

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1173-2010
:
vs. : **Opinion and Order re**
: **Defendant's Motion to Dismiss**
GREGORY A. BARTO, :
Defendant :

OPINION AND ORDER

Before the Court is a Motion to Dismiss that was filed on behalf of the Defendant on March 24, 2011.

By way of background, by Information filed on October 7, 2010, Defendant is charged with six counts of Criminal Conspiracy to commit various offenses including Involuntary Deviate Sexual Intercourse, Statutory Sexual Assault, Aggravated Indecent Assault, Sexual Assault, Indecent Assault and Rape; one count of Endangering Welfare of Children as a Parent; two counts of Unlawful Contact or Communication with Minors, two counts of Corruption of Minors, one count of Rape, one count of Indecent Exposure, one count of Indecent Assault and one count of Sexual Assault.

At the hearing in this matter on May 6, 2011, Defendant introduced in evidence without objection the Affidavit of Probable Cause relating to the charges. The charges relate to alleged criminal conduct involving K.W. and K.P., minors at the time the incidents allegedly occurred.

From June 2006 through May 2007, K.W. was 16 to 17 years old and worked for Defendant and his wife, Amber Barto. During this time span, the Defendant and his wife offered K.W. drugs, alcohol and money for the return of sexual favors. She indicated that on

one occasion at the Defendant's trailer, Defendant forcibly raped her.

K.W. had sexual intercourse with the Defendant on more than one occasion until it stopped after she was forcibly held down by Amber Barto while the Defendant had sexual intercourse with her. During the time that she worked for the Defendant, he exposed her to pornographic movies and offered her drugs and alcohol.

Around the spring of 2003, K.P., who was 14 years of age at the time, went to Defendant's place of business looking for employment. She was hired by the Defendant and his wife to perform various duties. After a few days of working, the minor was requested by the Defendant to work overtime at his trailer behind the business premises. She went to the residence and saw pornography on the television, drugs on the table and alcohol in the refrigerator. The Defendant and his wife apparently smoked marijuana in front of her and asked her to get in the hot tub to go tanning. During the "tanning" session, the Defendant had inappropriate contact with her as did Amber Barto. The Defendant and Amber Barto also had sexual relations with each other in front of the minor.

Defendant's Motion to Dismiss is based on section 110 of the Crimes Code, 18 Pa.C.S. §110. More specifically, Defendant contends that the present prosecution should be barred because Defendant was formerly prosecuted and convicted on offenses allegedly based on the same conduct or arising from the same criminal episode and the present offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial. 18 Pa. C.S.A. § 110 (1) (ii).

Defendant was in fact prosecuted and convicted following a jury trial in May of 2010 at the following Informations: CR-1079-2008; CR-110-2009; CR-844-2009; CR-896-

2009; CR-1606-2009; and CR-1632-2009. Introduced in evidence and marked as Defendant's Exhibit No. 2 were the Affidavits of Probable Cause with respect to said Informations.

In summary, at varied times over a period of approximately ten (10) years between 2000 and 2010, Defendant engaged in conduct, along with his wife, which involved soliciting minor girls who had worked for him at his tire shop to use alcohol and/or illegal substances such as cocaine and marijuana and then convince them to participate in one or all of the following activities: viewing pornography, making pornographic videos, engaging in sexual relations with Defendant, engaging in sexual relations with Amber Barto, engaging in sexual relations with both Defendant and Amber Barto. Defendant was convicted of numerous charges including but not limited to forcible rape, sexual assault, indecent assault, conspiracy and corruption of minors.

It was conceded by the Commonwealth at the hearing in this matter that the alleged offenses involved in the present case were known to the appropriate prosecuting officer at the time of the commencement of the trial on the prior charges. Accordingly, the issue to be determined by this Court is whether the present offenses arise from the same criminal episode. If so, this prosecution would be barred by the former prosecution. If not, Defendant's Motion would fail.

The "compulsory joinder rule" set forth in section 110 of the Crimes Code has a dual purpose. First, it protects a person accused of crimes from governmental harassment by being forced to undergo successive trials stemming from the same criminal episode. Second, it ensures judicial economy. Commonwealth v. Spotz, 563 Pa. 269, 759 A.2d 1280, 1285 (2000); Commonwealth v. Hude, 500 Pa. 482, 458 A.2d 177, 180 (1983).

A criminal episode has been defined as “an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series.” Commonwealth v. Schmidt, 919 A.2d 241, 245-246 (Pa. Super. 2007), quoting Commonwealth v. Lee, 291 Pa. Super. 164, 435 A.2d 620, 621 (Pa. Super. 1981)(citation omitted).

