

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

COMMONWEALTH OF PENNSYLVANIA	:	CR-1126-2018
	:	
vs.	:	
	:	CRIMINAL DIVISION
MARK A. BILLUPS,	:	
Defendant	:	MOTION <i>IN LIMINE</i>

OPINION

I. Factual and Procedural History

On May 8, 2018, Defendant was charged with several crimes including fleeing or attempting to elude a police officer. Defendant waived his arraignment on August 8, 2018. After several continuances, this matter proceeded to a pre-trial conference on July 14, 2020 where it was indicated that the case would proceed to a non-jury trial. On July 31, 2020, Defendant filed a Notice of Alibi Defense, stating that he intends to present evidence at trial proving that he was in Philadelphia on the day in question. This proposed evidence includes timecards and paystubs from Defendant’s employer as well as the testimony of Defendant’s brother, Aliek Carr, who was allegedly present with the Defendant in Philadelphia on the day in question. Promptly after receiving Defendant’s notice, the Commonwealth filed a Motion *in Limine* to Preclude the Defendant’s Alibi Defense on August 7, 2020. The Commonwealth asserts that the Defendant’s notice is “egregiously” untimely and, due to the prejudice to the Commonwealth, any evidence in support of his alibi defense should be precluded. Defendant admits that his notice is untimely. However, he asserts that there is no

prejudice to the Commonwealth and that Counsel for Defendant verbally informed the Commonwealth of Defendant's alibi prior to his arraignment. Argument on this matter was held on August 27, 2020 and a bench trial is scheduled for September 10, 2020.

II. Discussion

Pursuant to the Rules of Criminal Procedure, a Notice of Alibi Defense must be filed within thirty (30) days after Defendant is arraigned. Pa.R.Crim.P. 567(A) (a notice of alibi defense shall be filed "no later than the time required for filing the omnibus pretrial motion provided in Rule 579"); Pa.R.Crim.P. 579(A) ("the omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment, unless opportunity therefor did not exist, or the . . . defense attorney . . . was not aware of the grounds for the motion"). When a defendant fails to timely file his notice, the Court may:

1. Exclude all or parts of any evidence offered by the defendant to prove his alibi, except the defendant's testimony;
2. Grant a continuance to allow the Commonwealth to investigate the evidence; or
3. Make such other order as the interests of justice require.

Pa.R.Crim.P. 567(B)(1).

The purpose of Rule 567 is to ensure both parties have ample opportunity to investigate the facts and circumstances surrounding the guilt or innocence of the defendant. *Com. v. Lyons*, 833 A.2d 245, 257 (Pa. Super. 2003), *citing Com. v. Fernandez*, 482 A.2d 567, 572 (Pa. Super. 1984). Courts have consistently precluded evidence of defendant's alibi defense when the defendant fails to timely notify the Commonwealth of his intention to introduce such evidence. *See, i.e., Lyons*, 833 A.2d at 257 (precluding defendant's alibi witnesses when notice was given two days after trial commenced); *Com. v. Zimmerman*, 571

A.2d 1062 (Pa. Super. 1990) (precluding defendant's alibi evidence when he waited until the day of trial to provide notice to the Commonwealth); *Com. v. Anthony*, 546 A.2d 1122 (Pa. Super. 1988) (prohibiting defendant from introducing alibi evidence when he failed to give the Commonwealth notice until the morning of trial).

In the instant matter, the Commonwealth's primary argument is that Defendant's notice was not only late, but is almost two years late, the notice having been due on September 6, 2018. This, the Commonwealth argues, is inherently prejudicial because it has no way to establish when the Defendant's employer's timesheets were created and because the memory of potential witnesses to refute Defendant's evidence have likely faded, given this incident occurred over two years ago. Defendant argues that, while the notice was untimely, there is no prejudice to the Commonwealth because, at the time the notice was filed, it had forty-one (41) days prior to trial to investigate. The Commonwealth admits that it has not taken any steps to locate additional documentation or speak with Aliek Carr since receiving the notice. Specifically, the Commonwealth argues that speaking with Mr. Carr would be "futile" since Mr. Carr also has pending criminal charges in Lycoming County.

The Court finds that the extremely late filing of Defendant's Notice of Alibi Defense is prejudicial to the Commonwealth. The Defendant has provided no legitimate explanation as to why he failed to give notice of his alibi – an alibi of which he clearly had knowledge at the time of his arrest – until almost two years after his arraignment. The Defendant's failure has impaired the Commonwealth's ability to verify or rule out the Defendant's alibi. Therefore, the Court hereby grants the Commonwealth's Motion *in Limine*. The Court will fashion the remedy to address the prejudice suffered by the Commonwealth. As the Commonwealth stated it would be "futile" to speak with Mr. Carr due to his own pending

criminal charges and relation to the Defendant, the Court holds that the Commonwealth did not suffer prejudice in relation to the identification of potential alibi witness, Aliek Carr. Since Mr. Carr had at least one active criminal case in Lycoming County at the time this matter was initiated, pursuant to the Commonwealth's argument, speaking with Mr. Carr in 2018 would have been just as futile as it would be now. For the above reasons, all evidence regarding Defendant's alibi defense is precluded, except the testimony of Defendant and Aliek Carr.

ORDER

AND NOW, this 28th day of August, 2020, upon consideration of the Commonwealth's Motion *in Limine* and Defendant's response thereto, the Commonwealth's Motion is **GRANTED** in part and **DENIED** in part. Defendant is precluded from introducing any evidence in support of his alibi defense except the testimony of the Defendant and Aliek Carr.

By the Court,

Ryan M. Tira, Judge

RMT/ads

CC: DA (JR)
Peter Campana, Esquire
Gary Weber, Esq. – Mitchell Gallagher