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Constitutional Right to Speedy Trial - Pennsylvania Rule of Criminal Procedure 1100

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CONSTITUTIONAL RIGHT TO SPEEDY TRIAL—PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 1100—Commonwealth's failure to monitor court dates constitutes failure of due diligence.

Commonwealth v Browne, 526 Pa 83, 584 A2d 902 (1990).

In a criminal complaint dated April 5 and filed with the District Justice April 6, 1987, Edward Browne, Jr. was charged with driving under the influence of alcohol and two companion summary offenses.[1] The complaint and summons were mailed to Browne on April 21, 1987.[2] The initial date set by the District Justice for a preliminary hearing was June 17; however, the hearing was actually held on July 1, 1987, pursuant to a continuance requested by the defendant.[3] Finding that a prima facie case of driving under the influence of alcohol existed, the District Justice ordered the case held over for trial by the Court of Common Pleas, and had the defendant served with a "Notice of Arraignment"[4] dated July 1.[5] The notice scheduled the defendant for arraignment on September 30, 1987.[6] Although the District Justice actually assigned the arraignment date, it is significant to note that the ultimate responsibility to conduct arraignments rested with the District Attorney, pursuant to Lancaster County's Local Rule of Criminal Procedure Number 303.[7] A transcript of the preliminary hearing was received

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1. *Commonwealth v Browne*, 526 Pa 83, 584 A2d 902, 903 (1990). The charges were brought under the Vehicle Code, 75 Pa Cons Stat Ann. Id. The two summary offenses involved were "driving on the right side of a roadway," 75 Pa Cons Stat Ann § 3301 (Purdon 1977), and "period for required lighted lamp," 75 Pa Cons Stat Ann § 4302 (Purdon 1977). Brief for Appellee at 1, *Commonwealth v Browne*, (Pa Super 1987) (No 3516).

2. *Browne*, 584 A2d at 903.

3. Id. The issue in *Browne* centered on the Commonwealth's failure to bring the defendant to trial within the 180 day period mandated by the then-in-effect PaRCrP 1100. The date the complaint was filed was significant in that it marked the starting point for calculating the 180 day period. Id.

4. A "Notice of Arraignment" is prepared by the District Justice at the conclusion of the preliminary hearing for cases being held for trial in Lancaster County. The defendant is served with the notice, which specifies the scheduled date of the defendant's arraignment. Brief for Appellee at 2, *Commonwealth v Browne*, (Pa 1990) (No 4).

5. *Browne*, 584 A2d at 903.

6. Id at 904. The case was held for trial by the Court of Common Pleas pursuant to PaRCrP 143. Id.

7. Id at 904 n.1. The local rule states, in pertinent part:

> A. Arraignment shall be conducted by the District Attorney or his court approved designee, who shall be called the Arraignment Officer. Arraignment shall consist of calling the accused before the Arraignment Officer, identifying him, advising him of

by the Clerk of Courts for Lancaster County on July 8, 1987, and a copy of the "Notice of Arraignment" was received by the District Attorney's office at approximately the same time.[8] The assigned arraignment date of September 30, 1987 corresponded to the November, 1987 term of the Court of Common Pleas in Lancaster County.[9] The system in use in the county assigned a given case to the court term corresponding to the date of arraignment.[10] The effect, therefore, of the District Justice's assignment of the September 30th arraignment date was that the defendant could be brought to trial no earlier than November 9, 1987 (the first day of the November, 1987 term of court).[11]

Rule 1100(a)(2) of the Pennsylvania Rules of Criminal Procedure (hereinafter "Rule 1100(a)(2)"), which was in effect at all times relevant to this case, required that a criminal trial be commenced within 180 days of the filing of the written complaint that initiated the action.[12] The November 9, 1987 trial date was subsequent to the expiration of the 180 day maximum period allowed under Rule 1100.[13]

The Commonwealth filed an information[14] against Browne on

> the charges in the information, furnishing him a copy of the information, and advising him of his right to counsel and of the time periods within which he may commence discovery, file an omnibus pretrial motion and request a bill of particulars.

