IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	CRIMINAL DIVISION
vs.	:	
	:	
THERIM POWELL,	:	DOCKET NO. 700-2009
AMIEN PATTON,	:	DOCKET NO. 826-2009
Defendants	:	

O P I N I O N AND O R D E R

The instant matter comes before the Court on the motions of Defendants Therim Powell and Amien Patton to dismiss the above-captioned matter due to prosecutorial misconduct. Defendants base their motions on double jeopardy clauses of the state and federal constitutions. After a review of the record, while the Court cannot condone the prosecutor's conduct in Defendants' cases, the Court does not believe that the conduct, in and of itself, rises to the level of *intentional* prosecutorial misconduct. Therefore, the Court DENIES Defendants' motions.

I. Factual and Procedural Background

The relevant factual and procedural history is as follows.

Criminal Informations

By criminal information filed on May 15, 2009, Defendant Therim Powell was charged with two counts of possession with intent to deliver, receiving stolen property, persons not to possess, altering or obliterating marks of identification, firearms not to be carried without license, possession of a firearm with an altered manufacturer's number, two counts of possession of a controlled substance (powder cocaine and crack rock cocaine), and possession of drug paraphernalia. By criminal information filed on June 5, 2009, Defendant Amien Patton was charged with the same offenses.

Commonwealth's Motion to Consolidate

On June 10, 2009, Commonwealth filed a motion to consolidate Defendants' cases. On July 7, 2009, the Court granted Commonwealth's motion because both cases pertained to the same vehicle stop and events.

Defendants' Motions to Sever

On August 20, 2009, Defendant Patton filed a motion to sever count 4 of the information: persons not to possess. On October 16, 2009, the Court granted Mr. Patton's motion. The Commonwealth and Defendant Patton received a copy of this Order. On October 21, 2009, Defendant Powell filed a motion to sever count 4 of the information: persons not to possess. On November 3, 2009, the Court granted Mr. Powell's motion. The Commonwealth and Defendant Powell received a copy of this Order.

First Mistrial: New Information Regarding a Commonwealth Witness

On January 6, 2010, the first jury panel in this case was selected. On that date, no comment was made by either the Court or the prosecutor about the severed count of persons not to possess. *See* Transcript, 1/6/10. Trial was set for January 13, 2010, a week after the jury selection.

However, on January 8, 2010, Defendant Powell filed a motion in limine to preclude Defendant Patton from calling a witness, along with a motion to sever cases and a motion for continuance. These motions were based upon co-Defendant Powell's intent to call David Motyka as a witness in his defense. On January 4, 2010, the Court precluded the *Commonwealth* from calling David Motyka as a witness; however, Defendant Powell believed that his co-Defendant would call Mr. Motyka as a trial witness. On January 11, 2010, at Defendants' requests, the Court continued the scheduled trial, in the interest of

justice. The continuance was based upon new information revealed to Defendants "regarding a previously unknown witness," i.e. Mr. Motyka. Order, dated 1/11/10, filed 1/12/10.

Second Mistrial: Mention of Severed Count to Jury Panel

On February 16, 2011, the parties selected a second jury panel. Also, on this date, the Court granted a second mistrial and struck the jury panel. Prior to the actual jury selection, the Court referenced those charges severed from Defendants' criminal informations in its opening remarks to the panel. In particular, the Court stated:

> Folks, the information - - and I'll talk a little bit about that in a minute - - the information which contains the charges against the defendant - - defendants include 10 counts. Both informations are identical so I'm not going to go over them separately but each of the defendants are charged with two counts of delivery, possession with intent to deliver a controlled substance, receiving stolen property, a count of receiving stolen property, *a count of persons not to possess or use firearms*, a count of altering or obliterating marks for identification of firearms, a count of firearms not to be carried without a license and a count of possession with - - of a firearm with an altered manufacturer number, altered or obliterated, two counts of possession of a controlled substance and a count of possession of drug paraphernalia.

Transcript, 2/16/11, pg. 3 (emphasis added). The Court notes that none of the parties objected to the Court's inclusion of the severed counts during its opening remarks. However, during voir dire, the following discussion occurred between the prosecutor and a member of the panel:

> [Prosecutor]: ... In this case, the charges involve having a firearm with a serial number rubbed off.
> Juror 16: I understand that.
> [Prosecutor]: *Being a person who can not possess a firearm - -*
> Juror 16: Should not have one.

Transcript, 2/16/11, pg. 16 (emphasis added). After this interaction, defense counsel requested a sidebar discussion. At sidebar, defense counsel brought to light the motion to

sever the persons not to possess charges and requested the Court to strike the panel. At the time of the initial sidebar, the Court thought that a curative instruction would remedy any prejudice; it directed the parties to continue selecting a jury. However, after the Court sat the jury, defense counsel requested, again, that the panel be stricken based on the Court and the prosecutor's comments. At a second sidebar, the prosecutor admitted that she did not realize that the persons not to possess charges were severed. After the second request was made, the Court decided that it should strike the panel; it granted Defendants' motions and struck the panel. Order, dated 2/16/11, filed 2/22/11.

