

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-1454-2014  
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 JOSEPH JENNINGS, :  
 :  
 Defendant : Motion to Dismiss Pursuant to Rule 600

OPINION

Defendant filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure on May 19, 2016. Defendant filed a supplement to said motion on July 14, 2016. Argument was held on August 25, 2016. This opinion is being issued in support of the court’s order dated August 30, 2016.

Curiously, Defendant misapprehends Rule 600. Defendant’s original motion to dismiss and supplement to said motion both concede that the delays caused by the Commonwealth’s lack of due diligence total 354 days. This, in and of itself, defeats Defendant’s motion.

Defendant argues that the Commonwealth must prove its compliance with Rule 600. Specifically, 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 8. 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 diligence or punctilious care, but merely a showing the Commonwealth has put forth a

reasonable effort.” *Bradford*, 46 A.3d at 701-202.

As a Rule 600 (C) (1) makes clear, despite apparent protestations by Defendant, 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. As the comment to Rule 600 specifically notes:

Any delay in the commencement of trial that is not attributable to the Commonwealth when the Commonwealth has exercised due diligence must be excluded from the computation of time. Thus, the inquiry for a judge in determining whether there is a violation in the time periods in paragraph (A) is whether the delay is caused solely by the Commonwealth when the Commonwealth has failed to exercise due diligence.

Pa.R.Crim.P. 600, comment.

The court must keep in mind that Rule 600 serves two equally important functions: (1) the protection of the accused’s right to a speedy trial; and (2) protection of society. *Commonwealth v. Armstrong*, 74 A.3d 228, 235 (Pa. Super. 2013), quoting *Commonwealth v. Ramos*, 936 A.2d 1097, at 1099 (Pa. Super. 2007) (en banc). “The administrative mandate of Rule 600 was not designed to insulate the criminally accused from good faith prosecution delay through no fault of the Commonwealth.” *Id.*

With these concepts in mind, the court finds that Defendant is not entitled to dismissal in this case. Indeed, although there was a significant amount of delay in this case, very little of the delay was caused by the Commonwealth’s lack of due diligence.

Defendant filed his omnibus pretrial motion on October 21, 2014, which was

heard on December 4, 2014 and denied on February 10, 2015. At arraignment, this case was scheduled for a pretrial conference in December 2014 and the January 2015 trial term. Thus, Defendant's motion clearly delayed trial. Furthermore, on February 10, 2015, Defendant requested a continuance of the pretrial scheduled for May 5, 2015. The court granted the continuance request and specifically noted in its order that for Rule 600 purposes, the time would run against Defendant from February 10, 2015 to June 19, 2015. This time from October 21, 2014 to June 19, 2015, none of which is attributable to the Commonwealth, totals 242 excludable days.

Defendant, however, filed a motion in limine on April 27, 2015. An order denying the motion in limine was entered on July 2, 2015. The case was scheduled for a pretrial on August 4, 2015, which was the date for both the September term, which ran from August 31, 2015 to September 24, 2015, and the October term, which ran from October 12, 2015 to October 30, 2015. The first day of jury selection for the September term was August 18, 2015. Therefore, although Defendant's motion in limine was decided on July 2, 2015, it delayed the commencement of trial until at least August 18, 2015. Clearly, none of the 59 days from June 20, 2015 to August 18, 2015 was attributable to the Commonwealth.

The court issued an order on August 10, 2015 attaching the attorneys for jury selection on October 8, 2015 and trial on October 21, 2015. Despite efforts from the Commonwealth to change the trial schedule to try the severed counts in a different order, the schedule remained the same.

The first day for the jury selection for the October term was October 6, 2015.

The 48 days from August 19, 2015 to October 6, 2015 are excludable, because none of that delay was attributable to a lack of due diligence by the Commonwealth.

The Commonwealth was prepared to go to trial and a jury was selected on October 8, 2015, but the case was not tried because Defendant suffered a skull fracture and concussion while he was incarcerated at SCI-Benner and he was not cleared to travel to Lycoming County for his trial.

On November 18, 2015, Defendant filed a motion for reconsideration and dismissal. The case was placed on the January 5, 2016 call of the list but was not called due to unavailability of counsel, the pending defense motion for reconsideration (which was denied on February 22, 2016) and too many cases that were ahead of it for Rule 600 purposes.

