

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No. 99-10,125
	:
	:
vs.	: CRIMINAL DIVISION
	:
IKEIMA MAWIYAH LOWE,	: Motion to Dismiss
Defendant	: Rule 1100

OPINION AND ORDER

This matter came before the Court on the defendant's Motion to Dismiss for Violation of Right to Prompt and Speedy Trial. After reviewing the evidence submitted at the hearing on the defendant's motion, the Court makes the following of finding facts:

1. On March 30, 1998, the police executed a search warrant at 1815 Lincoln Drive. The defendant was taken into custody and interviewed.
2. On April 15, 1998, a criminal complaint was filed against the defendant and a warrant was issued for her arrest.
3. On May 27, 1998, the Pennsylvania State Police made their initial attempt to serve the arrest warrant on the defendant at her residence located at 1546 West Fourth Street, Williamsport, Pennsylvania and found no one at home.
4. On June 10, 1998, the police entered the information concerning the defendant into the National Crime Information Center (NCIC).
5. At some point between May 27, 1998 and June 11, 1998, Trooper Eisman, the trooper who had been handling the defendant's case, was transferred to the western part of the state.
6. On June 11, 1998, the arrest warrant for the defendant was assigned to Trooper

Davis for service.

7. On June 16, 1998, Trooper Davis attempted to serve the arrest warrant on the defendant at her residence. Again, no one was at the residence.

8. Sometime between June 16, 1998 and October 14, 1998, Trooper Davis verified with the Department of Public Welfare that the defendant's current address was 1546 West Fourth Street.

9. On October 14, 1998, Trooper Davis again attempted to serve the arrest warrant on the defendant at her residence. The defendant was not at home, but her mother was. Her mother indicated that she would inform the defendant that the police needed to speak to her, and arrangements were made for the police and the defendant to meet at District Justice McGee's office the next day.

10. On October 15, 1998, the defendant appeared at District Justice McGee's office. The police spoke to her about working as confidential informant and she signed a document, Commonwealth's Exhibit No. 2, indicating the conditions to which she would agree while cooperating with the Pennsylvania State Police.¹ The police then removed the information concerning the defendant from NCIC.

11. A week or two later, the defendant telephoned the police barracks and left a message on an answering machine, indicating she did not wish to be a confidential informant.²

¹The document does not mention Rule 1100 or a waiver thereof.

²The defendant testified that she left such a message. Trooper Davis testified that he gave the defendant his phone number, Corporal Hunter's phone number, the phone number for the desk at the barracks, his pager number, and Corporal Hunter's pager number. Trooper Davis could not recall that the defendant left any message. There was no testimony that Corporal Hunter or the desk did not receive such a message. Therefore, the Court accepted the defendant's credibility on this issue because Trooper Davis' recollection was not clear and

12. On December 23, 1998, Trooper Davis attempted to contact the defendant by telephone but there was no answer.

13. On January 5, 1999, Trooper Davis again attempted to contact the defendant by telephone with the same results.

14. On January 19, 1999, the police served the arrest warrant on the defendant at her place of employment.

15. A preliminary hearing was held on January 25, 1999 and the charges in this case were held for Court.

16. On March 12, 1999, defense counsel entered his appearance and waived the defendant's arraignment.

17. On June 11, 1999, the defendant filed her Motion to Dismiss based on a violation of Rule 1100. Up until this time, neither the defense nor the Commonwealth made any request for a continuance.

DISCUSSION

From the facts, it is readily apparent that more than 365 days have passed since the filing of the criminal complaint in this matter. In this case, there are two (2) issues which the Court must address: (1) whether any time is excludable under Rule 1100(c); and (2) whether the Commonwealth exercised due diligence. Rule 1100(c) states:

In determining the period for commencement of trial, there shall be excluded therefrom:

(1) the period of time between the filing of the written complaint and defendant's arrest, provided that the defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence;

he could not speak to whether Corporal Hunter or the desk received a message.

- (2) any period of time for which the defendant expressly waives Rule 1100;
- (3) such period of delay at any stage of the proceedings as results from:
 - (i) the unavailability of the defendant or the defendant's attorney;
 - (ii) any continuance granted at the request of the defendant or the defendant's attorney.

The Court finds there is no excludable time in this case. Throughout this litigation, the defendant resided at 1546 West Fourth Street, Williamsport, Pennsylvania. Therefore, the delay between filing of the written complaint and the defendant's arrest was not because her whereabouts were unknown. Also, the defendant neither expressly waived Rule 1100 nor requested a continuance prior to June 11, 1999.

The Commonwealth contends the delay from the defendant's agreement to be confidential informant on October 15, 1998 until her arrest on January 19, 1999 is attributable to the defendant and therefore excludable under Rule 1100. This Court cannot agree. Although the Commonwealth could have legitimate reasons for not wanting to bring the defendant to trial while she was acting as confidential informant, she was available for trial.³ If the prosecutors do not want to try the case of a confidential informant because it may subject the informant to impeachment in other cases, they have several options available. They could have waited to file the charges or they could withdraw the charges pending her work as a confidential informant. Even if the Court were to consider the defendant unavailable because she agreed to be a confidential informant, such unavailability would cease by October 29, 1998 because the defendant called the police and left a message that she no longer wished to be a confidential informant. Therefore, more than 365 days

³Since incarceration in another state does not automatically constitute unavailability, See Commonwealth v. Kubin, 432 Pa.Super. 144, 637 A.2d 1025 (1994), the Court doubts that merely agreeing to be a confidential informant would render a defendant unavailable.

have passed since the filing of the criminal complaint.

The next issue is whether the Commonwealth acted with due diligence. Given the facts of this case, the Court must conclude it has not. In the nine (9) months between the filing of the criminal complaint and defendant's arrest, the police telephoned the defendant twice and attempted to serve the warrant at her residence three (3) times. The first attempt to serve to serve the warrant did not occur until approximately six (6) weeks after the criminal complaint was filed. It was approximately three (3) more weeks until the second attempt occurred on June 16, 1998. Although the police confirmed the defendant's address with the Department of Public Welfare, another attempt to serve the warrant was not made until October 14, 1998, nearly four (4) months after the second attempt. These efforts do not constitute due diligence under the law of this Commonwealth. See Commonwealth v. Webb, 278 Pa.Super. 599, 420 A.2d 703 (1980) (two visits to the defendant's residence and three visits to a mall which he frequented during the ten day period between the filing of the complaint and the defendant's arrest did not constitute due diligence); Commonwealth v. Collins, 266 Pa.Super. 340, 404 A.2d 1320 (1979) (Commonwealth did not exercise due diligence when it made no contact with Philadelphia authorities until two months after being informed of the address of the defendant's aunt in Philadelphia and corroboration of the defendant's presence there).

For the foregoing reasons, the Court will grant the defendant's Motion to Dismiss for Violation of Right to Prompt and Speedy Trial.

ORDER

AND NOW, this ____ day of December 1999, the Court GRANTS the defendant's Motion to Dismiss for Violation of Right to Prompt and Speedy Trial and the above-captioned charges are hereby DISMISSED.

By The Court,

Kenneth D. Brown, J.

cc: Daniel Holmes, Esquire (ADA)
Eric Linhardt, Esquire
Law Clerk
Work File
Gary Weber, Esquire (Lycoming Reporter)