

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1197-2020  
:   
vs. :   
:   
: Opinion and Order re  
ERNEST LORENZO LEONARD SR., : Defendant's Motion to Dismiss  
Defendant : Pursuant to Rule 600

**OPINION AND ORDER**

On August 26, 2020, Officer Brittany Alexander of the Williamsport Bureau of Police filed a criminal complaint against Ernest Lorenzo Leonard, Sr. (“Defendant”), charging him with two counts each of rape of a complainant who suffers from a mental disability, involuntary deviate sexual intercourse with a complainant who suffers from a mental disability, sexual assault with a complainant who suffers from a mental disability, and aggravated indecent assault of a complainant who suffers from a mental disability.

On May 11, 2023, Defendant filed a motion to dismiss with prejudice pursuant to Rule 600. As Defendant was scheduled for jury selection on May 15 and trial on May 17 and 18, the court scheduled the hearing on Defendant’s motion for immediately after his jury selection, as there was no other available time on the court’s schedule. At the hearing, the Commonwealth presented two witnesses and twenty-one exhibits.

Martin Wade testified that he is the First Assistant District Attorney, and he calculates, adjusts and tracks Rule 600 for all the cases on the pretrial list. He compiles a chart and provides it to the Deputy Court Administrator (DCA), April McDonald, to assist her in scheduling criminal trials. He starts his calculations with the filing of the criminal complaint. He then excludes defense continuance requests, Commonwealth continuance requests that the defense indicates its concurrence, administrative orders regarding the

pandemic, and omnibus pretrial motions filed by a defendant. He also considers excusable delay where the Commonwealth was unable to select a jury because the case was not given a jury selection date by the DCA.

The criminal complaint was filed in this case on August 26, 2020. There were six administrative orders in Lycoming County which suspended the statewide rules regarding speedy trials due to the pandemic. The Commonwealth admitted these orders as Commonwealth's Exhibits 1 through 6. According to Mr. Wade's calculations, this resulted in excludable time from August 26, 2020 through and including May 31, 2021.

Mr. Wade also testified that, even absent the pandemic delay, there would be excludable time from December 14, 2020 through May 17, 2021 due to the defense omnibus motion and continuance requests related to that motion. He did not include that in his calculations, however, because it overlapped with the excludable time due to the pandemic.

Mr. Wade testified that he calculated June 1, 2021 through July 13, 2021 as excusable delay because Defendant's case was #135 of 169 cases eligible for jury selection during the week of May 17, 2021. The Commonwealth was ready for trial but the DCA did not give this case a jury selection date.

Mr. Wade testified that on July 13, 2021 the defense requested a continuance request, which was granted until October 4, 2021, the first day of the week of jury selection for the next trial term. On September 14, 2021, the defense requested a continuance request, which was granted to January 10, 2022 (the first day of jury selection for the next trial term) due to a change in counsel.<sup>1</sup> The Commonwealth asked the court to take judicial notice of the court

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<sup>1</sup> Defendant's attorney, Matthew Welickovitch, left the Public Defender's Office to take a job in the District Attorney's office, and current counsel began representing Defendant.

orders related to those continuance requests, which the court did.

After the December 2021 pretrial conferences, Mr. Wade sent an email to the DCA on December 30, 2021, which included Mr. Wade's spreadsheet of adjusted Rule 600 dates for the 272 cases on the list of potential trials for the January/February 2022 trial term. At that time, Defendant's case was #117 of 272. At that time, Mr. Wade was not excluding time due to the administrative orders related to the pandemic because he was not yet certain how the courts would treat this time until the Superior Court issued a decision holding the time was excludable. The email and the spreadsheet were admitted as Commonwealth's Exhibits 8 and 9.

On March 20, 2022, Mr. Wade sent another email to the DCA. See Commonwealth Exhibit 10. Mr. Wade's spreadsheet with the calculations of adjusted Rule 600 dates was attached to the email. See Commonwealth Exhibit 11. At that time, Defendant's case was #103 of 307 cases. Mr. Wade added the delay between January and April as excusable delay because, although the Commonwealth was ready for trial, Defendant's case was not given a jury selection date in January due to its position on the list. Mr. Wade calculated Defendant's adjusted Rule 600 date as October 13, 2022.

On July 1, 2022, Mr. Wade sent an email to the DCA. In his email, he made demands because there were far too many cases on the list. He asked for more jury selection dates, he asked to select as many juries as possible and to try as many cases as possible, and he asked that Judge Linhardt select and try criminal case. See Commonwealth Exhibit 12. At this time, Defendant's case was #245 of 320 cases. See Commonwealth Exhibit 13.

