IN THE COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH	:	
	:	
v.	:	**No.: 03-10,101**
	:	
BRIAN BARTO,	:	
Defendant	:	

OPINION AND ORDER

On November 18, 2002 the Commonwealth charged the Defendant, Brian Barto, with 3 counts each of Indecent Assault, 18 Pa.C.S.A. Section 3126(a)(1), Official Oppression, 18 Pa.C.S.A. Section 5301(1), and summary Harassment, 18 Pa.C.S.A. Section 2709(a)(1) for acts, which the Defendant allegedly committed during the month of September of 1999. District Justice C. Roger McRae announced his decision on 2 of the 3 sets of charges at the conclusion of the Preliminary Hearing on January 9, 2003. Decision on the third set was deferred and announced in writing dated January 30, 2003. An Omnibus Pretrial Motion was filed on Defendant's behalf on April 10, 2003, raising a number of issues. On July 3, 2003, the parties appeared before this Court and presented legal argument on the issues raised in the pretrial motion. This Court will address those issues seriatim.

Motion to Dismiss Criminal Information for Failure to Establish *Prima Facie* Case at Preliminary Hearing

Defendant's first assertion is that the charges against him should be dismissed because the Commonwealth failed to present a prima facie showing of the evidence at the preliminary hearing. Defendant argues that there was insufficient evidence presented to establish culpability for each of the three incidents, which allegedly occurred on September 9, 11, and 26, 1999.

September 9, 1999

The alleged victim in the September 9, 1999 incident is H.M., who testified at the preliminary hearing that she met the Defendant, a police officer, earlier that day while they were both working at the Lycoming Mall. (Notes of Testimony, 1/9/03, p. 28) When she left work, he followed her from the mall parking lot and pulled her over. (N.T. p. 28) The Defendant explained that he was aware that her driver's license was suspended and that she would not be permitted to drive the vehicle. (N.T. p. 29.) He offered her an opportunity to call someone to come and pick her up, but Ms. M. declined. (N.T. pp. 39 – 40). She further testified that the Defendant then told the alleged victim that he would need to frisk her prior to transporting her to her home. (N.T. p. 29). He asked her to get up against her vehicle and then proceeded to frisk her from the ankles up. The alleged victim testified that he paused briefly when his hands were on her buttocks (N.T. p. 41) and "got a firm squeeze" and then "squeezed, basically in a cupping motion, my breasts." (N.T. pp. 29 – 30). The Defendant then transported the alleged victim to her residence in the police cruiser. During the ride, he indicated to her that he would not issue a citation for Driving Under Suspension, but that instead he "could keep a citation in his desk for up to two

years, and that if need be, he could tell the chief . . . that he had caught me driving under suspension." (N.T. p. 31). The alleged victim testified that she took that statement as a threat. (N.T. p. 31).

September 11, 1999

The alleged victim in the September 11, 1999 incident is J.K. Ms. K. testified that she had a minor traffic accident on that date and later came into contact with the Defendant while he was on duty as a police officer so that she could file a police report. (N.T. pp. 42 – 43). She testified that as part of the report, she needed her license plate number and that the Defendant walked with her to her car to retrieve that number. She then explained that while they were walking, a joke was made and that the Defendant then smacked or patted her on her butt. (N.T. p. 44, 49). Ms. K. then got into her car and left. (N.T. p. 44). She testified that she believed she had been treated "inappropriately and disrespectfully." (N.T. p. 45).

September 26, 1999

The alleged victim in the September 26, 1999 incident is W.W. Ms. W. testified that on the date in question she was a passenger in a vehicle that was stopped by the Defendant while he was acting in his official capacity as a police officer. (N.T. pp. 3 – 5). The driver of the vehicle was determined to be intoxicated, however, the alleged victim was not offered an opportunity to drive the vehicle she was riding in home because she, too, had had a few drinks. (N.T. pp. 5 – 6) The Defendant performed a pat down search prior to giving her a ride home in his cruiser. (N.T. p. 77) She testified that Defendant searched her upper body, discovering the under wire in her bra and then searched her "vagina area"

underneath the short skirt that she was wearing, using the palm of his hand. (N.T. pp. 8 – 9) She testified that when the Defendant searched her vaginal area he did not leave his hand there, (N.T. p. 20) but later testified that the Defendant left his hand there for "four seconds . . . three to four seconds." (N.T. p. 24)

On the charge of Indecent Assault, the Crimes Code provides that "(a) person who has indecent contact with the complainant or causes the complainant to have indecent contact with the person is guilty of indecent assault if: (1) the person does so without the complainant's consent." 18 Pa.C.S.A. Section 3126(a)(1). Indecent contact is defined as "(a)ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa. C.S.A. Section 3101.

