

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

**COMMONWEALTH OF PENNSYLVANIA** :  
 :  
 **v.** : **CP-41-CR-1960-2016**  
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 :  
 **FRANK GIRARDI, JR.,** : **RULE 600 DISMISSAL**  
 **Defendant** :

**OPINION AND ORDER**

Frank Girardi Jr. (Defendant) filed a Motion to Dismiss Pursuant to Rule 600 on April 17, 2019. A hearing on the Motion was held on June 21, 2019. At the hearing, Deputy Court Administrator Eileen Dgien (Dgien) testified on behalf of the Commonwealth. For the following reasons Defendant’s Motion is granted.

**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). At any time prior to trial a defendant “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). In computing the time for purposes of Rule 600, only “when the Commonwealth has failed to exercise due diligence” shall that time be included against the Commonwealth, “[a]ny other periods of delay shall be excluded from the computation.” Pa. R. Crim. P. 600(C)(1). When determining whether a violation of Rule 600 occurred two important functions must be weighed “the protection of the accused's speedy trial rights, and the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it.”

*Commonwealth v. Moore*, -- A.3d --, 2019 WL 2723872 at \*2 (Pa. Super. July 1, 2019).

“Excludable time is classified as periods of delay caused by the defendant,” whereas “[e]xcusable delay occurs where the delay is caused by circumstances beyond the Commonwealth's control and despite its due diligence.” *Id.* at \*3. Neither excludable or excusable time counts towards a defendant’s Motion to Dismiss pursuant to Rule 600. *Id.* “[T]ime attributable to the normal progression of a case simply is not ‘delay’ for purposes of Rule 600.” *Commonwealth v. Mills*, 162 A.3d 323, 325 (Pa. 2017). Additionally, “where a trial-ready prosecutor must wait several months due to a court calendar, the time should be treated as ‘delay’ for which the Commonwealth is not accountable.” *Id.*

The Court will first determine excludable time. Defendant’s criminal complaint was filed on September 27, 2017 charging Defendant with Burglary<sup>1</sup> and related crimes. Therefore Defendant’s initial mechanical run date was September 27, 2017. *See Commonwealth v. Barbour*, 189 A.3d 944, 947 (Pa. 2018) (Description of how to calculate and adjust mechanical Rule 600 dates). Defendant’s preliminary hearing was initially scheduled for October 5, 2016, but was continued by Defendant until November 2, 2016. Defendant’s mechanical run date therefore is adjusted twenty-eight (28) days to October 25, 2017. On January 31, 2017, Defendant filed an Omnibus Pretrial Motion, which this Court denied on July 13, 2017. Defendant argues portions of that time period should not be excluded from the calculation of his mechanical run date. This Court disagrees and finds that case law is clear that the time is excludable. *See Commonwealth v. Cook*, 865 A.2d 869, 875-76 (Pa. Super. 2004) (Period from filing of a Motion to Suppress until rendering of the court’s decision is all excludable for purposes of Rule 600). In addition, during that time and through till October 17, 2017 Defendant had multiple continuance requests. *See Continuance Requests 5/11/17*

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<sup>1</sup> 18 Pa. C.S. § 3502(a)(2).

and 8/11/17. Defendant's mechanical run date must be adjusted by the period of two hundred sixty (260) days, the period from January 31, 2017 to October 17, 2017, to July 12, 2018.

From there the burden rests on the Commonwealth to demonstrate "due diligence" to determine what amount of time is excusable delay. The time period from the October 2017 call of the list to the January call of the list, January 9, 2018, runs against the Commonwealth as it requested a continuance. *See* Continuance Request 9/26/17. Additionally, since the Commonwealth provided no evidence to account for the time period from the January call of the list until the March call of the list, March 20, 2018, that time shall also run against the Commonwealth. The Commonwealth does contend that the time period from March 20, 2018 to the filing of the present motion is excusable delay. *See* Commonwealth's Brief 7/26/19, at 1.

Commonwealth's Exhibits #1-6 are lists produced by Dgien, which show the cases selected for trial during a particular call of the list, as well as the remainder of the cases on the trial list. The lists are organized by Rule 600 date. Dgien testified that she was not sure who came up with the Rule 600 date, that at one point it was her, but someone else is now calculating the date.<sup>2</sup> Commonwealth's Exhibit #1, call of the list for March 20, 2018, had Defendant's Rule 600 date as April 18, 2018 and it was slated as a one day jury trial. Twenty-two (22) cases were slated for jury selection, none of which had a later Rule 600 date than Defendant.<sup>3</sup> Sixty-three (63) cases on the back-up list had sooner Rule 600 dates.

