

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA,	: No. CR-528-2010
Appellant	:
vs.	: CRIMINAL
	:
CHRISTOPHER L. INGRAM, SR.,	:
Defendant	: Motion to Dismiss

OPINION AND ORDER

This matter came before the court on April 7, 2015 for a hearing and argument on Defendant's motion to dismiss based on Pa.R.Crim.P. 600, which was filed on March 26, 2015, and his supplemental motion, which was filed on March 31, 2015. Subsequently, the parties filed briefs in support of their respective positions. In deciding this motion, the court will take judicial notice of the orders and documents filed of record in this case, in addition to considering the evidence presented at the hearing on April 7, 2015

A criminal complaint was filed on November 30, 2009, charging Defendant with one count of aggravated assault, one count of simple assault and one count of endangering the welfare of children. Defendant is alleged to have knowingly or recklessly caused injuries to his then seven (7) week old infant son. The child's mother also was charged with these offenses.

The preliminary hearing was scheduled for December 8, 2009, but it was continued multiple times. The preliminary hearing was held on March 30, 2010 and the charges were held for court.

Defendant waived his arraignment on May 3, 2010, and he filed an omnibus pretrial motion on June 2, 2010. His motion included a request for *habeas corpus* relief, a motion for severance, a motion in limine to exclude Defendant's "prime suspect" statement, a motion in

limine to exclude evidence of Defendant's prior criminal convictions, a motion in limine to exclude any reference to Defendant's consultation with counsel, and a motion in limine to exclude evidence related to Defendant's drug use. The court held a hearing on Defendant's omnibus motion on June 22, 2010. Defendant's brief in support of his motion was due July 22 and the Commonwealth's brief was due fourteen days thereafter, but Defendant requested and was granted an extension such that the briefs were due on August 13, 2010 and August 27, 2010, respectively.

The case was scheduled for a status conference on September 15, 2010. Defendant requested a continuance of that conference, which was granted and the conference was rescheduled for December 15, 2010.

On October 5, 2010, the court issued an Opinion and Order granting Defendant's request for *habeas corpus* relief. In light of this ruling, the remaining portions of the omnibus motion were deemed moot.

On October 12, 2010, the Commonwealth appealed. The Pennsylvania Superior Court reversed the trial court in a decision filed on October 24, 2011. Defendant, however, sought further review in the Superior Court and then the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied Defendant's petition for allowance of appeal on June 20, 2012. The Superior Court Prothonotary remanded the record on July 16, 2012, and it was received in Lycoming County on July 17, 2012.

This case and the mother's case were scheduled for a pretrial conference on September 11, 2012. On August 8, 2012, however, the court entered an order continuing the pretrial conference to October 30, 2012, because mother's attorney was not available on

September 11, 2012 and the cases might be joined for trial.

On October 5, 2012, the court scheduled a conference for October 23, 2012 to address any outstanding issues from Defendant's omnibus pretrial motion. The Commonwealth's motion to consolidate (which was filed on October 19, 2012) also was scheduled to be heard on October 23, 2012.

Following the conference, the court issued an order on October 24, 2012. The court noted that Defendant made an oral motion in limine to preclude the Commonwealth from presenting evidence regarding the child's leg injuries and torn frenulum. The assistant district attorney assigned to the case was not available because he was away at a seminar. Therefore, the court gave the Commonwealth until November 2, 2012 to file a brief. The court also scheduled the case for jury selection on November 13, 2012 and a trial during the week beginning December 18, 2012.

On November 2, 2012, the Commonwealth filed a motion in limine in which it sought to introduce evidence regarding the child's leg injuries and torn frenulum, Defendant's prior criminal convictions, Defendant's statements, and portion of the transcripts from the dependency proceedings. The Commonwealth also indicated in the motion that it was withdrawing its motion to consolidate this case with the criminal case filed against the child's mother.

