

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KEITH ANTHONY RICKETTS,	:	
	:	
Appellant	:	No. 318 MDA 2012

Appeal from the Judgment of Sentence January 10, 2012  
In the Court of Common Pleas of Dauphin County  
Criminal Division No(s): CP-22-CR-0001431-2009

BEFORE: BENDER, SHOGAN, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.:

**FILED MAY 07, 2013**

Appellant, Keith Anthony Ricketts, appeals from the judgment of sentence entered in the Dauphin County Court of Common Pleas after he was found guilty in a nonjury trial of driving under the influence—incapable of safely driving and numerous summary violations of the Vehicle Code.<sup>1</sup> Appellant claims that he was entitled to discharge under Pa.R.Crim.P. 600(G). We vacate the judgment of sentence and remand this case for further proceedings.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 75 Pa.C.S. § 3802(a)(1), 3309 (driving on roadway laned for traffic), 3310 (following too closely), 3334 (turning movements and required signals), 3361 (driving vehicle at safe speed), 3736 (reckless driving).

Since the factual history underlying Appellant's conviction for driving under the influence is not relevant to this appeal, we briefly note that, on December 27, 2008, Appellant was arrested after he caused a traffic accident on Interstate 80. While no one was injured, the Pennsylvania State Trooper who initially responded to the accident noticed that Appellant appeared intoxicated and that there was an eight-year-old child in the backseat of his vehicle.

The Commonwealth, on December 31, 2008, filed a criminal complaint charging Appellant with endangering the welfare of a child, driving under the influence—incapable of safely driving, driving under the influence—high rate of alcohol, and numerous summary violations of the Vehicle Code. Appellant filed pretrial motions on August 5, 2009, after which a lengthy discovery dispute arose. The Honorable Todd A. Hoover ("pretrial court") presided over the discovery dispute and, on December 17, 2009, entered an order establishing a schedule for the Commonwealth to disclose materials to Appellant. **See** Order, 12/17/09. The December 17<sup>th</sup> order also provided that "[u]pon completion of discovery, either party may request Court Administration to schedule a non-jury proceeding in the above captioned matter before any Judge." **Id.** at ¶ 5.

However, the discovery dispute continued until April 15, 2010, when the pretrial court entered an order dismissing the count of driving under the influence—high rate of alcohol. The pretrial court stated it dismissed the

charge based on “the Commonwealth’s non-compliance with [its December 17, 2009, discovery order.]” Order, 4/15/10. Trial was then listed for May 24, August 9, and September 13, 2010, but did not commence on those dates.

On September 13, 2010, Appellant filed a “Motion to Dismiss for Violation of Rule 600.” In his motion, he conceded that four defense continuances constituted excludable time totaling 153 days.<sup>2</sup> Appellant alleged that “the time from arrest to trial still exceed[ed] 365 days by 57 days.” Appellant’s Rule 600 Mot. at ¶ 38.

On December 16, 2010, the pretrial court convened a hearing on Appellant’s motion. The Commonwealth expressly limited its argument to a period of 151 days from April 15 to September 13, 2010. N.T., 12/16/10, at 3-4. Specifically, the Commonwealth averred that it listed the case for trial in successive terms during that period, but that the pretrial court was

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<sup>2</sup> In his motion, Appellant conceded that the following times were attributable to the defense:

- May 6 to July 14, 2009, a period of 69 days.
- July 14 to August 5, 2009, a period of 22 days.
- September 15 to October 14, 2009, a period of 29 days.
- October 14 to November 16, 2009, a period of 33 days.

**See** Appellant’s Mot. to Dismiss for Violation of Rule 600, 9/13/10, at ¶¶ 7, 11, 17, 21 [hereinafter Rule 600 Mot.].

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unavailable. **Id.** The pretrial court, on January 20, 2011, denied Appellant's Rule 600 motion "based on judicial delay in the above-captioned matter." Order, 1/20/11.

Appellant, on March 9 and April 11, 2011, requested continuances that delayed the listing of trial until May 2, 2011. On May 6, 2011, the Commonwealth requested a continuance based upon the unavailability of the arresting officer and asserted that "this continuance would run against the Commonwealth." Commonwealth's Mot. for Continuance, 5/6/11, at ¶¶ 6, 10. On June 29, 2011, Appellant filed a motion to schedule a bench trial and acknowledged that he was responsible for delays caused by his motion. Trial was then scheduled for September 21, 2011.

