

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

|                     |  |
|---------------------|--|
| <b>COMMONWEALTH</b> | <b>: No. CR-154-2018</b>               |
|                     | <b>:</b>                               |
| <b>vs.</b>          | <b>:</b>                               |
|                     | <b>: Opinion and Order re</b>          |
|                     | <b>: Defendant's Motion to Dismiss</b> |
| <b>ETHAN ENTZ,</b>  | <b>: Pursuant to Rule 600</b>          |
| <b>Defendant</b>    | <b>:</b>                               |

**OPINION AND ORDER**

By way of background, on December 15, 2017, the Pennsylvania State Police filed a criminal complaint against Defendant Ethan Entz, charging him with aggravated assault by vehicle while driving under the influence of alcohol or a controlled substance, and related offenses arising out of a vehicle accident that occurred on September 23, 2017. Following a preliminary hearing held on January 24, 2018, the charges were held for court.

Defendant's arraignment scheduled for February 2, 2018 was waived, and the court placed this case on the May 8, 2018 pretrial list and the May 22, 2018 call of the list.

On June 8, 2018, the Commonwealth filed a motion to amend the Information to add one count of aggravated assault by vehicle and one count of recklessly endangering another person, which the court granted on July 19, 2018.

On January 23, 2019, Defendant filed a motion to dismiss pursuant to Rule 600.

The court held a hearing and argument on the motion on March 21, 2019. At the hearing, the court took judicial notice of the following facts: (1) the complaint was filed on December 15, 2017; (2) arraignment was scheduled for February 2, 2018; (3) arraignment

was waived; and (4) the case was placed on the call of the list initially set for May 22, 2018 and continued to be placed on call of the list thereafter but was never called to trial. The Commonwealth then called Eileen Dgien, the Deputy Court Administrator, as a witness.

Ms. Dgien testified that she had been the Deputy Court Administrator for 17 years and her duties included scheduling criminal trials and processing the criminal pretrial list. This case was listed as a two day trial. There were no two day trials with a later Rule 600 date that were called for trial during any of the trial terms from May 2018 through March 2019.

When asked if the Commonwealth had requested any continuances, Ms. Dgien responded that she did not have the docket. The only indication she had from the District Attorney's Office would have been unavailability during the trial term. Ms. Dgien did not believe the defense had requested any continuances.

Each term there were four days for jury selection, which began with the call of the list date for each term. Ms. Dgien testified regarding the pretrial dates and the information the parties provided regarding their unavailability, as well as the call of the list dates and the dates of each trial term.

This case was first listed on the May 8, 2018 pretrial list. The call of the list was May 22, 2018 and the trial term was from June 4, 2018 through July 20, 2018. During this June/July trial term, the District Attorney's office was unavailable June 7-17 and on July 16. The defense was unavailable on June 12, 13, 18-20, 25, and 29, as well as July 11 and 19.

The next pretrial date was July 16, 2018. The call of the list was July 31,

2018 and the trial term was August 6, 2018 through September 14, 2018. The District Attorney's office was unavailable on August 7, 8, 20, and 22, as well as September 10 through September 14. The defense was unavailable August 6, 7, 13, 15, 17, 22, 24, 28, 29 and 31. There was a one-half day nonjury trial with a later Rule 600 date that was tried during this term.

The next pretrial date was September 11, 2018 and the call of the list was September 25, 2018. The trial term was October 8, 2018 through November 16, 2018. The District Attorney's office was unavailable October 8-12, October 16-19, October 22, October 24-November 7, and November 14-16. The defense was unavailable October 8-12, 15, 17, 19, and 30-31, as well as November 8.

The January 15, 2019 call of the list was for the January 28 through March 8, 2019 trial term. The District Attorney's office was unavailable February 6-12 and February 28-March 1. The defense was unavailable January 30 and 31, February 5 and 19, and March 1 and 5.

The next pretrial date was February 19, 2019 and the call of the list was March 12, 2019. The trial term was March 18, 2019 through April 18, 2019. The District Attorney's office was unavailable March 20-22, March 29, April 3-5, April 9 and April 18. The defense was unavailable March 21-22, March 26, April 1-2, April 5, April 9-10, and April 15-16. There were two cases with later tentative Rule 600 dates that were called to trial during this term. Those trials were each scheduled for one day, but those two days were not consecutive; therefore, this case could not have fit in that slot.

When asked what constitutes unavailability for the Commonwealth, Ms.

