NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. BRIAN JAMES-PAUL HINES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 916 EDA 2013

Appeal from the Judgment of Sentence October 17, 2011
In the Court of Common Pleas of Carbon County
Criminal Division at No(s): CP-13-CR-0000843-2009

BEFORE: FORD ELLIOTT, P.J.E., BOWES, J., and OTT, J.

MEMORANDUM BY OTT, J.: **FILED JULY 14, 2014**

Brian James-Paul Hines appeals *nunc pro tunc* from the judgment of sentence entered on October 17, 2011, as amended on October 19, 2011, in the Carbon County Court of Common Pleas, made final by the denial Hines's post-sentence motion (petition for bail) on December 21, 2011. On July 20, 2011, a jury found Hines guilty of two counts of aggravated assault, two counts of simple assault, one count of recklessly endangering another person ("REAP"), and one count of firearms not to be carried without a license.[1] Hines was sentenced to an aggregate term of 84 to 168 months' incarceration, to be followed by four years of probation. On appeal, Hines

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[1] 18 Pa.C.S. §§ 2702(a)(1) and (a)(4), 2701(a)(1) and (a)(2), 2705, and 6106(a)(1), respectively.

claims the trial court erred: (1) in failing to discharge the matter due to a violation of Pennsylvania Rule of Criminal Procedure 600, (2) in failing to suppress a statement made by Hines to police, and (3) in providing jury instructions that improperly commented on the evidence. Hines also raises numerous ineffective assistance of counsel claims. Based on the following, we affirm.

The trial court set forth the facts and procedural history as follows:

> During the late afternoon of November 9, 2009, [Hines] called Gary Hoffner's ("Hoffner") home, which Hoffner shared with his girlfriend, Stacey Boyle, and her son, Jason Boyle ("Boyle"). [Jason] Boyle answered the phone, at which time [Hines] began accusing Hoffner of stealing his heater.[5] Jason Boyle responded by informing [Hines] that Hoffner was not present. Shortly thereafter, [Jason] Boyle called Hoffner at work to tell him of [Hines]'s call.[6] Meanwhile, [Hines] called his girlfriend, Anna Winger ("Winger"), and the two determined to drive together to Hoffner's residence. Accordingly, [Hines] went to Winger's home, picked her up, and the two proceeded as planned.
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> [5] [Hines] alleged that Hoffner had stolen several items from him including: a heater, DVD's, and an amplifier.
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> [6] That day, Gary Hoffner was working the day shift at Brian D. Kesler Roofing.
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> Hoffner returned from work at about 5:30 p.m. Shortly therafter, while outside with [Jason] Boyle, Hoffner observed [Hines] drive by and park his vehicle a short distance away from [Hines]'s home. Wanting to confront [Hines] regarding the earlier accusation, Hoffner got in his vehicle, accompanied by [Jason] Boyle, drove towards [Hines]'s location, and parked in such a manner that the drivers' doors of the two vehicles were close to each other, approximately four feet apart. None of the four individuals exited their vehicles; rather, [Hines] and Hoffner began speaking to one another through the open drivers' side windows.

An argument quickly ensued concerning the allegedly stolen heater. Winger exited [Hines]'s vehicle and began walking towards the rear of Hoffner's vehicle. [Jason] Boyle followed suit and approached Winger. While the two argued behind Hoffner's vehicle, [Hines] and Hoffner remained in their vehicles, arguing through the open windows. Suddenly, Hoffner noticed [Hines] reaching up with a gun and pointing it in [Jason] Boyle's direction. Worried for [Jason] Boyle's safety, Hoffner exited his vehicle. At the same time, [Hines] pointed the gun in Hoffner's direction, fired and shot Hoffner in his face, the bullet lodging in his right nostril. Upon hearing the gunshot, Winger ran back to [Hines]'s vehicle and the two drove away. [Hines] disposed of the gun by throwing it out his window into Lake Mineola, in Monroe County.[7] It has never been recovered.

> [7] According to Winger, she noticed [Hines] had a gun on him when she touched his leg as they were leaving the scene of the incident, approximately two miles away. After disposing of the gun, Winger testified that the two headed towards Stroudsburg, where they planned on switching vehicles, due to their current vehicle being low on gas. Following the switch, they headed to Winger's home, where, they waited for the police to call.

