

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-35-2021
:
vs. : Opinion and Order regarding
: Defendant's Motion to Dismiss
LAMAR STROTHERS, : Pursuant to Rule 600
Defendant :

OPINION AND ORDER

On December 8, 2020, Williamsport police filed a criminal complaint against Lamar Strothers (Defendant) charging him with aggravated assault and simple assault arising out of an incident that occurred while Defendant was a patient at UPMC Susquehanna Health hospital in Williamsport, Pennsylvania.

On October 17, 2022, Defendant filed a motion to dismiss all charges pursuant to Rule 600 and Article 1, §9 of the Pennsylvania Constitution. On December 19, 2022, the court held a hearing on Defendant's motion. The Commonwealth presented two witnesses and fourteen 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 testified that jury selections in 2021 and 2022 were held in January, March, May, August and October.

He started with the filing of the complaint in this case on December 8, 2020. He added 365 days to arrive at the mechanical run date of December 8, 2021. Then he added delay attributable to the defense. He noted that in March 2021 the defense requested a continuance that was granted to May so he added that time to the mechanical run date to

arrive at the February 21, 2022 adjusted run date listed on Commonwealth Exhibit #1, which was his chart for the August 9, 2021 week of jury selections. Both parties were ready for trial as evidenced by Judge Lovecchio's order dated July 13, 2021, which was admitted as Commonwealth Exhibit 2.

Mr. Wade testified that the DCA did not schedule Defendant's case for jury selection during the week of August 9, 2021. Although there are four courtrooms equipped to accommodate jury selections, two courtrooms were utilized for jury selections during that week, and 11 or 12 cases were selected for trial. Defendant's case was #111 of 195 cases. The jury selection charts were admitted as Commonwealth Exhibit 3. Less than 6% of the cases on the list were selected for trial.

The next week of jury selection was the week of October 4, 2021. Mr. Wade adjusted Defendant's Rule 600 date to April 16, 2022, because the delay in bringing the case to trial from August to October was due to the crowded trial docket. The chart Mr. Wade prepared and provided to the DCA for this week of jury selection was admitted as Commonwealth Exhibit #4. Defendant's case was #90 of 170 cases. Eleven or twelve cases were selected during that week. Again, two courtrooms were utilized for jury selections. The jury selection charts were admitted as Commonwealth Exhibit #5. The DCA did not give Defendant's case a jury selection date due to its position on the list. Less than 6% of the cases on the list were selected for trial.

Mr. Wade testified that the District Attorney did not control the court calendar or the number of jury selection days on the court calendar; the DCA does. He also testified that prior to the pandemic, six or more juries could be selected in a single day. Since the start of the pandemic, however, there were limits on the number of days and the number of jurors

that could be present in the courthouse and in a particular courtroom due to social distancing requirements.

In 2022, the jury selection days were the week of January 10, 2022; two special jury selection days on March 21 and 23; the week of April 4; the week of July 11; and the week of October 17. There also was a special date in June due to a guilty plea resolving a homicide case that was supposed to select a jury on June 27 and be tried that week.

Mr. Wade testified that he compiled a list of adjusted Rule 600 dates for the cases that could be called for jury selection the week of January 10, 2022, and he provided it to the DCA. He noted that Defendant's case was #114 of 272 cases. This list was admitted as Commonwealth Exhibit 6. Mr. Wade calculated Defendant's adjusted Rule 600 date as July 21, 2022. He started with the mechanical run date of December 8, 2021 and extended the date for Defendant's continuance in March 2021 and for excusable delay where Defendant's case was not given a jury selection date. There were ten or eleven juries selected during the week of January 10, 2022. The jury selection charts were admitted as Commonwealth Exhibit 7.

For the two special jury selection days in March 2022, Mr. Wade asked the DCA to use the adjusted Rule 600 list from January 2022. There were three jury selections scheduled – one on the afternoon of March 21 and two on March 23, 2022. Defendant's case was not selected because of his adjusted Rule 600 date. The jury selection charts were admitted as Commonwealth Exhibit 8.

