

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

BRAHYM T. WILSON

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3196 EDA 2011

Appeal from the Order October 31, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0011875-2009

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

DOUGLAS WILSON

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3208 EDA 2011

Appeal from the Order Entered October 31, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0011873-2009

COMMONWEALTH OF PENNSYLVANIA

Appellant

v.

MICHAEL SMITH

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3303 EDA 2011

Appeal from the Order October 31, 2011  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0011874-2009

BEFORE: MUNDY, J., OTT, J., PLATT, J.

MEMORANDUM BY: MUNDY, J.: Filed: January 11, 2013

The Commonwealth appeals from the October 31, 2011 order granting Appellees' Rule 600<sup>1</sup> motion. After careful review, we reverse the order and remand for proceedings consistent with this memorandum.

The relevant facts and procedural history, as gleaned from the certified record, are as follows. On May 17, 2008, Appellees were each charged with possession with intent to deliver<sup>2</sup> and other related offenses in connection with the discovery of approximately 500 pounds of marijuana and a marijuana-growing facility in the home of Appellee Michael Smith (Appellee Smith). Philadelphia Police arrived at the residence in response to a possible

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<sup>1</sup> Pa.R.Crim.P. 600.

<sup>2</sup> 35 P.S. § 780-113(a)(30).

burglary in progress and observed Appellees Brahym T. Wilson and Douglas Wilson exiting the rear of the residence. N.T., 9/18/09, at 7. As the officers approached, Appellees fled back into the residence, and the officers followed, wherein they observed large bulks of marijuana, heat lamps, an irrigation system, and other items associated with marijuana cultivation. *Id.* at 8.

A bench trial on the matter was scheduled for June 14, 2010, and subsequently was continued numerous times. On May 5, 2011, Appellees filed a Rule 600 motion. On October 31, 2011, the trial court granted Appellees' Rule 600 motion, and dismissed all charges. Thereafter, on November 30, 2011, the Commonwealth filed timely notices of appeal, as well as a concise statement of errors complained of on appeal.<sup>3</sup> On April 20, 2012, this Court granted the Commonwealth's motion to consolidate the appeals.<sup>4</sup>

On appeal, the Commonwealth presents a single issue for our review.

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<sup>3</sup> On February 22, 2012, a letter from the Philadelphia Court of Common Pleas Post Trial Unit was filed in this case, indicating that the trial judge, the Honorable John J. O'Grady, is no longer sitting as a judge in Philadelphia County, and therefore no trial court opinion was filed.

<sup>4</sup> Although the cases were not consolidated prior to this appeal, the record reflects that counsel for Appellees acted in concert with regard to the filing and arguing of motions and continuance requests. Accordingly, the Rule 600 calculations discussed herein apply equally to each Appellee.

1. Did the trial court err in dismissing the criminal charges against [Appellees] under Rule 600, where the run date was not violated?

Commonwealth's Brief at 14.

"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."

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

Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.

The proper scope of review ... is limited to the evidence on the record of the Rule 600 evidentiary hearing, and the findings of the trial court. An appellate court must view the facts in the light most favorable to the prevailing party.

...

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. In considering these matters ..., courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

***Commonwealth v. Peterson***, 19 A.3d 1131, 1134 (Pa. Super. 2011) (*en banc*), *affirmed*, 44 A.3d 655 (Pa. 2012) (citations omitted).

In pertinent part, Rule 600 of the Pennsylvania Rules of Criminal Procedure provides the following.

**Rule 600. Prompt Trial**

...

(3) 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.

...

(C) In determining the period for commencement of trial, there shall be excluded therefrom:

...

(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.

...

(G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon.

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.

Pa.R.Crim.P. 600(A)(3), (C)(3), (G).

The courts of this Commonwealth employ a three-step analysis to determine whether Rule 600 requires dismissal of the charges against a given defendant. **See** Pa.R.Crim.P. 600.