A jury trial began on July 18, 2011, and ended on July 20, when the jury returned a verdict of guilty on six of the seven counts charged.[8] Following a pre-sentence investigation report, by Order of Sentence dated October 17, 2011, and amended October 19, 2011, [Hines] was sentenced to not less than seventy-two (72) months nor more than one hundred forty-four (144) months of incarceration in a state correctional facility as to the charge of aggravated assault. As to the charge of firearms not to be carried without a license, [Hines] was sentenced consecutively to not less than twelve (12) months nor more than twenty-four (24) months followed by four (4) years state probation.[9]

> [8] [Hines] was found not guilty of criminal attempt – criminal homicide pursuant to 18 Pa.C.S.A. § 901(A). Further, by Order dated July 20, 2011, the conclusion of trial, [the trial court] dismissed with prejudice count four of the information, charging

> [Hines] with one count of terroristic threats with intent to terrorize another pursuant to 18 Pa.C.S.A. § 2706(A)(1).
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> [9] For purposes of sentencing, all other charges – simple assault and recklessly endangering another person, were merged with the lead offense of aggravated assault.
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> On October 27, 2011, [Hines] filed his Post Sentence Motions raising his post sentence bail as one of the issues. By Order dated December 13, 2011, [the trial court] dismissed [Hines]'s Post Sentence Motion (Petition for Bail). No appeal was filed. On October 12, 2012, [Hines] filed a *pro se* petition for post-conviction relief, pursuant to which he alleged that counsel was ineffective in failing to file an appeal on [Hines]'s behalf. After a hearing on the matter, held on February 21, 2013, [the trial court] found that notwithstanding the fact that [the] December 13, 2011, Order was somewhat vague as to whether it dismissed all of [Hines]'s post-sentence motions or solely his motion for bail, counsel had rendered ineffective assistance *per se* in failing to preserve his client's appellate rights.

Trial Court Opinion, 6/20/2013, at 2-5 (record citations omitted). As such, Hines's direct appeal rights were reinstated, and this appeal followed.

In his brief, Hines raises the following 12 issues:

> A. Whether the Trial Court erred when it denied the Defendant/Appellant's motion to have the charges against him dismissed under Pennsylvania Rule of Criminal Procedure 600 because it took the Commonwealth longer than 365 days to bring him to trial.
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> B. Whether prior defense counsel erred in failing to present any evidence at trial on the Defendant/Appellant's behalf.
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> C. Whether prior defense counsel erred in failing to present the testimony of the Defendant/Appellant at trial.
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> D. Whether prior defense counsel erred in failing to present the Defendant/Appellant's testimony at the hearing on his

omnibus pre-trial motion to suppress his statements to the police.

E. Whether prior defense counsel, and the trial court, erred in failing to move to suppress the Defendant/Appellant's second statement to the police under the "Davenport-Duncan rule" in that it was elicited greater than six (6) hours after the Defendant/Appellant's arrest. ***Commonwealth v. Watkins***, 750 A.2d 308 (Pa. Super. 2000); ***Commonwealth v. Davenport***, 370 A.2d 301 (Pa. 1977); ***Commonwealth v. Duncan***, 525 A.2d 1177 (Pa. 1987) (plurality opinion).

F. Whether trial counsel erred in not being prepared for sentencing, which may have resulted in the Defendant/Appellant receiving a longer sentence.

G. Whether prior defense counsel provided ineffective assistance in not doing a pre-sentencing submission of over 20 character letters.

H. Whether trial counsel erred in failing to either pursue the evidence of the victim's blood splatter found on the Defendant/Appellant's vehicle, or request a jury instruction on this missing evidence that was in the Commonwealth's possession.

I. Whether trial counsel erred in failing to have the Defendant/Appellant testify at the omnibus pre-trial suppression hearing and/or at trial on the issue that the police may have forged his initials on his written statement(s).

J. Whether trial counsel erred in failing to request a mistrial or a cautionary instruction when he objected at sidebar to the state police trooper (Barletto) rendering expert opinion testimony concerning the tire tracks and shell casings found at the scene of the crime.

K. Whether trial counsel erred in failing to object and request a mistrial when the prosecuting attorney rendered his personal opinion concerning witnesses' truthfulness or untruthfulness during his closing argument.

> L. Whether the trial court erred when in instructing the jury on the charge of firearms carried without a license it gave what amounted to an instruction that they return a verdict of guilty, and whether trial counsel erred in failing to request a mistrial as a result.

Hines's Brief at 6-7.

Initially, as indicated by the trial court, issues two, three, four, five (partially), six, seven, eight, nine, ten, eleven, and twelve (partially) concern various allegations of ineffective assistance of counsel.[2] Generally, claims of trial counsel's ineffectiveness are deferred until Post Conviction Relief Act (PCRA)[3] review unless the defendant expressly waives his right to PCRA review. ***See Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa. Super. 2011) (*en banc*).[4] This Court recently set forth the requirements for a valid waiver under ***Barnett***:

> [I]n order for a defendant to raise counsel's ineffectiveness on direct appeal, he or she must expressly, knowingly and voluntarily waive his or her right to PCRA review. Thus, established waiver principles must be applied to waiver of PCRA review when a defendant wishes to expedite the review of ineffective assistance of counsel claims by way of a post-trial motion. Consequently, a defendant must participate in an on-the-record colloquy, which ensures the defendant is aware of the rights being waived, *i.e.*, the "essential ingredients" of PCRA review. This includes, but is not limited to, an explanation of (1)

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[2] ***See*** Trial Court Opinion, 6/20/2013, at 6-7.

