

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
FRED ROBINSON,		
Appellant		No. 1021 MDA 2012

Appeal from the Judgment of Sentence entered February 27, 2012,  
in the Court of Common Pleas of Franklin County,  
Criminal Division, at No(s): CP-28-CR-0000779-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.:

Filed: January 4, 2013

Fred Robinson, ("Appellant"), appeals from the judgment of sentence entered after he was convicted of delivery of a controlled substance and conspiracy to commit delivery of a controlled substance.<sup>1</sup> We affirm.

The trial court summarized the pertinent facts and procedural history as follows:

[Appellant] was charged by criminal complaint on January 19, 2011, by Trooper John Brumbaugh before Magisterial District Judge Todd R. Williams. Preliminary Arraignment was held on April 15, 2011; bail was set in the amount of \$50,000, monetary. [Appellant] waived his preliminary hearing on April 26, 2011, at which time his bail was modified to \$5,000.00, monetary, on the condition that he be approved for the Franklin County Pre-Trial Release Program prior to his release from the Franklin County Jail. On June 3, 2011, counsel for [Appellant]

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<sup>1</sup> 35 P.S. § 780-113(a)(3); 18 Pa.C.S.A. § 903.

filed a Waiver of Appearance at a Formal Arraignment and Entry of Appearance on [Appellant's] behalf. At that time, [Appellant] was still incarcerated at the Franklin County Jail. At [Appellant's] request and without objection by the Commonwealth, bail was again modified on July 19, 2011, to remove the requirement that [Appellant] participate in the Pre-Trial Release Program. All other conditions remained in effect. [Appellant] signed a bail bond on July 22, 2011.

A pre-trial conference was held on September 2, 2011, at which time the Honorable Richard J. Walsh set December 15, 2011 as the date for trial by jury before President Judge Douglas W. Herman. Jury selection was set for November 14, 2011. Notably, the pre-trial conference Order does not include a list of proposed Commonwealth witnesses. [F.N.1. It is unknown ... if proposed Commonwealth witnesses were discussed at the September 2, 2011 pre-trial conference, as no transcript of this proceeding has been requested.]

On November 14, 2011, it was brought to President Judge Herman's attention that a potential Commonwealth witness was related to him; this information caused the President Judge to recuse himself from the case. The case was reassigned to [Judge Angela R. Krom]. A brief hearing was held with counsel and [Appellant] on November 14, 2011. All parties were made aware that [Judge Krom] was unavailable for trial on the previously assigned date, but would be available on three (3) alternate dates in December 2011. None of the dates in December [December 5, 6, and 12, 2011], offered by [Judge Krom] were acceptable to [Appellant]; therefore, trial was set for January 30, 2012. In setting the trial date, and over the vehement objection of [Appellant], [Judge Krom] found that the time between November 14, 2011 and January 30, 2012 "shall not count against the Commonwealth for the purpose of bringing this matter to trial under the time limit set by Rule 600." See Order of Court, November 14, 2011.

A Rule 600 Motion to Dismiss was filed by [Appellant] on January 27, 2012. The motion was addressed prior to the commencement of trial on January 30, 2012. [Judge Krom] denied [Appellant's] motion. ... The case then proceeded to trial before a jury and [Appellant] was found guilty of one count each of delivery of a controlled substance and conspiracy to commit delivery of a controlled substance.

Trial Court Opinion, 5/15/12, at 1-3.

On February 27, 2012, following a hearing, the trial court sentenced Appellant to a term of imprisonment of nine to twenty-three months. Appellant filed a post-sentence motion on March 8, 2012. On May 15, 2012, the trial court issued a memorandum opinion and order denying Appellant's post-sentence motion. Appellant filed a timely notice of appeal and complied with the trial court order directing him to file a concise statement of errors complained of on appeal. On July 10, 2012, the trial court issued a statement pursuant to Pa.R.A.P. 1925(a), stating that its May 15, 2012 memorandum adequately addressed the issues raised by Appellant for purposes of appeal.

In this appeal, Appellant presents a single issue for our review:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS THE CASE AGAINST APPELLANT WHERE THE TRIAL BEGAN MORE THAN 365 DAYS AFTER THE COMPLAINT WAS FILED AND THE ONLY DELAY WAS CAUSED BY THE LACK OF DUE DILIGENCE BY THE COMMONWEALTH WHERE THEY FAILED TO BRING TO THE COURT'S ATTENTION THAT ONE OF THEIR WITNESSES WAS RELATED TO THE TRIAL JUDGE UNTIL THE MORNING OF JURY SELECTION?