The first step in determining whether a technical violation of Rule 600 [...] has occurred is to calculate the “mechanical run date.” The mechanical run date is the date by which trial must commence under the relevant procedural rule. [T]he mechanical run date is ascertained by counting the number of days from the triggering event - e.g., the date on which ... the criminal complaint was filed - to the date on which trial must commence under Rule [600]. Pa.R.Crim.P. [600(A)(3)].

**Commonwealth v. Preston**, 904 A.2d 1, 11 (Pa. Super. 2006) (internal citations omitted), *appeal denied*, 916 A.2d 632 (Pa. 2007). In the second step, we must “determine whether any excludable time exists pursuant to Rule 600(C).” **Commonwealth v. Ramos**, 936 A.2d 1097, 1103 (Pa. Super. 2007), *appeal denied*, 948 A.2d 803 (Pa. 2008). Then, in the third step, “[w]e add the amount of excludable time, if any, to the mechanical run date to arrive at an adjusted run date.” **Id.**

In the instant matter, written complaints were filed against Appellees on May 17, 2008 signifying the start of the mechanical run date governed by

Rule 600(A)(3),<sup>5</sup> which required the Commonwealth to bring Appellees to trial by May 18, 2009, 365 days after filing the complaint. At the time of the Rule 600 hearing on October 31, 2011, 1262 days had passed from the filing of the written complaint on May 17, 2008. For the following reasons, we conclude that 916 of those days were excludable.

At the preliminary hearing on May 22, 2008, Appellees lacked counsel. The Commonwealth requested a protracted hearing date, and the hearing was continued until August 19, 2008. Accordingly, the 89-day period between May 22, 2008 and August 19, 2008 is chargeable to the defense and excludable for the purpose of calculating the adjusted run date. **See Commonwealth v. Solano**, 906 A.2d 1180, 1189 (Pa. 2006) (stating that when a defendant appears for a court proceeding without counsel and without waiving the right to counsel, the period of delay caused thereby is excludable from the Rule 600 calculation), *cert. denied*, **Solano v. Pennsylvania**, 550 U.S. 938 (2007).

On August 19, 2008, the defense and Commonwealth requested a joint continuance. The case was continued until June 10, 2009, resulting in 295 excludable days. **See** Pa.R.Crim.P. 600(C)(3)(b) (stating that any period of time resulting from a continuance granted at the request of the defense shall be excluded from the Rule 600 calculation); **Peterson, supra**

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<sup>5</sup> The record reflects that Appellees' were released on bail.

at 1137 (stating that a joint continuance is excludable delay). Additionally, on November 5, 2009, defense counsel requested a continuance, and the case was continued until December 3, 2009, resulting in 28 excludable days.

On December 17, 2009, the trial court was conducting proceedings in an unrelated matter and the instant case was continued until January 20, 2010, resulting in 34 excludable days. *See Commonwealth v. Riley*, 19 A.3d 1146, 1149 (Pa. Super. 2011) (stating that delay occasioned by the court's unavailability is generally excludable as the Commonwealth cannot control the court's calendar). On June 14, 2010, the trial court was again conducting proceedings in an unrelated matter and the instant case was continued until September 16, 2010, resulting in 94 excludable days.

From October 07, 2010 to January 27, 2011, 70 days were excludable following a continuance request by defense counsel; 27 days were ruled excludable by the trial court after defense counsel failed to give the Commonwealth adequate notice of new witnesses; and a 15-day period of excludable delay occurred when the case was administratively relisted. Accordingly, there were 112 days of excludable delay between October 7, 2010, and January 27, 2011.

On February 3, 2011, the case was continued until March 24, 2011 in the wake of a snowstorm, resulting in 49 excludable days. Thereafter, on March 24, 2011, the case was continued until May 5, 2011 when an investigating officer, a Commonwealth witness, failed to appear. The officer



had taken vacation. The trial court ruled that 36 days from March 30, 2011 to May 5, 2011 were excludable due to the officer's unavailability. **See Commonwealth v. Donaldson**, 483 A.2d 549, 552 (Pa. Super. 1984) (concluding that the Commonwealth was not responsible for delay due to police officer's vacation), *affirmed*, **Commonwealth v. Jackson**, 506 A.2d 885 (Pa. 1986).

