**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

| | |
|---|---|
| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>RONALD ABRAHAM CARTER<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 3580 EDA 2015 |

Appeal from the Judgment of Sentence October 13, 2015
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0001010-2014

BEFORE: OTT, J., RANSOM, J., and STEVENS, P.J.E.*

MEMORANDUM BY OTT, J.: **FILED January 12, 2017**

Ronald Abraham Carter appeals from the judgment of sentence entered on October 13, 2015, in the Court of Common Pleas of Monroe County following his conviction by jury of possession with intent to deliver heroin (PWID), possession of heroin, and possession of drug paraphernalia.[1] Carter received an aggregate sentence of 150 to 312 months' (12½ to 26 years) incarceration. In this timely appeal, Carter claims the trial court erred in failing to dismiss the charges against him where the Commonwealth violated the requirements of Pa.R.Crim.P. 600 regarding speedy trials, and also abused its discretion in sentencing Carter based upon its reliance on an

---

* Former Justice specially assigned to the Superior Court.

[1] 35 P.S. §§ 780-113(A)(30), (A)(16) and (A)(32) respectively. Carter was acquitted of conspiracy to commit those crimes.

improper offense gravity score and failure to state adequate reasons for issuing a sentence outside the guidleines. After a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

We quote the trial court's Pa.R.A.P. 1925(a) opinion for the underlying facts supporting the crimes charged:

> The charges stem from a traffic stop. Specifically, on January 29, 2014, the Pennsylvania State Police (PSP) stopped the rental car in which [Carter] was riding as a passenger. Neither [Carter] nor his co-defendant, Taquece Chitty (Chitty), the driver, was the lessee. A search of the vehicle yielded 31 pounds of heroin that was packaged for sale[2] and concealed in Christmas wrapping paper and sheets from pornographic publications. As a result, [Carter] and Chitty were charged with Possession of Heroin, Possession with Intent to Deliver (PWID) Heroin, Possession of Drug Paraphernalia, and Conspiracy to commit these crimes.

Trial Court Opinion, 3/28/2016, at 1-2.[3]

Carter's first issue is a claim the trial court erred in failing to dismiss the charges against him due to a violation of his right to a speedy trial. The gist of Carter's complaint is that he was charged in the underlying matter on

---

[2] The certified record reflects the heroin was packaged in more than 65,000 individual packets, in aggregate weighing more than 14,370 grams (14.37 kilograms).

[3] Chitty was reportedly acquitted of all charges. ***See*** N.T. Sentencing, 10/13/2015, at 11.

January 30, 2014 but was not tried until July 7, 2015,[4] more than 500 days after being charged.

Initially,

> 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. 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.

---

[4] Pursuant to Rule 600, trial commences "when the trial judge determines that the parties are present and directs them to proceed to *voir dire*…" Pa.R.Crim.P. 600, Comment.

> 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. Patterson***, 19 A.3d 1131, 1134-35 (Pa. Super. 2011) (citation omitted).

Rule 600 was amended in 2012. All relevant actions took place after the date of amendment, therefore this matter will be decided under the amended rule, which states in relevant part:

> (A) Commencement of Trial; Time for Trial
>
> (1) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.
>
> (2) Trial shall commence within the following time periods.
>
> (a) Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.[5]
>
> (C) Computation of Time
>
> (1) For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must

---

[5] Carter was not subject to pretrial detention. Accordingly, the Commonwealth had 365 days, per rule 600(A)(2)(a), to bring Carter to trial.

> commence. Any other periods of delay shall be excluded from the computation.

Pa.R.Crim.P. 600.

The trial judge, the Honorable Jonathan Mark, has provided a thorough recitation of the procedural history of this matter coupled with an able analysis regarding the delays contained therein. ***See*** Trial Court Opinion, 3/28/2016, at 10-27. We adopt that recitation and analysis in determining Carter is not entitled to relief on this issue. Here, we simply quote the summary provided by the trial court on page 26 of the opinion:

- February 6 to April 3, 2014 (56 days) – [Carter's] requests for continuances of the preliminary hearing
- April 3 to May 15, 2014 (42 days) – Preliminary hearing continuance necessitated by unavailability of PSP affiant
- August 20 to September 3, 2014 (14 days) – Pendency of bench warrant for [Carter's] failure to appear
- September 3 to October 2, 2014 (29 days) – relisting delay occasioned by [Carter's] failure to appear for September trial conferences
- September 15, 2014 to March 3, 2015 (89 days) (Total of 169 days less (1) the 17 day overlap with the relisting delay (see above); and (2) the 63 day trial continuance from December 2014 to February 2015) – Period of time from consolidation until Chitty's case was relisted after omnibus denied
- March 3, 2015 to May 5, 2015 (35 days) – Continuance necessitated by motion to withdraw filed by Chitty's attorney

Total Excludable Days: 265

Trial Court Opinion, 3/28/2016 at 26 (footnote omitted). The trial court notes there were 523 days from January 30, 2014 to the commencement of trial on July 7, 2015. ***Id***.

Subtracting the 265 days of excludable time from the 523 days of actual time it took to begin the trial, we are left with 258 days. This amount of time is well within the 365 days allowed under Rule 600. Accordingly, Carter's right to a speedy trial was not violated and the trial court did not err in refusing to dismiss the charges against him.

Carter's second claim is that the trial court abused its discretion in sentencing him based upon an offense gravity score (OGS) of 13 (relating to the weight of the heroin) where the weight of the drugs was not determined by the jury.

> A claim that the sentencing court used an incorrect OGS is a challenge to the discretionary aspects of one's sentence. ***Commonwealth v. Lamonda***, 52 A.3d 365, 370-371 (Pa. Super. 2012).
>
> It is well settled that a challenge to the discretionary aspects of a sentence is a petition for permission to appeal, as the right to pursue such a claim is not absolute. ***Commonwealth v. Treadway***, 104 A.3d 597, 599 (Pa. Super. 2014). Before this Court may review the merits of a challenge to the discretionary aspects of a sentence, we must engage in the following four-pronged analysis:
>
> > [W]e conduct a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal, *see* Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, *see* Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the

> sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S. § 9781(b).
>
> ***Commonwealth v. Moury***, 992 A.2d 162, 170 (Pa. Super. 2010) (citing ***Commonwealth v. Evans***, 901 A.2d 528, 533 (Pa. Super. 2006)).

***Commonwealth v. Williams***, ___ A.3d ___, 2016 PA Super 262, at *4 (11/23/2016).

All four of the initial factors have been met,[6] and accordingly, we will address Carter's claim. PWID is an ungraded felony. Sentencing is based, in part, on the amount of heroin possessed. ***See*** 240 Pa. Code § 303.15. Understandably, the more heroin possessed, the higher the possible sentence. This fact is reflected in the sentencing guidelines, specifically in the OGS. The OGS for PWID (heroin) ranges from 6 (possession of less than one gram) to 13 (possession of greater than 1000 grams). ***Id***. at 44. The difference in the standard range guideline sentence, between an OGS 6 and OGS 13 crime, can be substantial. Carter had a prior record score (PRS) of 5. The standard range minimum sentence, applying an OGS of 6, is between 21-27 months' incarceration. However, applying an OGS of 13, the standard range minimum sentence becomes 96-114 months' incarceration. It is important to note that this sentencing scheme is the recommendation of

---

[6] The appeal, as noted above, is timely; Carter raised the issue regarding the OGS at sentencing, thereby preserving the issue; Carter has included a Pa.R.A.P 2119(f) statement in his brief; and the issue, application of an incorrect OGS, raises a substantial question, ***see Commonwealth v. Lamonda***, 52 A.3d 365, 371 (Pa. Super. 2008) (claim that sentencing court used incorrect offense gravity score raises a substantial question).

the sentencing guidelines and does not reflect a mandatory minimum sentence.

