

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-17-2013; CR-35-2013;
 : CR-63-2013; 1382-2013
 REUBEN McDOWELL, :
 Defendant :

OPINION AND ORDER

This matter came before the court on Defendant Reuben McDowell's second Rule 600 motion, which seeks dismissal of the charges in case 17-2013 and nominal bail in all of the above-captioned cases. The relevant facts follow.

In CR-17-2013, Trooper Matthew Sweet filed a criminal complaint against Defendant on December 20, 2012, charging him with assault, burglary, robbery, criminal trespass, stalking, theft, receiving stolen property, simple assault, recklessly endangering another person and harassment. The crimes arose from an incident on December 12, 2012, in which a black male forced his way into the residence of an 85 year old female and stole her purse after she returned home from banking and shopping at the Giant Plaza. Through the use of a photo lineup or array on December 20, 2012, the victim identified Defendant as the individual who robbed her.

In CR-35-2013, Trooper Sweet filed a criminal complaint against Defendant on December 21, 2012, charging him with forgery, identity theft, theft from a motor vehicle, access device fraud, and theft by unlawful taking. The crimes arose out of an incident on December 12, 2012, in which a black male stole a purse from an 86 year old woman in the Aldi's grocery store parking lot. The woman's bank card was used by the perpetrator at the

Sunoco gas station on River Avenue and at the Weis grocery store on Lycoming Creek Road.

Video surveillance at the Weis store showed the perpetrator using the victim's bank card.

In CR-62-2013, Agent Raymond Kontz, III, of the Williamsport Bureau of Police, filed a criminal complaint against McDowell on December 31, 2012, charging him with robbery, theft by unlawful taking, receiving stolen property, recklessly endangering another person, simple assault, and theft from a motor vehicle. The crimes arose out of an incident on December 7, 2012. The victim, an 82 year old female, stopped at the Cinema Center to check movie times after shopping at Wegman's grocery store. After she returned to her vehicle and placed her purse on the passenger's seat, she was attacked from behind as she was getting into the driver's seat. The victim struggled, but the perpetrator gained control over her, grabbed her purse off the passenger seat, and fled. On December 22, 2012, the victim identified Defendant as the perpetrator from a photo array.

In CR-1382-2013, the police filed a criminal complaint against on February 13, 2013, charging him with robbery, stalking, theft by unlawful taking, receiving stolen property, harassment, burglary, criminal trespass, access device fraud and theft from a motor vehicle. The crimes were alleged to have occurred between December 9, 2012 and December 16, 2012. During that span of time, four more women in their eighties had their purse stolen from their person or their residence after shopping at either the Wegman's, Aldi's or Giant grocery stores. A warrant was issued for McDowell's arrest but was not returned as served until May 8, 2013, despite the fact that McDowell was incarcerated in the Lycoming County Prison on the other cases. The preliminary hearing was originally

scheduled for May 13, 2013, but according to the docket sheet from the Magisterial District Judge (MDJ) was continued at the request of MDJ Whiteman and rescheduled to May 20, 2013. On or about May 20, 2013, the preliminary hearing was continued at the request of the Commonwealth, due to witness unavailability. One of the victims was unavailable, because she had broken her hip. The preliminary hearing was rescheduled to August 12, 2013, and the charges were held for court.

Defendant filed his current Rule 600 motion on January 7, 2016. A hearing was held on this motion on January 27, 2016.

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.

(B) Pretrial Incarceration

Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of

(1) 180 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.

(2) For purposes of paragraph (B), only periods of delay caused by the defendant shall be excluded from the length of time of any pretrial incarceration. Any other periods of delay shall be included in 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.

(2) Except in cases in which the defendant is not entitled to release on bail as provided by law, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail subject to any nonmonetary conditions of bail imposed by the court as permitted by law. 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.

As Rule 600(C)(1) makes clear, 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.

Defendant contends that more than 365 days have elapsed since the filing of the complaint in 17-2013; therefore, he is entitled to dismissal of the charges in that case. The court cannot agree.

When a defendant seeks dismissal, only cause by the Commonwealth’s lack of due diligence is included in the computation. All other delay is excluded. PA. R. CRIM. P. 600 (C)(1). 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.

There were 295 days of delay from February 19, 2013 through December 11, 2013, which were not caused by the Commonwealth’s lack of diligence.

On February 19, 2013, an order was entered at the request of defense counsel and without objection from the Commonwealth, continuing the status conference to April 5, 2013 and the pretrial conference to May 7, 2013.

On April 5, 2013, another order was entered upon the request of the defense and without objection from the Commonwealth, continuing the status conference from April

5, 2013 to May 31, 2013 and continuing the pretrial from May 7, 2013 to August 13, 2013. However, a case cannot be tried at a status or pretrial conference. August 27, 2013 was the call of the list and first day of jury selection for the trial term associated with those status and pretrial conference dates.

On August 27, 2013, upon request of the defense and without objection by the Commonwealth, an order was entered continuing these matters to September 16, 2013.

On August 19, 2013, the Commonwealth filed a motion to consolidate cases 17-2013, 35-2013 and 63-2013. A hearing and argument on the motion was scheduled for September 16, 2013.

