

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
SETH ADAM ELOSSER,	:	
	:	
Appellant	:	No. 64 WDA 2013

Appeal from the Judgment of Sentence entered on December 27, 2012
in the Court of Common Pleas of Armstrong County,
Criminal Division, No. CP-03-CR-0000706-2011

BEFORE: PANELLA, OLSON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.:

FILED JANUARY 23, 2014

Seth Adam Elosser ("Elosser") appeals from the judgment of sentence imposed following his convictions of driving under the influence of alcohol and driving under the influence of alcohol (highest rate of alcohol). **See** 75 Pa.C.S.A. § 3802(a)(1), (c). We affirm.

The trial court set forth the relevant facts as follows:

On or about December 12, 2010, [Elosser] was arrested by Trooper Roger Kaufman of the Pennsylvania State Police, Kittanning Barracks. [Trooper Kaufman initially stopped Elosser because he was speeding. Following the stop, Trooper Kaufman observed that Elosser was intoxicated. Thereafter, Trooper Kaufman took Elosser for a blood draw. Elosser had a blood alcohol content of .185%.] The first criminal complaint was filed against [Elosser] on January 13, 2011. A preliminary hearing on the complaint was [initially] scheduled for March 15, 2011, but was rescheduled first to May 31, 2011, and then again to July 26, 2011. [Elosser] did not appear for either the March 15 or May 31 hearings. The hearings were continued at the request of the Commonwealth because Trooper Kaufman had fallen deathly ill with H1N1 flu, for which he was hospitalized and treated for

several months. He was released from the hospital on or about March 24, 2011[,] and continued outpatient [treatment] and physical therapy until on or about August 5, 2011. Trooper Kaufman returned to work on limited duty on August 31, 2011, and to full duty on November 14, 2011. Trooper Kaufman testified that no other Trooper could handle the prosecution of the case against [Elosser] because he was the only trooper present at the traffic stop giving rise to the charges.

On July 26, 2011, [Elosser] appeared with counsel before Magisterial District Judge Samuel Goldstrohm for preliminary hearing. Trooper Kaufmann again was unavailable because of illness, but [Elosser] would not consent to any further continuances. Accordingly, Magisterial District Judge Goldstrohm dismissed the complaint and all charges against [Elosser]. After his return to limited duty, Trooper Kaufman spoke with the Armstrong County District Attorney's office and received oral permission to re-file the charges against [Elosser]. Trooper Kaufman thereafter filed a second criminal complaint against [Elosser] on or about September 7, 2011, which contained charges identical to those in the first complaint. Preliminary hearing on the second criminal complaint was then scheduled for November 1, 2011. [Elosser] waived his right to preliminary hearing and arraignment, with the advice of counsel. [Elosser] was not incarcerated after the filing of either the first or second criminal complaints.

By Information filed on or about November 23, 2011, [Elosser] was charged with Driving Under the Influence of Alcohol or Controlled Substance, 75 Pa.C.S.A. § 3802(a)(1)(Count 1); Driving Under the Influence of Alcohol or Controlled Substance BAC 0.16% or Higher, 75 Pa.C.S.A. § 3802(c) (Count 2); Following Too Closely, 75 Pa.C.S.A. § 3310(a) (Count 3); Maximum Speed Limits, 75 Pa.C.S.A. § 3362(a) (3) (Count 4); Careless Driving, 75 Pa.C.S.A. § 3714(Count 5); and Restraint Systems-Driver, 75 Pa.C.S.A. § 4581(a)(2)(Count 6). [Elosser] filed an Omnibus Pretrial Motion on or about February 15, 2012, in which he requested that the charges against him be dismissed because of the Commonwealth's alleged violations of Rule 600 and Rule 544 of the Pennsylvania Rules of Criminal Procedure. The Court denied [Elosser's] Omnibus Pretrial Motion and Motion to Reconsider by Orders dated March 29, 2012[,] and April 30, 2012, respectively.

The case proceeded to jury trial, and [Elosser] was convicted on Counts 1 and 2 of the Information by verdict entered November 6, 2012. On December 27, 2012, the [trial c]ourt sentenced [Elosser] to 30 days' incarceration, together with 59 months in the County Intermediate Punishment Program ("IPP"). [Elosser] filed a Notice of Appeal and a Rule 1925(b) Statement on or about January 3, 2013.

Trial Court Opinion, 3/8/13, at 1-4.