Id, citing Lancaster County Local Rule of Criminal Procedure 303.

8. *Browne*, 584 A2d at 903. The exact date the District Attorney's office received the "Notice of Arraignment" is uncertain. Id. However, the trial court's opinion indicates that the notice was received around July 8, 1987. *Commonwealth v Browne*, No 1331, slip op at 2 (Pa Com Pl, Lancaster Cty, March 14, 1988).

9. *Browne*, 584 A2d at 904. The judicial district of Lancaster County has a term system of criminal trials, consisting of six two-week terms of court annually. Each term has a corresponding date of "arraignment court." Id.

10. Id. The trial court's Memorandum Opinion noted that there was a two-week term of court, commencing on September 8, 1987, followed by a two-week term commencing November 9, 1987. The "arraignment court" dates identified on the court's published calendar which corresponded to these terms were July 29 and September 30, 1987, respectively. Id.

11. Id at 905.

12. Id at 903. Rule 1100(a)(2), which was in effect at all times relevant to this case (repealed December 31, 1987), stated: "Trial in a court case in which a written criminal complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed." PaRCrP 1100(a)(2). Accounting for the fourteen day delay attributable to the defendant (the continuance to July 1, from the original June 17, 1987 preliminary hearing date), the 180 day period lapsed on October 18, 1987. *Browne*, 584 A2d at 905.

13. *Browne*, 584 A2d at 905.

14. An information is similar to an indictment except that the former is issued by a public official, while the latter is issued by a grand jury. *Black's Law Dictionary* 701 (West, 5th ed 1979).

August 5, 1987.[15] The Commonwealth then timely filed a Petition for Extension of Time for Commencing Trial.[16] On November 2, the trial court denied the petition, and on November 23, 1987, the defendant filed a Motion to Dismiss pursuant to Rule 1100.[17] The court granted the motion and dismissed the charges on November 23, 1987.[18] The trial judge found that the Commonwealth was not entitled to an extension of time to commence trial absent a satisfactory reason for the delay that would demonstrate the exercise of due diligence on the part of the District Attorney.[19]

The Commonwealth appealed to the superior court, which reversed the trial court and held that the Commonwealth had satisfied the standard of due diligence and was not responsible for the delay.[20] The intermediate appellate court relied primarily on *Commonwealth v Monosky*,[21] which held that the Commonwealth was generally not responsible for delays occasioned by other "agencies" within the criminal justice system.[22] The superior court concluded that it was the District Justice's scheduling of the arraignment, not the District Attorney, that precipitated the delay.[23] The superior court concluded it would not hold the Commonwealth responsible

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15. *Browne*, 584 A2d at 905.

16. Id. The Commonwealth's petition averred that the cause of the delay was the scheduling of the arraignment for September 30, 1987. *Browne*, No 1331 of 1987, slip op at 4 (Pa Com Pl, Lancaster Cty, March 14, 1988).

17. *Browne*, 584 A2d at 905.

18. Id. In his Memorandum Opinion, Judge Perezous distinguished the instant case from *Commonwealth v Monosky*, 511 Pa 148, 511 A2d 1346 (1986). Judge Perezous reasoned that, unlike the situation in *Monosky*, the District Attorney had received notice of the District Justice's actions in ample time to correct the Rule 1100 problem presented. The trial court concluded that the District Attorney should have been prepared to bring the case to trial during the September term of the Criminal Court, and failure to do so was a lack of due diligence. *Browne*, No 1331, slip op at 3, 4 (Pa Com Pl, Lancaster Cty, March 14, 1988).

19. *Browne*, No 1331, slip op at 4 (Pa Com Pl, Lancaster Cty, March 14, 1988).

20. *Browne*, 584 A2d at 905.

21. 511 Pa 148, 511 A2d 1346 (1986).