[3] 42 Pa.C.S. §§ 9541-9546.

[4] ***See also Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003); ***Commonwealth v. Wright***, 961 A.2d 119 (Pa. 2008); ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa. 2009).

> the eligibility requirements for PCRA relief; (2) the right to be represented by counsel for a first PCRA petition; (3) the types of issues that could be raised pursuant to the PCRA that are now being given up; and (4) the PCRA is the sole means of obtaining nearly all types of collateral relief. ***See*** 42 Pa.C.S.A. §§ 9542-9543; Pa.R.Crim.P. 904(C). The trial court must also ensure the defendant has made the decision to waive his right to PCRA review after consulting with counsel (if any) and in consideration of his rights as they have been explained in the colloquy.

Commonwealth v. Baker, 72 A.3d 652, 668 (Pa. Super. 2013) (footnote omitted). A review of the record reveals that no colloquy was conducted to determine if Hines expressly, knowingly and voluntarily waived his right to PCRA review.[5] Therefore, we dismiss Hines's ineffectiveness claims without prejudice to his ability to raise these claims in a timely PCRA petition, along with any other claims for post conviction relief, if he so chooses. Accordingly, we turn to Hines's remaining claims.

In his first issue, Hines alleges the court erred in denying his Rule 600 motion because it took the Commonwealth longer than 365 days to bring him to trial. Hines's Brief at 14. By way of background, the trial court set forth the pertinent facts and procedural history:

> [A] criminal complaint was filed on November 10, 2009, charging [Hines] with various offenses. [Hines] then waived his preliminary hearing scheduled for December 30, 2009. Next, was the pre-trial conference originally scheduled for February 4, 2010, and continued to March 2, 2010, upon motion for [Hines] citing seeking discovery as the reason for the request. By Order

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[5] Particularly, we note that transcripts from the December 18, 2012 and February 21, 2013, hearing, which addressed Hines's request for *nunc pro tunc* relief, do not indicate that a PCRA waiver colloquy took place.

dated March 8, 2010, trial was scheduled to commence on April 2, 2010. However, on March 31, 2010, [Hines] sought a continuance of the trial, and requested that this matter be scheduled for another pre-trial conference as he had retained new counsel. Subsequently, on May 13, 2010, the date of the pre-trial conference, [Hines] sought a continuance of same because he needed more time to investigate. The conference was moved to June 22, 2010, at which time [Hines] filed another continuance due to outstanding discovery. The conference was then scheduled for July 8, 2010, and continued, that same date, to September 9, 2010, upon [Hines]'s motion citing awaiting discovery. By Order dated September 15, 2010, trial was scheduled for December 6, 2010.

In the meantime, on November 9, 2010, [Hines] filed for a Motion to Suppress Evidence of two statements he made to the police relating to the incident in question. The hearing on said Motion was scheduled for December 2, 2010. As a result, on November 30, 2010, [Hines] filed for a continuance seeking to move the trial to January 10, 2011. Since a decision on [Hines]'s Motion had not yet been rendered, [Hines] filed another continuance on January 3, 2011, seeking to move the trial to March 7, 2011. By Order dated February 15, 2011, [the court] denied [Hines]'s Motion.

On February 28, 2011, [Hines] requested that the trial be continued to April 11, 2011, because defense counsel needed time to review the discovery. On April 8, 2011, [Hines] requested that trial be again continued, this time to June 6, 2011, as defense counsel was awaiting the Commonwealth's doctor's report, and defense counsel was unavailable for the month of May.

A couple of days prior to the commencement of trial, [Hines] filed a Motion to Dismiss Charges with Prejudice on the grounds that the Commonwealth had violated Rule 600. That same day, [Hines] filed a motion seek[ing] to continue the trial, again stating that defense counsel was awaiting the doctor's report. By Order dated June 6, 2011, we denied [Hines]'s Motion, and granted [Hines]'s request to have the trial continued to July 18, 2011.

On July 15, 2011, [Hines] re-filed his Motion to Dismiss alleging that the Honorable Judge Scott W. Naus did not have

> the authority to execute the order denying the motion as he had not, at that time, met the specifications needed to attain senior judge status. The Honorable Senior Judge John J. Rufe, who heard the second motion and presided over the trial, reaffirmed the decision of Judge Naus, denying the second motion on July 18, 2011.

Trial Court Opinion, 6/13/2013, at 7-9.[6]

Hines admits that he filed most, if not all of the continuances in this case. Hines's Brief at 16. Nevertheless, with respect to the period from June 22, 2010 through May 2, 2011, Hines contends:

> [T]his timeframe should not be excluded from the Rule 600 computation because the reason for each continuance was the Commonwealth's unreasonable failure to provide requested, discoverable material that was readily available to it. As such, the Commonwealth did not exercise due diligence in moving the case forward to trial. Therefore, the entire timeframe from June 22, 2010 through May 2, 2011, when the trial counsel was not available and had to request a continuance for that reason until June 6, 2011, should be chargeable to the Commonwealth for Rule 600 computation purposes.

