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Commonwealth v. Law

Commonwealth of Pennsylvania v. David Lonnell Law, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action
No. 506-2013

HEADNOTES

Criminal Law – Rule 600; Defendant’s Right to Speedy Trial; Commonwealth’s Due Diligence in Bringing Case to Trial;

Rule 600 - Generally

1. Under Rule 600 of the Pennsylvania Rules of Criminal Procedure, “[t]rial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.” Pa.R.Crim.P. 600(A)(3).
2. In this case, the Commonwealth filed charges of simple assault against the Defendant, withdrew those charges, then filed charges of aggravated assault, after which the Defendant filed a motion to dismiss under Rule 600.

Rule 600 – Due Diligence of the Commonwealth

3. When a defendant files a motion to dismiss under Rule 600, the burden is on the Commonwealth to prove that it acted with due diligence. The Commonwealth must prove due diligence in prosecuting the first complaint by a preponderance of the evidence. The trial court must grant the defendant’s motion to dismiss “unless it finds that the Commonwealth has exercised due diligence and that the circumstances occasioning the postponement were beyond its control.” Commonwealth v. Meadius, 870 A.2d 802 (Pa. 2005).

Applicable Run Date under Rule 600 – Multiple Filings against a Defendant

4. Where the Commonwealth has withdrawn charges and re-filed, Pennsylvania courts employ a two-prong test to determine whether the Rule 600 period should be calculated from the date of the first filing or the second.
5. The time period is calculated from the second filing only if: “(1) the first complaint was properly dismissed by a competent judicial authority; and (2) the record does not reveal any prosecutorial attempt to circumvent or evade the rule’s mandate.” Commonwealth v. Meadius, 870 A.2d 802, 804 (Pa. 2005). If the Commonwealth acted diligently, “the applicable run date . . . is triggered when the Commonwealth files the second complaint.” Commonwealth v. Peterson, 19 A.3d 1131, 1136 (Pa. Super. 2011).
6. In this case, the Commonwealth met its burden under Rule 600, and the applicable run date should be from the filing of the second complaint, October 31, 2012. First, the initial complaint was properly dismissed, as the Commonwealth withdrew the charges based on new information received from the victim, which supported charges of aggravated assault rather than simple assault. Second, there was no purposeful effort by the Commonwealth to evade the time limits under Rule 600. The Commonwealth presented evidence that it was prepared to go to trial on the initial charges had there been available trial dates, that all witnesses had been summoned and were available including the victim, and that the Commonwealth was following pretrial procedure throughout the first case.
7. The evidence established that once the Commonwealth became aware that the nature of the injuries supported charges of aggravated assault, it promptly withdrew the simple assault charges, and thus the first complaint was withdrawn “after the Commonwealth, in preparation for trial, determined that inappropriate charges had been filed against [Defendant Law].” Commonwealth v. Johnson, 11 A.3d 509, 512 (Pa. Super. 2010).
8. The fact that the Commonwealth used the same Affidavit of Probable Cause in the second filing as it did in the first does not mean the Commonwealth failed to act with due diligence. Commonwealth v. Johnson, 11 A.3d 509, 510 (Pa. Super. 2010).

Due Diligence of the Commonwealth under Rule 600 – Days to be Excluded

9. Because the run date under Rule 600 is the date of the filing of the second complaint, the Commonwealth must prove it acted with due diligence in bringing that case to trial.
10. When computing the number of pretrial days attributable to the Commonwealth under Rule 600, certain delays are excluded from that calculation. Including delays caused by: (1) defense postponements, (2) express defense waivers of Rule 600, (3) the unavailability of the defendant or defense counsel, and/or (4) by the fact that the defendant could not be located and apprehended. Pa. R.Crim.P. 600(C); Commonwealth v. Riley, 19 A.3d, 1146, 1148-49 (Pa. Super. 2011).
11. Although Rule 600 requires that the trial commence within 365 days of the date the complaint is issued, days attributable to the Commonwealth may still be excluded as “excusable delay.” Excusable delay is a “legal construct [that] takes into account delays which occur as a result of circumstances beyond the Commonwealth’s control and despite its due diligence.” Commonwealth v. Frye, 909 A.2d 853, 858 (Pa. Super. 2006). This requires a showing that the Commonwealth acted with due diligence attempting to try the defendant in a timely fashion.
12. When calculating excusable time, it is well settled in Pennsylvania that delay due to court congestion is excludable time that does not

