IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-1596-2007**
Appellant	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
WALLACE KELCE,	:	
	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's Order dated July 30, 2018, which granted Wallace Kelce's motion to dismiss pursuant to Rule 600.

On August 10, 2007, Wallace Kelce ("Appellee") allegedly drove a vehicle after imbibing a sufficient amount of alcohol that he was rendered incapable of safely driving. At that time, Appellee resided at 25 Sweetbriar Drive, Newport News, VA 23606. The police filed a criminal complaint charging Appellee with Driving Under the Influence (DUI) and related offenses on September 20, 2007. The preliminary hearing was scheduled for November 5, 2007, but Appellee failed to appear. The Magisterial District Judge held the preliminary hearing in Appellee's absence and requested that a bench warrant be issued by the court of common pleas. A bench warrant was issued on November 13, 2007. The bench warrant was vacated on May 11, 2018, and Appellee was released on unsecured bail.

On May 31, 2018, Appellee filed a motion to dismiss pursuant to Rule 600. On July 20, 2018, the court held a hearing and argument on Appellee's motion. On July 30, 2018, the court granted the motion, finding that the Commonwealth had not met its burden of

establishing proper notice or due diligence. On August 9, 2018, the Commonwealth filed a motion for reconsideration, which the court summarily denied.

On August 28, 2018, the Commonwealth filed a notice of appeal.

"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).

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 Appellee'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 Appellee, which listed Appellee's address as "25 Sweetbriar Drive, Newport News, VA 23606-3904."

Appellee 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. Appellee 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, Appellee has resided in Newport News, Virginia. He stated that if he had received the summons, he "would have been there" for the preliminary hearing.

Appellee argued that he was never aware of the charges and that once he became aware, he voluntarily surrendered. He 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. He 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 Appellee.

The burden was on the Commonwealth to show that the time was excludable. *Evans,* 473 A.2d at 608. In this case, the Commonwealth was required to show either that proper notice of the preliminary hearing was sent to Appellee or that it exercised due diligence in serving the bench warrant or attempting to locate Appellee. It did neither.

Appellee 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, Appellee'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. The return receipt or the returned summons would have shown the address to which the summons was sent. There was nothing 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 Schriner, the current MDJ or any of their staff. Instead, the Commonwealth wanted the court to assume that the summons was properly addressed and mailed to Appellee 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 Appellee'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 concluded that the Commonwealth failed to meet its burden to show proper notice. Rule 511 requires the Commonwealth to present either a return receipt signed by Appellee or **both** the returned summons **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. The Commonwealth only presented the transcript which contained a notation that the summons was returned on 10/09/07.[1]

Absent proper notice, the Commonwealth was required to establish that it was unable to locate Appellee despite the exercise of due diligence. The Commonwealth, however, presented no evidence whatsoever as to any efforts that it made in trying to apprehend Appellee. In fact, the record is devoid of any attempts whatsoever made by anyone to locate Appellee, to apprehend him or to execute the bench warrant on him.[2] Moreover, there was no evidence

[1] The court also notes that the paperwork from the MDJ's office contained other errors, some of which were corrected and others which were not. For example, Box 25 originally indicated that the case was "Waived to Court" on 11/05/07 but that was corrected with "white out." The "Current Bail Information" page not only indicates that bail was set at the preliminary hearing on 11/05/07 at 9:15 a.m. but also that a bail bond was signed on that date at 8:28 a.m. A bail bond could not have been signed at 8:28 on November 5, 2007, if bail was not set until 9:15 a.m. and Appellee failed to appear for the preliminary hearing.

[2] The Sheriff's Return of Service filed on June 20, 2018 indicates that the Sheriff received the bench warrant on

whatsoever that Appellee attempted to evade the police or that Appellee was instrumental in causing the delay.

