NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JULIO ERIGUE MELECIO	:	
Appellant	:	No. 210 MDA 2018

Appeal from the Judgment of Sentence December 20, 2017
In the Court of Common Pleas of York County Criminal Division at No(s): CP-67-CR-0002388-2016

BEFORE: SHOGAN, J., STABILE, J., and STEVENS*, P.J.E.

MEMORANDUM BY SHOGAN, J.: **FILED OCTOBER 10, 2018**

Appellant, Julio Erigue Melecio, appeals from the December 20, 2017 judgment of sentence entered in the Court of Common Pleas of York County following a jury trial. We affirm.

The trial court summarized the facts of the crimes as follows:

> At trial, [M.O. ("Victim")] testified that she used be in a sexual relationship with Appellant. [Victim] testified that on August 31, 2015, she found Appellant had shown up at her house uninvited. Transcript of Trial, 9/12/2017 at 94-95. [Victim] testified that Appellant accused her of seeing someone else and called her a "whore" and a "bitch." Id. [Victim] testified that Appellant was poking her and calling her a slut. Id. at 96. [Victim] testified that Appellant punched her in the face. Id. [Victim] testified that Appellant pushed her down and took her phone. Id. at 97.
>
> [Victim] testified that Appellant slapped her, poked her, and choked her for a few seconds. Id. at 99. [Victim] testified that at that point, she decided to submit to whatever "he says and it'll be over, or it'll be less confrontation." Id. at 158.

---

* Former Justice specially assigned to the Superior Court.

> [Victim] testified that Appellant yanked her arm and told her not to leave the couch. Id. at 100. [Victim] testified that Appellant allowed her to go to the kitchen, but that Appellant then choked her with his hands again and pushed her to the kitchen floor. Id. at 101.
>
> [Victim] testified that Appellant stated that he wanted to have sex with her one last time. Id. at 102. [Victim] testified that Appellant made her take her underwear off and proceeded to shave her pubic hair. Id. at 102. [Victim] testified that afterwards, Appellant pulled her into the bedroom and made her take off the rest of her clothes. Id. at 103.
>
> [Victim] testified that Appellant made her lay on the bed before he got on top [of] her and "stuck his penis inside" of her vagina. Id. [Victim] testified that she told Appellant to stop and that he was hurting her. Id. at 104. [Victim] testified that she yelled loudly so that her neighbor would hear. Id.
>
> [Victim] testified that afterwards, Appellant straddled her chest and forced his penis into her mouth. Id. [Victim] testified that she was not able to move her arms. Id. at 105.
>
> [Victim] testified that Appellant told her to bend over and then put his penis inside her anus. Id. at 106. [Victim] testified that she was in pain and continued to tell Appellant to stop. Id. [Victim] testified that later, it hurt to sit down. Id. at 114. [Victim] testified that she had vaginal pain and that her face hurt. Id. at 124. [Victim] testified that she thought Appellant could kill her. Id. at 158.

Trial Court Opinion, 3/22/18, at 3–5.

The trial court summarized the procedural history as follows:

> On October 8, 2015, the criminal complaint was filed against Appellant and an arrest warrant was issued. On November 30, 2015, the arrest warrant was withdrawn and a fugitive warrant was issued in its place. On February 24, 2016, Appellant was arrested.
>
> On August 11, 2016, Appellant filed a continuance for the upcoming trial, which was scheduled for the September 2016 trial term. Appellant's continuance was granted and the new date was

> scheduled to be October 31, 2016, the start date for the November 2016 trial term.
>
> On May 8, 2017, Appellant filed a continuance, which was granted, and the trial was rescheduled for the July 2017 trial term. The Commonwealth did not call the case until August 21, 2017 when it filed for a "trial date certain" in the 2017 September trial term. On August 28, 2017, the trial court scheduled the trial for September 12, 2017.
>
> On September 12, 2017, Honorable Harry M. Ness ("trial court") denied Appellant's Motion to Dismiss pursuant to Rule 600[1] and the case proceeded to trial the same day.
>
> On December 20, 2017, Appellant was sentenced, in total, to 30–60 years imprisonment after being found guilty by a jury of 1 count of rape and 2 counts of involuntary deviate sexual intercourse.[2] On January 3, 2018, the trial court denied Appellant's Post-Sentence Motions.

