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Commonwealth v. Hernandez

COMMONWEALTH OF PENNSYLVANIA
v. JAIME HERNANDEZ, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 27 of 2007

Motion to Dismiss Charges Under Rule 600 - Exclusions - Due Diligence - Law of the Case

1. Pennsylvania Rule of Criminal Procedure 600 requires trial to commence not later than 365 days from the filing of the criminal complaint; this date can be extended because the Rule excludes certain time frames from the calculation.
2. The period of time between the filing of the complaint and the defendant's arrest is excluded if the defendant could not be apprehended because his whereabouts were unknown and could not be determined by due diligence.
3. The due diligence analysis balances the activities of police against the interest of the accused in receiving a fair trial; police need only engage in reasonable efforts to apprehend the defendant; the availability of potentially more efficacious options does not mean due diligence was lacking.
4. The Rule also excludes any period of time for which the defendant expressly waives Rule 600.
5. The Commonwealth is also not charged with any delay resulting from the unavailability of the defendant or the defendant's attorney or from any continuance granted at the request of the defendant or the defendant's attorney.
6. The law of the case doctrine prevents a judge from revisiting a preliminary determination made by a judge of co-equal jurisdiction with respect to whether a period of time is excluded under Rule 600.
7. The law of the case doctrine allows such a preliminary determination to be overturned only for an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed.
8. Defendant's attorney is unavailable for Rule 600 purposes when she has a conflict of interest that delays trial but was readily discoverable under Pa. R.Cr.P. 573.

Appearances:

Jeremiah D. Zook, Esq., *Assistant District Attorney*

Stephen D. Kulla, Esq., *Counsel for Defendant*

OPINION

Walsh, J., November 25, 2008

Facts

The Court must decide Jaime Hernandez's Motion Requesting Dismissal of Charges Based on Violation of Rule 600. The case is scheduled for a jury trial on December 3, 2008 before Judge Herman. Since the crux of this matter consists in the amount of time that has elapsed prior to Defendant being brought to trial, the Court will lay out a timeline with the material events that have transpired.

On September 8, 2006, Trooper James O'Shea filed a criminal complaint against Hernandez charging him with one count of violating the Controlled Substance, Drug, Device, and Cosmetic Act, 35 P.S. §780-113(a)(30), and with one count of conspiracy to violate the Controlled Substance Act. Both charges stemmed from a June 27, 2006 incident. On January 2, 2007, Defendant voluntarily surrendered to authorities and was arraigned on February 21, 2007. On April 30, 2007, Defendant waived his right to a jury trial and a trial without jury was set for June 14, 2007. However, on that date, Defendant applied for a continuance, and President Judge John Walker granted the continuance specifically excluding the period from June 14, 2007 to September 10, 2007 from Rule 600 consideration. Next, on August 27, 2007, Defendant requested a continuance until November 13, 2007, and the Court granted the request, specifically excluding the period from August 27, 2007 to November 13, 2007. On November 13, 2007, Judge Walker continued the matter again until January 14, 2008, because Defendant had failed to secure an attorney. This order also indicated that the elapsed time for this continuance would not count against the Commonwealth.

On January 3, 2008, the parties set a non-jury trial date for February 11, 2008. Yet, on February 11, 2008, Defendant withdrew his waiver of a jury trial, and the matter was continued, on Defendant's request, to the May 2008 trial term. On May 1, 2008, Defendant once more requested a continuance, and Judge Walker granted it until July 14, 2008; this order also specifically indicated that the time did not count against the Commonwealth for Rule 600 purposes. Next, on July 3, 2008, the Commonwealth applied for a continuance, which was granted until September 8, 2008. On September 3, 2008, a jury trial was scheduled for September 22, 2008, but trial was cancelled when the Public Defender discovered it had a conflict with the confidential informant in Hernandez's case. On November 3, 2008, a pre-trial conference was held, a trial date of December 3, 2008 was set, and a schedule was set to determine Defendant's Rule 600 motion prior to the trial date. On November 13, 2008, a hearing was conducted, and the Rule 600 matter is now ready for decision.

