

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1663-2012
:
vs. :
:
:
: **Opinion and Order re Defendant's**
MICHAEL WILLS, : **Motion to Dismiss Pursuant to**
Defendant : **Pa.R.Crim.P. 600**

OPINION AND ORDER

Before the court is Defendant's motion to dismiss pursuant to Pa.R.Crim.P. 600(G).¹ The defense stipulated to the facts as evidenced by the docket transcript from the Magisterial District Judge (MDJ) and the documents filed of record in his case, as well as the continuance requests granted in his co-defendants' cases, but disagreed with the Commonwealth's legal conclusions regarding the periods of delay that the Commonwealth asserted were excusable or excludable delay. In light of the stipulation, the relevant facts follow.

The Commonwealth filed the criminal complaint against Defendant on June 25, 2012. The preliminary hearing was scheduled for July 2, 2012, but it was continued at the request of the Commonwealth and rescheduled to July 16, 2012. On July 16, 2012, the preliminary hearing was again continued at the request of the Commonwealth. The Commonwealth's continuance requests were due to the victim's failure to appear to testify at the preliminary hearing.

The preliminary hearing was rescheduled for September 10, 2012, but issues

¹ The court notes that paragraph (G) was the provision in former Rule 600 that permitted a defendant to file a motion to dismiss. With the adoption of new Rule 600, the provision is now found in paragraph (D)(1).

arose concerning bail and the admissibility of the victim's statements due to forfeiture by wrongdoing. As a result and with the agreement of the parties, the preliminary hearing was rescheduled to September 13, 2012 before President Judge Nancy L. Butts. See N.T., September 13, 2012, at 3-8.

The preliminary hearing began on September 13, 2012, but it could not be completed, so the remainder of the hearing was held on September 18, 2012. The charges were held for court. The case was scheduled for a status conference on October 8, 2012 and a pretrial conference on December 7, 2012.

Defense counsel requested a continuance of the pretrial conference. The court granted the continuance and the pretrial conference was continued to February 1, 2013.

On January 11, 2013, this case was consolidated with the cases of co-defendants Kenneth Martin and Terence Forshyte. On that date, defense counsel requested and received a forty-five (45) day extension within which to file omnibus pretrial motions.

Defense counsel also requested a continuance of the February 1, 2013 pretrial conference. The continuance request was granted and the pretrial conference was rescheduled for May 10, 2013.

On February 26, 2013, Defendant's counsel filed an omnibus pretrial motion, which was scheduled for a hearing and argument on May 14, 2013. The hearing on Defendant's omnibus pretrial motion was continued at the request of the Commonwealth because Trooper Havens was going to be in New York State on the date of the hearing. The hearing was rescheduled for July 30, 2013.

Defense counsel requested a continuance of the May 10 pretrial conference, because he was scheduled for trial in Snyder County. The court continued the pretrial conference to August 16, 2013, but noted that the request included excludable time against Defendant from May 10, 2013 to September 26, 2013, end of trial term.

Co-defendant Martin requested three continuances, where Defendant was not opposed. The first was continued with the notation that the request included excludable time from September 27, 2013 to January 31, 2014, end of term. The second continuance by co-defendant Martin contained the notation that it included excludable time from December 6, 2013 to March 14, 2014. The third continuance by co-defendant Martin contained the notation that it included excludable time from January 14, 2014 to May 2, 2014.

Co-defendant Martin also requested five continuances, which were granted over Defendant's objection. These continuances contained notations that excluded the time from March 18, 2014 to June 20, 2014; May 2, 2014 to September 26, 2014; August 12, 2014 to November 14, 2014; September 23, 2014 to January 31, 2015; and December 16, 2014 to May 1, 2015.

Defendant filed a motion to dismiss pursuant to Rule 600, in which he asserted more than 365 days had elapsed since the filing of the criminal complaint. A hearing and argument on the motion was originally scheduled for December 2, 2014, but it was continued to December 23, 2014 at the request of the Commonwealth because the attorney assigned to the case was not available.

At the argument, Defendant's attorney argued that only time attributable to Defendant was excludable. The Commonwealth argued that all delay was excludable or

excusable unless it was attributable to a lack of due diligence by the Commonwealth.

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 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.