On November 13, 2012, the court issued an order in which it denied the Commonwealth's motion to admit transcripts from the dependency proceedings, granted the motion to admit evidence regarding the child's leg injuries and torn frenulum, granted Defendant's request to sever count 3 from counts 1 and 2, granted Defendant's request for a

continuance and scheduled the case for a pretrial conference on February 1, 2013. The court deferred ruling on the Commonwealth's motion to introduce Defendant's prior convictions, because Defendant argued that the Commonwealth conceded that the convictions were not admissible at an earlier proceeding and the court wanted to review the transcripts of that proceeding. On December 11, 2012, the court denied the Commonwealth's motion to admit Defendant's prior convictions.

The Commonwealth appealed the court's rulings on the inadmissibility of the transcripts of the dependency proceedings and Defendant's prior convictions on December 13, 2012 and January 2, 2013, respectively. In a decision filed on December 10, 2013, the Superior Court affirmed the trial court's ruling regarding Defendant's prior convictions, but reversed the court's ruling regarding the dependency transcripts. The Superior Court Prothonotary remanded the record on January 17, 2014, and it was received in Lycoming County on or about January 21, 2014.

On January 1, 2014, the Commonwealth filed a motion to amend the grading of the endangering the welfare of a child charge from a misdemeanor of the first degree to a felony of the third degree. A hearing and argument on that motion was originally scheduled for January 13, 2014, but it was moved to January 30, 2014. In an order dated January 30, 2014, but docketed February 4, 2014, the court granted the Commonwealth's motion. The court also noted that the defense did not appear for this hearing and argument. On March 3, 2014, Defendant filed a motion for reconsideration, which was heard on March 11, 2014 and denied on March 19, 2014.

On May 9, 2014, the Commonwealth filed a motion for discovery regarding Defendant's expert witness. This motion was granted and Defendant was directed to provide

supplemental information to the Commonwealth on or before July 15, 2014.

The case was scheduled for a pretrial conference on August 12, 2014, jury selection on August 28, 2014 and trial on September 23-25, 2014. On August 27, though, defense counsel requested a continuance, which was granted and the case was scheduled for a pretrial conference on September 23, 2014.

On September 25, 2014, the Commonwealth requested a continuance of the case from the October 13 – November 7 trial term, due to the unavailability of its witnesses. This continuance was granted and the case was scheduled for a pretrial conference on December 16, 2014.

The December 16 pretrial list was for two trial terms: the January 12-30, 2015 trial term and the February 17-March 12, 2015 trial term. Due to the unavailability of Commonwealth witnesses and difficulties with the court schedule, the case was not tried during either of these trial terms.

A jury was selected on March 31, 2015 and the jury trial is set to begin on April 27, 2015.

Defendant argues that the complaint was filed against him on November 30, 2009, that 1949 days have passed since that date, that more than 365 non-excludable days have elapsed, that the Commonwealth has failed to exercise due diligence to bring Defendant to trial and that all court orders filed in connection with the case should be reviewed according to the standards of Rule 600 and that the charges should all be dismissed. At the hearing on Defendant's motion on April 7, 2015, however, the court asked counsel for both parties whether its calculations should begin with the filing of the criminal complaint, the remand in July 2012 following the

Commonwealth's first appeal, or the remand in January 2014 upon the completion of the Commonwealth's second appeal. See Pa.R.Crim.P. 600 (A)(2)(a) and (e). As a result of defense counsel's acknowledgement that the Superior Court's decision reinstating the charges constituted a remand for a new trial, the Commonwealth excused one of its witnesses and did not present any evidence regarding the time period between the filing of the criminal complaint on November 30, 2009 and the first remand on July 16, 2012.

DISCUSSION

Rule 600 states, in relevant part:

(A) Commencement of Trial; Time for Trial

(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.

*** (e) When an appellate court has remanded a case to the trial court, the new trial shall commence within 365 days from the date of the written notice from the appellate court to the parties that the record was remanded.

(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.