Discussion

Hernandez seeks dismissal of the charges against him because they were brought more than 365 days after a criminal complaint was filed against him. Indeed, since charges were filed on September 8, 2006 and trial will not occur until December 3, 2008, a total of 817 days have transpired.^[1] This total clearly exceeds the 365 days Pa. R.Cr.P. 600(A)(3) permits when a defendant is free on bail.^[2] So, the Court must determine whether more than 365 of the elapsed days count against the Commonwealth under Rule 600. Commonwealth v. Williams, 876 A.2d 1018 (Pa. Super. 2005). In performing its analysis, the Court will adopt the framework the parties have used and examine each time period to determine if Defendant's trial is still timely. Fortunately, the parties have agreed that certain times shall be counted for or against the Commonwealth, so the Court will not investigate these.^[3]

In determining the period to begin trial, Rule 600 excludes three categories of elapsed time. Pa. R.Cr.P. 600(C). First, "the period of time between the filing of the written complaint and the defendant's arrest" is excluded if "the defendant could not be apprehended because his . . . whereabouts were unknown and could not be determined by due diligence." Pa. R.C.P. 600(C)(1). Second, the Rule excludes "any period of time for which the defendant expressly waives Rule 600." Pa. R.C.P. 600(C)(2). Third, the Commonwealth is not charged with any delay resulting from "the unavailability of the defendant or the defendant's attorney" or from "any continuance granted at the request of the defendant or the defendant's attorney." Pa. R.Cr.P. 600(C)(3). With this framework in mind, the Court will now turn to each disputed time period.

I. September 8, 2006 to January 2, 2007 (116 days)

This period of time runs from the date that Trooper O'Shea filed a complaint against Defendant to the date on which Defendant turned himself in to the police and falls under Pa. R.Cr.P. 600(c)(1). This period of time counts against the Commonwealth, unless the defendant's "whereabouts were unknown and could not be determined by due diligence." Pa. R.Cr.P. 600(C)(1). Defendant argues that this time should count against the Commonwealth, because the trooper failed to use due diligence to locate Defendant.

In determining whether the police acted with due diligence, the Court uses its common sense and balances "the activities of the police and against the interest of the accused in receiving a fair trial." Commonwealth v. Ingram, 591 A.2d 734, 737 (Pa. Super. 1991). Police need only engage in reasonable efforts to apprehend the Defendant. Id. The availability of potentially more efficacious options does not mean that due diligence was lacking. Id.

Here, the defendant's whereabouts were unknown, and the police exercised due diligence in attempting to apprehend Defendant. Truly, this case is closely analogous to Ingram, in which the Superior Court found due diligence after police attempted to serve the arrest warrant at Defendant's last known address, learned from Ingram's mother that he had left the area, entered Ingram's name in the PCIC, and conducted routine patrols through Ingram's known haunts. Id. Similarly, in Hernandez's case, Trooper O'Shea attempted to serve the arrest warrant at Defendant's last known address, he learned from Defendant's co-conspirator that Defendant had gone to Northern Pennsylvania, and he entered Defendant's information into NCIC and checked it periodically. Although the trooper did not patrol Defendant's known haunts hoping to apprehend him, his efforts were still reasonable, because he had seemingly reliable information that Defendant had left Franklin County.^[4] Accordingly, the time from September 8, 2006 to January 2, 2007 will not count against the Commonwealth.

II. January 2, 2007 to April 30, 2007 (118 days)

The parties have stipulated that this interval of time shall count against the Commonwealth. See November 21, 2008 Stipulation.

III. April 30, 2007 to June 14, 2007 (45 days)

The next period of time begins with Defendant's waiver of his right to a jury trial and runs to June 14, 2007, the date at which Defendant's non-jury trial was scheduled. None of the three Rule 600 exceptions apply to this period of time since it is a waiver of a jury trial and not a continuance requested by Defendant. Therefore, the forty-five days count against the Commonwealth.

