

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-1210-2007**
 :
SHAWN BRISTER, :
Defendant :

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Terminate ARD and Amended Motion to Terminate ARD and/or Reconsider Order filed on September 9, 2010.

By way of background, by Information filed on August 9, 2007, Defendant was charged with unauthorized use of automobiles and other vehicles, a misdemeanor 2 offense. By Order of Court entered on September 27, 2007, Defendant was placed on Accelerated Rehabilitative Disposition (ARD) for a period of one year.

By Motion filed on July 29, 2008, the Commonwealth requested that Defendant's ARD be terminated. The Commonwealth contended that Defendant violated the condition of ARD requiring that he comply with all State and Federal laws. Specifically, the Commonwealth alleged that on May 12, 2008, Defendant was arrested and charged with drug related offenses.

The hearing on the Commonwealth's Motion to Terminate was scheduled for numerous dates but subsequently continued upon motion of the Defendant. On August 5, 2009, the Court entered an Order continuing the scheduled hearing upon request of the Defendant, without objection of the Commonwealth, and noted that the termination was predicated upon new criminal charges being filed against the Defendant. The Court further noted that the trial in connection with the new criminal charges would be "important to the disposition of this Motion."

By Order of Court dated December 9, 2009, upon request of the Defendant, again without objection of the Commonwealth, the hearing on the Motion to Terminate ARD was continued by Order of Court. The Court noted that the alleged violation of ARD was the new pending charges and that counsel agreed “to wait for a disposition of that charge before proceeding on the termination.”

A hearing was eventually scheduled for July 29, 2010. Following the hearing, the Commonwealth’s Motion was granted. The Court noted in its July 29, 2010 Order that both Defendant and Defendant’s attorney were advised of the time and date for the hearing yet failed to appear. The Court noted further that it was satisfied that the allegations in the Petition were true and accordingly granted the ARD termination request.

Defendant filed a Motion for Reconsideration of the Court’s Order and an argument was held on September 9, 2010. Following the argument, the Court granted the Defendant’s Motion to Reconsider and vacated its July 29, 2010 Order. At the Commonwealth’s request, the Court granted it twenty (20) days within which to file an Amended Petition to Terminate ARD.

The Commonwealth then filed its Amended Motion to Terminate ARD and/or Reconsider the Order filed on September 9, 2010. The Commonwealth first argues that the Order of September 9, 2010 was entered more than thirty (30) days after the Order of July 29, 2010 and that the Court accordingly has no jurisdiction to rescind its prior Order.

The Commonwealth next argues that ARD can be terminated upon proving the alleged violation by a preponderance standard. Finally, the Commonwealth argues that ARD should be terminated because the Defendant failed to comply with other conditions such as

failing to report to or call his probation officer on a monthly basis, failing to report his new arrest and failing to pay costs as required.

A hearing and argument on the Commonwealth's Motion was held before the Court on December 29, 2010. Matt Gottshall of the Lycoming County Adult Probation Office testified on behalf of the Commonwealth. Mr. Gottshall testified that the Defendant failed to report that the new criminal charges were actually filed against him although he did report to his supervising adult probation officer that he had contact with the police the night of his arrest. Furthermore, Mr. Gottshall testified that the Defendant was not current with his payment of costs and fines, paying sporadically, sometimes missing a monthly payment and sometimes paying less than what was directed. Mr. Gottshall indicated that the Defendant is presently \$20.00 behind in his payments.

Rule 318 of the Pennsylvania Rules of Criminal Procedure governs the procedure to be followed in connection with alleged violations of ARD conditions. A Motion alleging a violation of the conditions of ARD must be filed during the period of the program or if filed thereafter, must be filed within a reasonable time after the alleged violation was committed. Rule 318 (B). If a Judge finds that the Defendant has committed a violation of a condition of the program, the Judge may order, when appropriate, that the program be terminated. Rule 318 (C).

The only alleged violation that the Court will consider in connection with the Commonwealth's Motion to Terminate ARD is the allegation that the Defendant failed to comply with all State and Federal laws as set forth in the Commonwealth's original Motion for Termination filed on July 29, 2008. The Court will not consider the allegations set forth in the

Amended Motion to Terminate ARD in that the Amended Motion was not filed within a reasonable time after the alleged violations were committed as required by Rule 318 (B).

Moreover, the Court will deny the Commonwealth's Motion to Reconsider the Order of September 9, 2010 on jurisdictional grounds. The September 9, 2010 Order was not a final Order and not appealable. Buehl v. Horn, 728 A.2d 973 (Pa. Cmwlth. 1999); Rule 318 (C). Accordingly, the Court was not divested of jurisdiction.

Despite the fact that the Defendant has not been convicted of the alleged charges, the Commonwealth contends that he has violated the conditions of his ARD Program in that a prima facie case against the Defendant has been established by virtue of the fact that Defendant's criminal charges were either bound over to court following a preliminary hearing or waived into court by the Defendant. The Commonwealth's position, however, is contrary to what it previously represented to the Court in connection with Defendant's continuance requests. More specifically, the Commonwealth previously represented to the Court that while the Motion to Terminate was predicated upon new criminal charges, the parties would need to wait for a disposition of those charges before proceeding on a hearing on the Motion to Terminate ARD. (See Orders of August 5, 2009 and December 9, 2009).

Termination of Defendant's participation in the ARD Program is within the sound discretion of the Court. Commonwealth v. Lebo, 713 A.2d 1158, 1161 (Pa. Super. 1998), appeal denied, 737 A.2d 741 (Pa. 1999). The Court will not terminate Defendant's ARD at this point because the Court is of the opinion that given the Commonwealth's prior representations, it is not appropriate to do so. On the other hand, however, the Court will not deny and/or dismiss the Commonwealth's Motion. The charges against the Defendant remain

pending and if the Defendant is convicted, the Commonwealth will have a sound basis to proceed with the termination and in all likelihood the Court would deem termination to be appropriate under the circumstances.

This case has gotten to this point because of unusual circumstances. The underlying charges certainly would have been resolved but for the fact that an interlocutory appeal was taken. The parties need guidance under these unusual circumstances.

The Court does not deem it appropriate to continue the Defendant on ARD while the charges are pending and while a Motion to Terminate is pending. Accordingly, the Court will direct that the Defendant's participation in the ARD Program is stayed from July 29, 2008, the date that the original Motion to Terminate was filed, until an Order is entered in the future either granting or denying the Commonwealth's Motion to Terminate. The Commonwealth's Motion to Terminate shall be stayed until the underlying case against the Defendant is resolved. The Commonwealth is directed to notify the Court as to the disposition of the underlying charges. If the Defendant pleads guilty or is convicted, the Court will schedule a hearing on the Commonwealth's Motion. If the Defendant is acquitted, the Court will enter an Order reinstating the Defendant's ARD and requiring him to complete whatever portions of the Program he has failed to complete up to that point.

ORDER

AND NOW, this 3rd day of January 2011, the Court defers a decision on the Commonwealth's Motion to Terminate ARD. The Commonwealth is directed to notify the Court upon the disposition of the underlying charges pending against the Defendant. Upon notification by the Commonwealth, the Court will enter an appropriate Order in accordance

with this decision. Pending the entry of a further Order, the Defendant's participation in the ARD Program is stayed.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Edward J. Rymza, Esquire
DA (KO)
APO
Gary Weber, Esquire (Lycoming Reporter)
Work File