(3)(a) When a judge or issuing authority grants or denies a continuance:

(i) the issuing authority shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance; and

(ii) the judge shall record the identity of the party requesting the continuance and the reasons for granting or denying the continuance. The judge also shall record to which party the period of delay caused by the continuance shall be attributed, and whether the time will be included in or excluded from the computation of the time within

which

trial must commence in accordance with this rule.

(b) The determination of the judge or issuing authority is subject to review as provided in paragraph (D)(3).

(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.

(3) Any requests for review of the determination in paragraph (C)(3) shall be raised in a motion or answer filed pursuant to paragraph (D)(1) or paragraph (D)(2). Pa. R. Crim. P. 600

Pa.R.Crim.P. 600.

At a Rule 600 hearing, the Commonwealth bears the burden to demonstrate, by a preponderance of the evidence, that the defendant was tried within the prescribed time period or that the Commonwealth exercised due diligence and the delay was beyond the Commonwealth's control. *Commonwealth v. Bradford*, 616 Pa. 122, 46 A.3d 693, 701 (Pa. 2012); *Commonwealth v. Thompson*, 93 A.3d 478, 488 (Pa. Super. 2014). “[D]ue diligence is fact-specific, to be determined case-by-case; it does not require perfect vigilance or punctilious care, but merely a showing the Commonwealth has put forth a reasonable effort.” *Bradford*, 46 A.3d at 701-702.

As Rule 600 (C) (1) makes clear, the only time that is included for purposes of a motion to dismiss the charges is when the proceedings have been delayed because of a lack of due diligence by the Commonwealth. All other periods of delay are excluded.

Following the filing of the complaint, this court entered two rulings adverse to the Commonwealth, which the Commonwealth appealed. In both instances, the Commonwealth was successful in overturning, at least in part, the trial court's rulings.

At the hearing, neither party disputed that following the first appeal, in which the court dismissed the charges but was overturned in part by the Superior Court, the 365-day period would be to run anew pursuant to Rule 600 (A) (2) (e) as of July 16, 2012, the date the Superior Court Prothonotary remanded the record.

The court must first address, however, whether the return of the record after the second appeal starts the 365-day period.

On November 2, 2012, the Commonwealth filed a motion in limine, which among other things, requested that the court admit transcripts of statements made by Defendant during prior dependency proceedings and sought to admit Defendant's *crimen falsi* convictions. The court denied the Commonwealth's motion to admit transcripts on November 13, 2012. The Commonwealth appealed on December 13, 2012. In a decision dated December 10, 2013, the Superior Court reversed in part the trial court's order, relinquished jurisdiction and remanded the case for further proceedings. Pursuant to the Superior Court docket, the record was remanded on January 17, 2014.

Defendant contends that the 365-day period did not begin to run again as of January 17, 2014. The court agrees. The language of Rule 600 specifically references the 365-day period commencing with respect to a new trial after a remand. The comments to the Rule specifically note that the 365-day period applies when an appellate court has remanded a case to the trial court "for a new trial."

Contrary to this language, former Rule 600 specifically noted that the required period commenced after a case was remanded. Indeed, the comments noted that the period commenced when the appellate court remanded the case "for whatever reason." *Commonwealth v.*

Anderson, 995 A.2d 1184, 1196 (Pa. Super. 2010), *appeal denied*, 9 A.3d 626 (Pa. 2010).

Clearly, the Pennsylvania Supreme Court intended to commence the new time period only when the case was remanded for a new trial. Otherwise, the language of the Rule would not have been changed to include the phrase “for a new trial.”

Accordingly, the court will calculate the appropriate days beginning with the date that the Superior Court Prothonotary remanded the record in connection with the first appeal, that being July 16, 2012. Pa.R.Crim.P. 600, comment (“When an appellate court has remanded a case to the trial court for a new trial, for purposes of computing the time for trial under paragraph (A)(2)(e) or the length of pretrial incarceration for purposes of paragraph (B)(5), the date of the remand is the date of the prothonotary’s notice to the parties that the record was remanded.”); Pa.R.A.P. 2572(e) (“The prothonotary of the appellate court shall note on the docket the date on which the record is remanded and give written notice to all parties of the date of the remand.”).

