

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

YURIY FAUSTOV,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2917 EDA 2011

Appeal from the Judgment of Sentence September 26, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0000840-2011

BEFORE: STEVENS, P.J., BOWES, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J.

Filed: March 5, 2013

This is an appeal from the judgment of sentence entered by the Court of Common Pleas after the trial court convicted Appellant Yuriy Faustov of knowing and intentional possession of a controlled substance.¹ Appellant claims the trial court abused its discretion in denying his motions to dismiss the action pursuant to Pennsylvania Rules of Criminal Procedure 1013(g) and 600. We affirm.

On October 12, 2008, police filed a criminal complaint charging Appellant with possession of a controlled substance after officers discovered him in possession of crack cocaine. On December 12, 2008, Appellant was

* Former Justice specially assigned to the Superior Court.

¹ 35 P.S. § 780-113(a)(16).

arraigned in the Philadelphia Municipal Court. After multiple continuances and delays, Appellant's trial was held on December 21, 2010, in which Appellant was convicted of the possession charge and sentenced to probation. Appellant did not challenge the timeliness of his trial in the Municipal Court.

On January 20, 2011, Appellant appealed and sought a trial *de novo* in the Court of Common Pleas of Philadelphia County. Appellant was arraigned on February 9, 2011. The trial court initially listed this case for trial on May 12, 2011. However, Appellant was granted a continuance because defense counsel was unavailable as he was required to be at a trial in a different county. As a result, the trial court listed the trial for July 26, 2011, which was the next available court date. The trial was postponed again as a police officer essential to the Commonwealth's case did not appear in court despite being subpoenaed. The trial was rescheduled for September 26, 2011, which the docket indicates was the earliest possible date.

On September 26, 2011, Appellant moved to dismiss the case pursuant to Pennsylvania Rule of Criminal Procedure 1013(g), claiming that he had not been brought to trial within 120 days of his notice of appeal from his sentence in the Municipal Court. After both parties presented oral argument, the trial court found the Commonwealth was duly diligent in bringing Appellant to trial and denied Appellant's motion to dismiss pursuant to Pa.R.Crim.P. 1013(g).

On the same day, a bench trial was held in which the trial court found Appellant guilty of knowing and intentional possession of a controlled substance and sentenced him to one year probation. The docket indicates that on October 13, 2011, Appellant filed a Motion to Arrest Judgment *nunc pro tunc* in which he raised a speedy trial issue pursuant to Pa.R.Crim.P. 600. Recognizing that his post-sentence motion was untimely, Appellant also filed a notice of appeal on October 26, 2012.² During the pendency of this appeal, the trial court purported to enter an order denying Appellant's Motion to Arrest Judgment on November 18, 2011.³

On appeal, Appellant claims the trial court erred in denying his motions to dismiss this action pursuant to Pennsylvania Rules of Appellate Procedure 600 and 1013(g), respectively. We find Appellant's Rule 600 claim is waived as he failed to preserve it in the trial court. **See** Pa.R.A.P. 302 (providing that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Appellant did not successfully raise the issue in his Motion to Arrest Judgment, which was untimely filed seventeen days after his sentence was imposed. Our Rules of Criminal Procedure provide

² Rule 720 further states that "if the defendant does not file a timely post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence." Pa.R.Crim.P. 720(A)(3).

³ Although the docket indicates that Appellant filed a Motion to Arrest Judgment *nunc pro tunc* which the trial subsequently denied, neither the motion nor the trial court's order were included in the certified record.

that a “post-sentence motion shall be filed no later than 10 days after the imposition of sentence.” Pa.R.Crim.P. 720(A)(1). Further, the trial court had no jurisdiction to rule on the merits of the Motion to Arrest Judgment during the pendency of this appeal. *Commonwealth v. Moore*, 715 A.2d 448, 453 (Pa. Super. 1998). Pennsylvania Rule of Appellate Procedure 1701 provides that “after an appeal is taken..., the trial court ... may no longer proceed further in the matter.” Pa.R.A.P. 1701. Accordingly, we decline to review the merits of this issue.