On September 16, 2013, upon request of the defense and without objection by the Commonwealth, an order was entered continuing these matters to October 11, 2013.

On October 11, 2013, the court granted the defense motion to continue the hearing on the Commonwealth's motion to consolidate. The order noted that the Commonwealth had recently provided a global offer to defense counsel and he needed time to discuss the offer and perhaps renegotiate the terms. Defense counsel also requested additional time to discuss the consolidation motion with his client. The court indicated that it would reschedule the consolidation motion on the request of either the Commonwealth or Defendant. On November 25, 2013, the Commonwealth made such a request and the motion was argued on December 11, 2013. In an opinion and order entered on January 8, 2014, the court granted the Commonwealth's motion to consolidate.

Defendant contends that this time period is not excludable because Mr. Cronin

never filed a petition for writ of habeas corpus, never discussed any waiver with Defendant and Defendant did not authorize or expressly waive Rule 600 for this time period.

Defendant's argument is based on a faulty premise that counsel cannot validly obtain continuances and waivers of his Rule 600 rights. To the contrary, counsel can request continuances on behalf of Defendant, and Defendant is bound by the actions of his counsel. See *Commonwealth v. Wells*, 513 Pa. 463, 521 A.2d 1388, 1391 (1987) (“trial counsel may, at times, be in a position to make strategic or tactical decisions for his client concerning the start of trial. While such decisions may implicate the requirements of Rule 1100, we see no reason why counsel cannot exercise his discretion, weigh the alternatives available, and make an intentional informed choice for his client. The actions of counsel in this regard are imputed to the defendant who is bound thereby.”); *Commonwealth v. Walley*, 396 A.2d 1280, 1283 (Pa. Super. 1978) (“We have inferentially held that counsel may request continuances that postpone trial commencement...without the specific signed consent of his client. ...Continuances are a matter of trial strategy within the reasonable purview of counsel. To hold that counsel cannot unilaterally request continuances that delay the start of trial past the Rule 1100 limit would severely hamper his ability to effectuate trial strategy.”).¹

The next period of excludable delay is the 191 days from March 19, 2014 to September 26, 2014.

On March 19, 2014, the Commonwealth requested a continuance from the April/May trial term, because there were not enough consecutive days to hold the trial due to

¹ Rule 1100 was renumber Rule 600, effective April 1, 2001.

the lack of availability of all the officers involved. Defense counsel was not opposed to the continuance request. The case was continued to a pretrial conference on May 7, 2014. The order noted that it included excludable time against Defendant from March 18, 2014 to June 20, 2014, end of term.

On May 9, 2014, the Commonwealth requested a continuance from the May/June trial term, because there were not enough consecutive days to hold the trial due to the lack of availability of all the officers involved. Defense counsel was not opposed to the continuance request. The case was continued to a pretrial conference on August 12, 2014. The order noted that it included excludable time against Defendant from May 6, 2014 to September 26, 2014, end of term.

Initially, the court notes that the orders specifically stated that these periods of time were excludable. Pursuant to Rule 600(D)(3) if Defendant wished to challenge these determinations, he needed to specifically do so in this Rule 600 motion. Defendant did not; therefore, he has waived any claim that these periods are not excludable.

Furthermore, the Pennsylvania appellate courts have held that when a defendant or his counsel agrees or is not opposed to a continuance motion or request made by the Commonwealth, such is construed “as consent to the new date and waiver of any Rule 600 claim arising from that postponement.” *Commonwealth v. Hunt*, 858 A.2d 1234, 1241 (Pa. Super. 2004).

The time from May 27, 2014 to August 12, 2014 also is excludable because Defendant wished to fire his counsel and represent himself. On May 27, 2014, Defendant

filed a “Pro Se Motion to both Relieve Public Defender and Appoint New Defense Counsel.”

This motion was followed by a July 11, 2014 document also filed by Defendant which the court construed as a “Waiver of Appointed Counsel.” In the waiver document, Defendant requested that he be permitted to defend the charges against him pro se with the assistance of “a counselor as an advisor only.” Following a hearing on August 12, 2014, which included an extensive colloquy of Defendant, the court permitted Defendant to proceed pro se, but appointed Robert Cronin, Esquire of the Lycoming County Public Defender’s office, as standby counsel.

The next period of excludable delay is the 402 days from September 26, 2014 through November 2, 2015.² Defendant conceded that delay attributable to his omnibus pretrial motions was excludable time. On August 26, 2014, Defendant filed a pro se omnibus pretrial motion. In a letter, Defendant requested time to file additional motions. On September 9, 2014, an order was entered which granted Defendant’s request and directed that any such motion must be filed on or before October 12, 2014.