Mr. Wade testified about the limitations on criminal jury selections and the changes to the way jury selections occurred due to the pandemic. He stated that civil jury selections

were taking up court time. In July 2022, Lycoming County was down one main criminal judge. Senior Judge Kenneth Brown was brought in to help but he was limited in the number of days per month that he could work. The other judges had other matters that could not be continued or removed due to time limits associated with those matters such as bench warrants, Protection From Abuse (PFA) hearings, juvenile proceedings, Children and Youth Services (CYS) proceedings, and probation violation hearings. In particular, the number of criminal matters that could be scheduled in courtroom #3 was limited by the juvenile and CYS proceedings that also were scheduled in that courtroom. He also noted that prior to the COVID-19 pandemic, four to eight juries could be picked each day during a week of jury selections held every three months. As a result of the pandemic, the social distancing requirements and the space limitation of the jury lounge, the number of jury selections was reduced to selecting one jury in the morning and one jury in the afternoon.

The next week of jury selections was October 17, 2022. On October 6, 2022, Mr. Wade sent an email to the DCA. In this email, Mr. Wade asked for the following: every case on the list be scheduled for jury selection this October; any civil cases be continued to make room for more criminal trials; more judges be brought in to select more juries; more courtrooms be open during jury selection week so that more juries can be selected; and Senior Judge Brown be permitted to select more than two juries per day. See Commonwealth Exhibit 14. As an attachment to the email, Mr. Wade sent his spreadsheet of adjusted rule 600 dates. Defendant's case was #76 out of 274 cases. See Commonwealth's Exhibit 15. Defendant's case was listed as a back-up on the jury selection chart for a jury selection on the afternoon of October 20, 2022 and trial November 8 and 9, 2022, but it was not selected. See Commonwealth's Exhibit 16. All of the Commonwealth's witness were

available and the Commonwealth was ready for trial. Mr. Wade deducted the time until the next trial term as excusable delay.

On December 29, 2022, Mr. Wade sent an email to the DCA with his adjusted Rule 600 calculations added to the original pretrial spreadsheet so the DCA, Mr. Wade and Melissa Bell<sup>2</sup> would be working from the same list. See Commonwealth's Exhibit's 17 and 18. Again, Mr. Wade asked that to "the extent you can substitute criminal jury selections for civil jury selections, we prefer that you do so." Commonwealth's Exhibit 17.

Mr. Wade testified that near the end of 2022, he was part of a meeting with the court, the DCA, and some members of the defense bar to discuss alternatives to address the size of the trial list. The result was a change in 2023 to picking juries four days every month on Mondays and Tuesdays. He indicated that is causing headaches and inconveniences. There are no breaks and criminal trials are always happening, but the new system seems to be working. The list is down to about 150 cases for the current trial term.

For jury selections in April and May, 2023, Mr. Wade sent the DCA an email simply asking that cases be scheduled according to Rule 600 dates with the oldest cases getting scheduled first. See Commonwealth's Exhibit 19. Attached to the email was the March 2023 pre-trial list with Mr. Wade's calculations of adjusted Rule 600 dates added. See Commonwealth's Exhibit #20. Defendant's case was #24 of 163 cases. His case was the first jury selection for the afternoon of May 15, 2023 (see Commonwealth's Exhibit #21) and a jury was selected.

Mr. Wade admitted on cross-examination that the last defense continuance request in this case was on September 14, 2021. He explained that Defendant's case moved down on

the list without any continuance requests because the list was flooded in July 2022 with approximately 100 new cases where eight or nine months of time had already run for Rule 600 purposes. He explained that the Commonwealth was ready for trial and made efforts to schedule this case for trial but it was not given a jury selection date so the time was excusable. When defense counsel asked if in perpetuity Rule 600 would never take effect for this case and others like it with pandemic delay, Mr. Wade disagreed and stated that over time Defendant's case has moved up the list. Mr. Wade also stated that he disregarded several months of excusable delay to get this case to trial this term before Defendant's Rule 600 motion was filed.

April McDonald testified that she has been the DCA since August of 2021. As DCA, she manages handles the criminal and civil case management. She determines the jury selection dates, and schedules trials in criminal cases. When she became DCA, the courts were conducting jury selections one week every three months. Due to the COVID pandemic and social distancing restrictions, one jury would be selected in the morning and one jury would be selected in the afternoon. COVID limited the number of jurors that could be brought into the building. Only 45 jurors could fit in the jurors lounge with social distancing and it was not enough jurors for two jury selections in the morning or afternoon.

