

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1364-2009  
vs. :  
: Opinion and Order re Commonwealth's  
WILLIAM HAYDUK, : Motion to Nolle Prosequi  
Defendant :

**OPINION AND ORDER**

Before the Court is the Commonwealth's motion to nolle prosequi the charges filed in the above-captioned matter. Defendant opposed the Commonwealth's motion, requesting that the charges be dismissed with prejudice. The relevant facts follow.

On August 18, 2009, Defendant was charged with aggravated indecent assault of a child, indecent assault of a complainant less than 13 years of age, endangering the welfare of a child, and corruption of a minor, all arising out of allegations that Defendant assaulted his daughter, who was only 4 years old, in 2009. After the preliminary hearing held on February 19, 2010, the Magisterial District Judge dismissed the aggravated indecent assault charged, but held the other charges for court.

In a pre-trial motion, Defendant challenged the child's competency to testify as a witness due to her age and her mother tainting her testimony. Following a hearing held on October 5, 2011, the Court granted Defendant's motion, finding that the child could not remember the events in question and noting that the child specifically indicated "my mom told me what happened." The Court, relying on Commonwealth v. Kriner, 915 A.2d 653 (Pa. Super. 2007), also precluded the Commonwealth from utilizing statements the child made to third parties under the Tender Years Act, because the child was not unavailable due to severe emotional distress.

The Commonwealth appealed the Court's ruling, but its appeal was dismissed for failing to file a docketing statement, as required by Rule 3517 of the Rules of Appellate Procedure.

On March 6, 2012, the Commonwealth filed its motion to nolle prosequi.

The Court held an argument on the Commonwealth's motion on March 14, 2012. At the argument, the Commonwealth indicated the reason for its request was that without the child's testimony or the statements she made to third parties the Commonwealth would be unable to obtain a conviction. The Commonwealth sought to drop the charges without prejudice to re-filing them at a later date.

Defendant asked for the charges to be dismissed with prejudice. Defendant argued that, since the Court's ruling was based on the child's testimony being tainted by her mother, the Commonwealth should not be able to re-file the charges at a later date. In essence, defense counsel argued that any taint could not be alleviated and the effect of taint would only increase with time. Defense counsel also argued that Defendant should not be subject to the specter of these charges hanging over him indefinitely. Defense counsel conceded, however, that the Commonwealth was not making its request merely to avoid a speedy trial claim.

The Commonwealth countered that it hoped the child would become competent as she became a little older and more mature and that, with the passage of time, the child would not need to have her mother present when she testified. Therefore, the effect of the mother's alleged tainting of the child would lessen over time.

## **DISCUSSION**

“A *nolle prosequi* is a voluntary withdrawal by the prosecuting attorney of proceedings on a particular bill or information, which can at anytime be retracted to permit revival of proceedings on the original bill or information.” Commonwealth v. Whiting, 509 Pa. 20, 500 A.2d 806, 807 (Pa. 1985). When a request for a *nolle prosequi* is made, the Court must consider two factors: “(1) is the reason given by the Commonwealth for requesting the *nolle prosequi* valid and reasonable, and (2) does the defendant, at the time the *nolle prosequi* is requested, have a valid speedy trial claim?” Commonwealth v. Reinhart, 466 Pa. 591, 353 A.2d 848, 853 (Pa. 1976); see also Commonwealth v. Rega, 856 A.2d 1242, 1245 (Pa. Super. 2004).

The Court finds this case is somewhat similar to the case of Commonwealth v. Leaming, 442 Pa. 223, 275 A.2d 43 (1971). In Leaming, the Commonwealth lost an appeal regarding the admissibility of the defendant’s confession. When appellant appeared for a new trial, the Commonwealth requested a *nolle prosequi*. The Commonwealth conceded that one witness to the murder was insane and the only other known potential witness denied he had any evidence to offer. In essence, the Commonwealth was hoping the law might some day change so that appellant’s confession would be admissible. The lower court granted the Commonwealth’s request for a *nolle prosequi*, but the Pennsylvania Supreme Court reversed.

The Commonwealth argued that since murder had no statute of limitations, a greater delay in bringing appellant to trial was permissible; therefore, the 10 months between the remand for a new trial and the Commonwealth’s request for *nolle prosequi* was not

significant. The Pennsylvania Supreme Court disagreed. The Court noted that the right to a speedy trial also concerns the presence, for an unreasonable period of time, of an outstanding criminal charge and the anxiety and concern accompanying public accusation. The Court also noted that there was little basis to expect the possibility of a trial in the foreseeable future. Under these facts and circumstances, the Court found appellant was “entitled to demand that the Commonwealth either proceed to trial or be barred from further prosecution.” 275 A.2d at 46.

Under the unique facts and circumstances of this case, the Court does not believe that the ability to re-file the charges at a later date would be appropriate. Although Rule 600 may not have expired yet due to numerous defense continuances, this case has been pending for approximately 2 ½ years. Furthermore, unlike the typical case where a young child is incompetent, but may become competent at later date, this is not a case where the Court simply found that the child lacked the maturity to communicate effectively, to understand the difference between the truth and a lie, or to understand what it means to take an oath to tell the truth. Instead, the Court found that the child lacked the ability to remember the events in question, at least in part due to taint by her mother. If the Commonwealth would re-file the charges in the future, there would be no way to know whether the child was remembering events that actually happened or whether she was remembering what her mother told her. Like the appellant in Leaming, the Court finds Defendant in this case is entitled to demand that the Commonwealth either proceed to trial or be barred from further prosecution. Accordingly, the following Order is entered:

**ORDER**

**AND NOW**, this \_\_\_\_ day of April 2012, the Court DENIES the Commonwealth's motion to nolle prosequi the charges in this case.

By The Court,

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Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire (ADA)  
William Miele, Esquire (PD)  
Gary Weber, Esquire (Lycoming Reporter)  
Work file