IV. June 14, 2007 to January 3, 2008 (203 days)

The parties have stipulated that this time period shall not count against the Commonwealth. See November 21, 2008 Stipulation.

V. January 3, 2008 to January 14, 2008 (11 days)

Defendant also contests the eleven day period from January 3, 2008 to January 14, 2008, a time extending from the January 3, 2008 pre-trial conference to the January 14, 2008 expiration of the time afforded by Judge Walker's November 13, 2007 order. Defendant plausibly argues that the entire period from the pre-trial conference to the February 11, 2008 trial without jury should be counted against the Commonwealth. However, two fully sufficient factors combine to preclude this. First, Judge Walker's November 13, 2007 order unambiguously determined that the clock would not begin to run against the Commonwealth until January 14, 2008, and the law of the case doctrine prevents this Court from revisiting such a preliminary determination. [\[5\]](#) Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995). Second, Defendant and his counsel failed to object to the November 13, 2007 order at the time it was entered or even at the January 3, 2008 pre-trial conference. So, Defendant failed to preserve any objection at this intermediate stage. Accordingly, this eleven day period will not count against the Commonwealth.

VI. January 14, 2008 to February 11, 2008 (28 days)

Next, Defendant urges convincingly that the twenty-eight day period running from the expiration of Judge Walker's order to the date of Defendant's trial without jury should count against the Commonwealth. Truly, none of the three Rule 600 exceptions applies to this time period, and, thus, it will count against the Commonwealth.

VII. February 11, 2008 to May 1, 2008 (80 days)

The parties have agreed that this time interval shall not count against the Commonwealth. See November 21, 2008 Stipulation.

VIII. May 1, 2008 to May 12, 2008 (11 days)

On May 1, 2008, Defendant applied for and was granted another continuance to run from May 1, 2008 to July 14, 2008. Although such an application clearly fits within the Rule 600 exception for a "continuance granted at the request of the defendant or the defendant's attorney," Defendant challenges this period because he asserts that the continuance was actually granted so the Commonwealth could obtain lab tests. However, Defendant's testimony on this point simply was not credible, and his assertion in the motion that he needed more time for preparation controls this issue. Defendant and his attorney applied for the continuance, and, accordingly, the

eleven days will not count against the Commonwealth.

IX. May 12, 2008 to July 14, 2008 (63 days)

This period of time consists of the remainder of the duration requested by Defendant in his May 1, 2008 motion for continuance, and it will not count against the Commonwealth because the delay was requested by Defendant or his attorney. Pa. R.Cr.P. 600(C)(3)(b).

X. July 14, 2008 to August 28, 2008 (45 days)

Defendant next challenges the delay caused by a July 3, 2008 continuance requested by the Commonwealth due to the military deployment of a witness. The motion was granted by Judge Carol Van Horn, and she added to the order that the time between the date of the order and September 8, 2008 would not count against the Commonwealth under Rule 600. Defendant has presented no evidence that he objected to Judge Van Horn's ruling, and, thus, he has failed to preserve an objection at this intermediate stage of the case. This is clearly a preliminary ruling covered by the law of the case doctrine. Accordingly, although this Court might have counted the time against the Commonwealth, Judge Van Horn's decision is not clearly erroneous in this close case, and the Court will not overrule her decision. Accordingly, this forty-five day period will not count against the Commonwealth.

