NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. BILLIE JO NICKLOW, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1309 WDA 2014

Appeal from the Order of August 7, 2014
In the Court of Common Pleas of Fayette County
Criminal Division at No(s): CP-26-CR-0001266-2012

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

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 23, 2014**

The Commonwealth of Pennsylvania appeals from the order entered on August 7, 2014 granting Appellee, Billie Jo Kicklow's, motion to dismiss pursuant to Pennsylvania Rule of Criminal Procedure 600.[1] We vacate and remand.

As alleged in the affidavit of probable cause, the factual background of this case is as follows. On November 11, 2011, Troopers Scott Dowlin and Patrick Bouch witnessed Appellee's vehicle swerve across the double yellow line and fog line on Morgantown Road. The troopers conducted a traffic stop during which Trooper Dowlin noticed a strong smell of alcohol emanating

[1] Rule 600 was rescinded on October 1, 2012, effective July 1, 2013. ***See*** 42 Pa.B 6622 (Oct. 20, 2012). A new Rule 600 was promulgated on October 1, 2012, effective July 1, 2013. ***See id.*** As this case is governed by the former Rule 600, all references in this memorandum are to the former Rule 600.

from Appellee's vehicle. As he approached the vehicle, Trooper Dowlin also noticed that Appellee's eyes were red and glassy. Trooper Dowlin administered field sobriety tests which Appellee failed. At 12:39 a.m. Appellee gave two breath samples which registered blood alcohol contents of .105 and .102.

The relevant procedural history of this case is as follows. On March 1, 2012, Appellee was charged via criminal complaint with driving under the influence – general impairment,[2] driving under the influence – high rate of alcohol,[3] disregarding traffic lanes,[4] failure to wear a seat belt,[5] and careless driving.[6] At Appellee's request, the preliminary hearing was continued from April 20, 2012 until July 19, 2012. On August 13, 2012, a criminal information charging the same five offenses was filed.

On February 4, 2013, Appellee requested a continuance in order to pursue Accelerated Rehabilitative Disposition ("ARD"). Prior to that continuance lapsing, on February 26, 2013, Appellee submitted an application for ARD. That application was withdrawn on May 3, 2013. On August 5, 2013, Appellee requested a second continuance in order to explore

[2] 75 Pa.C.S.A. § 3802(a)(1).

[3] 75 Pa.C.S.A. § 3802(b).

[4] 75 Pa.C.S.A. § 3309(1).

[5] 75 Pa.C.S.A. § 4681(a)(2).

[6] 75 Pa.C.S.A. § 3714(a).

once again the possibility of being admitted to ARD. Prior to that continuance lapsing, Appellee filed an application for ARD on September 5, 2013. That application was denied on January 14, 2014. The case was listed for trial on May 22, 2014. On May 19, 2014, Appellee filed a motion to dismiss under Rule 600.

At the Rule 600 evidentiary hearing, the Commonwealth argued that the adjusted run date was January 14, 2015 because the denial of Appellee's application for ARD was a termination under Pennsylvania Rule of Criminal Procedure 600(D)(3). In its brief submitted after the hearing, however, the Commonwealth conceded that it made an error of law as Rule 600(D)(3) did not apply, and that according to a stipulation made between the parties, the adjusted run date was January 16, 2014.[7] Nonetheless, the Commonwealth argued that it had acted with due diligence in bringing Appellee to trial. On August 7, 2014, the trial court granted Appellee's motion to dismiss. This timely appeal followed.[8]

The Commonwealth presents one issue for our review:

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[7] The stipulation of January 16, 2014 as the adjusted run date was binding on the parties. The January 16, 2014 date, however, was incorrectly calculated.

[8] On August 12, 2014, the trial court ordered the Commonwealth to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). On August 18, 2014, the Commonwealth filed its concise statement. On August 21, 2014, the trial court issued a statement in lieu of a Rule 1925(a) opinion. The Commonwealth's lone issue on appeal was included in its concise statement.

> Whether the [trial c]ourt erred in granting [Appellee]'s motion to dismiss pursuant to Rule 600 when the delay was attributable to an honest, unintentional administrative error?

Commonwealth's Brief at 4.

> Rule 600 provides, in pertinent part:
>
> (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.
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> (C) In determining the period for commencement of trial, there shall be excluded therefrom
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> * * *
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> (3) such period of delay at any stage of the proceedings as results from:
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> (a) the unavailability of the defendant or the defendant's attorney;
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> (b) any continuance granted at the request of the defendant or the defendant's attorney.
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> **(D) . . . . (3) When a trial court has ordered that a defendant's participation in the ARD program be terminated pursuant to Rule 184[9], trial shall commence within . . . 365 days of the termination order.**
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> * * *
>
> (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

[9] Now Rule 318.

> 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, 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 (emphasis added).

> As we have stated:
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> In evaluating Rule 600 issues, our standard of review of a trial court's decision is whether the trial court abused its discretion. Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.
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> 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.
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> 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.

> 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.

Commonwealth v. Thompson, 93 A.3d 478, 486–487 (Pa. Super. 2014) (internal alterations, ellipses, and citation omitted).

The Commonwealth phrases the question presented as whether it acted with due diligence despite its administrative error. That, however, incorrectly presumes that the Commonwealth's error was an administrative error. An administrative error is an error of fact. The error in this case was an error of law as the Commonwealth incorrectly relied on Rule 600(D)(3) in calculating the adjusted run date. Thus, correctly phrased, the question presented is whether the Commonwealth acted with due diligence despite its error of law.

