

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-552-2014
	:
THERIN POWELL,	:
Defendant	:

OPINION AND ORDER

Before the court is Defendant's motion to modify bail and/or for nominal bail pursuant to Pa.R.Crim.P. 600. The relevant facts follow.

In a criminal complaint filed on February 24, 2014, the police charged Defendant with possession with intent to deliver a controlled substance (heroin), conspiracy to possess a controlled substance with the intent to deliver it, possession of a controlled substance, possession of drug paraphernalia and two traffic summaries. Defendant was incarcerated in lieu of bail on February 25, 2014.

The preliminary hearing was scheduled for March 3, 2014, but Defendant requested a continuance which the Magisterial District Judge granted. The preliminary hearing was rescheduled for March 24, 2014, but was not held on that date due to a continuance request by Defendant's attorney. The preliminary hearing was held on March 31, 2014 and all the charges were held for court.

On May 21, 2014, Defendant's attorney filed a motion to extend the time for filing pre-trial motions. The court granted the motion and extended defense counsel's deadline for filing such motions to June 30, 2014.

On June 30, 2014, defense counsel filed an omnibus pretrial motion, which

the court scheduled for an evidentiary hearing on July 30, 2014. Defendant's attorney requested a continuance of the hearing because he was on vacation on that date. The Commonwealth did not object to the continuance request because the prosecuting attorney was scheduled for a continuing legal education seminar. The court granted the continuance request and the hearing was rescheduled for August 19, 2014. The Commonwealth, however, requested a continuance of the August 19 hearing because the officers were unavailable due to their duties at the Little League World Series. Defense counsel did not object to this continuance because he was scheduled to be in federal court in Harrisburg on this date. The court granted the continuance request and the hearing was held on October 30, 2014.

Defendant's case was scheduled for a pre-trial conference on September 23, 2014, but defense counsel requested a continuance because the hearing on the omnibus motion had not been held yet. This continuance was granted and a notation was made on the continuance form indicating that the request included excludable time against Defendant from "September 23 to January 30, 2015, end of term."

This case was scheduled for a pre-trial conference on December 16, 2014, which was for cases on the trial list for the February/March and April trial terms. Defense counsel requested a continuance because he was attached for a trial in a capital case which was to commence on January 5, 2015 and last approximately 5 weeks. The court granted the continuance request and noted the request included excludable time against Defendant from "December 16, 2014 to May 1, 2015, end of term."

The court issued a decision on Defendant's omnibus pretrial motion on January 27, 2015.

On January 7, 2015, Defendant filed his motion to modify bail and/or for nominal bail pursuant to Pa.R.Crim.P. 600. The court summarily denied the motion with respect to discretionary bail, but scheduled a hearing on the request for nominal bail.

The parties stipulated to the above facts. In addition, defense counsel stipulated that the Commonwealth was prepared to proceed with the hearing on Defendant's omnibus motion on July 30, 2014. The parties did not agree, however, on the legal significance of these facts.

The Commonwealth argued that all the time except February 24, 2014 to March 3, 2014 and March 31, 2014 to May, 21, 2013 was excludable due to the unavailability of Defendant or Defendant's attorney.

Defense counsel conceded March 3 to March 30, May 21 to June 30, and July 30 to August 19, 2014 were periods of excludable time due to defense requests for continuances or extensions. Defense counsel argued that other than his continuance request for the July 30 hearing, no other time related to the Defendant's omnibus pretrial motion was excludable, because August 19, 2014 through January 27, 2015 was delay attributable to the Commonwealth and to the court for nominal bail purposes.

DISCUSSION

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.

(3)(a) When a judge or issuing authority grants or denies a continuance:

(ii) the judge shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance. The judge also shall record to which party the period of delay caused by the continuance shall be attributed, and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with this rule.

(b) The determination of the judge or issuing authority is subject to review as provided in paragraph (D)(3).

(D) Remedies

(2) Except in cases in which the defendant is not entitled to release on 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. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

(3) Any requests for review of the determination in paragraph (C)(3) shall be raised in a motion or answer filed pursuant to paragraph (D)(1) or paragraph (D)(2)

Pa.R.Crim.P. 600.