The total number of days between July 16, 2012 and the date of jury selection, March 31, 2015 is 988 days. In order for the Commonwealth to survive Defendant’s Rule 600 challenge, the Commonwealth will need to have proved that more than 623 days are excludable as not being caused by the Commonwealth because of a lack of due diligence.

The court concludes that all of the time between the date of remand on July 17, 2012 through the date the record was remitted following the second appeal on January 17, 2014 is excludable.

From July 17, 2012 through August 7, 2012, the case could not be called because a pretrial date was not available. This constitutes 21 days.

The case was scheduled for a pretrial conference on September 11, 2012. On

August 8, 2012, however, the court continued the pretrial to October 30, 2012 at the request of mother's counsel because mother's counsel was unavailable on September 11, 2012 and it was contemplated that the cases would be joined for trial. The time from August 8, 2012 through October 30, 2012 is 83 days.

The court held a conference on the outstanding issues from Defendant's omnibus pretrial motion on October 23, 2012. The Commonwealth's motion to consolidate also was scheduled for October 23, 2012. At the conference, defense counsel made an oral motion in limine to preclude the Commonwealth from presenting any evidence regarding the child's leg injuries and torn frenulum. After the conference, the court issued an order dated October 24, 2012, setting forth a briefing schedule on the outstanding issues and scheduling the case for jury selection on November 13, 2012 and trial for the week of December 18, 2012, which was the only week of the trial term that defense counsel was available.

On November 2, 2012 the Commonwealth filed a motion in limine, which included, but was not limited to, a request to permit it to introduce portions of transcripts from the child's dependency proceedings at which Defendant and his counsel made statements and representations on the record and evidence regarding Defendant's prior criminal history.

The case could not be tried at a pretrial conference. Therefore, co-defendant's continuance of the pretrial conference resulted in additional delay at least from October 30, 2012 to November 13, 2012, the date the case was scheduled for jury selection, which results in 15 additional days of excludable time under Rule 600 (C)(1).

In the alternative, due to the outstanding issues from Defendant's omnibus pretrial motion, which included severance of his case from the co-defendant's and the admissibility of

Defendant's statements, as well as the issues that defense counsel subsequently raised in his oral motions in limine regarding the admissibility of the child's leg injuries and torn frenulum and the request to sever count 3 from counts 1 and 2, the entire period of time from the remand following the first appeal until the court's order dated November 13, 2012 is 119 days of excludable time.

The court entered an order dated November 13, 2012 (which was docketed November 19, 2012). In that order, the court: (1) denied the Commonwealth's motion to admit the transcripts from the dependency proceeding, (2) granted the Commonwealth's motion to admit evidence regarding the child's leg injuries and torn frenulum but limited that evidence to count 3, endangering the welfare of a child; (3) granted the defense motion to sever count 3 from counts 1 and 2; (4) granted the defense motion to continue the case and scheduled a pretrial conference for February 1, 2013; (5) denied the Commonwealth's motion to admit Defendant's "prime suspect" comment; and (6) denied the Commonwealth's motion to admit any evidence regarding drug use. The court deferred ruling on the Commonwealth's motion to introduce Defendant's prior convictions, because Defendant argued that the Commonwealth conceded that the convictions were not admissible at an earlier proceeding and the court wanted to review the transcripts of that proceeding. The court denied the Commonwealth's motion to admit Defendant's prior criminal convictions in an order dated December 11, 2012.

The Commonwealth appealed the court's ruling regarding the dependency transcripts on December 13, 2012 and appealed the ruling regarding Defendant's prior criminal convictions on January 4, 2013. The record was not remitted until January 17, 2014.

The time period from the defense continuance on November 13, 2012 to the Commonwealth's appeal on December 13, 2012 is 30 days of excludable time.