A single criminal episode analysis is a totality of circumstances analysis. Schmidt, supra. at 246; Commonwealth v. M.D.P., 831 A.2d 714, 719 n.3 (Pa. Super. 2003). The courts consider the logical and/or temporal relationship between the charges, whether the charges share common issues of law, whether the charges share common issues of fact, whether separate trials would involve substantial duplication and whether separate trials would be a waste of scarce judicial resources. Schmidt, supra.

While neither party referenced the M.D.P. case, it appears to be most analogous to the case at issue. The Defendant in M.D.P. previously pled guilty to two counts of indecent assault involving his minor son, which occurred between June 1, 2000 and July 16, 2000.

Prior to the Defendant pleading guilty, the police met with the Defendant who admitted to inappropriate sexual contact with two other sons. Subsequently, the Defendant was charged with numerous counts involving those other sons including rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, incest and corruption of minors. Not unexpectedly, Defendant filed a Motion to Dismiss pursuant to § 110 on the basis of the former prosecution.

The Superior Court concluded that the two cases presented different legal questions and different facts because they relied on different victims, different witnesses and

contained different evidence. Therefore, the two prosecutions were not logically related and did not constitute a single criminal episode.

The same is true in connection with the case at issue. While there may be some duplication of legal issues because of the similarity in charges, those legal issues relate to clearly different factual scenarios. Indeed, the pertinent facts in each case differ. Only the specific victims could testify as to the crimes at issue. Moreover, the witnesses are different.¹ Most importantly, the specifics of the alleged incidents are unique to each victim. While the conduct can generally be characterized as sexual assault, the evidence relating to the prosecutions is different. Accordingly, the Court does not hesitate in concluding that the present charges do not involve the same criminal episode as the former charges to which the Defendant was found guilty. See Spotz, *supra*; Commonwealth v Bracalielly, 540 Pa. 460, 650 A.2d 755 (1994); Schmidt, *supra*; M.D.P., *supra*; Commonwealth v. Lee, 435 A.2d 620 (Pa. Super. 1981).

¹ The Court notes that the Commonwealth has filed a notice under Rule 404(b) of the Pennsylvania Rules of Evidence to admit evidence of Defendant prior “bad acts” with the victims from his previous cases. Even if the Court would permit the Commonwealth to introduce evidence of the prior crimes under Rule 404(b), it would not alter the Court’s conclusion that the current charges stem from separate criminal episodes than the original charges. See Spotz, 759 A.2d at 1285 (the mere fact that the prior killings were admissible for limited evidentiary purposes, such as to show motive, intent, identity and the sequence of events leading up to murder of Ms. Amstutz, did not alter their independent nature; “accordingly, there was not such a ‘substantial duplication of issues of law and fact’ and duplicative witnesses in the four cases that joinder was required.”).

Finally, the Court notes that the Commonwealth objected to the late filing of the Motion to Dismiss. The denial of the Motion renders the Commonwealth objection moot. The Court notes, however, that in the interests of justice the Court exercised its discretion and permitted the late filing. The Court construed the Motion as a double jeopardy type claim, which in the Court's opinion should be heard when filed prior to trial and there is no prejudice to the Commonwealth for reasons similar to why such a motion is immediately appealable despite being an interlocutory order. Commonwealth v. Anthony, 553 Pa. 55, 717 A.2d 1015, 1017 (1998)(“A Motion to Dismiss on the basis of the compulsory joinder rule of §110 embodies the same constitutional protections underlying the double jeopardy clause justifying the interlocutory appeal of such claims...”); Commonwealth v. Bracalielly, 540 Pa. 460, 658 A.2d 755, 759-60 (1995)(because section 110 embodies the same purposes as those underlying the Federal and Pennsylvania double jeopardy clauses, the interlocutory appealability of double jeopardy claims has been applied to claims based on section 110); see also Commonwealth v. Schmidt, 919 A.2d 241, 244 (Pa. Super. 2007). The interests the compulsory joinder rule was designed to protect, i.e., avoiding duplicative trials and preserving judicial resources, would be defeated if the Court waited to determine whether there was any merit to the motion until Defendant could raise it as a claim under the Post Conviction Relief Act (PCRA), see 42 Pa.C.S.A. §9543(a)(2)(i) and (ii).

ORDER

AND NOW, this ____ day of May 2011, following a hearing and argument, the Court **DENIES** the Defendant's Motion to Dismiss.

By The Court,

Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire
Philip M. Masorti, Esquire
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Gary Weber, Esquire (Lycoming Reporter)
Work file