Appellant's Brief at 7.

Appellant challenges the trial court's denial of his motion to dismiss pursuant to Rule 600 of the Rules of Criminal Procedure. Pa.R.Crim.P. 600 provides in pertinent part as follows:

(A)

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- (3) 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.

\* \* \*

- (C) In determining the period for commencement of trial, there shall be excluded therefrom:
  - (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;
  - (2) any period of time for which the defendant expressly waives Rule 600;
  - (3) such period of delay at any stage of the proceedings as results from:
    - (a) the unavailability of the defendant or the defendant's attorney;
    - (b) any continuance granted at the request of the defendant or the defendant's attorney.

\* \* \*

- (G) . . .

If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, the Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant.

In evaluating a Rule 600 claim, our standard of review of a trial court's decision is whether the trial court abused its discretion. ***Commonwealth v. Surovcik***, 933 A.2d 651, 653 (Pa. Super. 2007).

The proper scope of review is limited to the evidence of record of the [Rule] 600 evidentiary hearing, and the findings of the trial court. An appellate court must view the facts in the light most favorable to the prevailing party. Additionally, when considering the trial court's ruling, this Court is not permitted to ignore the dual purpose behind [Rule] 600. [Rule] 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of [Rule] 600 was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.

***Surovcik***, 933 A.2d at 653 (citations omitted).

Here, the trial court set forth the reasons for its denial of Appellant's Rule 600 motion as follows:

In this present case, the Complaint was filed January 19, 2011, making the mechanical run date January 19, 2012. The adjusted run date was April 5, 2012. The adjusted run date was calculated by excluding the period between November 14, 2011 and January 30, 2012, a period of 77 days. To January 19, 2012, the 77 days were added, making the adjusted run date April 5, 2012. Therefore, [Appellant] was brought to trial within 365 days and Rule 600 was not violated.

In determining that the 77 days between November 14, 2011 and January 30, 2012 should be excluded from the period of time within which the Commonwealth was required to bring [Appellant] to trial under the Rule, the [trial court] considered the reasons the trial had to be rescheduled, specifically the recusal of [President Judge Herman] and the unavailability of [Judge Krom] for the original trial date. While [Appellant] would

argue that [Judge Herman's] conflict of interest [which resulted in the recusal] could have and should have been known well prior to the November 14, 2011 jury selection date, the record is not clear with respect to who knew what and when. What is clear is that the original trial judge [President Judge Herman] did not recuse himself until November 14, 2011. Only the trial judge can know if he or she must recuse himself or herself from handling a particular case based on a conflict of interest. The conflict is personal to the judge. The Commonwealth cannot know whether the trial judge has a conflict of interest. Even if the Commonwealth knew it had a potential witness with the same last name as the President Judge [Herman], there is no indication in the record as to when the Commonwealth discovered the relationship and took action.

It is also of no consequence that the Commonwealth did not call at trial the potential witness necessitating the recusal. [The trial court] knows of no rule of procedure or evidence or other requirement of law that would demand that the Commonwealth call every *potential* witness in its case-in-chief.

Further, upon the recusal of [Judge Herman], the case was reassigned to [Judge Krom] on November 14, 2011. The original trial date, December 15, 2011, was not available on [Judge Krom's] calendar. [Judge Krom] did attempt to find a trial date within the 365-day mechanical run date. To that end, the Commonwealth and [Appellant] were offered three trial dates in December. The three dates were acceptable to the Commonwealth; the dates were not acceptable to [Appellant] and/or his counsel. Accordingly, Rule 600(C)(3)(a) is applicable.

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Upon recusal of [Judge Herman], the Commonwealth sought reassignment of the case. The case was reassigned the same day and reviewed by [Judge Krom] for the purpose of rescheduling the trial. The Commonwealth was ready and able to proceed to trial on the dates offered by [Judge Krom]. [Appellant] was not. There is no evidence of record to suggest that the Commonwealth in any way manipulated the rescheduling of the trial for some improper purpose. Accordingly, Rule 600(C)(3)(a) provides for exclusion of the time as ordered by [Judge Krom] on January 30, 2012.

