

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-536-2018
	:
JAMIR M. CERUTI,	: Motion to Dismiss
Defendant	: Pursuant to Rule 600

**OPINION AND ORDER**

By Criminal Complaint filed on March 23, 2018, Defendant was charged with persons not to possess, firearms not to be carried without a license, possession with intent to deliver, theft, receiving stolen property, escape, flight to avoid apprehension, resisting arrest and additional related charges.

On May 6, 2019, Defendant filed a motion to dismiss pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure.

Rule 600 governs a defendant's right to a speedy trial. When a defendant has not been brought to trial within 365 days from the date on which the complaint was filed, the charges must be dismissed. Rule 600 (A) (2) (a); (D) (1). The thrust of the rule was to crystalize and clarify the Commonwealth's obligation to afford the defendant a speedy trial. *Commonwealth v. Morgan*, 398 A.2d 972, 974 (Pa. 1979). The failure to meet this prompt trial requirement constitutes grounds for dismissal. Rule 600 (D) (1); *Commonwealth v. Mills*, 162 A.3d 323, 324 (Pa. 2017).

While the start date for the prompt trial calculation is the date on which the criminal complaint is filed, 600 (A) (2) (a), delay that is not attributable to the Commonwealth when the Commonwealth has exercised due diligence must be excluded

from the computation of the 365 days. Rule 600 (c) (1); *Commonwealth v. McCarthy*, 180 A.3d 368, 375 (Pa. Super. 2018).

The Commonwealth has the burden of proving by a preponderance of the evidence on the record that it acted with due diligence and this duty to act extends to all stages of the criminal case. *Mills*, 162 A.3d at 326 (Wecht, J., concurring). The Commonwealth must do everything reasonable within its power to see that the case is tried in time. *Commonwealth v. Browne*, 584 A.2d 902, 905 (Pa. 1990). “The test to be met is whether the Commonwealth’s efforts to bring the defendant to trial were reasonable and pursued with diligence.” *Browne*, at 905, citing *Commonwealth v. Koonce*, 515 A.2d 543 (Pa. 1986).

The administrative mandate of Rule 600 is not designed to insulate an accused from good faith prosecution delayed through no fault of the Commonwealth. *McCarthy*, 180 A.3d at 374 (citing *Watson*, 140 A.3d 696, 698 (Pa. Super. 2016)). Rule 600 serves two equally important functions: (1) protecting an accused’s speedy trial rights; and (2) the protection of society. *Id.*

Due diligence is fact specific, to be determined on a case by case basis; it does not require perfect vigilance and punctilious care but merely a showing that the Commonwealth has put forth a reasonable effort. *Commonwealth v. Burno*, 154 A.3d 764, 794 (Pa. 2017). Further, the court cannot ignore the dual purpose of the rule as set forth above. The courts must carefully factor in to the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law

enforcement. *Commonwealth v. Wendel*, 165 A.3d 952, 956 (Pa. Super. 2018)(citing *Commonwealth v. Armstrong*, 74 A.3d 228, 235 (Pa. Super. 2013)).

Over the past decades, Rule 600 and its predecessor Rule 1100 have been interpreted sometimes narrowly and other times broadly. In applying the basic principles, each decision has been extremely fact specific and dependent on an exacting analysis of the efforts by the Commonwealth to ensure a timely trial.

For example, some courts have held that as long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, the rule must be construed in a manner consistent with society's right to deter and punish criminals. *Wendel*, 165 A.3d at 956. It has been posited that the Commonwealth's stewardship must be judged by what was done rather than what was not done. *Commonwealth v. Holt*, 175 A.3d 1014, 1019 (Pa. Super. 2017).

Moreover, other cases have determined that the Commonwealth cannot be held to be acting without due diligence when a necessary witness or party becomes unavailable due to circumstances beyond the Commonwealth's control. *Wendel*, 165 A.3d at 957 (affiant police officer was unavailable due to a previously scheduled training related to his law enforcement duties); *Commonwealth v. Wright*, 178 A.3d 884, 886-887 (Pa. Super. 2018) (although Commonwealth took no action to locate the defendant for 25 years, the defendant had notice of the initial court proceeding and willfully failed to appear).