Dgien indicated that she did not know. Holly, the trial clerk in the District Attorney's office, simply indicated that those were the dates the Commonwealth was unavailable. Ms. Dgien didn't receive or require a list of who was unavailable or why they were unavailable.

At the end of the hearing, the Commonwealth requested a briefing schedule. The court ordered the Commonwealth to file a brief in opposition to Defendant's motion based on the facts adduced at the hearing no later than March 29, 2019 and Defendant's supporting brief was due no later than April 8, 2019.

The Commonwealth filed a brief on March 29, 2019, but it included many facts that were not adduced at the hearing in this matter. The brief included information regarding a defense continuance of the preliminary hearing from December 20, 2017 to January 24 2018; the number of cases with earlier tentative Rule 600 dates than this case at each call of the list; and an assertion that, at the pretrial conference after the filing of Defendant's motion to dismiss, the assistant district attorney verbally requested that the case be scheduled as soon as possible. The brief also referenced exhibits regarding the calls of the list and notations of unavailability. These exhibits, however, were not introduced into evidence at the hearing. Furthermore, despite the representations in the brief, the exhibits were not attached to the brief that was filed with the clerk of courts or the copy that was provided to the court.

In the brief in support of the motion to dismiss, defense counsel does not dispute the continuance of the preliminary hearing or the number of cases on each call of the list with earlier tentative Rule 600 dates than this case. Rather, defense counsel argued that the number of cases on the trial lists speaks to the Commonwealth's lack of due diligence

and its failure to communicate and negotiate fair plea deals with defense attorneys. Defense counsel also argued that the Commonwealth failed to present any evidence to suggest that its witnesses were unavailable for good cause.

## **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 cause 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 criminal complaint in this case was filed on December 15, 2017. Therefore, the mechanical run date was December 15, 2018.

The Commonwealth asserts that this date should be adjusted to January 19, 2019 due to the defense continuance of the preliminary hearing from December 20, 2017 to January 24, 2018. While the Commonwealth offers this argument in its brief, it did not present any evidence to support this assertion at the hearing on this matter. “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)).

The court anticipates that the Commonwealth would argue that the court should exclude this time period because it presented evidence by submitting an exhibit with

its brief. The Commonwealth would fare no better with this argument. Although exhibits were referenced in the Commonwealth's brief, none were attached to the original brief filed with the clerk of court or the copy of the brief provided to the court. Moreover, "matters attached to or contained in briefs are not evidence and cannot be considered part of the record." *Commonwealth v. McBride*, 957 A.2d 752, 758 (Pa. Super. 2008). In fact, "[t]he practice of setting forth facts in a party's brief but not of record has been specifically condemned." *Commonwealth v. Stanton*, 440 A.2d 585, 588 (Pa. Super. 1982).

Even if the court excluded this time period, the adjusted run date would be January 19, 2019. Therefore, more than 365 days have passed since the filing of the charges.

The Commonwealth submits that despite the fact that more than 365 days have elapsed since the filing of the charges, this case cannot be dismissed because the Commonwealth exercised due diligence and any delay was the result of circumstances beyond the Commonwealth's control, specifically the unavailability of its witnesses and the court's crowded criminal docket. Again, the court cannot agree.

The court is not convinced that the Commonwealth has established that it exercised due diligence in this case. The court heard testimony from Ms. Dgien about the various trial terms and her tentative Rule 600 dates for some of the cases on the pretrial lists compared to this case, but Ms. Dgien is a court employee. There is nothing in the record to show what efforts, if any, the Commonwealth took to bring this case to trial, as the Commonwealth did not call its trial clerk as a witness. Ms. Dgien did not know whether the Commonwealth was ready for trial; she only knew the dates that the District Attorney's

Office was allegedly unavailable during the trial terms.

As the court previously noted, due diligence imposes a duty on the Commonwealth to employ simple record keeping systems. *Browne*, 584 A.2d at 906. The court questions whether the Commonwealth had any record keeping system of its own to track this case. The evidence that was presented at the hearing was that the defense did not request any continuances. Thus, it is likely that the Rule 600 date listed on Ms. Dgien's pretrial list was the mechanical run date. If the Commonwealth had been independently keeping track and adjusting Rule 600, it would have presented evidence at the hearing regarding the defense continuance of the preliminary hearing and/or informed Ms. Dgien that the date on her list was incorrect and needed to be adjusted for the continuance of the preliminary hearing. It did neither.