Further, the law is clear that even if [Appellant] has not been brought to trial within 365 days, and even if those days are attributable to the Commonwealth, Rule 600 may not result in dismissal of the case if the Commonwealth acted with due diligence. ***Commonwealth v. Riley***, 19 A.3d 1146, 1149 (Pa. Super. 2011). "Due diligence is a fact specific concept to be determined on a case-by-case basis. While due diligence does not demand perfection, it does require the Commonwealth to put forth a reasonable effort." *Id.* (citations omitted). Upon review of the record and despite [Appellant's] arguments to the contrary, [the trial court] cannot find that the Commonwealth did not put forth a reasonable effort to bring [Appellant] to trial within 365 days.

Trial Court Opinion, 5/15/12, at 5-7. *See also* N.T., 1/30/12, at 5-7.

We find no error in the trial court's determination that the delay caused by the recusal of Judge Herman on November 14, 2011 constituted excusable delay, and that Appellant's unavailability for trial on the dates offered in December of 2011, constitute excludable delay attributable to Appellant.<sup>2</sup> "It is long-established that judicial delay may serve as a basis

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<sup>2</sup> "'Excludable time' is defined in Rule 600(C) as the period of time between the filing of the written complaint and the defendant's arrest, ... any period of time for which the defendant expressly waives Rule 600; and/or such period of delay at any stage of the proceedings as results from: (a) the unavailability of the defendant or the defendant's attorney; (b) any continuance granted at the request of the defendant or the defendant's attorney. 'Excusable delay' is not expressly defined in Rule 600, but the legal construct takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence." ***Commonwealth v. Peterson***, 19 A.3d 1131 (Pa. Super. 2011) ***citing Commonwealth v. Booze***, 953 A.2d 1263, 1272-1273 (Pa. Super. 2008).

for extending the period of time within which the Commonwealth may commence trial, where the Commonwealth is prepared to commence trial prior to the expiration of the mandatory period, but the court, because of scheduling difficulties or the like, is unavailable. A trial court is not automatically required to rearrange its docket to accommodate Rule 600 run dates...." *Malgieri*, 889 A.2d at 607-608. Here, the unavailability of the trial court due to Judge Herman's recusal and Judge Krom's scheduling conflicts constitutes such excusable delay. In addition, the delay caused by Appellant's unavailability for trial in December, 2011 was properly excluded pursuant to Pa.R.Crim.P. 600(C)(3)(a), which provides that delay resulting from the unavailability of the defendant or the defendant's attorney is to be excluded from the 365-day calculation.

Moreover, "[s]o long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Pa.R.Crim.P. 600 must be construed in a manner consistent with society's right to punish and deter crime." *Surovcik*, 933 A.2d at 653. "If the trial court determines that the Commonwealth exercised due diligence and that the circumstances which occasioned the postponement(s) were beyond the control of the Commonwealth, it shall deny the motion." *Commonwealth v. Malgieri*, 889 A.2d 604, 606 (Pa. Super. 2005). *See also Commonwealth v. Bradford*, 46 A.3d 693, 701 (Pa. 2012) (citations and internal quotations omitted); Pa.R.Crim.P. 600(G). While Appellant



argues that the Commonwealth should have more promptly discovered the conflict resulting in the recusal of Judge Herman, the trial court did not find that, under the circumstances, the Commonwealth's actions constituted misconduct in an effort to evade Appellant's right to a speedy trial. We find no abuse of discretion in this determination. While the party requesting recusal must produce the evidence to support the request, the ultimate decision to recuse is "a personal and unreviewable decision that only the jurist can make." *Commonwealth v. Flor*, 998 A.2d 606, 642 (Pa. 2010) *citing Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (1998). Here, the record is not clear as to when Judge Herman learned of a potential conflict of interest warranting his recusal. The delay caused by his recusal cannot be attributed solely to the Commonwealth, and falls within the realm of excusable "judicial delay." *Malgieri, supra*.

We therefore conclude that the trial court's exclusion of the 77 days between November 14, 2011 and January 30, 2012 was proper. The Commonwealth was required to commence Appellant's trial by April 5, 2012, and did so, with trial commencing on January 30, 2012. The trial court did not err in finding that no Rule 600 violation occurred. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.