On appeal, Elosser raises the following questions for our review:

1. Whether the [trial c]ourt erred in denying [Elosser's] omnibus pretrial Motion alleging violations of his speedy trial rights under Pennsylvania Rule of Criminal Procedure 600[?]
2. Whether the [trial c]ourt erred in denying [Elosser's] omnibus pretrial Motion alleging violations of his rights under Pennsylvania Rule of Criminal Procedure 544[?]

Brief for Appellant at 5.

In his first claim, Elosser contends that the trial court abused its discretion in denying his Motion to dismiss for the Commonwealth's violation of Criminal Rule 600. *Id.* at 9-14. Elosser argues that the trial court erred in permitting the Commonwealth to use the filing of the second complaint as the run date for Rule 600 purposes. *Id.* at 11, 13-14. Elosser further argues that the Commonwealth did not exercise due diligence in bringing him to trial within one year of the filing of the initial complaint. *Id.* at 13. Elosser asserts that Trooper Kaufman's serious illness did not justify the delay in the trial as the Commonwealth could have brought the case to trial earlier. *Id.* at 13-14. Elosser claims that finding that the illness was out of the Commonwealth's control would circumvent his constitutional right to a

speedy trial. *Id.* at 13. Elosser relies primarily upon our Supreme Court's ruling in ***Commonwealth v. Meadius***, 870 A.2d 802 (Pa. 2005), to support his contention. Brief for Appellant at 11-13.

Our standard and scope of review in analyzing a Rule 600 issue are both well-settled:

In evaluating Rule 600 issues, our 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. 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. ...

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. Ramos, 936 A.2d 1097, 1100 (Pa. Super. 2007) (*en banc*) (citation omitted).

Relevant to this case, Rule 600(A)(3) requires that trial commence for a defendant at liberty on bail within 365 days of the filing of the written complaint. Pa.R.Crim.P. 600(A)(3). "Rule 600(C) expressly provides that certain time periods are to be excluded from the calculation of the Rule 600 run date." **Ramos**, 936 A.2d at 1101.

The mechanical run date is the date by which the trial must commence under Rule 600. 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. ... [T]he 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. If the defendant's trial commences prior to the adjusted run date, we need go no further.

If, however, the defendant's trial takes place outside of the adjusted run date, we must determine, pursuant to Rule 600(G), whether the delay occurred despite the Commonwealth's due diligence. To this end, we have fashioned the "excusable delay" doctrine. "Excusable delay" is a legal construct that takes into account delays which occur as a result of circumstances beyond the Commonwealth's control and despite its due diligence. [T]he Commonwealth must do everything reasonable within its power to guarantee that a trial begins on time. Moreover, the Commonwealth bears the burden of proving that its efforts were reasonable and diligent.

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. A period of delay that is excusable pursuant to Rule 600(G) results in an extension to the adjusted run date.

Ramos, 936 A.2d at 1102-03 (citations and some quotation marks and brackets omitted).

[W]hen a trial court is faced with multiple identical criminal complaints, it must first determine whether the Commonwealth intended to evade Rule 600's timeliness requirements by withdrawing or having nolle prossed the charges. If the prosecution attempted to circumvent Rule 600, then the mechanical run date starts from the filing of the initial complaint, and the time between the dismissal of one complaint and the re-filing of the second complaint is counted against the Commonwealth. However, where the prosecution has not attempted to end run around the rule, and a competent authority properly dismissed the case, the court must next decide if the Commonwealth was duly diligent in its prosecution of the matter. Where the prosecution was diligent, the inquiry ends and the appropriate run date for purposes of Rule 600 begins when the Commonwealth files the subsequent complaint.

Commonwealth v. Peterson, 19 A.3d 1131, 1141 (Pa. Super. 2011) (*en banc*), **aff'd**, 44 A.3d 655 (Pa. 2012).

Here, the record demonstrates, and Elosser concedes, that all of the continuances requested by the Commonwealth were solely due to the fact that Trooper Kaufman had contracted the H1N1 flu. The Commonwealth required Trooper Kaufman's testimony because he was the only person with personal knowledge of the incident giving rise to the charges against Elosser. Because Trooper Kaufman's serious illness was beyond the Commonwealth's control, it exercised due diligence in prosecuting the first

complaint. **See Peterson**, 19 A.3d at 1141.¹ Thus, we conclude that the appropriate run date for Rule 600 purposes is the filing of the second complaint on September 7, 2011. Based upon our review of the record, and Elosser's failure to argue that the Commonwealth did not prosecute the second complaint in a timely manner under Rule 600,² we conclude that the trial court did not abuse its discretion in denying Elosser's Rule 600 Motion.

