NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	No. 1535 WDA 2012
	:	
MICHAEL LEO KANE	:	

Appeal from the Order Entered September 27, 2012,
in the Court of Common Pleas of Cambria County
Criminal Division at No. CP-11-CR-0001182-2012

BEFORE: FORD ELLIOTT, P.J.E., ALLEN AND COLVILLE,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: December 4, 2013

The Commonwealth appeals from the order entered by the Cambria County Court of Common Pleas, dismissing the charges against appellee, Michael Leo Kane. We affirm.

The facts and procedural history of this case are as follows. On September 2, 2010, the Geistown Borough Police Department received a report of reckless driving involving a white motor home that was followed by a witness to the parking lot of the Harmony House, located at 601 Lamberd, Geistown Borough, Cambria County. Geistown Police Officer Jerry J. Martin arrived at the home and located the owner of the vehicle, Michael Leo Kane ("Kane"). At the time, Kane was a resident of the home. While speaking with Kane, Officer Martin smelled a strong odor of alcohol on his breath. Officer Martin also noticed Kane's glassy and bloodshot eyes as well as

* Retired Senior Judge assigned to the Superior Court.

slurred speech. Officer Martin arrested Kane for suspicion of drunk driving, and drove Kane to Windber Hospital for blood alcohol testing. However, a sample was not collected because Kane refused. Officer Martin returned Kane to the Harmony House and told him he would receive a summons in the mail.

On September 7, 2010, Officer Martin filed a criminal complaint against Kane charging him with driving under the influence (first offense/refusal), 75 Pa.C.S.A. § 3802(a)(1), and public drunkenness, 18 Pa.C.S.A. § 5505. The district court set a preliminary arraignment and preliminary hearing for November 2, 2010. According to the magisterial district criminal docket, a first class summons for the preliminary hearing was issued on September 9, 2010, and returned as "undeliverable" on September 22, 2010. Additionally, a certified summons was issued on September 9, 2010, and was returned as "rejected" on September 22, 2010. On November 2, 2010, the Honorable Max F. Pavlovich, the district judge for the area encompassing the Borough of Geistown, continued the case and issued a bench warrant for Kane's arrest for failure to appear.

In June of 2012, officers from the Johnstown Police Department arrested Kane and brought him to the district court. At that time, Kane waived his right to a preliminary hearing and was incarcerated when he was unable to post bail. On September 14, 2012, Kane filed a pre-trial motion to dismiss under Pa.R.Crim.P. 600 alleging that his right to a speedy trial was

violated by the Commonwealth's failure to exercise due diligence in bringing him to trial. A hearing on the motion was held on September 26, 2012; and on September 27, 2012, the trial court granted Kane's motion to dismiss, and dismissed the charges with prejudice. The Commonwealth filed this timely appeal and raises the following issue for our consideration:

> 1. Whether the trial court erred by holding that the Commonwealth of Pennsylvania failed to exercise due diligence in timely bringing the defendant to trial pursuant to Rule of Criminal Procedure 600?

Commonwealth's brief at 4.[1]

"In evaluating Rule 600 issues, our standard of review of a trial court's decision is whether the trial court abused its discretion." ***Commonwealth v. Hunt***, 858 A.2d 1234, 1238 (Pa.Super. 2004) (***en banc***), ***appeal denied***, 583 Pa. 659, 875 A.2d 1073 (2005). Further, we note:

> The proper scope of review . . . is limited to the evidence on the 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

[1] In this case, there is no dispute that the mechanical run date begins on September 7, 2010. Thus, on September 14, 2012, 738 days had passed since the filing of the criminal complaint -- one year and one week more than the mechanical 365-day rule. The Commonwealth and Kane agree that 136 days count against the Commonwealth, and the determination of this matter centers on the 602-day period between November 2, 2010, and June 26, 2012, during which this matter remained inactive in District Court.

> 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.
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> . . . .
>
> So 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, Rule 600 must be construed in a manner consistent with society's right to punish and deter crime.

Id. at 1238-1239 (internal citations and quotation marks omitted).

"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." ***Commonwealth v. Peterson***, 19 A.3d 1131, 1137 (Pa.Super. 2011), ***affirmed***, 615 Pa. 587, 44 A.3d 655 (2012).

