IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 796 CR 2009
	:	
FRANCINE B. GEUSIC,	:	
Defendant	:	

Cynthia A. Dyrda-Hatton, Esquire
Assistant District Attorney — Counsel for the Commonwealth

Gregory L. Mousseau, Esquire — Counsel for the Defendant

Criminal Law – Speedy Trial Rights – Sixth Amendment – Rule 600 – Thirty-Two Month Delay – Motion to Dismiss

1. Pa.R.Crim.P. 600 is intended to protect an accused's speedy trial rights. In doing so, it presumptively fixes the time period by which a case should normally be prosecuted.

2. Rule 600 (A)(3) requires the trial of a criminal case to begin within 365 days of the date when the criminal complaint was filed. This deadline is known as the mechanical run date.

3. The mechanical run date is adjusted or extended by adding to this date any excludable time attributable to a defendant under Rule 600 (C). The mechanical run date, as so modified, becomes an adjusted run date.

4. If trial does not commence before the adjusted run date, unless such additional delay is attributable to circumstances beyond the Commonwealth's control and despite its due diligence pursuant to Rule 600 (G), the defendant, upon application prior to the commencement of trial, is entitled to have the charges dismissed and to be discharged from further prosecution.

5. Due diligence requires that the Commonwealth make reasonable efforts to move the case forward to ensure compliance with Rule 600. The duty to adhere to Rule 600 is upon the Commonwealth, not the defendant.

6. Where a thirty-two month delay exists between the filing of the complaint and Defendant's arrest because of the Commonwealth's failure to exercise reasonable efforts to locate and timely prosecute Defendant, Rule 600 has been

violated and Defendant is entitled to have all charges dismissed.

7. The right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution is triggered by a formal criminal prosecution (i.e., arrest, indictment or other official accusation). In contrast, a challenge on due process grounds permits a defendant to challenge delay both before and after official accusation.

8. In determining whether a violation of a defendant's Sixth Amendment rights to a speedy trial has been proven, a minimum of four factors must be examined: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

9. Unlike Rule 600 which is administrative in nature and does not require a finding of prejudice to be violated, a speedy trial claim ordinarily will fail absent some evidence of prejudice, albeit, under certain circumstances, prejudice will be presumed.

10. For purposes of an accused's Sixth Amendment right to a speedy trial, courts have held that post-accusation delays approaching one year are "presumptively prejudicial." Where there exists a thirty-two month delay after the complaint is filed and before arrest, the reasons for the delay are attributable to the Commonwealth, and Defendant has promptly asserted her Sixth Amendment right upon learning of the prosecution, a failure to establish actual prejudice, in the absence of persuasive evidence to the contrary, is not essential to the successful assertion of Defendant's Sixth Amendment claim.

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MEMORANDUM OPINION

Nanovic, P.J. – September 15, 2010

Pending before us is Defendant, Francine B. Geusic's, Motion to Dismiss all charges filed against her on the grounds of untimely prosecution - a delay of almost three years between the filing of the complaint and her arrest. This delay, Defendant argues, is in violation of her rights to a speedy trial safeguarded by both the Sixth Amendment of the United States Constitution, as well as by Rule 600 of the Pennsylvania Rules of Criminal Procedure.

PROCEDURAL AND FACTUAL BACKGROUND

Defendant was involved in a three-car motor vehicle accident on October 31, 2006, in Mahoning Township, Carbon County, Pennsylvania. Defendant was driving west on Blakeslee Boulevard Drive East when her vehicle crossed into the eastbound lane and struck an oncoming vehicle driven by Robert Speshok. The Speshok vehicle in turn struck a third vehicle.

The investigating officer, Audie Mertz of the Mahoning Township Police Department, determined that Defendant was driving under the influence. As part of his investigation, Officer Mertz secured and sent a sample of Defendant's blood to the state police crime lab for testing. The results of this

testing, which Officer Mertz received on November 14, 2006, showed a blood alcohol content of .22%.

On November 28, 2006, a criminal complaint was filed in the office of Magisterial District Judge Edward Lewis. Therein, Defendant was charged, *inter alia*, with two misdemeanor counts of driving under the influence,[1] and aggravated assault while driving under the influence, a felony of the second degree.[2] A warrant for Defendant's arrest was issued by Judge Lewis on December 5, 2006. *See* Pa.R.Crim.P. 509(2)(a) (requiring the issuance of a warrant of arrest, and not a summons, when one or more of the offenses charged is a felony or murder).

