

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-0000798-2020
:
vs. :
:
DARVEN MOORE, : Opinion and Order re Defendant's
: Motion to Dismiss Pursuant to Rule 600
Defendant :
:

OPINION AND ORDER

Before the court is a motion to dismiss charges pursuant to Pa. R. Crim. P. 600 filed on behalf of Darven Moore (“Defendant”) on October 13, 2022. A hearing on the motion was originally scheduled for November 7, 2022 but the court continued it at the request of the defense and without objection by the Commonwealth. The hearing was held on December 23, 2022.

At the hearing, the Commonwealth presented testimony from First Assistant District Attorney Martin Wade and Deputy Court Administrator (DCA) April McDonald and it introduced numerous exhibits. Upon the request of the Commonwealth and without objection from Defendant, the court took judicial notice of its administrative orders regarding pandemic delay. These orders suspended Rule 600 from March 17, 2020 through May 31, 2021.

Martin Wade testified that he monitors for Rule 600 purposes all of the cases on the trial list. In this case, the criminal complaint was filed on April 1, 2020. The preliminary hearing was originally scheduled for April 22, 2022, but was continued to May 20, 2020 at the request of the arresting officer, Officer Robert Mausteller, due to his unavailability on April 22. See Commonwealth Exhibit #1. The preliminary hearing scheduled for May 20, 2020 was continued to June 3, 2020 by Magisterial District Judge (MDJ) William Solomon.

Commonwealth Exhibit #2. Defense counsel, Michael Morrone, then requested a continuance of the preliminary hearing and it was continued to July 1, 2020. Commonwealth Exhibit #3. The preliminary hearing was held on July 1, 2020 and the charges were held for court.

Defendant's formal court arraignment was scheduled for July 20, 2020. This case was placed on the trial list and scheduled for a pre-trial conference on September 22, 2020.

On August 31, 2020, Defendant filed an omnibus pre-trial motion. At the September 22, 2020 pre-trial conference, defense counsel requested a continuance. Without objection from the Commonwealth, this case was continued to a pretrial conference on December 17, 2020 and call of the list on January 8, 2021. The order indicated that the time from September 22, 2020 to December 17, 2020 would run against Defendant for Rule 600 purposes. Commonwealth Exhibit #4.

On January 5, 2021, at the request of the Commonwealth and without objection from the defense, the case was continued due to pending motions and scheduled for a pretrial conference on March 4, 2021, call of the list on March 19, 2021, and the trial term of April 5 through May 13, 2021. Commonwealth Exhibit #5. The January 2021 trial term also was cancelled in its entirety by the court due to the pandemic.

At the March 4, 2021 pretrial conference, upon the request of the defense and without objection from the Commonwealth, this case was continued to April 30, 2021 pretrial conference, call of the list on May 14, 2021, and the trial term of June 1 through July 1, 2021. Commonwealth Exhibit #6.

The April 30, 2021 pretrial conference was held via remote technology due to the pandemic. This case remained on the call of the list with the possibility of being called for

jury selection between May 17 and May 21, 2021. Commonwealth Exhibit #7. This case was not reached during this term. Due to the pandemic, the number of jury selections were limited to one per half-day per courtroom. There were also limits on the number of jurors being brought into the courthouse and that would fit into the courtroom due to spacing restrictions imposed by court administration. This case was automatically placed on the next pretrial list and trial term, which would have been in July 2021 and August 2021, respectively.

According to Mr. Wade's Rule 600 priority list for the August 2021 jury selections, this case was number 85 out of 195, with an adjusted Rule 600 date of January 21, 2022. Commonwealth Exhibit #8. Mr. Wade provided this list to DCA McDonald for her to utilize when selecting cases for jury selection. Mr. Wade testified that he "under calculated" Defendant's adjusted Rule 600 date because he did not deduct any pandemic delays. This case was not selected and did not even make to the jury selection charts for potential selection as there were only 10 or 11 available slots for jury selections.