Trial Court Opinion, 3/22/18, at 1–2. Appellant filed a timely notice of appeal.

Both Appellant and the trial court complied with Pa.R.A.P. 1925.

Appellant raises the following issue on appeal:

> Whether the Commonwealth violated Rule 600 where there were 399 days of delay in bringing [Appellant] to trial that can neither be excluded nor excused.

Appellant's Brief at 4.

Our standard of review of a trial court's decision in evaluating Rule 600 issues is whether the trial court abused its discretion. ***Commonwealth v.***

---

[1] Appellant filed a Motion to Dismiss Pursuant to Pa.R.Crim.P. 600 on September 11, 2017, and the Commonwealth filed its response that same day.

[2] 18 Pa.C.S. §§ 3121(a)(1) and 3123(a)(1), respectively.

Peterson, 19 A.3d 1131, 1134 (Pa. Super. 2011). Our scope of review is limited to the record evidence and "the findings of the lower court, viewed in the light most favorable to prevailing party." ***Commonwealth v. Burno***, 154 A.3d 764, 793 (Pa. 2017).

Our Supreme Court recently expounded on the laudable and balanced purposes behind Pa.R.Crim.P. 600 of protecting the defendant's rights while maintaining the Commonwealth's needs and interest in prosecuting criminal offenders:

> We have described Rule 600 as "a careful matrix protecting a defendant's rights to be free from prolonged pretrial incarceration and to a speedy trial, while maintaining the Commonwealth's ability to seek confinement of dangerous individuals and those posing a risk of flight, and to bring its cases in an orderly fashion." ***Commonwealth v. Dixon***, 589 Pa. 28, 907 A.2d 468, 473 (2006). In fixing a general time frame of 365 days, the rule provides the Commonwealth with sufficient opportunity to prepare its case for trial, but seeks to minimize the harms to the accused that would result from a lengthier period. However, consistent with the rule's "dual purpose of both protecting a defendant's constitutional speedy trial rights and protecting society's right to effective prosecution of criminal cases," [***Commonwealth v.***] ***Bradford***, 46 A.3d [693,] 701 [(Pa. 2012)], the 365–day time limit is not absolute, and certain periods of delay are not to be held against the Commonwealth. Principally, . . . delays caused by the defendant do not count toward the 365 days provided to the Commonwealth. Because the Commonwealth is allotted the full time period within which to bring the defendant to trial, Rule 600 "seeks to prevent the Commonwealth from being accountable for those delays in the commencement of trial where they result from actions properly attributable to the defense." ***Commonwealth v. Morgan***, 484 Pa. 117, 398 A.2d 972, 974–75 (1979).

Commonwealth v. Barbour, ___ A.3d ___, ___, 2018 WL 3446243, at *9 (Pa. 2018) (filed July 18, 2018).

Rule 600 provides, in pertinent part, that "[t]rial 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)(2)(a); ***Commonwealth v. McCarthy***, 180 A.3d 368 (Pa. Super. 2018). Regarding this time requirement, Rule 600 also provides that "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)(1). The Rule explains:

> For purposes of determining the time within which trial must be commenced pursuant to paragraph (A), paragraph (C)(1) makes it clear that any delay in the commencement of trial that is not attributable to the Commonwealth when the Commonwealth has exercised due diligence must be excluded from the computation of time. Thus, the inquiry for a judge in determining whether there is a violation of the time periods in paragraph (A) is whether the delay is caused solely by the Commonwealth when the Commonwealth has failed to exercise due diligence. If the delay occurred as the result of circumstances beyond the Commonwealth's control and despite its due diligence, the time is excluded. In determining whether the Commonwealth has exercised due diligence, the courts have explained that "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."

Pa.R.Crim.P. 600 cmt (citations omitted).

In concluding that Appellant's speedy trial rights were not violated, the trial court stated the following:

Appellant argues that his speedy trial rights were violated when the jury trial did not start until September 12, 2017. The Commonwealth argues that there were combinations of periods of time that were excluded from Rule 600 as well as periods of time that were excused for the Commonwealth's due diligence. The trial court took both parties' filings into consideration when it agreed with the Commonwealth's calculations and denied the Rule 600 Motion.

