

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

VICTORIA SANTINO

Appellant

No. 2264 EDA 2013

Appeal from the Judgment of Sentence July 12, 2013
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0004745-2011

BEFORE: GANTMAN, P.J., PANELLA, J., and STABILE, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED JULY 28, 2014

Appellant, Victoria Santino, appeals from the judgment of sentence entered in the Montgomery County Court of Common Pleas, following her bench trial convictions for possession of a controlled substance with intent to deliver ("PWID") and criminal use of communication facility.¹ We affirm.

The relevant facts and procedural history of this appeal are as follows. On June 13, 2011, the Commonwealth filed a criminal complaint against Appellant due to her role in a drug distribution ring involving multiple individuals. Appellant posted bail on June 15, 2011. On August 24, 2011, Appellant waived a formal arraignment and entered a plea of not guilty. Also on August 24, 2011, Appellant executed an application for Accelerated

¹ 35 P.S. § 780-113(a)(30), 18 Pa.C.S.A. § 7512, respectively.

Rehabilitative Disposition ("ARD"). The ARD application included a waiver of rights under Pa.R.Crim.P. 600, which Appellant signed on September 12, 2011. On October 17, 2011, the Commonwealth denied Appellant's ARD application.

The court scheduled a pretrial conference for October 20, 2011. On October 20, 2011, Appellant requested a continuance, which the court granted. On November 16, 2011, the court rescheduled Appellant's pretrial conference for December 14, 2011. On December 14, 2011, Appellant requested a continuance, which the court granted. Thereafter, Appellant requested several additional continuances of the pretrial conference, each of which the court granted. On February 5, 2013, the Commonwealth filed a motion to consolidate the cases against Appellant and Co-defendant for trial.² The court granted the motion to consolidate on February 22, 2013. On February 25, 2013, the court scheduled trial for April 2, 2013. On March 19, 2013, the Commonwealth requested a continuance, which the court granted. Ultimately, the court placed the matter on the May 2013 trial list.

On or about April 9, 2013, Appellant and Co-defendant filed motions to dismiss the charges pursuant to Rule 600.³ The court conducted an

² Appellant and Co-defendant have been, and continue to be, represented by the same attorney.

³ Appellant's Rule 600 motion does not appear in the certified record. At the Rule 600 hearing, the court admitted the certified docket entries for both
(Footnote Continued Next Page)

evidentiary hearing on April 24, 2013. Immediately following the hearing, the court denied Appellant's Rule 600 motion. On May 24, 2013, Appellant filed a premature notice of appeal from the order denying Rule 600 relief. This Court quashed the appeal as interlocutory on July 3, 2013.

Following a bench trial, the court convicted Appellant of PWID and criminal use of communication facility. On July 12, 2013, the court sentenced Appellant to an aggregate term of three (3) years' probation. Appellant did not file post-sentence motions.

Appellant timely filed a notice of appeal on August 9, 2013. On August 20, 2013, the court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on September 3, 2013.

Appellant now raises three issues for our review:

DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION BY SCHEDULING AN ARGUMENT DATE ON [APPELLANT'S] MOTION TO DISMISS PURSUANT TO PA.R.CRIM.P. 600(A)(3) AND THEN, WITHOUT ANY PRIOR NOTICE TO DEFENSE COUNSEL, HOLDING AN EVIDENTIARY HEARING ON THAT SAME DATE AND CALLING ITS OWN WITNESSES AND INTRODUCING INTO EVIDENCE DOCUMENTS THAT WERE NEVER PREVIOUSLY DISCLOSED NOR PROVIDED TO DEFENSE COUNSEL?

(Footnote Continued) _____

Appellant and Co-defendant. While the certified docket entries for Appellant's case do not include a filing date for the Rule 600 motion, the certified docket entries for Co-defendant's case list the filing date for the Rule 600 motion as April 9, 2013.

DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION BY FINDING THAT [APPELLANT'S] LIMITED RULE 600 WAIVER FOR PURPOSES OF HER APPLICATION FOR THE [ARD] PROGRAM REMAINED IN EFFECT AFTER SHE WAS DENIED ENTRY INTO THE ARD PROGRAM?

DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION BY DENYING [APPELLANT'S] MOTION TO DISMISS PURSUANT TO PA.R.CRIM.P. 600(A)(3) IN LIGHT OF [APPELLANT] HAVING ESTABLISHED THAT 404 DAYS OF NON-EXCLUDABLE TIME HAD RUN AGAINST THE COMMONWEALTH?

(Appellant's Brief at 3).