For the week of April 4, 2022, Mr. Wade calculated Defendant's adjusted Rule 600 date as October 13, 2022. He extended the date for the defense continuance in March 2021 and excusable delay. The list of cases and their adjusted Rule 600 dates was provided to the

DCA and admitted as Commonwealth Exhibit 9. Defendant's case was #105 of 307 cases. The DCA did not scheduled Defendant's case for jury selection.

On June 27, 2022, Defendant's case was not selected because the victim was unavailable. Upon motion of the Commonwealth, and without objection from the defense, the court granted the Commonwealth's continuance request. See Commonwealth Exhibit 10.

The next jury selection week was July 11, 2022 to July 15, 2022. Mr. Wade provided an adjusted Rule 600 list to the DCA. See Commonwealth Exhibit 11. He added excludable delay pursuant to the *Carl* case¹ for any periods during the pandemic when Rule 600 was suspended by order of the President Judge. In Defendant's case, that was from December 8, 2020 through May 31, 2021. Defendant's case was #203 of 320 cases on the list.² A jury was not selected in his case; it was not given a jury selection date by the DCA.

In July 2022, Mr. Wade asked the DCA for more jury selection dates. He requested that civil jury selections be cancelled and criminal cases be selected instead, because the criminal trial list was extremely large and civil cases do not have constitutional or rule-based speedy trial rights. The DCA did not have the power to make that change.

In October 2022, jury selections were the week of October 17 through October 21, 2022. See Commonwealth Exhibit 13. Mr. Wade provided an adjusted Rule 600 list to the DCA. See

¹ *Commonwealth v. Carl*, 276 A.3d 743 (Pa. Super. 2022).

² On this list, Mr. Wade calculated Defendant's adjusted Rule 600 date as April 24, 2023.

Commonwealth Exhibit 12. Defendant's case was #50 of 274. It was listed as a back-up jury selection during that week but it was not selected because Defendant filed his motion to dismiss on October 17, 2022. The next day, he requested a continuance because he obtained new counsel. See Commonwealth Exhibit 14. The court granted the continuance and the case was scheduled for a pretrial conference on December 13, 2022. The order noted that this time (which would be at least from October 18, 2022 to December 13, 2022) for Rule 600 purposes would run against the defense.

Mr. Wade testified that if all the excludable delays and excusable delays are added, including but not limited to the defense continuance in March 2021 and the Commonwealth continuance without objection from the defense in June 2022, the adjusted Rule 600 date in this case would be no earlier than October 2023.

On cross-examination, Mr. Wade testified that he determined the amount of excusable delays based on case law. If excusable delays were taken out of the equation, the adjusted Rule 600 date might be earlier than October 2023, and it was "very possible" that the Rule 600 date would be exceeded without the excusable delay.

He testified that he asked the DCA to replace civil jury selections and trials with criminal cases in July 2022 and October 2022. He also testified that to decrease the list he lobbied for additional dates, asked to remove civil selections, requested more jurors, requested more time slots for jury selections and tried to engage in plea bargaining. However, he acknowledged that Defendant was not given a plea bargain.

April McDonald testified that she has been the DCA for a little over a year. Before that, she was the court scheduling technician for ten years. As DCA, she creates the court calendar, determines the jury selection dates, and schedules trials in criminal cases. In

September and October of 2021, she created the 2022 court calendar. There are a number of proceedings set in the court calendar and cannot be changed to accommodate criminal trials.³

She did not handle jury selections in 2021; however, given the number of cases on Commonwealth's Exhibit 1 and 4, not all of the cases on the list could be selected. In fact, not even 25 cases could be accommodated. There were also COVID restrictions in 2021 and 2022. Furthermore, in January 2022 there was a shortage of judges to pick juries.

During the week of April 4, 2022, two civil juries were picked and the cases utilized eight trial days. The District Attorney asked to cancel the civil jury selections and trials and replace them with criminal cases but the DCA was not permitted to do so.

The District Attorney did approach the DCA to try to develop a plan to address the criminal trial list. They spoke about it numerous times, but it hasn't been feasible to implement a new plan or any changes until 2023.