On September 21, 2011, a nonjury trial commenced before the Honorable Bernard L. Coates, Jr. ("trial court"). Immediately prior to trial, Appellant renewed his Rule 600 motion. N.T., 9/21/11, at 8-9. The Commonwealth responded that the pretrial court had previously ruled upon the motion. **Id.** at 9. The Commonwealth further represented that it did not "believe that the time—any of the time that's passed since then—there's enough to get it past the Rule 600 requirement . . . ." **Id.** The trial court immediately denied the motion and proceeded to trial that same day.

The trial court, on October 12, 2011, entered its verdict finding Appellant guilty of driving under the influence—incapable of safely driving

and summary Vehicle Code violations.<sup>3</sup> On January 10, 2012, the court sentenced Appellant to serve six month's intermediate punishment on the count of driving under the influence, and imposed fines and costs for the summary violations. Appellant filed a timely notice of appeal, and complied with the order of the trial court to file a Pa.R.A.P. 1925(b) statement. The **pretrial** court, on August 15, 2012, filed a Pa.R.A.P. 1925(a) opinion.

Appellant presents the following question for review: “. . . Did the trial court err in denying [Appellant's] motion to dismiss for violation of Pa.R.Crim.P. 600?” Appellant's Brief, at 5.

Preliminary, it is necessary to consider the issues properly before this Court. In the underlying proceedings, Appellant raised two Rule 600 objections: the first in his September 13, 2010, motion and the second by oral objection on September 21, 2011. In the first instance, the Commonwealth responded to the motion by seeking a limited finding that it exercised due diligence from April 15 to September 13 of 2010. The pretrial court credited the Commonwealth's proffer and found that 151 days between April 15 and September 13, 2010, were excusable due to judicial delay. In the second instance, the Commonwealth asserted that the pretrial court's determination provided sufficient time under Rule 600 to commence trial on September 21, 2011. The trial court accepted the Commonwealth's assertions and proceeded to trial.

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<sup>3</sup> The court acquitted Appellant of endangering the welfare of a child.

Appellant subsequently submitted the following statement of errors complained of on appeal:

The trial court erred in failing to grant Appellant's pretrial motion to dismiss for violation of Pa.R.Crim.P. 600, where more than 620 days elapsed between the filing of the criminal complaint [and] the Motion to Dismiss, a large majority of which were caused by the Commonwealth's failure to produce mandatory discovery that [it was] later compelled to turn over to the [Appellant].

Appellant's Concise Statement of Matter Complained of upon Appeal Pursuant to Pa.R.A.P. § 1925(b), 3/2/12, at 1-2.

This statement of error is ambiguous because it fails to identify which of the two rulings Appellant seeks to challenge—*i.e.* the January 20, 2011, or the September 21, 2011 denial of his Rule 600 objection. **See** Pa.R.A.P. 1925(b)(4)(i)-(ii). However, the record reveals that the Commonwealth, at the December 16, 2010 hearing, only argued that it exercised due diligence during from April 15 to September 13, 2010. Moreover, the Commonwealth, prior to trial on September 21, 2011, relied upon the January 20, 2011 ruling denying Appellant's Rule 600 motion. Accordingly, the record makes clear that the critical ruling in this appeal was the pretrial court's January 20, 2011 determination.

Therefore, we conclude that Appellant has preserved a challenge to the January 20, 2011 determination that the Commonwealth exercised due diligence. Moreover, in light of the record, we find that Appellant properly preserved an objection to the commencement of trial on September 21,

2011, under Rule 600. In sum, the issue properly before this Court is whether, in light of the present record, the January 20<sup>th</sup> determination provides a sufficient basis to find that September 21, 2011 trial date complied with Rule 600.<sup>4</sup>

The principles governing our review of a claimed violation of Rule 600 are well established:

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. Accordingly, in reaching our determination, we consider whether the evidence adduced at the Rule 600 hearing, viewed in the light most favorable to the prevailing party, supports the trial court's findings, and whether those findings, in turn, conform with applicable law.

Additionally, when considering the trial court's ruling, this Court is not permitted to ignore the dual purpose behind Rule 600. Rule 600 serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule 600 was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.

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<sup>4</sup> Conversely, we find that Appellant waived a challenge to the September 21, 2011 ruling of the trial court that denied his renewed Rule 600 motion. **See** Pa.R.A.P. 1925(b)(4)(vii)(stating, "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived").

***Commonwealth v. Trippett***, 932 A.2d 188, 196 (Pa. Super. 2007) (citations and quotation marks omitted).

Rule 600 provides, in relevant part: "Trial in a court case in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed." Pa.R.Crim.P. 600(A)(3).<sup>5</sup> A defendant who is on bail after the expiration of 365 days "may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated." Pa.R.Crim.P 600(G).

