

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-147-2014
 :
 NAFIS FAISON, : Opinion and Order re:
 Defendant : Defendant's Motion to Dismiss Pursuant to
 : Rule 600

OPINION AND ORDER

By Information filed on February 7, 2014, Defendant is charged with several counts of possession with intent to deliver controlled substances and delivery of controlled substances along with related charges. The charges arise out of incidents that allegedly occurred in the City of Williamsport between July 7, 2009 and August 21, 2009.

According to the docket, the criminal complaint was filed on August 21, 2009. An arrest warrant for Defendant was issued that same date. The arrest warrant was served on Defendant on December 13, 2013 at which time Defendant was committed in lieu of \$250,000.00 bail.

On February 11, 2015, Defendant filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. Defendant contends that “more than 365 days have elapsed since the filing of the Complaint and the initial arrest in this case and therefore, the case should be dismissed with prejudice.” (Motion to Dismiss, paragraph 13). Defendant further submits “that the Commonwealth failed to exercise due diligence in its efforts to locate him from August 21, 2009 to November 18, 2013.” (Motion to Dismiss, paragraph 14).

The hearing on Defendant's motion was held before the Court on February 18, 2015.

Defendant's claim of pre-arrest delay implicates his due process rights under the United States and Pennsylvania Constitutions.

[I]n order to prevail on a due process claim based on pre-arrest delay, the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will [the court] find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.

Commonwealth v. Scher, 569 Pa. 284, 803 A.2d 1204, 1221-1222 (2002).

Defendant has not established actual prejudice; he has only made a bald allegation of prejudice. Furthermore, there is nothing in the record to even suggest that the delay was intentional or for an improper reason. Therefore, the Court will deny Defendant's Motion to Dismiss based on a due process violation.

Pursuant to Pennsylvania Rule of Criminal Procedure 600, generally, the trial in a court case must commence no later than 365 days from the date on which the complaint is filed. Pa. R. Cr. P. 600 (A) (2)(a). In determining the period of commencement of trial, "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." Pa. R. Cr. P. 600 (C) (1). The period of time between the filing of

the Complaint and the defendant's arrest is attributable to the defendant and excluded "provided the defendant could not be apprehended because his whereabouts were unknown and could not be determined by due diligence." Pa.R.Crim.P. 600, comment. The burden is on the Commonwealth to prove by a preponderance of the evidence that it acted with due diligence in attempting to apprehend a defendant. Commonwealth v. Hill, 558 Pa. 238, 736 A.2d 578, 589 (Pa. 1999); Commonwealth v. Booze, 953 A.2d 1263, 1273 (Pa. Super. 2008); Commonwealth v. McNear, 852 A.2d 401, 404 (Pa. Super. 2004).

Due diligence is a fact specific concept that must be determined on a case by case basis; due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth. Commonwealth v. Selenski, 606 Pa. 51, 994 A.2d 1083, 1089 (Pa. 2010); Commonwealth v. Peterson, 19 A.3d 1131, 1137 (Pa. Super. 2011). Due diligence must be judged by what was done by the authorities, not by what was not done. Commonwealth v. Ingram, 404 Pa. Super. 560, 591 A.2d 734, 735 (1991); Commonwealth v. Faison, 324 Pa. Super. 406, 471 A.2d 902, 903 (1984), quoting Commonwealth v. Hinton, 269 Pa. Super. 43, 50, 409 A.2d 54, 57-58 (1979).

Defendant first asserts that the Commonwealth did not exercise due diligence in attempting to locate Defendant during the period between the filing of the complaint on August 21, 2009 and the apprehension of Defendant on December 12, 2013. The court cannot agree.

Law enforcement made numerous efforts to locate Defendant. They obtained a bio sheet from PaCIC that contained addresses of Defendant and his known associates.

They checked with Williamsport police for any reports of stolen vehicles on August 21 or 22 to make sure Defendant had not stolen a vehicle shortly after the incident in order to flee the area. They contacted Defendant's former landlords. They sought information from and provided wanted posters to individuals with the Lycoming County Prison, the Adult Probation Office, the Sheriff's office, the Pennsylvania Board of Probation and Parole, the Domestic Relations Office and the Williamsport Bureau of Police. They made a Crime Stopper submission. They checked all 50 states for any operator's license information for Defendant, and contacted the Pennsylvania Department of Public Welfare (DPW). They did research for possible associates of Defendant and obtained the names of Jasmine Fields and Jessica Houston. They contacted Alix Fils-Aime and Matt Persun with the United States Marshal Fugitive Task Force and conducted surveillance on Defendant's aunt and uncle's residence at 1016 Elmira Street and attempted to contact Michael Wong, a neighbor of Defendant's aunt and uncle, to determine if he had seen Defendant in the area but they did not get an answer. They routinely checked to make sure Defendant was still listed as a wanted person in NCIC/CLEAN. They forwarded the warrant to Sergeant Aldenderfer with the Jersey Shore Police Department.

They received information that Defendant might be located at or associated with various residences in the Williamsport area and they conducted surveillance of those residences in an attempt to apprehend Defendant. They conducted surveillance on the following residences/addresses: 1625 Catherine Street, a brown residence near the intersection of High and Wildwood, 452 Market Street, 352 Federal Avenue 451 Market

Street Apartment 8, 601 Locust Street and 802 Hepburn Street.

They included Defendant in a “Most Wanted” ad in the Williamsport Sun-Gazette. They also looked for Defendant when they were conducting another drug investigation in July/August 2012 and when they were conducting “trigger lock details” in June 2013.

Eventually, Defendant was apprehended on December 13, 2013 at 2017 West Fourth Street.

Under all of the circumstances of this case, the Court finds that the Commonwealth has met its burden of establishing due diligence. See, for example, Commonwealth v. Laurie, 483 A.2d 890 (Pa. Super. 1984) (the police contacted a number of defendant’s relatives, the electric and gas companies and the Department of Public Welfare. The defendant’s sister informed the police that the defendant was no longer living at the address they had on file for him. When police obtained information that the defendant may have been in the northeast Philadelphia area, the police took out an ad in a newspaper that contained a photograph and physical description of the defendant and requested anyone information contact the police. The police also entered the defendant’s name in the Philadelphia crime computer).

Defendant also contends that he is entitled to dismissal because he was not brought to trial within 365 days after he was apprehended. Again, the court cannot agree. The failure to try this case within 365 days of Defendant’s apprehension was not because of a lack of due diligence by the Commonwealth. Defense counsel requested a continuance from

August 12, 2014 until November 14, 2014, because he was involved in a homicide case, which resulted in at least 94 days of excludable time. Furthermore, this case could have been tried in January 2015, but defense counsel asked that Defendant's other case (CR-126-2014) be tried first. See Commonwealth's Exhibit 2. Therefore, the failure of Defendant's case to be tried earlier was as a result of defense counsel's requests, not a lack of due diligence by the Commonwealth.

Accordingly, the following order is entered:

ORDER

AND NOW, this 18th day of February 2015, following a hearing and argument, the court **DENIES** Defendant's motion to dismiss.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Robert A. Hoffa, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file