After applying the elements of the charge, the Court finds that the Commonwealth failed to present a prima facie case on the charge of indecent assault with respect to the September 11, 1999 incident involving J.K. There is no evidence presented which would tend to show that the momentary touching by the Defendant of the victim was for the purpose of arousing or gratifying sexual desire in either person. However, the evidence presented by the Commonwealth does establish a prima facie case on the indecent assault charges regarding W. W. and H.M. Both women testified that the Defendant touched intimate parts of their body and that he touched those body parts in a manner the Court would find was inappropriate for the purposes of a pat down search or frisk.

Official oppression, 18 Pa.C.S.A. Section 5301(1), provides that

> "(a) person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor of the

second degree if, knowing that his conduct is illegal, he: (1) subjects another to . . . mistreatment."

In his motion, Defendant asserts the Commonwealth failed to show that he acted in bad faith. While the Court agrees with this assertion with respect to the charges concerning J.K., the Court finds that the Commonwealth provided sufficient evidence to make a prima facie showing that the Defendant acted inappropriately towards W.W. and H.M. and that he knew his conduct in touching them in the manner described was illegal.

By local practice, the summary offenses of harassment will not be addressed here, as the Commonwealth has no obligation to present evidence as to the summary offenses at the time of the preliminary hearing.

Motion to Dismiss Criminal Information as Being Barred by the Applicable Statute of Limitations

Defendant next claims that his prosecution is in violation of the Statute of Limitations, found at 42 Pa.C.S.A. Section 5552(a); the statute provides for a two-year limitation on the filing of all of the charges involved in this case. However, subsection (c) of the statute states a prosecution may be commenced for

> "(2) Any offense committed by a public officer or employee in the course of or in connection with his office or employment at any time when the defendant is in public office or employment or within five years thereafter".

It is clear from the evidence presented in this case that the Defendant is alleged to have committed these offenses in the course of or in connection with his employment as a public officer. Prosecution was commenced with the filing of a criminal complaint on November 18, 2002, approximately three years and two

months after the alleged offenses. There is no statute of limitations violation in this case and the Court will not dismiss the case on that basis.

Motion to Dismiss Information (Failure to Comply with Rule of Law)

Defendant next moves to dismiss the charges against him because of an alleged violation of Pennsylvania Rule of Criminal Procedure 543. Rule 543 requires that the decision of the issuing authority whether to hold a defendant for court shall be publicly pronounced. Once the decision is announced, the issuing authority shall then transmit the transcript of the preliminary hearing proceedings to the Clerk of Court within five days.

In this case, the transcript of the preliminary hearing establishes the Defendant and his counsel were aware at the conclusion of the hearing that the District Justice would delay his decision with respect to some of the counts in the complaint. (N.T. at p.59-61) The District Justice then offered the Defendant and his counsel the opportunity to have a date and time set for the public pronouncement of his decision, which the Defendant declined (N.T. at p.59.) The Court therefore holds that the Defendant has waived his right to complain about any violation of Rule 543.

Motion to Dismiss Counts II, V and VII (Official Oppression) based on Violation of Right to Due Process of Law

Defendant next asserts that the three charges of official oppression must be dismissed because they are overly broad and vague, and violate his right to due process of law. For the reasons stated above, the Court has already indicated its intent to dismiss the official oppression charge as it relates to J.K., therefore only two counts remain.

Prior case law has upheld the validity of the official oppression statute. Commonwealth v. Stumpo, 306 Pa. Super. 447, 452 A.2d 809 (1982). It has been held that:

> …a policeman wearing his badge of office, his uniform, pistol and nightstick carries with him at all times two unstated veiled threats, two capabilities: one is the use of force, the other is the power to arrest. These capabilities are known to people with whom the police officer deals and, together with a proper respect for his office, they engender an attitude of circumspection and deference. This attitude is greatly to the advantage of the police themselves. It affords them an important measure of protection and enables them to perform their official duties. Of course, it is also in the interests of the state to encourage this attitude. Thus, it becomes all the more important that improper actions taking advantage of this authority be within the scope of the crime of official oppression. The legislature has clearly provided for this coverage with the broad language of the statute.

Stumpo, 306 Pa. Super. at 457.

This Court holds that a uniformed officer is to know the laws which it is his duty to enforce, and knows that the conduct alleged by Ms. M. and Ms. W. constitutes not only mistreatment, but potentially the crime of indecent assault. In addition, the comments allegedly made by the Defendant to Ms. M. to the effect that "he could keep a citation in his desk for up to two years" constitute a prima facie showing of official oppression. "(E)ven a veiled threat to use the power of his office would suffice to meet this requirement" under the official oppression statute that a Defendant used the color of office to mistreat another. Commonwealth v. Francis, 201 Pa.Super. 313 at 322, 191 A.2d 884 at 889 (1963).