The time period from December 13, 2012 to January 17, 2014 is 400 days. Accordingly, the total excludable days from July 17, 2012 through January 17, 2014 are 549 days. Subtracting this from 623 leaves 74 days. If the Commonwealth proves that 74 days are excludable from January 17, 2014 to jury selection, March 31, 2015, it will survive Defendant's Rule 600 motion.

Perhaps an easier way of evaluating the issue is to start with the remitter date of January 17, 2014 because all of those days have been excluded prior to that date. The total number of days from January 17, 2014 to March 31, 2015 are 439 days. Subtracting 365 days from this figure equals 74 days.

The first trial term in 2014 was from February 24 through March 14, 2014, with jury selection days from February 11-13, 2014. The pretrial conference date for this term, though, was January 14, 2014, before the Superior Court Prothonotary remanded the record. As evidenced by the testimony presented at the hearing, the Commonwealth would send subpoenas to their witnesses prior to the pretrial conference. Thus, as a practical matter, this trial term was not available for this case. The next pretrial date was March 18, 2014, for the trial term from April 14 through May 2, 2014. The jury selection dates for this term were April 1-3, 2014. Therefore, the time period from January 17, 2014 through at least April 1, 2014 is 74 days of excludable time, because the earliest date that trial could have commenced for Rule 600 purposes would have been at jury selection.

The Commonwealth also filed a motion to amend the grading of count 3 from a misdemeanor of the first degree to a felony of the third degree based on a course of conduct. The court held a hearing and argument on this motion on January 30, 2014, but neither defense

counsel nor Defendant appeared. The court granted the Commonwealth's motion on January 30, 2014, but the order was not docketed until February 4, 2014.

On March 3, 2014, Defendant filed a motion to reconsider that order. The motion was still pending as of the date of the next pretrial, that being March 18, 2014. Because the motion was still pending, the case could not be pre-tried. The next pretrial date was May 6, 2014. The Court finds that the time from March 3, 2014 to May 6, 2014 cannot be attributed to the Commonwealth. These 65 days are excludable, because the delay was attributable to Defendant's motion.

The case was not set for the May 6, 2014 pretrial. The trial term associated with that pretrial date was June 2-20, 2014, with jury selections May 20-22, 2014. Sometime in May, though, the District Attorney's office contacted Eileen Dgien, the Deputy Court Administrator, and asked her to put the case on the next pretrial list.

Even if the Commonwealth had contacted Ms. Dgien early enough to put the case on the May 6 pretrial list, the case could not have been tried in the June 2014 trial term. On May 9, 2014, the Commonwealth filed a motion for discovery pertaining to Defendant's expert witness. This motion was heard and granted on June 2, 2014. An amended order dated June 11, 2014, directed the defense to provide the supplemental information on or before July 15, 2014. Since the Commonwealth did not have discovery relevant to Defendant's expert prior to the June trial term, the case could not have been tried during that term despite the Commonwealth's diligence. Therefore, the 67 days between the Commonwealth's motion for discovery on May 9 and the defense deadline for providing discovery on July 15, 2014 is excludable under Rule 600 (C)(1).

Defense counsel contends this time should not be excluded because the Commonwealth could have requested this discovery any time after the case was held for court in 2010. The court cannot agree.

Shortly after the charges were held for court, Defendant filed his omnibus motion which sought habeas corpus relief. The court granted that relief. There was no reason to request expert discovery during the period from the filing of Defendant's omnibus motion until the conclusion of the appeal. Once the appeal was over, there were issues regarding the interpretation of the Superior Court's decision and the admissibility of evidence regarding the child's leg injuries and torn frenulum. The court ruled on this issue shortly before the Commonwealth took its second appeal. The second appeal took approximately 13 months. It would not have made sense to request the expert discovery during the second appeal, because issues could be raised whether the court would have jurisdiction to entertain such a motion.

Finally, even if an appellate court would find that this time period was not technically excludable, the motion shows that the Commonwealth was taking reasonable efforts to prepare this case and proceed to trial.

The next pretrial was August 12, 2014 with call of the list set for August 26, 2014. The case was placed on the August 12 pretrial and was set for jury selection on August 28, 2014.