The next dates for jury selection were in October 2021. There were no more than 12 jury selections during that week in October. According to Mr. Wade's October 2021 adjusted Rule 600 dates, this case was number 68 out of 178, with an adjusted Rule 600 date of March 16, 2022. Commonwealth Exhibit #9. Mr. Wade provided this list to DCA McDonald to utilize when picking cases for jury selections. Mr. Wade testified that he adjusted his Rule 600 calculations because the delay from August 2021 to October 2021 was not due to the Commonwealth. This case was not given a jury selection date and did not proceed to trial. The next trial term was January/February 2022.

For the January 2022 jury selection, this case was number 76 of 272, with an adjusted

Rule 600 date of June 20, 2022. Commonwealth Exhibit #11.¹ Mr. Wade provided this list to DCA McDonald, who made the decisions on which cases were scheduled for jury selection. Mr. Wade determined the delay from October 2021 to January 2022 was excusable delay, because the delay was not caused by the Commonwealth. Defendant's case was not reached.

For the April 4, 2022 jury selection week, this case was number 54 of 307, with an adjusted Rule 600 date of September 12, 2022. Commonwealth Exhibit #12. Mr. Wade adjusted the Rule 600 date from June 20, 2022 to September 12, 2022 because this delay was not caused by the Commonwealth. Mr. Wade testified that this adjusted date was artificially low because it did not count include any pandemic delay. He was still waiting for a decision from the Pennsylvania Superior Court regarding how to deal with pandemic-related delay.

Jury selections for the next trial term were the week of July 11, 2022. At this time, Defendant's case was number 85 of 250, with an adjusted Rule 600 date of February 28, 2023. Commonwealth Exhibit #13. Mr. Wade excluded time from April 2022 to July 2022 because the delay was not caused by the Commonwealth. Again, this adjusted date did not exclude pandemic delay, which "was considerable." Mr. Wade asked DCA McDonald to cancel any civil jury selections and replace them with criminal jury selections, but she did not have the authority to do that. Defendant's case was not reached.

On the October 2022 list, this case was number 10 of 274, with an adjusted Rule 600 date of February 28, 2023. Commonwealth Exhibit #14. The case was not selected because the defense requested a continuance. The basis for the continuance was request was that Defendant tested positive for COVID. The court granted the continuance request and indicated that the delay from October 17, 2022 to January 9, 2023 (the first day of jury

¹ There is no Commonwealth Exhibit #10. The assistant district attorney inadvertently skipped that number.

selection for the next trial term) was attributable to Defendant; therefore, it was excludable for Rule 600 purposes. Commonwealth Exhibit #15.²

Mr. Wade also testified that Defendant filed a Rule 600 motion on January 28, 2022, which was withdrawn on March 1, 2022. Defendant's current Rule 600 motion was filed on October 13, 2022.

Mr. Wade testified that the current adjusted Rule 600 date for Defendant's case is October 15, 2023. He calculated this date by excluding the time from the filing of the complaint until May 31, 2021, because Rule 600 was suspended by order of court. He also excluded: the time from January 28, 2022 to March 1, 2022, which was the time period when Defendant's first Rule 600 motion was pending until it was withdrawn; the time from October 18, 2022 to January 9, 2023, which was the time attributable to Defendant's continuance request; and the time from October 13, 2022 through October 17, 2022, due to Defendant's current pending Rule 600 motion. He adjusted his Rule 600 date for excusable delay from August 10, 2021 to October 17, 2022, because the case was not reached for trial despite the Commonwealth's due diligence.