The court will take judicial notice of the documents filed in Defendant's case. The court will also take judicial notice of the administrative orders it issued related to the COVID-19 pandemic and the suspension of the speedy trial rule, which were emailed to members of the Lycoming County bar and are available online at pacourts.us/ujs-coronavirus-information. See Pa. R. E. 201(c)(1), (d)(providing that the court may take judicial notice on its own at any stage of the proceeding).

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.”

³ Examples of some of these proceedings are juvenile delinquency proceedings, and Children and Youth hearings (juvenile dependency and termination of parental rights).

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). 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 December 8, 2020. Adding 365 days to December 8, 2020 yields a mechanical run date of December 8, 2021. From December 8, 2020 through May 31, 2021, however, the statewide prompt trial rules (i.e., Rule 600) were suspended in Lycoming County.⁴ Therefore, the 174 days between December 8, 2020 and May 31, 2021 are excludable time.⁵ *Commonwealth v. Carl*, 276 A.3d 743 (Pa. Super. 2022). This additional 174 days would adjust the run date to May 31, 2022.

No evidence was presented regarding the time from June 1, 2021 through July 13, 2021. Therefore, the court is including this time as part of the natural progression of the case. *See Commonwealth v. Mills*, 640 Pa. 118, 162 A.3d 323 (2017).

⁴The administrative orders for this time period were dated 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.

⁵Defense counsel requested a continuance on March 2, 2021, which was granted and the case was continued to the May 14, 2021 call of the list. However, these 73 days are included in the 174 days that Rule 600 was suspended.

From the date of pretrial conference on July 13, 2021, both parties were ready for trial.⁶ The next jury selection dates were the week of August 9, 2021. The court finds the time between July 13 and August 9, 2021 is also due to the natural progression of the case, because a case cannot be tried at a pretrial conference.

The court finds that the Commonwealth exercised due diligence in this case. The Commonwealth was ready for trial from July 13, 2021 onward. The delays in this case were outside its control and despite its due diligence. Due to the COVID-19 pandemic and social distancing requirements, the court could not schedule as many criminal jury selections and trials and a backlog of criminal cases developed. The Commonwealth had a system for tracking its cases, it was ready for trial, and it even requested additional dates and the cancellation of civil jury trials but its requests could not be accommodated.

Defendant's case was on the trial list but was not one of the cases listed for jury selection during the week of August 9, 2021 due to the overcrowded docket and the position of Defendant's case on the list (#111 of 195 cases). The court finds that the time from August 9, 2021 through the next jury selection week of October 4, 2021 (56 days) is excusable delay. *Commonwealth v. Johnson*, ___ A.3d ___, 2023 WL 2146502 (Pa. 2023)(judicial delay is excludable if the Commonwealth exercised due diligence during that time). This would extend the adjusted run date to July 26, 2022.

Defendant's case was #90 of 170 cases on the list of cases for jury selection during the week of October 4, 2021. The DCA did not give Defendant's case a jury selection date

⁶ The only time that they arguably were not, which will be discussed in more detail, *infra*, was when the Commonwealth requested a continuance on June 27, 2022 due to the unavailability of the victim.

due to its position on the list. The next week of jury selections was January 10, 2022. The court finds that the time from October 4, 2021 to January 10, 2022 (98 days) is excusable delay, which would extend the adjusted run date to November 1, 2022.

During the week of January 10, 2022, Defendant's case was #114 of 272 cases. The DCA did not give Defendant's case a jury selection date due to its position on the list. There were two special jury selection dates on March 21, 2022 and March 23, 2022. The January 2022 list was used for these special dates. Again, Defendant's case was not reached. The next week of jury selections was the week of April 4, 2022. The court finds that January 10, 2022 through March 21, 2022 (70 days) and March 21 to April 4, 2022 is excusable delay, which would extend the adjusted run date to January 20, 2023.

Defendant's case was #105 of 307 on the list of cases for jury selection during the week of April 4, 2022. The DCA did not give Defendant's case a jury selection date due to its position on the list. The next jury selection date was June 27, 2022. The court finds that April 4, 2022 to June 27, 2022 (84 days) is excusable delay that extends the adjusted run date to April 14, 2023.