In his second claim, Elosser contends that the trial court erred in denying his Motion to dismiss the case for a violation of Pennsylvania Rule of Criminal Procedure 544, which addresses the reinstating of charges following a withdrawal or dismissal. Brief for Appellant at 14. Elosser argues that Trooper Kaufman was not given proper authority by a

¹ Elosser's reliance on **Meadius, supra** is misplaced. In **Meadius**, our Supreme Court held that the Commonwealth had not exercised due diligence in prosecuting the matter because the Commonwealth caused delays when the prosecuting attorney and the Commonwealth's witnesses were absent attending to personal matters or for unexplained reasons. **Meadius**, 870 A.2d at 807-08. The prosecuting attorney had to continue a preliminary hearing due to a continuing legal education course. **Id.** at 803, 807-08. Further, the Commonwealth failed to take any reasonable steps in procuring the presence of the witnesses for the preliminary hearing. **Id.** at 803, 807. As noted above, unlike **Meadius**, the Commonwealth acted with due diligence and the only reason for the delay was Trooper Kaufman's serious illness. Thus, we conclude that the reasoning in **Meadius** is inapplicable to this case.

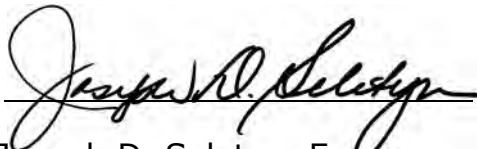
² We note that Elosser filed two Motions to continue the proceedings after the filing of the second complaint. Elosser also filed a Motion to file an interlocutory appeal based upon the denial of his pre-trial Motions on July 9, 2012, the day trial was scheduled. The trial court granted the Motion and stated that the proceedings in the trial court were stayed pending the appeal. However, it is unclear from the record whether Elosser actually filed an appeal. Nevertheless, based upon these delays, which were attributable to Elosser, the case was brought to trial in a timely manner.

Commonwealth attorney to refile the original criminal charges. **Id.** at 14-16. Elosser specifically argues that Trooper Kaufman was provided a verbal authorization, but that the Commonwealth did not approve the refiling in writing, as required by Rule 544. **Id.** at 15. Elosser further asserts that the Commonwealth did not send a representative to the preliminary hearing to provide approval of Trooper Kaufman's refiling of the charges. **Id.** at 16.

The trial court has thoroughly and correctly addressed Elosser's claim and determined that it is without merit. **See** Trial Court Opinion, 3/8/13, at 7-9. We adopt the sound reasoning of the trial court for the purpose of this appeal. **See id.**

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/23/2014

IN THE COURT OF COMMON PLEAS OF ARMSTRONG COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : No. CP-03-CR-0000706-2011
 :
 SETH ADAM ELOSSER :

1925 (a) OPINION

PANCHIK, J.

Defendant Seth Adam Elosser ("Defendant") appeals his conviction of Driving Under the Influence of Alcohol or Controlled Substance (75 Pa.C.S.A. § 3802(a)(1) (General Impairment) and Driving Under the Influence of Alcohol or Controlled Substance (75 Pa.C.S.A. § 3802(c) (Highest Rate of Alcohol) after a jury trial held on November 6, 2012. For the reasons that follow, we recommend affirmance.

I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The following facts are taken from the documents of record, including the exhibits and testimony presented at the hearing on Defendant's Omnibus Pretrial Motion on March 27, 2012.

On or about December 12, 2010, Defendant was arrested by Trooper Roger Kaufman of the Pennsylvania State Police, Kittanning Barracks. The first criminal complaint was filed against Defendant on January 13, 2011. A preliminary hearing on

the complaint was first scheduled for March 15, 2011, but was rescheduled first to May 31, 2011, and then again to July 26, 2011. Defendant did not appear for either the March 15 or May 31 hearings. The hearings were continued at the request of the Commonwealth because Trooper Kaufman had fallen deathly ill with H1N1 flu, for which he was hospitalized and treated for several months. He was released from the hospital on or about March 24, 2011 and continued outpatient and physical therapy until on or about August 5, 2011. Trooper Kaufman returned to work on limited duty on August 31, 2011, and to full duty on November 14, 2011. Trooper Kaufman testified that no other Trooper could handle the prosecution of the case against Defendant because he was the only trooper present at the traffic stop giving rise to the charges.