Id.

We are guided by the following:

> When reviewing a trial court's decision in a Rule 600 case, an appellate court will reverse only if the trial court abused its discretion. ***See Commonwealth v. Selenski***, 606 Pa. 51, 994 A.2d 1083, 1087 (2010). "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 ... discretion is abused." ***Id***. (internal citation

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[6] A Rule 600 hearing was held on June 6, 2011. At that time, the court determined the following: "And from May 9 until this date I counted no days against the Commonwealth for a total of … 337." N.T., 6/6/2011, at 27.

> omitted). Our scope of review is limited to the record evidence from the Rule 600 hearing and the findings of the lower court, viewed in the light most favorable to the prevailing party. ***See Id***.

Commonwealth v. Bradford, 46 A.3d 693, 700 (Pa. 2012).

> Additionally,
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> [w]e 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. ***Selenski***, 994 A.2d at 1088; ***Commonwealth v. Dixon***, 589 Pa. 28, 907 A.2d 468, 473 (2006). 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, "Rule 600 requires the court to consider whether the Commonwealth exercised due diligence, and whether the circumstances occasioning the delay of trial were beyond the Commonwealth's control." ***Selenski***, 994 A.2d at 1088. 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. ***See*** [***Commonwealth v. Browne***, 584 A.2d 902, 908 (Pa. 1990)]. As has been oft stated, "[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." ***Selenski***, 994 A.2d at 1089. "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).

Bradford, 46 A.3d at 701-02.

Also, in relevant part, Pennsylvania Rule of Criminal Procedure 600 states:

> (A) Commencement of Trial; Time for Trial
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> (1) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.
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> (2) Trial shall commence within the following time periods.
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> > (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.

Pa.R.Crim.P. 600(A)(1)-(2)(a). The Rule provides the following guidelines as to the 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.

Pa.R.Crim.P. 600(C).

Lastly, we note the following:

> In assessing a Rule 600 claim, the court must exclude from the time for commencement of trial any periods during which the defendant was unavailable, including any continuances the defendant requested and any periods for which he expressly waived his rights under Rule 600. Pa. R. Crim. P. 600(C). "The mere filing of a pre-trial motion by a defendant does not automatically render him unavailable. Rather, a defendant is unavailable for trial only if a delay in the commencement of trial is caused by the filing of the pretrial motion." ***Commonwealth v. Hill***, 558 Pa. 238, 254, 736 A.2d 578, 587 (1999).
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> In the context of Rule 600, there is a distinction between "excludable time" and "excusable delay":
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> > "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.
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> [***Commonwealth v. Hunt***, 858 A.2d 1234, 1241 (Pa. Super. 2004)] (internal citations omitted).

Commonwealth v. Hyland, 875 A.2d 1175, 1189-1190 (Pa. Super. 2005).

Here, the trial court found the following:

> In this case, the mechanical run date is November 10, 2010 – three hundred and sixty-five days after the filing of the complaint. At the time of the hearing on June 6, 2011, this court found that the following periods of time were excludable: [(1) 3/31/2010-6/22/2010 – Defense continuance of trial originally scheduled for 4/2/2010 due to retention of new counsel; rescheduled for pretrial conference for 6/22/2010 – 83 days of delay; (2) 12/6/2010-1/10/2011 – Defense continuance of trial originally scheduled for 12/6/2010; continuance requested because of outstanding pretrial motion filed on 11/9/2010; trial rescheduled for 1/10/2011 – 35 days of delay; (3) 1/10/2011-3/7/2011 – Defense continuance of trial originally scheduled for 1/10/2011; continuance requested because of outstanding pretrial motion filed on 11/9/2010; trial rescheduled for 3/7/2011 – 56 days of delay; (4) 5/9/2011-6/6/2011 – Defense continuance of trial originally scheduled for 4/11/2011; continuance requested because of defense counsel's unavailability for the month of May; trial rescheduled for 6/6/2011 – 28 days of delay. The total number of days excluded were 202 days.]
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> The eighty-three day delay between March 31, 2010, and June 22, 2010, resulted from [Hines]'s requested continuance as a result of obtaining new counsel. The thirty-five day delay between December 6, 2010, and January 10, 2011, as well as the fifty-six day delay between January 10, 2011, and March 7,