XI. August 28, 2008 to September 8, 2008 (11 days)

Here, Defendant contends that the eleven day period from August 28, 2008 to September 8, 2008 should count against the Commonwealth, because, at some point between August 28, 2008 and September 22, 2008, Defendant's prior counsel from the Public Defender's Office was disqualified due to a recently discovered conflict. The Public Defender represented the confidential informant in this case, and new counsel had to be appointed, an action that occurred on October 3, 2008 through an order signed by Judge Van Horn. Defendant argues that since the Commonwealth knew the identity of the confidential informant, the delay should count against the Commonwealth. However, this time period should not count against the Commonwealth for two reasons. First, Judge Van Horn's July 3, 2008 order conclusively determined that the delay would not run against the Commonwealth until September 8, 2008. Second, Defendant has failed to prove that the Commonwealth breached a duty of disclosure to Defendant such that it should be penalized for failing to disclose the identity of the informant. Indeed, as the Commonwealth notes, Pa. R.Cr.P. 573 governs pretrial discovery and inspection and provided a ready mechanism for Defendant and his counsel to have discovered any conflicts through a simple request for discovery. Defendant made no such request and is responsible for the delay. Accordingly, the Court will not count these eleven days against the Commonwealth.

XII. September 8, 2008 to September 22, 2008 (14 days)

The parties have agreed that this time interval shall count against the Commonwealth. See November 21, 2008 Stipulation.

XIII. September 22, 2008 to November 17, 2008 (56 days)

This period of time encompasses the fifty-six days required to appoint new counsel after the cancellation of the September 22, 2008 jury trial and prepare for the December 3, 2008 jury trial. Although Defendant urges that the time should count against the Commonwealth because the prosecution did not identify the confidential

informant, the Court has already ruled in section VIII of this Opinion that Defendant was responsible for the delay. Furthermore, the Commonwealth was ready for trial on September 22, 2008, and the case would have proceeded to trial without the untimely conflict that made the Public Defender unavailable. Accordingly, this interval of time fits into the Rule 600 exception excluding any delay resulting from "the unavailability of . . . the defendant's attorney." Pa. R.C.P. 600(C)(3)(a). Thus, these fifty-six days will not count against the Commonwealth.

XIV. November 17, 2008 to December 3, 2008 (16 days)

Finally, these sixteen days, ranging from jury selection to trial will count against the Commonwealth since the prosecution has agreed that it should run against them. See Commonwealth's Brief at 12.

Conclusion

In conclusion, although 817 days have passed since Trooper O'Shea filed charges against Defendant, only 221 of those days count against the Commonwealth under Rule 600. Since the Rule permits trial within 365 days after a defendant is charged, Defendant's December 3, 2008 jury trial is timely. Additionally, the adjusted run date is April 27, 2009.^[6] Therefore, the Court will deny Defendant's Motion Requesting Dismissal of Charges Based on the Violation of Rule 600.

ORDER OF COURT

November 25, 2008, this matter having come before the Court on Defendant's Motion Requesting Dismissal of Charges Based on the Violation of Rule 600, and the Court having reviewed the record, the motion and answer, the arguments and briefs, and the law, it is hereby ordered that Defendant's request for relief is denied. December 3, 2008 remains Defendant's date for jury trial.

[1] The mechanical run date was September 9, 2007.

[2] "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 criminal complaint is filed." Pa. R.Cr.P. 600.

[3] The following times SHALL NOT count against the Commonwealth: 1) June 14, 2007- September 10, 2007; 2) September 10, 2007- November 13, 2007; 3) November 13, 2007- January 3, 2008; and 4) February 11, 2008- May 1, 2008. The following times SHALL count against the Commonwealth: 1) January 2, 2007-April 30, 2007 and 2) September 8, 2008- September 22, 2008. See November 21, 2008 Stipulation. Thus, the parties have stipulated to an elapsed time of 118 days that will count against the Commonwealth.

[4] The trooper testified that Defendant and his co-conspirator spoke regularly.

[5] Judge Walker's order is certainly not subject to attack for an "intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed." Id. at 1332.

[6] 365 days minus the 221 that have already run against the Commonwealth leaves 144 days for the Defendant to be brought to trial. April 26, 2009 is the 144th day after December 3, 2008, but, since April 26 is a Sunday, the Commonwealth will gain an additional day, April 27, 2009. 1 P.S. §1908.