Here, the laboratory report from the Pennsylvania State Police Bureau of Forensic Services, stated that over 14,300 grams of heroin was confiscated from Carter. Clearly, that amount was sufficient to support the OGS 13 that was utilized by the trial court in fashioning Carter's sentence. However, Carter now asserts that before the amount of drugs can be used to raise the OGS, that amount must be proven to the jury. Carter bases this argument on the United States Supreme Court cases ***Alleyne v. United States***, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); ***Commonwealth v. Hopkins***, 117 A.3d 247 (Pa. Super. 2015); ***Commonwealth v. Mosley***, 114 A.3d 1072 (Pa. Super. 2015); ***Commonwealth v. Ferguson***, 107 A.3d 206 (Pa. Super. 2015); and ***Commonwealth v. Wolfe***, 106 A.3d 800 (Pa. Super. 2014). ***See*** Appellant's Brief at 21. The common denominator in all of these cases is the requirement that the government prove beyond a reasonable doubt whatever factor is relied upon to extend the maximum sentence a defendant is subjected to (***Apprendi***)[7] or that forms the basis of a mandatory

---

[7] "***Apprendi*** said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime-and thus the domain of the jury-by those
*(Footnote Continued Next Page)*

minimum sentence (***Alleyne*** and the cited Pennsylvania cases).[8] The OGS does neither. The OGS is a factor in the Pennsylvania Sentencing Guidelines. The other factor is the defendant's PRS. Together, these two make up the "Y" and "X" axes respectively of the sentencing guideline matrix. Where the two factors intersect on that matrix provides the recommended "standard range" minimum sentence for the defendant.

For the purposes of this appeal, what is particularly notable about this process is the fact that,

> [T]he guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors – they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence.

***Commonwealth v. Holiday***, 954 A.2d 6, 13 (Pa. Super. 2008) (*quoting* ***Commonwealth v. Walls***, 926 A.2d 957, 964 (Pa. 2007)). Because the sentencing guidelines require neither mandatory action by the trial court nor extend the maximum sentence beyond statutory limits, the cases cited by

*(Footnote Continued)* ———————————

who framed the Bill of Rights." ***Commonwealth v. Newman***, 99 A.3d 86, 96 (Pa. Super. 2014). The statutory maximum sentence for PWID as applicable to Carter was 30 years' incarceration. ***See*** 35 P.S. §§ 780-113(f)(1) and 780-115(a).

[8] "In ***Alleyne***, the Supreme Court held that 'facts that increase mandatory minimum sentences must be submitted to the jury' and must be found beyond a reasonable doubt. ***Alleyne***, ***supra*** at 2163." ***Commonwealth v. Wolfe***, 106 A.3d at 802.

Carter are inapplicable herein. Further, Carter has provided no compelling argument demonstrating why due process considerations should apply the ***Apprendi*/*Alleyne*** reasoning to the sentencing guidelines. Accordingly, Carter is not entitled to relief on this aspect of his sentencing claim.

Carter also claims the trial court abused its discretion by issuing a sentence above the aggravated range without citing legitimate aggravating factors. This claim raises a substantial question, allowing for our review. ***See Commonwealth v. Naranjo***, 53 A.3d 66, 72 (Pa. Super. 2012) (failure to state sufficient reasons for imposing sentence outside sentencing guidelines raises substantial question that sentence was not appropriate under sentencing code).

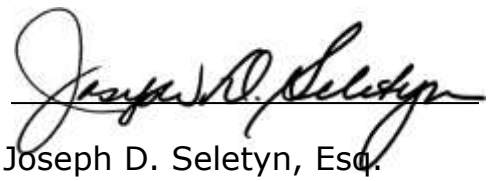
Initially, we note that Carter is correct in asserting his 144 month minimum sentence for PWID is outside of the guidelines. Even using the OGS 13, an aggravated range sentence for the crime is 126 months. Carter's sentence is 18 months longer than an aggravated range sentence. However, the certified record belies Carter's allegation that the trial court provided insufficient reasons for imposing that sentence. The trial court's reasoning is found on pages 16-21 of the notes of testimony for the sentencing hearing, which we incorporate by reference in this decision. ***See*** N.T. Sentencing Hearing, 10/13/2015, at 16-21. The trial court specifically stated the factors he considered in formulating the sentence, the pre-sentence investigation report, Carter's letter to the court in which he again

blamed his co-defendant and the "staggering" amount of drugs (valued at approximately $1,000,000.00) that had been confiscated.

Our review of the certified record confirms the trial court stated ample reasons for imposing the lengthy sentence. Therefore, Carter is not entitled to relief on this aspect of his sentencing claim.

Judgment of sentence affirmed. Parties are directed to attach pages 10-27 of the trial court's Pa.R.A.P. 1925(a) opinion and pages 16-21 of the notes of testimony from the sentencing hearing, both of which are referenced above, in the event of further proceedings.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/12/2017

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | NO. 1010 CR 2014 |
| v. | : | Appeal No. 3580 EDA 2015 |
| RONALD A. CARTER, Defendant | : | |

## OPINION IN SUPPORT OF ORDER PURSUANT TO Pa. R.A.P. 1925(a)

Defendant has filed an appeal from the judgment of sentence entered on October 13, 2015, following his jury trial conviction for possessory drug crimes involving a large quantity of heroin. After the appeal was filed, we directed Defendant to file a concise statement of errors complained of on appeal pursuant to Pa. R.A.P. 1925(b). Defendant complied, claiming that we: 1) erred by denying his Rule 600 motions; and (2) used an improper offense gravity score in sentencing him.

We now file this opinion in accordance with Pa. R.A.P. 1925(a). For the reasons that follow, Defendant's appeal issues lack merit and the judgment of sentence should be affirmed.

## BACKGROUND

The charges stem from a traffic stop. Specifically, on January 29, 2014, the Pennsylvania State Police (PSP) stopped the rental car in which Defendant was riding as a passenger. Neither Defendant nor his co-defendant, Taquece Chitty (Chitty), the driver, was the lessee. A search of the vehicle yielded 31 pounds of heroin that was packaged for sale and concealed in Christmas wrapping paper and sheets from

pornographic publications. As a result, Defendant and Chitty were charged with Possession of Heroin, Possession with Intent to Deliver (PWID) Heroin, Possession of Drug Paraphernalia, and Conspiracy to commit these crimes.

The next day, PSP filed the Criminal Complaint and Defendant and Chitty were preliminarily arraigned. Defendant posted bail on February 4, 2014. He remained at liberty on bail until the jury found him guilty.

The preliminary hearing was scheduled for February 6, 2014. However, the hearing was continued twice at Defendant's request and rescheduled to April 3, 2014. The hearing was then continued at the request of the Commonwealth due to the unavailability of the arresting trooper.

A consolidated preliminary hearing was ultimately held on May 15, 2014. At the conclusion of the hearing, all charges in this case and in Chitty's case were bound over to this Court.

Initially, the cases were separately listed on the August 2014 trial term. However, on June 27, 2014, Chitty filed an omnibus pretrial motion. A hearing on the motion was scheduled for August 1, 2014. Accordingly, Chitty's case was removed from the August trial list. The order scheduling the hearing indicated that the case would be relisted, if necessary, after the motion was decided.

In this case, at the status call for the August trial term, the Commonwealth asked for a continuance due to unavailability of the assigned assistant district attorney. The request was granted and the case was continued to the September Trial Term. For the same reason, the omnibus hearing in Chitty's case was continued until September 22, 2014.

On August 19, 2014, the day before a scheduled status call in this case, the Commonwealth filed motions seeking to consolidate this case and Chitty's case for trial. Defendant did not appear for the scheduled status call. As a result, the joinder motion was not discussed and a bench warrant was issued for Defendant. After the bench warrant was issued, counsel for Defendant filed a non-concurrence in the joinder motion.

On September 2, 2014, the Honorable Jennifer Harlacher Sibum, the judge who had issued all previous orders in both cases and who had also scheduled the omnibus hearing in Chitty's case, issued an Order scheduling a hearing on the Commonwealth's motion for consolidation for September 15, 2014.

On September 3, 2014, the Honorable Margherita Patti-Worthington, President Judge, issued an order dissolving the bench warrant that had been issued for Defendant's failure to appear and placing this case on the December 2014 trial term.