Ms. McDonald testified that in August of 2021 about 7500 juror summonses were sent out for each three-month period. There were difficulties getting prospective jurors to appear due to individuals suffering from COVID or being exposed to COVID, healthcare workers being excused from jury service, and the like. There are still difficulties with getting prospective jurors to appear for jury service. Ms. McDonald testified that there is about an

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<sup>2</sup> Melissa Bell is the trial clerk for the District Attorney's Office.

80% “no show” rate, and there have not been any discussions about what can be done.

Currently, jury summonses are sent to between 2000 and 4000 people every two weeks. Forty-five jurors can fit in the jury lounge and courtroom #4 is utilized for additional jurors. Ms. McDonald calls in about 225 to 300 for a jury selection and usually between 45 and 60 actually show up. If jurors are recycled, two juries can be picked each morning and each afternoon. In 2023, jurors are recycled if needed. In 2022, only one jury was picked in the morning and one was picked in the afternoon.

Ms. McDonald testified that currently Lycoming County is missing one full-time judge.<sup>3</sup> Judge McCoy used to handle custody, PFA, juvenile, and CYS cases. Ms. McDonald testified that cases other than criminal cases also need to be heard in a certain amount of time such as CYS, juvenile, PFAs, custody and probation and parole violation (PV) cases. All of the judges hear PFA cases. Judge Carlucci, who presides in Courtroom #5,<sup>4</sup> also handles custody and civil cases. Judge Tira, who presides in Courtroom #3, hears some criminal cases but he also handles the CYS and juvenile cases and some civil cases. Judge Linhardt, who presides in Courtroom #2, handles civil cases. If his civil trials settle or

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<sup>3</sup> Two full-time judges retired unexpectedly. Judge Marc Lovecchio, who handled criminal cases, retired in early November 2021, and Judge Joy McCoy, who handled family law cases, retired in late January 2022. In early August 2022, William Carlucci was appointed to fill one of the vacancies.

<sup>4</sup> Due to its small size and lack of a jury box, jury trials cannot be held in Courtroom #5.

are continued, criminal trials are scheduled as back-up case using the same jury pool. The undersigned presides in Courtroom #1 and handles PVs and criminal cases (including specialized courts such as Treatment Court and Veteran's Court). Ms. McDonald does not control moving or canceling civil trials. The judge scheduling them does.

Ms. McDonald also stated that Lycoming County is utilizing two senior judges – Senior Judge Kenneth Brown and Senior Judge Dudley Anderson. The senior judges are limited to working ten days per month total. Judge Brown works in Lycoming County ten days per month. Judge Anderson works in Lycoming County five days per month and also works in other counties. Lycoming County previously brought in other senior judges from other counties, but other counties are short judges, too.

Ms. McDonald was not aware of any defense unavailability for trial in this case.

Following the close of the evidence, defense counsel argued that the charges should be dismissed. He stated that he has a hard time finding that the adjusted Rule 600 date would be in 2024 when there have not been any defense continuances or delays since current defense counsel entered the case. According to defense counsel, if the Commonwealth keeps using its excusable delay theory, this case and other cases like it will continue to be pushed back into perpetuity.

The Commonwealth argued that the motion should be dismissed. Mr. Wade reduced the amount of excusable time he was including and moved this case up so it could be scheduled for jury selection prior to Defendant filing his motion to dismiss. Mr. Wade based his calculations of excludable time and excusable time based on appellate case law. The Commonwealth has exercised due diligence in bringing this case to trial, and its calculations are supported by case law. Until defense counsel can show that the case law is wrong, the



defense is not entitled to dismissal.

## **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). “For purposes of paragraph (A), periods 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 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).

The Commonwealth bears the burden of proving by a preponderance of the evidence that it exercised due diligence. *Commonwealth v. Plowden*, 157 A.3d 933, 941 (Pa. Super. 2017)(en banc), *appeal denied*, 170 A.3d 574 (Pa. 2017). Due diligence is fact-specific, to be determined case-by-case; it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort. *Id.* Reasonable effort includes such actions as the Commonwealth listing the case for trial prior to the run date to ensure that the defendant is brought to trial within the time presented by Rule 600 and having a system of tracking the Rule 600 deadline for its cases. *See Commonwealth v. Jones*, 886 A.2d 689, 700 (Pa. Super. 2005); *Commonwealth v. Hunt*, 858 A.3d 1234, 1242 (Pa. Super. 2004)(en banc), *appeal denied*, 875 A.2d 1073 (Pa. 2005). “The matters of availability and

due diligence must be judged by what was done by the authorities rather than by what was not done.” *Jones*, 886 A.2d at 701.