The case was placed on the February 22, 2016 pretrial list but Defendant requested a continuance. The case was continued through March 22, 2016 with the order specifically noting that the time would run against Defendant for Rule 600 purposes.

On March 4, 2016, Defendant filed another motion to dismiss. On March 14, 2016, the defense filed a continuance due to “outstanding pretrial motions.” The order granting the continuance noted that the case would be continued through May 17, 2016 and that for Rule 600 purposes, the time would run against Defendant.

On May 17, 2016, the case was listed for call of the list but was not reached. The case was not called due to other cases being ahead of it for Rule 600 purposes.

On June 27, 2016, defense counsel requested a continuance from the July term

“due to prescheduled vacation.” Again, the order granting the continuance noted that the time would run against Defendant for Rule 600 purposes. The time was excludable to August 30, 2016.

All of this time totals 327 days.

The total number of days not solely attributable to the Commonwealth equal 674 days. The total number of days between the date the complaint was filed and the first day of jury selection on August 30, 2016 are 737 days. Accordingly, the only includable days for Rule 600 purposes are 63 days.

Clearly Rule 600 has not expired. But for a very short period of time, the delay occurred as a result of circumstances beyond the Commonwealth’s control and despite its due diligence, when Defendant was instrumental in causing the delay, when the Defendant or Defendant’s attorney were unavailable or there were other circumstances precluding the case proceeding to trial.

Defendant argues that the Commonwealth caused a delay beyond 365 days due to the Commonwealth failing to comply with its discovery obligations. Defendant has failed, however, to identify any period of time or days which it contends were delayed by the Commonwealth’s apparent failures. The court has conducted a painstaking review of the Defendant’s discovery motions and cannot agree with Defendant’s position.

On April 27, 2015, Defendant filed his first motion to compel discovery. Defendant requested all email correspondence between law enforcement officials regarding the arrest and alleged illegal activities of Defendant.

Following an argument on Defendant's motion, the court granted such on June 12, 2015. The court directed that the correspondence be provided within thirty (30) days of June 12, 2015.

Defendant filed a motion to enforce and/or dismiss the Information on August 10, 2015, because he asserted that the Commonwealth failed to comply with the June 12 order. Following an argument on September 8, 2015, the court granted Defendant's motion in part. The court ordered that no later than September 21, 2015, law enforcement must submit a written verification that the relevant databases were searched and that all of the emails and other correspondence were provided. On September 22, 2015, Defendant filed yet another motion to dismiss alleging that the September 8, 2015 order was violated. The court summarily denied Defendant's motion. On September 25, 2015, Defendant filed a motion for reconsideration which was summarily denied as well by order dated September 28, 2015.

While not specifically raised in Defendant's motion, Defendant appears to argue that the time period between April 27, 2015 when Defendant first filed his motion to compel through September 21, 2015, when law enforcement was ordered to provide appropriate verifications, should be attributable to the Commonwealth, because this period of delay was caused solely by the Commonwealth not providing mandatory discovery and subsequently failing to comply with the court's discovery order.

The only time period which could arguably can be included would be the 71 days between July 12, 2015 the date by which the Commonwealth was required to produce the requested discovery and September 21, 2015, the date that law enforcement was required

to submit the written verifications because, contrary to Defendant's assertions, the requested discovery was not mandatory discovery, but rather discovery that the court had the discretion to direct the Commonwealth to provide. However, other defense motions and continuances delayed the trial to at least August 18, 2015.

Defendant filed a continuance in February of 2015 because of the outstanding omnibus pretrial motion. The continuance was granted through June 19, 2015. The order noted that this time was excludable time against Defendant. Further, on May 6, 2015, the Defendant filed a motion in limine. That motion was not decided until an opinion and order was entered on July 2, 2015.

The June term had ended and there was no trial term during the month of July. The case was given a pretrial date of August 4, 2015, which was the pretrial date for both the September trial term and the October trial term.

A case cannot be tried at pretrial. Instead, trial commences when the judge determines that the parties are present and directs them to proceed to *voir dire*. See Pa.R.Crim.P. 600, comment. The jury selection dates for the September trial term were August 18, 2015 through August 20, 2015. Call of the list was scheduled for August 18, 2015. Therefore, as a result of the defense continuance and motion in limine, the case could not be tried prior to August 18, 2015. On August 10, 2015, though, the court entered an order providing dates certain for jury selection on October 8, 2015 and trial on October 21, 2015. Accordingly, it is clear that none of the time period between April 27, 2015 and September 21, 2015, relating to the defense discovery motions is includable time. None of

the delay was attributed to the Commonwealth's failure to provide any discovery documentation or alleged failure to comply with the court's discovery orders.