Appellant concedes in his Concise Statement that the time period from when the fugitive warrant was issued on November 30, 2015 until the arrest date is excludable time. However, from the time the Commonwealth filed the criminal complaint on October 8, 2015 to the time Appellant was arrested on February 24, 2016, the Commonwealth exercised due diligence. The withdrawal of the arrest warrant and the issuance of a fugitive warrant show the Commonwealth's due diligence in arresting Appellant.

Appellant concedes that the period of March 8, 2016 until April 11, 2016 is excludable.

When the trial court granted Appellant's continuance request on August 11, 2016, the period from the start of the September 2016 trial term until the rescheduled date of October 31, 2016 became excludable.

The trial court granted another request by Appellant to continue the trial from May 8, 2017 until the July 2017 trial term. This period was also excludable.

The Commonwealth did not call the case for trial during the July 2017 trial term because it was waiting for Appellant's expert reports to be handed over to the Commonwealth. It received the reports on August 15, 2017. Because the Commonwealth regularly attempted to reach out to Appellant to obtain the reports, the Commonwealth exercised due diligence during this period.

There is no trial term in August. Therefore, the September 2017 trial term was the next, "earliest practicable trial date."

Because the trial court found that the Commonwealth exercised due diligence in bringing the case to trial and because the earliest practicable trial date was September 12, 2017, this

> Court should find that the trial court did not err in denying Appellant's Rule 600 Motion.

Trial Court Opinion, 3/22/18, at 7–9.

In his brief, Appellant confirms that he "already conceded" the following periods of delay as excludable:

> 1) the 86 days between November 30, 2015, when the fugitive arrest warrant was issued, and February 24, 2016, when [Appellant] was arrested; 2) the 34 days between March 8, 2016, when the preliminary hearing was *sua sponte* continued, and April 11, 2016, when the preliminary hearing was held; 3) the 55 days between September 6, 2016, when the September, 2016 trial term began, and October 31, 2016, the first day of the November, 2016 trial term; and 4) the 103 days between May 4, 2017, when [Appellant] moved for a continuance through the July, 2017 trial term, and August 15, 2017, when [Appellant] produced his expert report. (Rule 600 Motion at 2; Rule 1925(b) Statement at 1-2.)

Appellant's Brief at 13. Moreover, Appellant acknowledges that the trial court correctly observed that because there was no August 2017 trial term, "trial could not take place until the September, 2017 trial term after [Appellant] produced the defense expert report on August 15, 2017." ***Id***. at 13–14. Further, Appellant admitted that the earliest practicable trial date "in light of [Appellant's] schedule was September 12, 2017, when trial actually began." ***Id***. at 14. Thus, Appellant also concedes that the period between August 15, 2017, and September 12, 2017, is excludable. ***Id***.

In the instant case, a criminal complaint was filed against Appellant on October 8, 2015, and an arrest warrant issued that day. On November 30, 2015, the arrest warrant was returned unserved, and a "Fugitive Notice"was filed that day. On appeal, Appellant challenges the period between the filing

of the complaint on October 8, 2015, and the issuance of the fugitive warrant on November 30, 2015, a period of fifty-three days ("Challenged Period"). Appellant's Brief at 10, 14. Appellant admits, if this period is excludable, he was brought to trial within 346 days, obviously within the 365 days required by Pa.R.Crim.P. 600. Appellant argues that the Challenged Period cannot be excluded because the Commonwealth failed to bear its burden that it employed due diligence in attempting to apprehend Appellant. ***Id***. at 15. Appellant maintains that the Commonwealth failed to present evidence of its efforts in locating Appellant, and therefore, it could not have been duly diligent, as required by Rule 600. ***Id***.