As well, the Commonwealth cannot be held responsible for judicial delay. *Commonwealth v. Bethea*, 185 A.3d 364, 372 (Pa. Super. 2018); *Holt, id.* (trial date was set,

no continuances by Commonwealth, trial readiness was not at issue, trial court rescheduled trial date due to conflicts with defense counsel and changes in judicial assignment); *McCarthy, id.* (delay that resulted from unavailability of time on trial court's calendar was excludable). *Mills, id.* (where trial ready prosecutor must wait several months due to trial court's calendar, the time is delayed for which the Commonwealth is not accountable).

Yet, the Commonwealth cannot simply rely on the court to list the cases for trial. It is not unreasonable to expect the Commonwealth to track arraignment dates on a routine basis to determine whether Rule 600 may be jeopardized. *Commonwealth v. Browne*, 584 A.2d 902, 906 (Pa. 1990). It is not unreasonable and in order to be diligent, the Commonwealth must have a simple system in place to identify cases at arraignment in order to properly place them on a trial list that complies with Rule 600. *Id.* The failure to utilize a routine diary or docket system or similar record keeping system constitutes a failure of the Commonwealth to exercise due diligence. *Id.*

It has long been the law that the Commonwealth has the burden of establishing due diligence on the record. *Commonwealth v. Smith*, 383 A.2d 1280, 1282 (Pa. 1978). As well, prosecutors have always been responsible to do everything reasonable within their power to see that a case is tried on time. *Id.*

In *Commonwealth v. Mills*, 162 A.3d 328 (Pa. 2017), the Pennsylvania Supreme Court seems to have strengthened the speedy trial protections under Rule 600. While the courts may still exclude those periods of time which are due solely to court's scheduling issues, the time leading up to trial may now count against the Commonwealth

where the Commonwealth is not ready for trial at the first listing. The Supreme Court eschewed a bright line rule that ordinary trial preparation should always be deemed to be a delay and is excludable as a matter of course.

In Lycoming County, there are seven annual terms of court, each generally being between four and six weeks in duration. Lycoming County also employs arraignment court virtually every week of the calendar year. As well, there is a status conference and pretrial for each case placed on the trial list. The trial list comprises all cases not set for a plea or similar disposition. Cases are placed on the list by the Court, generally at the request of defense counsel; although, the Commonwealth may and has requested at arraignment or afterwards that a case be moved to an earlier trial list. The ultimate decision to call a case for trial or where to place it on the list depends on the Commonwealth. Each Call of the List listing document is prepared by the Deputy Court Administrator.

Following the complaint being filed on March 23, 2018, Defendant's preliminary hearing was scheduled for April 3, 2018. Defendant waived his preliminary hearing and indicated that he would plead guilty at his arraignment on April 23, 2018. At Defendant's arraignment on April 23, 2018, however, he indicated that he would not be pleading guilty. This change of heart, though, did not in any way delay the case. Due to the grading of the charges against Defendant, the plea could not be taken before the Magisterial District Judge at Defendant's preliminary hearing. Defendant's first appearance at the Court of Common Pleas was for his arraignment. At that time, the case was placed on the July pretrial list with call of the list scheduled for July 31, 2018, which also would have occurred

if Defendant had indicated at his preliminary hearing that he wanted a trial, instead of a guilty plea.

The trial term for cases on the July 31, 2018 call of the list was from August 6, 2018 to September 14, 2018. At the Call of the List, both parties indicated that they were ready for trial. 143 cases were on the list. Only six juries were selected. Defendant's case was not reached.

Defendant's case was placed on the September 25, 2018 Call of the List with the trial term of six weeks being between October 8, 2018 and November 16, 2018. Thirteen juries were selected. Defendant's case was not reached and it was placed on the next call of the list scheduled for January 15, 2019.

On November 16, 2018, Defendant filed a motion to suppress. A hearing was held on December 14, 2018 and by Opinion and Order dated December 18, 2018, Defendant's suppression motion was denied. This motion did not delay trial.

The trial term for the Call of the List scheduled for January 15, 2019 was the six weeks between January 28, 2109 and March 8, 2019. Both sides were ready. There were 136 cases on the list with alleged earlier Rule 600 dates than the defendant. Ten juries were selected. None of them had alleged later Rule 600 dates than Defendant's case.

The case was not called and it was placed on the next trial list with Call of the List scheduled for March 12, 2019 with a trial term of four weeks from March 18, 2019 to April 12, 2019. There was also a "pick and go" misdemeanor trial term of two weeks between April 8, 2019 and April 18, 2019. This case was not on the "pick and go" list at this

time because Defendant had several felony charges.