April McDonald testified that she has been the DCA for approximately 1 ½ years. As part of her job duties, she creates the jury selection list for each trial term. Typically, between 10 to 15 jury selections are scheduled during the jury selection week, depending on the number of available courtrooms and judges. During the pandemic, jury selections were limited. She testified that she received a list of cases with Rule 600 dates from the District Attorney's office. She would receive input from the attorneys regarding their availability

² The Commonwealth inadvertently also referred to this exhibit as Exhibit 14. To avoid confusion, the court re-numbered it as Commonwealth Exhibit 15.

during the trial term. She would schedule cases for jury selection and trial based on the Rule 600 date and the information she received from the attorneys about availability. She could not remove custody trials, Children and Youth hearings, juvenile hearing, probation and parole violation hearings or civil trials; criminal trials were scheduled around those dates. Back-up cases were also scheduled.

Lycoming County had a shortage of judges in 2022, which affected the number of courtrooms available for criminal jury selections and criminal trials. COVID restrictions also impacted the number of juries that could be selected.

This case was estimated to be a one-day trial.

During the October 4, 2021 week of jury selections and October/November 2021 criminal trial term, defense counsel was unavailable on the following dates: October 4, the morning of October 5, October 6, the morning of October 7, the morning of October 8, October 18 through October 21, the morning of October 26, October 27, the morning of October 28, the morning of October 29, the afternoon of November 1, the morning of November 5, the afternoon of November 8, November 11, the morning of November 12 and the morning of November 16.

During the January 10, 2022 week of jury selections and the January/February 2022 criminal trial term, defense counsel was unavailable: January 10 through the morning of January 14, January 18-21, the morning of January 24, the morning of January 25, the afternoon of January 26, January 27, January 28, January 29, the morning of February 1, the morning of February 2, the afternoon of February 7, the morning of February 8, February 14, the morning of February 15, the morning of February 18, and the morning of February 22.

During the July 11, 2022 week of jury selections, defense counsel was unavailable

July 11, July 12, July 13 and the morning of July 15. During the August/September 2022 trial term, the Commonwealth was unavailable on August 12 and August 19.

Defense counsel agreed that the defense continuances and the time attributable to the omnibus pretrial motion constituted excludable time. He argued that the case had been ready for trial for more than 1½ years after the suspension of Rule 600 was lifted and, instead of consistently moving up the list, this case moved down in priority. He contended that the Commonwealth failed to establish due diligence when this case was not even on the jury selection charts, and he asked the court to dismiss this case with prejudice.

The prosecuting attorney argued that the testimony and evidence it presented showed it acted with due diligence and that the delay was beyond its control. She contended that the number of jury selections and jury trials were limited over the last two years by the COVID pandemic and the lack of judges. Since Defendant's adjusted Rule 600 date is in October 2023, she asked the court to deny Defendant's motion to dismiss.

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 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. *Commonwealth v. 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).

Any delay attributable to the defendant is excludable delay. *Commonwealth v. Ramos*, 936 A.2d 1097, 1102 (Pa. Super. 2007), quoting *Commonwealth v. Cook*, 676 A.3d 639, 646 n.12 (Pa. 1996), *cert. denied*, 519 U.S. 1119 (1997). “Excusable delay” is delays which occur as a result of circumstances beyond the Commonwealth’s control and despite its due diligence. *Ramos*, 936 A.2d at 1102. Time frames during the suspension of Rule 600 pursuant to Pennsylvania Supreme Court and local administrative orders also adjusts the Rule 600 date. *Commonwealth v. Carl*, 276 A.3d 743 (Pa. Super. 2022).

As the Superior Court reiterated in *Carl*,

The Rule 600 analysis thus entails three steps:

First, Rule 600(A) provides the mechanical run date. Second, we determine whether any excludable time exists pursuant to Rule 600(C). We add the amount of excludable time, if any, to the mechanical run date to arrive at an adjusted run date.

If the trial takes place after the adjusted run date, we apply the due diligence analysis set forth in Rule 600([D]). As we have explained, Rule 600[] encompasses a wide variety of circumstances under which a period of delay was outside the control of the Commonwealth and not the result of the Commonwealth's lack of diligence. Any such period of delay results in an extension of the run date. Addition of any Rule 600[] extensions to the adjusted run date produces the final Rule 600 run date. If the Commonwealth does not bring the defendant to trial on or before the final run date, the trial court must dismiss the charges.

