

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH | : No. CR-1298-2021 |
| | : |
| vs. | : Opinion and Order regarding |
| | : Defendant's Motion to Dismiss |
| ERIC TYSON, | : Pursuant to Rule 600 |
| Defendant | : |

OPINION AND ORDER

On September 20, 2021, Williamsport police filed a criminal complaint against Eric Tyson (Defendant) charging him with attempted homicide, aggravated assault, possession of an instrument of crime and tampering with or fabricating physical evidence arising out of an incident that occurred on September 19, 2021 at 213 Campbell Street, City of Williamsport, when Defendant allegedly stabbed Curtis Kinney.

On April 5, 2023, Defendant filed a motion to dismiss all charges pursuant to Rule 600 and Article 1, §9 of the Pennsylvania Constitution. On May 1, 2023, the Court held a hearing on Defendant's motion. The Commonwealth presented two witnesses and ten exhibits.

The Commonwealth first called Martin Wade, who is the first assistant District Attorney. He testified that he is responsible to calculate, adjust and track Rule 600 for all the cases on the pretrial list. He then compiles a master chart and provides it to the Deputy Court Administrator (DCA), to use in scheduling criminal trials. In 2015, he would have provided it to Eileen Dgien and currently since 2021, to April McDonald. He testified that jury terms in 2015 selections were held in 2-3 court rooms with 4 slots per day. Commonwealth's Exhibit #1. In 2019, there were 2-3 courtrooms being used but fewer selection slots available. Commonwealth's Exhibit #2.

In 2020 with COVID-19 and then 2021 when Judge Lovecchio retired¹, there were fewer courtrooms and jurors available for trials. Due to COVID-19, Rule 600 was suspended between March 2020 until May 2021. Criminal trials resumed in Lycoming County in August 2020. And despite Wade's request, no more time in 2022 was able to be allotted to criminal jury trials, but were only scheduled in January, March, May and October of that year. In 2023, jury trials are now scheduled every two weeks. Senior judges are used for trials but can only be used for so many days per month. Trial days are also limited due to Judge Tira's handling of certain matters which cannot be rescheduled such as Children and Youth and Juvenile cases.

In January 2021, an entire trial term was cancelled due to an increase in COVID cases. This resulted in a larger number of cases waiting for jury selection. The county suspension of rules of Criminal Procedure concluded in May 2021.

Wade testified that the charges in this case were filed September 20, 2021. The mechanical run date calculated by adding 365 days is September 20, 2022.

Commonwealth's exhibit #3 is an email that Wade sent to the DCA on March 22, 2023 in advance of the April jury selections with the updated Rule 600 list. Wade testified that Defendant's case was listed at #10. However, Defendant filed his Rule 600 motion to dismiss which tolled the running of Rule 600. Prior to the motion, Wade believed that with how high the Defendant's number was on the list, he would have been at least a backup trial in April.

Wade testified that Commonwealth's exhibit #4 was showing that Defendant's case was listed to pick as a first selection on Tuesday April 11, 2023 had it not been continued due

¹ Judge Lovecchio retired November 2, 2021

to the Rule 600 motion being filed. On April 6, 2023, Defense counsel asked for the trial to be continued so that the recently filed Rule 600 motion could be litigated. Commonwealth's exhibit #5. Since the Defendant was requesting the continuance, the delay from April 6, 2023 to June 5, 2023 (60 days) can be assessed against the Defendant.

Wade further explained that at the pretrial conferences for December 2021 which populated the jury selection list of January 10, 2022, Defendant's case was #193 of 272 cases. Commonwealth's exhibit #6. As a result, the case was not scheduled for jury selection in January 2022. Wade listed the run date as September 20, 2022.

Wade explained that he sent an email to the DCA on March 30, 2022 attaching the list of adjusted rule 600 for the week of April 4, 2022. Commonwealth's exhibit #7. There were 307 cases on the list and Defendant's was #221. Wade stated that both the victim and officer were available, and the Commonwealth was prepared to go to trial. Wade stated he calculated the Defendant's adjusted rule 600 date as December 12, 2022.

On June 23, 2022, Wade sent another email to the DCA requesting that she schedule as many cases as there were 250 cases on the trial list and Defendant's was #113. Commonwealth's exhibit #8. The Commonwealth was ready and prepared to go to trial this term. Wade calculated the Defendant's adjusted rule 600 date as March 19, 2023.

Wade additionally testified that he sent an email to the DCA on October 6, 2022 regarding the upcoming trial list by rule 600 dates. Commonwealth's exhibit #9. He repeated his request that no civil trials be scheduled to maximize the number of courtrooms available to handle criminal trials, have senior judges do more than one trial and have more jury selections scheduled. Wade placed the Defendant's case at #139 of 274 on the trial list. He again stated that the Commonwealth was ready to proceed but was not given a trial date. He

calculated Defendant's adjusted rule 600 date to June 23, 2023.

Finally, Wade testified that Commonwealth's exhibit #10 represents an email he sent to the DCA on December 29, 2022 for the jury selections to be scheduled in January of 2023. Defendant's case was listed as #125 on a list of 281. Although the Commonwealth was also prepared to proceed, the case was not reached. He calculated Defendant's adjusted rule 600 date as September 13, 2023.

Wade then referred back to exhibit #3 which would be the chronologically next list for the trial term in April 2023. He believed that Defendant's run date was artificially low. He also said that he disregarded 3 months of excusable delay from June to September 2023 or October 22 to January 2023 jury selections. He is conscious of the current cases decided by the Superior Court and believes that his calculations, to the best of his ability, align with those decisions.

