

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1972-2017; CR-2139-2017
:
vs. :
:
KASAN SANDERS, : Opinion and Order regarding
: Defendant's Motion to Dismiss
Defendant : For Violation of Rule 600

OPINION AND ORDER

By way of background, under 1972-2017 a criminal complaint was filed on November 9, 2017, charging Defendant with four counts each of possession with intent to deliver a controlled substance, delivery of a controlled substance, possession of a controlled substance and criminal use of a communications facility. Under 2139-2017, a criminal complaint was filed on December 12, 2017, charging Defendant with four counts of persons not to possess firearms and one count each of possession with intent to deliver a controlled substance, delivery of a controlled substance and possession of a controlled substance.

On May 22, 2018, Defendant requested a continuance to the July 16, 2018 pretrial list and the July 31, 2018 call of the list. Defendant then requested another continuance request, which was granted and these cases were continued to the September 11, 2018 pretrial list and the September 25, 2018 call of the list.

On September 27, 2018, the cases were called for jury selection and trial was scheduled for October 12, 2018. At the time of jury selection and at Defendant's request, the firearm charges were severed and the remaining charges were continued by Order of September 28, 2018 to the next jury selection date. (Defendant's Motion, paras. 8 & 9; Order

Commonwealth's Exhibit 3 (emphasis original).

On August 14, 2019, Defendant filed his Motion to Dismiss for Violation of Rule 600.

On August 15, 2019, a jury was selected and these cases are scheduled for trial on September 6, 2019.

On August 28, 2019, the court held a hearing and argument on Defendant's Motion at which the Deputy Court Administrator, Eileen Dgien, testified regarding the scheduling of these cases for trial and the defense continuances, and the Commonwealth introduced its three exhibits.

DISCUSSION

Rule 600 states, in relevant part:

(A) Commencement of Trial; Time for Trial

* * * *

(2) Trial shall commence within the following time periods.

(a) 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.

(C) Computation of Time

(1) For purposes of paragraph (A), period of delay at any stage of the proceedings caused by the Commonwealth 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 will be excluded from the computation.

* * *

(3)(a) When a judge or issuing authority grants or denies a continuance:

* * *

(ii) the judge shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance. The judge also shall record to which party the period of delay caused by the continuance shall be attributed, and whether the time will be included in or excluded from the computation of the time within which the trial must commence in accordance with this rule.

(b) The determination of the judge or issuing authority is subject to

of September 28, 2018).¹

On October 12, 2018, Defendant waived his right to a jury trial and a bench trial was held on the firearms offenses (Counts 1 through 4) of case 2139-2017. The remaining charges in case 2139-2107 and all of the charges in case 1972-2017 were placed on the December pretrial list.

On December 13, 2018, the Commonwealth requested a continuance because the “Commonwealth’s material witness, specifically the affiant [in] the case, [was] not available due to medical leave for the entire [trial] term.” The Honorable Nancy L. Butts granted the continuance request on December 13, 2018, placed these cases on the February 19, 2019 pretrial list, and noted that the time runs against the Commonwealth. See Commonwealth’s Exhibit 1.

After the call of the list on March 12, 2019, Judge Butts issued an order which indicated that these cases were not reached, they would continue on the trial list and be placed on the April 2, 2019 pretrial list. See Commonwealth’s Exhibit 2.

On April 29, 2019, the court entered an order granting the Commonwealth’s continuance request, which specifically stated:

following a conference with counsel, and the court being convinced that the Commonwealth’s material witness is not available and that this unavailability arose after the pretrial scheduling of the matters, the Court will continue the trial scheduled for June 7, 2019. These matters are CONTINUED to the **July 9, 2019, pretrial list** and the **August 13, 2019, call of the list**. If there is any Rule 600 issue, the time shall run against the Commonwealth and not the defendant.

¹ Although the Commonwealth failed to introduce a copy of this Order as an exhibit, the court will take judicial notice of it since the fact of the Order and the substance of its contents are acknowledged in Defendant’s Motion.

review as provided in paragraph (D)(3).

(D) Remedies

(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. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

* * *

(3) Any requests for review of the determination in paragraph (C)(3) shall be raised in a motion or answer filed pursuant to paragraph (D)(1) or (D)(2).

Pa. R. Crim. P. 600.

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 368, 374 (Pa. Super. 2018) (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.* The courts must carefully factor into 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)).