On August 28, 2014, the court granted Defendant's request for a continuance. The case was continued to the next pretrial on September 23, 2014 with call of the list set for October 7, 2014. The Commonwealth filed a continuance on September 25, 2014. The court finds that the 28 days between August 28 and September 25 are excludable.

Defense counsel contends that this time is not excludable despite the fact that the

defense requested a continuance, because the continuance was necessitated by the Commonwealth's failure to provide discovery in a timely manner. The court cannot agree.

Initially, the court notes that there is nothing in the record to indicate that the defense ever filed a formal request for discovery or ever filed a motion to compel discovery. The defense also did not seek other avenues of relief such as a motion to exclude evidence at trial. Instead, the defense elected to request a continuance.

On August 27, 2014, defense counsel sent an email to Judge Gray indicating he was requesting a continuance because he had just received CDs of Defendant's prison phone calls, excerpts from mother's Facebook account, some photographs and some medical records. In response to defense counsel's email, the prosecutor indicated that he would not be using the prison phone recordings at trial, he would not be introducing the medical records except for the x-rays and Dr. Bellino's expert report, and he believed he had previously provided all of the materials except the Facebook photographs. The prosecutor also indicated that he would present testimony from the child's pediatrician, Dr. Martin, consistent with the testimony he provided at mother's trial, but Dr. Martin never prepared a report. The prosecutor requested a copy of the transcript from mother's trial, but he had not received it yet. The prosecutor also stated that he believed the Facebook material was available for anyone to view, it was not mandatory discovery, and it was provided merely to avoid delay at trial. Despite the prosecutor's responses, the defense still wanted a continuance and the prosecutor had no objection.

Even if this time would not be considered attributable to the defense, it would nonetheless be excludable. As reflected in defense exhibit 1, even if Defendant had not requested a continuance, the Commonwealth would have had to request a continuance because court

administration had inadvertently scheduled the affiant, Agent Kevin Stiles, for two different trials on the same dates. Agent Stiles was the affiant for a rape case, which was scheduled for trial September 23-24, 2014 and this case, which was scheduled for trial September 23-25, 2014.

On September 25, 2014, the Commonwealth requested a continuance for the October 13 – November 7, 2014 trial term, because the unavailability of its witnesses made it “unavailable the whole term.” The witnesses and their dates of unavailability are listed in Commonwealth Exhibit 2. The case was continued to the December 16, 2014 pretrial with call of the list set for January 6, 2015 or February 10, 2015.

With respect to the January term, defense counsel was available January 19-26, but the Commonwealth as not available for any of the trial dates. With respect to the February term, the Commonwealth’s witnesses were available only February 17-20, and 24- 25. February 16 was a holiday. This case was listed as a three-day trial. The undersigned had trials on February 17 and was not available from February 19 and 20. The undersigned was not available on February 25 nor were other judges due to the statewide trial judges’ conference. The case was not reached in the February/March term due to the limited numbers of days the Commonwealth witnesses were available, the estimated length of the trial and the unavailability of any judge for three consecutive days when the Commonwealth witnesses were available.

The Commonwealth contends that 71 days from August 28, 2014 to November 7, 2014 are excludable due to Defendant continuing the pretrial. The Commonwealth further argues that the dates from November 7, 2014 to January 30, 2015 are excludable because the Commonwealth was granted a continuance for unavailable witnesses. The Commonwealth contends that the time period from January 30, 2015 to March 16, 2015 is excludable because

there were no trial dates available. Finally, the Commonwealth contends that the timeframe from March 6, 2015 to March 31, 2015 is excludable because the Court continued the case to the March 17, 2015 pretrial.

The Commonwealth's continuance was granted on September 25 because of witness unavailability. The next pretrial was December 16, 2014 with call of the list set for January 6, 2015.

Defendant contends that none of this time is excludable because the Commonwealth failed to exercise due diligence. The Court cannot agree.

