

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MARIO PAGAN,	:	
	:	
Appellant	:	No. 3020 EDA 2011

Appeal from the Judgment of Sentence Entered October 3, 2011,
In the Court of Common Pleas of Philadelphia County,
Criminal Division, at No. CP-51-CR-0011203-2008.

BEFORE: SHOGAN, JENKINS and PLATT*, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED MAY 02, 2014

Appellant, Mario Pagan, appeals from the judgment of sentence imposed on his convictions of possession of a controlled substance and possession with intent to deliver. On appeal, Appellant challenges the denial of his motion to dismiss pursuant to Pa.R.Crim.P. 600. We affirm.

Appellant was charged with the above-mentioned crimes on April 24, 2008. On September 2, 2010, Appellant filed a Rule 600 motion to dismiss. Following a bifurcated hearing on September 7, 2010, and October 6, 2010, the Honorable Robert Coleman denied Appellant’s motion. The Honorable Adam Beloff conducted a waiver trial on June 15, 2011, and found Appellant guilty of both crimes. Judge Beloff sentenced Appellant on October 3, 2011,

*Retired Senior Judge assigned to the Superior Court.

to a mandatory minimum sentence of incarceration for two to four years followed by two years of probation. This appeal followed.¹

Due to the unavailability of the October 6, 2010 Rule 600 hearing transcript, Appellant filed a motion for remand in this Court pursuant to Pa.R.A.P. 1923. Appellant and the Commonwealth filed statements in lieu of the transcript, and Judge Coleman filed findings of fact regarding the October 6, 2010 hearing. This matter is now ripe for review.

Appellant argues that the trial court erred in denying his Rule 600 motion to dismiss for two reasons: Appellant was not brought to trial within the time limits contemplated by the rule, and the Commonwealth did not exercise due diligence in bringing Appellant to trial. Appellant's Brief at 14. We disagree.

We review Appellant's Rule 600 argument according to the following principles:

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

¹ We note that Appellant complied with Judge Beloff's order for a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). In response, Judge Beloff requested that Judge Coleman file a Rule 1925(a) opinion because Judge Coleman ruled on Appellant's Rule 600 motion. The record does not contain an opinion by Judge Coleman or Judge Beloff, who no longer sits as a judge in Philadelphia County.

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.

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.

Commonwealth v. Armstrong, 74 A.3d 228, 234 (Pa. Super. 2013) (quoting **Commonwealth v. Ramos**, 936 A.2d 1097, 1099 (Pa. Super. 2007) (*en banc*) (citation omitted)).

Rule 600 provides, in pertinent part, as follows:

(A) Commencement of Trial; Time for Trial

* * *

(2) Trial shall commence within the following time periods.

(a) Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.

* * *

(C) Computation of Time

(1) For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation.

* * *

(3)(a) When a judge or issuing authority grants or denies a continuance:

(i) the issuing authority shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance; and

(ii) the judge shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance. The judge also shall record to which party the period of delay caused by the continuance shall be attributed, and whether the time will be included in or excluded from the computation of the time within which trial must commence in accordance with this rule.

(b) The determination of the judge or issuing authority is subject to review as provided in paragraph (D)(3).

(D) Remedies

(1) When a defendant has not been brought to trial within the time periods set forth in paragraph (A), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the charges be dismissed with prejudice on the ground that this rule has been violated. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

(2) Except in cases in which the defendant is not entitled to release on bail as provided by law, when a defendant is held in pretrial incarceration beyond the time set forth in paragraph (B), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the defendant be released immediately on nominal bail subject to any nonmonetary conditions of bail imposed by the court as permitted by law. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

(3) Any requests for review of the determination in paragraph (C)(3) shall be raised in a motion or answer filed pursuant to paragraph (D)(1) or paragraph (D)(2).

Pa.R.Crim.P. 600(A), (C), and (D).

We have explained that Rule 600 has the dual purpose of both protecting a defendant's constitutional speedy trial rights and protecting society's right to effective prosecution of criminal cases. To protect the defendant's speedy trial rights, Rule 600 ultimately provides for the dismissal of charges if the Commonwealth fails to bring the defendant to trial within 365 days of the filing of the complaint (the "mechanical run date"), subject to certain exclusions for delays attributable to the defendant. Pa.R.Crim.P. 600(A)(3), (G). Conversely, to protect society's right to effective prosecution prior to dismissal of charges, [R]ule 600 requires the court to consider whether the [C]ommonwealth exercised due diligence, and whether the circumstances occasioning the delay of trial were beyond the Commonwealth's control. If the Commonwealth exercised due diligence and the delay was beyond the Commonwealth's control, the motion to dismiss shall be denied. Pa.R.Crim.P. 600(G). The Commonwealth, however, has the burden of demonstrating by a preponderance of the evidence that it exercised due diligence. As has been oft stated, 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. 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(G).

Commonwealth v. Bradford, 46 A.3d 693, 701–702 (Pa. 2012) (internal case citations and quotation marks omitted).

In determining whether Rule 600 has been violated, the courts of this Commonwealth employ three steps:

First, Rule 600(A) provides the mechanical run date. Second, we determine whether any excludable time exists pursuant to Rule 600(C). We add the amount of excludable time, if any, to the mechanical run date to arrive at an adjusted run date.

If the trial takes place after the adjusted run date, we apply the due diligence analysis set forth in Rule 600(D). As we have explained, Rule 600 encompasses a wide variety of circumstances under which a period of delay was outside the control of the Commonwealth and not the result of the Commonwealth's lack of diligence. Any such period of delay results in an extension of the run date. Addition of any Rule 600 extensions to the adjusted run date produces the final Rule 600 run date. If the Commonwealth does not bring the defendant to trial on or before the final run date, the trial court must dismiss the charges.