count against the Commonwealth. *Commonwealth v. Brown*, 875 A.2d 1128, 1138 (Pa. Super. 2005); *Commonwealth v. Jones*, 886 A.2d 689, 701-702 (Pa. Super. 2005). Here, the time attributable to the Defendant's continuances and scheduling requests is excluded from the time attributable to the Commonwealth. The total amount of time is 181 days. The time between the first Rule 600 hearing and this Court's rendering of its Opinion should not count against the Commonwealth. The time between that Opinion and the new Rule 600 hearing should also be excluded. The total time period is 84 days.

13. The total amount of days that have elapsed from the time the second criminal complaint was filed, on October 21, 2012, and the date of this Opinion, January 8, 2014, is 434 days. Based on the foregoing analysis, this Court finds that of those 434 days, 265 are excludable from the time attributable to the Commonwealth under Rule 600. The initial run date was October 21, 2013. Taking the excluded time into account, the adjusted run date is Sunday, July 13, 2014. Therefore, this case is well within the 365 day limit under Rule 600.

Appearances:

Tony Miley, *Attorney for Defendant*

John Lisko, *Franklin County District Attorney's Office*

OPINION

Before Meyers, J.

On June 24, 2013, Defendant David Lonnell Law filed a Motion to Dismiss Pursuant to Pa.R.Crim.P. 600. The Commonwealth filed an Answer on July 26, 2013. This Court held a hearing on September 19, 2013, after which it issued an Order clarifying the burden of proof in a Rule 600 hearing, the type of evidence to be presented, and the appropriate standard of review. A Rule 600 hearing was set for December 12, 2013. On November 20, 2013, the Commonwealth filed a Motion in Limine seeking to call defense attorney Tony Miley as a witness at the September 19 Rule 600 Hearing. The Defense filed a response, and this Court issued an Order denying the Commonwealth's Motion.¹ The parties appeared for the Rule 600 hearing on December 12, 2013. The issue is now ready for decision.

FACTS

The current Rule 600 issue centers on the Commonwealth's withdrawal and re-filing of charges against Defendant Law. The relevant facts are as follows:

1. May 27, 2011: Defendant Law was charged with simple assault, case number 1041-2011.
2. July 20, 2011: Defendant Law appeared for mandatory arraignment.
3. September 2, 2011: The parties appeared for a pretrial conference. Upon a finding that all available trial dates were filled, the Court continued the matter to the November term.
4. November 4, 2011: On the day set for a pretrial conference, Defendant Law did not appear until 1:00p.m. At that point, all available trial dates had been filled and the case was continued to the January 2012 trial term. The Court ordered Law to appear on December 19, 2011 for a Call Hearing.
5. December 19, 2011: The Court granted Defendant Law's Motion for Scheduling and re-set the hearing for December 21, 2011.
6. December 21, 2011: The Defendant requested a continuance of the trial to March 12, 2012. The time between those dates was excluded from the Rule 600 requirement.
7. February 29, 2012: At Call the List, Defendant requested a pretrial conference, which was set for March 2, 2012 at 9:00 a.m.
8. March 2, 2012: Defendant failed to appear for pretrial conference and a bench warrant was issued. The bench warrant was revoked on March 22, 2012.
9. April 23, 2012: Defendant requested a continuance of the trial to July 9, 2012. The time between those dates was excluded from the Rule 600 requirement.
10. June 18, 2012: Defendant failed to appear at Call of the List and a bench warrant was issued.
11. July 12, 2012: After a hearing, the Court vacated the bench warrant and re-instated Defendant's bail.