On September 15, 2014, the hearing on the Commonwealth's motion for consolidation was held, as scheduled. During the hearing, Defendant's attorney did not oppose joinder. As a result, at the conclusion of the hearing, Judge Sibum issued an order which noted that the Commonwealth's motion was not opposed and granted consolidation.

On September 22, 2014, the Omnibus hearing in Chitty's case was convened before Judge Sibum. Due to the involvement of the Commonwealth's witnesses in a large scale manhunt in Monroe County for a suspect who had shot and killed one member of PSP and seriously wounded another, the Commonwealth was not able to

present its full case.[1] By agreement of the parties, the Commonwealth introduced several exhibits, Chitty called a witness, and the hearing was recessed until October 31, 2014.

The omnibus hearing was re-convened, as scheduled, on October 31, 2014. Three troopers testified and the Commonwealth introduced additional exhibits.

Subsequently, Judge Sibum recused herself and the omnibus motion was re-assigned to the Honorable Stephen M. Higgins for decision. Transcripts of the hearings were ordered and the parties filed briefs.

On November 12, 2014, the Commonwealth filed a motion to have this case continued from December 2014 to the February 2015 term, the next available trial term. The basis for the request was that this case and Chitty's case had been joined for trial and Chitty's omnibus motion was still pending. On November 15, 2014, President Judge Worthington issued an order granting the continuance. The order, supplied by the Commonwealth, provided that "[f]or purposes of Rule 600, delay resulting from this continuance shall run against the Commonwealth."

On January 30, 2015, Judge Higgins issued an opinion and order denying Chitty's omnibus motion. The order scheduled Chitty's case for trial during the March 2015 trial term. Subsequently, Chitty's attorney filed a motion seeking leave to withdraw and a motion to continue the case because of the request to withdraw. Judge

[1] More specifically, about ten days before the hearing, PSP Corporal Bryon K. Dickson, II and Trooper Alex Douglas were shot from ambush as they exited their barracks in Blooming Grove, Pike County. Corporal Dickson was killed and Trooper Douglas was seriously injured. The suspect was identified as Eric Frein, a resident of Monroe County. After the shooting, the largest manhunt in PSP history was launched. The manhunt occurred in Monroe County. It lasted almost fifty days. At times, the manhunt caused closures of schools, roads, businesses, and public lands. Virtually every PSP officer based in Monroe County and hundreds based in other areas of the Commonwealth were involved. So were members of local police departments, a variety of state and federal law enforcement agencies, and police officers from other counties and states. During this period, hearings in this Court were routinely continued or recessed when officers who were needed as witnesses were involved in the manhunt.

Higgins scheduled a hearing on the motion and continued the case until the April 2015 trial term. Because the cases had been consolidated for trial, when Chitty's case was continued to April, this case was continued as well. Chitty's attorney subsequently withdrew his motion and remained in the case.

On April 7, 2015, both cases were called for trial before the undersigned. The Commonwealth asked for a continuance to a date certain during the May 2015 trial term. The request was based on the Commonwealth's need to secure an interstate subpoena for a witness who lived and worked in New Jersey. For unknown reasons, the motion listed only the caption of Chitty's case; however, the discussion the Court held with the assistant district attorney, counsel for Defendant, and Chitty's lawyer encompassed both cases. After discussion, the cases were continued until the May 2015 trial term. Defendant did not consent to the continuance. The order granting the continuance, again supplied as a form by the Commonwealth, indicated that "[f]or purposes of Rule 600, delay resulting from this continuance shall run against the Commonwealth."

Subsequently, after a scheduling conference, the May 2015 trial listing was confirmed, jury selection was scheduled for May 5, 2015, and a date certain for commencement of the evidentiary portion of trial was set for May 26, 2015.

On April 20, 2015, Defendant filed a motion to dismiss pursuant to Pa R. Crim. P. 600. A hearing was scheduled for May 1, 2015. Prior to the hearing, the Commonwealth filed an answer with exhibits.

The hearing was held, as scheduled, on May 1, 2015. At the end of the hearing, we reserved ruling. We informed counsel that we would decide the motion prior to jury selection.

Both cases were called for trial and a jury was picked on May 5, 2015. Before *voir dire* began, we informed the attorneys that Defendant's motion to dismiss was denied. Immediately after jury selection, we gave a quick summary of our reasoning on the record.

Shortly after jury selection, the Commonwealth gave counsel for Defendant and Chitty's attorney supplemental discovery. Specifically, the Commonwealth produced statements made by Defendant and Chitty to PSP on the day of their arrest and voluminous data and information recently obtained from their cell phones that were seized from the car in which they were riding at the time of the traffic stop.

On May 12, 2015, Defendant filed a motion to suppress the statements as well as the data downloaded from the cell phones. A hearing on Defendant's motion was scheduled for May 18, 2015.

On May 15, 2015, Chitty filed a motion to exclude the new evidence. Subsequently, counsel for Chitty asked for a continuance due to the combination of the late disclosure of evidence and a pre-paid vacation, which had previously been disclosed to the Court, the Commonwealth, and counsel for Defendant at the time a date certain for the trial had been set, that precluded any meaningful opportunity for him to review the substantial amount of information that had been disclosed. In addition, since the Commonwealth conceded only that it could not use the evidence in

its case-in-chief, counsel for Chitty wanted time to research whether the Commonwealth could use the evidence on cross-examination or rebuttal.

Chitty's request for continuance was granted and both cases were continued until the July trial term. A hearing on Chitty's suppression motion was scheduled for May 26, 2015, in lieu of the trial.

On May 18, 2015, a hearing was held on Defendant's motion to suppress. The Commonwealth conceded that the challenged evidence should be suppressed and that it could not use the evidence in its case-in-chief. On May 21, 2015, we issued an order granting Defendant's motion and suppressing the evidence.

On May 22, 2015, the Commonwealth filed a motion asking that the trial be "moved up" to June. In its motion, the Commonwealth conceded, in writing, that the challenged evidence should be suppressed and that it should be precluded from presenting the evidence in its case in chief.

On May 26, 2015, the hearing on Chitty's motion to preclude evidence was convened, as scheduled. Chitty's motion, like Defendant's motion, was granted.

During the hearing, we discussed the Commonwealth's request that the trial be moved up to June. The parties and attorneys were in agreement. However, due to the trial schedule of the undersigned, which included a child sex abuse trial expected to last three to four days, and a 47 year-old cold case homicide trial expected to last seven to ten days, well as the trial schedules of the other judges of this Court, a trial in June could not be accommodated. Accordingly, the Commonwealth's motion was denied.

On June 19, 2015, Defendant filed a renewed motion to dismiss. He alleged that the passage of an additional two months from the date trial was scheduled in May resulted in a violation of Rule 600. A hearing on the motion was held on June 24, 2015. At the conclusion of the hearing, the matter was taken under advisement and the parties were granted leave to file briefs.

On July 7, 2015, the cases were called for trial and a jury was picked. Prior to *voir dire*, we denied Defendant's second or renewed motion to dismiss, summarizing our reasons on the record.

On July 17, 2015, following a two-day trial, the jury found Defendant guilty of PWID Heroin, Possession of Heroin, and Possession of Drug Paraphernalia. We then issued an order accepting the verdict, directing our Probation Department to conduct a Pre-Sentence Investigation (PSI), and scheduling a sentencing hearing for October 1, 2015.

The sentencing hearing was convened, as scheduled. Counsel for Defendant raised a legal argument challenging the Offense Gravity Score (OGS) of 13 that was listed in the PSI report and used to calculate guideline ranges. Specifically, counsel asserted that, because the OGS scores for PWID are based on the weight of the controlled substance, and since the OGS in turn impacts guideline sentencing ranges, under the holdings and rationale of the United States Supreme Court in *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151 (2013) and *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the jury rather than the Court must determine the weight. In order to allow the parties and the Court the opportunity to research the issue, the sentencing hearing was recessed.

