

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

vs.

**JONATHAN BAIR,
Defendant**

: No. CR-1512-2016

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:

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: Opinion and Order re Defendant's

: Motion to Dismiss Pursuant to Rule 600

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OPINION AND ORDER

By way of background, on July 19, 2016, Defendant was arrested and held on a probation/parole violation detainer. On August 5, 2016, Daniel Switzer of the Pennsylvania State Police filed a criminal complaint against Defendant, charging Defendant with burglaries and related offenses that occurred between June 26, 2016 and July 19, 2016. On August 22, 2016, Defendant waived his preliminary hearing and requested a future plea date.

Defendant waived his arraignment which was scheduled for September 12, 2016. On September 6, 2016, an order was entered scheduling this case for a guilty plea on November 4, 2016. The order expressly stated that the time from September 12, 2016 to November 4, 2016 would run against Defendant for Rule 600 purposes. At the request of defense counsel, the guilty plea date was continued from November 4, 2016 to February 3, 2017.

On February 3, 2017, this case was removed from the guilty plea list and placed on the March 28, 2017 pretrial list and April 18 2017 call of the list.

On April 6, 2017, a continuance request was filed by Defendant's attorney to continue the trial scheduled for April 26 and 27, 2017 due to ongoing plea negotiations,

Defendant's desire to work out a global plea agreement for this case and another case, and a need for additional time to review recently provided phone records. The court granted the continuance request and indicated that the time until June 4, 2017 would be excludable against Defendant for Rule 600 purposes.

On September 8, 2017, defense counsel requested a continuance of the trial scheduled for September 28 and 29, 2017 as the defense was seeking to obtain data off two cell phones that may have relevant evidence in this case. This continuance request was granted and indicated that the time until October 17, 2017 (the next call of the list date) was excludable against Defendant for Rule 600 purposes.

On September 26, 2017, the defense requested a continuance because the assistant public defender who had been handling the case was leaving the Public Defender's Office and the case was reassigned to another attorney. The continuance request was granted and included excludable time against Defendant until January 8, 2018.

On January 9, 2018 the court treated a letter written by Defendant as a request for new counsel and scheduled a hearing for January 18, 2018. At the time of the hearing, Defendant withdrew his request.

On March 20, 2018, Defendant filed a motion to sever. The hearing was scheduled to be held immediately prior to jury selection on March 22, 2018. At the time of jury selection, however, Defendant requested a continuance, which was granted. As a result, this case was scheduled for a pretrial on May 8, 2018 and the call of the list on May 22, 2018.

On May 8, 2018, Defendant requested another continuance, as he recently retained new counsel and additional discovery was pending. The continuance was granted

and specifically noted excludable time against Defendant until July 31, 2018.

At the pretrial on July 16, 2018, Defendant requested another continuance, and this case was continued to the September 25, 2018 call of the list.

The case was scheduled for trial on November 6-7, 2018. On October 30, 2018, however, Defendant filed a motion for sanctions. On November 2, 2018, the trial was continued as there were too many witnesses to complete the trial in two days and there were still outstanding discovery issues. The order stated that the case would only be put back on the trial list once both counsel certified there were no discovery issues remaining. The order also stated that all of the time will be counted against Defendant.

On January 10, 2019, Defendant filed an omnibus pretrial motion, which included a motion to dismiss pursuant to Rule 600 and motions to suppress evidence and statements.

On March 11, 2019, the court held a hearing and argument regarding Defendant's motion to dismiss.¹ The Commonwealth submitted a copy of the criminal complaint and copies of the orders and continuance request forms to establish the defense continuances in this case.

Defense counsel argued that the continuance requests should not constitute excludable time as the delay in this case was attributable to the Commonwealth's failure to provide discovery.

The court directed the parties to file written arguments in support of their positions. The Commonwealth's brief was due within ten days and Defendant's brief was

¹ The remainder of the omnibus pretrial motion is scheduled for a hearing and argument on May 7, 2019.

due ten days thereafter. The Commonwealth filed its letter brief and case citations on March 25, 2019. Defendant has not submitted a brief or memorandum of law.