¹ See Order of Court, 12/11/2013.

12. August 31, 2012: Both parties appear for a pretrial conference. Trial was set for October 24, 2012, and jury selection was set for October 17, 2012.

13. October 17, 2012: On the day set for jury selection, the Commonwealth filed a motion to withdraw the case. The Court granted the motion, and the matter was withdrawn without prejudice, with the Commonwealth having two weeks to re-file charges.

14. October 31, 2012: The Commonwealth filed criminal charges against Defendant Law for aggravated assault, case number 506-2013.

15. June 24, 2013: Defendant filed a Motion to Dismiss Pursuant to Pa.R.Crim.P. 600.

This Court held a Rule 600 hearing on December 12, 2013. At the hearing, Assistant District Attorney John Lisko stated that the Commonwealth withdrew the initial charges because new information was received prior to jury selection. At some point during the week prior to the October 17, 2012 jury selection date, attorney Lisko contacted the victim and learned of injuries that were not set forth in the Affidavit of Probable Cause. Specifically, the victim stated that Defendant Law had tried to cut him with a knife across the neck and that he had to get sutures on his arm. The Affidavit only referenced injuries to the neck, not the weapon used, and did not state the severity of the injuries. Attorney Lisko stated that based on this conversation with the victim, the Commonwealth believed it mistakenly charged Law with simple assault instead of aggravated assault, which was supported by the nature of the injuries. The Commonwealth withdrew the simple assault charges and re-filed charges of aggravated assault, using the same Affidavit of Probable Cause. This Court must now determine whether the Commonwealth failed to act with due diligence, and if it acted to intentionally thwart the time limits under Rule 600.

DISCUSSION

The Defendant's Motion to Dismiss is based upon the argument that the Commonwealth did not exercise due diligence in bringing the first case (1041-2011) to trial, as required under Rule 600 of the Pennsylvania Rules of Criminal Procedure.

Rule 600 states as follows:

Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.

Pa.R.Crim.P. 600(A)(3).

In his Motion to Dismiss, Defendant Law argues that the Commonwealth failed to exercise due diligence. Specifically, Law states that the Commonwealth "was unprepared to proceed with the first case, and with the intent of evading or manipulating the proscriptions of Rule 600 . . . re-filed a criminal case against the Defendant based upon the same information that previously existed and information that was within the express knowledge of the Commonwealth." The Commonwealth denies these allegations in its Answer, and argues that it was duly diligent in pursuing the case under the first complaint. This Opinion will first address the standard applied to Rule 600 issues before addressing the arguments raised.

I. Rule 600 Challenges – Standard of Review:

When a defendant files a motion to dismiss under Rule 600, the burden is on the Commonwealth to prove that it acted with due diligence. The Commonwealth must prove due diligence in prosecuting the complaint by a preponderance of the evidence. See Commonwealth v. Meadius, 870 A.2d 802 (Pa. 2005). The trial court must grant the defendant's motion to dismiss "unless it finds that the Commonwealth has exercised due diligence and that the circumstances occasioning the postponement were beyond its control." Meadius, 870 A.2d at 805. Where the Commonwealth has withdrawn charges and re-filed, Pennsylvania courts employ a two-prong test to determine whether the Rule 600 period should be calculated from the date of the first filing or the second. Under that test, the time period is calculated from the second filing *only if*: "(1) the first complaint was properly dismissed by a competent judicial authority; and (2) the record does not reveal any prosecutorial attempt to circumvent or evade the rule's mandate." Meadius, 870 A.2d at 804 (citing Commonwealth v. Sires, 424 A.2d 1386, 1387 (Pa. Super. 1981)). The key is that the Commonwealth must show that it has not acted to thwart Rule 600, and that it acted with due diligence when it filed the first complaint. If the Commonwealth acted diligently, "the applicable run date . . . is triggered when the Commonwealth files the second complaint." Commonwealth v. Peterson, 19 A.3d 1131, 1136 (Pa. Super. 2011) *aff'd*, 44 A.3d 655 (Pa. 2012). For the reasons set forth below, this Court finds that the Commonwealth has

met its burden by a preponderance of the evidence.

