

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs.

MICHAEL T. DEGILIO,
Defendant

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:
:
:
:

NO. 232 CR 2010

Gary F. Dobias, Esquire
District Attorney

Counsel for Commonwealth

John J. Waldron, Esquire

Counsel for Defendant

Criminal Law - Speedy Trial - Rule 600 (Prompt Trial) -
Mechanical Run Date - Adjusted Run Date -
Excusable Delay - Due Diligence - Burden of
Proof

1. The defendant in a criminal proceeding has a constitutional right to a speedy trial.
2. Pa.R.Crim.P. 600 is designed, in part, to ensure a defendant's right to a speedy prosecution by requiring that a criminal defendant who is charged with a misdemeanor or felony offense, and who is at liberty on bail, be tried within 365 days of the filing of the criminal complaint. A violation of Rule 600 requires dismissal of the charges, with prejudice.
3. Rule 600 serves two equally important functions: (1) to protect a criminal defendant's right to a speedy trial and (2) to safeguard the state's interest in the effective prosecution of criminal cases in order to protect society by punishing those guilty of a crime and deterring those contemplating it.
4. To determine whether Rule 600 has been violated, a sequential three-step analysis is undertaken. First, the mechanical run date - the date 365 days after the filing of the complaint - is computed to ascertain whether trial has commenced within this period. If trial has not commenced by the mechanical run date, the adjusted run date - the mechanical run date plus any excludable time as defined by Rule 600 (C)(1-3) is next computed. If trial has not commenced by the adjusted run date, before the charges will be dismissed, the court must determine whether any of the delay is "excusable" within the meaning of Rule 600 (G),

that is, whether notwithstanding the Commonwealth's exercise of due diligence, the delay is attributable to circumstances beyond the Commonwealth's control such that the adjusted run date should be extended.

5. Excludable delay under Rule 600 (C)(3) includes delay caused by any continuance granted at the request of the defendant or the defendant's attorney and which is properly attributable to the defense.
6. At all stages of a criminal prosecution, the Commonwealth must exercise due diligence. The burden of proving, by a preponderance of the evidence, that it has acted with due diligence and that delay in the prosecution is not attributable to it is upon the Commonwealth. Consequently, if a defendant is forced to file a continuance request because the Commonwealth failed to act with due diligence in answering discovery needed by the defendant to proceed to trial, such delay is not excludable under Rule 600.
7. That period of delay as results from continuances requested by the Commonwealth, to which a defendant consents, and which effects an extension of the trial date beyond the mechanical or adjusted run dates is excusable time under Rule 600.

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MEMORANDUM OPINION

Nanovic, P.J. - March 18, 2013

On January 25, 2010, Michael T. Degilio ("Defendant"), a licensed psychologist, was charged with having inappropriate sexual contact with a patient. The case has been scheduled for trial on multiple occasions, most recently for January 7, 2013. On November 5, 2012, Defendant filed a Motion to Dismiss premised on Rule 600 (prompt trial). At the heart of Defendant's challenge is whether defense continuances necessitated because of the Commonwealth's delay in responding to requests for discovery count against the Commonwealth or the defense.

PROCEDURAL AND FACTUAL BACKGROUND

A criminal complaint charging the Defendant with involuntary deviate sexual intercourse (forcible compulsion),¹

¹ 18 Pa.C.S.A. § 3123(a)(1).

indecent assault (forcible compulsion),² and indecent exposure³ was filed on January 25, 2010. Defendant was arrested on January 28, 2010, and released the same date on \$100,000.00 unsecured bail.

Defendant's preliminary hearing, originally scheduled for February 3, 2010, was continued at Defendant's request to March 26, 2010, and further continued, at the Commonwealth's request, to April 9, 2010. At the preliminary hearing, all charges were bound over. The same date, Defendant waived formal arraignment; a pretrial conference was scheduled for May 13, 2010.

On May 12, 2010, Defendant submitted informal discovery to the Commonwealth. In consequence, Defendant requested a continuance of the May 13, 2010 pretrial conference, which was continued to June 22, 2010. Prior to that date, on May 28, 2010, Defendant filed an omnibus pretrial motion. A hearing on this motion was initially scheduled for August 13, 2010, but later continued, at Defendant's request, to September 30, 2010. The motion was denied on June 14, 2011. Pending disposition of the motion, Defendant requested eight continuances of the pretrial conference. Each was granted with the most recent date of the pretrial conference scheduled for June 21, 2011.