> 2011, are attributable to [Hines]'s pre-trial motion filed on November 9, 2010, and decided on February 15, 2011. ***See Commonwealth v. Hill***, 736 A.2d 578, 587 (Pa. 1999) (holding that the time intervening between a defendant's filing of a pretrial motion and the trial court's disposition of that motion is excludable to the extent the effect is to render the defendant unavailable for trial and/or to delay the commencement of trial, provided, that for the entire period to be excludable, the Commonwealth must exercise due diligence throughout the entire time period such that none of the delay is attributable to it). Finally, the twenty-eight day delay between May 9, 2011, and June 6, 2011, resulted from defense counsel's unavailability during the May trial term.
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> Thus, the adjusted run date for commencing trial is extended to May 31, 2011. Trial was scheduled to begin on April 11, 2011, fifty days prior to the deadline set forth by Rule 600. However, prior to that, [Hines] had filed two continuance motions – the first on February 28, 2011, and the second on April 8, 2011 – because he was still awaiting discovery and his counsel would not be available for the May term. Accordingly, trial was set for June 6, 2011. This Court determined to count the delay between March 7, 2011 to May 9, 2011 – totally sixty-three days – against the Commonwealth as a result of its failure to act with due diligence in providing discovery. ***See Commonwealth v. Preston***[,] 904 A.2d 1, 12 (Pa. Super. 2006) ("if the delay in providing discovery is due to either intentional or negligent acts, or merely stems from the prosecutor's inaction, the Commonwealth cannot claim that its default was 'excusable'"). The delay between May 9, 2011, and June 6, 2011, on the other hand, were excluded due to defense counsel's unavailability previously stated herein. Since June 6, 2011, trial was delayed upon motion by [Hines] for a total of forty-two days excludable days until July 18, 2011.
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> We, therefore, believe that pursuant to Rule 600, [Hines] was brought to trial within three hundred and sixty-five non-excludable days of the filing of the complaint against him.

Trial Court Opinion, 6/13/2013, at 10-13.

Given our standard and scope of review, as well as the findings of the trial court, which were supported in the certified record, we conclude the

court did not abuse its discretion in denying Hines's motion to dismiss the prosecution. Hines's argument that the entire timeframe from June 22, 2010 to May 2, 2010 should not be excluded from computation is unavailing as there were numerous periods where the court was deciding his motion to suppress and where counsel filed continuances – both of which were attributable to him. ***See Hyland***, ***supra***. Accordingly, Hines's first argument fails.

Next, in his fifth argument, Hines asserts the trial court erred in failing to suppress his second statement to police pursuant to the "***Davenport***-***Duncan*** rule" because it was elicited greater than six hours after his arrest. Hines's Brief at 30. He states he was taken into custody at 9:45 p.m. on November 9, 2009, and his first statement was elicited at 12:02 a.m. on November 10, 2009. He notes that his second statement was not taken until several hours later, at 4:45 a.m. ***Id.*** at 31. He argues that because seven hours lapsed between when he was first taken into custody and when he gave the second statement, the subsequent statement should be suppressed under the "***Davenport***-***Duncan*** rule." ***Id.*** He claims the failure to suppress the statement was prejudicial because it was incriminating, and "the Commonwealth made it a cornerstone of its prosecution" as the Commonwealth would have only been left with the testimony of the victim. ***Id.*** at 32.

Our standard of review is well-settled:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Farnan, 55 A.3d 113, 115 (Pa. Super. 2012) (citation omitted).

As noted above, Hines relies on the ***Davenport***-***Duncan*** "six-hour" rule. In ***Davenport, supra***, the Pennsylvania Supreme Court held an arrestee must be arraigned within six hours of his or her arrest in order "to guard against the coercive influence of custodial interrogation [and] to ensure that the rights to which an accused is entitled at preliminary arraignment are afforded without unnecessary delay." ***Davenport,*** 370 A.2d at 305. "If the accused is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment shall not be admissible at trial." ***Id.*** at 306 (footnote omitted).

In ***Duncan***, the Supreme Court modified the rule by concluding:

> [T]he focus should be upon *when* the statement was obtained, *i.e.*, within or beyond the six hour period. If the statement is obtained within the six hour period, absent coercion or other illegality, it is not obtained in violation of the rights of an accused and should be admissible. In keeping with the underlying objectives of the rule, only statements obtained after the six hour period has run should be suppressed on the basis of ***Davenport***.

Duncan, 525 A.2d at 1182-1183 (italics in original).

Contrary to Hines's argument, the Pennsylvania Supreme Court expressly rejected the ***Davenport***-***Duncan*** "six-hour rule" and adopted a totality of the circumstances test in ***Commonwealth v. Perez***, 845 A.2d 764 (2004). With respect to the totality of the circumstances test, we are guided by the following:

> The [***Perez***] majority abandoned the six-hour rule and held that voluntary statements by an accused, given more than six hours after arrest when the accused has not been arraigned, are no longer inadmissible *per se*. Instead, the majority in ***Perez*** concluded that courts should look to the totality of the circumstances to determine whether a pre-arraignment statement was freely and voluntarily made, and therefore admissible. The majority explained that, in making this determination, courts should consider factors such as the attitude exhibited by the police during the interrogation, whether the defendant was advised of his constitutional rights, whether he was injured, ill, drugged or intoxicated when he confessed, and whether he was deprived of food, sleep, or medical attention during the detention.
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> ***Commonwealth v. Sepulveda***, __ Pa. __, __, 855 A.2d 783, 792-93 (2004) (citations and quotation marks omitted).

