IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH,	**:**	**No. CP-41-CR-1473-2016**
Appellant	**:**	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
COLIN BEST,	**:**	
Appellee	**:**	**1925(a) Opinion**

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

This opinion is in written in support of this court's order dated May 8, 2019 (and docketed on May 10, 2019), which granted the motion to dismiss pursuant to Rule 600 filed by Colin Best ("Appellee"), and the court's order entered on May 30, 2019, which denied the Commonwealth's motion for reconsideration. The relevant facts follow.

On August 4, 2016, a criminal complaint was filed against Appellee. On April 29, 2019, this case was scheduled for jury selection and given a trial date of May 22, 2019. Immediately prior to jury selection Appellee filed a motion to dismiss based on a violation of Rule 600 of the Pennsylvania Rules of Criminal Procedure.

A hearing and argument on the motion was held on May 8, 2019.[1] At the hearing, the court advised the parties that it would take judicial notice of the contents of the court file. **The Commonwealth did not present any testimony or evidence.**

The court discussed the various orders and continuances which showed delay

[1] The court notes that there is a typographical error on the transcript; it incorrectly lists the hearing date as May 5, 2019.

attributable to Appellee or his counsel. The court provided the parties with a worksheet, which included the court's calculations of the excludable time attributable to Appellee and his counsel. According to the court's calculations, there were 997 days between the filing of the complaint and the filing of Appellee's motion. Of those days, 490 days were excludable as a result of delay attributable to Appellee or his counsel. As this left 507 days of includable time and the Commonwealth failed to introduce any evidence regarding its efforts to bring this case to trial or the reasons for the remaining delay, the court granted Appellee's motion and dismissed the charges.

On May 14, 2019, the Commonwealth filed a motion for reconsideration. On May 21, 2019, Appellee filed a motion to dismiss the Commonwealth's motion for reconsideration. The court held a hearing and argument on May 22, 2019 and denied the Commonwealth's motion on May 30, 2019.

The Commonwealth filed an appeal. The Commonwealth has asserted the following issues in its concise statement:

1. The trial court erred in granting [Appellee's] Rule 600 Dismissal Motion.
2. The trial court erred in concluding that the Commonwealth had not exercised due diligence in complying with Pennsylvania Rule of Criminal Procedure 600.
3. The trial court erred in its denial of the Commonwealth's Motion for Reconsideration.

DISCUSSION

"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." Pa. R. Crim. P. 600(A)(2)(a). "[P]eriods of delay 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).

While the language of this rule changed in 2013, the interpretation of the rule did not change. Paragraph (C)(1) does not give the Commonwealth carte blanche to act without due diligence for 365 days. See *Commonwealth v. Mills*, 640 Pa. 118, 162 A.3d 323 (Pa. 2017). Rather, the rule was modified to clarify the procedures and reflect prevailing case law. Pa. R. Crim. P. 600, Comment; *Commonwealth v. Roles*, 116 A.2d 122, 125 n.1 (Pa. Super. 2015).

Under prevailing case law, there are two types of delay that are deducted when calculating whether dismissal is required. "Excludable time" includes delay caused by the defendant or his lawyer. *Roles*, 116 A.3d at 125, citing *Commonwealth v. Goldman*, 70 A.3d 874, 879 (Pa. Super. 2013). "Excusable delay" occurs where the delay is caused by "circumstances beyond the Commonwealth's control and despite its due diligence." *Roles*, *id*.

The burden is on the Commonwealth to prove due diligence by a preponderance of the evidence. *Commonwealth v. Browne*, 526 Pa. 83, 584 A.2d 902, 908 (1990). Due diligence is a fact-specific concept that must be determined on a case-by-case basis. *Commonwealth v. Hill*, 558 Pa. 238, 736 A.2d 578, 588 (1999). "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." *Id*. Due diligence does,

however, impose a duty on the Commonwealth to employ simple record keeping systems. *Browne*, 584 A.2d at 906.

The Commonwealth did not meet its burden of proof. The Commonwealth was not prepared to present any evidence in this case. It did not subpoena any witnesses and did not offer any exhibits. N.T., May 8, 2019, at 14, 16. The Commonwealth attorney's references to the various calls of the list were based on him somewhat frantically scrolling through information on his laptop computer, and not offering marked exhibits to the court and opposing counsel. See id. at 9 ("I can actually pull up that list for '17…."). At least twice, the court asked him what record evidence the court had of any of the Commonwealth's arguments. Id. at 10, 12. Ultimately, there was none; there was only a request to delay the hearing until the start of trial.