22. *Browne*, 584 A2d at 905. Judges Cavanaugh and Brosky were in the majority, with Judge Montemuro dissenting. *Browne*, No 03516, slip op at 1, 8 (Pa Super 1987). The Supreme Court's opinion indicated that the superior court had relied on *Monosky* in reaching their conclusion. *Browne*, 584 A2d at 905. However, the superior court had noted that *Monosky* differed from the instant case in that here the Commonwealth was made aware of the charges and the arraignment date in ample time to take action to avoid a Rule 1100 problem. *Browne*, No 03516, slip op at 4 (Pa Super 1987). The superior court then stated that they found no precedent directly on point. Their analysis cited several cases involving other agencies within the system, and concluded that *Commonwealth v Lamb*, 309 Pa Super 415, 455 A2d 678 (1983), was most closely analogous. *Browne*, No 03516, slip op at 6 (Pa Super 1987). See also *Commonwealth v Harris*, 315 Pa Super 544, 462 A2d 725 (1983); *Commonwealth v Lewis*, 287 Pa Super 64, 429 A2d 721 (1981).

23. *Browne*, 584 A2d at 905.

for failing to oversee the actions of the District Justice, just as the court had not historically "held the Commonwealth responsible for derelictions on the part of other agencies within the system."[24]

Browne's appeal to the Pennsylvania Supreme Court was founded upon the issue of whether the Commonwealth had acted with due diligence when the District Attorney failed to monitor the assignment of arraignment dates to ensure that the mandate of Rule 1100(a)(2) was met.[25]

The supreme court[26] reversed the superior court, concluding that the District Attorney, who was ultimately responsible for scheduling arraignments, had not met the test of due diligence.[27] The court reasoned that to expect the District Attorney's office to ensure compliance with Rule 1100 by maintaining a simple diary monitoring court dates was not unreasonably burdensome, and that failure to do so was a failure to exercise due diligence.[28] The court concluded that it was the District Attorney's failure to monitor the docket, not the District Justice's assignment of arraignment dates, that ultimately was responsible for the delay.[29] Consequently, the trial court's decision dismissing the charges against Browne with prejudice was reinstated.[30]

In his concurring opinion, Justice Zappala cited a number of in-

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24. *Browne*, No 03516, slip op at 8 (Pa Super 1987).

25. *Browne*, 584 A2d at 905. PaRCrP 1100(c)(3) allowed the Commonwealth to motion for an extension of time to commence trial so long as the Commonwealth had exercised due diligence. Subsection (c)(3) of the rule required that:

> Such motion shall set forth facts in support thereof, and shall be granted only upon findings based upon a record showing that trial can not be commenced within the prescribed period despite due diligence by the Commonwealth and, if the delay is due to the court's inability to try the defendant within the prescribed period, upon findings based upon a record showing the causes of delay, and the reasons why the delay cannot be avoided.

PaRCrP 1100(c)(3).

26. The four member majority consisted of Chief Justice Nix and Justices Flaherty, Zappala and Papadakos. Justices Larsen and Cappy dissented. Justice McDermott did not participate in the consideration of this case. *Browne*, 584 A2d at 903, 906.

27. Id at 906. The court cited *Commonwealth v Smith*, 477 Pa 424, 383 A2d 1280, 1282 (1978), and *Commonwealth v Polsky*, 493 Pa 402, 426 A2d 610 (1981), in support of their view that the due diligence requirement required the prosecution to do everything reasonably within their power to bring the case to trial in a timely manner. *Browne*, 584 A2d at 905.

28. *Browne*, 584 A2d at 906. The court thus rejected the Commonwealth's contention that to require the District Attorney to monitor the district justices to insure proper scheduling exceeded the requirements of "reasonable effort" enunciated in *Polsky*, 426 A2d 610 (1981). Brief for Appellee at 6, 12, *Commonwealth v Browne*, 584 A2d 902 (Pa 1990) (No 4).

29. *Browne*, 584 A2d at 906.