We find instructive our Supreme Court's decision in ***Commonwealth v. Selenski***, 994 A.2d 1083 (Pa. 2010). In ***Selenski***, the defendant was charged with murder. ***Id.*** at 1085. While awaiting trial on the murder charges, Selenski escaped. ***Id.*** After recapture, the Commonwealth filed a petition under Pennsylvania Rule of Criminal Procedure 130 seeking consolidation of the murder and escape charges. ***Id.*** The trial court granted the petition. ***Id.*** The trial court subsequently suppressed certain

statements made by Selenski related to the murders. ***Id.*** The Commonwealth appealed, and this Court affirmed. ***Commonwealth v. Selenski***, 876 A.2d 469 (Pa. Super. 2005) (unpublished memorandum), *appeal denied*, 891 A.2d 732 (Pa. 2005). Upon remand, Selenski filed a motion to dismiss the escape charges, arguing that, because the escape charges were not properly consolidated with the murder charges, the appeal of the suppression ruling relating to the murder charges did not toll the Rule 600 run date for the escape charges. ***Selenski***, 994 A.2d at 1086.

The trial court granted Selenski's motion, concluding that proper consolidation had not been accomplished because the Commonwealth's consolidation motion was filed under Rule 130 instead of Rule 582. ***Id.*** at 1087. This Court reversed, concluding that consolidation was achieved. ***Commonwealth v. Selenski***, 919 A.2d 229, 234 (Pa. Super. 2007), *aff'd*, 994 A.2d 1083 (Pa. 2010).

Our Supreme Court affirmed, but on other grounds. It declined to address whether the charges were properly consolidated. ***Selenski***, 994 A.2d at 1088-1089. Instead, it determined that whether proper consolidation had occurred was not a prerequisite to determining if a Rule 600 violation had occurred.[10] ***Id.*** at 1088. The High Court stated that the

[10] Our Supreme Court was able to make this determination because of its ultimate resolution of the case. If it had determined that the Commonwealth had not acted with due diligence in bringing the case to trial, then it would have confronted whether or not consolidation had occurred. If consolidation
(Footnote Continued Next Page)

trial court should have done an in-depth due diligence inquiry instead of summarily dismissing the Commonwealth's argument. ***Id.*** at 1088-1089. Having determined that the trial court erred by not conducting such an analysis, our Supreme Court then held that this Court erred by not immediately remanding the matter to the trial court to conduct such an inquiry. ***Id.*** at 1089. Nonetheless, in the interest of judicial economy, our Supreme Court conducted a *de novo* due diligence analysis. ***See id.*** at 1089. Based upon this analysis, it concluded that the Commonwealth acted with due diligence and therefore affirmed this Court. ***Id.*** at 1090.

Our reading of ***Selenski*** leads us to conclude that, so long as the Commonwealth acts with due diligence in bringing a defendant to trial, the charges filed against the defendant are not subject to dismissal under Rule 600 even if an error of law by the Commonwealth has contributed to the delay. Specifically, although our Supreme Court in ***Selenski*** implicitly assumed *arguendo* that consolidation was not accomplished by the Commonwealth's Rule 130 motion, it concluded that the actions of the Commonwealth amounted to due diligence. The Commonwealth's belief that it had accomplished consolidation by filing the Rule 130 motion was an error of law. That error of law led the Commonwealth to believe, albeit

(Footnote Continued) ———————————
had occurred, there would have been no Rule 600 violation. ***See Selenski***, 994 A.2d at 1089.

mistakenly, that it had 120 days from the date of remand to bring Selenski to trial.

Likewise, in the case at bar, the Commonwealth mistakenly believed that, under Rule 600(D)(3), it had 365 days from the date it rejected Appellee's application for ARD to bring Appellee to trial. This was an error of law as Rule 600(D)(3) does not apply to situations in which a defendant's application for ARD is rejected by the Commonwealth. Instead, by its express terms, it applies to situations in which a defendant has been accepted into ARD and a trial court later orders that a defendant's participation in ARD be terminated. Thus, we conclude, under ***Selenski***, where the Commonwealth exercises due diligence to bring a defendant to trial before the adjusted run date, it may avoid dismissal of charges under Rule 600 even though an error of law on the part of the Commonwealth may have contributed to the delay in bringing the defendant to trial.

In this case, the trial court made the same error as the trial court in ***Selenski***. The trial court determined that the Commonwealth committed an error of law and therefore summarily dismissed the Commonwealth's argument that it exercised due diligence. We, therefore, must vacate the trial court's order granting Appellee's motion to dismiss under Rule 600. Furthermore, cognizant of the fact that in ***Selenski*** our Supreme Court disapproved of this Court conducting a due diligence analysis in the first instance, we remand to the trial court for a due diligence analysis. As such

analysis may lead the trial court to determine that the Commonwealth exercised due diligence, we relinquish jurisdiction.[11]

Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/23/2014

[11] Upon remand, the trial court must determine whether the Commonwealth exercised due diligence in bringing Appellee to trial. The burden is on the Commonwealth to prove, by a preponderance of the evidence, that it acted with due diligence in bringing Appellee to trial before the adjusted run date. ***Thompson***, 93 A.3d at 488 (citation omitted). The Commonwealth is "not require[d to prove] perfect vigilance and punctilious care, but merely [prove it] has put forth a reasonable effort." ***Commonwealth v. Sloan***, 67 A.3d 1249, 1252 (Pa. Super. 2013) (citation omitted).