

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No's.: CP-41-CR-0001090-2020  
: CP-41-CR-0001155-2020  
:  
vs. : CRIMINAL DIVISION  
:  
: Commonwealth's Motion to  
JAHREESE STRICKLAND, : Reconsider  
Appellant

**OPINION AND ORDER**

Under 1090-2020, Defendant is charged with delivery of a controlled substance and related offenses. Under 1155-2020, Defendant is charged with possession with intent to deliver, delivery of a controlled substance and related offenses. Both cases are on the trial list.

On October 30, 2020, Defendant filed an omnibus motion under 1090-2020, which included a motion for writ of habeas corpus. The hearing on this motion was originally scheduled for December 1, 2020. On October 30, 2020, Defendant filed an omnibus motion under 1155-2020, which included a motion for a writ of habeas corpus. The hearing on this motion was originally scheduled for the same date, December 1, 2020.

On or about November 17, 2020, the Commonwealth filed a request to continue the hearings with the basis for the application being: "Commonwealth would like to have preliminary hearings transcribed." Defendant agreed with the Commonwealth's request.

By Order dated November 18, 2020, the court continued the hearings to January 27, 2021. In the Order continuing the hearings, the court included the time between December 1, 2020 and January 27, 2021 to run against the Commonwealth for Rule 600

purposes.

The Commonwealth filed a motion to reconsider on December 23, 2020 alleging that because Defendant, through counsel, “had no objection” to the Commonwealth’s request, the time between the hearing dates should be excludable for Rule 600 purposes. Argument was held on January 20, 2021.

Initially, the court notes some procedural irregularities with the Commonwealth’s motion to reconsider. The motion was not filed within 30 days of the court’s ruling. The court’s ruling occurred on November 18, 2020, but the Commonwealth did not file its motion to reconsider until December 23, 2020. Furthermore, although Rule 600(c)(3)(b) permits a party to request review of a court’s determination to which party the period of delay shall be attributed and whether the time will be included or excluded from the computation of the time within trial must commence, such a review is “as provided in paragraph (D)(3).”

Paragraph (D)(3) states: “Any request for review of the determination in paragraph (C)(3) *shall be raised in a motion or answer filed pursuant to paragraph (D)(1) or paragraph (D)(2).* Pa. R. Crim. P. 600(D)(3)(emphasis added). Paragraph (D)(1) permits a defendant’s attorney or an unrepresented defendant to file a written motion to dismiss, at any time before trial, when a defendant has not been brought to trial within the time periods set forth in paragraph (A). If a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), paragraph (D)(2) permits the defendant’s attorney or an unrepresented defendant to file a written motion requesting immediate release on nominal bail. In other words, the Rule envisions the defendant asserting a request for review in a motion to dismiss or motion for nominal bail or the Commonwealth asserting a request in its answer to such a

motion. It does not contemplate the review occurring in a motion for reconsideration. Nevertheless, as the defense did not lodge any objection to the Commonwealth's motion for reconsideration, any procedural irregularity has been waived.

In this case, the court clearly included the time between the hearing dates, within which the trial must commence, for Rule 600 purposes. In other words, the time was to run against the Commonwealth.

Under Rule 600, a trial must commence within 365 days from the date on which the complaint is filed. Rule 600(A)(2)(a). Periods of delay caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in this computation. Rule 600(c)(1).

During oral argument in this matter, the Commonwealth added to its argument set forth in its motion by noting that the delay was excusable delay in that the Commonwealth exercised due diligence. The court cannot agree.

The Commonwealth caused the delay in this matter. The Commonwealth requested the continuance because it wanted the transcripts of the preliminary hearings.

Defendant, through counsel, apparently tape-recorded the preliminary hearings and was agreeable to have them transcribed and provide such to the Commonwealth. These transcribed hearings were apparently not available on November 17, 2020 when the continuance request was filed and might not have been available for the December 1, 2020 hearing. Nonetheless, the Commonwealth chose not to record the preliminary hearings and chose instead to rely on defense counsel. Moreover, the Commonwealth did not need the transcripts for the habeas corpus hearings; rather, they "wanted" the transcripts to introduce them in lieu of presenting live testimony.

Where a defendant seeks to challenge the sufficiency of the evidence presented at the defendant's preliminary hearing, the defendant may do so by filing a writ of habeas corpus. *Commonwealth v. Landis*, 48 A.3d 432, 444 (Pa. Super. 2012) (en banc). At the habeas corpus hearing, the Commonwealth must present sufficient evidence to prove a prima facie case. *Commonwealth v. Predmore*, 199 A.3d 925, 928-29 (Pa. Super. 2018).

At a habeas corpus hearing, the Commonwealth must produce evidence of every element of the charged offenses as well as defendant's complicity therein. *Commonwealth v. Lambert*, 2020 PA Super 297 at 6, 2020 WL 7650278 at \*2-3 (December 24, 2020), citing *Commonwealth v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2011) (en banc).

To meet this burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. *Lambert, id.* at \*3. Depending on the particular circumstances of the case, the Commonwealth may introduce the preliminary hearing record and/or present evidence. *Id.* The Commonwealth is required to establish a prima facie case by introducing some manner of evidentiary support. *Id.*

Where no transcript of the preliminary hearing exists or where there is no record to rely upon, the Commonwealth must produce evidence to satisfy its burden. *Id.*

During oral argument in his matter, the Commonwealth presented arguments of due diligence in connection with seeking the transcript. This due diligence argument is misplaced. There was no argument why the Commonwealth could not have submitted or played the recording of the preliminary hearing at the habeas corpus hearing. The Commonwealth routinely utilizes recordings at hearings and in trials. The types of recordings have included prison phone calls, audio and/or videotaped interviews of

defendants and motor vehicle recordings (MVRs) from dash cameras in law enforcement vehicles. Furthermore, there was no evidence of due diligence with respect to obtaining witnesses for the hearing. In fact, there was no *evidence* of due diligence whatsoever. There were only arguments of counsel related to efforts to procure a transcript of the preliminary hearing from defense counsel. Arguments of counsel are not evidence. *Commonwealth v. Puksar*, 597 Pa. 240, 951 A.2d 267, 280 (2008).

Accordingly, this court has no hesitation in concluding that the Commonwealth caused the delay and failed to exercise due diligence in preventing the delay.

Commonwealth's second argument, however, does have merit. It is undisputed that defense counsel did not oppose the Commonwealth's request. When the defense indicates approval or acceptance of the continuance, the time associated with the continuance is excludable under Rule 600. *Commonwealth v. Hunt*, 858 A.2d 1234, 1241 (Pa. Super. 2004); *Commonwealth v. Murray*, Lyc. Cty. No. CR-183-2018 (Lovecchio, J., April 29, 2019).

Accordingly, the Commonwealth's motion to reconsider shall be granted.

### **ORDER**

**AND NOW**, this \_\_\_\_ day of January 2021, following a hearing and argument on the Commonwealth's Motion to Reconsider pursuant to Rule 600, said motion is granted. The time between December 1, 2020 and January 27, 2020 shall be excludable for Rule 600 purposes. The court notes that this Order does not address the excludable time or any excusable time attributed to any other periods associated with this case.

By The Court,

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Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)/Michael Sullivan, Esquire (ADA)  
Andrea Pulizzi, Esquire/Timothy Reitz, Esquire  
Work file  
Gary Weber, Esquire