On October 9, 2014, Defendant filed an extensive amended omnibus pretrial motion. Hearings were held in connection with Defendant’s omnibus motion on November 17, 2014; December 30, 2014; February 6, 2014; March 18, 2014; March 25, 2014; May 4, 2015; and July 8, 2015. Defendant wanted the opportunity to brief the issues in his omnibus pretrial motions. Defendant’s brief was originally due August 31, 2015, but that deadline

²The time attributable to Defendant’s omnibus pretrial motions began with the filing of his first motion on August 26, 2014. However, as the court already found excludable time to September 26, 2014, the court began calculating the time from September 26, 2014 so that it did not “double count” the time from August 26 to

was extended to October 5, 2015, at Defendant's request. In an opinion and order entered on November 2, 2015, the court denied Defendant's omnibus pretrial motions.

The court also finds that the 89 days from December 16, 2015 to March 14, 2016 is excludable for dismissal purposes. The Commonwealth requested a continuance because one of the police witnesses (Corporal Fusco) and two of the victims (Ms. Campbell and Ms. Economu) were unavailable for trial. On December 16, 2015, over Defendant's objection, the court granted the Commonwealth's motion to continue jury selection. Defendant's cases were scheduled for jury selection between February 16-18, 2016 and the March 2016 trial term. In the order, the court specifically noted this time shall not run against the Commonwealth for Rule 600 dismissal purposes, but would run against the Commonwealth for nominal bail purposes.

A jury was selected in this case on February 18, 2016, and trial is scheduled for March 14-18, 2016.

The Commonwealth had no control over the unavailability of its witnesses. Therefore, this time cannot be included in the Rule 600 computation for dismissal purposes. See *Commonwealth v. Hyland*, 875 A.2d 1175, 1191-1192 (Pa. Super. 2005)(witness's unavailability due to deployment to the Middle East was beyond the Commonwealth's control; therefore, the Commonwealth could not be held to be acting without due diligence); *Commonwealth v. Hunt*, 858 A.2d 1234, 1241 (Pa. Super. 2004)(delay which occurs as a result of circumstances beyond the Commonwealth's control and despite its due diligence is

excusable).

The court also notes that regardless of the Commonwealth's continuance, the period of time (67 days) from January 7, 2016 to March 14, 2016 is excludable due to Defendant's Rule 600 motion.

There are a total of 1113 days from the filing of the complaint on December 20, 2012 to the filing of Defendant's Rule 600 motion on January 7, 2016. When the 295 days from February 19, 2013 to December 4, 2015, the 191 days from March 19, 2014 to September 26, 2014, the 402 days from September 26, 2014 to November 2, 2015 and the 22 days from December 16, 2015 to January 7, 2016 are excluded, there are only 203 days of non-excludable time from the filing of the complaint in case 17-2013 to the date of Defendant's Rule 600 motion or the date of trial. The other cases were filed after case 17-2013. Therefore, Defendant is not entitled to dismissal of any of the charges filed against him.

In his motion, Defendant also requested nominal bail pursuant to Rule 600. Rule 600 states: "Except in cases in which the defendant is not entitled to release on bail as provided by law, no defendant shall be held in pretrial incarceration in excess of 180 days from the date on which the complaint is filed." PA. R. CRIM. P. 600 (B)(1).

Article 1, section 14 of the Pennsylvania Constitution states: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses or offenses for which the maximum is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when

the proof is evident or the presumption great...”

The Commonwealth argued that Defendant was not entitled to nominal bail because no condition or combination of condition existed to assure the safety of elderly women in the community. Through the use of a photo lineup or array, several of the victims identified Defendant as the individual who robbed them. After he was given Miranda warnings, Defendant gave a statement to the police in which he admitted committing all of these offenses. The proof is evident and the presumption is great that Defendant is a danger to elderly women and the community. Defendant evidently committed these offenses in broad daylight by attacking elderly women after they came out of the grocery store and went to their vehicle or by following them from the grocery store to their home or other locations where they were vulnerable.

There are only a few grocery stores in the Williamsport area. Defendant’s crimes involved nearly all of them. If Defendant hunted and culled his victims from some other location, such as a senior center, the court would require, as a condition of his release, that Defendant stay away from senior centers and wear a GPS unit to make sure that he did so. The court cannot do that in this case. Everyone has to eat. The court cannot preclude Defendant from going to a grocery store as a condition of his release.

At the same time, the court cannot subject the community, and in particular the elderly women of the community, to the risk of being attacked by Defendant at their vehicles or in their homes after being followed home from grocery shopping. Children and the elderly are particularly vulnerable segments of the community.

Furthermore, Defendant's conduct in prison adds to the court's concerns about his dangerousness. While incarcerated, Defendant has had numerous infractions for fighting, instigating a fight, disrupting prison routine, and refusing to obey orders. Since Defendant has been unable to comply with the prison rules and regulations, the court finds Defendant would be similarly unable to comply with any conditions or combination of conditions of release designed to protect elderly women and the community.

Defendant's trial should be over in a few days. In light of these particular facts and circumstances, the court will deny Defendant's request for release on nominal bail.

ORDER

AND NOW, this ___ day of March 2016, the court DENIES Defendant's Rule 600 motion which seeks dismissal of the charges against him or, in the alternative, release on nominal bail.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
Joshua Bower, Esquire (APD)(standby counsel)
Reuben McDowell, c/o Lycoming County Prison
Gary Weber, Esquire (Lycoming Reporter)
Work file