The comment to Rule 600 explains that periods of delay will be excluded from the computation of time when the defendant or the defense has

been instrumental in causing the delay. Pa.R.Crim.P. 600, comment. The periods of delay that were previously enumerated in the text of former Rule 600(C) are excludable, including but not limited to, such periods of delay at any stage of the proceedings that result from either the unavailability of the defendant or the defendant's attorney or any continuance granted at the request of the defendant or the defendant's attorney. *Id.* Although the mere filing of a pretrial motion does not automatically render a defendant unavailable, a defendant is considered unavailable if the pretrial motion causes a delay in the commencement of trial. *Commonwealth v. Hill*, 558 Pa. 238, 736 A.2d 578 (1999).

After reviewing the facts of this case and the relevant law, the court finds that there is a sufficient amount of delay attributable to the defense that Defendant is not entitled to release on nominal bail.

The parties do not dispute that several time periods are excludable. March 3, 2014 to March 24, 2014 is excludable because the preliminary hearing was continued at Defendant's request. Similarly, March 24, 2014 to March 31, 2014 is excludable because the preliminary hearing was continued on the request of Defendant's attorney. May 21, 2014 to June 30, 2014 is excludable because Defendant's attorney requested an extension of time within which to file Defendant's omnibus pretrial motion. July 30, 2014 to August 19, 2014 also is excludable because the hearing on Defendant's omnibus pretrial motion was continued at the request of Defendant's attorney.

The Commonwealth contends that June 30 to July 30 and August 19, 2014 to

the present also are excludable due to Defendant's omnibus pretrial motion and continuance requests by Defendant's attorney. Defense counsel contends that August 19 to October 30 is delay attributable to the Commonwealth and October 30, 2014 to January 27, 2015 is delay attributable to the court.

The court finds that June 30 to July 30 and October 30 to the present are excludable due to Defendant's omnibus pretrial motion and continuance requests by Defendant's attorney, but that the period of August 19 to October 30 is not excludable because the omnibus hearing was continued due to the Commonwealth's request for a continuance.

In *Hill*, the defendant had filed several pretrial motions. In considering these motions, the trial court conducted numerous hearings and other proceedings between May 2, 1994 and July 17, 1995. On two occasions, the Commonwealth requested continuances of the proceedings. A proceeding scheduled for May 12, 1995 was continued until three days later due to the unavailability of the Commonwealth and another proceeding scheduled for July 13, 1995 was continued to the following day. The Superior Court found that the entire period between May 2, 1994 and July 17, 1995 was excludable.

The Pennsylvania Supreme Court found that all of this time period except the four days attributable to the Commonwealth's continuances was excludable due to the unavailability of the defendant. The Court stated: "When defendant is deemed unavailable for trial, the time is excludable from the *Rule 1100* calculation; however, the mere filing of a pretrial motion by a defendant does not automatically render him unavailable. Rather, a

defendant is only unavailable if a delay in the commencement of trial is caused by the filing of the pretrial motion.” 736 A.2d at 587.

Here, the filing of Defendant’s omnibus pretrial motion clearly caused a delay in the commencement of trial. Defendant could not be brought to trial while his omnibus motion was pending and, as evidenced by counsel’s continuance requests, counsel did not want the case to proceed to a pretrial so it could be called for trial until there was a decision on the outstanding omnibus pretrial motion. However, as in *Hill*, the period of delay attributable to the Commonwealth’s continuance request must be excluded. Therefore, the time from August 19 to October 30 is not excludable, but the time from June 30 to July 30 and October 30 to January 27, 2015 is excludable due to Defendant’s unavailability as a result of his omnibus pretrial motion. January 27, 2015 to the present is excludable due to continuance requests by Defendant’s attorney.

In the alternative, any time after October 30 is excludable due to the unavailability of Defendant’s attorney. Even if the court had decided Defendant’s omnibus pretrial motion on October 30, the date of the evidentiary hearing, the next trial term was in January 2015. The case was listed on the December pretrial list, which included cases for the January and February/March trial terms. Defendant’s attorney requested a continuance of this pretrial conference, because he was attached for trial in a capital case in Luzerne County during the month of January and part of February.¹

¹ Defendant also did not request review of the notations of excludable time on continuance requests in his Rule 600 motion as required by Pa.R.Crim.P. 600(D)(3).

When the periods of delay attributable to the unavailability of Defendant and his attorney are excluded, only approximately 133 days have elapsed. Therefore, Defendant is not entitled to release on nominal bail at this time.

ORDER

AND NOW, this ____ day of March 2015, the court DENIES Defendant's motion to modify bail and/or for nominal bail pursuant to Pa.R.Crim.P. 600.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Edward J. Rymsha, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file