecchio

cc: DA (MK)
PD (RC)
Reuben McDowell, c/o Lycoming County Prison
Gary Weber, Esquire (Lycoming Reporter)
Work file