Commonwealth v. Seilhamer, 862 A.2d 1263, 1268 (Pa. Super. 2004).

In the present case, Pennsylvania State Trooper Patrick Finn testified that on November 9, 2009, Hines turned himself into state troopers located at the Shiftwater Barracks in Monroe County. N.T., 12/2/2010, at 6. Hines was transported to Trooper Finn's Lehighton station in Carbon County sometime before midnight. ***Id.*** Trooper Finn stated that Hines was placed in a custodial interview room and advised of his ***Miranda***[7] rights, prior to giving his first written statement that began at 12:02 a.m. and lasted until 12:30 a.m. ***Id.*** at 7-14.[8] Hines was handcuffed and put in shackles. ***Id.*** at 20.

Trooper Finn testified that Hines initialed in the affirmative on the statement form that he understood his rights, that he wished to make a statement, and that he could read and write in the English language. ***Id.*** at 11. The trooper also stated that Hines acknowledged that the information in the two-page statement was correct, that it was given of his own free will and accord without promises or threats, he understood what they were discussing, there were no corrections to the statement, and he initialed both pages. ***Id.*** at 12-14. In the first statement, Hines alleged the gun was the victim's and there was a struggle for the weapon. ***Id.*** at 15.

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[7] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[8] The trooper indicated he audiotaped the interview. N.T., 12/2/2010, at 9.

Trooper Finn testified that after the initial statement was given, he had another discussion with Hines and Hines agreed to provide a second statement. ***Id.*** at 15-16. In the interim between the two statements, Trooper Finn testified that he spoke to Hines "a lot" but there may have been a "whole hour" where the two did not speak because the trooper was processing Hines. ***Id.*** at 29. The trooper could not remember if he offered Hines a drink and/or permission to use the bathroom, but did say that he "usually offer[ed] drinks, especially on longer [custodial interviews]" and he "would have to assume" that he took Hines to the bathroom "in that time." ***Id.*** Trooper Finn also stated "If you're asking if I would deny him food, water, or toiletry, no…. If he asked for it, I will guarantee you, from my personality and professionality [sic] I would definitely give it to him[.]" ***Id.*** at 29-30.[9] The trooper also explained that during this time, he "was talking to the D.A., talking to the magistrate about the arraignment, doing the charges, doing the criminal complaint, talking to the seven or eight or nine troopers that were involved in the investigation." ***Id.*** at 35.

The subsequent statement began at 4:45 a.m. and lasted 15 minutes, following the same procedures at the earlier statement, including giving ***Miranda*** warnings. ***Id.*** at 16-17. In the second statement, Hines told the trooper it was his gun, he pulled it out and shot the victim, and there was no

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[9] Trooper Finn indicated that food would not have been offered to Hines because there was no food available at the barracks. ***Id.*** at 30.

struggle. ***Id.*** at 15. The trooper answered in the negative that there was never any indication on the part of Hines that these statements were not voluntarily provided by him. ***Id.*** at 17.

In the February 15, 2011, order denying Hines's motion to suppress, the court made the findings of fact and conclusions of law, which are set forth in relevant part:

> 5. Both statements were on pre-printed forms provided by the Pennsylvania State Police, which contain statements indicating the rights of the Defendant to remain silent and to consult with an attorney.
>
> 6. The forms were produced at the hearing as Exhibits 1 and 2 by the Commonwealth.
>
> 7. [Hines] signed both statements and placed his initials indicating that his rights had been explained to him.
>
> 8. This Court concludes [Hines] knowingly and voluntarily waived his right to the assistance of counsel and his right to remain silent during his custodial interrogation. We further conclude that [Hines] was properly warned of these rights by the interrogating officer.
>
> 9. The statements of [Hines] given at 30 minutes past midnight and at 5:00 a.m. on November 10, 2009 and identified as Exhibits 1 and 2 during the hearing were signed by [Hines] after Miranda warnings were given and are the product of his free will.

Order of Court, 2/15/2011, at unnumbered 1-2.[10] Further, in its Rule 1925(a) opinion, the court explained:

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[10] We note the case was originally before the Honorable Richard W. Webb, who held the December 2, 2010, motion to suppress hearing and entered the February 15, 2010, order denying Hines's motion to suppress. The
(Footnote Continued Next Page)

> The totality of the circumstances indicates that the statements were freely and voluntarily made: [Hines] turned himself in following the incident; he was advised of and waived his constitutional rights prior to giving the statement; there is no indication that he was ill, drugged or intoxicated; and there is no indication that [Hines] asked for and was deprived of food[,] sleep or medication attention [sic] during this period. Furthermore, it is plain from the record that less than six hours elapsed between the time the defendant voluntarily appeared at the State Police Barracks until the time he gave his second voluntary statement.

Trial Court Opinion, 6/13/2013, at 15-16.