However, Appellant properly preserved his claim that the trial court erred in denying his motion to dismiss this case based on the Commonwealth’s alleged violation of Pa.R.Crim.P. 1013(g).⁴ Our standard of review is as follows:

the proper scope of review is limited to the evidence on the record from the evidentiary hearing and the findings of the trial court. If the hearing court denied relief under Rule 1013, appellate courts must view the facts in the light most favorable to the Commonwealth as the prevailing party. In assessing a Rule 1013 issue, we are confined to determining whether the trial court committed an “abuse of discretion” in reaching its decision.

* * *

When considering the trial court’s ruling, an appellate court may not ignore the dual purpose behind Rule 600 and Rule 1013. The Rules serve 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

⁴ We do not have the benefit of a trial court opinion as the trial judge left the bench shortly after this appeal was filed.

to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it.

* * *

The Pennsylvania Supreme Court adopted our speedy trial rules as an administrative means of protecting the constitutional rights embodied in the Sixth Amendment to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution. However, the Supreme Court's administrative mandate was neither designed nor intended to insulate a criminal accused from good faith prosecution. *In the absence of actual misconduct on the part of the Commonwealth specifically calculated to evade the fundamental speedy trial rights of an accused, the applicable speedy trial rule must be construed in a manner consistent with society's right to punish and deter crime....* Strained and illogical judicial construction adds nothing to our search for justice, but only serves to expand the already bloated arsenal of the unscrupulous criminal determined to manipulate the system.

Commonwealth v. Staten, 950 A.2d 1006, 1009 (Pa. Super. 2008) (quoting ***Commonwealth v. Preston***, 904 A.2d 1, 9–10 (Pa. Super. 2006) (*en banc*) (citations and quotation marks omitted) (emphasis added)).

Rule 1013 states that “[a] trial *de novo* in the Court of Common Pleas shall commence within a period of 120 days after the notice of appeal from the Municipal Court is filed. In all other respects the provisions of Rule 600 shall apply to such trials in the Court of Common Pleas.” Pa.R.Crim.P. 1013(g). The first step in reviewing a Rule 1013 claim is to determine the “mechanical run date,” the date which statute provides the criminal trial must commence. As Appellant filed his notice of appeal from the sentence imposed by the Municipal Court on January 20, 2011, the mechanical run date for Appellant’s trial was May 20, 2011.

The mechanical run date may be extended by the addition of periods of time which constitute excludable or excusable delay. *Preston*, 904 A.2d at 11.

“Excludable time” is defined by Rule 1013 itself as any period of time during which a defendant expressly waives his rights under the Rule. Pa.R.Crim.P. 1013(D)(1). Delays caused by the unavailability of the defendant or counsel also are excludable, as are delays for continuances granted at the request of the defendant or counsel. Pa.R.Crim.P. 1013(D)(2)(a), (b). “Excusable delay” is not expressly defined in either Rule 600 or in Rule 1013, 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.

Id. In this case, the parties agree that Appellant was responsible for 96 days of excludable time. Appellant concedes that the period between March 7, 2011 and March 28, 2011 is not attributable to the Commonwealth as Appellant was considering withdrawing his Municipal Court appeal. Further, Appellant asked for his trial to be rescheduled as defense counsel was unavailable on May 5, 2011. The trial was rescheduled for July 26, 2011, the earliest possible date. When these 96 days of excludable time are added to the mechanical run date, Appellant's adjusted run date is August 24, 2011.

In addition, the trial court found that the Commonwealth was entitled to excusable delay for the period that the trial had to be rescheduled from July 26, 2011 to September 26, 2011. The trial was continued because a police officer that was essential to the prosecution's case did not appear in

court on July 26 even though the Commonwealth had subpoenaed him. Our court has held that “the Commonwealth cannot be held to be acting without due diligence when a witness becomes unavailable due to circumstances beyond its control.” ***Commonwealth v. Hyland***, 875 A.2d 1175, 1191 (Pa. Super. 2005). ***See also Commonwealth v. Gilliam***, 448 A.2d 89, 91 (Pa. Super. 1982) (finding the Commonwealth exercised due diligence in subpoenaing the complaining witness to appear at trial). The officer had appeared for trial on May 5, 2011, and September 24, 2011, but failed to appear on July 26, despite the Commonwealth’s issuance of a subpoena. As we find the Commonwealth exercised due diligence in bringing Appellant to trial, we conclude that the trial court properly denied Appellant’s motion to dismiss the case under Rule 1013.

Judgment of sentence affirmed.