On July 26, 2011, Defendant appeared with counsel before Magisterial District Judge Samuel Goldstrohm for preliminary hearing. Trooper Kaufmann again was unavailable because of illness, but Defendant would not consent to any further continuances. Accordingly, Magisterial District Judge Goldstrohm dismissed the complaint and all charges against Defendant. After his return to limited duty, Trooper Kaufman spoke with the Armstrong County District Attorney's office and received oral permission to re-file the charges against Defendant. Trooper Kaufman thereafter filed a second criminal

complaint against Defendant on or about September 7, 2011, which contained charges identical to those in the first complaint. Preliminary hearing on the second criminal complaint was then scheduled for November 1, 2011. Defendant waived his right to preliminary hearing and arraignment, with the advice of counsel. Defendant was not incarcerated after the filing of either the first or second criminal complaints.

By Information filed on or about November 23, 2011, Defendant was charged with Driving Under the Influence of Alcohol or Controlled Substance, 75 Pa.C.S.A. § 3802(a)(1) (Count 1); Driving Under the Influence of Alcohol or Controlled Substance BAC 0.16% or Higher, 75 Pa.C.S.A. § 3802(c) (Count 2); Following Too Closely, 75 Pa.C.S.A. § 3310(a) (Count 3); Maximum Speed Limits, 75 Pa.C.S.A. § 3362(a)(3) (Count 4); Careless Driving, 75 Pa.C.S.A. § 3714 (Count 5); and Restraint Systems-Driver, 75 Pa.C.S.A. § 4581(a)(2) (Count 6). Defendant filed an Omnibus Pretrial Motion on or about February 15, 2012, in which he requested that the charges against him be dismissed because of the Commonwealth's alleged violations of Rule 600 and Rule 544 of the Pennsylvania Rules of Criminal Procedure. The Court denied Defendant's Omnibus Pretrial Motion and Motion to Reconsider by Orders dated March 29, 2012 and April 30, 2012, respectively.

The case proceeded to jury trial, and Defendant was convicted on Counts 1 and 2 of the Information by verdict entered November 6, 2012. On December 27, 2012, the Court sentenced Defendant to 30 days' incarceration, together with 59 months in the County Intermediate Punishment Program ("IPP"). Defendant filed a Notice of Appeal and a Rule 1925(b) Statement on or about January 3, 2013.

II. DEFENDANT'S APPEAL

Defendant presents the following two issues in his appeal, which mirror those raised in his Omnibus Pretrial Motion: (1) whether the Court should have dismissed the case due to the Commonwealth's alleged violation of Defendant's rights under Pa.R.Crim.P. 600?; and (2) whether the Court should have dismissed the case due to the Commonwealth's alleged violation of Pa.R.Crim.P. 544?

A. Analysis

1. The Commonwealth's Alleged Violation of Rule 600

Defendant argued in his Omnibus Pretrial Motion, and now argues again on appeal, that the Commonwealth violated Defendant's rights to a speedy trial as set forth in Pennsylvania Rule of Criminal Procedure 600. Rule 600 provides, in pertinent part, as follows:

(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.

. . .

(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. . . .

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, 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. Defendant argued that, as of February 15, 2012 (the date of the filing of his Omnibus Pretrial Motion), the Commonwealth had failed to bring him to trial within one year after the filing of the initial criminal complaint on January 13, 2011.

In *Commonwealth v. Meadius*, 870 A.2d 802 (Pa. 2005), a case relied upon by both Defendant and this Court, the Pennsylvania Supreme Court held that the Commonwealth had not exercised due diligence in prosecuting its case against the defendant. *Id.* at 807-808. The Court found specifically that the defendant's Rule 600 right to a speedy trial had been violated and that the delays in prosecution were due to the Commonwealth's failure to procure, or to take reasonable steps

to procure, the presence of its essential witnesses at preliminary hearing. *Id.* The "personal matters" of the witnesses and prosecuting attorney that conflicted with the dates on which the preliminary hearings were scheduled included a Continuing Legal Education course and the birth of one of the witness's children. *Id.* at 803, 807-808. The Pennsylvania Supreme Court agreed with the Court of Common Pleas and affirmed the dismissal of the charges against defendant based on the violation of Rule 600. *Id.* at 808.