II. Rule 600 Challenges – Applicable Case Law:

The Pennsylvania appellate courts have decided several cases addressing the issues raised under Rule 600 where there have been multiple filings against a defendant. This Court finds those cases instructive in its analysis of the current matter.

In Commonwealth v. Johnson, the Commonwealth initially filed sexual assault charges against the defendant, but later found that the facts did not support those charges. 11 A.3d 509, 510 (Pa. Super. 2010). The Commonwealth withdrew the charges and re-filed, this time including charges of aggravated indecent assault. Id. The affidavit of probable cause was identical to the affidavit used in the first filing. Id. at 510 (“[T]he Commonwealth filed a new complaint based upon the identical factual allegations contained in the affidavit of probable cause.”). The date of the first filing was August 12, 2008 and the date of the re-filing was January 20, 2009. The defendant filed a motion to dismiss pursuant to Rule 600, and the trial court granted the motion. Id. The Commonwealth appealed, arguing that the time limit under Rule 600 began to run with the filing of the second complaint, not the first complaint. Id. The Superior Court reversed the trial court, finding that the two prong test was satisfied and that the Commonwealth had exercised due diligence in pursuing the case. Id. at 512.

The Superior Court in Johnson focused on several factors. First, the initial complaint was properly dismissed, “after the Commonwealth, in preparation for trial, determined that inappropriate charges had been filed.” Id. Second, neither the trial court nor the Superior Court found any “intent to attempt to evade the time constraints of Rule 600 by seeking disapproval” on the part of the Commonwealth. Id. Additionally, the time between the two filings also played a role in the analysis. Id. at 512 (“A mere three months passed from the time the charges were filed until the Commonwealth’s filing of a notice of disapproval in December of 2008.”).

In Commonwealth v. Meadius, the Commonwealth was unprepared to proceed at the preliminary hearing, held on March 22, 2001, based on the absence of two witnesses. 870 A.2d 802, 803 (Pa. 2005). The Complaint had been filed on January 16, 2001. Id. The district justice indicated that the case would be dismissed if the charges were not withdrawn, after which the Commonwealth withdrew them. Id. On March 27, 2001, the Commonwealth re-filed charges against the defendant. Id. Trial was set for February 4, 2002. Id. The defendant filed a motion to dismiss, based on the fact that trial was set more than one year after the first complaint was filed. Id. The Commonwealth argued that the Rule 600 period began at the filing of the second complaint. Id. at 804. After a hearing, the trial court granted the defendant’s motion. Id. The trial court found that the Commonwealth failed to exercise due diligence, and therefore it was “not entitled to the benefit of the second filing date, as the delays in question were solely due to its unjustified failure to comply with the applicable procedural rules.” Id. at 804.

In Meadius, the Commonwealth did not act to purposefully thwart the time limits of Rule 600, but it did not act with the requisite diligence. This was based on the Commonwealth’s inability to secure the presence of its witnesses, not on the Commonwealth’s desire to withdraw the charges in order to file proper charges. The Supreme Court specifically noted that “the Commonwealth concedes that the delays in question were all caused when its prosecuting attorney or its witnesses were absent attending to personal matters or for unexplained reasons.” Id. at 807.

III. Defendant Law’s Rule 600 Challenge and the Commonwealth’s Burden:

In this case, for the Commonwealth to meet its burden under Rule 600 it must establish the following. First, that the first complaint was properly dismissed. Second, that there was no purposeful effort by the Commonwealth to evade the time limits under Rule 600. This factor necessarily incorporates the idea that any postponements were due to circumstances “beyond its control.” Meadius, 870 A.2d at 805. Third, the Commonwealth must prove it acted with due diligence, and thus must provide evidence that it was prepared to go to trial on the first criminal complaint. Based on this framework and the controlling case law set forth above, this Court finds that the Commonwealth has met its burden under Rule 600.

