

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-1656-2014
	:
vs.	: Opinion and Order re
	: Defendant's Motion to Dismiss
	: Pursuant to Rule 600
JEFFREY S. LEWIS,	:
Defendant	:

**OPINION AND ORDER**

This matter came before the court on the Defendant's motion to dismiss pursuant to Rule 600. The relevant facts follow.

On September 5, 2014, a criminal complaint was filed against Defendant charging him with person not to possess a firearm, possession of a firearm without a license, receiving stolen property and false identification to law enforcement. A preliminary hearing was scheduled for September 16, 2014, but was continued at the request of the Commonwealth. The preliminary hearing was held on October 14, 2014.

Defendant waived formal arraignment. The court issued an order which scheduled this case for a status conference on January 2, 2015 and a pre-trial conference on March 17, 2015.

On December 3, 2014, Defendant filed an omnibus pretrial motion. A hearing on that motion was held on or about January 2, 2015. The court filed its opinion and order deciding the omnibus motion on March 2, 2015.

The firearm was swabbed for DNA. On January 7, 2015, the Commonwealth sent swabs to the Wyoming Regional Pennsylvania State Police lab (PSP lab) for analysis.

The Commonwealth requested a continuance because it was awaiting the

DNA tests results. Defendant was opposed to this request. On March 20, 2015, the court granted the continuance request and scheduled this case for May 5, 2015.

The PSP lab issued its DNA analysis report on April 24, 2015, but the Commonwealth did not receive it until May 4, 2015. The report indicated that a mixture of DNA was found on the firearm, but the lab could not identify who the contributors to that mixture were.

On May 5, 2015, Defendant filed a motion in limine to exclude certain evidence from being presented at trial. This motion was scheduled to be heard on May 20, 2015 at the time of jury selection. Prior to jury selection, however, the Commonwealth requested another continuance, because it was trying to find a private lab which could identify the contributors to the DNA mixture. Although Defendant was also opposed to this continuance request, the court granted the request and scheduled this case for a pretrial conference on August 4, 2015. The court decided Defendant's motion in limine on July 1, 2015.

The August 4 pretrial date was for both the August/September trial term and the October trial term. The jury selection dates for the August/September trial term were August 18 through 20. Defense counsel sent the Deputy Court Administrator, Eileen Dgien, an email regarding dates that he was unavailable for jury selection and trial. Counsel's email stated in relevant part: "I'm not available 8/18, 19, 20 or 31. In Sept., I'm not available 9/1 or 2, 15 or 21. I'm scheduled for a 2 month trial in federal court in Harrisburg beginning 9/21. I believe my guy will plead. If he does, I'm free all of Oct. and Nov." Commonwealth Exhibit 3.

In late July, the Commonwealth received a preliminary report from a private lab in Pittsburgh, Cybergenetics. A formal report, however, would cost \$5,000. The lead prosecutor, Aaron Biichle, told defense counsel that Defendant would not receive a guilty plea offer if the Commonwealth needed to obtain a formal report. He asked defense counsel whether he wanted an offer or whether he should just order the formal report. Defense counsel told Mr. Biichle to hold off on ordering the final report. He also informed Mr. Biichle that he was scheduled for trial in federal court. If that case went to trial, he would ask for a continuance. If that case did not go to trial, defense counsel would agree to a continuance to enable the Commonwealth to obtain the report. The gist of this conversation was set forth in defense counsel's letter dated August 6, 2015, which was admitted as Commonwealth's Exhibit 1.

Due to defense counsel's unavailability for all of the August jury selection dates and because the Commonwealth did not yet have a final lab report, Ms. Dgien scheduled this case for jury selection on October 7, 2015.

On September 14, 2015, Defendant filed his motion to dismiss pursuant to Rule 600. The court held hearings on this motion on September 28, 2015 and October 13, 2015.

Rule 600 generally requires that trial commence within 365 days from the date on which the written criminal complaint is filed against the defendant. PA. R. CRIM. P. 600(A)(2)(a). Periods of delay caused by the defendant are excluded from the computation, and periods of delay caused by the Commonwealth when the Commonwealth exercises due diligence are excusable. *Commonwealth v. Roles*, 116 A.3d 122, 125 (Pa. Super. 2015); see

also *Commonwealth v. Matis*, 710 A.2d 12, 16 (Pa. 1998)(excludable time is delay attributable to defendant or defense counsel); *Commonwealth v. Ramos*, 936 A.2d 1097, 1102 (Pa. Super. 2007)(en banc)(excusable delay is delay which occurs as a result of circumstances beyond the Commonwealth’s control and despite its due diligence), *appeal denied*, 948 A.2d 803 (Pa. 2008). Therefore, when considering a motion to dismiss, the only times included in the computation are those periods of delay caused by the Commonwealth when the Commonwealth has failed to exercise due diligence. PA. R. CRIM. P. 600(C)(1).

Due diligence is a fact-specific concept. It does not require perfect vigilance or punctilious care, but only requires the Commonwealth to put forth a reasonable effort. *Commonwealth v. Hill*, 736A.2d 578, 588 (Pa. 1999); *Roles*, supra.

The court must also 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) the protection of society. *Commonwealth v. Armstrong*, 74 A.3d 228, 235 (Pa. Super. 2013), quoting *Ramos*, 936 A.2d at 1099. “[T]he administrative mandate of Rule 600 was not designed to insulate the criminally accused from good faith prosecution delayed 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. Defense counsel was unavailable for any of the jury selection dates for the August/September trial term. Therefore, the time from August 6, 2015 to October 7, 2015 is excludable delay. The court also finds that trial in this case was delayed primarily due to delays related to obtaining DNA swabs, analyses, and reports. The Commonwealth took reasonable efforts to obtain the DNA results. The Commonwealth had little or no

control over the amount of time it took the PSP lab or Cybergenetics to test the swabs and/or issue reports.<sup>1</sup>

Accordingly, the following order is entered:

**ORDER**

**AND NOW**, this \_\_\_ day of January 2016, the court DENIES Defendant's motion to dismiss pursuant to Rule 600.

By The Court,

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Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)  
Robert Hoffa, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file

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<sup>1</sup> The court rejects the Commonwealth's argument that Defendant's omnibus pretrial motion or his motion in limine resulted in excludable time. The omnibus motion was decided prior to the first pretrial conference. The case was not reached in May due to the Commonwealth's continuance, not Defendant's motion in limine. Therefore, these motions did not delay trial. *Commonwealth v. Hill*, 736 A.2d 578, 587 (Pa. 1999) ("a defendant is only unavailable for trial if a delay in the commencement of trial is caused by the filing of the pretrial motion").