Not until August 19, 2009, after Defendant unexpectedly learned that a warrant was outstanding for her arrest and made arrangements to voluntarily appear at Judge Lewis' office, was the warrant executed and service of the complaint made on Defendant. On this same date, Defendant was arraigned before Judge Lewis and bail was set at $10,000 unsecured. The reason for and the effects of the thirty-two month delay between when the complaint was filed and when Defendant was arrested are at the heart of Defendant's challenge.

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[1] 75 Pa.C.S.A. § 3802(a)(1), (c).

[2] 75 Pa.C.S.A. § 3735.1(a). Mr. Speshok allegedly sustained serious bodily injuries in the accident.

Defendant's preliminary hearing, initially scheduled for August 26, 2009, was continued several times until December 9, 2009, when the hearing was waived. Thereafter, on January 4, 2010, Defendant filed an omnibus pretrial motion which included the instant Motion to Dismiss. The Motion was heard on March 23, 2010. At this hearing, Officer Mertz testified that sometime between December 5, 2006, the date the warrant was issued, and April 4, 2008, when he was injured and began disability leave,[3] he contacted Chief Strauss of the Lansford Borough Police Department to arrest Defendant and effect service of the complaint. Officer Mertz did not know the date of this contact, or whether he provided Chief Strauss with a copy of the arrest warrant and complaint. According to Officer Mertz, he heard nothing further from Chief Strauss on the matter and made no further attempt to contact Chief Strauss. In contrast, Defendant testified that Chief Strauss was a personal friend of hers, that he had been in her home on several occasions since the accident, that he knew where she lived and how to reach her, and that he never mentioned that a criminal complaint had been filed against her or that a warrant was outstanding for her arrest.

The only other efforts to locate Defendant about which Officer Mertz testified were his entry of Defendant's name on

[3] **Officer Mertz returned from disability in January 2009.**

the National Crime Information Center database on July 19, 2007, identifying Defendant as a wanted person, and a check he made of Defendant's driver's license on February 11, 2008, confirming that Defendant's address was the same as that listed in the criminal complaint. Defendant's home, where she has resided continuously since 1995 until the present time, is in Lansford, Carbon County, Pennsylvania. No evidence was presented that Officer Mertz or anyone else ever attempted service on Defendant at her home. Likewise, although Defendant's telephone number is publicly listed in the phone directory, no evidence was presented that Officer Mertz or anyone else ever attempted to call Defendant at her home.

DISCUSSION

Rule 600

Rule 600 provides in pertinent part:

> [(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 therefrom:
>
> (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. 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.

Pa.R.Crim.P. 600.

As provided by Rule 600, trial must commence by the mechanical run date, which is calculated by adding 365 days to

the date on which the criminal complaint was filed. The mechanical run date is then adjusted or extended by adding to this date any "excludable" time attributable to a defendant under Rule 600(C).[4] The mechanical run date, as so modified, becomes an adjusted run date. If trial begins before the adjusted run date, there is no violation and no need for further analysis. However, if a defendant's trial is delayed until after the adjusted run date, it becomes necessary to determine if the delay is "excusable," that is due to circumstances beyond the Commonwealth's control and despite its due diligence pursuant to Rule 600(G)[5].

> 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. Due diligence includes, among other things, listing a case for trial prior to the run date, preparedness for trial within the run date, and keeping adequate records to ensure compliance with Rule 600.

Commonwealth v. Tickel, 2 A.3d 1229, 1234 (Pa.Super. 2010) (emphasis in original) (quoting Commonwealth v. Ramos, 936 A.2d

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[4] "Excludable time" is defined in Rule 600(C) as "the period of time between the filing of the written complaint and the defendant's arrest, . . . any period of time for which the defendant expressly waives Rule 600; [and/or] such period of delay at any stage of the proceedings as results from: (a) the unavailability of the defendant or the defendant's attorney; [and] (b) any continuance granted at the request of the defendant or the defendant's attorney." Pa.R.Crim.P. 600(C).