1. Rule 600 Calculation – Whether the relevant time period begins with the filing of the first complaint or the second:

This Court first finds that the initial criminal complaint was properly dismissed based on the Commonwealth’s request. At the Rule 600 hearing held on December 12, 2013, attorney Lisko stated that the Commonwealth withdrew

the initial charges based on new information received from the victim. Attorney Lisko contacted the victim within the week prior to the October 17, 2012 jury selection date. It was during this conversation that attorney Lisko found out that the victim had been cut across his neck with a knife, and that he had to get sutures on his arm. The Affidavit of Probable Cause only referenced injuries to the neck, not the weapon used, and did not state the severity of the injuries. Attorney Lisko stated that at that point it became clear that the Commonwealth mistakenly charged Defendant Law with simple assault, as the injuries described by the victim supported charges of aggravated assault. On October 17, 2012, the Commonwealth was granted its request and proceeded to withdraw the first complaint.

Additionally, the Commonwealth presented evidence that it was prepared to go to trial on the initial charges of simple assault, set for October 24, 2012. Attorney Lisko testified that, at the time the parties met for a pretrial conference on September 2, 2011, had there been available trial dates, he would have been prepared to go to trial. Attorney Lisko stated that he had not spoken to the victim about the trial as of that pretrial conference date, as that is not the common practice of the District Attorney's office when the pretrial conference is set far from the trial date. He did contact the victim early on to ensure that he would be available for the trial, and he was prepared to go to trial on the simple assault charges as they were charged at that time.

Attorney Lisko maintained that he was prepared to proceed with trial when the parties met for the next pretrial conference on November 4, 2011. Because the Defendant failed to show up before 1:00 p.m., all available trial dates for that term were filled. As of that date, attorney Lisko had not contacted the victim to discuss the trial. Attorney Lisko stated however, that the Commonwealth would have been prepared to go to trial. He stated that all witnesses had been issued subpoenas and were summoned for trial, the victim was available to testify, and that jury instructions and a verdict slip had been prepared.

Based on the foregoing, it is clear that once the Commonwealth became aware that the injuries sustained supported charges of aggravated assault, it promptly withdrew the simple assault charges. The first complaint was withdrawn "after the Commonwealth, in preparation for trial, determined that inappropriate charges had been filed against [Defendant Law]." Johnson, 11 A.3d at 512. While the Commonwealth did not contact the victim until the week before the jury selection date, it appears that it is not the practice of the Commonwealth to do so when the date is far ahead of trial. The evidence indicates that the Commonwealth was following pretrial procedure throughout the first case. The record shows that "the Commonwealth's actions precipitating dismissal were undertaken without any intent to evade the rule's mandate." Commonwealth v. Sires, 424 A.2d 1386, 1387 (Pa. Super. 1981). The fact that the Commonwealth used the same Affidavit of Probable Cause in the second filing as it did in the first does not mean the Commonwealth failed to act with due diligence. See, e.g., Johnson, 11 A.3d at 510. Therefore, the Court finds that the Rule 600 calculation should be made starting with the date the Commonwealth filed the second complaint.

2. Rule 600 Calculation:

Although in his Rule 600 Motion, Defendant Law argues that, as of the date of that filing, 485 days have elapsed since the filing of the first complaint without Defendant being brought to trial, as this Court stated above, the Rule 600 calculation should be made using the date the second complaint was filed. That date is October 31, 2012.

When computing the number of pretrial days attributable to the Commonwealth under Rule 600, certain delays are excluded from that calculation. This includes delays caused by: (1) defense postponements, (2) express defense waivers of Rule 600, (3) the unavailability of the defendant or defense counsel, and/or (4) by the fact that the defendant could not be located and apprehended. Pa. R.Crim.P. 600(C); Commonwealth v. Riley, 19 A.3d, 1146, 1148-49 (Pa. Super. 2011).