30. Id.

stances in which the court allowed cases to go to trial under exceptions to Rule 1100, and in which he had filed dissenting opinions.[31] Justice Zappala opined that the rule had been viewed as impotent prior to the *Browne* decision and accordingly went on to applaud the majority decision, which he hailed as revitalizing the rule.[32] In his opinion, the exceptions had swallowed the rule and its rebirth was necessary.[33]

Justice Larsen's one sentence dissenting opinion stated that he would have affirmed the superior court on the basis of its Memorandum Opinion.[34] Justice Cappy dissented without comment.[35]

The concept of the right to a speedy trial predates the Magna Carta,[36] and is incorporated into the United States Constitution by the Sixth Amendment.[37] The United States Supreme Court has ruled that the constitutional right to a speedy trial is "fundamental"[38] and is enforceable against the states under the Fourteenth Amendment.[39]

While recognizing a clear right to a speedy trial, the Supreme Court did not attempt to articulate the criteria by which that right was to be measured until its opinion in *Barker v Wingo*.[40] The Court in *Barker* specifically refused to quantify a specific period of time within which a defendant must be brought to trial before finding that the right to a speedy trial had been denied.[41] The

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31. Id. See *Commonwealth v Bond*, 516 Pa 171, 532 A2d 339 (1987) (Zappala dissenting); *Commonwealth v Koonce*, 511 Pa 452, 515 A2d 543 (1986) (Zappala dissenting); *Monosky*, 511 A2d 1346 (1986) (Zappala dissenting); *Commonwealth v Terfinko*, 504 Pa 385, 474 A2d 275 (1984) (Zappala dissenting); *Commonwealth v Manley*, 503 Pa 482, 469 A2d 1042 (1983) (Zappala dissenting); *Commonwealth v Green*, 503 Pa 278, 469 A2d 552 (1983) (Zappala dissenting); *Commonwealth v Crowley*, 502 Pa 393, 466 A2d 1009 (1983) (Zappala dissenting).

32. *Browne*, 584 A2d at 906.

33. Id.

34. Id.

35. Id.

36. J. Verney, *And the Saints Go Marching Out - Rule 1100: Pennsylvania's Implementation of the Right to a Speedy Trial*, 16 Duquesne L Rev 531, 533 (1977-78). For a general historical perspective of the origin of the right to a speedy trial, see Verney, 16 Duquesne L Rev at 533 (cited within this note); *Klopfer v North Carolina*, 386 US 213, 223-26 (1967).

37. US Const, Amend VI. The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." Id.

38. *Klopfer*, 386 US at 223.

39. Id at 222, 223.

40. 407 US 514 (1972).

41. *Barker*, 407 US at 523. The Court reasoned, "[w]e find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or

opinion, however, noted that the states are "free to prescribe a reasonable period consistent with constitutional standards."[42] The Court rejected any requirement that a defendant specifically request a trial before he could assert that his right to a speedy trial had been violated.[43] The standard that emerged was a balancing analysis, which required that each case be resolved upon its specific facts.[44] Four factors were identified for consideration: "the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant."[45] The Court also specified that the only possible remedy for violation of the right to a speedy trial was a dismissal of the indictment.[46]

Concomitant with the federal requirements imposed by the Sixth and Fourteenth Amendments, the Pennsylvania constitution independently mandates the right to a speedy trial.[47] Prior to the Supreme Court's articulation of its balancing test in *Barker*, Pennsylvania had employed a "two term" or "180-day" rule to determine whether the right to a speedy trial had been violated.[48] Shortly after *Barker* was decided, the Pennsylvania Supreme Court again had occasion to address the right to a speedy trial in

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months." Id.

42. Id.

43. Id at 524. The Court observed that most states had adopted rules (referred to as the "demand waiver" doctrine) that provided that a defendant waived consideration of his right to a speedy trial for the time period prior to the point where the defendant actually demanded a trial. Id. The Court found the presumption of silence as a waiver to be inconsistent with the Court's previous pronouncements on the waiver of constitutional rights. Id. Accordingly, the Court rejected the rule that a defendant who fails to demand a speedy trial absolutely waives his right. Id at 528.

44. Id at 530. The Court summarized its decision: "We, therefore, reject both of the inflexible approaches — the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." Id at 529-30.

45. Id at 530.

46. Id at 522.

47. Pa Const, Art 1, § 9. The relevant portion of § 9 states, "[i]n all criminal prosecutions the accused hath a right to a speedy public trial by an impartial jury of the vicinage." Id.