Moreover,

If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, the Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. 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.

***Id.***

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<sup>5</sup> We note that amendments to Rule 600 were adopted on October 1, 2012, and will come into effect on July 13, 2013. However, this proceeding is governed by the current version of Rule 600, which remains in effect until July 13, 2013.

When calculating the running of time under Rule 600, the following relevant periods of delay must be excluded:

(2) any period of time for which the defendant expressly waives Rule 600;

(3) 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.

Pa.R.Crim.P. 600(C)(2)-(3).

In addition to delays "excludable" under the Rule, a court must consider the construct of "excusable" delays. "'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." ***Commonwealth v. Hunt***, 858 A.2d 1234, 1241 (Pa. Super. 2004) (citing Pa.R.Crim.P. 600(G)). "Due diligence is a fact-specific concept that must be determined on a case-by-case basis. [It] does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a **reasonable** effort has been put forth." ***Id.*** at 1241-42 (citations omitted). When seeking excusable time, the Commonwealth bears the burden of establishing, by a preponderance of evidence, that it exercised due diligence. ***Commonwealth v. Bradford***, 46 A.3d 693, 701 (Pa. 2012).

The Commonwealth, in the present case, filed a criminal complaint against Appellant on December 31, 2008. Therefore, the mechanical application of Pa.R.Crim.P. 600(A)(3) required the Commonwealth to commence trial by December 31, 2009.

Appellant subsequently conceded that 153 days were excludable due to defense continuances during the discovery dispute. **See** Appellant's Rule 600 Mot. at ¶¶ 7, 11, 17, 21. Therefore, we adjust the Rule 600 run date to June 2, 2010.

On appeal, Appellant asserts that the pretrial court erred in determining that 151 days, from April 15 to September 13, 2010, were excusable. Appellant's Brief at 25. He insists that the Commonwealth acted unreasonably in listing the case for trial before the presiding pretrial judge. **Id.** at 24-25. In support of his contention, he refers to the December 17, 2009 discovery order that granted the Commonwealth leave to seek trial before any trial judge upon the completion of discovery. **Id.** at 22, 25. Appellant also asserts that the record did not support the court's finding of "judicial delay" beyond the control of the Commonwealth. **Id.** at 17-18.

Although the December 17, 2009 discovery order granted leave to all parties to seek trial before any trial judge, we find that this order was superseded by the April 15, 2010 order, the latter of which did not grant the

parties leave to list the case before any trial judge. **See** Order, 4/15/10.<sup>6</sup> Moreover, our review of the record reveals that the pretrial court found that it was unavailable between April and September of 2010 because it was “not sitting.” Trial Ct. Op. at 3 (unpaginated); N.T., 12/16/10, at 7. Therefore, viewing the present record in a light most favorable of the Commonwealth, we decline to disturb the conclusion of the trial court that 151 days were excusable under Rule 600, and find that the Commonwealth had until March 9, 2011, to bring Appellant to trial.<sup>7</sup>

Although the January 20, 2011 determination extending the time for trial until March 9, 2011, was proper when entered, trial in this instance did not commence until September 21, 2011. Thus, there was a gap of 196 days between March 9 and September 21, 2011, which was not covered by the pretrial court’s ruling.

As to this gap, the record contains clear evidence that Appellant also waived Rule 600 objections to the following delays: (1) from March 9 to May 2, 2011, a period of 33 days; and (2) from June 29 to September 21, 2011,

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<sup>6</sup> While Appellant essentially suggests that the efforts of the Commonwealth to schedule trial in the presiding pretrial court should be deemed disingenuous, we find no basis in the present record to make such a determination.

<sup>7</sup> We apply the 151 days of excusable time as follows: (1) **103 days**—from the adjusted run date of June 2, 2010, to the September 13, 2010; and (2) **48 days**—from January 20, 2010, the date of the pretrial court’s Rule 600 ruling, to March 9, 2011. In so doing, we note that Appellant did not contemporaneously object to the delay in the litigation of his Rule 600 motion and did not preserve a challenge to that delay in this appeal.

a period of 84 days. **See** Appellant's Mot. to Continue, 3/9/11; Appellant's Mot. to Continue, 4/11/11. Therefore, an additional 117 days are excludable, which extended the time for bringing Appellant to trial from March 9 to July 5, 2011.<sup>8</sup> Nevertheless, there still remained a gap of 78 days between the extended Rule 600 run date of July 5 and the start of trial on September 21, 2011.

