

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-1956-2007  
 :  
 WALLACE KELCE, : Motion to Dismiss Pursuant to  
 Defendant : Rule 600

**OPINION AND ORDER**

On August 10, 2007, Defendant is alleged to have driven a vehicle after imbibing a sufficient amount of alcohol that he was rendered incapable of safely driving. At the time of the alleged incident, Defendant resided at 25 Sweetbriar Drive, Newport News, VA 23606. The police filed a criminal complaint charging Defendant with Driving Under the Influence and related offenses on September 20, 2007. The complaint listed Defendant's address as 25 Sweet Briar Drive, Newport News, VA 23606. A summons was issued on September 28, 2007. Defendant failed to appear for his preliminary hearing on November 5, 2007, and on November 13, 2007, a bench warrant was issued for Defendant's arrest by Judge Dudley Anderson of the Lycoming County Court of Common Pleas. The bench warrant was vacated on May 11, 2018, and Defendant was released on unsecured bail.

On May 31, 2018, Defendant filed a motion to dismiss pursuant to Rule 600. The court held a hearing and argument on Defendant's motion on July 20, 2018. At the hearing, the Commonwealth did not present any testimony. Instead, the Commonwealth introduced three exhibits. Commonwealth Exhibit 1 was the first page of the transcript from the Magisterial District Judge (MDJ), which in Box 20 indicated that the summons was issued

on 9/28/07 and in Box 22 indicated that the summons was returned on 10/09/07. Commonwealth Exhibit 2 was the bench warrant issued by Judge Anderson for Defendant's failure to appear at the preliminary hearing on 11/5/07. Commonwealth's Exhibit 3 was the DL-26 chemical test warnings form signed by Defendant, which listed Defendant's address as "25 Sweetbriar Drive, Newport News, VA 23606-3904."

Defendant testified he never received the summons, either by certified mail or first class mail. In fact, he stated he never received any mail from the MDJ. He also testified that he was not aware of the charges, the preliminary hearing date or the bench warrant until he was arrested by the Newport News police in May of 2018. The police told him he was being arrested for failure to appear in Pennsylvania and took him before a judge. The judge released him, and he returned to Pennsylvania and voluntarily surrendered on May 11, 2018. Defendant admitted that 25 Sweetbriar Drive was his address in the fall of 2007 and continued to be his address for about a year thereafter at which point he moved to 77 Middlesex Road and filed the appropriate change of address forms with the United States Postal Service. Throughout this case, Defendant has resided in Newport News, Virginia. Defendant stated that if he had received the summons, he "would have been there" for the preliminary hearing.

Defendant argued that he was never aware of the charges and that once he became aware, he voluntarily surrendered. Defendant claimed that the Commonwealth must prove that he was served with the complaint and that it took reasonable and diligent efforts to locate him; without such proof it would be "unfair" to prosecute the defendant almost 11 years after the alleged crime. Defendant asserted that the Commonwealth violated Rule 600 by not

bringing him to trial within one year of the date the charges were filed against him.

The Commonwealth argued that all of the time after the bench warrant was issued should be excluded. The Commonwealth asserted that the transcript from the MDJ showed that the summons was properly served. The Commonwealth further argued that once the bench warrant was issued, it no longer had a duty to exercise due diligence to locate Defendant.

### **DISCUSSION**

“Trial in a court case in which a written complaint is filed against the defendant shall commence no later than 365 days from the date on which the complaint is filed.” Pa. R. Crim. P. 600(A)(2)(a). “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.” Pa. R. Crim. P. 600(C)(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.” Pa. R. Crim. P. 600(D)(1).

A defendant who fails to appear at a court proceeding, **of which he has been properly notified**, is unavailable from the time of that proceeding until he is subsequently apprehended or until he voluntarily surrenders himself. *Commonwealth v. Cohen*, 481 Pa. 349, 393 A.2d 1327, 1331 (1978)(emphasis added). “An accused unaware that process has been

issued against him, has no obligation to make himself available. Employing a due diligence criteria in such a situation provides the basis for attributing to the accused any delay that results in his apprehension. Where, however, the accused is aware of his obligation to appear and fails to do so, he may legitimately be held accountable for any resultant delay.” 392 A.2d at 1330. “Proper notice is notice which is reasonably calculated to give actual notice. If the Commonwealth fails to prove proper notice, it must establish that it was unable to locate the defendant despite the exercise of due diligence.” *Commonwealth v. Evans*, 326 Pa. Super. 57, 473 A.2d 606, 608 (1984).