² 18 Pa.C.S.A. § 3126(a)(2).

³ 18 Pa.C.S.A. § 3127(a).

Following the conference held on this date, trial was scheduled for August 1, 2011.

On July 21, 2011, Defendant requested a continuance of the trial, which was continued to September 12, 2011. The stated reasons for the continuance were more time needed for preparation and Defendant's recent request for additional discovery from the Commonwealth. This request was made on July 19, 2011. In it, Defendant sought various documents, including the results of a forensic analysis of Defendant's computer and the results of attempts made by the Commonwealth to secure DNA from any seminal material, hairs or other matter found on the victim's clothing.

Three subsequent trial continuances were filed by Defendant - on August 31, 2011; September 22, 2011; and November 18, 2011 - giving as the reason in each case that Defendant was waiting for responses to his additional discovery and that this information was needed for trial. As of the dates of these continuance requests, Defendant had not been provided the results of the examination of Defendant's computer and the Commonwealth's testing for DNA. Each request was granted, the most recent scheduling trial for January 9, 2012.

On December 12, 2011, Defendant filed a motion to compel discovery. Therein, Defendant asserted that on August 3, 2011, he requested missing pages from documents previously provided by

the Commonwealth - the motion acknowledges that this information was later provided on August 17, 2011 - and also was following up on his July 19, 2011 discovery requests, for which earlier inquiries had been made on August 26, 2011, October 27, 2011, and November 21, 2011, without success. This same date, December 12, 2011, we issued an order providing the Commonwealth twenty days to either provide the requested information, or explain why this could not be done.

On December 28, 2011 and February 21, 2012, Defendant filed additional continuances of trial, both times explaining the basis of the continuance as awaiting discovery. Both continuances were granted, with trial continued to March 5, 2012 and May 7, 2012, respectively. The forensic lab report regarding the computer examination was provided on January 24, 2012. (Defendant's Brief in Support of Motion, p.3). Though the DNA lab report was not provided until November 28, 2012 (Defendant's Brief in Support of Motion, p.3), by letter dated December 30, 2011, the Commonwealth correctly advised the Defendant that both the forensic analysis of Defendant's computer and the DNA testing yielded negative results.

On April 27, 2012, the Pennsylvania Department of State, Bureau of Professional and Occupational Affairs, filed a motion to quash a defense subpoena requesting a copy of its investigative report on behalf of the State Board of Psychology

relating to the criminal accusations made against Defendant; the same date Defendant filed a motion to compel the production of a copy of this report. The Bureau sought to enforce the confidentiality of investigations made by licensure boards pursuant to 63 P.S. § 2205.1, which privilege, Defendant claimed, must yield under Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987), to the due process rights of a criminal defendant to discover exculpatory material. At the same time, Defendant also filed a continuance requesting a delay of the May 7, 2012 trial date, citing as the basis for this continuance his outstanding discovery requests and the pending motion to compel disclosure of the Bureau's report. Trial was continued to July 16, 2012.

Argument on the Bureau's motion to quash and Defendant's motion to compel related to the Bureau's investigative report was scheduled for July 23, 2012, and continued to August 17, 2012, but then withdrawn on August 27, 2012.⁴ During the pendency of this discovery issue with the Bureau, Defendant requested an additional trial continuance on June 27, 2012, which was granted, with trial rescheduled for September 10, 2012.

At the call of the trial list on September 4, 2012, the Commonwealth orally requested a continuance because the

⁴ It is the court's understanding that a copy of the Bureau's investigative report was given to the Defendant. (Defendant's Brief in Support of Motion, p.3).

assistant district attorney assigned to the case was ill. This was unopposed by Defendant. A written request for continuance was filed by the Commonwealth on September 24, 2012, and trial was continued to November 5, 2012. The Defendant next filed a continuance request on October 24, 2012, due to the prior attachment of defense counsel in Lehigh County. The request was granted and trial was next scheduled for January 7, 2013. Prior to this date, on November 5, 2012, Defendant filed the instant motion to dismiss which is now before us.

DISCUSSION

Rule 600 provides, in relevant part, as follows:

Rule 600. Prompt Trial

* * *

(A)(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 therefore:

(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;

(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.

* * *

(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.

Rule 600 is designed to implement the constitutional guaranty of a speedy trial contained in our federal and state constitutions (United States Constitution, Sixth Amendment; Pennsylvania Constitution, Article I, section 9), balancing the accused's right to have his guilt or innocence fairly and timely decided, against the state's interest in a fair and just disposition. As stated in Commonwealth v. Hunt:

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.

