NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JAMES MICHAEL AHERN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1828 EDA 2012

Appeal from the Judgment of Sentence May 29, 2012
In the Court of Common Pleas of Monroe County
Criminal Division at No.: CP-45-CR-0001818-2011

BEFORE: GANTMAN, J., OLSON, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: April 26, 2013

Appellant, James Michael Ahern, appeals from the judgment of sentence entered on May 29, 2012, following his convictions of simple assault,[1] recklessly endangering another person,[2] and harassment.[3] We affirm.

On August 30, 2010, Appellant was charged with multiple offenses stemming from a December 12, 2009 assault, which took place at a Uni-Mart in Monroe County. Between September 17, 2010 and January 10, 2011, the

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S.A. § 2701(a)(1).

[2] 18 Pa.C.S.A. § 2705.

[3] 18 Pa.C.S.A. § 2709(a)(1).

police made four attempts to locate Appellant at the home address listed on his driver's license. On two of these occasions, the police spoke with Appellant's mother, who claimed to be unaware of his whereabouts. For reasons not apparent in the record, on March 17, 2011, the police contacted the Monroe County Probation Office and became aware that Appellant was on probation. The police arrested Appellant at his next probation meeting on March 24, 2011. Following a January 19, 2012 trial, a jury convicted Appellant of the aforementioned charges. On May 29, 2012, the sentencing court sentenced Appellant to an aggregate term of incarceration of not less than four months nor more than one year.

The instant, timely appeal followed. Appellant filed a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). The trial court filed a statement pursuant to Pa.R.A.P. 1925(a), relying on its January 17, 2012 opinion, that denied Appellant's motion to dismiss pursuant to Pennsylvania Rule of Criminal Procedure 600.

On appeal, Appellant challenges the denial of his Rule 600 motion. (***See*** Appellant's Brief, at 4). Appellant claims the trial court erred in denying his motion to dismiss pursuant to Pennsylvania Rule of Criminal Procedure 600, which states in pertinent part:

> **RULE 600 PROMPT TRIAL**
>
> (A)(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.

* * *

> (G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon.
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> 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.

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

In evaluating Rule 600 issues, our standard of review is whether the trial court abused its discretion. ***See Commonwealth v. Bradford***, 46 A.3d 693, 700 (Pa. 2012). The proper scope of review in determining the propriety of the trial court's ruling is limited to the evidence on the record of the Rule 600 evidentiary hearing and the findings of the trial court. ***See id.*** In reviewing this determination, "[a]n appellate court must view the facts in the light most favorable to the prevailing party." ***Commonwealth v. Ramos***, 936 A.2d 1097, 1100 (Pa. Super. 2007) (*en banc*), *appeal denied*, 948 A.2d 803 (Pa. 2008) (citation omitted). Further, ***Ramos*** provides that

when considering a Rule 600 issue, a court must contemplate the dual purpose behind the Rule:

> 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.
>
> 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. In considering [these] matters . . ., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

Id. (citation omitted). Further, "[d]ue 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. Selenski***, 994 A.2d 1083, 1089 (Pa. 2010) (citation omitted).

Pursuant to Rule 600, the mechanical run date, the date by which the trial must commence, occurs 365 days after the filing of the complaint. ***See*** Pa.R.Crim.P. 600(A)(3). The court then calculates an adjusted run date according to the precepts of Rule 600. In the instant matter, the criminal complaint was filed on August 30, 2010. Thus, the Commonwealth had until

August 30, 2011, to bring Appellant to trial. Appellant was not brought to trial until January 19, 2012, 507 days after the filing of the complaint.

Appellant argues that the Commonwealth failed to make reasonable efforts to search for Appellant between August 30, 2010, and the date of his arrest on March 24, 2011. (***See*** Appellant's Brief, at 6). Appellant also argues that the trial court erred in failing to attribute certain continuances at the request of the magisterial district justice to the Commonwealth. (***See id.*** at 6, 12). Further, Appellant generally argues that the Commonwealth failed to prioritize Appellant's case even though it was aware of the speedy trial issue. (***See id.*** 6). We disagree.