[5] "Excusable delay," while not expressly defined in Rule 600, is that delay "which occur[s] as a result of circumstances beyond the Commonwealth's control and despite its due diligence." Commonwealth v. Brown, 875 A.2d 1128, 1135 (Pa.Super. 2005), *appeal denied*, 891 A.2d 729 (Pa. 2005).

1097, 1102 (Pa.Super. 2007) (*en banc*)); *see also* Commonwealth v. Meadius, 870 A.2d 802, 807 (Pa. 2005) (*en banc*) (the exercise of "due diligence" requires the Commonwealth to do everything reasonably within its power to guarantee that a trial begins on time).

Instantly, the Commonwealth filed its complaint against Defendant on November 28, 2006. Therefore, the initial Rule 600 mechanical run date was November 28, 2007. Defendant's arrest, however, was not effected until August 19, 2009, almost two years after the mechanical run date. For this period to constitute excludable time and be added to the mechanical run date, it must meet the requirements of Rule 600(C)(1).

On this point, we are not convinced that the Commonwealth exercised "due diligence" in locating Defendant and bringing this case to trial on time. As previously stated, Defendant has resided at the same address in the same county where the incident giving rise to the charges occurred since 1995, is known in her community by the local chief of police, and has a public telephone number. Defendant made no effort to avoid service.[6] More importantly, no reasonable effort was made

[6] The fact that Defendant testified that after the accident she expected criminal charges to be filed does not extend the time for trial or excuse the delay. As stated by the Court in Commonwealth v. Bradford:

> **The duty to adhere to Rule 600 rested with the Commonwealth, not [Defendant]. [Defendant] did not have an obligation to tell the Commonwealth that the Commonwealth was not proceeding with its case against [her].**

by the Commonwealth to contact Defendant at her home, either in person or by telephone, to advise her of the charges. Nothing prohibited Officer Mertz himself from making personal service notwithstanding that Defendant's residence is beyond the territorial limits of his primary jurisdiction. 42 Pa.C.S.A. § 8953(a)(1); *see also* Commonwealth v. England, 375 A.2d 1292, 1297 (Pa. 1977), *affirmed*, 441 A.2d 1214 (Pa. 1982).

In accordance with the foregoing, none of the delay which occurred between the filing of the complaint and Defendant's arrest is excludable time attributable to Defendant. Nor is this delay excusable pursuant to Rule 600(G). The Commonwealth did not act with due diligence in locating and apprehending Defendant. The circumstances why this occurred were not beyond the Commonwealth's control.[7]

In concluding that all charges must be dismissed because Rule 600 has been violated, we understand and recognize that Rule 600 serves two equally important functions: (1) the

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2 A.3d 628, 633 (Pa.Super. 2010); *see also* Barker v. Wingo, 407 U.S. 514, 527 (1972) (stating, in reference to the Sixth Amendment right to a speedy trial, "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process."). Moreover, Defendant testified that she first became aware of the charges and the warrant for her arrest approximately one week prior to when she turned herself in at Judge Lewis' office.

[7] Significantly, the complaint against Defendant was previously approved for filing by the District Attorney's office on November 27, 2006, pursuant to Pa.R.Crim.P. 507(A). *Cf.* Bradford, 2 A.3d at 637 (attributing to the Commonwealth delay which occurred after the District Attorney was aware of the charges).

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. . . . [T]he 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.

Tickel, 2 A.3d at 1233 (quoting Ramos, 936 A.2d at 1100-01). While being cognizant of the societal interest inherent in Rule 600, it is because we specifically find that the Commonwealth has not acted with the necessary due diligence and attentiveness appropriate to the circumstances, that we cannot condone the continued prosecution of Defendant and will dismiss the charges.

Sixth Amendment

The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a

speedy . . . trial . . . ."[8] This amendment, which among others protects a criminal defendant's interest to a fair adjudication, is triggered by a formal criminal prosecution - arrest, indictment, or other official accusation. *See* Doggett v. United States, 505 U.S. 647, 654-55 (1992); United States v. Marion, 404 U.S. 307, 320 (1971) (the Sixth Amendment right to a speedy trial does not apply until "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge").[9]

In assessing whether a violation of an accused's Sixth Amendment right to a speedy trial exists, four factors must be examined, together with such other circumstances as may be

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[8] In Barker, the United States Supreme Court stated:

> **The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.**

407 U.S. at 522 (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)). In general, if the Commonwealth has pursued a defendant with reasonable diligence from indictment to arrest, his speedy trial claim will fail regardless of the length of the delay (e.g. legitimate investigative delay), unless the defendant can show specific prejudice to his defense. *See* Doggett v. United States, 505 U.S. 647, 656 (1992).