Commonwealth's Exhibit #2, call of the list for May 22, 2018, had Defendant's Rule 600 date

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<sup>2</sup> The Rule 600 date in the lists appears to be the date 365 days from the date of the complaint plus any time determined to be excludable, but the dates cannot be verified as to accuracy.

<sup>3</sup> Throughout the remainder of this Opinion, cases scheduled for jury selection includes those listed as immediate back-ups. Additionally, the numbers provided in this Opinion are taken directly from the Exhibits themselves and the numbers given are different than those as testified to by Dgien.

as April 18, 2018 and it was slated as a one day jury trial. Twenty-one (21) cases were listed for jury selection, none of which had a later Rule 600 date than Defendant. Thirty-two (32) cases on the back-up list had sooner Rule 600 dates. The time from March 20, 2018 to July 31, 2018, this Court finds to be excusable. There was a system in place and Defendant's Rule 600 date was later than other cases, which were proceeding to jury selection. Regardless of whether the Rule 600 dates of all the cases were completely accurate, there was a system in place established between the Commonwealth and Court Administration to list the cases and bring the cases to trial based on Rule 600. The Commonwealth did not request that Defendant's case be continued and the determination of what cases were selected was based on Rule 600. Therefore one hundred thirty-four (134) days needs to be added to Defendant's mechanical Rule 600 date, making the new date November 23, 2018.

Commonwealth's Exhibit #3, call of the list for July 31, 2018, had Defendant's Rule 600 date as April 18, 2018 and it was listed as a one day jury trial. Six cases listed for jury selection had later Rule 600 dates and six cases had sooner Rule 600 dates. Ten cases on the back-up list had sooner Rule 600 dates. Commonwealth's Exhibit #4, call of the list for September 25, 2018, had Defendant's Rule 600 date as April 18, 2018 and it was listed as a two day jury trial. Seventeen cases listed for jury selection had sooner Rule 600 dates and five cases had later Rule 600 dates. Of those five cases, only one could have satisfied the two days necessary for Defendant's trial. Nine cases on the back-up list had sooner Rule 600 dates. The next call of the list was January 15, 2019. *See* Commonwealth's Exhibit #5. The Court finds that the period from July 31, 2018 to January 15, 2019 is not excusable. Due diligence requires "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." *Moore*, 2019 WL

2723872 at \*3. If the Commonwealth is going to rely on call of the list sheets created by Dgien then it is also bound by how those lists are executed. Aside from the fact that the Rule 600 dates cannot be verified for accuracy as no definitive evidence was provided of how those dates were determined,<sup>4</sup> cases with Rule 600 dates sooner than Defendant's were scheduled while Defendant's was not. On the July 31, 2018 call of the list Defendant's case was still listed as a one day trial and could have been put in the place of any of the other six cases that had a later Rule 600 date. On September 25, 2018 call of the list one case that was called had a later Rule 600 date and Defendant's case could have been called in its place.<sup>5</sup> Since the next call of the list was not until January 15, 2019, beyond Defendant's mechanical run date of November 23, 2018, Defendant's rights under Pa. R. Crim. P. 600(A)(2)(a) have been violated, and therefore the case must be dismissed. *See also Commonwealth v. Ceruti*, CR 536-2018 (Lyco. Cnty. Ct. Com. Pleas July 10, 2019) (Decision by Judge Marc F. Lovecchio determining that the Commonwealth cannot simply rely on Court Administration to properly schedule cases in accordance with Rule 600 and the Commonwealth has the burden at a hearing on a Motion to Dismiss pursuant to Rule 600 to demonstrate due diligence).

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<sup>4</sup> Defendant's Rule 600 date as listed April 18, 2018 is clearly incorrect as seen above.

<sup>5</sup> It is also important to note, Attorney Campana was the attorney listed on the other case that was called, so clearly he would have been available for trial on those dates.

**ORDER**

**AND NOW**, this 2<sup>nd</sup> day of August, 2019, based upon the foregoing Opinion, Defendant's Motion for Dismissal Pursuant to Pursuant to Pa. R. Crim. P. 600 is hereby **GRANTED**. It is **ORDERED** and **DIRECTED** that Defendant's case is **DISMISSED** with prejudice.

By the Court,

Nancy L. Butts, President Judge

cc: DA (JR)  
Peter Campana, Esq.