On May 5, 2011, the trial court was conducting proceedings in a different matter and the instant case was continued until October 31, 2011, resulting in 179 excludable days. Thereafter, on October 31, 2011, the trial court dismissed all charges pursuant to Rule 600. **See** Pa.R.Crim.P. 600.

Based on the foregoing, we conclude that there are 916 excludable days between the time at which charges were filed against Appellees and the time at which all charges were dismissed by the trial court. Pursuant to **Ramos**, we must add 916 days to the mechanical run date in order to yield the adjusted run date, the date by which the Commonwealth was required to bring Appellees to trial in this case. **See Ramos, supra** at 1103. In so doing, we arrive at an adjusted run date of November 21, 2011, which is 1281 days after the Commonwealth filed the complaints against Appellees.

At the Rule 600 hearing held on October 31, 2011, the Commonwealth conceded that it had violated the adjusted run date by no fewer than 14 days and no more than 64 days. N.T., 10/31/11, at 7, 9. In granting Appellees' Rule 600 motion, the trial court erroneously relied on the

Commonwealth's concession, which is unsupported by the record. Accordingly, the trial court abused its discretion by prematurely dismissing the charges on October 31, 2011 when at least 21 days remained before expiration of the adjusted run date of November 21, 2011.

In the alternative, the trial court reasoned that the Commonwealth violated Rule 600 by failing to seek reassignment of the case to another judge who could hear the case more promptly. N.T., 10/31/12 at 19. Appellees argued, and the trial court agreed, that the time during which the trial court was unavailable should not be ruled excludable because the Commonwealth did not act with due diligence. This analysis decreases the adjusted run date by over 200 days, and places the Commonwealth in plain violation of Rule 600.

"[T]he Commonwealth may, under some circumstances (e.g. a prolonged judicial absence), have a duty to seek other courtrooms [in which] to try the case." *Riley, supra, citing Commonwealth v. Anderson*, 959 A.2d 1248, 1250 (Pa. Super. 2008). In *Anderson*, this Court made the following observations.

The extent to which the Commonwealth must look for other available courtrooms is not clear. [Appellant] cites *Commonwealth v. Hawk*, 528 Pa. 329, 597 A.2d 1141 (1991), for the proposition that the Commonwealth has an affirmative duty to make such an inquiry. In *Hawk*, part of the delay was occasioned by the trial judge, in an individual calendar system, being sick ... and then taking vacation .... The Supreme Court found the Commonwealth had not exercised due diligence

because it had not ... made any effort to “transfer the case quickly to a judge who would be able to hear protracted matters.” *Hawk*, 597 A.2d at 1145.

...

Under current case law, it is the Commonwealth which bears the burden of showing due diligence, no matter the identity of the appellant. Therefore, it would appear, though it is not certain, that the *Hawk* requirement is the standard.

*Anderson, supra* at 1250.

Guided by our observations in *Anderson*, we note that our Supreme Court in *Hawk* specifically rejected the Commonwealth’s claim that the trial court calendar was backlogged because the argument was inconsistent with the fact that the trial judge went on vacation, which caused significant delay. *Hawk, supra* at 1145. However, unlike the trial court in *Hawk*, the trial court herein was consistently conducting different trial proceedings in other matters. Moreover, the record belies the complexity of the instant case, which involves three co-defendants and approximately 15 police officers. As such, the record does not support the trial court’s conclusion that the Commonwealth failed to exercise due diligence in bringing this case to trial. *See Ramos, supra* at 1104 (citing the complexity of the case and the clogged trial court docket as circumstances beyond the control of the Commonwealth). Accordingly, under the facts and circumstances of this case, the trial court abused its discretion and misapplied the law in concluding that the Commonwealth was not duly diligent in this matter.

Based on the foregoing, we vacate the order granting Appellees' Rule 600 motion and we remand for proceedings consistent with this memorandum.

Order reversed. Case remanded. Jurisdiction relinquished.