We found, and continue to find, that the instant case is distinguishable from *Meadius*, specifically because there was no evidence presented at the hearing on March 27, 2012 indicating that the Commonwealth had not exercised due diligence in prosecuting the charges against Defendant. See Order of Court dated March 28, 2012. It is clear from the record before us that all of the continuances requested by the Commonwealth were due to Trooper Kaufman's near-death illness that required months of intensive treatment to cure. The Commonwealth also had no option to procure another trooper to testify at the preliminary hearing or at trial because no other troopers had personal knowledge of the incidents giving rise to the charges against Defendant. We therefore found that, although Defendant had not been brought to trial within one year of the date of the filing of the initial criminal complaint, the delays were not

due to any evasive intent or lack of due diligence on the part of the Commonwealth. Instead, we found that all of the circumstances giving rise to the delays were outside the Commonwealth's control. Therefore, Defendant was not entitled to dismissal of the charges against him pursuant to Rule 600(G).¹

2. The Commonwealth's Alleged Violation of Rule 544

Defendant alleges that the charges against him should be dismissed on the additional ground that the second criminal complaint, which contained the exact same charges as those included in the first complaint, was not authorized by the Commonwealth as required by Rule 544 of the Pennsylvania Rules of Criminal Procedure. Rule 544 provides, in pertinent part, as follows:

(A) When charges are dismissed or withdrawn at, or prior to, a preliminary hearing, or when a grand jury declines to indict and the complaint is dismissed, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the re-filing of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

Pa.R.Crim.P. 544. The comments to Rule 544 further instruct as follows:

The decision to reinstated charges must be made by the attorney for the Commonwealth. Therefore, in cases in

¹ We also note that the initial charges against Defendant were dismissed by Magisterial District Judge Goldstrohm on or about July 26, 2011. Because we found that the Commonwealth did not exhibit evasive intent or lack of due diligence, the Commonwealth also presumably would be entitled to the benefit of calculating the one-year period provided by Rule 600 from the date of the filing of the second criminal complaint on or about September 7, 2011. See *Meadius*, 870 A.2d at 805, 808.

which no attorney for the Commonwealth was present at the preliminary hearing, the police officer may not re-file the complaint without the written authorization of the attorney for the Commonwealth.

Comments, Pa.R.Crim.P. 544.

In *Commonwealth v. Bowman*, 840 A.2d 311 (Pa.Super. 2004), charges were reinstated against the defendant after having been dismissed several times for failure of the police to appear at preliminary hearings. *Id.* at 316. The defendant moved to dismiss the charges after the last re-filing because the Commonwealth had not given express written permission to the police to re-file the charges pursuant as required by Rule 544. *Id.* The trial court dismissed the charges, and the Superior Court reversed, finding that the Commonwealth's presence at the defendant's preliminary hearing gave implicit approval for the reinstatement of the charges. *Id.* at 316-317. The Superior Court also noted that, even where Rule 544 technically is violated, the trial court should not dismiss the charges absent "a showing of demonstrable prejudice." *Id.* at 317-18. The Superior Court found that the defendant had not made such a showing, and the trial court's dismissal of the charges was improper on that ground as well. *Id.* at 318.

It is undisputed by the parties that Trooper Kaufman did not have written authorization from the District Attorney's office to re-file the charges against Defendant on September 7,

2011. It also is undisputed that Defendant ultimately waived his right to a preliminary hearing on those charges.

Nonetheless, we found that Trooper Kaufman received actual oral permission from the district attorney's office to re-file the charges against Defendant. Although the circumstances in this case are different from those in *Bowman* in that the Commonwealth was not present at a preliminary hearing, we still found facts indicating that the Commonwealth gave express permission to Trooper Kaufman to file the charges. Thus, the spirit of *Bowman*, if not the exact letter, supports our conclusion that dismissal of the charges here would have been improper.


Moreover, and more importantly, even if there was a technical violation of Rule 544 by the Commonwealth, Defendant failed to show either at hearing or in his briefing any demonstrable prejudice to his defense caused by the violation. Pennsylvania courts are hesitant to dismiss charges for technical violations of the Rules of Criminal Procedure absent a showing of egregious conduct on the part of the Commonwealth and prejudice suffered by the defendant. *Bowman*, 840 A.2d at 317. Neither exists in this case, and therefore dismissal of the reinstated charges against Defendant would have been improper and contrary to law.

III. CONCLUSION

For the reasons stated above, we recommend affirmance on all issues raised in Defendant's Concise Statement.

BY THE COURT,

Date: March 8th, 2013

, P.J.
James J. Panchik