[9] In contrast, a defendant may invoke due process to challenge delay both before and after official accusation. *See* Doggett, 505 U.S. at 655 n.2; *see also* Commonwealth v. Scher, 803 A.2d 1204, 1215-16 (Pa. 2002) (finding twenty-year delay in filing murder charges and arresting defendant not *per se* violative of defendant's rights to due process under the law). In order to prevail on a due process claim based upon delay between the commission of the offense and the initiation of prosecution,

> **the defendant must first show that the delay caused him actual prejudice, that is, substantially impaired his or her ability to defend against the charges. The court must then examine all of the circumstances to determine the validity of the Commonwealth's reasons for the delay. Only in situations where the evidence shows that the delay was the product of intentional, bad faith, or reckless conduct by the prosecution, however, will we find a violation of due process. Negligence in the conduct of a criminal investigation, without more, will not be sufficient to prevail on a due process claim based on pre-arrest delay.**

Scher, 803 A.2d at 1221-22.

relevant: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530, 533 (1972). Here, all four factors support Defendant's claim, as does the violation of Rule 600, which itself presumptively fixes the time period in which a case should normally be prosecuted.

The delay is in excess of one year,[10] is attributable to minimal efforts extended by the police to locate and apprehend Defendant, and was asserted promptly by Defendant after her arrest, there being no evidence that Defendant knew of the complaint earlier than one week before she reported to Judge Lewis' office.[11] Although actual prejudice has not been established,[12] the "affirmative proof of particularized prejudice

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[10] In general, courts have held that post-accusation delays approaching one year are "presumptively prejudicial." Doggett, 505 U.S. at 652 n.1. As used as a triggering mechanism, the term "presumptively prejudicial" "does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry." Id.; *see also* Barker 407 U.S. at 530.

[11] Were this not the case, and had it been shown that Defendant was aware of the charges years earlier, Barker's third criteria would weigh heavily against Defendant. *See* Doggett, 505 U.S. at 653.

[12] Defendant's claim of prejudice on the basis that she has been deprived of the opportunity to independently test the blood sample drawn following her accident is unavailing. This sample was destroyed by the lab once thirty days passed from testing. Such destruction would have occurred in the ordinary course of even a timely prosecution and is not attributable to any excessive delay for which the Commonwealth can be held accountable. As stated in Scher,

> **These claims more properly relate to a due process claim based on police failure to preserve evidence. The United States Supreme Court has made clear, however, that the police do not violate a defendant's due process rights by failing to preserve potentially useful evidence unless the defendant can show that the police acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). There has been no showing of bad faith on the part of the police with respect to the loss of evidence in these instances.**

is not essential to every speedy trial claim." Doggett, 505 U.S. at 655. Instead, common sense dictates that the greater the delay, the greater "the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence" and the greater the possibility that the reliability of the trial itself will be compromised "in ways that neither party can prove or, for that matter, identify." Doggett, 505 U.S. at 654-55. Although such presumed prejudice cannot alone sustain a Sixth Amendment claim, when combined with the other Barker criteria, each of which weighs against the government, a delay of almost three times that sufficient to trigger judicial review, with no extenuating circumstances nor persuasive evidence to the contrary, entitles Defendant to relief. *See* Doggett, 505 U.S. at 658.[13]

CONCLUSION

For the reasons discussed, the delay which occurred in this case between the filing of the criminal complaint and Defendant's arrest violates the rights afforded an accused to a speedy trial and fair adjudication as provided by Rule 600 of the Pennsylvania Rules of Criminal Procedure and the Sixth

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803 A.2d at 1223 n.17.

[13] We expressly do not find any intentional misconduct or bad faith by the Commonwealth. Instead, we believe the delay is attributable to a failure to exert reasonable diligence, that is, simple negligence. In weighing whether prejudice exists, any delay caused by intentional misconduct or official bad faith is weighed heavily against the government. *See* Doggett, 505 U.S. at 656.

Amendment. In consequence, Defendant is entitled to have the charges dismissed and to be discharged from further prosecution.

BY THE COURT:

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P.J.