On October 13, 2015, the sentencing hearing resumed. At the beginning of the hearing, after the attorneys argued their respective positions on the OGS issue raised by Defendant, we informed the parties of our conclusion that *Alleyne* and *Apprendi* did not apply to determination of the OGS score and that we would use OGS of 13 in sentencing Defendant because the weight of the heroin, as proven at trial, exceeded 1,000 grams. At the conclusion of the hearing, we sentenced Defendant to an aggregate period of incarceration of 150 months to 312 months in a state correctional institute.

Before imposing sentence, we gave Defendant and his attorney ample opportunity to address the Court. They did not contest any of the factual information contained in the PSI reports. Counsel for Defendant asked the Court to impose a standard range sentence. Defendant declined to speak on his own behalf; however, he had previously submitted a written statement that was included as an attachment to the PSI report and reviewed by the Court.

The Assistant District Attorney also addressed the court. She asked us to impose an aggravated range sentence.

After hearing from the attorneys, we informed Defendant of the documents and information on which the sentence was based. Specifically, we advised Defendant that the sentence was based on the record and file in this case, the PSI report, including Defendant's letter, the statements and arguments of his attorney and the assistant district attorney, and the applicable sentencing laws, rules, and guidelines. We then comprehensively stated our reasons on the record. (N.T., 10/13/2015, pp. 7-8 and 16-23).

On October 23, 2015, Defendant filed a post-sentence motion seeking reconsideration of his sentence. In his motion, Appellant reiterated the OGS argument made during sentencing.

On October 28, 2015, we denied the motion. Defendant then filed this appeal.

## DISCUSSION

### 1. Defendant's Rule 600 Claim Lacks Merit

Defendant first contends that this Court erred in denying his motions for dismissal under Rule 600. Specifically, Defendant maintains that we erred "in not granting dismissal of the charges against the Defendant pursuant to Pa.R.Cr.P. 600 where it was more than 365 days from the date of the Defendant's arrest to the date of Defendant's trial, and the Defendant requested no continuances and filed no pre-trial motions which would constitute excludable time to the Defendant under Pa.R.Cr.P. 600." (Defendant's Rule 1925(b) Statement ¶ 1). Within this averment, Defendant's assertion that he did not request any continuances is factually inaccurate and the contention that there is no excludable time attributable to him is legally wrong. As to our reasoning and the issue of whether Defendant is entitled to speedy trial relief, even though one of the reasons we orally gave for denial of Defendant's motion was incorrect, and despite the fact that the parties and the Court discussed Defendant's request for dismissal under the computational paradigm and framework of the prior version of Rule 600, our other bases for rejecting Defendant's speedy trial claim -- that a calculated or adjusted 365 days had not elapsed and that the Commonwealth had exercised due diligence -- were correct under the facts and current version of Rule 600. Defendant's assignment of error lacks merit.

a. The Applicable Law

Rule 600 provides, in relevant part, that:

> (A) Commencement of Trial; Time for Trial
>
> (1) For the purpose of this rule, trial shall be deemed to commence on the date the trial judge calls the case to trial, or the defendant tenders a plea of guilty or *nolo contendere*.
>
> (2) Trial shall commence within the following time periods.
>
> (a) Trial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed.
>
> * * *
>
> (C) Computation of Time
>
> (1) For purposes of paragraph (A), periods of delay at any stage of the proceedings caused by the Commonwealth when the Commonwealth has failed to exercise due diligence shall be included in the computation of the time within which trial must commence. Any other periods of delay shall be excluded from the computation.
>
> * * *
>
> (D) Remedies
>
> (1) When a defendant has not been brought to trial within the time periods set forth in paragraph (A), at any time before trial, the defendant's attorney, or the defendant if unrepresented, may file a written motion requesting that the charges be dismissed with prejudice on the ground that this rule has been violated. A copy of the motion shall be served on the attorney for the Commonwealth concurrently with filing. The judge shall conduct a hearing on the motion.

Pa. R.Crim.P. 600.

In 2012, prior Rule 600 was rescinded and the current version was adopted in order to "reorganize and clarify the provisions of the rule in view of the long line of cases that have construed the rule." Pa. R.Crim.P. 600, *Comment*. The current

version of Rule 600 took effect on July 1, 2013. Thus, the new Rule applies to this case.

To date, there are no reported, precedential appellate court cases interpreting the current version of Rule 600. Under the former rule, in computing time, courts conducted a three-step inquiry. First, the mechanical run date was calculated by adding 365 days to the date on which the criminal complaint was filed. *See Commonwealth v. Ramos*, 936 A.2d 1097 (Pa. Super. 2007) (*en banc*), *appeal denied*, 948 A.2d 803 (Pa. 2008). Second, a determination was made as to whether excludable time existed. If so, the amount of excludable time was added to the mechanical run date to arrive at an adjusted run date. *Id.* Third, if the defendant's trial took place outside the adjusted run date, a determination was made as to whether the delay occurred despite the Commonwealth's due diligence. *Id.* If the Commonwealth acted with due diligence, the delay was considered "excusable." The excusable time, in turn, effectively extended the adjusted run date (or "excused" the time beyond the adjusted run date). *Id.* It was this computational framework that the parties and the Court, perhaps out of habit, used to discuss Defendant's motion to dismiss in this case.

Under the current version of Rule 600, these concepts are "front-ended" and folded into Paragraph (C)(1). Now, instead of "excusing" or "excepting" delay beyond the adjusted run date, periods of delay previously considered "excusable" are excluded from the 365 day computation. Stated another way, periods of delay traditionally characterized as "excludable" and periods of time historically considered "excusable" are now both excluded from the 365 day calculation. As explained in the Comment to current Rule 600 under the heading "*Computation of Time*:"

For purposes of determining the time within which trial must be commenced pursuant to paragraph (A), paragraph (C)(1) makes it clear that any delay in the commencement of trial that is not attributable to the Commonwealth when the Commonwealth has exercised due diligence must be excluded from the computation of time. Thus, the inquiry for a judge in determining whether there is a violation of the time periods in paragraph (A) is whether the delay is caused solely by the Commonwealth when the Commonwealth has failed to exercise due diligence. *See, e.g., Commonwealth v. Dixon*, 589 Pa. 28, 907 A.2d 468 (2006); *Commonwealth v. Matis*, 551 Pa. 220, 710 A.2d 12 (1998). If the delay occurred as the result of circumstances beyond the Commonwealth's control and despite its due diligence, the time is excluded. *See, e.g. Commonwealth v. Browne,* 526 Pa. 83, 584 A.2d 902 (1990); *Commonwealth v. Genovese,* 493 Pa. 65, 425 A.2d 367 (1981). In determining whether the Commonwealth has exercised due diligence, the courts have explained that "[d]ue diligence is fact-specific, to be determined case-by-case; it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort." *See, e.g., Commonwealth v. Selenski,* 606 Pa 51, 61, 994 A.2d 1083, 1089 (Pa. 2010) (citing *Commonwealth v. Hill* [736 A.2d 578 (Pa. 1999)] and *Commonwealth v. Cornell*, 558 Pa. 238, 256, 736 A.2d 578, 588 (1999)).

Delay in the time for trial that is attributable to the judiciary may be excluded from the computation of time. *See, e.g., Commonwealth v. Crowley*, 502 Pa. 393, 466 A.2d 1009 (1983). However, when the delay attributable to the court is so egregious that a constitutional right has been impaired, the court cannot be excused for postponing the defendant's trial and the delay will not be excluded. *See Commonwealth v. Africa,* 524 Pa. 118, 569 A.2d 920 (1990).

When the defendant or the defense has been instrumental in causing the delay, the period of delay will be excluded from computation of time. *See, e.g., Commonwealth v. Matis, supra; Commonwealth v. Brightwell,* 486 Pa. 401, 406 A.2d 503 (1979) (plurality opinion). For purposes of paragraph (C)(1) and paragraph (C)(2), the following periods of time, that were previously enumerated in the text of former Rule 600(C), are examples of periods of delay caused by the defendant. This time must be excluded from the computations in paragraphs (C)(1) and (C)(2):

* * *

> (3) such period of delay at any stage of the proceedings as results from either the unavailability of the defendant or the defendant's attorney or any continuance granted at the request of the defendant or the defendant's attorney.
>
> * * *
>
> For periods of delay that result from the filing and litigation of omnibus pretrial motions for relief or other motions, see *Commonwealth v. Hill* and *Commonwealth v. Cornell*, 558 Pa. 238, 736 A.2d 578 (1999) (the mere filing of a pretrial motion does not automatically render defendant unavailable; only unavailable if delay in commencement of trial is caused by filing pretrial motion).