48. *Commonwealth v Hamilton*, 449 Pa 297, 297 A2d 127, 130 (1972). The two term rule provided for discharge from imprisonment of an accused who was not tried by the second term after his commitment. Such a discharge from incarceration only entitled the accused to release on bail until the case could be brought to trial. *Hamilton*, 297 A2d at 130. See *Smith v Patterson*, 409 Pa 500, 187 A2d 278 (1963). The court maintained that the Pennsylvania constitution's mandate for a speedy trial "does not, in itself, warrant anything beyond a discharge from imprisonment where indictment or trial is delayed." *Smith*, 187 A2d at 278.

Commonwealth v Hamilton.[49] The court concluded that the "two term" rule previously utilized in the Commonwealth was inconsistent with the federal rule articulated in *Barker.*[50] The federal balancing test supplanted the now unconstitutional "two term" rule, and was applied by the court in the *Hamilton* case which resulted in the defendant's release.[51]

Having rejected the previous Pennsylvania standard, the court expressed dissatisfaction with the federal balancing test and observed that "experience has demonstrated that under this type of approach, there has been little success in eliminating criminal backlogs in populous counties where delays and the evils they create are most severe."[52] The more efficient approach, the court concluded, was to set a fixed time period within which the accused must be either brought to trial or released with prejudice.[53] Accordingly, the supreme court referred the matter to the Criminal Procedure Rules Committee for study and recommendation.[54] The result of the Committee's study was the promulgation of Rule 1100.[55]

The original fixed time period rule, adopted by the Supreme Court of Pennsylvania in June of 1973, allowed the Commonwealth an opportunity to request an extension of the specified period at any time prior to the expiration of the period.[56] The rule mandated

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49. 449 Pa, 297, 297 A2d 127 (1972). Hamilton, the principal suspect in a Philadelphia murder, was incarcerated in South Carolina. Pennsylvania authorities, knowing his whereabouts, lodged an arrest detainer against the defendant in 1965 charging him with murder. No attempt was made to prosecute Hamilton until he initiated proceedings to remove the detainer in 1971 (a delay of more than six years). *Hamilton,* 297 A2d at 128.

50. Id at 131. In the court's opinion, the fatal shortcoming of the "two term" rule was its failure to require the dismissal of the charges with prejudice. Id.

51. Id at 128.

52. Id at 131-32.

53. Id at 132. The court accepted the theory of a fixed period on the supposition that such a rule eliminates the vagueness inherent in any type of balancing process, and avoids the judicial burden of deciding each case on an individual basis. Id. The court expressed a belief that "a mandatory time requirement will act as a stimulant to those entrusted with the responsibility of managing court calendars." Id at 133.

54. Id.

55. PaRCrP 1100, 42 Pa Cons Stat Ann (Purdon 1989). The original rule, devised pursuant to *Hamilton,* was adopted June 8, 1973, and was effective prospectively as set forth in paragraphs (a)(1) and (a)(2) of the rule. There have been several modifications of the rule since its adoption, specifically: paragraph (e) amended December 9, 1974, effective immediately; paragraph (e) re-amended June 28, 1976, effective July 1, 1976; amended October 22, 1981, effective January 1, 1982; amended December 31, 1987, effective immediately; paragraph (g) amended September 30, 1988, effective immediately. Id, notes and comments following the statute.

56. PaRCrP 1100 adopted June 8, 1973 and in effect with further amendments until

that such application was to be granted only if trial could not have been commenced within the prescribed period, despite due diligence on the part of the Commonwealth.[57] A similar exception survived the amendment of the rule promulgated on October 22, 1981 (in effect at the time of *Commonwealth v Browne*).[58]

In order to prevail on a petition for an extension of the prescribed time period, the Commonwealth has the burden of proving by a preponderance of the evidence that it has exercised due diligence.[59] The courts have interpreted due diligence to require the exercise of efforts reasonable to the circumstances,[60] not that every conceivable effort be made.[61] The Pennsylvania Supreme Court

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October 22, 1981.