The Commonwealth has the burden of proving by a preponderance of the evidence that it acted with due diligence and this duty to act extends to all stages of the criminal case. *Commonwealth v. Mills*, 162 A.3d 323, 326 (Pa. 2017)(Wecht, J., concurring); *Commonwealth v. Burno*, 154 A.3d 764, 794 (Pa. 2017). 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).

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. Hyland*, 875 A.2d 1175, 1191 (Pa. Super. 2005)(trooper was unavailable due to deployment to Iraq).

With respect to case 1972-2017, the criminal complaint was filed on November 9, 2017; therefore, the mechanical run date was November 8, 2018. With respect to case 2139-2017, the criminal complaint was filed on December 12, 2017; therefore, the mechanical run date was December 11, 2018.

Defendant requested continuances from the May 22, 2018 call of the list to the July 31, 2018 call of the list and from the July 31, 2018 call of the list to the September 25, 2018 call of the list. The delay from May 22, 2018 through September 25, 2018 is 126 days that are attributable to the defense and excludable for Rule 600 purposes. Adding 126 days to November 8, 2018, yields an adjusted run date of March 14, 2019 in case 1972-2017. Adding 126 days to December 11, 2018, yields an adjusted run date of April 16, 2019 in case 2139-2017.

On September 27, 2018, Defendant's cases were scheduled for jury selection. At that time, Defendant requested severance of the firearm charges and a continuance on the remaining charges. This request was granted. A jury was selected for a trial on the firearm charges and the remaining charges were continued to the next jury selection. See Order dated

September 27, 2018. The call of the list and the first day of jury selection for the next trial term was January 15, 2019. The delay from September 27, 2018 to January 15, 2019 is 110 days that are attributable to the defense and excludable for Rule 600 purposes. Adding 110 days to March 14, 2019, yields an adjusted run date of July 2, 2019 in case 1972-2017. Adding 110 days to April 16, 2019 yields an adjusted run date of August 4, 2019 in case 2139-2017.

In determining the adjusted run date, the court did not find that the time attributable to the Commonwealth's continuances was excludable delay, at least in part because the Commonwealth failed to follow the procedure set forth in Rule 600(D)(3).

Even when more than 365 days have elapsed since the filing of the complaint, though, the court cannot dismiss the case unless the Commonwealth failed to exercise due diligence in bringing the cases to trial.

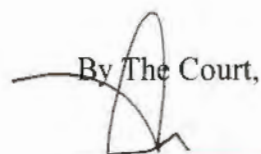
While case 1972-2017 was not tried by July 2, 2019 and case 2139-2017 was not tried by August 4, 2019, such was not due to a lack of due diligence by the Commonwealth. Defendant was responsible for the delay from May 22, 2018 to January 15, 2019. The Commonwealth was unable to try these cases during the January 28, 2019 to March 1, 2019 trial term because the affiant was on medical leave during the entire term. See Commonwealth's Exhibit 1. While that delay was attributable to the Commonwealth, it was delay that was outside of the Commonwealth's control and it was not a result of a lack of due diligence. The cases were on the trial list for the next trial term, but were not reached. See Commonwealth's Exhibit 2. During the following trial term, the cases were scheduled for the call of the list/jury selection on April 29, 2019 and a trial on June 4, 2019; however a

material witness for the Commonwealth was unavailable and the cases were continued to the July 9, 2019, pretrial list and the August 13, 2019, call of the list. See Commonwealth's Exhibit 3.

Although ideally the court would have liked the Commonwealth to provide more information at the Rule 600 hearing regarding why the case was not reached and why its witness was unavailable for the June 4, 2019 trial date (or perhaps the court should have done a better job documenting such in its Order dated April 29, 2019), due diligence does not require perfect vigilance and punctilious care; it only requires reasonable efforts. It is clear to the court that the Commonwealth made reasonable efforts to bring these cases to trial within the time limits of Rule 600, but it was unable to do so due primarily to defense continuances and the unavailability of its witnesses.

ORDER

AND NOW, this 5 day of September 2019, the court DENIES Defendant's Motion to Dismiss for Violation of Rule 600. These cases shall proceed to trial on September 6, 2019, as scheduled.

By The Court,


Marc F. Lovecchio, Judge

cc: Jerry Grill, Esquire (ADA)
Matthew Welickovitch, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work file