Pa. R.Crim.P. 600, *Comment*.

Periods of delay caused by the defendant, such as defense continuances, are excludable delay. *See Commonwealth v. Jones,* 886 A.2d 689, 702 (Pa. Super. 2005) (249–day period occasioned by defense continuances excludable). Additionally, the period of time from the filing of a Rule 600 motion to its disposition is excludable time. *Commonwealth v. Booze,* 953 A.2d 1263, 1277 (Pa. Super. 2008); *Commonwealth v. Williams,* 726 A.2d 389, 392 (Pa. Super. 1999) ("The period of time between a defendant's motion to dismiss pursuant to Rule [600] and the trial court's rendering a decision on the motion is excludable time under Rule [600].").

"The Commonwealth cannot be held to be acting without due diligence when a witness becomes unavailable due to circumstances beyond its control." *Commonwealth v. Hyland,* 875 A.2d 1175, 1191 (Pa. Super. 2005). *See also Commonwealth v. Kostra,* 502 A.2d 1287, 1291 (Pa. Super. 1985) ("So long as [a] witness['s] unavailability is through no fault of the Commonwealth, ... an extension is

proper."). The Superior Court has explained that, "[i]t is well settled that when a witness becomes unavailable ... due to illness, vacation or other reason not within the Commonwealth's control ... an extension of time is warranted." *Commonwealth v. Corbin,* 568 A.2d 635, 638 (Pa. Super. 1990). Specifically, the Superior Court has determined that a witness' unavailability to testify was beyond the control of the Commonwealth in a variety of circumstances. *See Commonwealth v. Staten,* 950 A.2d 1006, 1010 (Pa. Super. 2008) (unavailability of the arresting police officer who had been placed on a separate, specific work assignment for date of trial was beyond control of the Commonwealth and did not defeat a record of due diligence for speedy trial purposes); *Commonwealth v. Brawner,* 553 A.2d 458, 461 (Pa. Super. 1989), *appeal denied,* 563 A.2d 886 (Pa. 1989) (police officer's unavailability due to vacation was beyond the Commonwealth's control; extension of trial date was properly granted); *Kostra,* 502 A.2d at 1291 (illness of a Commonwealth witness); *Commonwealth v. Burke,* 496 A.2d 799, 801 (Pa. Super. 1985) (police officer on vacation); *Commonwealth v. Reihart,* 449 A.2d 35 (Pa. Super. 1982) (Commonwealth witness seriously ill); *Commonwealth v. Caden,* 473 A.2d 1047, 1052 (Pa. Super. 1984) (Commonwealth's essential eyewitness ill and hospitalized); *Hyland, supra* (military deployment of police officer).

Similarly, judicial delay is not chargeable to the Commonwealth. *See Ramos,* 936 A.2d at 1104 (a "clogged trial court docket [is a] circumstance [ ] beyond the control of the Commonwealth[.]"). *See also Commonwealth v. Nellom,* 565 A.2d 770, 773 (Pa. Super. 1989) (noting that when a case is scheduled for the earliest possible

date consistent with the court's business, delay from this scheduling is not chargeable to the Commonwealth).

Rule 600 has the dual purpose of both protecting a defendant's constitutional speedy trial rights and protecting society's right to effective prosecution of criminal cases. *Commonwealth v. Bradford*, 46 A.3d 693 (Pa. 2012); *Commonwealth v. Selenski*, 994 A.2d 1083 (Pa. 2010); *Commonwealth v. Dixon*, 907 A.2d 468 (Pa. 2006). "To protect the defendant's speedy trial rights, Rule 600 ultimately provides for dismissal of charges if the Commonwealth fails to bring the Defendant to trial within 365 days of the filing of the complaint, ... subject to [recognized] exclusions.... Conversely, to protect society's right to effective prosecution prior to dismissal of charges, Rule 600 requires the court to consider whether the Commonwealth exercised due diligence. *Bradford*, 46 at 701 (Pa. 2012) (quoting *Selenski*, 994 A.2d at 1088). The Superior Court has similarly explained that:

> Rule [600] serves two equally important functions: (1) the protection of the accused's speedy trial rights, and (2) the protection of society. In determining whether an accused's right to a speedy trial has been violated, consideration must be given to society's right to effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. However, the administrative mandate of Rule [600] was not designed to insulate the criminally accused from good faith prosecution delayed through no fault of the Commonwealth.
>
> So long as there has been no misconduct on the part of the Commonwealth in an effort to evade the fundamental speedy trial rights of an accused, Rule [600] must be construed in a manner consistent with society's right to punish and deter crime. In considering [these] matters, courts must carefully factor into the ultimate equation not only the prerogatives of the individual accused, but the collective right of the community to vigorous law enforcement as well.

*Commonwealth v. Thompson*, 93 A.3d 478, 486-87 (Pa. Super. 2014) (quoting *Commonwealth v. Ramos,* 936 A.2d 1097, 1100 (Pa. Super. 2007) (internal citations, ellipses, and quotation marks omitted).

As the Comment to Rule 600 notes, due diligence is "fact specific, to be determined case-by-case; it does not require perfect vigilance and punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort." *Selenski*, 994 A.2d at 1089. 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. Ramos, supra.*

When cases are joined for trial, a delay caused by a co-defendant is not excludable time attributable to the other defendant pursuant to the speedy trial computation. *See Commonwealth v. Hill,* 736 A.2d 578 (Pa. 1999); *Commonwealth v. Hagans*, 349 A.2d 470 (Pa. 1978); *Commonwealth v. Jackson*, 765 A.2d 389 (Pa. Super. 2000). However, a delay caused by one co-defendant which results in trial after 365 calendar days for the other defendant does not automatically result in a violation of the other defendant's speedy trial rights. Instead, trial courts are still required to determine if there is any excludable time attributable to the other defendant and whether the Commonwealth exercised due diligence. If the Commonwealth has exercised due diligence, then dismissal is not warranted. In this regard, due diligence does not require the Commonwealth to move for severance. *See Commonwealth v. Robbins*, 900 A.2d 413 (Pa. Super. 2006), *app. den.*, 907 A.2d

1102 (Pa. 2006); *Commonwealth v. Kearse*, 890 A.2d 388 (Pa. Super. 2005), *app. den.*, 906 A.2d 1106 (Pa. 2006); *Jackson, supra*.[2]

b. Excludable Time

In this case, the complaint was filed against Defendant on January 30, 2014. Regarding Defendant's first motion, commencement of trial was on May 5, 2015, when a jury was picked. As to the second motion, trial began on July 7, 2015, when the jury that ultimately convicted him was selected. P. R.Crim.P. 660 (A)(1) and *Comment*. These periods lead to the "mechanical" passage of 460 and 523 days respectively. Although more than 365 days elapsed, when excludable time is factored-in, it is clear that Defendant's speedy trial rights were not violated.

The relevant procedural history, including filing dates, requests for continuances, and related matters, is recited in detail above. From the history, the following periods of exclusion are clear:[3]

1) Defendant Caused Delays Totaling 99 Days of Excludable Time

Contrary to the assertion in his Rule 1925(b) statement, Defendant asked for continuances. Specifically, he asked for two continuances of his preliminary hearing. The total period attributable to the continuances is 56 days. Further, on August 20, 2014, Defendant failed to appear for a mandatory status conference. As a result, a

[2] In orally summarizing the several reasons why we denied Defendant's motion, we indicated that delay occasioned by Chitty's initial omnibus motion constituted excludable time in this case. Under the law cited in the body of this Opinion, that statement was incorrect. However, that error did not affect our other computation and due diligence analyses.