Armstrong, 74 A.3d at 236 (quoting **Ramos**, 936 A.2d at 1103 (footnote and citations omitted)).

In the case at hand, the Commonwealth filed charges against Appellant on April 24, 2008. Pursuant to Rule 600, the mechanical run date for bringing Appellant to trial was April 24, 2009. Appellant went to trial on June 15, 2011. The only time period in dispute for purposes of calculating the adjusted run date is February 3, 2009 through April 30, 2009, a total of eighty-six days.² According to the Criminal Docket, the Commonwealth requested a continuance on February 3, 2009, because "one officer out sick, one officer on vacation." Docket Entry, 2/3/09. The case was listed "next on EPD of 4/30/09 in Rm. 704." **Id.**

The parties agree that if those eighty-six days were charged against the Commonwealth, then the final run date was August 11, 2010. The

² The parties agree that any time after the Rule 600 motion hearing on September 7, 2010 is not at issue. Appellant's Brief at 19; Commonwealth's Brief at 16-17.

Rule 600 motion hearing occurred on September 7, 2010, which was twenty-seven days after the final run date. Under this scenario, the Commonwealth violated Appellant's right to a speedy trial. Appellant's Brief at 21; Commonwealth's Brief at 13 n.4. Contrarily, if the eighty-six days were counted as excusable delay, the final run date fell beyond the Rule 600 motion hearing on September 7, 2010. Under this scenario, the Commonwealth did not violate Appellant's right to a speedy trial.

Appellant claims that the eighty-six days were not excusable delay because the Commonwealth failed to present sufficient evidence of its due diligence regarding the February 3, 2009 date. Specifically, Appellant challenges the Commonwealth's failure to produce subpoenas issued to the unavailable officers. Appellant's Brief at 24. In response, the Commonwealth claims it was only required to establish that it subpoenaed the officers and that the officers' unavailability was beyond its control. Commonwealth's Brief at 17.

The record reveals that, on the first Rule 600 motion hearing date, Judge Coleman relied on ***Commonwealth v. Peterson***, 19 A.3d 1131, 1138–1139 (Pa. Super. 20011) (*en banc*), in concluding that the district attorney's office "subpoenaed the officers. That's all they are required to do, even if the officers were sick or otherwise on vacation." N.T., 9/7/10, at 15. According to Judge Coleman, "diligence under ***Peterson*** is established by

the issuance of the subpoena itself; whether or not [the officers] appear is a different reason.” *Id.* at 18 (emphasis supplied). In an effort to complete the record and bolster its position, the Commonwealth requested a continuance to produce documentation supporting its subpoena request, and defense counsel did not object. *Id.*

On the second hearing date, the Commonwealth presented documentary evidence that it ordered subpoenas for the officers in question. Appellant conceded this fact and attached a copy of the Commonwealth’s request to his Statement in Absence of Transcript Pursuant to Pa.R.A.P. 1923. Relying on his notes and recollection from the October 6, 2010 hearing, Judge Coleman made the following findings of fact:

- Officer Wheeler and Officer Collaretti testified that they did not remember being on vacation and out sick respectively on February 3, 2009.
- Neither Officer Wheeler nor Officer Collaretti could produce copies of subpoenas for February 3, 2009.
- The District Attorney’s Office produced a copy of a subpoena request for both Officers to be in court on February 3, 2009.
- The District Attorney’s Office followed their standard operating procedure in requesting a subpoena for each officer through the Police Department’s liaison.

Findings of Fact in Absence of Transcript Pursuant to Pa.R.A.P. 1923, 8/16/13.

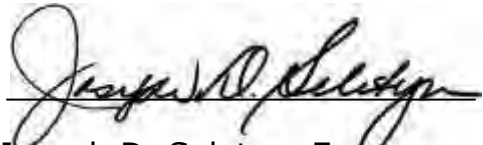
We note that **Peterson** involved an officer's failure to appear twice, once because he had been "subpoenaed to testify in a different matter at the family court building," and once because "a court liaison officer incorrectly informed him that the case was continued and he was permitted to leave." **Peterson**, 19 A.3d at 1137, 1139. In both instances, the officer had been subpoenaed by the Commonwealth. **Id.** at 1137–1138, n.8. This Court *en banc* agreed with the trial court that the delay caused by the officer's failure to appear was beyond the control of the Commonwealth; therefore, the Commonwealth acted with due diligence in prosecuting the complaint. **Id.** at 1139.

Based on our review of the case *sub judice* in the light most favorable to the Commonwealth, we conclude that the certified record supports Judge Coleman's findings of fact. We further conclude that the rationale of **Peterson** supports the trial court's legal conclusion. The Commonwealth asserted that it followed standard procedures and requested subpoenas for the officers to appear on February 3, 2009. N.T., 9/7/10, at 6–7. Additionally, the parties agree—and the record confirms—that the Commonwealth produced a copy of an internal document from the district attorney's office dated January 26, 2009, indicating a request for court notices to the officers. Statement [of the Evidence] in Absence of Transcript Pursuant to Pa.R.A.P. 1923, 4/17/13, at Attachment. Furthermore, the

criminal docket contains the Commonwealth's February 3, 2009 request for a continuance because "one officer out sick, one officer on vacation." Docket Entry, 2/3/09. Based on this record, we agree with the trial court that the eighty-six-day delay caused by the officers' failure to appear was beyond the control of the Commonwealth; therefore, the Commonwealth acted with due diligence in prosecuting the complaint. Thus, we conclude that the trial court did not abuse its discretion in denying Appellant's Rule 600 motion.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/2/2014