This case had been confirmed as a one-day jury trial. Both sides were ready. There were 107 cases on the list with alleged earlier Rule 600 dates. Fourteen juries were selected. Three of these cases had alleged later Rule 600 dates than Defendant. During the trial term, the Commonwealth was unavailable eight days. Defendant was available the entire term.

The case was not called and placed on the next trial list with Call of the List scheduled for April 29, 2019 with a trial term, scheduled for five weeks, from May 13, 2019 to June 14, 2019 as well as a “pick and go for both misdemeanor and felony cases” trial term of two weeks between June 17, 2019 and June 28, 2019.

There were 78 cases on the list with alleged earlier Rule 600 dates. Defendant was available for the entire term. The Commonwealth was not available 16 of the trial term days. Both sides were ready. Nine juries were selected. Two of the cases had alleged later Rule 600 dates. One was scheduled at the Court’s directive. The other was scheduled at the Commonwealth’s directive based on the thinking that if the defendant was convicted on his felony, his other misdemeanor cases would resolve.

The case was not reached at that trial term and by order of court dated May 3, 2019, the case was continued on the trial list for the July 9, 2019 criminal pretrials.

Defendant’s motion to dismiss was filed on May 6, 2019. The time period from the filing of the Complaint on March 23, 2018 to May 6, 2019 is 410 days. Clearly, this is beyond the Rule 600 mandate of 365 days.

The issue is whether the delay is attributable to the Commonwealth because of the Commonwealth not exercising due diligence. Were the Commonwealth's efforts to bring the defendant to trial reasonable and pursued with diligence?

The court does not believe the Commonwealth exercised due diligence in bringing this case to trial within 365 days. There was no testimony regarding the Commonwealth utilizing a diary or record keeping system to keep track of cases with Rule 600 issues. In fact, Holly Thomas, the administrative specialist in the District Attorney's Office, testified that the District Attorney's Office did not have an independent system to track Rule 600; it basically relied on court administration. There was no testimony as to any efforts that the Commonwealth made to bring this case to trial before Rule 600 expired. While there were numerous cases called to trial with alleged earlier Rule 600 dates, there was no evidence that the case could not have been called during one of the many open trial dates or instead of the four cases that were called to trial that had alleged later Rule 600 dates. This case was set as only a one-day jury trial. At no time whatsoever during any of the five calls of the list did the Commonwealth specifically request that this case be called. Indeed, there is no evidence that the Commonwealth verified the Rule 600 dates for any of the cases on the entire list. The Commonwealth simply "sat on its hands" and left the job to the Deputy Court Administrator.

This was not the Deputy Court Administrator's job or responsibility. If one looks at the January 15, 2019, March 12, 2019 and April 29, 2019 lists, it is readily apparent that the Commonwealth made no effort to determine the actual adjusted Rule 600 date for



this case or any of the cases on the entire list. The listing of the cases pursuant to Rule 600 was nothing more than an estimated guess by the Deputy Court Administrator and total reliance by the Commonwealth on these guesses.

During the “pick and go” trial terms there were very few cases placed on the list and the vast majority were disposed of by pleas or dismissals prior to actual jury selection, or even at jury selection. Never once during the pendency of this entire case did the Commonwealth identify it as a potential Rule 600 problem and request that the Deputy Court Administrator list it. This case could easily have been placed and called as a backup. As well, felony cases were placed on the “pick and go” list for June.

Due to the Commonwealth’s lack of a diary or record keeping system to track Rule 600 as well as defense counsel’s notation of several cases on the lists that had events which would require adjustment of the Rule 600 dates, the court cannot find that the Commonwealth exercised due diligence. *Commonwealth v. Browne*, 584 A.2d 902, 906 (Pa. 1990)(the failure to utilize a routine diary or docket system or similar record keeping system constitutes a failure of the Commonwealth to exercise due diligence).

In *Commonwealth v. Moore*, 2019 PA Super 204 (July 1, 2019), the Superior Court noted that due diligence includes listing a case for trial prior to the run date, preparedness for trial within the run date and keeping adequate records to ensure compliance with Rule 600. *Id.* at 6, citing *Commonwealth v. Ramos*, 936 A.2d 1097, 1102 (Pa. Super. 2007).