The trial court cogently analyzed the Rule 600 issue as follows:

> We first note the reasonable effort put forth by the Commonwealth in locating [Appellant]. The first attempt to locate [Appellant] was on September 17, 2010, at his home address of 1800 Cane Lane, Effort, Pa. The next attempt was on September 23, 2010, also at 1800 Cane Lane, Effort, PA. A third attempt was made on December 8, 2010, at [Appellant's] home address of 1800 Cane Lane, Effort, PA. Finally, on January 10, 2011, a fourth attempt was made to locate [Appellant] at 1800 Cane Lane, Effort, PA. These first four attempts to serve [Appellant] were at 1800 Cane Lane, which is [Appellant's] registered home address, were within a four month period, which we find to be reasonable. Although the police could have pursued other avenues to locate [Appellant], there is no requirement that the Commonwealth exhaust every conceivable method of locating [Appellant]. The Pennsylvania Supreme Court has noted that "[i]t is not the function of our courts to second-guess the methods used by the police to locate (defendants). . . . Deference must be afforded the police officer's judgment as to which avenues of approach will be fruitful." ***Commonwealth v. Mitchell***, 472 Pa. 553, 566, 372 A.2d 826, 832 (1977).

At our hearing on January 6, 2012, the Commonwealth introduced [Appellant's] Pennsylvania driving record which lists [Appellant's] address as 1800 Cane Lane, Effort, PA. [Appellant's] Pennsylvania driver's license was issued on February 17, 2010, and expired September 23, 2011, the time period during which attempts were made to arrest [Appellant]. During the January 10, 2011, attempt, Trooper Maynard was advised by Katherine Arnont, [Appellant's] mother, that she was unaware of [Appellant's] whereabouts and she did not have his phone number. On March 17, 2011, Corporal Reffeor located [Appellant] when he contacted Ms. Bodden at the Monroe County Probation Office.

While there was approximately two months from the January 10, 2011, attempt until [Appellant] was arrested, we find this time to be excludable. These two months are excludable because of the information conveyed by [Appellant's] mother to Trooper Maynard and [Appellant's] registered address with the Pennsylvania Bureau of Driver Licensing. After numerous attempts at locating [Appellant] at his registered address and without additional information on [Appellant's] whereabouts, Corporal Reffeor contacted the Monroe County Probation Office. Upon learning that [Appellant] was on probation, [Appellant] was thereafter taken into custody on March 24, 2011.

After [Appellant's] arrest on March 24, 2011, [Appellant] was scheduled for a preliminary hearing on April 1, 2011. [Appellant], however, requested a continuance in order to obtain legal counsel and the matter was rescheduled for May 20, 2011. This time is excludable and charged against [Appellant]. [The trial court rejected defense counsel's argument that it normally only takes one week to secure counsel and therefore the extra week was chargeable to the Commonwealth.] On May 20, 2011, the matter was continued to June 17, 2001, by the M[agisterial] D[istrict] J[ustice] [(MDJ)] pursuant to a Court order to move to a new office. On June 17, 2011, the preliminary hearing was continued to July 1, 2001, because the MDJ was unavailable. We find these continuances were beyond the control of the Commonwealth and are excludable. On July 1, 2011, the MDJ docket indicates that [Appellant] requested the preliminary hearing to be continued, however, at our January 6, 2012, hearing the parties agreed that the Commonwealth requested a continuance due to the unavailability of its witness. The

preliminary hearing was rescheduled and held on July 29, 2011. At the preliminary hearing, the charges of simple assault, recklessly endangering, criminal mischief and harassment were bound over for trial and all other charges were dismissed.

On September 27, 2011, [Appellant] filed a Waiver of Appearance at Arraignment, which contained notice that [Appellant] was scheduled to appear for the Call of the Criminal Trial List on December 20, 2011, and indicated trial was scheduled for the January 2012 Trial Term. The Commonwealth filed Criminal Information on October 3, 2011. The next criminal term available would have been January 2012. [The case could not be listed for the November Criminal Term because Appellant was entitled to file pre-trial motions during that period.] The case was called for trial on January 5, 2012. Accordingly, trial commenced on that date. Pa. R. Crim. P. 600 (B).

[Appellant] cites two cases arguing that the Commonwealth was not diligent in its search to apprehend [him]. In ***Commonwealth v. Collins***, 404 A.2d 1320 (Pa. Super. 1979), the defendant was arrested approximately 5 months after the criminal complaint was filed. The ***Collins*** court determined that a single unsuccessful visit to the homes of two relatives, 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 if the accused is seen, falls short of due diligence. In ***Collins***, there was no discussion as to [the d]efendant's home address and no efforts were made to contact the probation or parole office in Philadelphia.

