

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 03-10,399
	:
vs.	: CRIMINAL DIVISION
	:
ERNEST SIDNEY CANNON,	:
Defendant	: Motion to Dismiss

OPINION AND ORDER

Before the Court is Defendant's Motion to Dismiss, filed April 4, 2003. Argument on the motion was heard May 21, 2003, at which time defense counsel indicated that transcripts of the two preliminary hearings held in this matter would be necessary before the motion could be decided. After those transcripts were produced, a further conference with counsel was held, on September 17, 2003, at which time the Commonwealth requested the opportunity to supplement the testimony presented at the preliminary hearings. Further hearing was therefore held, on November 7, 2003.

Defendant was originally charged, in No. 03-10,225, with two counts of criminal attempt, homicide, four counts of aggravated assault, two counts of simple assault, two counts of recklessly endangering, two counts of terroristic threats, possessing an instrument of crime, and firearms not to be carried without a license, in connection with a shooting on December 26, 2002, at approximately 11:45 p.m. in a Uni-Mart parking lot at the intersection of Sixth Avenue and High Street in Williamsport, Pennsylvania. After a preliminary hearing on February 4, 2003, Defendant moved to dismiss the charges for lack of a prima facie case and all charges excepting that of firearms not to be carried without a license were dismissed. On February 10, 2003, the police re-filed the charges (substituting a charge of persons not to possess firearms for the prior charge of firearms not to be carried without a license) to No. 03-10,399. On February 24, 2003, Defendant pled guilty to the count of firearms not to be carried without a

license in No. 03-10,225. On March 11, 2003, after a preliminary hearing in No. 03-10,399, one count of criminal attempt, homicide, two counts of aggravated assault, one count of simple assault, one count of recklessly endangering, and one count of terroristic threats were held for court, the remaining counts having been withdrawn by the Commonwealth. In the instant motion to dismiss, Defendant contends that prosecution of the re-filed charges is barred by Section 110 of the Crimes Code.

Section 110 provides, in pertinent part, as follows:

Section 110. When prosecution barred by former prosecution for different offense

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

- (1) The former prosecution resulted in ... a conviction ... and the subsequent prosecution is for :

...

- (ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and was within the jurisdiction of a single court....

18 Pa.C.S. Section 110(1)(ii). The Commonwealth argues the charge of firearms not to be carried without a license to which Defendant pled guilty in No. 03-10,225 (the former prosecution) did not arise from the same criminal episode as the charges re-filed to No. 03-10,399, and also that even if Section 110 would otherwise barr the subsequent prosecution, Defendant waived his right to raise this issue by requesting a severance of the charges. The Court does not agree with either argument.

The Commonwealth's assertion that the firearms not to be carried without a license charge to which Defendant pled guilty did not arise from the same criminal episode is based on

their contention that Defendant possessed the firearm at some time prior to the actual shooting.¹ In support of that contention the Commonwealth offered evidence at the hearing on November 7, 2003, which was accepted by proffer and stipulation, in the form of testimony from the owner of the vehicle involved that Defendant had possession of the vehicle for a period of time prior to the shooting. The Commonwealth would therefore ask the Court to infer that Defendant carried the firearm in the vehicle at some point prior to the shooting and, based on that prior period of time, conclude that the charge to which he pled guilty did not arise from the same criminal episode in which the shots were fired and from which the remaining charges arose. Without even considering whether the Commonwealth may properly supplement the evidence with respect to a charge to which Defendant has already pled guilty, the Court finds the Commonwealth's assertion spurious. The criminal complaint which was filed to No. 03-10,225 on December 27, 2002, indicates Defendant is accused of having violated "the penal laws of the Commonwealth of Pennsylvania at Uni-Mart Sixt (sic) Ave. and High St., Williamsport, PA 17701 in Lycoming County on or about 12/26/02 at about 2345." The criminal complaint which was filed to No. 03-10,399 on February 10, 2003, indicates Defendant is accused of having violated "the penal laws of the Commonwealth of Pennsylvania at Uni-Mart Sixt (sic) Ave. and High St., Williamsport, PA 17701 in Lycoming County on or about 12/26/02 at about 2345." Even were the Court to conclude that Defendant did indeed carry the firearm in a vehicle without a valid license for some period of time prior to the shooting, it is clear that the charge to which Defendant pled guilty "arose" from the shooting, the same criminal episode from which the subsequent charges arose.

The Court notes that in Commonwealth v. Failor, 770 A.2d 310 (Pa. 2001), the defendant therein was charged with both speeding and Driving Under Suspension. He pled guilty to speeding and when the Commonwealth attempted to subsequently prosecute him for DUS, argued that such was barred by Section 110. The Supreme Court agreed, finding inter alia that the "speeding and DUS charges arose during the same criminal episode, namely one traffic stop." Commonwealth v. Failor, *supra* at 313. The Court could just as easily have concluded that the defendant must have been driving under suspension before he was actually

¹ The Commonwealth had offered evidence at the preliminary hearing that Defendant did not have a license to

speeding, and thus that there were two separate criminal episodes, but did not do so. Instead, the Court looked to the traffic stop as the source of the charges. In the instant case, this Court looks to the incident which led to Defendant's arrest on the charges, finding only one criminal episode, the shooting, which led to both the carrying a firearm without a license charge as well as the charges re-filed in the subsequent prosecution.

With respect to the issue of waiver, the Commonwealth argues Defendant's motion to dismiss the charges at the conclusion of the first preliminary hearing, which was granted as to all but the carrying a firearm without a license charge, constituted a request to sever the charges and since Defendant took such an "affirmative action", he cannot now seek the protections of Section 110. The Court does not agree, however, that moving to dismiss for lack of a prima facie case constitutes a request to sever, nor that such is "affirmative action" which leads to a finding of waiver.

In Commonwealth v. Failor, *supra*, the Court noted that a defendant should be said to have waived his right to a single trial only when he affirmatively acts to separate the prosecution of charges pending against him. The Court went on to note examples such as opposing a Commonwealth motion to consolidate or pleading guilty to one charge while demanding a jury trial on the remaining charges. In the matter before it, the Court specifically found no waiver where the defendant therein pled guilty to one charge only, knowing full well there was another, outstanding charge which arose from the same traffic stop, based on its reading of the policy reasons underlying Section 110 which, in its view, places the burden to consolidate trials on the Commonwealth. In the instant matter, the Court believes those same policy reasons dictate against finding a motion to dismiss to constitute a request to sever,² and thus finds Defendant did not waive his rights under Section 110.

carry a firearm, and that element does not appear to be in dispute.

² In Commonwealth v. Pachipko, 677 A.2d 1247 (Pa. Super. 1996), the defendant's motion for writ of habeas corpus was granted in part, and the defendant pled guilty to the remaining counts. The Court held that prosecution of the charge dismissed pursuant to defendant's motion was precluded by Section 110 since it arose from the same criminal episode as did the charges to which the defendant had pled guilty. Although the issue of waiver was not specifically addressed, it may be inferred from the disposition that the Court found no waiver.

ORDER

AND NOW, this 17th day of November, 2003, for the foregoing reasons, Defendant's Motion to Dismiss is hereby GRANTED and the charges filed to No. 03-10,399 are hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley Anderson