Excludable time is delay that is attributable to the defendant or his or her attorney, and “excusable delay” is delay that occurs as a result of circumstances beyond the Commonwealth’s control and despite its due diligence. *See id.* at 700; *Commonwealth v. Ramos*, 936 A.2d 1097, 1102 (Pa. Super. 2007). Excusable time includes time attributable to judicial delay as a result of a crowded docket, provided the Commonwealth has exercised due diligence. *See Commonwealth v. Harth*, 252 A.3d 600 (Pa. 2021). Time during the COVID-19 pandemic when the statewide prompt trial rules were suspended is excludable time. *Commonwealth v. Carl*, 276 A.3d 743 (Pa. Super. 2022).

The criminal complaint was filed on August 26, 2020. Adding 365 days to August 26, 2020 yields a mechanical run date of August 26, 2021. From August 26, 2020 through May 31, 2021, however, the statewide prompt trial rules (e.g., Rule 600) were suspended in Lycoming County.<sup>5</sup> Therefore, the 279 days between August 26, 2020 and May 31, 2021 are excludable time. *Commonwealth v. Carl*, 276 A.3d 743 (Pa. Super. 2022). These additional 279 days would adjust the run date to July 1, 2022.<sup>6</sup>

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<sup>5</sup>The administrative orders for this time period were dated August 6, 2020; September 17, 2020; December 4, 2020; January 27, 2021; March 11, 2021; and May 11, 2021. Paragraph 2b of these orders stated: “The following **statewide rules are suspended**:...b. Rules pertaining to the rule-based right of criminal defendants to a prompt trial.

<sup>6</sup>Even without the delay related to the suspension of Rule 600 in Lycoming County, there was a significant amount of delay which would have been attributable to the defense.

On December 11, 2020, Defendant filed an omnibus pretrial motion. At the December 18, 2020 pretrial, defense counsel requested a continuance due to the outstanding motion. The court granted the continuance and the case was continued to the March 19, 2021 call of the list with a pretrial conference date of March 2, 2021.

The hearing on the defense motion was scheduled for February 23, 2021. On February 22, 2021, defense counsel requested a continuance because he was in isolation due to COVID. The court granted the continuance and the hearing on the motion was rescheduled for March 12, 2021.

At the March 3, 2021 pretrial conference, defense counsel requested a continuance due to the outstanding omnibus motion. The court granted the motion and the case was continued to the call of the list on May 14,

During the May 17, 2021 week of jury selections, the Commonwealth was ready for trial, but the DCA did not give this case a jury selection date due to the crowded criminal trial list. Therefore, the time from June 1, 2021 (when the administrative orders suspending speedy trial rules expired) to July 13, 2021, a period of 42 days, is excusable delay. Adding 42 days to July 1, 2022 would adjust the run date to August 12, 2022

At the pretrial conference on July 13, 2021, defense counsel requested a continuance, which the court granted. The court continued the case to the October/November trial term, and found that the time from July 13, 2021 to October 4, 2021 was excludable for Rule 600 purposes as time attributable to Defendant. At the pretrial conference on September 14, 2021, defense counsel requested another continuance, which was granted. The case was continued to jury selection during the week of January 10, 2022. Therefore, October 4, 2021 to January 10, 2022 is excludable for Rule 600 purposes as time attributable to Defendant. There are 181 days between July 13, 2021 and January 10, 2022. These additional 181 days would adjust the run date to February 9, 2023.

The Commonwealth was ready for trial but the DCA did not give this case a jury selection date during the week of January 10, 2022. The next week of jury selections was April 4, 2022. There are 84 days between January 10, 2022 and April 4, 2022. The court

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2021, with a pretrial conference date of April 27, 2021. Therefore, even without the administrative orders suspending the speedy trial rule, there would be excludable time from December 11, 2020 through May 14, 2021 (155 days).

finds this time is excusable delay. These additional 84 days would adjust the run date to May 4, 2023.

The Commonwealth was ready for trial but the DCA did not give this case a jury selection date during the week of April 4, 2022. The next week of jury selections was July 11, 2022. There are 98 days between April 4, 2022 and July 11, 2022. The court finds this time is excusable delay. These additional 98 days would adjust the run date to August 10, 2023.

Defendant filed his Rule 600 motion on May 11, 2023. As the adjusted Rule 600 date had not expired by that date, the court will deny Defendant's motion.

The court need not determine whether there is any excusable delay after July 11, 2022, because a jury was selected in this case on May 15, 2023 and is scheduled for a jury trial on May 17 and 18, 2023.

**ORDER**

**AND NOW**, this 16<sup>th</sup> day of May 2023, the court denies Defendant's Motion to Dismiss With Prejudice Pursuant to Rule 600.

By The Court,

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Nancy L. Butts, President Judge