Although the Commonwealth attorney argued that the Commonwealth was ready to proceed to trial and that the case was not tried due to the docket being overwhelmed with many cases, he never produced any evidence to establish that the Commonwealth acted with due diligence. "It is well-settled that arguments of counsel are not evidence." *Commonwealth v. Puksar*, 597 Pa. 240, 951 A.2d 267, 280 (2008); see also *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 111, 1146 (2011)(citing *Commonwealth v. Ligons*, 565 Pa. 417, 773 A.2d 1231, 1238 (2001)). Furthermore, bare assertions by the Commonwealth's attorney are insufficient to establish due diligence. *Commonwealth v. Ehredt*, 485 Pa. 191, 401 A.2d 358, 360-61 (1979)(although the preponderance standard is the least burdensome standard of proof known to the law, a bare statement by the Commonwealth's attorney, without more, does not establish due diligence).

As the burden of proof was on the Commonwealth and it failed to present any

evidence that it acted with due diligence, the court did not err in concluding that the Commonwealth failed to exercise due diligence or in granting Appellee's motion to dismiss.

The Commonwealth also contends that the trial court erred in denying its motion for reconsideration. Generally, trial court decisions are evaluated utilizing an abuse of discretion standard. "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will, or partiality as shown by the evidence or the record." *Commonwealth v. Bullock*, 170 A.3d 1109, 1117 (Pa. Super. 2017).

The court did not base its decision on bias, prejudice, ill-will or partiality. It based its decision on the fact that there was no new evidence or new case law to justify reconsidering the court's prior ruling. Instead, the Commonwealth sought a "second bite at the apple" to create a record when it failed to do so at the original hearing on Appellee's motion. See *Commonwealth v. Akridge*, 422 A.2d 487 (Pa. 1980)(per curiam)(a remand for a "second bite" of the Commonwealth's evidentiary burden on the due diligence requirement is in contradiction of the mandates set forth in *Ehredt*).

Although the Commonwealth's attorney asserted that following jury selection he was attending a seminar regarding child abuse training for prosecutors and he did not return to the office until the morning of Tuesday, May 7, 2019,[2] he admitted that he was aware of allegations contained within Appellee's motion but not the hearing date prior to his departure for his seminar, and that his support staff and other staff in the District Attorney's office were available during his absence. Nonetheless, no one in the District Attorney's

[2] The court recently discovered that the Child Abuse Training for Prosecutors seminar was held in State College Pennsylvania from April 30, 2019 through May 2, 2019.

Office subpoenaed any witnesses, prepared any exhibits or did anything else to be ready to meet the Commonwealth's burden of proof at the May 8 hearing.

The court also notes that to allow the Commonwealth to present the evidence that it should have presented on May 8, 2019 would have required a continuance of the trial scheduled for May 22, 2019. The court could not simply hold the reconsideration hearing prior to the trial on May 22. First, the reconsideration hearing had to be heard by the undersigned, but the trial was scheduled before another judge. Not only was there insufficient time in the undersigned's schedule to conduct a full evidentiary hearing, there was insufficient time to hold a Rule 600 evidentiary hearing and the trial on the same day, as this case was listed as a one-day jury trial. See Order entered May 17, 2019; Order entered May 20, 2019.

In the court's opinion, its decisions were not manifestly unreasonable. What was manifestly unreasonable was the Commonwealth's failure to bring this case to trial for nearly three years, its lack of evidence at and its lack of preparation for the Rule 600 hearing on May 8, and its expectation that the court would be able to simply rearrange the schedules of two judges as well as the schedules of the other attorneys and litigants scheduled for hearings before the undersigned on May 22 to allow the Commonwealth to have a "second bite at the apple."

The court did not enter its decisions lightly. It would have much preferred the Commonwealth to have complied with the law regarding Appellee's speedy trial rights so that the alleged victim could have had her day in court. However, if the Commonwealth were truly as concerned about the interests of the victim in this case as it claimed at the reconsideration argument, it would have put forth more of an effort to bring this case to trial

and present the necessary evidence at the Rule 600 hearing.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (DA)
Michael J. Rudinski, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)