

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

COMMONWEALTH	:
(TH),	:
Plaintiff	:
	: NO. 14-20, 424
vs.	:
	: PROTECTION FROM ABUSE
MB,	: CONTEMPT
Defendant	:

Date: January 5, 2014

**OPINION IN SUPPORT OF THE ORDER OF OCTOBER 8, 2014, IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

The Commonwealth has appealed this Court's order dismissing two Petitions for Contempt of a Protection from Abuse Order entered October 8, 2014. This Court dismissed the Petitions for Contempt after the Plaintiff failed to appear at the time set for the hearing.

In the Commonwealth's Concise Statement of Matters Complained of on Appeal, filed November 21, 2014, the Commonwealth raises three separate issues.

1. Did the Court err in denying a Commonwealth continuance request at the time of the PFA hearing and dismissing the PFA contempt petition and denying the Commonwealth's Motion for Reconsideration when the victim failed to appear for the contempt hearing, and the victim had not received her subpoena sent October 6, 2014 for a hearing scheduled for October 8, 2014 when notice of the hearing was given October 3, 2014, because she was in the hospital from October 7, 2014 to October 9, 2014 and the Commonwealth believed the subpoena, although sent

October 6, 2014 would be received by the victim on October 7, 2014 , and where the Commonwealth made efforts to contact the victim on October 7, 2014 by phone, using hone number of the victim contact in the most recent contempt petition filed against the defendant, however said phone listed was not the correct number for the victim and where the defendant would not be prejudiced had the hearing been continued,

2. Did the court err in dismissing the contempt petition and denying reconsideration by finding that the efforts made to secure the presence of the witness as set forth above, was unreasonable and by finding that the Commonwealth was aware due to the time frame in which notice of the hearing was given when the victim was sent a subpoena, that the victim was unlikely to appear and therefore a continuance should have been sought prior to the hearing date.
3. Did the court err in dismissing charges and denying reconsideration even if the efforts of the Commonwealth to obtain the witness was unreasonable and even if the Commonwealth should have requested a continuance prior to October 8, 2014 when the Commonwealth did not engage in willful misconduct, and the remedy of dismissal was a sanction out of proportion to the violation , and where other sanctions could have been imposed, even if the conduct of the Commonwealth constituted willful misconduct and when the defendant was not prejudiced.

I. FACTS AND PROCEDURAL HISTORY

A temporary Protection From Abuse order was entered between TH (hereinafter Plaintiff) and MB (hereinafter Defendant) on March 31, 2014. At the Plaintiff's request on

June 27, 2014 the Temporary Order was amended to allow contact between the parties regarding the Plaintiff's pregnancy and child care. At the time set for the final PFA hearing, August 25, 2014 at which time the Defendant failed to appear a final Protection From Abuse Order was entered.

Plaintiff filed two separate criminal complaints alleging the Defendant had contacted her in violation of the Protection from Abuse Order. The first complaint was made July 18, 2014 and alleged text messages were received from the Defendant. The second complaint was made September 9, 2014 and alleged the Defendant had sent text messages to the Plaintiff. Contained in the Affidavit of Probable cause dated September 4, 2014 is the Plaintiff's statement that the Defendant was out of the state and not expected back until the end of September.

The Defendant was arraigned on October 3, 2014. On October 3, 2014, notice went to both the Commonwealth and the Defendant as to the hearing scheduled for October 8, 2014. The Plaintiff did not appear on October 8, 2014. The Defendant and his attorney were present as well as a police officer present as a witness. At the time of the hearing, no testimony was taken. Both the attorney for the Commonwealth and Defendant's attorney made argument. The Commonwealth made argument as to their request for a continuance and outlined the efforts made by their office to secure the presence of the Plaintiff. The Commonwealth sent a subpoena by mail to the Plaintiff on October 6, 2014 (*Hearing Transcript*, October 8, 2014, p.2, l.19). The Commonwealth also attempted to contact the Plaintiff by a telephone number contained in the most recent police report, but were informed the number was incorrect (*Hearing Transcript*, October 8, 2014, p.2, l.15-18). The

Commonwealth did not attempt to contact the Plaintiff's attorney or pull the PFA file to obtain information on the Plaintiff. (*Hearing Transcript*, October 8, 2014, p.5, 1.4-8). The Defendant's attorney objected to the continuance request and asked the Court to dismiss the charges. (*Hearing Transcript*, October 8, 2014, p.4, 1.9). The Defendant's attorney cited the responsibility of the Commonwealth to bring forward witnesses and their responsibility to have used hand service to locate and properly serve the Plaintiff. (*Hearing Transcript*, October 8, 2014, p.4, 1.3-6).