The case was next set for call of the list on October 8, 2016. Defendant was transported from SCI – Benner to Lycoming County Prison on October 7, 2015. A jury was selected on October 8, 2015, and the trial was scheduled for October 21, 2016.<sup>1</sup> The trial, however, was continued because Defendant suffered a head injury and was not medically cleared to be transported from SCI – Benner to Lycoming County. Clearly, none of this time is attributable to the Commonwealth for any alleged failure to meet its discovery obligations. Indeed, at no time during jury selection nor when requesting a continuance did Defendant claim that it did not have the required discovery.

The case was next placed on the December 8, 2015 pretrial with call of the list scheduled for January 5, 2016. As set forth above, the case was not called to trial. This was not due to any conduct attributable to the Commonwealth let alone the Commonwealth's alleged failure to comply with prior Court Orders or its discovery obligation.

The case was next placed on call of the list for February 16, 2016. Again, the Court ordered that Defendant be transported from SCI – Benner for jury selection. At Defendant's request and because defense counsel was "awaiting some outstanding

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<sup>1</sup>The court would have had Defendant remain at the Lycoming County Prison until his trial was completed; however, defense counsel arranged for Defendant to be returned to SCI-Benner between jury selection and trial.



decisions,” the trial was again continued. The continuance order noted that for Rule 600 purposes the time ran against Defendant through March 22, 2016.

On March 4, 2016, Defendant filed a motion to dismiss alleging a discovery violation and non-compliance with the court’s prior discovery orders. On March 14, 2016, Defendant requested still another continuance asserting that there were “outstanding pretrial motions.” The court granted the continuance without any response by the Commonwealth and continued the case to the May 17, 2016 call of the list.

In connection with the motion to dismiss, argument was held on April 20, 2016 and the court issued an opinion and order denying Defendant’s motion to dismiss on May 20, 2016. The court noted that parties could be held in contempt but that any contempt was “a collateral matter that shall not delay the trial in this case.” Incidentally, a contempt hearing was subsequently held and by order dated July 5, 2016, none of the parties were found in contempt.

None of this time is attributed to the Commonwealth. Defendant’s motion to dismiss was denied. The case was not reached during the June term through no fault of the Commonwealth. By order dated June 21, 2016, Defendant was again ordered to be transported from SCI – Benner for call of the list on July 12, 2016 and jury selection on the same date. On June 28, 2016, however, the court granted defense counsel’s request for still another continuance. Defense counsel indicated that he was “out of the office on a prepaid family vacation.” Accordingly, the case was continued to the September 2016 term with call of the list and jury selection being scheduled for August 30, 2016. Clearly, this time does not

run against the Commonwealth.

As is apparent, the Commonwealth's alleged discovery failures had no bearing whatsoever on any delays that were occasioned in this case.

For purposes of a dismissal under present Rule 600, only the periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence should be included in the computation of the time within which the trial must commence. Any other periods of delay shall be excluded from the computation. Rule 600 (C) (1). Furthermore, when a judge has granted or denied a continuance and determined excludable time, any request for review of said determination must be raised in a motion or answer. Rule 600 (D) (3). In this particular case, Defendant has not contested any of the court orders attributing the time to Defendant or noting in particular that the time would run against Defendant for Rule 600 purposes.

Even if Defendant had properly challenged the calculations of excludable time that resulted from continuances and the court found that the Commonwealth failed to exercise due diligence with respect to complying with the discovery order issued on July 12, 2015, the only additional periods of time that the court would find excludable would be the 71 days between July 12, 2015 and September 21, 2015 and the 77 days between Defendant's motion to dismiss filed on March 4, 2016 and the court's opinion and order entered on May 20, 2016.<sup>2</sup> Even including these time periods, only 211 days have elapsed

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<sup>2</sup> The court denied Defendant's motion to dismiss filed on March 4, 2016, because Defendant did not show that he was prejudiced by the Commonwealth's untimely disclosure of the emails from Corporal Akers. The uncontroverted record clearly established that the prosecutor did not promptly provide to defense counsel the

and Defendant would not be entitled to dismissal of the charges against him.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Edward J. Rymza, Esquire  
Lori Rexroth, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file