57. Id at § c.

58. PaRCrP 1100 amended October 22, 1981, effective until December 31, 1987, sections (c)(1) and (c)(3). These sections stated:

> (c)(1) At any time prior to the expiration of the period for commencement of trial, the attorney for the Commonwealth may apply to the court for an order extending the time for commencement of trial.
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> * * *
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> (c)(3) Such motion shall set forth facts in support thereof, and shall be granted only upon findings based upon a record showing that trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth.

Id.

A similar due diligence exception has survived to Rule 1100's present form as amended on December 31, 1987, with a further amendment to subsection (g), which was effective September 30, 1988. PaRCrP 1100, 42 Pa Cons Stat Ann (Purdon 1989).

The present statute has extended the time period within which the accused must be brought to trial to 365 days, id at subsection (g), but mandates the release of an incarcerated defendant on nominal bail after 180 days. Id at subsection (e). The section of the statute dealing with the due diligence exception is now subsection (g), which states:

> (g) For defendants on bail after the expiration of three hundred sixty-five (365) days, at any time before trial, the defendant or his attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth, who shall also have the right to be heard thereon.
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> If the court, upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, the Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time, it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant.

Id at subsection (g).

59. *Commonwealth v Ehredt*, 485 Pa 191, 401 A2d 358, 360 (1981).

60. *Commonwealth v Williams*, 317 Pa Super 456, 464 A2d 411, 417 (1983).

61. *Commonwealth v Colon*, 317 Pa Super 412, 464 A2d 388, 395 (1983). In *Polsky*, 426 A2d 610 (1981) (cited in note 27), the supreme court stated that the requirement of due diligence imposed by Rule 1100 on the Commonwealth's efforts to execute an arrest warrant

has held that prosecutors must do everything reasonably within their power to see that a case with possible Rule 1100 problems is tried on time.[62] The standard for due diligence, specifically what is "reasonable," is malleable, and the court in the past has often allowed the Commonwealth considerable leeway.

The flexibility of the due diligence standard was demonstrated in *Commonwealth v Mayfield*.[63] In *Mayfield*, the court allowed the Commonwealth's application for an extension of time for the sole reason that the trial court's calendar was too congested to bring the case to trial before the expiration of the mandated time period.[64] The Supreme Court of Pennsylvania maintained that, in spite of the fact that a fundamental tenet underlying Rule 1100 was the intent to promote prompt action by courts and prosecutors, the Rule was not intended to be inflexible.[65] Concluding their opinion, the court indicated that trial courts could grant extensions under Rule 1100 upon a showing of due diligence by the prosecution with a certification that the trial was scheduled for the earliest possible date.[66]

The rule set forth in *Mayfield*[67] was applied in *Commonwealth v*

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did "not demand perfect vigilance and punctilious care, but rather a reasonable effort." *Polsky*, 426 A2d at 613.

62. *Commonwealth v Smith*, 477 Pa 424, 383 A2d 1280, 1282 (1978). The court held that the Commonwealth did not show due diligence when it reassigned the prosecutor handling the case to another trial and did not assign another prosecutor to handle the instant case before the expiration of the prescribed period. The court specifically noted that there may be instances where the Commonwealth has more cases with Rule 1100 problems than they have available prosecutors, but that was not the case here. *Smith*, 383 A2d at 1282.

63. 469 Pa 214, 364 A2d 1345 (1976). The prosecution was prepared to try the accused on drunken driving charges three months before the 180 day time period was to expire. Due to a backlog of cases, the earliest available trial date was ten days after the period expired. *Mayfield*, 364 A2d at 1349.

64. Id at 1346.

65. Id at 1348. Conceding that, despite due diligence, it may sometimes be possible that a trial cannot be commenced within the required time frame, the court reasoned that the policies that prompted the promulgation of Rule 1100 would not be served by disallowing a reasonable extension which specified when the trial would be held. Id.

66. Id at 1349.

67. The rule announced was:

> Henceforth, the trial court may grant an extension under rule 1100(c) only upon a record showing: (1) the "due diligence" of the prosecutor, and (2) certification that trial is scheduled for the earliest possible date consistent with the court's business; provided that if the delay is due to the court's inability to try the defendant within the prescribed period, the record must also show the causes of the court delay and the reasons why the delay cannot be avoid.