II. DISCUSSION

The denial of a continuance by the trial judge constitutes reversible error only if there has been an abuse of discretion. It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law.

Commonwealth v. Howard, 466 Pa. 445,447 (Pa. 1976)(internal citations omitted).

There was no abuse of discretion in this Court's denial of the continuance request.

The Defendant in this matter had a right to a speedy trial pursuant to 42 Pa.C.S. § 4136 (2014).

§ 4136. Rights of persons charged with certain indirect criminal contempts.
the court.

(i) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein the contempt is alleged to have been committed.

42 *Pa.C.S.* § 4136 (2014)

The Defendant and his attorney appeared and were ready to proceed at the time set for the contempt hearing. The attorney for the Commonwealth as well as at least one police officer appeared at the time set for the hearing. The Defendant through his attorney adamantly opposed a continuance of the hearing. Notice of the October 8, 2014 hearing was provided to the Commonwealth on October 3, 2014.

Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider, rehear, or permit reargument of a final decree is not reviewable on appeal. We will not permit appellant to do indirectly that which he cannot do directly. *Geek v. Smeck*, 275 Pa. Super. 259, 261 (Pa. Super. Ct. 1980). In each of its matters complained the Commonwealth seeks to review the Court's denial of the Motion for Reconsideration and consider facts which were not presented to the Court at the time of the denial of continuance and dismissal of charges. This is clearly not remedy available to the Commonwealth.

The Court did not "err in dismissing the contempt petition and denying reconsideration by finding that the efforts made to secure the presence of the witness as set forth above, was unreasonable and by finding that the Commonwealth was aware due to the time frame in which notice of the hearing was given when the victim was sent a subpoena, that the victim was unlikely to appear and therefore a continuance should have been sought prior to the hearing date" as contained in the Commonwealth's second matter complained. This Court within its sound discretion refused to grant a continuance request by the Commonwealth. The Court did consider whether the efforts of the Commonwealth to subpoena its witness were sufficient in its ruling on the Request for

Continuance. The Commonwealth did not exercise due diligence in their attempts to have the Plaintiff present as a witness. The Commonwealth simply mailed the subpoena three days after their receipt of Notice of the hearing. The Commonwealth depended on an overnight delivery although no expedited postal service was requested. Further, when the Commonwealth learned the number they had called was incorrect the office made no attempt to pull the file, contact the Plaintiff's attorney or reach the Plaintiff by any other means.

It is also clear from the record that appellant's counsel exercised due diligence in attempting to obtain the presence of the witness at trial. Counsel had had him subpoenaed twice, had requested that a bench warrant issue for him, and had furnished the police with the witness' home address, the type of work he did, and where he might be found.

Commonwealth v. Howard, 466 Pa. 445, 449 (Pa. 1976)

The Commonwealth did not file a continuance request as soon as the issue of the wrong phone number became known. Instead, the Commonwealth allowed for the Defendant, his attorney and at least one police officer to appear in Court and depended on the Court allowing for a continuance. The Court did not err in refusing to allow the matter to be continued.

The charges were dismissed based on the Commonwealth's inability to meet its burden at the time set for the hearing. Both Affidavits of Probable Cause allege the Defendant's violation was communicating with the Plaintiff in violation of the Protection From Abuse Order. The Plaintiff was not present to testify to the alleged communications.

The test of sufficiency of the evidence-irrespective of whether it is direct or circumstantial, or both is whether, accepting as true all the evidence and all reasonable inferences therefrom, upon which if believed the [trier of fact] could properly have based [the] verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime or crimes of which he has been convicted.

Commonwealth v. Minoske, 395 Pa.Super. 192, 198 (1982)

The Court did not “err in dismissing charges and denying reconsideration even if the efforts of the Commonwealth to obtain the witness was unreasonable and even if the Commonwealth should have requested a continuance prior to October 8, 2014 when the Commonwealth did not engage in willful misconduct, and the remedy of dismissal was a sanction out of proportion to the violation, and where other sanctions could have been imposed, even if the conduct of the Commonwealth constituted willful misconduct and when the defendant was not prejudiced”. As outlined above the Commonwealth was unable to meet its evidentiary burden leading to the dismissal of the charges. The dismissal was not entered as a sanction against the Commonwealth’s attorney but as a matter of law due to the insufficiency of evidence available at the time of trial.

CONCLUSION

The Commonwealth's appeal should be denied and the Order of October 8, 2014 affirmed. The Court relies on its reasoning stated herein. There was no abuse of discretion when the Court denied a continuance request made by the Commonwealth at the time of the hearing. Further, the Court did not err in dismissing the charges where there was insufficient evidence.

BY THE COURT,

Joy Reynolds McCoy, Judge

JRM/jan