

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANTHONY DEFILIPPO,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 973 WDA 2013

Appeal from the Judgment of Sentence of May 9, 2013
In the Court of Common Pleas of Potter County
Criminal Division at No(s): CP-53-CR-0000112-2011

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANTHONY D. DEFILIPPO,

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No. 974 WDA 2013

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In the Court of Common Pleas of Potter County
Criminal Division at No(s): CP-53-CR-0000113-2011

BEFORE: PANELLA, OLSON AND WECHT, JJ.

MEMORANDUM BY OLSON, J.:

FILED: January 8, 2014

Appellant, Anthony DeFilippo, appeals from the judgments of sentence entered on May 9, 2013. We affirm.

The factual backgrounds of these cases are as follows. As to 974 WDA 2013, on February 5, 2009, Appellant attempted to sell one-half ounce of cocaine to Pennsylvania State Police Trooper Nicholas Madigan. On March 3,

2009, Appellant sold one ounce of marijuana and a .22 caliber Colt handgun to Trooper Madigan.¹ On March 10, 2009, Appellant sold Trooper Madigan an over/under rifle, ten morphine pills, and one ounce of marijuana.² On March 16, 2009, Appellant sold Trooper Madigan Adderall, oxycodone, a .22 caliber handgun, and a .22 caliber rifle.³ The serial number on the .22 caliber handgun had been obliterated. On March 26, 2009, Appellant sold Trooper Madigan a handgun and a rifle. A juvenile was present during the transaction. Finally, on March 30, 2009, Appellant sold Trooper Bobby Clegg a handgun, a shotgun, and a rifle. The serial numbers on the handgun and shotgun were obliterated.

As to 973 WDA 2013, Appellant and three co-conspirators burglarized a log cabin located at the corner of Sunnyside Rd. and Canda Hollow Rd. and three seasonal residences located on Dug Rd. They stole a chain saw, planer, and a Redi heater. They then traveled to New York to sell the stolen goods.

The procedural histories of these cases are as follows. In 974 WDA 2013, the criminal complaint was filed on November 12, 2010. Appellant

¹ Although Trooper Madigan sought to purchase one ounce of marijuana, it appears Appellant only gave Trooper Madigan one-half ounce of marijuana.

² This time, even though Trooper Madigan paid for one ounce of marijuana, he only received approximately three-quarters of an ounce.

³ Trooper Madigan paid for one ounce of marijuana; however, he only received approximately three-quarters of an ounce. Also, the oxycodone pills were actually morphine.

was arrested on November 12, 2010. A 33-count information was filed on June 1, 2011 and an amended 33-count information was filed on August 3, 2011. On March 7, 2013, Appellant pled guilty⁴ to seven counts of manufacture, delivery, or possession with intent to deliver a controlled substance,⁵ possession of a firearm with an altered serial number,⁶ criminal use of a communication facility,⁷ and transfer of a firearm by an unlicensed individual.⁸ That plea was accepted on March 11, 2013. On March 13, 2013, Appellant filed a motion to dismiss the charges pursuant to Pennsylvania Rule of Criminal Procedure 600.⁹ The trial court denied the motion on May 7, 2013.

⁴ The trial court stated in its opinion that Appellant pled *nolo contendere* in both cases. Trial Court Opinion, 5/7/13, at 2. The certified record appears to show that Appellant pled guilty in both cases. The plea agreements, the orders accepting the pleas, and the dockets all reflect that Appellant pled guilty to the charges, not *nolo contendere*. However, the notes of testimony from the plea hearing are not part of the certified record. As the issue does not impact our disposition of this matter, we decline to address it further.

⁵ 35 P.S. § 780-113(a)(30).

⁶ 18 Pa.C.S.A. § 6110.2(a).

⁷ 18 Pa.C.S.A. § 7512(a).

⁸ 18 Pa.C.S.A. § 6111(c).

⁹ Rule 600 was rescinded on October 1, 2012, effective July 1, 2013. **See** 42 Pa.B 6622 (Oct. 6, 2012). A new Rule 600 was promulgated on October 1, 2012, effective July 1, 2013. **See id.** As this case is governed by the former Rule 600, all references in this memorandum are to the former Rule 600.

In 973 WDA 2013, a criminal complaint was filed on November 23, 2010. A 13-count information was filed on June 1, 2011. On March 7, 2013, Appellant pled guilty to burglary,¹⁰ theft by unlawful taking,¹¹ and criminal mischief.¹² That plea was accepted on March 11, 2013. On March 13, 2013, Appellant filed a motion to dismiss the charges pursuant to Pennsylvania Rule of Criminal Procedure 600. The trial court denied the motion on May 7, 2013. On May 9, 2013, Appellant was sentence to an aggregate term of 10 to 20 years' imprisonment for the two cases. These timely appeals followed.¹³

Appellant presents one issue for our review:

Should the [trial] court dismiss the charges in both cases as they were not properly brought in a timely manner pursuant to Pennsylvania Rule of Criminal Procedure 600[?]

Appellant's Brief at 3.