“When a case has possible Rule [600] problems, prosecutors must do everything reasonable in their power to see that the case is tried on time.” *Browne*, 584 A.2d at 905. There is nothing in the record to show that the Commonwealth made any request for this case to be scheduled for trial prior to either the mechanical run date or the adjusted run date contained in the Commonwealth's brief. *Commonwealth v. Aaron*, 804 A.2d 39, 43-44 (Pa. Super. 2002)(en banc)(the Commonwealth failed to exercise due diligence where it made no request to schedule the defendant's trial prior to the Rule 1100 run date). Even if the court could consider facts contained in a party's brief and it accepted the Commonwealth's representations contained therein, the Commonwealth did not request that the case be scheduled “as soon as possible” until the pretrial conference **after** Defendant filed his motion to dismiss, which would have been February 19, 2019 or 30 days beyond the



alleged adjusted run date of January 19, 2019.

The court acknowledges that case law holds that the Commonwealth cannot be held to be acting without due diligence when a witness becomes unavailable due to circumstances beyond its control. *Commonwealth v. Wendel*, 165 A.3d 952, 957 (Pa. Super. 2017)(officer unavailable due to previously scheduled training); *Commonwealth v. Hyland*, 875 A.3d 1175, 1191 (Pa. Super. 2005)(officer called into active duty) In those cases, however, the Commonwealth made a record that showed why the witness was unavailable and established that the unavailability was beyond the Commonwealth's control. Here, however, the record contains only bare statements of unavailability. Bare statements of unavailability, without more, do not establish due diligence. *Commonwealth v. Schuster*, 431 A.2d 1063, 1066 (Pa. Super. 1981); *Commonwealth v. Ehredt*, 401 A.2d 358, 360-361 (Pa. Super. 1979).

In *Commonwealth v. Mills*, 162 A.3d 323 (Pa. 2017), the Commonwealth argued that the time after the filing of the complaint and during which neither party was ready for trial was excludable. The Court disagreed, as this was simply the normal progression of the case and not delay attributable to the Commonwealth, the defense or any other entity. Justice Wecht, in his concurring opinion which was joined by Justice Todd and Justice Donahue, cautioned the Commonwealth that it must first establish its due diligence before other causes for delay, including judicial delay, may be considered. Justice Wecht stated:

“Judicial delay” is not a mechanism or totem that exempts the Commonwealth from its obligations under the Rules. It may be invoked only after the Commonwealth has demonstrated that it is ready, able, and willing to proceed with its case against the defendant. Otherwise, the due

diligence concept of Rule 600 would have little, if any, meaningful import. 162 A.3d at 326-327. Additionally, Justice Wecht noted the peculiar facts of *Bradford*<sup>1</sup> and stated “it can be hoped that Pennsylvania prosecutors no longer rely exclusively upon court systems to advance cases through the criminal justice process without an internal tracking system.” *Mills*, 162 A.2d at 327 n.2.

Unfortunately, that is exactly what appears to have happened in this case. It is questionable whether the Commonwealth had its own tracking system in this case, as the Commonwealth failed to present evidence regarding the continuance of the preliminary hearing or many of the other facts argued in its brief, and the Commonwealth tried to establish judicial delay as a result of a crowded criminal docket through the testimony of Ms. Dgien without presenting any evidence regarding its readiness for trial or its efforts to bring the case to trial within 365 days.

Since more than 365 days have elapsed from the filing of the complaint and the record fails to establish that the Commonwealth exercised due diligence, the court will grant Defendant’s motion to dismiss.

**ORDER**

**AND NOW**, this \_\_\_ day of April 2019, the court grants Defendant’s motion to dismiss. The charges filed against Defendant are dismissed with prejudice.

---

<sup>1</sup>In *Commonwealth v. Bradford*, 616 Pa. 122, 46 A.3d 693, 705 (2012), the Pennsylvania Supreme Court held that the Commonwealth did not fail to exercise due diligence when the Commonwealth turned over all of its paperwork to the Magisterial District Judge (MDJ) but he did not forward the case to the Court of Common Pleas in accordance with the Pennsylvania Rules of Criminal Procedure which was the trigger for the Commonwealth’s tracking system.

By The Court,

---

Marc F. Lovecchio, Judge

cc: Joseph Ruby, Esquire (ADA)  
Andrea Pulizzi, Esquire  
Gary Weber, Esquire (Lycoming Reporter)  
Work file