Motion to Dismiss Information (Selective Prosecution /Prosecutorial Vindictiveness)

Defendant next contends that the information should be dismissed because Defendant believes the charges were filed because he exercised his right to report the wrongdoing of a fellow officer, in this case his former chief. This issue is controlled by the case of Commonwealth v. Mulholland, 549 Pa. 634, 702 A.2d 1027 (1997).

In Mulholland, a twenty-four year veteran police officer was charged with third degree murder and official oppression after the compression asphyxia death of an individual upon whom he performed a traffic stop. He asserted that selective prosecution had occurred in his case because five officers were involved in the incident, but only three were charged with criminal wrongdoing. The Mulholland case sets forth the standard for establishing selective prosecution. "(F)irst, others similarly situated were not prosecuted for similar conduct, and second, the Commonwealth's discriminatory selection of them for prosecution was based on impermissible grounds such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification." Id. at 649, 1034.

In this case, there is no showing that others similarly situated were not prosecuted for similar conduct. In fact, there is no allegation that anyone else is similarly situated. For this reason, the court declines to find that selective prosecution can be established. There will be no need for a hearing on the issue of grounds for selection of the Defendant for selective prosecution because the Defendant does not meet the first prong of the selective prosecution test.

Motion for Severance

Defendant asserts in his last issue that the offenses charged as to the separate victims should be severed and separate trials should be held for each of them.

Rules 582 and 583 of the Pennsylvania Rules of Criminal Procedure govern severance motions. Pa.R.Crim.P. 583 provides that "(t)he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together. Pa.R.Crim.P. 582 provides that "(o)ffenses charged in separate indictments or informations may be tried together if: (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or (b) the offenses charged are based on the same act or transaction." In reading these two rules together, the Pennsylvania Supreme Court has created a three-part test for deciding a motion to sever:

> Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the court must therefore determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418 (1997) 54,422, citing Commonwealth v. Lark, 518 Pa. 290, 302, 543 A.2d 491, 496-497 (1988). See also Commonwealth v. Lauro, 819 A.2d 100 (Pa.Super. 2003).

Applying this test, the Court must first determine if the evidence of each of the offenses would be admissible in a separate trial for the other. Where "(e)vidence of crimes other than the one in question is not admissible solely to show the defendant's bad character or propensity to commit crime." Commonwealth v. Newman, 528 Pa. 393, 598 A.2d 275 (1991), evidence of other crimes is admissible to show "(1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial." Collins, supra. 703 A2d. at 423. Additionally, "evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts." Id.

In this case, the Court finds that the evidence of each of the remaining cases would be admissible in a separate trial for the other. The alleged actions on the part of the Defendant in one case would show the absence of mistake or accident as to his actions in the other case. The similarities between the charged offenses can also be construed as a common scheme, plan or design and might also arguably explain motive and intent on the part of the Defendant.

The second prong of the test requires an examination of whether the evidence is capable of separation by the jury so as to avoid danger of confusion. The Court finds that the evidence to be offered against the Defendant is capable of separation by the jury. Some of the remaining charges pertain to H M, some pertain to W W. The incidents allegedly occurred on separate dates, at separate places and with

separate witnesses. The Court believes that it would be a simple matter for the jury to differentiate between the two incidents.

Finally, under the test set forth in Lark and Collins, supra, the Court must decide if the Defendant would be unduly prejudiced by the consolidation of the offenses at trial. Here, the Court notes that “the "prejudice" of which Rule 1128 (now Rule 583) speaks is not simply prejudice in the sense that appellant will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of all Commonwealth evidence. The prejudice of which Rule 1128 speaks is, rather, that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.” (parenthesis added). Lark, supra, at 307, 499. The Court finds that no evidence of undue prejudice exists. Consequently, the Defendant’s Motion for Severance fails.

ORDER

AND NOW, this 16th day of September, 2003, for the reasons stated above, the Court ORDERS and DIRECTS that the Defendant's Omnibus Pre-Trial Motion is GRANTED IN PART and DENIED IN PART. Defendant's motion to dismiss the charges is GRANTED insofar as the charges Official Oppression and Indecent Assault, which relate to the alleged victim J.K. Those charges contained in Counts 4, 5 and 6 are DISMISSED.

In all other respects, Defendant's Omnibus Pre-Trial Motion is DENIED.

By the Court,

_____ J.
Nancy L. Butts, Judge

xc: DA (Hardaway)
Barbara Zemlock, Esquire
Hon. Nancy L. Butts
Diane L. Turner, Esquire
Gary Weber, Esquire
CST