In this case, the mechanical run date was the same as the adjusted run date,

i.e., March 23, 2019. The Commonwealth did not specifically request that this case be listed for trial and jury selection at the March 12, 2019 call of the list or at any other time prior to March 23, 2019.

On May 6, 2019, Defendant filed his motion to dismiss pursuant to Rule 600. A hearing on Defendant's motion was scheduled for June 5, 2019. At the time of the hearing, however, the Commonwealth asserted that defense counsel had a conflict of interest. As a result, the court permitted defense counsel to withdraw, appointed new counsel for Defendant, and rescheduled the hearing for June 13, 2019.

At the June 13, 2019 hearing, the Lycoming County Deputy Court Administrator, Eileen Dgien, testified. Ms. Dgien testified that, as part of her job duties, she is involved in the scheduling of criminal cases for trial. Ms. Dgien stated that cases are listed on the pretrial list according to their apparent Rule 600 date. Importantly, she does not keep track of the adjusted Rule 600 dates for any cases. They are initially placed on the list and kept on the list according to their mechanical run date. Adjustments are made only at the request of the Court or Commonwealth. The factors that are taken into consideration when the cases are scheduled for trial are the listed Rule 600 date and the availability of the witnesses, counsel and the court.

The pretrial for the March 12, 2019 call of the list was February 19, 2019. At the pretrial, the parties indicated that this case would be a one-day jury trial. Prior to that date, this case was listed as a two-day jury trial. The trial term ran from March 18, 2019 through April 12, 2019. There was also a "pick and go" misdemeanor trial term of two

weeks between April 8, 2019 and April 18, 2019. Both sides were ready for trial. The Commonwealth was unavailable March 20, 2019; April 3, 2019; April 8 through April 12, 2019; and April 17, 2019. The defense was available for the entire term. There were 107 cases on the call of the list with apparent earlier Rule 600 dates than this case. Fourteen cases were scheduled for trial. Three of those cases had apparent later Rule 600 cases than this case. Each of those three cases, however, was a one-half day nonjury trial.

The next pretrial date was April 2, 2019 and the call of the list was April 29 2019. The trial term ran from May 13, 2019 through June 14, 2019. Ms. Dgien testified that the Commonwealth was unavailable May 15, 2019; May 20 through May 24, 2019; May 28 through May 30, 2019; June 7, 2019; June 11, 2019; June 12, 2019; and June 24 through June 28, 2019. The defense was available for the entire term. This case was not reached. There were 78 cases on the list with apparent earlier Rule 600 dates. Nine cases were scheduled for trial, but two of those cases had apparent later Rule 600 dates than this case. David Bean's case had an apparent later Rule 600 date but was scheduled at the court's direction. Another individual, John Cobb, had a felony case had an apparent later Rule 600 date, but he had a misdemeanor case with an apparent earlier Rule 600 date that the parties thought would turn into a plea if his felony case was tried first and resulted in a conviction.

The prosecutor requested a continuance so it could call as a witness the District Attorney's Office's administrative specialist, who was unavailable due to an illness. The court granted the Commonwealth's request and the hearing was continued to June 24, 2019.

At the hearing on June 24, 2019, Holly Thomas testified regarding the unavailability of the Commonwealth's witnesses for each trial term. For the September 25, 2018 call of the list (which coincided with the October/November trial term), Officer Ananea was unavailable October 22-26, 2018 due to vacation. Officer Bell was unavailable due to training on October 17, 2018; October 23, 2018; October 30, 2018; November 1, 2018; and November 14, 2018. Officer Gardner was unavailable due to training on October 17, 2018; October 30, 2018; November 1, 2018; and November 14, 2018. Corporal Hofford was on vacation on October 31, 2018 and he was unavailable due to training on November 1, 2018. Officer Minnier was unavailable due to training on October 23, 2018. Officer Stevens was unavailable due to training on October 17, 2018; October 23, 2018; October 30, 2018; November 7-9, 2018; and November 14, 2018. Assistant District Attorney Nicole Ippolito was on vacation on October 11, 2018.

For the January 15, 2019 call of the list (which was for the trial term from January, 28, 2019 to March 8, 2019), Officer Bell and Officer Gardner were unavailable on February 6, 2019 and February 19-21, 2019 due to training, and Officer Stevens was unavailable on February 20, 2019 due to training.