858 A.2d 1234, 1238-39 (Pa.Super. 2004) (*en banc*) (internal citations and quotation marks omitted), *appeal denied*, 875 A.2d 1073 (Pa. 2005).

In assessing a defense request for dismissal, with prejudice, premised upon a violation of Rule 600, a three-step analysis is undertaken. First, the court must determine the mechanical run date, which is three hundred and sixty-five days after the filing of the criminal complaint. If trial has not commenced by this date, the court must next compute the "adjusted run date," which is the mechanical run date plus any excludable time as that term is defined by Rule 600(C)(1-3). In the instant matter, this would be any period during the proceedings that resulted from the unavailability of the defendant or his attorney, or any continuance granted at the

request of the defendant or his counsel. Finally, if trial has not commenced by the adjusted run date, the court must determine if any of the delay is "excusable" within the meaning of Rule 600(G) so as to extend the adjusted run date. "Excusable delay" is any delay that occurs despite the Commonwealth's exercise of due diligence, and which arose from circumstances beyond the Commonwealth's control. Hunt, 858 A.2d at 1241.

Due diligence is a fact-specific concept that must be determined on a case-by-case basis. Due diligence 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 (internal quotation marks, emphasis, and citations omitted).

The mechanical run date in this case is January 25, 2011 - one year after the filing of the complaint. Although some disagreement exists between the parties, we find the following periods of time are excludable in computing the date when trial was to commence under Rule 600:

<u>Period of Delay</u>	<u>Reason for Delay</u>	<u>Amount of Delay</u>
2/3/10 - 3/26/10	Defense continuance of preliminary hearing originally scheduled for 2/3/10; rescheduled for 3/26/10	51 days
5/13/10 - 6/22/10	Defense continuance of pretrial conference originally scheduled for 5/13/10; continuance requested to obtain	40 days

Commonwealth responses to
discovery made on 5/12/10;
conference rescheduled for
6/22/10

6/22/10 - 6/21/11	Defense omnibus pretrial motion filed 5/28/10, decided 6/14/11 (delay includes defense continuance of hearing first scheduled for 8/13/10 due to personal commitment of defense counsel); pretrial conference delayed to 6/21/11	364 days
8/1/11 - 9/12/11	Defense continuance of 8/1/11 trial date; continuance requested because of additional document requests made by Defendant on 7/19/11 and Defendant's need for additional time to prepare; trial rescheduled for 9/12/11	42 days
5/7/12 - 9/10/12	Defense continuance of 5/7/12 trial date due to dispute with Pennsylvania Department of State, Bureau of Professional and Occupational Affairs, over Bureau's investigative report; this delay was beyond the control of the District Attorney's office; next scheduled trial date 9/10/12	126 days
11/5/12 - 1/7/13	Defense continuance of 11/5/12 trial date because of counsel's attachment for trial in Lehigh County	32 days

Total number of days excluded 655

The fifty-one day delay between February 3, 2010 and March
26, 2010 resulted from Defendant's requested continuance of the

preliminary hearing scheduled for February 3, 2010. Similarly, the forty day delay between May 13, 2010 and June 22, 2010 occurred when Defendant requested a continuance of the pretrial conference scheduled for May 13, 2010, in order to receive and review the Commonwealth's responses to Defendant's recent discovery requests - first made on May 12, 2010 - before holding a conference.

The delay between June 22, 2010 and June 21, 2011 is attributable to Defendant's omnibus pretrial motion filed on May 28, 2010, and decided June 14, 2011. See Commonwealth v. Hill, 736 A.2d 578, 587 (Pa. 1999) (holding that the time intervening between a defendant's filing of a pretrial motion and the trial court's disposition of that motion is excludable to the extent the effect is to render the defendant unavailable for trial and/or to delay the commencement of trial, provided that, for the entire period to be excludable, the Commonwealth exercises due diligence throughout the entire period, such that none of the delay is attributable to it); see also Commonwealth v. Kearse, 890 A.2d 388, 393 (Pa.Super. 2005) (holding that the Commonwealth must exercise diligence throughout the pendency of a criminal proceeding), *appeal denied*, 906 A.2d 1196 (Pa. 2006), *cited with approval in* Commonwealth v. Peterson, 19 A.3d 1131, 1145 n.5 (Pa.Super. 2011) (Donohue, J., concurring). Although we also find, based upon our review of the record, that during