There are 888 days between the filing of the criminal complaint on August 5, 2016 and the filing of Defendant's motion on January 10, 2019. The court finds the following time periods are excludable: September 12, 2016-November 4, 2016 (53 days); November 5, 2016-February 3, 2017 (91 days); April 6, 2017-June 6, 2017 (61days); September 8, 2017-October 17, 2017 (39 days); October 18, 2017-January 9, 2018 (84 days); March 22, 2018-May 22, 2018 (61 days), May 23, 2018-July 31, 2018 (70 days); August 1, 2018-September 25, 2018 (56 days); and November 2, 2018-January 10, 2019 (68 days). According to the court's calculations, 305 have elapsed since the filing of the complaint after the delay attributable to the defense is excluded. Therefore, Defendant is not entitled to dismissal.²

The Court rejects defense counsel's arguments that his continuances should not constitute excludable time as the delay in this case was attributable to the Commonwealth's failure to provide discovery. If the Commonwealth did not provide discovery that defense counsel informally requested, defense counsel could have filed a motion to compel discovery or a motion for sanctions such as the preclusion of witnesses or evidence. According to the docket, no such motion was filed until October 30, 2018. Instead, defense counsel requested a continuance of the trial that was scheduled for September 28-29, 2017, as well as numerous other continuances including continuances related to changes of counsel. Despite Defendant's arguments related to the

² The court notes that the time from the filing of the motion to the present would also be excludable in this case.

Commonwealth's failure to provide discovery, delay occasioned by defense continuances and express waivers are clearly excludable time under Rule 600. See *Commonwealth v. Boczkowski*, 846 A.2d 75, 83-84 n.11 (Pa. 2004)(rejecting a similar argument made under former Rule 1100).

Furthermore, there is nothing in the court file or in the record of the hearing on Defendant's motion to support the assertions made in Defendant's motion and arguments that, at jury selection on August 22, 2017, the court ruled that the District Attorney's Office did not provide all discovery and the time was to run against the Commonwealth. Statements of counsel are not evidence. If such a ruling or statement was made, defense counsel should have had the proceeding transcribed and submitted the transcript as evidence.

Although defense counsel filed a motion for sanctions on October 30, 2018, the order entered by the Honorable President Judge Nancy Butts on November 2, 2018 stated that all of the time would be counted against Defendant for Rule 600 purposes. The delay was not attributed to the Commonwealth.

The Commonwealth asserted that there were two additional periods of delay that should be excluded: August 22, 2016- September 11, 2016 (20 days) and February 4, 2017-April 5, 2017 (61 days). The court rejects the Commonwealth's assertions that these additional time periods are excludable.

The 20-day period represented the time between Defendant's preliminary hearing and Judge Butts' order scheduling this case for a guilty plea hearing. Although Defendant requested a future guilty plea date at his preliminary hearing, such a date could not be scheduled at the MDJ's office, and this time period was not included in the September

2016 order by the Honorable Nancy L. Butts scheduling the case for a guilty plea.

Furthermore, the course of a case that requests a guilty plea date and a case that requests a trial date at the MDJ's office are the same until the case reaches the Court of Common Pleas. Both cases are scheduled for the same arraignment date. At or near the date of arraignment,³ a Common Pleas Judge will issue an order giving the case a guilty plea date or a call of the list date. Since the designation does not affect the scheduling of the case until the Court of Common Pleas Judge issues an order, the time between the preliminary hearing and the issuance of the order would not be excludable.

The 61-day time period represents the time between the guilty plea date and the call of the list date for the next trial term. Once Defendant elected not to plead guilty, the Commonwealth was put on notice that it was now required to proceed with due diligence to bring the case to trial. The case was back at square one, as if it were back at arraignment and being scheduled for the first time. The case was placed on the next trial term in the normal course. Neither party requested additional time due to their or their witnesses' unavailability. Time attributable to the normal progression of a case is not excludable time. *Commonwealth v. Mills*, 162 A.3d 323 (Pa. 2017).

ORDER

AND NOW, this 7th day of May 2019, the court DENIES Defendant's motion to dismiss pursuant to Rule 600, which is contained in his omnibus pretrial motion.

By The Court,

Marc F. Lovecchio, Judge

³ If a defendant waives his formal court arraignment, the order may be issued a few days prior to the arraignment date.

cc: Joseph Ruby, Esquire (ADA)
Michael Rudinski, Esquire
Gary Weber, Lycoming Reporter
Work file