[3] As noted, the time computations contained in this opinion differ in some respects to what we attempted to orally recite on the record when denying Defendant's motions. The differences are attributable to use in this opinion of the computational paradigm and framework of current Rule 600, the availability of transcripts, and, frankly, the opportunity for additional research and reflective analysis prompted by the appeal. While some aspects of our articulated computational analyses may have been off, the end result was correct.

bench warrant was issued. The bench warrant was dissolved on September 3, 2014. This added another 14 days. In addition, since Defendant did not appear for either the status conference or the final call of the September 2014 trial list, the earliest his case could have been tried after the bench warrant was dissolved was the next term which began on October 2, 2014. This added 29 more days.[4] Thus, under the law cited above, the total excludable time attributable to delays caused by Defendant is 99 days.

2) Substantial Additional Periods of Time are Excludable Because the Commonwealth Exercised Due Diligence

*(a) The Time Attributable to the Commonwealths' Request for Continuance of the Preliminary Hearing is Excludable*

As indicated, after the preliminary hearing was continued twice at the request of Defendant, the Commonwealth asked for and was granted a continuance. The continuance caused a delay of 42 days. However, the continuance was not a delay tactic and did not result from inaction or improper motivation. Rather, the continuance was granted due to the unavailability of the arresting PSP trooper, a reason that, as discussed above, has historically been considered "excusable" (now excludable) and not the product of lack of due diligence.

We found and continue to believe that this continuance, requested early in the case due to the unavailability of the affiant, granted on the heels of two continuances requested by Defendant, did not result from a lack of due diligence. Thus, the period of delay is excludable.

[4] We recognize that 17 of these 29 days overlap with the period of time following consolidation of this case with Chitty's case which, as discussed in the next section of this opinion, we find is also excludable. However, our final calculations do not "double dip."

*(b) Most of the period Between the Date this Case was Consolidated with Chitty's Case and the Date Chitty's Case Was Re-Listed is Excludable*

This case and Chitty's case were consolidated on September 15, 2014. At that time, Chitty's omnibus motion was pending. The motion was denied on January 30, 2015, a delay of 137 days. In his order denying the motion, Judge Higgins placed Chitty's case on the March 2015 trial term, the next available listing, and this case was accordingly continued to the same list. This added an additional 32 days for a total of 169 days from the date of consolidation. Most of this period of delay is excludable.

On appeal Defendant will undoubtedly repeat his argument that while the delay caused by Chitty's filing of an omnibus motion constituted excludable time against Chitty in Chitty's case, the delay did not constitute excludable time caused by Defendant (or under traditional parlance "excusable" time for the Commonwealth) in this case. *See Commonwealth v. Hill, supra*; *Commonwealth v. Hagans*, *supra*; *Commonwealth v. Jackson*, *supra*. This headnote assertion is superficially correct, but shallow, and does not carry the day.

Under the law cited above, the delay caused by Chitty's filing of an omnibus motion did not, by itself, result in excludable time against Defendant. However, since the cases were properly consolidated, the mere fact that the delay caused by the omnibus proceeding in Chitty's case resulted in trial occurring in this case more than 365 calendar days after the criminal complaint was filed did not automatically constitute a violation of Defendant's speedy trial rights. Similarly, the delay did not require the Commonwealth to sever the cases. Instead, the issue of whether the delay violated Defendant's speedy trial rights turns on whether the Commonwealth exercised due

diligence, a determination that requires the Court to assess the Commonwealth's conduct in both cases. *See Commonwealth v. Robbins*, *supra*; *Commonwealth v. Kearse*, *supra*; *Commonwealth v. Jackson, supra*. For the reasons that follow, we believe that the Commonwealth exercised the requisite due diligence, and therefore, most of the time period at issue is excludable.

Initially, and importantly, consolidation was objectively reasonable and strongly supported by well settled precedent. In this regard, "a joint trial is not only permissible, but advisable, where multiple defendants are charged with participation in the same criminal act and much of the same evidence is necessary to prove the Commonwealth's case against each defendant." *Commonwealth v. Lee,* 662 A.2d 645, 651 (Pa. 1995); *Commonwealth v. Childress,* 680 A.2d 1184, 1187 (Pa. 1996). Further, where defendants have been charged with conspiracy, joint rather than separate trials are preferred. *Commonwealth v. Jones*, 668 A.2d 491, 501 (Pa. 1995).

Given these considerations, this case and Chitty's case were ripe for consolidation. Defendant and Chitty were arrested as a result of the same vehicle stop. They were charged with the same possessory drug offenses. Significantly, the charges included multiple counts of conspiracy. Further, the co-defendants had a joint preliminary hearing. Moreover, the witnesses and evidence were the same in both cases. Simply, the cases presented a classic scenario for joinder.

Of significance, while counsel for Defendant initially filed a written non-concurrence to the Commonwealth's motion, the Public Defender who appeared at the consolidation hearing did not object to joinder, a fact noted by Judge Sibum in her order. Similarly, neither Defendant nor Chitty subsequently filed a motion to sever.

Procedurally, the Commonwealth's joinder motions were timely filed and a hearing on the motions was held quickly. In this regard, the Commonwealth's motions were filed before the first scheduled status conference. The goal was to discuss consolidation at the status conference. However, Defendant failed to appear and a bench warrant was issued. The hearing at which consolidation was granted was held only 12 days after Defendant appeared and the bench warrant was dissolved.

Similarly, Chitty's motion was a legitimate, good faith motion. Had it been successful, Defendant would have benefitted directly and substantially.

Once Chitty's motion was filed, the Commonwealth properly, reasonably, actively, and in good faith contested Chitty's requests for relief. It did so by presenting evidence at both hearing days and filing briefs in opposition to Chitty's requests for relief.

During the omnibus proceeding, there were three periods that, for purposes of Rule 600 speedy trial analysis, could be considered "delays." None of the three resulted from a lack of due diligence by the Commonwealth.

First, the Commonwealth asked for and was granted one continuance. However, that continuance was not the product of inaction, intentional delay, improper motives, or lack of due diligence. Rather, it was an uncontested motion based on the unavailability of the assigned assistant district attorney, the same reason that caused this case to be continued from its initial August 2014 trial listing.[5]

Second, the omnibus hearing was not completed in one day. A second hearing day was required because the Commonwealth's witnesses, including the affiant, were

[5] The omnibus hearing was continued from August 1, 2014 to September 22, 2014, a period of 52 days. However, only 7 of those days elapsed after the cases were consolidated.

unavailable. However, the witnesses were unavailable due to the extraordinary manhunt described in the background section, not any act or omission of the Commonwealth. As a result, the "delay" between hearings was not caused by the Commonwealth's failure to exercise due diligence. This is especially true since the parties used the first hearing day substantively to present evidence. Specifically, the Commonwealth submitted several exhibits and Chitty called a witness.

Third, the decision time – the time between conclusion of the hearing and issuance of the order denying the omnibus motion – was clearly attributable to the Court, not the Commonwealth. This period of delay resulted from the recusal of Judge Sibum, the time needed to prepare and file transcripts, the time given to the parties to file briefs, and the time needed for Judge Higgins to bring himself up to speed, prepare an opinion, and enter an order. This delay was neither extended nor "egregious." In fact, given the circumstances of this case, the time frame was eminently reasonable. Since under the law discussed above judicial delay is not chargeable to the Commonwealth, this period of delay is unquestionably excludable.

As noted, Chitty's case was removed from the trial list during the entire period that his omnibus motion was pending. When the motion was denied, the case was placed on the March 2015 criminal trial list.

This case, in turn, was continued three times while Chitty's motion was pending so that the cases could be tried together. None of the continuances resulted from lack of due diligence.

Initially, after the Commonwealth filed its consolidation motions and Defendant failed to appear, this case was removed from the September 2014 trial list. On

September 3, 2014, after Defendant appeared in court, an order was issued dissolving the bench warrant and placing this case on the December 2014 trial term which was scheduled to begin 90 days later.[6] The order specifically referenced consolidation of the cases and the pendency of the omnibus motion in Chitty's case. Since this period began with a trial re-listing occasioned by Defendant's failure to appear for a status conference at a time when the omnibus motion and was pending in Chitty's case and the Commonwealth's consolidation motions were pending in both cases, the Commonwealth acted promptly and with proper motives in joining the cases for trial, there was no intentional delay, the Commonwealth opposed Chitty's motion, and the Court picked the trial term, there was clearly no lack of due diligence on the part of the Commonwealth.