The Commonwealth maintains that it diligently searched for Kane. The Commonwealth refers to Kane as a transient, who, during the time in question, lived in a group home (the Harmony House) in Geistown, as well as a self-propelled motor home, and in a rear apartment in a house on Franklin Street in the Kernville section of Johnstown. (Commonwealth's brief at 9-10.) According to the Commonwealth, the trial court demanded an overly vigilant diligence not contemplated by Rule 600. (***Id.*** at 11.) The

Commonwealth also contends the trial court improperly focused on the investigation not done as opposed to what steps the police actually took. (***Id.***)

Our review of the record reflects the following. At the September 26, 2012 hearing on Kane's motion to dismiss, Officer Martin testified regarding his efforts to find Kane which consisted of his returning to the Harmony House one time in November 2010 and learning that Kane no longer lived there. (Notes of testimony, 9/26/12 at 6.) When asked if he ever checked Kane's license address with the Pennsylvania Department of Transportation ("PennDOT"), Officer Martin stated that the address was listed since 2009 as 618 Franklin Street, in the city of Johnstown. (***Id.*** at 6-7.) According to Officer Martin, once Kane was unable to be located in November of 2010, his name was entered into the Commonwealth Law Enforcement Assistance Network ("CLEAN"), and no further action was taken. (***Id.*** at 10-11.)[2]

[2] Specifically, Officer Martin was asked:

> Q. Did you make any reasonable efforts after November of 2010 to locate --
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> Officer Martin: We had no leads to go off of to know even where he was at.
>
> Q. So it was discontinued after that?
>
> Officer Martin: Right. It was entered into the NCIC/CLEAN system so that if anybody ever stopped him, then he would be picked up. And, eventually, that's how he was taken into custody.

Also testifying was Chief Nicolas Zakucia of the Geistown Borough Police Department. He testified that he visited the Harmony House numerous times to locate Kane in the fall of 2010. (***Id.*** at 16.) Chief Zakucia was asked if he tried to locate Kane at the Harmony House in the winter or spring of 2011, and he replied, "Not that I can remember. I didn't physically go there after that, after 2010." (***Id.***) When asked about Kane's listed address with PennDOT, the chief said he visited the Johnstown address one time in September or early October of 2010. (***Id.*** at 16-17.) The chief also stated he did not believe Kane lived there, but did not explain why he believed that. (***Id.*** at 17.)

Additionally, Nova Irons, the administrator of the Harmony House, testified that Kane lived at the Harmony House from August of 2009 until the day of his arrest on September 2, 2010.[3] (***Id.*** at 12.) Ms. Irons explained that Kane was going to be evicted but that he refused to sign the eviction papers, so he walked out. (***Id.***) She was asked if police officers came to the residence looking for Kane, and she replied that officers came sometime in September. (***Id.*** at 13.) Ms. Irons stated the police kept calling asking if

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Id. at 10-11.

[3] According to the notes of testimony, Ms. Irons stated Kane lived at the Harmony House until "he left the day of his arrest on 9/2 of 2009." (***Id.*** at 12.) Clearly, Ms. Irons misspoke as Kane was arrested on September 2, 2010.

she had heard from Kane. (***Id.***) When asked how many times they called, she responded, "I don't know. It was numerous. Numerous times." (***Id.***) On cross-examination, Ms. Irons was asked if she could approximate when the police were looking for Kane, she answered, "2010." (***Id.*** at 14.) When asked if there were any attempts in 2011, she replied, "I don't recall. If there were, it would have been very early 2011 but I don't really recall that." (***Id.***)

Kane testified that when he left the Harmony House, he stayed at a hotel for one night then lived in his motor home for approximately two or three weeks. (***Id.*** at 22.) He testified that he began living at the rear of 618 Franklin Street around October 15, 2010. (***Id.***)

At the conclusion of the hearing, the Commonwealth argued that reasonable effort to locate Kane was shown when the police went to the Harmony House and Franklin Street, and then put his name in the CLEAN/NCIC system. (***Id.*** at 34.) The trial court asked: "So your argument is they tried to find him personally, then they did the only thing they could do at that point, put it in the CLEAN system and hope that he'd be picked up, which is exactly what happened?" (***Id.***) The Commonwealth answered, "Exactly." (***Id.***)

In dismissing the charges with prejudice, the trial court explained:

> [T]he Court is satisfied that subsequent to defendant's September 2, 2010 arrest, from September through December of 2010, the Commonwealth exercised due diligence in attempting

> to ascertain defendant's whereabouts. However, the Court cannot make a finding, in good conscience, that the Commonwealth acted with due diligence at anytime thereafter, until defendant was ultimately arrested in June of 2012, as the only affirmative action by the Commonwealth to locate defendant was to list his name in the NCIC computer system. Thus, because the Commonwealth has failed to satisfy its burden, we find that defendant is entitled to a dismissal of the charges.

Order, 9/27/12 at 1-2.