The first periods of delay relate to the continuances of the preliminary hearing. The Commonwealth contended that the first continuance of the preliminary hearing from July 2 to July 16, 2012 was attributable to the defense. The court cannot agree. The MDJ docket transcript reflects that both the continuance request from July 2 to July 16 and the request from July 16 to September 10, 2012 were made by the Commonwealth. The Commonwealth did not present any evidence to show that the first continuance was caused by Defendant or his counsel.

Nevertheless, both of these time periods are excludable under Rule 600(C)(1), because the Commonwealth subpoenaed the victim to appear as a witness at the preliminary hearing and exercised due diligence in its efforts to locate him after he failed to appear for the preliminary hearing.² See N.T., September 13, 2012, at 12-16, 30-36.

²The Commonwealth labels this delay as excusable. Under former Rule 600, only delay attributable to the Defendant or his attorney was considered excludable. Delay which occurred as a result of circumstances

By the agreement of the parties and due, at least in part, to an issue regarding forfeiture by wrongdoing in co-defendant Martin's case, the preliminary hearing was continued from September 10, 2012 to September 13, 2012 so that the hearing could be held before President Judge Nancy Butts, instead of MDJ Whiteman. See N.T., September 13, 2012, at 3-8.

The court finds that all of the delays of the preliminary hearing are excludable because these delays resulted from circumstances beyond the Commonwealth's control and despite its due diligence. Therefore, the time period from July 2, 2012 to September 13, 2012 is excludable.

Defendant does not dispute that delay attributable to continuance requests filed by Defendant and his attorney constitute excludable time. Defendant's attorney requested three continuances of the pretrial conference. Defendant did not request review of the time designated as excludable in conjunction with those continuances as contemplated by Rule 600(C)(3)(b) and (D)(3). Therefore, the time period from December 7, 2012 to September 26, 2013 is excludable due to continuance requests by Defendant's attorney.

Co-defendant Martin's attorney requested three continuances, without objection from Defendant. These continuances resulted in delay from September 27, 2013 through May 2, 2014. Defendant contends this time period is not excludable because it was not attributable to him. The court cannot agree. Rule 600 clearly provides that, for dismissal purposes, only delay "caused by the Commonwealth when the Commonwealth has failed to

beyond the control of the Commonwealth and despite its due diligence was considered "excusable delay." *Commonwealth v. Ramos*, 936 A.2d 1097, 1102 (Pa. Super. 2007). With the rescission of former Rule 600 and the adoption of new Rule 600, such delay is now considered excludable delay for dismissal purposes. Pa.R.Cr.P. 600(C)(1).

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.”

Pa.R.Crim.P. 600(C)(1).³

Similarly, co-defendant Martin’s continuances which were opposed by Defendant result in excludable delay because they were neither caused by the Commonwealth nor a result of a lack of due diligence. Pa.R.Crim.P. 600 (C)(1); see also *Commonwealth v. Kimbrough*, 872 A.2d 1244, 1260 (Pa. Super. 2005) These continuances cover the time period from May 2, 2014 to the present.

The court, however, will not exclude December 2 through December 23, 2014, because the Commonwealth was not prepared to address Defendant’s motion to dismiss on December 2, 2014, the date it was first scheduled, and the hearing and argument had to be continued to December 23, 2014. Although this period of time did not delay trial, it must nevertheless be included in the computation, as the plain language of Rule 600(C)(1) requires inclusion of delay **at any stage of the proceedings** that is caused by the Commonwealth’s lack of due diligence.

When the periods of delay not attributable to the Commonwealth are excluded as required by Rule 600(C)(1), less than 365 days have elapsed since the filing of the criminal complaint.⁴

Accordingly, the following order is entered:

³ Even under former versions of the rule this time would have been excludable or excusable delay because Defendant acquiesced to the delays and the delay was beyond the control of the Commonwealth. See *Commonwealth v. Kearsse*, 890 A.2d 388, 394 (Pa. Super. 2005); *Commonwealth v. Kimbrough*, 872 A.2d 1244, 1260 (Pa. Super. 2005).

⁴ According to the court’s calculations, approximately 997 days have elapsed between the filing of the complaint and March 17, 2015. Of that time, approximately 881 days are excludable under Rule 600(C)(1). Therefore, for

ORDER

AND NOW, this ___ day of March 2015, the Court DENIES Defendant's motion to dismiss pursuant to Rule 600.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Jerry Lynch, Esquire
Work file

dismissal purposes, only 116 days are included in the computation of time within which trial must commence.