On cross-examination, Wade testified that there has been "headway" made on the trial list. There were no prior continuance requests by the defense and if there had been Commonwealth continuances, the defense did not agree to them. He further explained that there was specific authority on calculating excusable delay despite Commonwealth's due diligence. That calculation is discretionary and outside of the Commonwealth's control.

When asked how Defendant's case could fluctuate or move backwards on the list, Defense counsel pointed out the changes on Commonwealth's exhibits 7,8,9, and 10. For example, Exhibit 8 indicated that the Defendant's case was #113 but on Exhibit #9 it was #139. Wade responded by saying that there were 24 more cases on the list. As of October 2022, there are more cases added to the list, many misdemeanors. Wade said that his office's position is that when cases are not reached it becomes excusable delay and that the

Commonwealth is showing due diligence to get these cases to trial.

April McDonald testified that she has been the DCA since August, 2021. As Deputy, she creates the court calendar, determines the jury selection dates, and schedules trials in criminal cases. She also creates the yearly court calendar and takes judicial availability into account. It is possible to hold multiple trials at one time but difficult because the jurors lounge only holds so many people. Additionally, jurors have an 80% no show rate. Usually Court Administration summons between 225-250 jurors for each selection. If there are not enough jurors to select from, no trials can be held. Jurors are unable to recycle to the next day but could be kept for the entire day.

McDonald also testified that although (3) three courtrooms are available to select juries, courtroom number (3) three has limited availability because of Judge Tira's commitment to juvenile, children and youth and termination hearings. Previously those matters were all handled in Family Court. One courtroom is dedicated to family and civil, and another is the primary civil courtroom which handles criminal cases if the civil trials settle. She also stated that she has the availability of two senior judges but that their availability is limited to 10 days per month. However, not all 10 days are available to this county.

McDonald added that she works through the rule 600 list provided by the Commonwealth and schedules trials based upon the availability of both the Commonwealth and Defense. Because the defendants in the majority of cases are represented by attorneys from the Public Defender's office there is ordinarily not a lot of delay or unavailability.

The Court will take judicial notice of the documents filed in Defendant's case. 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.” 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).

Initially the Court notes that on May 3, 2022, Defendant filed a Rule 600 bail motion (Rule 600 (B) (1)) which was heard by this Court on May 24, 2022. This Court ruled that 224 days had passed without the Defendant being brought to trial and made the Defendant eligible for nominal bail. While the Commonwealth objected to the Court’s calculation of time, no witnesses or evidence were presented to establish the timeline of the case. No reconsideration of the Court’s order was filed. However, this prior determination is not binding on the Court in the calculation of this issue as “only periods of delay caused by the defendant shall be excluded from the computation of the length of time of any pretrial incarceration. Any other periods of delay shall be included in the computation.” Pa. R. Crim. P. 600(C)(2). Therefore, the Court is not bound by any calculation in its order of May 23, 2022 in reaching its decision on the instant motion.

The criminal complaint was filed on September 20, 2021. Adding 365 days to September 20, 2021 results in a mechanical run date of September 20, 2022.

The Court finds that the Commonwealth exercised due diligence in this case. The Commonwealth was ready for trial from January 10, 2022 onward. The delays in this case were outside its control and despite its due diligence. Due to the lasting effects of 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 January 10, 2022 due to the overcrowded docket and the position of Defendant's case on the list (#193 of 272 cases). The Court finds that the time from January 10, 2022 through the next jury selection week of April 4, 2022 (84 days) is excusable delay. *Commonwealth v. Johnson*, 289 A.3d 959 (Pa. 2023)(judicial delay is excludable if the Commonwealth exercised due diligence during that time). Adding this additional time to September 20, 2022 would extend the adjusted run date to December 13, 2022.

Defendant's case was #221 of 307 cases 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 week of jury selection after April was July 11, 2022. The Court finds that the time from April 4, 2022 to July 11, 2022 (98 days) is excusable delay, which would extend the adjusted run date to March 21, 2023.

During the week of July 11, 2022, Defendant's case was #113 of 250 cases. The DCA did not give Defendant's case a jury selection date due to its position on the list and it was not reached. It was kept on the trial list to be scheduled for the October 17, 2022 jury selection. Again, the Court finds that the time from July 11, 2022 to October 17, 2022 (98 days) is excusable delay. This added 98 days to the Defendant's adjusted run date or June 27, 2023.

As testified at the hearing Defendant's case was listed as #139 of 274 on the list of cases for jury selection during the week of October 17, 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 January 9, 2023. The Court finds that the time from October 17, 2022 to January 9, 2023 (84 days) is excusable delay. This extends the Defendant's adjusted run date to September 19, 2023.

Defendant filed his motion to dismiss on April 5, 2023. There also was a defense request for a continuance on May 9, 2023 which was granted because Defendant wanted to litigate this dismissal motion resetting the case for July 31, 2023. Excludable time attributable to Defendant and his attorney is accruing from the date of the filing of the motion to the present. Rule 600(c)(2).

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 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 September 20, 2021 to the filing of the motion to dismiss on April 5, 2023 was 18 months and 16 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 April 5, 2023, however 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 20th day of November 2023, the Court DENIES Defendant's motion to dismiss.

By The Court,

Nancy L. Butts, President Judge