Third Mistrial: Trial Testimony of Trooper Dammer

On April 12, 2011, trial commenced. Also, on this date, the Court granted a third mistrial during the testimony of the Commonwealth's first witness, affiant Trooper Edward Dammer. Trooper Dammer testified about his encounter with Defendants on December 4, 2008. Generally, Trooper Dammer testified that he was working the midnight shift with Trooper McMunn. On this date, the troopers came across a car in the Sheetz parking lot in Loyalsock. When Trooper Dammer came upon the car, Defendant Patton was in the car; during the Trooper's interaction with Defendant Patton, Defendant Powell came out of Sheetz and went to the passenger side of the car.

Defendants' first mistrial request occurred during the Trooper's testimony about searching Defendant Patton's car; the applicable portion of Trooper Dammer's testimony is as follows:

> [Prosecutor]: At some point, did you arrest these two people right then?
> [Trooper]: No
> [Prosecutor]: What did you do then?
> [Trooper]: Trooper McMunn came back to the vehicle, he explained some information to me and I returned to the patrol vehicle and I wanted to

> get their consent to search the vehicle. So I prepared a Consent to Search from while Trooper McMunn was back at the vehicle with them.
> [Prosecutor]: At some point, you had the vehicle towed, is that correct?
> [Trooper]: That is correct.
> [Prosecutor]: And then what happened?
> [Trooper]: It was towed to the Montoursville barracks which is where it was placed in a garage and secured.
> [Prosecutor]: What happened to the two defendants?
> [Trooper]: They were released.
> * * * * * * * * * * *
> [Prosecutor]: Was your squad car equipped with audio and visual aides?
> [Trooper]: Yes, it was.
> * * * * * * * * * * *
> [Prosecutor]: When you searched the vehicle, is there some procedure of searching a vehicle once you tow it to PSP?
> [Trooper]: Yes, I had to get approval from the District Attorney's Office, then I had to bring it before a district justice and have it authorized.

Transcript, 4/12/11, pg. 17-19. Then, the following conversation was held at sidebar:

> [Powell Counsel]: Judge, I don't think it's admissible that they declined a consent to search the vehicle.
> [Prosecutor]: That wasn't in evidence.
> [Powell Counsel]: That's what she just brought in. They prepared a consent form and now he's saying they went and got a search warrant. Clearly they didn't consent to search and that's not admissible. I thought she was going to stop that they prepared a consent form and let it appear that they consented. Now she's bringing in that they got a search warrant. Well, they wouldn't get a search warrant if they consented and that's not admissible. I am asking for a motion for mistrial.

Transcript, 4/12/11, pg. 19. In that instance, the Court ruled that the Trooper's testimony was not a clear violation of Defendants' constitutional rights; therefore, the Court declined the motion for mistrial. *Id*. at 21.

However, later during the Trooper's testimony, a second mention of the denial of consent took place when the Prosecutor played the audio and video from the Trooper's squad car for the jury. The video contained both the actual video shot from the squad car and a transcript of the audio underneath the picture; the transcript of the audio was prepared by the District Attorney's office. The Court notes that the lines of the transcript were

highlighted when the audio was occurring on the video and then that portion of the transcript was shifted off of the screen. The Court also notes that the audio portion of the video was inaudible. At some point during the video, Defendants objected; the prosecutor instructed the video to be stopped, and the following discussion occurred at sidebar:

> [Powell Counsel]: Your Honor, I would like to put on the record - - I would like to put on the record that when [Prosecutor] introduced the video tape, I asked her if she had redacted it for material or information that would not be admissible and she said she had. They just went in and all over it again on that search warrant business and I was trying to listen and read because I guess I would also object to the transcript. That's not - - I would submit that's not admissible, it's a transcript prepared by them. But again, three separate occasions, I believe, he's saying to them, look, you can consent or I have to get a search warrant. And at the bottom of the transcript, it said, Okay, I'm going to have to get a search warrant because you won't consent to the search. That's not admissible and I'm asking for the mistrial. It was crystal clear that their choice was consent or search warrant and you're not allowed to tell the jury that they asserted their rights under the Fourth Amendment for searches.

Id. at 32. After an argument was held on the record, the Court made the following ruling:

> Very well. For the record, the Court notes that the first reference when this issue came up, the Court did believe it was [de minimis] and now with the further testimony and particularly the video that was shown to the jury, it is now clear that the jury would know that the search was refused by the defendants and that a search warrant was applied for. The Court believes that this is a violation of the Fourth Amendment in that it was revealed that they exercised their Constitutional rights and would be overly prejudicial to the case. The Court declares a mistrial in this case and the jury is dismissed.