There was a special jury selection date on June 27, 2022, due to the resolution of a homicide case. On June 27, 2022, Defendant's case was not selected because the victim was unavailable. Upon motion of the Commonwealth, and without objection from the defense, the court granted the Commonwealth's continuance request. When the defense indicates approval or acceptance of the continuance, the time associated with the continuance is excludable. *Commonwealth v. Hunt*, 858 A.2d 1234, 1241 (Pa. Super. 2004)(en banc), *appeal denied*, 875 A.2d 1073 (Pa. 2005). The next week of jury selection was July 11, 2022. Therefore, the court finds that the 14 days between June 27, 2022 and July 11, 2022 is

excludable pursuant to *Hunt*. This time would extend the adjusted run date from April 14, 2023 to April 28, 2023.

On the jury selection list for the week of July 11, 2022, Defendant's case was #203 of 320 cases. Defendant's case fell on the list, because the Commonwealth for the first time factored in the suspension of the rule-based prompt trial right pursuant to *Carl*.⁷ The DCA did not give Defendant's case a jury selection date due to its position on the list. The next week of jury selection was October 17, 2022. The court finds that the time between July 11, 2022 and October 17, 2022 (98 days) is excusable delay that extends the adjusted run date to August 4, 2023.

Defendant filed his motion to dismiss on October 17, 2022. There also was a defense request for a continuance on October 18, 2022 which was granted because Defendant had retained new counsel who needed time to prepare for trial. Therefore, excludable time attributable to Defendant and his attorney is accruing from October 17, 2022 to the present.

The court finds that Rule 600 was not violated and Defendant is not entitled to dismissal of the charges filed against him. The Commonwealth has exercised due diligence and the delays in this case were beyond its control. Therefore, the court will deny Defendant's motion to dismiss pursuant to Rule 600.

While Defendant also asserts in his motion a constitutional right to a speedy trial

⁷ The Pennsylvania Superior Court issued the *Carl* decision on May 4, 2022 and denied reargument on July 7, 2022.

under Art. 1, §9 of the Pennsylvania Constitution was violated, he does so in a boilerplate fashion. He acknowledges that Art 1, §9 does not set forth a deadline for prompt trial and then exclusively discusses the deadlines and requirements of Rule 600. He does not address any of the factors related to a constitutional speedy trial claim. Although the motion was filed by prior counsel, current counsel did not address the constitutional claim or the factors used to determine it at the hearing and argument on this matter. Accordingly, the court would find this claim is waived. *See Commonwealth v. Colon*, 87 A.3d 352, 356 n.2 (Pa. Super. 2014)(“Where the appellant does not raise the separate constitutional issue apart from the Rule 600 issue as a basis for the motion to dismiss, there is no need for the *Barker* balancing test to be examined.”)(citation omitted).

Even if the claim were not waived, the court would reject it. When considering a constitutional speedy trial claim, the court must consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant’s assertion of his rights; and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972); *Colon*, 87 A.3d at 356.

The length of the delay from the filing of the criminal complaint on December 8, 2020 to the filing of the motion to dismiss on October 17, 2022 was 22 months and 9 days.

The primary reason for the delay was the COVID-19 pandemic, the difficulties that it imposed on the court’s ability to conduct jury selections and trials, and the backlog of criminal trials that it created. For example, to comply with social distancing requirements, the court could not conduct as many jury selections in a day as it could before the pandemic and it limited the courts’ ability to conduct multiple jury trials on the same day due to the space limitations of the juror’s lounge.

Defendant asserted his rights in his motion to dismiss filed on October 17, 2022.

There is no evidence of record of any prejudice to Defendant. In fact, such was not even mentioned at the hearing. The defendant needed to prove prejudice with respect to his constitutional claim. *See Commonwealth v. DeBlase*, 542 Pa. 22, 665 A.2d 427, 437 (1995)(“prejudice from a lengthy pretrial delay will not be presumed; rather, the defendant must demonstrate that he has suffered prejudice in fact”).

In light of these factors, the court finds that Defendant’s constitutional right to a speedy trial have not been violated.

ORDER

AND NOW, this 3rd day of April, 2023, the court DENIES Defendant’s motion to dismiss.

By The Court,

Nancy L. Butts, President Judge