IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 02-10,366
	:
CHARLES THOMAS,	: CRIMINAL ACTION –LAW
Defendant	: MOTION TO RECONSIDER

DATE: January 10, 2003

OPINION AND ORDER

Before the Court is the Motion to Reconsider filed by the Commonwealth on November 13, 2002. The Commonwealth is seeking reconsideration of this Court's Order of October 7, 2002, which granted Defendant's Motion to Compel his admission into the ARD program. The Commonwealth cites the decision of ***Commonwealth v. Jagodzenski***, 739 A.2d 173 (Pa. Super. 1999) for the proposition that a prior record is clearly relevant in the Commonwealth's determination as to whether ARD should be granted a particular individual. The Order, which was filed October 18, 2002, was actually made a matter and entered of record on October 7, 2002, at the time of the hearing on Defendant's motion seeking to dismiss the information or, in the alternative, to have Defendant placed into the ARD program. That motion had been filed August 29, 2002. At the October 7th hearing the Commonwealth was represented by Assistant District Attorney Don Martino, Esquire, who represented to the Court that the decision to deny Defendant ARD was made by Assistant District Attorney Kenneth Osokow, Esquire. There is no factual dispute that Mr. Osokow, the First Assistant District Attorney, denied Defendant's initial request for ARD on May 1, 2002 and a reconsideration request made by

Defendant by a letter dated July 10, 2002 on the basis of Defendant's "prior record." Defendant's prior record consisted of a conviction for possession of a controlled substance approximately six years earlier.

At the October 7th proceeding, the Court was concerned with the representations made by defense counsel, which were not disputed by the Commonwealth, that prior to the denial of Defendant's ARD application other individuals who had prior records had been granted ARD. Defendant introduced into the record a letter dated September 16, 2002 sent by Assistant District Attorney Osokow to defense counsel. The letter acknowledged that sometimes under "special circumstances" people with prior convictions are admitted into the ARD program under the exercise of discretion by the District Attorney's Office.

Defendant relied upon ***Commonwealth v. Agnew***, 600 A.2d 1265 (Pa. Super. 1991) in arguing that the denial of ARD must be pursuant to a general policy that bears a rational :relationship to protection of the public. Defendant specifically argued that the District Attorney's Office had no "written policy" in place and that there were no policy guidelines nor any applicable policy cited in the letters of the District Attorney denying the ARD application and reconsideration request. Defendant also argued that since he was African-American this denial without a stated policy amounted to a violation of his equal protection rights.

This Court believes it made an error in its Order filed October 18, 2002, which directed that Defendant must be admitted into the ARD program. At the hearing, there was no question this Court was greatly disturbed by the many "policy" changes undertaken by the District ; Attorney's Office. It was suggested to this Court that the policy changed when the current District Attorney, Mr. Dinges, took office

earlier in 2002. It was also suggested to this Court that the policy changed when the responsibility for making ARD determinations was given to Mr. Osokow sometime after Mr. Dinges took office. This is not to say that the District Attorney cannot change the policy nor change the ARD's standards from time to time, but there needs to be some clarity in the Lycoming County District Attorney's Office as to who qualifies for ARD and who does not. It is not clear to this Court that there is any clear ARD criteria currently being applied in the District Attorney's Office. Consequently, it does not appear that the defense bar has a clear understanding of the present ARD criteria either.

Nevertheless, it is clear under ***Agnew***, supra, that written policy guidelines are not I required. It is also clear under ***Jagodzenski*** and ***Agnew*** that denial of ARD due to a defendant's , prior record is an appropriate exercise of the District Attorney's discretion. The district attorney has broad discretion in granting admission into the ARD program that should not be disturbed unless that decision is fully, patently and without doubt unrelated to the protection of society or the likelihood of the individual's successful rehabilitation. ***Agnew***, *supra*; ***Commonwealth v. Lutz***, 495 A.2d 928 (Pa. 1985). Obviously, both ***Lutz*** and ***Agnew*** would prohibit the denial of entry into the ARD program due to a defendant's race. Although Defendant has raised that issue, there is no evidence for the Court to sustain that allegation.

Agnew and ***Lutz*** also make it clear that in asserting of a violation of the Equal Protection Clause one must demonstrate that the classification bears no rational relationship to the legitimate state interest.[1] The legitimate state interests at issue here include the protection of society and the likelihood of

[1] The rational basis test is applied when the classification does not implicate fundamental interests or affect with

successful rehabilitation. The classification made by the District Attorney of denying ARD to applicants with prior records that do not fall into situations involving "special circumstances" cannot be said to violate the Equal Protection Clause. The classification has an obvious relationship to both the protection of society and the likelihood of successful rehabilitation.

Assistant District Attorney Martino strongly and appropriately argued at the October 7th hearing that the evidence of the prior substance abuse conviction and the current DUI offense were strong evidence that Defendant has demonstrated that he cannot rehabilitate himself and abstain from abusing harmful substances. Therefore, Defendant has not demonstrated that the denial of ARD due to his prior drug offense record does not bear a rational relationship to the protection of society or the likelihood of rehabilitation. Accordingly, the Court must deny Defendant's request that he be placed in the ARD program by the District Attorney, despite the, varying and lack of clearly enunciated standards for admission into the program.

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particularity a suspect class. ***Agnew***, 600 A.2d at 1269.

O R D E R

Therefore, in accordance with the foregoing Opinion, the Court's Order dated October 7, 2002 and filed October 18, 2002 directing Defendant be admitted into the ARD program is VACATED. The Motion of Defendant for admission into the ARD program or in the alternative for dismissal of the information against him is DENIED. Defendant shall appear for full processing in accordance with notice to appear for pretrial as may be given by the Deputy Court Administrator.

BY THE COURT,

William S. Kieser, Judge

cc: Eileen A. Grimes, DCA
Peter Campana, Esquire
Donald Martino, Esquire, ADA
Kenneth Osokow, Esquire, ADA
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)