We are mindful that our review is limited to the record evidence of the Rule 600 hearing, and we must view the facts in the light most favorable to the prevailing party. ***Commonwealth v. Williams***, 876 A.2d 1018, 1020 (Pa.Super. 2005). The trial court concluded that the Commonwealth did not act with due diligence where it abandoned its search for Kane after it failed to locate him in the fall of 2010. The Commonwealth argues that it met its burden because there was no misconduct and it undertook efforts to find Kane before abandoning its attempts to bring him to trial.

We have reviewed several decisions on Rule 600 motions where the defendants alleged lack of due diligence by the Commonwealth in ascertaining their whereabouts in order to effectuate their arrest. In ***Commonwealth v. Cruz***, 524 A.2d 507, 509 (Pa.Super. 1987), we upheld the trial court's finding of due diligence on a record revealing that police had made various attempts to locate the accused in his residence and the residences of his relatives and girlfriend; had contacted the FBI, which then undertook several out-of-state activities to locate the accused; had entered

and checked for the name of the accused in crime computers; and had printed and distributed a wanted poster. In ***Commonwealth v. Branch***, 486 A.2d 460, 462 (Pa.Super. 1984), we found due diligence on a record extending for over two years in which police had conducted regular surveillance of the accused's neighborhood; had contacted the accused's last employer; had entered the accused's name into the national crime computer; and had made various record checks with the state bureau of motor vehicles, voter registration, and police department criminal records division. In ***Commonwealth v. Laurie***, 483 A.2d 890, 891 (Pa.Super. 1984), we reversed a trial court's finding that police had not exercised due diligence in locating the accused and remanded the case for trial. The ***Laurie*** record revealed the following efforts by police over a period of nearly eight months, which we held did constitute due diligence: several visits to the accused's relatives; contact with the electric, gas, and phone companies and with the Department of Welfare concerning the accused's records; an advertisement with a photograph and physical description of the accused in a local newspaper, with a request for information; entering the accused's name in crime computers. By contrast, in ***Commonwealth v. Collins***, 404 A.2d 1320, 1323 (Pa.Super. 1979), we overturned the trial court's finding of due diligence by police in attempting to locate the accused. As we explained, "[a] single unsuccessful visit to the homes of two relatives [of the accused], followed a month and one-half later by dropping one's card at the

accused's mother's residence with a request to be contacted should the accused come calling, falls far short of due diligence." ***Id.*** A similar result was reached in ***Commonwealth v. Webb***, 420 A.2d 703, 706 (Pa.Super. 1980). In ***Webb***, police officers made only two visits to appellant's last known address within a ten-day period and also looked at the mall the appellant was known to frequent. We concluded that these efforts did not satisfy the Commonwealth's burden.

Viewing the record in the light most favorable to Kane, it is clear the police were aware of the 618 Franklin Street address listed on Kane's driver's license. Kane testified he resided there until he was arrested in June of 2012 for a traffic violation. While the Commonwealth emphasizes the Geistown Police continued to check with the Harmony House, the testimony revealed they were told by Ms. Irons that Kane left the Harmony House, where he was in the process of being evicted, the day he was arrested. As Kane did not leave the Harmony House on good terms, it is puzzling why the police believed he would show up there.

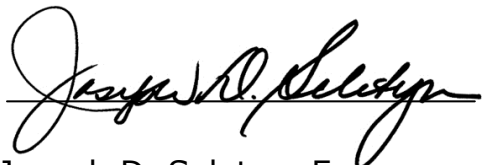
Also, it is not clear why, after visiting the Johnstown address <u>one</u> <u>time</u> in September or early October 2010, the police believed Kane was not living at that address. There was no testimony that the police attempted to talk to neighbors at the Franklin Street address or checked with local utility companies to ascertain if Kane was residing at 618 Franklin Street. There was also no testimony why the police did not put out an APB on the motor

home since they knew the license number. Simply putting Kane's name in the CLEAN/NCIC computer system and waiting for him to commit a crime so that his name would come to their attention is not due diligence on the part of the police.[4]

We do not wish to be too critical of the police or take the tremendous demands on their time lightly, but we must conclude the efforts made here over the course of approximately 18 months do not satisfy the standard of due diligence imposed upon them by Rule 600. One attempt at Kane's 618 Franklin Street address in a span of 18 months does not constitute an "on the ground" investigation, and evidences a lack of due diligence. Accordingly, we affirm the order of the trial court.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013

[4] We note the Commonwealth's argument that entering the defendant's name into the NCIC system has been found to be part of a successfully diligent effort to locate a defendant with an "on the ground" investigation. The problem in this case is that there was basically no "on the ground" investigation.