Commonwealth v. Wendel, 165 A.3d 952, 956–57 (Pa. Super. 2017) (citation omitted).

276 A.3d at 749.

The court must start with the mechanical run date, which comes 365 days after the complaint is filed. The complaint was filed on April 2, 2020. Therefore, the mechanical run date was April 2, 2021.

Pursuant to administrative orders, Rule 600 was suspended in Lycoming County from March 17, 2020 through May 31, 2021. The complaint was filed on April 2, 2020. April 2, 2020 through May 31, 2021 is 425 days. Adding 425 days to April 2, 2021 extends the Rule 600 date to June 1, 2022.

The delay attributable to Defendant's omnibus pretrial motion³, and three defense continuances⁴ occurred during the time that Rule 600 was suspended. The MDJ also rescheduled the preliminary hearing from May 20, 2020 to June 3, 2020, which was during the time that Rule 600 was suspended. Therefore, even absent the suspension of Rule 600 due to the COVID pandemic, the majority of the 425 days would still be excludable or excusable time.

Defendant filed his first motion to dismiss on January 28, 2022, and it was withdrawn on March 1, 2022. The time between the filing of a defendant's motion to dismiss and its resolution is excludable time. *Commonwealth v. Williams*, 726 A.3d 386, 392 (Pa. Super. 1999). January 28, 2022 to March 1, 2022 is 32 days, which extends the Rule 600 date from June 1, 2022 to July 3, 2022.

Defendant filed his current motion to dismiss on October 14, 2022. He also requested a continuance from the October/November trial term due to testing positive for COVID,

³ This delay was from August 31, 2020 to March 26, 2021.

⁴ Defense counsel requested a continuance of the preliminary hearing from June 3, 2020 to July 1, 2020; defense counsel requested a continuance from the September 22, 2020 pretrial conference to the December 17, 2020 pretrial conference; and defense counsel requested a continuance from the March 4, 2021 pretrial conference to

which resulted in his case being rescheduled for jury selection during the week of January 9, 2023. October 14, 2022 through January 9, 2023 is another 87 days, which extends the Rule 600 date from July 3, 2022 to September 28, 2022.

In addition to the suspension of Rule 600 and defense delays, this case has not been selected and tried due to an overcrowded docket and a lack of judges.⁵ The court agrees with the Commonwealth that this delay constitutes excusable judicial delay. *See Commonwealth v. Mills*, 162 A.3d 323, 325 (Pa. 2017); *Commonwealth v. Bradford*, 46 A.3d 693, 705 (Pa. 2012); *Commonwealth v. Crowley*, 466 A.2d 1009 (Pa. 1983).

From at least August 9, 2021 to the present, the Commonwealth has been ready to proceed to trial. It has acted with due diligence. The delays were not attributable to the Commonwealth and were beyond its control. There are 518 days between August 9, 2021 and January 9, 2023. When the 119 days of defense delay from January 28, 2022 through March 1, 2022 and October 14, 2022 through January 9, 2023 are deducted to avoid double-counting, the court agrees with the Commonwealth that the final run date would be in mid-October 2023, if not slightly later.⁶

ORDER

AND NOW, this 6th day of January 2023, the court **DENIES** Defendant's motion to dismiss pursuant to Rule 600.

the April 30, 2021 pretrial conference. See Commonwealth Exhibits 3, 4, and 6.

⁵ Two of Lycoming County's five judges retired unexpectedly in early November 2021 and the end of January 2022. Lycoming County has been utilizing senior judges and received one interim judicial appointment in August 2021, but it will not be back to its full complement of five full-time judges until January 2024.

⁶ Even if the court did not utilize the administrative orders suspending Rule 600, the final run date would be June 13, 2023.

By The Court,

Nancy L. Butts, President Judge