We agree with the trial court's rationale. There was no evidence that the delay in procuring Hines's subsequent custodial statement "was intended to wear [him] down or overcome [his] will." ***Seilhamer***, 862 A.2d at 1270. Likewise, the record did not establish that the trooper used "coercive tactics to persuade" Hines to give his second custodial statement. ***Id.*** Rather, the trooper provided Hines with ***Miranda*** warnings on two occasions, before each of his statements. Moreover, as the trial court noted, Hines was not injured, ill, drugged, or intoxicated when he confessed and he was not deprived of water, sleep, or medical attention during those four-and-a-half hours between statements. ***See Sepulveda***, ***supra***. Based on the totality of the circumstances, we find both of Hines's pre-arraignment statements were voluntarily given. ***See Seilhamer***, ***supra***; ***Perez***, ***supra***. Accordingly, the trial court properly denied his motion to suppress.

(Footnote Continued) ———————————

matter was subsequently transferred to the Honorable John Rufe before Hines's trial began.

In his twelfth and final argument, Hines complains the trial court erred when instructing the jury on the charge of firearms not to be carried without a license because "it gave what amounted to an instruction that [the jury] return a verdict of guilty[.]" Hines's Brief at 43.

By way of background, the court gave the following instruction:

> And finally, [Hines] has been charged in the last count with carrying a firearm without a license. To find [Hines] guilty of this offense you must find that each of the following elements have been proven beyond a reasonable doubt.
>
> First, that [Hines] carried a firearm in a vehicle or consealed [sic] on or about his person. A firearm is any pistol or revolver with a barrel less than 15 inches long or any pistol, revolver, or rifle or shotgun with an overall length of less than 26 inches.
>
> To be a firearm the specific object charged must be either operable, that is capable of firing a projectile. Or if inoperable, [Hines] had it under … his control [--] the means to convert the object into one capable of firing a shot. You may if you choose infer that the object was an operable firearm by the way it appears and feels.
>
> Second, that [Hines] was not in his place of abode, that is, he was not at his home or fixed place of business. And third, that [Hines] did not have a valid or lawfully issued license for carrying the firearm.
>
> Ladies and gentlemen, that may be the easiest decision for you to make in this case. The evidence appears to be uncontradicted that [Hines] by his statements acknowledged the possession of a firearm. And there was a certification produced that he did not have a license to carry that weapon.

N.T., 7/18/2011-7/20/2011, at 364-365.

After further instructions were given, the following sidebar conference took place:

THE COURT: Additions or corrections?

[Defense counsel]: Yes, Your Honor. There was one major problem when you went to the firearms charge you, I believe instructed the jury, this should be easy for you to decide.

THE COURT: I took that risk.

[Defense Counsel]: But, Your Honor, that's not fair to [Hines]. First of all, you stated that he acknowledged that he had the firearm. When we were in Chambers we specifically discussed that firearm was the one at the time of the incident. It is our argument to the jury that [Gary Hoffner brought the firearm], that [it was] not Mr. Hines. And you stated that he acknowledged --

THE COURT: I thought he amended that on the second statement.

[Defense counsel]: But we argued about voluntariness of the second statement. And also, Your Honor.

THE COURT: I can retract that, what I said.

[Defense counsel]: And also that you stated that it would be easy because certification stated that he could not carry a weapon.

When [the prosecutor] was questioning the officer about that certification I objected to the officer making his statement as to what the certificate meant and I said the certificate speaks for itself, and it does.

It is up for the jury to decide if that certificate states whether or not he could carry a weapon on the date of November 9th. That's the jury's decision and the document speaks for itself.

THE COURT: All right.

[Defense counsel]: The only -- when you talk about verdict slip, you said it is for you to decide guilt or innocence. But I think they should be instructed, guilty or not guilty.

THE COURT: Sure. Okay.

Id. at 373-374.

The court then gave the following curative instruction:

> THE COURT: Members of the jury, I may have misspoken to you during the course of my discussion with regard to count seven, firearms not to be carried without a license.
>
> Counsel points out to me and I believe correctly, that the testimony of [Hines] in one of his statements was that the handgun had been brought to the scene of the crime or scene of the incident not by him, but by Gary Hoffner.
>
> And so if, in fact, you accept that testimony, [Hines] would not be guilty of possession of a firearm and therefore would not be guilty of a violation of carrying a firearm without a license.
>
> And further, it will be for you to determine whether the certificate which was introduced says anything other than what it says. More particularly, it will be for you to determine what, if anything, that certificate introduced by the Commonwealth shows; whether it shows anything relevant to this case or not.
>
> And finally, on the verdict sheet, you should determine whether [Hines] is found guilty or not guilty as to each of the seven counts.

Id. at 374-375.

Hines argues that the original jury instructions were in error as the last paragraph of the instructions "essentially [took] the determination of [his] guilt or innocence on that charge out of the jury's hands because the trial judge for all intent and purpose expressed the opinion that [Hines] was guilty of the charge." Hines's Brief at 44.