We now reach the crux of the present appeal, namely, whether the January 20, 2011 ruling extended the Rule 600 run date to permit trial on September 21, 2011. Appellant asserts that the January 20<sup>th</sup> ruling did not do so because the Commonwealth did not proceed with reasonable diligence during the discovery dispute. Appellant's Brief at 26. The pretrial court, in its opinion in support of affirming the judgment of sentence, concludes that its January 20<sup>th</sup> ruling provided a sufficient extension of Rule 600 because Appellant waived his challenge to the delays attributable to the discovery dispute. Trial Ct. Op. at 2 (unpaginated). Lastly, the Commonwealth responds that the entire time spent on the discovery dispute should run

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<sup>8</sup> The Commonwealth also notes that it requested a continuance on May 6, 2011, which rescheduled trial for July 8, 2011. Commonwealth's Brief at 14. While the Commonwealth asserts that Appellant did not object to the request, our review reveals that the Commonwealth stated that its request "would run against [it]" for the purposes of Rule 600. Commonwealth's Mot. for Continuance, 5/6/11, at ¶ 10. Given the contradictory facts on the present record, we decline to count this delay against Appellant because the Commonwealth did not seek a determination in the trial court that this time was excusable and instead raised this argument for the first time on appeal.

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against Appellant because he was “unavailable” for trial while his pretrial motions were pending. Commonwealth’s Brief at 12-13.

Following our review, we conclude that the record belies the pretrial court’s suggestion of waiver. At the December 16, 2010 hearing, Appellant set forth his claim that Rule 600 had been violated. N.T., 12/16/10, at 7-8.

The parties and the court then engaged in the following exchange:

[Commonwealth]: Your Honor, as I’ve indicated, I agree with the mechanical run dates as the defense has presented them. Obviously, there have been—there were several defense continuances prior to the discovery issues that made the—

THE COURT: Is all this in your reply, the dates you agree on when it was continued?

[Commonwealth]: We didn’t go through all the dates that are relevant prior to the discovery issue letter, because I think we’ve limited the —

THE COURT: So it’s from the discovery, the April 15<sup>th</sup> order, forward?

[Appellant’s Counsel]: Yes. The prior discovery, if I may again just to supplement the record, the prior continuances were based on the failure to receive discovery from the Commonwealth. **We took those continuances on us.**

N.T., 12/16/12, at 8 (emphasis added).

While Appellant clearly conceded that the **defense** continuances taken during the discovery dispute were excludable time, we find no support for the conclusion that Appellant waived an objection to **all** delays incurred during the entire period of the discovery dispute. Rather, the record

demonstrates that Appellant had carried his burden of demonstrating a *prima facie* violation of the Rule 600, which, in turn, required the Commonwealth to establish excusable time. **See generally *Commonwealth v. Cook***, 865 A.2d 869, 875 (Pa. Super. 2004) (noting that “to establish that the delay [on a pretrial motion] is excludable, the Commonwealth must demonstrate, by a preponderance of the evidence, that it exercised due diligence in opposing or responding to the pretrial motion”). The Commonwealth, however, only sought a determination that it acted with due diligence for the period from April 15 to September 13, 2010. Appellant, having set forth his preliminary burden, was under no further obligation to object to the delays incurred during the discovery dispute. Thus, we conclude that Appellant did not waive his present challenge.

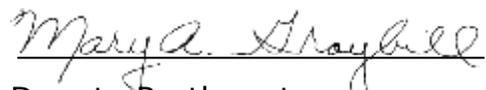
The Commonwealth further asserts that the entire delay attendant the litigation of Appellant’s pretrial motions made him unavailable for trial. However, we decline to consider this contention for the first time on appeal. First, the Commonwealth bore the burden of demonstrating that it acted with due diligence. Second, the Commonwealth sought only a ruling in the pretrial court that it acted with due diligence from April to September of 2010. Third, while the Commonwealth obtained a ruling that it acted with due diligence for a period of 151 days during this period, the record is devoid of any further judicial finding on whether the Commonwealth was diligent in bringing Appellant to trial for this Court to review.

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Consequently, we conclude that the present record is insufficient to conclude whether the January 20, 2011, order permitted a trial date of September 21, 2011. We further decline the invitation of both Appellant and the Commonwealth to rule, for the first time on appeal, upon disputed points of fact regarding the delays during the litigation of Appellant's pretrial motions, or the delays incurred after the January 20, 2011 ruling. Therefore, we vacate the judgment of sentence and remand this case to the trial court for a Rule 600 hearing. If the court finds that the Commonwealth complied with Rule 600, it shall reinstate the judgment of sentence. If the court finds that a violation of Rule 600 occurred, it shall discharge Appellant.

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

  
Deputy Prothonotary

Date: 5/7/2013