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. Selinski*, 606 Pa. 51, 994 A.2d 1083, 1089 (2010). 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).

In this particular case, the Commonwealth has not met its burden of establishing proper notice or due diligence. Defendant credibly testified that he did not receive any mail regarding these charges and he was not aware of the charges, the preliminary hearing date or the bench warrant until May of 2018. While the evidence presented at the hearing clearly established that at the time the complaint was filed and the summons was issued, Defendant’s address was 25 Sweetbriar Drive, Newport News, VA 23606, the Commonwealth did not present sufficient evidence to show that the summons was actually sent by certified mail and

first class mail to that address.

Rule 511 states:

(A) The summons shall be served upon the defendant by both first class mail and certified mail, return receipt requested. A copy of the complaint shall be served with the summons.

(B) Proof of service of the summons by mail shall include:

(1) a return receipt signed by the defendant; or

(2) the returned summons showing that the certified mail was not signed by the defendant and a notation on the transcript that the first class mailing of the summons was not returned to the issuing authority within 20 days after the mailing.

Pa. R. Crim. P. 511.

The Commonwealth wanted the court to find that the summons was properly served based on Rule 511. The Commonwealth, however, failed to present evidence to show proof of service in accordance with Rule 511(B). The Commonwealth failed to present either the return receipt signed by the defendant or the returned summons showing that the certified mail was refused or unclaimed. There isn't even anything in the record to show that the Commonwealth attempted to obtain the summons or the return receipt from the MDJ office or any archives but was unable to do so due to the passage of nearly eleven years since the summons was issued. The Commonwealth also did not present any testimony from former MDJ Schriener, the current MDJ or any of their staff. Instead, the Commonwealth wanted the court to assume that the summons was mailed to Defendant's address and the first class mail was not returned based solely on the address listed in box 6 and the dates recorded in boxes 20 and 22 of the MDJ transcript. The Commonwealth also wanted the court to interpret box 22, which states "Summons Returned 10/09/07" to mean that the summons was not returned to the

MDJ but that it was served. Unlike the current MDJ transcripts, however, there are no clear notations to indicate whether the certified mail was accepted, refused or unclaimed or whether the first class mail was returned. Furthermore, merely because the correct address is listed on the MDJ transcript does not mean that the envelope used to mail the paperwork was addressed correctly. Based upon Defendant's credible testimony that he never received the summons and the dearth of evidence presented by the Commonwealth to show that the summons was properly served, the court must conclude that the Commonwealth failed to meet its burden to show proper notice.

Absent proper notice, the Commonwealth must prove that it was unable to locate the defendant despite the exercise of due diligence. The Commonwealth, however, presented no evidence whatsoever as to any efforts that it made in trying to apprehend Defendant. In fact, the record is devoid of any attempts whatsoever that were made by law enforcement officers to locate Defendant, to apprehend Defendant or to execute the bench warrant on Defendant. Moreover, there was no evidence whatsoever that Defendant attempted to evade the police or that Defendant was instrumental in causing the delay.

As the Commonwealth has failed to prove proper notice or that it exercised due diligence in attempting to locate or apprehend Defendant, the court must grant Defendant's motion to dismiss. Accordingly, the following Order is entered.

**ORDER**

**AND NOW**, this \_\_\_\_ day of July, 2018 following a hearing and argument, the court GRANTS Defendant's Motion to Dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. All of the charges against Defendant are dismissed with prejudice.

By The Court,

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Marc F. Lovecchio, Judge

cc: Aaron Gallogly, Esquire (ADA)  
Kenneth Osokow, Esquire (DA)  
Mary Kilgus, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Kevin Williams, Deputy Clerk of Court  
Work file