For the March 12, 2019 call of the list (which was for the trial term from March 18, 2019 to April 12, 2019), Officer Bell, Officer Gardner, and Officer Stevens were each unavailable due to training on March 20, 2019; April 3, 2019; and April 17, 2019. A lab witness, Jennifer Libus, was unavailable March 26-29, 2019; April 11-12, 2019; April 17, 2019; and April 18, 2019 due to trials in other courts in other counties. Officer Minnier was

unavailable on March 5, 2019 due to training and April 8-12, 2019 due to vacation.

For the April 29, 2019 call of the list (which was for the trial term from May 13, 2019 to June 14, 2019) and the “pick and go” list for June 17-28, 2019, Officer Bell was unavailable due to training on May 15, 2019; May 20, 2019; May 29, 2019; June 12, 2019; June 17-20, 2019; and June 26, 2019. Officer Gardner was on vacation on May 21, 2019 and he was unavailable due to training on May 14, 2019; May 29, 2019; June 11, 2019; June 17-20, 2019, and June 26, 2019. Officer Stevens was unavailable due to training on May 15, 2019; May 29, 2019; June 12, 2019; June 17-20, 2019; and June 26, 2019. Officer Minnier was unavailable due to training on June 11, 2019. Jennifer Libus was unavailable due to testifying in other courts in other counties on May 21, 2019; May 24, 2019; May 28, 2019; May 30, 2019; and June 25, 2019.

The court asked Ms. Thomas if “training” was a code word, because it seemed like there was an awful lot of unavailability due to training. Ms. Thomas explained that some of the officers were part of the Special Response Team (SRT), which had training two to three times per month. She also noted that she had spoken with Chief Damon Hagan of the Williamsport Bureau of Police and he will be making trials a priority over SRT training.

Ms. Thomas also testified that the District Attorney’s Office did not have its own independent system to track Rule 600 and it basically relied on the Rule 600 dates provided by court administration. On occasion, the District Attorney, Kenneth Osokow, would contact the Deputy Court Administrator, Eileen Dgien, to request priority for a case; however, Ms. Thomas was not aware of Mr. Osokow requesting priority for this case.

While the Commonwealth was ready for trial and indicated its preparedness for trial within the run date, contrary to the mandates in *Browne*, *Mills*, *Moore*, and *Ramos*, it failed to keep any records to ensure compliance with Rule 600. It had no routine diary, docket or similar record keeping system to identify cases in order to place them properly on a list to ensure compliance with Rule 600.

Unlike in *Moore*, the Commonwealth did nothing to monitor or address any issues potentially impacting Defendant's speedy trial rights under Rule 600. The Commonwealth failed to present the court with any evidence whatsoever regarding its efforts to protect Rule 600 in this case.

Unfortunately, the Commonwealth did not fulfill either of the purposes of Rule 600. It certainly failed to bring the defendant to trial on a timely basis and abjectly failed to protect society.

The problem with the Commonwealth's efforts is systemic, or rather, no system. While one could analyze this issue by reviewing specific cases on the list and distinguishing their particular facts and circumstances, such an analysis misses the point. While certain cases may have had adjusted Rule 600 dates prior to Defendant, there was no management of the entire caseload. No one was keeping track of the mechanical or adjusted Rule 600 dates for the cases as a whole. No one in the District Attorney's Office was tracking Rule 600 at all. Essentially, it was left to each prosecuting attorney to evaluate a particular case to determine if Rule 600 was complied with. There was no evidence that attorneys communicated with each other or compared dates. There cannot be a reasonable

effort, or due diligence, when there is no system in place to accurately track all of the cases pursuant to their adjusted Rule 600 date. Moreover, and perhaps determinatively, no one from the Commonwealth made any effort to properly calculate the Rule 600 dates for all of the case on the list in order that they could properly be listed. Based on the evidence presented by the Commonwealth, the Court cannot reasonably conclude that any of the cases tried before the Defendant actually had Rule 600 dates earlier than the Defendant, as the Commonwealth had no record keeping system for tracking and adjusting Rule 600.

**ORDER**

**AND NOW**, this \_\_\_\_ day of July 2019, Defendant's Motion to Dismiss pursuant to Rule 600 is **GRANTED**.

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)  
Helen Stolinias, Esquire,  
Work file  
Gary Weber, Esquire, Lycoming Reporter