Id at 1349-50.

This two prong requirement was incorporated into Rule 1100 as amended October 22, 1981, effective January 1, 1982. PaRCrP 1100(c)(3), which was in effect at all times perti-

Lamb.[68] The *Lamb* court held that the Commonwealth had satisfied the rule by filing its petition for extension within the prescribed period, stipulating with opposing counsel that other cases on the docket had earlier run dates,[69] and representing to the court that the Commonwealth was prepared to go to trial before the expiration of the period but was unable to do so because of the unavailability of any criminal trial terms prior to the run date.[70]

The supreme court refined the *Mayfield* test in *Commonwealth v Crowley*.[71] In *Crowley*, the court held that *Mayfield* "does not require the Commonwealth to exhaust the possibility of rearranging overcrowded court dockets to accommodate the Rule 1100 run dates regardless of that rearrangement's effect on other matters."[72] This view was fortified in *Commonwealth v Terfinko*,[73] where the court, finding in favor of the Commonwealth, said it would refuse

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nent to this case. *Browne*, 584 A2d at 903. The rule was later amended effective December 31, 1987, with a further amendment to subsection (g) effective September 30, 1988. PaRCrP 1100, 42 Pa Cons Stat Ann (Purdon 1989), notes and comments following the statute.

68. 309 Pa Super 415, 455 A2d 678 (1983). In *Lamb* the defendant, accused of robbery, was not brought to trial within the period mandated by Rule 1100 because no trial dates within the prescribed period were available. *Lamb*, 455 A2d at 681. The trial court granted an extension of time to commence trial, accepting the prosecution's assertion that the Commonwealth was fully prepared to go to trial and had thereby fulfilled Rule 1100's due diligence requirement. Id.

69. The term "run date" was used by the court to identify the latest date that trial could begin and still be within the time period specified by Rule 1100. Id.

70. Id at 683. The superior court relied in part on *Lamb* in reaching its decision in favor of the Commonwealth in *Commonwealth v Browne*, 385 Pa Super 646, 555 A2d 242 (1988). In its memorandum opinion, the court said that the lack of stipulation in *Browne* was not fatal to its analogy with *Lamb*. The court reasoned that the Commonwealth's timely filing of a Petition for Extension of Time and the acknowledgement by all concerned that the assignment of the September 30th arraignment date was the reason for the late trial date were sufficient to satisfy the requirements of *Mayfield*. *Commonwealth v Browne*, No 03516, slip op at 4 (Pa Super 1987).

71. 502 Pa 393, 466 A2d 1009 (1983). In *Crowley*, the defendant's case was not reached on the day it was scheduled for trial. The assignment clerk then placed the case at the bottom of the list of pending cases. The pending cases were taken in chronological order. By the time Crowley's case was heard, the 180 day limit imposed by Rule 1100 had expired. *Crowley*, 466 A2d at 1011.

72. Id at 1010. The superior court had ruled against the Commonwealth based upon a belief that *Mayfield* allowed for "judicial delay" only when the delay was unavoidable. Id at 1011.

The supreme court reversed the superior court, conceding that while it may be possible in some sense to arrange court calendars to ensure that every criminal defendant is tried within the prescribed time limit, such a scheduling system would be unrealistic. Id at 1013.

73. 504 Pa 385, 474 A2d 275 (1984). In *Terfinko*, the defendant's case was not reached on its original trial date, nor on the following day (within the prescribed time period). Consequently, the case was rescheduled for the next month, which exceeded the specified period. *Terfinko*, 474 A2d at 277.

to apply a "stopwatch approach to the definition of 'due diligence.' "[74]