Next, on November 12, 2014, the Commonwealth filed a written motion seeking a continuance to the February 2015 trial term, a period of 63 days, on the basis that Chitty's omnibus motion had not yet been decided. The next day, President Judge Worthington granted the continuance by signing the form order prepared by the Commonwealth. As indicated, the order provided that, "[f]or purposes of Rule 600, delay resulting from this continuance shall run against the Commonwealth." While we believe that this period of delay was excludable and not the result of lack of due diligence for the reasons already discussed, since the language making the time "includable" (run against the Commonwealth) was penned by the Commonwealth, another judge of this Court signed the order, and the Commonwealth neither objected

[6] We recognize that 29 of the 90 days overlaps with the period of time, discussed in the preceding section of this opinion, we find excludable due to delays caused by Defendant. As indicated in footnote 4, our final calculations will not "double dip."

to the determination nor sought amendment of the order, we will not exclude this period of delay.

The third and final continuance was from the February 2015 trial term to the March 2015 trial term, a period of 28 days, which continuance was effectuated in order to formally place this case on the same trial list as Chitty's case. For the reasons discussed above, this period of delay did not result from lack of due diligence by the Commonwealth.

*(d) One of the Continuances Granted After Chitty's Motion Was Denied and Before the First jury Was Picked is Excludable and Not Chargeable to the Commonwealth*

Before the first jury was picked, there were two more continuances. The first continued the case to the April 2015 trial term, a period of 35 days, because Chitty's attorney filed a motion seeking leave to withdraw. This delay, occasioned by counsel for Chitty, was not caused by the Commonwealth and, under the law discussed above, is excludable.

The second continued the case to the May 2015 term, a period of 28 days, so that the Commonwealth could request a date certain for trial and have sufficient time to obtain an out-of-state witness subpoena. Since the motion for leave to withdraw filed by counsel for Chitty was pending for approximately one month before it was withdrawn, the Commonwealth's request was reasonable and within the realm of due diligence. However, the order granting the continuance, which as noted was on a form order supplied by the Commonwealth, directed that this period be included in the 365

day calculation. Therefore, even though this period of delay was not the product of a lack of due diligence, we will not exclude the 28 days.[7]

*(e) Synthesis and Computation of Excludable Time*

As indicated, Defendant filed two Rule 600 motions to dismiss. Regarding the first, 460 days elapsed from filing of the criminal complaint on January 30, 2014 and jury selection on May 5, 2015. From this period, the following delays are excludable:

- February 6 to April 3, 2014 (56 days) – Defendant's requests for continuances of the preliminary hearing
- April 3 to May 15, 2014 (42 days) – Preliminary hearing continuance necessitated by unavailability of PSP affiant
- August 20 to September 3, 2014 (14 days) – Pendency of bench warrant for Defendant's failure to appear
- September 3 to October 2, 2014 (29 days) – Relisting delay occasioned by Defendant's failure to appear for September trial term conferences
- September 15, 2014 to March 3, 2015 (89 days) (Total of 169 days less (1) the 17 day overlap with the relisting delay (see above);[8] and (2) the 63 day trial continuance from December 2014 to February 2015) – Period of time from consolidation until Chitty's case was re-listed after omnibus denied
- March 3, 2015 to May 5, 2015 (35 days) – Continuance necessitated by motion to withdraw filed by Chitty's attorney

**TOTAL EXCUDABLE DAYS: 265**

With these days excluded, it is clear that Defendant's speedy trial rights were not violated before the first jury was picked, and therefore, the first motion to dismiss was properly denied.

As to the second motion, 523 days elapsed from the filing of the complaint unitl trial. However, given the total number of excludable days, we need not critically analyze the additional delay of 63 days occasioned by release of the first jury and

[7] Within this period of time, Defendant filed his first Rule 600 motion to dismiss. The motion was denied 15 days after it was filed. As discussed above, this period of time is typically excludable. However, since the filing of the motion did not delay trial, we do not exclude it.

[8] See footnotes 4 and 6 and accompanying text.

continuance of trial to July 2015. Even if all 63 days are charged to the Commonwealth and considered includable, the 365 period was not exceeded and Defendant's speedy trial rights were not violated. Thus, Defendant's second motion to dismiss was also properly denied.

**2. Defendant's Sentencing Challenge Also Lacks Merit**

In his second issue, Defendant asserts that "[t]he trial court erred and abused its discretion in sentencing defendant using an offense gravity score of 13 [relating to the weight or amount of heroine (*sic*)] where the fact finder at trial, the jury, never determined the amount of heroine (sic) 'beyond a reasonable doubt,' and that fact, the amount of heroine (sic) where the finding of this fact is a basis for increasing the punishment." (Defendant's Rule 1925(b) Statement, ¶2 (brackets in original)). As noted, fleshed out Defendant's argument is that, because the OGS scores for PWID are based on the weight of the controlled substance (204 Pa. Code. §303.15), and since the OGS in turn impacts guideline sentencing ranges, under *Alleyne* and *Apprendi* the jury rather than the Court must determine the weight. However, *Alleyne* and *Apprendi* do not reach that far, and neither case supports Defendant's argument. Accordingly, there is no merit to Defendant's sentencing challenge.

In *Alleyne,* the Supreme Court held that "facts that increase mandatory minimum sentences must be submitted to the jury" and must be found beyond a reasonable doubt. *Id.* at 2163. An *Alleyne* challenge implicates

> the legality of a sentence. *Commonwealth v. Lawrence,* 99 A.3d 116, 123 (Pa. Super. 2014). "A challenge to the legality of a sentence ... may be entertained as long as the reviewing court has jurisdiction." *Commonwealth v. Borovichka,* 18 A.3d 1242, 1254 n. 8 (Pa. Super. 2011) (citation omitted). "An illegal sentence must be vacated." *Commonwealth v.*

> *Rivera,* 95 A.3d 913, 915 (Pa. Super. 2014) (citation omitted). "Issues relating to the legality of a sentence are questions of law.... Our standard of review over such questions is *de novo* and our scope of review is plenary." *Commonwealth v. Akbar,* 91 A.3d 227, 238 (Pa. Super. 2014) (citations omitted).

*Commonwealth v. Ali*, 112 A.3d 1210, 1225-26 (Pa. Super. 2015), *petition for allowance of appeal granted in part*, 127 A.3d 1286 (Pa. 2015).

Our Superior Court recently considered whether *Alleyne* applies to cases involving sentencing enhancements and concluded that it does not. See *Commonwealth v. Ali, supra* and *Commonwealth v. Buterbaugh,* 91 A.3d 1247, 1270 n. 10 (Pa. Super. 2014) (*en banc*), *appeal denied,* 104 A.3d 1 (Pa. 2014). Even though OGS determinations are different than sentencing enhancements, the rationale expressed by the Superior Court in these cases effectively debunks Defendant's OGS argument in this case.

In *Buterbaugh*, the Superior Court found that the defendant's truck constituted a deadly weapon for purposes of the deadly weapon sentencing enhancement. Although neither party raised the issue, the Superior Court analyzed its finding in light of *Alleyne* and *Apprendi* and determined that neither applied. The Superior Court stated:

> In both cases, the Supreme Court determined that certain sentencing factors were considered elements of the underlying crime, and thus, to comply with the dictates of the Sixth Amendment, must be submitted to the jury and proven beyond a reasonable doubt instead being determined by the sentencing judge. However, this inquiry is not relevant to our case because of the nature of the [Deadly Weapon Enhancement].
>
> *Alleyne* and *Apprendi* dealt with factors that either increased the mandatory minimum sentence or increased the prescribed sentencing range beyond the statutory maximum, respectively. Our case does not involve either situation;

> instead, we are dealing with a sentencing enhancement. If the enhancement applies, the sentencing court is required to raise the standard guideline range; however, the court retains the discretion to sentence outside the guideline range. Therefore, neither of the situations addressed in *Alleyne* and *Apprendi* are implicated.