In her first issue, Appellant contends the court initially entered an order scheduling argument on the Rule 600 motion. Appellant asserts the court subsequently decided to hold an evidentiary hearing, and it *sua sponte* contacted the deputy court administrator and asked her to testify about the pretrial delays. Appellant complains the court did not provide defense counsel with notice of this witness until the morning scheduled for argument. Despite Appellant's timely objections, the court permitted the administrator to testify. Additionally, Appellant avers the court improperly permitted the administrator to rely on documents supplied by the Commonwealth at the hearing. Appellant concludes the court's actions violated Pennsylvania Rule of Evidence 614. We disagree.

Rule 614 governs a trial court's ability to call or examine a witness as follows:

Rule 614. Court's Calling or Examining a Witness

(a) Calling. Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.

Pa.R.E. 614(a), (b).

Instantly, the court conducted Appellant's Rule 600 hearing on April 24, 2013. Prior to the hearing, the court asked the administrator to appear and testify regarding the pretrial delays. On the morning of the Rule 600 hearing, the court informed the parties that the administrator would testify. At that time, defense counsel objected. Nevertheless, the parties proceeded to the hearing, whereupon the court questioned the administrator. Defense counsel fully cross-examined the administrator.

The court justified its decision to call the witness as follows:

[The c]ourt was only interested in getting at the facts so as to make a proper ruling. Nothing in [the administrator's] testimony came as a surprise to defense counsel. When the testimony of [the administrator] is compared to the evidence gleaned right from the docket, *i.e.*, the courtroom generated continuance orders, it is clear that they are in concert with one another. In other words, the records generated by [the administrator's] office and kept in the regular course of business mirror those that were issued from the courtroom and are on the docket. Therefore, in furtherance of finding the truth [the c]ourt called [the administrator] to testify, and no prejudice resulted....

(Trial Court Opinion, filed September 19, 2013, at 7).

Here, the court properly acted pursuant to Rule 614. Rule 614 does not expressly state when the court must provide notice to the parties. **See**

Pa.R.E. 614(a). Our review of the transcript demonstrates that the short notice at issue in the present case did not hamper defense counsel's ability to provide effective representation at the Rule 600 hearing. Absent more, the court did not commit reversible error on the grounds alleged.

In her second and third issues, Appellant acknowledges that she signed a Rule 600 waiver after executing the ARD application. Appellant insists, however, that the waiver was limited to the period of delay associated with the ARD application. Appellant maintains the Rule 600 waiver did not remain in effect after the denial of the ARD application. Although the court determined that Appellant's waiver remained in effect, Appellant argues the court failed to cite to any relevant authority to support its conclusion. Regarding the delays following Appellant's rejection from the ARD program, Appellant emphasizes that the Commonwealth failed to prove that any of the delays were excludable under Rule 600. Appellant claims there have been over 365 days of non-excludable delay, and Appellant did not waive her Rule 600 rights in conjunction with these delays. Based upon the foregoing, Appellant concludes the court erred in denying her Rule 600 motion. We disagree.

"In evaluating Rule 600 issues, our standard of review of a trial court's decision is whether the trial court abused its discretion." ***Commonwealth v. Hunt***, 858 A.2d 1234, 1238 (Pa.Super. 2004) (*en banc*), *appeal denied*, 583 Pa. 659, 875 A.2d 1073 (2005).

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.

Id. at 1238-39 (internal citations and quotation marks omitted).

Rule 600 sets forth the speedy trial requirements and provides in pertinent part:

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 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.

* * *

Pa.R.Crim.P. 600(A)(3), (C)(1)-(3).⁴ "Rule 600 generally requires the Commonwealth to bring a defendant on bail to trial within 365 days of the date the complaint was filed." *Hunt, supra* at 1240. A defendant on bail after 365 days, but before trial, may apply to the court for an order dismissing the charges with prejudice. *Id.* at 1240-41. To obtain relief, a defendant must have a valid Rule 600 claim at the time she files her motion for relief. *Id.* at 1243.

⁴ A new version of Rule 600 went into effect on July 1, 2013, after the trial court disposed of Appellant's Rule 600 motion.

“The mechanical run date is the date by which the trial must commence under Rule 600.” **Commonwealth v. McNear**, 852 A.2d 401, 406 (Pa.Super. 2004).

It is calculated by adding 365 days (the time for commencing trial under Rule 600) to the date on which the criminal complaint is filed. The mechanical run date can be modified or extended by adding to the date any periods of time in which delay is caused by the defendant. Once the mechanical run date is modified accordingly, it then becomes an adjusted run date.

Id. (quoting **Commonwealth v. Lynn**, 815 A.2d 1053, 1056 (Pa.Super. 2003)).

In the context of Rule 600, “excludable time” is differentiated from “excusable delay” as follows:

“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; (b) any continuance granted at the request of the defendant or the defendant’s attorney. “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. Brown, 875 A.2d 1128, 1135 (Pa.Super. 2005), *appeal denied*, 586 Pa. 734, 891 A.2d 729 (2005) (quoting **Hunt, supra** at 1241).