Although Rule 600 requires that the trial commence within 365 days of the date the complaint is issued, days attributable to the Commonwealth may still be excluded as "excusable delay." Commonwealth v. Frye, 909 A.2d 853, 858 (Pa. Super. 2006). The definition of "excusable delay" is not expressly stated in Rule 600. It is a "legal construct [that] takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence." Id. In order to have time excluded due to excusable delay, the Commonwealth must prove that it acted with due diligence in attempting to try the defendant in a timely fashion and that the circumstances causing the delay were beyond its control. Id. Due diligence is a fact-specific concept to be determined on a case-by-case basis. Commonwealth v. Ramos, 936 A.2d 1097, 1102 (Pa. Super. 2007). While due diligence does not demand perfection, it does require the Commonwealth to put forth a reasonable effort. Id.

In this case, the Commonwealth filed the second criminal complaint on October 31, 2012. The dates of relevant scheduling and continuance motions are as follows:

1. 3/15/2013: Continuance of mandatory arraignment, sua sponte, until 4/24/2013.
2. 6/20/2013: Defendant requested a continuance of Call of the List until 7/17/2013.
3. 7/17/2013: Defendant requested a continuance of disposition hearing until 10/2/2013.
4. 10/02/2013: Continuance of disposition/arraignment, sua sponte, until 10/23/2013.
5. 10/23/2013: Defendant requested a continuance of mandatory arraignment until 1/8/2014.

Defendant filed his Motion to Dismiss on June 24, 2013. The Commonwealth filed its Answer on July 26, 2013. This Court held a hearing on September 19, 2013. At that hearing, it became apparent that there was a disagreement between the parties as to the burden of proof in a Rule 600 hearing, the type of evidence to be presented, and the appropriate standard of review. This Court issued an Order on October 9, 2013, clarifying those issues and setting a second Rule 600 hearing for December 12, 2013.²

This Court finds that, when calculating excusable time, it is well settled in Pennsylvania that delay due to court congestion is excludable time that does not count against the Commonwealth. See, e.g., Commonwealth v. Brown, 875 A.2d 1128, 1138 (Pa. Super. 2005); Commonwealth v. Jones, 886 A.2d 689, 701-702 (Pa. Super. 2005). This Court finds that the time attributable to the Defendant's continuances and scheduling requests is excluded from the time attributable to the Commonwealth under Rule 600. The total amount of time is 181 days.

Additionally, the time between the first Rule 600 hearing and this Court's rendering of its Opinion should not count against the Commonwealth. The time between that Opinion and the second Rule 600 hearing should also be excluded. The total time period is 84 days.

The total amount of days that have elapsed from the time the second criminal complaint was filed on October 21, 2012, and today's date, January 8, 2014, is 434 days. Based on the foregoing analysis, this Court finds that of those 434 days, 265 are excludable from the time attributable to the Commonwealth under Rule 600. The initial run date was October 21, 2013. Taking the excluded time into account, the adjusted run date is Sunday, July 13, 2014. Therefore, this case is well within the 365 day limit under Rule 600.

ORDER OF COURT

AND NOW THIS 8th day of January, 2014, the Court having read and considered the Defendant's Motion to Dismiss Pursuant to Pa.R.Crim.P. 600 and the Commonwealth's Answer;

IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**. An Opinion in support of this Court's Order is attached.

IT IS FURTHER ORDERED that the Defendant's case shall be listed for a pretrial conference on February 17, 2014, at 9:00 a.m., before the undersigned Judge, in the assigned courtroom of the Franklin County Courthouse.

Pursuant to the requirements of Pa. R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.

² The Court notes that the Commonwealth filed its Motion in Limine on November 22, 2013, seeking to call defense attorney Tony Miley as a witness at that Rule 600 hearing. This raised an additional issue that was addressed at the December 12, 2013 hearing.