In its motion for reconsideration, relying on *Commonwealth v. Bradford*,[3] the Commonwealth argued that it was entitled to rely on the MDJ to comply with the "specific, mandatory Rules of Criminal Procedure" which only permit the MDJ to proceed with the preliminary hearing if Appellee had been provided proper notice. Quoting *Commonwealth v. Wright*, the Commonwealth also noted that "the law clearly states that once a defendant is provided with notice of a court hearing, and he willfully fails to appear, the Commonwealth has no burden to demonstrate due diligence." 178 A.3d 884, 888 (Pa. Super. 2018).

The court believes that *Bradford* and *Wright* are distinguishable. In *Wright*, the Commonwealth presented specific evidence to show that the defendant had proper notice of the hearing. The parties entered a stipulation that the defendant signed a notice to appear on November 26, 1990. The defendant failed to appear on that date and a bench warrant was issued for his arrest. The defendant did not surrender until 25 years later in October of 2016. The Superior Court held that all of those years were excludable due to the defendant's failure to appear despite proper notice. If, in this case, the Commonwealth presented a return receipt signed by Appellee, *Wright* would be analogous and the court would have denied Appellee's motion.

In *Bradford*, the case was never set for trial within 365 days of the filing of the complaint due to judicial delay. Here, there was no judicial delay. Instead, there was delay

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April 27, 2018. Shortly thereafter, Newport News police arrested Appellee and took him before a judge in Virginia. Appellee agreed to drive to Pennsylvania and straighten this out. N.T., July 20, 2018, at 8. He drove to Pennsylvania and turned himself in on May 11, 2018. See Order dated May 11, 2018 which vacated the bench warrant. This clearly establishes that if the Commonwealth had exercised due diligence Appellee would have been located and/or the bench warrant would have been executed.

attributable to the Commonwealth's failure to make any effort to serve the warrant or locate Appellee.

Furthermore, the Commonwealth did not blindly rely on the MDJ's records in *Bradford*, as the record indicated that "the district judge's Office printed and allegedly mailed the docket transcript on April 20, 2009." *Bradford*, 46 A.3d at 695. Instead, the Commonwealth established that the Department of Court Records did not receive the package and as a result, the Commonwealth's tracking system was not triggered. *See id*.

Paragraph 12 of the Commonwealth's motion for reconsideration is telling. Paragraph 12 states: "the Commonwealth argues that the evidence and factual findings stated by the Court shows one of two possibilities…." The problem in this case is that it was the Commonwealth's burden to show what actually occurred in this case, as it is in every case where a defendant files a motion to dismiss pursuant to Rule 600. If the Commonwealth establishes proper notice, it has no duty to exercise due diligence. If the Commonwealth fails to establish proper notice, it must establish that it exercised due diligence to locate the defendant. *Commonwealth v. Evans*, 326 Pa. Super. 57, 473 A.2d 606, 608 (1984); *see also Commonwealth v. Ashford*, 419 A.2d 1206 (Pa. Super. 1980)(where Commonwealth failed to show what, if any, efforts were made to find the defendant after he failed to appear for an arraignment for which the Commonwealth had sent notice to an incorrect address, motion to dismiss was proper and should have been granted).

The result in this case likely would have been different if the Commonwealth had shown any effort to locate Appellee or execute the bench warrant. The criminal complaint in this case even appears to list a phone number for Appellee below his address,

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[3] 46 A.3d 693 (Pa. 2012).

but there isn't any evidence that the Commonwealth attempted to call the number.

The Commonwealth did not establish proper notice or due diligence. The Commonwealth's arguments regarding what occurred or what should have occurred at the MDJ's office are not evidence. *See Evans*, 473 A.2d at 608-609 (district attorney's unsworn statements and information cited in the Commonwealth's brief inadequate to prove proper notice had been given where no witness testified that notice was sent). The only proposition that the Commonwealth established was the issuance of a bench warrant, which was insufficient.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Aaron Gallogly, Esquire (ADA)
Mary Kilgus, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)