Even where a violation of Rule 600 has technically occurred, we recognize:

[T]he motion to dismiss the charges should be denied if the Commonwealth exercised due diligence and...the

circumstances occasioning the postponement were beyond the control of the Commonwealth.

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.

Reasonable effort includes such actions as the Commonwealth listing the case for trial prior to the run date to ensure that [defendant] was brought to trial within the time prescribed by Rule [600].

Brown, supra at 1138 (quoting **Hunt, supra** at 1241-42) (emphasis in original).

Instantly, Appellant's application to the ARD program included a Rule 600 waiver. Specifically, the application and waiver appeared on one sheet of paper, with the waiver directly beneath the application section. The waiver Appellant executed differed from the "standard" Rule 600 waiver form utilized in Montgomery County.

The fact that Appellant's application to the ARD program included a Rule 600 waiver on the same form suggests that Appellant intended to limit her Rule 600 waiver to the delay associated with the ARD process. Moreover, it appears that Appellant did not have the benefit of counsel while executing the form, as the space reserved for counsel's signature is blank. Assuming without deciding that Appellant's Rule 600 waiver was limited to the delay associated with the ARD process, Appellant still caused several additional delays prior to the filing of her Rule 600 motion. Specifically, the Commonwealth filed the criminal complaint against Appellant on June 13,

2011. Therefore, the initial Rule 600 mechanical run date was June 12, 2012, because 2012 was a leap year. Appellant posted bail on June 15, 2011. On August 24, 2011, Appellant executed the ARD application. Appellant subsequently signed the Rule 600 waiver. The Commonwealth denied Appellant’s ARD application on October 17, 2011. Appellant concedes that the delay associated with the ARD application is excludable. (**See** Appellant’s Brief at 11, 14.)

The court scheduled a pretrial conference for October 20, 2011. On October 20, 2011, Appellant requested a continuance, which the court granted. The court rescheduled the pretrial conference for December 14, 2011. At the next five listings, Appellant requested continuances. Ultimately, the court conducted the pretrial conference on January 30, 2013. The delays between October 20, 2011 and January 30, 2013 constituted 468 days of excludable delay. **See Brown, supra.** The adjusted trial run date became October 17, 2013.

The following chart summarizes the delays in bringing the case to trial at that point:

<u>DATES</u>	<u>ACTIVITY</u>	<u>DAYS DELAY</u>	<u>EXCLUDABLE OR EXCUSABLE</u>	<u>ADJUSTED RUN DATE</u>
6/13/11-8/24/11	Commonwealth filed criminal complaint; following her arrest, Appellant posted bail.	72	No	6/12/12
8/24/11-10/17/11	Appellant waived arraignment; Appellant executed ARD application and Rule 600	54	Excludable; Rule 600 expressly	8/5/12

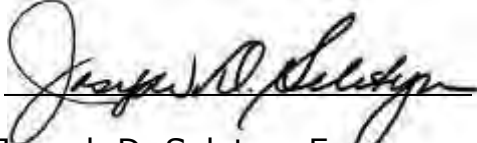
	waiver.		waived	
10/17/11-10/20/11	Court previously scheduled pretrial conference.	3	No	8/5/12
10/20/11-12/14/11	Appellant requested pretrial continuance.	55	Excludable; continuance requested	9/29/12
12/14/11-3/8/12	Appellant requested pretrial continuance.	85	Excludable; continuance requested	12/23/12
3/8/12-4/9/12	Appellant requested pretrial continuance.	32	Excludable; continuance requested	1/24/13
4/9/12-12/31/12	Appellant requested pretrial continuance.	266	Excludable; continuance requested	10/17/13
12/31/12-1/14/13	Appellant requested pretrial continuance.	14	Excludable; continuance requested	10/31/13
1/14/13-1/30/13	Appellant requested pretrial continuance.	16	Excludable; continuance requested	11/16/13

Appellant filed her Rule 600 motion on April 9, 2013, before the date we have calculated as the adjusted trial run date. Therefore, Appellant did not have a viable speedy trial claim when she filed the motion to dismiss, and the motion was premature. ***See Hunt, supra.*** Based upon the foregoing, the court properly denied Appellant's Rule 600 motion, and Appellant is not entitled to relief on her second and third claim. Accordingly, we affirm the judgment of sentence, albeit on different grounds. ***See Commonwealth v. Johnson***, 941 A.2d 1286 (Pa.Super. 2008) (reiterating

appellate court can uphold trial court's decision if there is any proper basis for result reached; appellate court is not constrained to affirm on grounds relied upon by trial court). Accordingly, we affirm the judgment of sentence.

Judgment 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: 7/28/2014