When reviewing a trial court's jury charge, we adhere to the following standard of review:

> [T]his Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. We further note that, it is an unquestionable maxim of law in this Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Antidormi, 84 A.3d 736, 754 (Pa. Super. 2014) (citations omitted).

Moreover,

> the trial court must frame the legal issues for the jury and instruct the jury on the applicable law, while on the other hand, it must not usurp the power of the jury to be sole judge of the evidence. Plainly, these principles may conflict with each other, for in order to instruct the jury on the law the court may have to refer to the evidence. The proper balance to be struck will depend heavily on the facts and circumstances of each case. However, some general guidelines have been formulated. Thus the court may not comment on, or give its opinion of, the guilt or innocence of the accused. Nor may it state an opinion as to the credibility of witnesses, nor remove from the jury its responsibility to decide the degree of culpability. However, the court may summarize the evidence and note possible inferences to be drawn from it. In doing so, the court may ". . . express [its] own opinion on the evidence, including the weight and effect to be accorded it and its points of strength and weakness, providing that the statements have a reasonable basis and it is clearly left to the jury to decide the facts, regardless of any opinion expressed by the judge."

Commonwealth v. Leonhard, 485 A.2d 444, 446 (Pa. Super. 1984) (citations omitted).

Here, the trial court explained its rationale with regarding to the jury instruction at issue:

> [W]e believe our remark to have been proper. First, there was a reasonable basis for making the statement as the evidence showed that [Hines] had given a statement to the police that the gun was his, that he brought it with him for the confrontation, which he initiated with Hoffner; and a certificate had been introduced as an exhibit showing that [Hines] did not have a license to carry a weapon. Second, we had … previously instructed the jury that they were the sole finders of fact,[12] and further instructed the jury of the same following the making of our remark. Thus, if any error resulted, we believe it to have been harmless, and not such that would result in [Hines] being deprived of a fair and impartial trial. *See* Leon[h]ard, at 447 (a new trial is warranted where the language at issue is "of such a nature and substance … that it may reasonably be said to have deprived the defendant of a fair and impartial trial").
>
> [12] Specifically, we instructed the jury that
>
> > if I do discuss the evidence, remember that I am giving you my recollection of the evidence. If my recollection is not consistent with your recollection, then your recollection prevails, not mine. When I mention evidence or refer to testimony, I do not mean to imply that that particular testimony or piece of evidence to which I refer has any greater impact or significance than any other evidence or testimony in the case. Also, if I fail to mention evidence or refer to testimony that you think is important or significant, it is not my intention to imply that it has any less significant [sic] than you wish to attach to it. As members of the jury, you are the sole judges of the facts. It is up to you and you alone to determine what the facts are in this case …. And if any expression of mine seems to indicate an opinion on matters which are within your province, factual matters, I instruct you, you are to be guided by your own judgment in those things.

Trial Court Opinion, 6/13/2013, at 17-18 (record citations omitted).

After applying the principles set forth above to this case, we conclude the trial court's remarks were not such that we should remand for a new

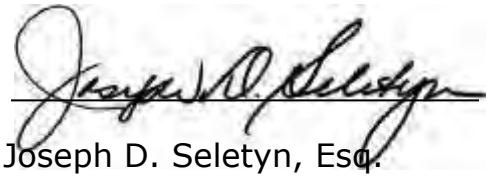
trial. While the court's initial remarks gave the appearance of usurping the power of the jury to weigh the evidence regarding the firearms charge, and, if read by itself, the statements may have constituted sufficient ground to remand for a new trial. ***See Leonhard***, ***supra***. However, the court did not give its opinion with respect to Hines's guilt or innocence, and the court's remarks, when read in the context of the entire charge, did not deprive Hines of a fair trial. Specifically, with respect to the curative instruction, the trial judge indicated to the jury that he had misspoken and referred to the fact that Hines, in one of his statements, averred that the handgun had been brought to the crime scene by Hoffner, and not by him. N.T., 7/18/2011-7/20/2011, at 375. Therefore, the judge instructed the jury they would determine whether Hines was guilty of a violation of carrying a firearm without a license. ***Id.***

With respect to a curative instruction, the jury is presumed to have followed the trial court's instructions. ***Commonwealth v. DeJesus,*** 860 A.2d 102, 111 (Pa. 2004). No evidence was presented demonstrating that the jury disregarded the trial court's instruction. "We do not suggest that the court's remarks regarding [Hines]'s defense had no effect on the jury. Nevertheless, we think that considered as a whole, the charge left the jury free to reach its 'independent conclusion' as to [Hines]'s guilt or innocence." ***Leonhard***, 485 A.2d at 447. Accordingly, we conclude that the trial court properly exercised its discretion in determining that the curative instruction

was sufficient to overcome any prejudicial effects of the remarks in question. Therefore, Hines's final argument also fails.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2014