*Commonwealth v. Buterbaugh*, 91 A.3d at 1270 n. 10 (citations modified).

Similarly, in *Ali* the Superior Court held that

> *Alleyne* has no application to the sentencing enhancements at issue in this case. The parameters of *Alleyne* are limited to the imposition of mandatory minimum sentences, *i.e.*, where a legislature has prescribed a mandatory baseline sentence that a trial court must apply if certain conditions are met. The sentencing enhancements at issue impose no such floor. Rather, the enhancements only direct a sentencing court to consider a different range of **potential** minimum sentences, while preserving a trial court's discretion to fashion an individual sentence. By their very character, sentencing enhancements do not share the attributes of a mandatory minimum sentence that the Supreme Court held to be elements of the offense that must be submitted to a jury. The enhancements do not bind a trial court to any particular sentencing floor, nor do they compel a trial court in any given case to impose a sentence higher than the court believes is warranted. They require only that a court consider a higher range of possible minimum sentences. Even then, the trial court need not sentence within that range; the court only must consider it. Thus, even though the triggering facts must be found by the judge and not the jury—which is one of the elements of an *Apprendi* or *Alleyne* analysis—the enhancements that the trial court applied in this case are not unconstitutional under *Alleyne*.
>
> Ali maintains that, because both of the enhancements contain the word "shall," the enhancements are mandatory in nature, and must fall within *Alleyne* 's holding. However, the enhancements only require the trial court to consider a certain range of sentences. The enhancements do not bind the trial court to impose any particular sentence, nor do they compel the court to sentence within the specified range. Indeed, it is well-settled that the sentencing guidelines ultimately are only advisory. *Commonwealth v. Griffin,* 804

A.2d 1, 8 (Pa. Super. 2002). Thus, *Alleyne* has no application to the enhancements.

*Commonwealth v. Ali*, 112 A.3d at 1226 (emphasis in original).

In this case, Defendant's *Alleyne*-based OGS argument fails for the same reasons. By itself, an OGS has no effect. The OGS is but one component of the sentencing matrix that is used to determine basic guideline ranges. Neither the OGS nor the ranges it is used to compute invoke a mandatory minimum sentence or increase a maximum sentence. In fact, while the ranges must be considered, they are not binding on the trial court. Simply put, the determination of an OGS does not implicate *Alleyne* or *Apprendi.*

For these reasons, we believe that we properly denied defendant's motions to dismiss, that Defendant's sentencing challenge lacks merit and that the judgment of sentence should be affirmed.

**BY THE COURT:**

DATE: 3/28/16

JONATHAN MARK, J.

2016 MAR 28 PM 2 10
CLERK OF COURTS
MONROE COUNTY, PA

cc: Superior Court of Pennsylvania
Jonathan Mark, J.
District Attorney (CS/JF)
Public Defender (RS)

I think that the PSI was prepared fairly and accurately and I think that Your Honor should adopt the recommendation which is within the standard range that is called for.

**THE COURT:** Okay, Mr. Carter in imposing the sentence that you're about to hear I've considered several things.

First, I've considered the record and file of this Court.

Second, I've considered the evidence that was presented during the trial in this matter and also in other hearings relating to this matter.

I've considered the content of the pre-sentence investigation report and that includes, as I told you before, the statement that you had written out that was attached to the report as well.

I note that I already decided that I will use the offense gravity score of 13 for the most serious charge. The possession has an offense gravity score of three and the possession of paraphernalia has an offense gravity score of one.

I will also note sir that you have a prior record score of five which you earned through seven adult arrests and five convictions that resulted at one point in a probation that was revoked.

You did have three paroles -- that apparently, at least not yet -- none of which had been revoked.

All of the crimes related in one way or the other to drugs and/or weapons, or included drugs or weapons.

Most of the crimes from before had to do with trafficking drugs; at least one in a school zone. And then you had spent a significant portion of your life -- or at least your adult life -- in jail.

So those are things that are all clear from the pre-sentence investigation report. As Ms. Fry indicated you also really didn't have much and don't have much work history. The little bit you had recently was through a family business where you were earning only $200 a week and it's pretty clear that for a significant period of the time when you were not in custody of a state -- either this state or New Jersey -- you were selling drugs as a means to support yourself and potentially your family; and of course not only selling but using along the way which of course is not a positive.

In imposing sentences in this Commonwealth we need to take an individualized approach that takes into consideration the nature, grading and severity of the crime or crimes charged, the defendant's

rehabilitative prospects, the effect of the crime on society and our community, the vindication of rights if there's a victim. In this case there were no direct victims, just through drug trafficking -- as Ms. Fry indicated thousands -- because of the amount here -- of victims who were indirectly affected by use or addiction or even death resulting from heroin.

And we should note that last year for the first time that drug overdoses overtook car accidents in terms of number of deaths in the country. There were 43,000 deaths last year give or take from drug overdoses.

So Mr. Carter, again we're supposed to look at those factors. Also I think our sentencing schemes are based on three foundational philosophies. One is we need to punish those who commit crimes; find an appropriate consequence or sanction.

Second is we need to try to rehabilitate those who would break our laws if we take them into our systems to try to make sure that the cycle gets broken and they don't keep violating our laws.

Third, we need to deter others from this type of conduct.

Mr. Carter, the amount of -- the sheer amount

and the weight of the heroin here is staggering and I will tell you and I will say for the record that even if a lower offense gravity score was used, you know, the weight is a factor that cannot be ignored and seriously and significantly mandates a very potent consequence.

It may be argued that you were just a mule and that you were just transporting this and that others are the ones who put this much heroin into the stream of drug trafficking. I won't say the stream of commerce, but in the stream of drug trafficking; but it really is shocking.

Had this been a first time, had this been a situation where you hadn't been through the system before; you were younger, you knew what you were doing but maybe you didn't realize the full significance or the amounts I might feel differently but, you know, this amount -- and combined with your record -- does call for a very significant penalty that will punish you accordingly. It will send a message to the community and our society that we're not going to tolerate this type of trafficking.

This isn't someone using for themselves. This isn't someone stealing things to support a habit. This is putting 1.2 million dollars of heroin --

going interstate with it to get people on the other side of Pennsylvania and that market involved in the heroin trade and it's unconscionable. It's shocking.

Unfortunately it also tells us that there are vehicles going on Route 80 and other interstates all through Pennsylvania that have -- that they're taking heroin all over the place.

A message needs to be sent. This requires a significant penalty. I'll also note that when I look at your pre-sentence investigation report and your own criminal and personal background and histories your rehabilitative prospects -- regardless of the length of sentence, regardless of the offense gravity score that should be applied -- are pretty minimal.

It just hasn't taken. State prison, supervision, and other forms of -- other tools that have been applied in our criminal and penal justice systems just really haven't taken hold and haven't done anything.

And then finally again deterance is something that I think does need to be recognized in this case; and again society needs to send a message.

So I believe that the weight of this heroin

itself, regardless of what it does to the offense gravity score -- the sheer amount of heroin that was being transported is by itself a factor that justifies a sentence outside of the ranges.

I believe that your history and the fact that your rehabilitative prospects are none or nil mandate a long sentence and I believe that we really need to make sure that people understand we get addiction, we get substance abuse, we get the need for treatment; what we don't get is someone who is willing to participate in drugs on this scale and this level.

And so for those reasons I am going to issue the following Order:

AND NOW, this 13th day of October, 2015, the Defendant having been convicted after a jury trial of Count 1, possession with intent to deliver heroin, an ungraded felony, it is ORDERED that the Defendant, RONALD ABRAHAM CARTER, be incarcerated in a State Correctional Institution for a period of not less than one hundred forty-four (144) months nor more than three hundred (300) months. In addition the Defendant shall pay restitution in the amount of one thousand three hundred seventy-three dollars ($1,373.00) to the Commonwealth of Pennsylvania,