this period the Commonwealth failed to diligently respond to the Defendant's discovery requests made on May 12, 2010, this failure did not contribute to or extend the delay attributed to the filing of Defendant's omnibus pretrial motion. See Defendant's Motion to Compel Discovery filed on November 15, 2010; Order of Court dated November 15, 2010, directing the Commonwealth to respond within seven days; Hill, 736 A.2d at 594 (Zappala, J., dissenting) (noting that the "court may properly take judicial notice of uncontested notations in the court record in determining whether the Commonwealth has exercised due diligence in attempting to bring an accused to trial.").⁵ The omnibus motion was decided on June 14, 2011, with the Commonwealth's responses to discovery having been made months earlier - on November 24, 2010. See Motion to Dismiss, paragraph 14; (Defendant's Brief in Support of Motion, p.2).

The delays between August 1, 2011 and September 12, 2011,⁶ May 7, 2012 and September 10, 2012, and November 5, 2012 and

⁵ At the December 18, 2012, evidentiary hearing on Defendant's Motion to Dismiss, the parties further stipulated that the court could review and rely upon the various exhibits attached to the Motion in making its decision.

⁶ On July 21, 2011, Defendant requested the August 1, 2011 trial date be continued because he had recently requested additional documents from the Commonwealth and needed time to prepare. This continuance request was granted and trial was rescheduled for September 12, 2011. Because this delay was at Defendant's request due to additional discovery requests made on the Commonwealth on July 19, 2011 - two days before the continuance was requested - we have counted it against the Defendant. See also Commonwealth v. Williams, 726 A.2d 389 (Pa.Super. 1999) (finding that a defense continuance which requests additional time to prepare is excludable under Rule 600), *appeal denied*, 747 A.2d 368 (Pa. 1999).

Thereafter, Defendant filed continuance requests on August 31, 2011, September 22, 2011, and November 18, 2011: all because the Commonwealth had

January 7, 2013,⁷ are all attributable to continuances requested by the Defendant with none of the responsibility for this delay attributable to the Commonwealth. When each of these periods of excludable time is taken into account - a total of six hundred and fifty-five days - the adjusted run date for commencing trial is extended to November 10, 2012. Significantly, trial was

failed to respond to the July 19, 2011 discovery requests. In consequence, a motion to compel discovery was filed by Defendant on December 12, 2011. That same date we issued an order directing the Commonwealth within twenty days to either provide discovery or explain why it couldn't.

On December 28, 2011 and February 21, 2012, Defendant filed additional continuance requests claiming he was still awaiting responses to his discovery from the Commonwealth. Because the Commonwealth has not carried its burden of proving due diligence in responding to discovery during this period of time, none of the resulting delay between September 12, 2011 and May 7, 2012 has been counted against the Defendant. Commonwealth v. Peterson, 19 A.3d 1131, 1142 (Pa.Super. 2011) (Donohue, J., concurring) (noting that the burden of proving, by a preponderance of the evidence, that it acted with due diligence in complying with Rule 600 is upon the Commonwealth). Stated differently, a defendant's continuance request caused because the Commonwealth failed to act with due diligence in answering discovery needed by the defendant to proceed to trial is not excludable under Rule 600. Commonwealth v. Edwards, 595 A.2d 52, 55 (Pa. 1991) (holding that where the Commonwealth failed to demonstrate due diligence in responding to a defendant's uncontested discovery requests, a defense continuance necessitated thereby did not toll the allotted time period under Rule 1100, the predecessor to Rule 600). Rule 1100 was renumbered as Rule 600, effective April 1, 2001.

⁷ Although Defendant claims in his motion to dismiss that he was not provided a copy of the DNA report until November 28, 2012, the Commonwealth had previously advised the Defendant by letter dated December 30, 2011 that it was having difficulty obtaining a copy of the report and that, in any case, there was no DNA obtained. Cf. Commonwealth v. Taylor, 598 A.2d 1000, 1002-03 (Pa.Super. 1991) (holding, with respect to the Municipal Court's counterpart to the speedy trial rule, that the Commonwealth's argument that its failure to provide timely discovery was beyond its control because of a delay in receiving a requested police report evidenced a lack of due diligence where the Superior Court found "the Commonwealth could have done more in its attempt to secure the report from the police than merely requesting the report two or three times"), *appeal denied*, 613 A.2d 559 (Pa. 1992). Further, the Defendant did not give this as a basis for his continuance request of the November 5, 2012 trial date filed on October 24, 2012. Consequently, we believe the real and actual reason for this continuance was that stated in the request, and not a need to review a DNA report which only confirmed what Defendant had previously been told by the Commonwealth, that there was no DNA found to be tested.

scheduled to begin on November 5, 2012, five days before the deadline imposed by Rule 600.