In the instant case, the police attempted to locate [Appellant] at his home address, which was also registered with the Pennsylvania Bureau of Driver Licensing. Additionally, Corporal Reffeor contacted the Monroe County Probation Office within two months of the last unsuccessful attempt to locate [Appellant] at 1800 Cane Lane, Effort, PA.

[Appellant] also cites ***Commonwealth v. Webb***, 420 A.2d 703 (PA. Super. 1980) in support of his position that the Commonwealth did not exercise due diligence in apprehending him. In ***Webb***, a Post Conviction Hearing Act ("PCRA") petition was filed by the appellant. The Superior Court determined that the lower court erred in determining that the officers made reasonable efforts to arrest appellant during ten days between

filing of the complaint and his eventual arrest. The ***Webb*** court stated that the officers had no reason to believe that appellant was not living at his residence and two visits to appellant's home during a ten day period did not constitute reasonable efforts.

Unlike the ***Webb*** case, the instant matter is not before the Court on a PCRA petition. In ***Webb***, the [Superior Court reversed the lower court and found the petition meritorious] because trial counsel was ineffective in failing to file a motion to dismiss the charges under Rule 1100. [Clearly, this Court made no finding that the petition would have been successful, only that there was no reasonable basis for counsel not to have filed a speedy trial motion.]

After hearing and reviewing all the evidence, we find that the time period from September 3, 2010, to March 17, 2011, a period of 196 days, is excludable under Rule 600(C)(1). During this time [Appellant's] whereabouts were unknown and could not be determined by due diligence. Our review of the evidence demonstrates that the police entered information into a national database and attempted personal service at [Appellant's] registered address. After being unsuccessful, the police contacted the Monroe County Probation Office which resulted in locating [Appellant]. These methods sufficiently demonstrate reasonable effort to determine [Appellant's] whereabouts and are sufficient to toll the period for trial prescribed under Rule 600.

In addition, the period from April 1, 2011, to May 20, 2011, a period of 50 days, is excludable under Rule 600 (C)(3)(a). On April 1, 2011, [Appellant] requested a continuance in order to obtain legal counsel. This time is chargeable against [Appellant].

Finally, the period of time from June 17, 2011, to July 1, 2011, is excludable under Rule 600(G). During this time, two postponements occurred at the request of the MDJ for a total of 41 days. These postponements were beyond the control of the Commonwealth. However, the Commonwealth's request for continuance on July 1, 2011 is not excludable. This period of time is 28 days for the period between July 1, 2011, and July 29, 2011.

> Accordingly, the "mechanical run date" is modified to account for a period of 287 days. By adding the 287 days onto the "mechanical run date" of August 30, 2011, the "adjusted run date" is June 4, 2012. Pa. R. Crim. P. 600 "provides for dismissal of charges only in cases in which the defendant has not been brought to trial within the term of the adjusted run date, after subtracting all excludable and excusable time." [***Commonwealth v.***] ***Murray***, [879 A.2d 309,] 313 [(Pa. Super. 2005)]. We find that the Commonwealth is well within the adjusted run date of June 4, 2012, and therefore, [Appellant's] motion must be denied.

(Trial Court Opinion, 1/17/12, at 5-9).

This Court has reviewed the record in this matter as well as the briefs of the parties. In support of its findings, the trial court thoroughly reviewed the relevant factors and the evidence adduced. We agree with the trial court's analysis of the Rule 600 issue, in particular, its finding that the Commonwealth exercised due diligence in attempting to locate Appellant. We also find no support in law for Appellant's contention (***see*** Appellant's Brief, at 6, 12) that the delays caused by the MDJ are attributable to the Commonwealth. ***See Commonwealth v. Riley***, 19 A.3d 1146, 1149 (Pa. Super. 2011) (observing that delays caused by administrative decisions of the court, over which the Commonwealth has no control, are excused); ***Commonwealth v. Trippett***, 932 A.2d 188, 198 (Pa. Super. 2007) (noting that delays caused by the court's unavailability are excused). Thus, we find that the record demonstrates that the trial court did not abuse its discretion in denying Appellant's motion to dismiss pursuant to Pa.R.Crim.P. 600, and Appellant's claims to the contrary are without merit.

Judgment of sentence affirmed. Jurisdiction relinquished.