

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-1148-2013
	:
CHRISTOPHER SCHENCK,	:
Defendant	:

OPINION AND ORDER

This matter came before the court on March 27, 2015 for a hearing and argument on Defendant's motion to dismiss pursuant to Pa.R.Crim.P. 600. The parties stipulated to the court considering the docket transcript from the Magisterial District Judge (MDJ) and the records contained in the court file. The relevant facts follow.

On June 3, 2013, the police filed a criminal complaint against Defendant, charging him with aggravated assault, endangering the welfare of a child, simple assault, and recklessly endangering another person. The preliminary hearing was scheduled for June 6, 2013, but it was continued at Defendant's request and rescheduled for June 19, 2013. The preliminary hearing that was scheduled for June 19, 2013 was continued at the request of the arresting officer, Trooper Jennifer McMunn and rescheduled for July 10, 2013. The preliminary hearing was held on July 10 and all of the charges were held for court.

An assistant public defender was representing Defendant. At some point on or about September 14, 2013, the public defender's office realized that it had a conflict of interest and could not continue to represent Defendant. On September 14, 2013, the court appointed Trisha Hoover to represent Defendant. Unfortunately, Ms. Hoover also discovered that she had a conflict of interest, and Julian Allatt was appointed to represent Defendant on

September 21, 2013.

The case was scheduled for a status conference on November 22, 2013. At the status conference, defense counsel requested a continuance, and the case was continued from the January 14, 2014 pretrial list to the March 18, 2014 pretrial list.¹

The Commonwealth filed a motion in limine which was scheduled for argument on March 3, 2014. Defense counsel requested a continuance because he was going to be in Washington County for another hearing. The court granted the continuance request and rescheduled the argument for March 31, 2014.

On May 5, 2014, defense counsel requested a continuance of the trial because he was still obtaining and reviewing medical records. The court granted the continuance and the case was scheduled for a pretrial conference on August 12, 2014. The court noted that the request included excludable time against Defendant from May 5, 2014 to September 26, 2014, end of term.

Defense counsel requested a continuance of the August 12 pretrial conference because Defendant requested counsel to withdraw. Counsel indicated he would attempt to resolve the issue and would file a petition to withdraw if necessary. The court granted the continuance and scheduled the case for a pretrial conference on September 23, 2014. The court noted that the request included excludable time against Defendant from August 12 to November 14, 2014, end of term.

¹The March 18 pretrial conference was for the April 2014 trial term. The jury selection dates for that term were April 1, 2 and 3.

An informal pretrial was held on December 16, 2014.² The case was scheduled for trial on February 18 and 20, 2015. On or about January 28, 2015, the Commonwealth requested a continuance because it had just received notice that its main medical expert on child abuse, Dr. Paul Bellino, was not available for the trial. The case was continued to March 17 for pretrial.

On March 12, 2015, Defendant filed his motion to dismiss. The court scheduled a hearing on the motion for March 25, 2015; however, defense counsel was unavailable so the hearing was moved to March 27.

DISCUSSION

Rule 600 states, in relevant part:

(A) Commencement of Trial; Time for Trial

(2) Trial shall commence within the following time periods.

(a) 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.

(C) Computation of Time

(1) For purposes of paragraph (A), periods 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.

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

(i) the issuing authority shall record the identity of the party

² The court changed its procedure for pretrial conferences. Instead of having a formal meeting between the court, the deputy court administrator and the attorneys, by December 16, 2014 the attorneys and the deputy court administrator were required to informally exchange information regarding the availability of the parties and their witnesses for trial.

requesting the continuance and the reasons for granting or denying the continuance; and

(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

(1) When a defendant has not been brought to trial within the time periods set forth in paragraph (A), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the charges be dismissed with prejudice on the ground that this rule has been violated. 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.

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 forth a reasonable effort.” *Bradford*, 46 A.3d at 701-702.

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. After a review of the facts in this case, even if the court only excluded time attributable to the defense, Defendant would not be entitled to dismissal of the charges in this case.

Approximately 653 calendar days have elapsed between the filing of the complaint and the date of the hearing. There are numerous periods of delay that are excludable because they resulted from the unavailability of Defendant or his counsel or continuances granted at the request of Defendant or his counsel.

Thirteen days from June 6 to June 19, 2013 are excludable because the preliminary hearing was continued at the request of Defendant.

On November 22, 2013, defense counsel requested a continuance of the case from the January 14, 2014 pretrial to the March 18, 2014 pretrial. Defense counsel contends that this results in excludable delay from January 14, 2014 through April 4, 2014. The Commonwealth argued that the excludable time started on November 22, 2013 and extended through the end of the trial term which would have been later than April 4, 2014.

The court finds that the period from November 22, 2013 through April 4, 2014 (133 days) is excludable.

The court rejects defense counsel's argument that the excludable time should not begin until January 14. By requesting a continuance on November 22, 2013, from the January 14 pretrial to the March 18 pretrial, defense counsel indicated to the court that the case was not ready for trial before the April trial term. Defense counsel conceded that the

case could not be tried at the pretrial conference and agreed the excludable time should extend to April 4, 2014.

The court also rejects the Commonwealth's argument that the time attributable to this continuance request should go beyond April 4, 2014. It is the Commonwealth's burden to show that Defendant is not entitled to dismissal. The Commonwealth did not present any evidence regarding the dates or duration of the April trial term.³

Defense counsel requested a continuance on May 5, 2014. The defense concedes that this continuance request included excludable time from May 5, 2014 through September 26, 2014. There are 144 days in this time period.

Defense counsel also requested a continuance on August 12, 2014, which included excludable time to November 14, 2014. The time period from September 26, 2014 through November 14, 2014 is an additional 49 days of excludable time.

When the periods of excludable time due to defense continuance requests are totaled (339) and subtracted from number of calendar days that have passed since the filing of the criminal complaint (653), at most 314 days have passed for dismissal purposes under

³ Moreover, Defendant was available for the April trial term. His case could have been tried during that trial term, but his case was not called for jury selection in early April. Once the jury selection days passed without his case being called, the case could not be tried in April despite Defendant's availability for that term. Furthermore, jury selection can constitute the commencement of trial for Rule 600 purposes. Pa.R.Crim.P. 600, comment ("A trial commences when the trial judge determines that the parties are present and directs them to proceed to *voir dire* ... or to some other such first step in the trial").

Rule 600.⁴

ORDER

AND NOW, this ____ day of March 2015, the court DENIES Defendant's motion to dismiss pursuant to Pa.R.Crim.P. 600.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Julian Allatt, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file

⁴ In light of this finding, the court does not need to address whether time attributable to the continuance request by the Commonwealth is also excludable or excusable.