The only reason trial did not begin on November 5, 2012, was because of Defendant's application for continuance filed on October 24, 2012. Since January 7, 2013, trial has been delayed because of Defendant's pending motion to dismiss filed on November 5, 2012. Consequently, at the time Defendant filed his November 5, 2012 Motion to Dismiss, he did not have a valid Rule 600 claim.

In addition to the foregoing, the Commonwealth claims that the period between September 12, 2011 and May 7, 2012, should be excludable from the Rule 600 computation. According to the Commonwealth, this delay resulted from continuances filed by the Defendant on August 31, 2011, September 22, 2011, November 18, 2011, December 28, 2011, and February 21, 2012. While these continuance requests were made, and granted, in each instance the request was made because of the Commonwealth's failure to respond and provide discovery which had been requested by Defendant on July 19, 2011. Though we do not attribute the delay between August 1, 2011 and September 12, 2011 to the Commonwealth - the continuance filed by the Defendant on July 21, 2011 was to allow time for the Commonwealth to respond to the discovery requested by the Defendant on July 19, 2011 - we do find that the delay between September 12, 2011 and May 7,

2012 is attributable to the Commonwealth's failure to exercise due diligence in responding to Defendant's July 19, 2011 discovery requests.

Finally, the Commonwealth concedes, and we agree, that the delay in trial between September 10, 2012 and November 5, 2012, which was occasioned by the Commonwealth's continuance request on September 4, 2012, is not excludable even though consented to by the Defendant. (Commonwealth's Brief in Opposition to the Motion, p.8). This continuance was requested due to illness of the assistant district attorney assigned to the case, and was agreed to by defense counsel as a professional courtesy. Although the Superior Court in Hunt, 858 A.2d at 1241, stated that "[i]f the defense does indicate approval or acceptance of the continuance, the time associated with the continuance is excludable under Rule 600 as a defense request," the question is really one of waiver.

In Hunt, defendant's counsel signed the consent section of the Commonwealth's application for postponement of trial which was then rescheduled from April 9, 2001 to April 23, 2001, three days after the adjusted run date. In doing so, the Superior Court held that defendant's counsel's "signature and lack of objection constitute[d] consent to the April 23, 2001 trial date, and a waiver of [defendant's] Rule 600 rights with respect to the three (3) calendar days between the adjusted run date of

Friday, April 20, 2001 and the scheduled trial date of Monday, April 23, 2001." *Id.* at 1243.

While a defendant may well waive any later claim of a Rule 600 violation by agreeing to and not opposing a continuance which extends the date of trial beyond the adjusted run date, that is not what occurred here. According to our calculations, at the time the Commonwealth made its request, the adjusted run date was November 10, 2012. The rescheduled trial date, November 5, 2012, was prior to the adjusted run date.

Moreover, the record before us is devoid of any indication that when defense counsel consented to the Commonwealth's request there was any agreement to effect a waiver of Rule 600 which, for the reasons stated, was not exceeded by the grant. The burden of establishing a defense waiver is upon the Commonwealth and for a valid waiver to exist the record must demonstrate that the waiver was an informed and voluntary decision of the defendant. Commonwealth v. Brown, 875 A.2d 1128, 1135 (Pa.Super. 2005), *appeal denied*, 891 A.2d 729 (Pa. 2005). Under the facts before us no waiver was effected or agreed to by Defendant's concurrence in the Commonwealth's request for a continuance of the September 10, 2012 trial date. See also Brown, 875 A.2d at 1137.⁸

⁸ Because the record is insufficient to establish that the delay resulting from this continuance was excusable, and the Commonwealth has in any event not made this argument, this issue is not addressed.

CONCLUSION

Pursuant to Rule 600, a criminal defendant in a court case must be brought to trial within three hundred and sixty-five non-excludable days of the filing of the complaint against him. Under this standard, Defendant's right to a prompt and speedy trial under Rule 600 was not violated. Nevertheless, in denying Defendant's Motion to Dismiss, we caution the Commonwealth to be mindful of the applicable time constraints.

BY THE COURT:

P.J.