In *Commonwealth v Monosky*,[75] a delay occasioned by a district magistrate was addressed.[76] The district attorney was not made aware of the charges against the defendant until 165 days after the complaint was filed.[77] The only reason that was advanced for the delay was that the district magistrate had simply misplaced the paperwork.[78] The supreme court reversed the superior court and reinstated judgement against the defendant, holding that a judicial delay occurring before the district attorney becomes aware of the case may justify (and in this case did justify) the granting of an application for extension.[79] Furthermore, the court stated that it disapproved of the dictum in *Mayfield* to the extent that it implied that the Commonwealth was to be held accountable for inadvertent judicial delays occasioned by the minor judiciary.[80] The court specifically underscored the fact that they were not reaching the question of whether an unexplained judicial delay, occurring after the district attorney had been made aware of the charges against an accused, could support an extension.[81]

The status of Rule 1100 prior to the supreme court's decision in *Browne* was that of a rule riddled with exceptions. It is clear that the Commonwealth was not held responsible for delays occasioned by other agencies within the criminal justice system when the party ultimately responsible for satisfying the mandate of the Rule was unaware of the delay. It is equally clear that the Rule's requirement of due diligence had been interpreted to allow the vast majority of delays to be tolerated, so long as the Commonwealth had made a timely petition for an extension of time. The significance of *Browne*, therefore, is the meaning the supreme court has

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74. Id at 279. The court, quoting *Crowley*, 466 A2d at 1014, reiterated:

> Rule 1100 should not be construed to require the Common Pleas Courts with backlogged criminal dockets to devote all their administrative and judicial resources to guarantee that every defendant is tried within the period prescribed by the Rule.
>
> It should be sufficient for the court to establish that it has devoted a reasonable amount of its resources to the criminal docket and that it scheduled the criminal trial at the earliest possible date consistent with the court's business.

Terfinko, 474 A2d at 279.

75. 511 Pa 148, 511 A2d 1346 (1986).
76. *Monosky*, 511 A2d at 1347.
77. Id.
78. Id.
79. Id at 1348.
80. Id.
81. Id.

infused into the due diligence requirement; that is, what is "reasonable." In its opinion, the court specifically set out the reason they chose to review *Browne*:

> We granted allocatur based on a continuous review of our appellate docket, because, blatantly put, we have become concerned that the Superior Court is more and more inclined to accept any and every excuse for failure to bring a criminal case to trial within the period prescribed by Rule 1100, and that this case presented the opportunity to prevent further emasculation of Rule 1100.[82]

The stern tone of this portion of the opinion is unmistakable. A narrow reading of the *Browne* opinion would reveal that Rule 1100's due diligence component requires the Commonwealth to "employ a simple record keeping system" to monitor run dates in criminal cases to ensure compliance with the Rule's prescribed time period.[83] The real significance of the opinion, however, is that the supreme court has put the Commonwealth on notice that Rule 1100 issues will now be reviewed in a more critical light. As Justice Zappala concluded in his concurring opinion:

> The purpose of the rule cannot be advanced if we continue to make excuses for the failure to enforce it. It is for these reasons that I strongly concur in the great stride made by the majority today in recognizing this fact.[84]

Justice Zappala's concurrence reflected his view that the decision in *Browne* portends a strong reversal of the court's previous ambivalence toward enforcement of Rule 1100.[85]

There is little doubt that the court has strengthened its commitment to Rule 1100. It remains to be seen, however, how deeply that commitment runs. The true test of Rule 1100's apparent resurrection will be whether or not the court will vigorously enforce the statute when the crimes at issue are of a more grave nature than the drunk driving violation at issue in *Browne*.

The fact that the supreme court's renewed dedication to Rule 1100 was expressed in a relatively minor criminal[86] case should not be misinterpreted. It is only logical to choose a relatively minor case as the forum to put the Commonwealth on notice that Rule 1100 violations will be examined with closer scrutiny. Given the

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82. *Browne*, 584 A2d at 905.
83. Id at 906.
84. Id.
85. Id. See note 32 and accompanying text.
86. The crime of driving under the influence of alcohol is characterized as a relatively minor crime only to distinguish it from more heinous crimes where the interests of the Commonwealth in successfully prosecuting the case are arguably greater.

clarity with which the court expressed its intention to thwart further emasculation of the Rule,[87] the Commonwealth should not expect the court to regress on this issue, regardless of the severity of the crime in question.

David Gilmartin

87. *Browne*, 584 A2d at 905. See note 82 and accompanying text.