As noted, Appellant filed his motion to dismiss pursuant to Rule 600 the day before jury selection began, and the Commonwealth filed its response that day. The next day, the date set for trial, the following occurred with respect to the motion:

> [The Commonwealth]: Your Honor, yesterday the Commonwealth did receive a motion to dismiss pursuant to Rule 600 from the Defense. The Commonwealth did file a response yesterday around 3:00. So we are prepared to address that at this time.
>
> THE COURT: Okay. And I did read both the motion and the Commonwealth's response. I note, [defense counsel], in your number seven of your allegations,[3] I guess you miss—it says on

---

[3] Appellant's paragraph seven stated: "On May 4, 2017, the defense requested a trial continuance after receiving additional discovery from the Commonwealth in order to consult with a defense expert; and said continuance was granted by this [c]ourt on May 8, 2017." Motion to Dismiss Pursuant to Pa.R.Crim.P. 600, 9/11/17, at ¶ 7.

> May the 4th, they requested additional discovery. They got it. And they wanted to—May the 8th you requested a continuance to have your expert examine it.
>
> There's no end date there, where the Commonwealth's motion does have the end date which brings us almost to now, as a matter of fact, when your email exchange back and forth indicated that we were going to have a date certain, and I set the date certain for now.
>
> I agree with their calculations. And accordingly, your motion is denied.

N.T., 9/12/17, at 4–5. There was no further discussion on the motion.

In its September 11, 2017 written response to Appellant's motion to dismiss, and in particular regarding the Challenged Period, the Commonwealth relied on the comment to Pa.R.Crim.P. 600:

> When the defendant or the defense has been instrumental in causing the delay, the period of delay will be excluded from computation of time. ***See***, ***e.g., Commonwealth v. Matis, supra***; ***Commonwealth v. Brightwell***, 486 Pa. 401, 406 A.2d 503 (1979) (plurality opinion). For purposes of paragraph (C)(1) and paragraph (C)(2), the following periods of time, that were previously enumerated in the text of former Rule 600(C), are **examples of periods of delay caused by the defendant**. This time must be excluded from the computations in paragraphs (C)(1) and (C)(2):
>
> (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;

Pa.R.Crim.P. 600, cmt. (emphasis added).

We agree with the trial court that the Commonwealth exercised due diligence in regard to the Challenged Period and that "withdrawal of the arrest warrant and the issuance of a fugitive warrant show the Commonwealth's due

diligence in arresting Appellant." Trial Court Opinion, 3/22/18, at 8.[4] As noted *supra*, on November 30, 2015, York County Detective Sean Conway completed a Fugitive Notice on November 30, 2015, indicating that he had done all of the following:

- contacted Appellant at his last known address
- contacted Appellant's neighbors and friends
- verified Appellant's name was entered on "NCIC/CLEAN"
- contacted state and county probation and parole officers
- contacted county prison personnel, and
- notified "Y.C.S.D. CRU."

Fugitive Notice, 11/30/15. Based on these attempts to locate Appellant, Detective Conway swore before the magisterial district judge that he could not locate Appellant and believed him to be a fugitive from justice. ***Id***. Appellant suggests the form, which is in the certified record, cannot serve to support the Commonwealth's efforts of due diligence because, *inter alia*, "there is no indication that the trial court relied on it . . . in its Rule 1925(a) Opinion." Appellant's Brief at 16. Appellant is incorrect. The trial court's conclusion, "the withdrawal of the arrest warrant **and the issuance of a fugitive warrant** shows the Commonwealth's due diligence in arresting Appellant," is

---

[4] Because we conclude herein that the trial court correctly determined that the Commonwealth exercised due diligence, we do not consider the Commonwealth's alternative argument of waiver. ***See*** Commonwealth's Brief at 17–19.

sufficient evidence that the trial court relied upon the Fugitive Notice in determining the Commonwealth's due diligence. Trial Court Opinion, 3/22/18, at 8 (emphasis added). As we recently reaffirmed:

> Most significantly, both Rule 600 and the cases in which we have applied it proceed from the premise that 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. Thus, we do not apply the Rule mechanically nor will we affirm its application where the trial court's construction of it fails to acknowledge the policies it serves. The Commonwealth's stewardship therefore must be judged by what was done ... rather than by what was not done.

Commonwealth v. Wendel, 165 A.3d 952, 959–960 (Pa. Super. 2017).

Thus, we conclude that the trial court correctly determined that the Commonwealth exercised due diligence in attempting to locate Appellant during the Challenged Period. Therefore, the trial court did not err in denying Appellant's motion to dismiss pursuant to Pa.R.Crim.P. 600.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/10/2018