When considering an appeal from a Rule 600 order:

[O]ur 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.

¹⁰ 18 Pa.C.S.A. § 3502(a).

¹¹ 18 Pa.C.S.A. § 3921(a).

¹² 18 Pa.C.S.A. § 3304(a)(5).

¹³ The trial court entered orders requiring Appellant to file concise statements of errors complained of on appeal ("concise statements") on June 12, 2013. **See** Pa.R.A.P. 1925(b). On June 13, 2013, Appellant filed his concise statements. The trial court issued its Rule 1925(a) opinion on June 18, 2013.

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.

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.

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. Armstrong, 74 A.3d 228, 234-235 (Pa. Super. 2013)

(internal alterations and ellipsis omitted), *quoting* ***Commonwealth v.***

Ramos, 936 A.2d 1097, 1099 (Pa. Super. 2007) (*en banc*).

"Prior to addressing the substance of [Appellant's argument] we must determine whether [he] properly preserved [the issue]." ***Madrid v. Alpine***

Mountain Corp., 24 A.3d 380, 382 (Pa. Super. 2011) (citation omitted).

“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa.R.A.P. 302(a); ***Commonwealth v. Cruz***, 71 A.3d 998, 1009 (Pa. Super. 2013) (citations omitted).

Pennsylvania Rule of Criminal Procedure 600(G) provides, in relevant part, that, “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.” Pa.R.Crim.P. 600(G) (emphasis added).

We conclude that Appellant has waived his argument that the charges should have been dismissed for violating Rule 600(A). Appellant has waived the issue in two distinct manners. First, Appellant has waived the issue by withdrawing his request for dismissal of the charges before the trial court. Second, assuming *arguendo* that Appellant did not withdraw his dismissal request before the trial court, he waived the issue by failing to raise it prior to entering his guilty pleas.

In his “[p]etition for [r]elease [under] Rule 600,” Appellant sought dismissal of the charges brought against him for violating Rule 600(A). Petition for Release, 3/13/13. However, according to the trial court, Appellant withdrew his request to have the charges dismissed and only sought release on nominal bail at the Rule 600 hearing. Trial Court Opinion, 5/7/13, at 1 n.1. If the trial court’s recitation of what occurred at the

hearing is accurate¹⁴, Appellant has waived the issue by withdrawing it before the trial court. **Cf. Commonwealth v. Lewis**, 598 A.2d 975, 982 (Pa. 1991) (defendant waives right to challenge lack of adverse inference instruction when he withdraws request at trial).

Assuming, *arguendo*, that Appellant did not waive the issue by withdrawing his request before the trial court; we conclude he has waived the issue by pleading guilty.¹⁵ “[A] plea of guilty usually constitutes a waiver of all defects and defenses except those concerning the jurisdiction of the court, legality of sentence, and validity of plea.” **Commonwealth v. Coles**, 530 A.2d 453, 457 (Pa. Super. 1987), *appeal denied*, 559 A.2d 34 (Pa. 1989), *quoting Commonwealth v. Johnson*, 466 A.2d 636 (Pa. Super. 1983); **Commonwealth v. Sisneros**, 692 A.2d 1105, 1107 (Pa. Super. 1997), *appeal denied*, 702 A.2d 1060 (Pa. 1997) (citation omitted). A Rule 600 violation does not impact the trial court’s jurisdiction, the legality of sentence, or the validity of the plea. **See, e.g., Sisneros**, 692 A.2d at 1110; **Commonwealth v. Weber**, 389 A.2d 1107, 1110 (Pa. Super. 1978); **Commonwealth v. Blanchard**, 380 A.2d 853, 853 (Pa. Super. 1977), *citing Commonwealth v. Roundtree*, 326 A.2d 285 (Pa. 1974). Therefore, by pleading guilty to the informations, Appellant waived his argument that

¹⁴ It does not appear that the hearing on Appellant’s rule 600 petition was transcribed. If it were, there is no copy of the transcript on the certified record.

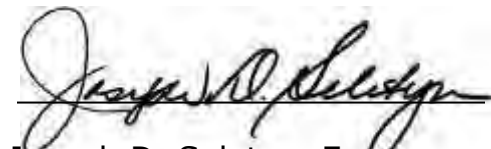
¹⁵ Even if Appellant pled *nolo contendere*, this would not impact our analysis.

the Commonwealth had violated Rule 600(A) and that he was entitled to dismissal of the charges.

To the extent that Appellant challenges the trial court's denial of his request to be released on nominal bail, we find that argument to be without merit. No charges were currently pending for the purposes of Rule 600 when Appellant filed his request to be released on nominal bail. Appellant had already pled guilty to the charges and was awaiting sentencing. Rule 600(E) only covers incarceration prior to entry of a guilty plea or the commencement of trial. Furthermore, the trial court stated in its opinion that Appellant conceded at the Rule 600 hearing that he was incarcerated on separate charges for most of the time period in question and was only incarcerated for approximately two months on the instant charges, well below the 180-day threshold of Rule 600(E). Trial Court Opinion, 5/7/13, at 2.

Judgments of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/8/2014