As testified to by the Deputy Court Administrator, Eileen Dgien, the case was placed on the December 16, 2014 pretrial for jury selection on January 12, 2015 or February 10, 2015. According to information provided by the parties, defense counsel was only available from January 19 through January 26. The Commonwealth was only available from February 17 to February 20, February 24 and February 25. Presumably, defense counsel was available for February.

The dates of the Commonwealth's unavailability were as set forth in Commonwealth's Exhibit 4.

The case was not reached because of the inability to complete the trial during the dates that opposing counsel and their respective witnesses were available. Accordingly, the case was placed on the next pretrial list, that being March 17, 2015 with jury selection scheduled for March 31, 2015.

The court finds that the time from September 25, 2014 through jury selection on March 31, 2015 is excludable. The Commonwealth presented testimony and exhibits at the

hearing to establish that its witnesses were unavailable for trial during the October 13-November 7, 2014 trial term, the January 2015 trial term and the February 2015 trial term. The Commonwealth exercised due diligence by insuring that the case was on the December 16, 2014 pretrial list. Jury selection was scheduled for either January or February with the respective trial terms scheduled for January and February. While defense counsel was available for the January term, the Commonwealth was not; and while the Commonwealth was available for the February term, and while the Defendant was also available presumably for the February term, given the Commonwealth's limited availability and the expected length of the trial, the case could not be set. This is not the Commonwealth's fault and cannot be said to be due to the Commonwealth not exercising due diligence.

Much has been made of the Commonwealth's listing cases for trial and then precluding certain trial dates because of witness availability. As testified to by the Commonwealth witnesses, the process involved subpoenas going out to the respective Commonwealth witnesses and those witnesses being directed to contact the District Attorney's office. If respective witnesses contacted the District Attorney's office indicating that they were unavailable for a particular reason, that being a work obligation or a previously scheduled vacation, the Commonwealth would list such on their witness availability sheet. If it appeared that necessary witnesses were not available, the Commonwealth would submit a continuance request.

Defense counsel asserts that the Commonwealth was obligated to further investigate witness unavailability. Defense counsel posits that the Commonwealth should ensure that witnesses are unavailable through inquiring as to the reasons for unavailability and taking efforts to rectify any unavailability. Defendant's position, however, is both unreasonable and

contrary to the law. The Commonwealth is not required to exercise perfect vigilance or to take exacting measures in order to ensure that a case is called to trial. The court finds that the Commonwealth has satisfied its due diligence requirement by initially subpoenaing the necessary witnesses, then speaking with the witnesses and then communicating their unavailability if the unavailability met the requisite standard. This is not a situation where the Commonwealth simply accepts a witness' claim of unavailability for any reason.

Furthermore, it is not incumbent on the Commonwealth to call each witness to establish his or her unavailability. As the Superior Court noted in *Commonwealth v. Hollingsworth*, 499 A.2d 381, 388-389 (Pa. Super. 1985) a finding of due diligence may be based on judicial notice of facts contained in uncontested notations in court records or a defense challenge can be met with testimony from members of the prosecutorial team. This is what the Commonwealth has done in this case. The Commonwealth noted its reasons on its continuance requests and called as witnesses the individuals in the District Attorney's office who sent the subpoenas to the witnesses and spoke to them regarding their unavailability.

Although it certainly would have been helpful if the Commonwealth had recorded the specific reasons for the witnesses' unavailability (and the court would encourage the Commonwealth to do so in the future), Ms. Rasdorf credibly testified that each witness provided a valid reason at the time. This case involves several medical witnesses from the Williamsport Hospital and the Geisinger Medical Center in Danville, whose schedules and availability are difficult to coordinate, and a defense attorney from outside of the area.

Even if the time period from December 16, 2014 through March 31, 2015 would not be excludable, there is enough other excludable time following the July 16, 2012 remand that

Defendant is not entitled to dismissal of the charges.

ORDER

AND NOW, this 21 day of April, 2015 following a hearing and the submission of briefs, the Court **DENIES** Defendant's motion to dismiss.

By The Court,



Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
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