Id. at 44-45.

Motions to Dismiss

On May 13, 2011, Defendant Patton filed a motion for dismissal on double jeopardy grounds pursuant to the state and federal constitutions. On May 17, 2011, Defendant Powell filed his motion for dismissal. These motions are the subject of this Opinion and Order.

II. Discussion

Generally, the double jeopardy clauses of the federal and state constitutions preclude retrial when prosecutorial misconduct *provokes* a defendant to move for a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667 (1982); *Commonwealth v. Simmons*, 522 A.2d 537 (Pa. 1987). Yet, in *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), our state Supreme Court strengthened the clause's protection of criminal defendants under our state constitution; in *Smith*, our Supreme Court held that:

> the *double jeopardy clause* of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, *but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.*

Smith, 615 A.2d at 325 (emphasis added). *See also Commonwealth v. Martorano*, 741 A.2d 1221, 1223 (Pa. 1999).

Throughout the years, our Superior Court has had an opportunity to review the Supreme Court's decision in *Smith*. *See generally Commonwealth v. Anderson*, 38 A.3d 828 (Pa. Super. Ct. 2011); *Commonwealth v. Wood*, 803 A.2d 217 (Pa. Super. Ct. 2002); *Commonwealth v. Chimel*, 777 A.2d 459 (Pa. Super. 2001). *See also Commonwealth v. Culver*, No. 1803 WDA 2010, No. 1821 WDA 2010, 2012 Pa. Super. LEXIS 2062 (Aug. 21, 2012). In *Chimel*, our Superior Court provided:

> *Smith* did not create a *per se* bar to retrial in all cases of intentional prosecutorial overreaching. Rather, the *Smith* Court primarily was concerned with prosecution tactics, which actually were designed to demean or subvert the truth seeking process. The *Smith* standard precludes retrial where the prosecutor's conduct evidences intent to so prejudice the defendant as to deny him fair trial. A fair trial, of course is not a perfect trial. Errors can and do occur. That is why our judicial system provides for appellate review to rectify such errors. However, where the prosecutor's conduct changes from mere error to intentionally subverting the court process, then a fair trial is denied. A fair trial is not simply a lofty goal, it is a constitutional mandate,

> … [and] where that constitutional mandate is ignored by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity.

777 A.2d at 464 (citations omitted). Therefore, in order to determine if the Commonwealth's double jeopardy clause bars retrial, the Court must determine if Defendants' claims of prosecutorial misconduct are meritorious, and then if these claims bar retrial on double jeopardy grounds. *See id*.

In this matter, Defendants argue that the prosecutor's conduct was intentionally undertaken to preclude Defendants from having a fair trial. Defendants allege that the number of mistrials shows this intent. Additionally, Defendants note other evidentiary motions argued by the prosecution, relating to admissions of marijuana smoking and gang-related tattoos, to show her intention to deny Defendants a fair trial. However, the Court does not believe that the prosecutor's conduct was *intentionally* undertaken to deprive Defendants a fair trial. Therefore, Defendants' claims lack merit.

The Court believes that this case is similar to *Culver*. In *Culver*, the trial court refused defendant's request to bar retrial on double jeopardy grounds based upon the intentional misconduct of the prosecutor. *Culver*, at *43. Specifically, that prosecutor engaged in menacing behavior during his opening and closing arguments, called defendant a liar in his closing argument, made reference to evidence that did not exist, and asked leading questions. *Id*. at *14-37. On appeal, the Superior Court upheld the trial court's ruling that the prosecutor did not intentionally undertake actions to deny defendant a fair trial; in particular, that Court held:

> [i]n the instant case, however, though there is plenty of smoke, we are constrained to agree with the trial court that there is no visible fire. We cannot discern a clear intent to deprive [defendant] of a fair trial where [prosecutor's] misconduct could largely be explained by his incompetence or

> mere indifference to the rights of the accused and the decorum of the court, and were there is also no direct evidence to the contrary.

Id. at *43-44.

Similarly, in this case, the Court cannot find any direct evidence that the prosecutor intended to deprive Defendants of a fair trial. In the instant matter, three mistrials were granted by the Court over a course of two years. The first mistrial occurred when the prosecution received information about a potential witness; the Court finds that the prosecution turned over this information to the defense when it was received by the authorities. Therefore, this mistrial was justified so that the parties could appropriately question this witness.

The second mistrial was also justified. The second mistrial occurred during the second jury selection when the prosecutor questioned the panel about a severed charge. However, in that case, the Court and the prosecution were both proceeding under the mistaken presumption that all of the charges against Defendants were viable, when they, in fact, were not. Therefore, although the prosecution should have known about the severed charges and informed the Court as such, the Court does not believe that the prosecutor's failure to do so was intentional. Both the prosecutor and the Court held a mistaken belief that all of the charges were viable.

The only actions undertaken by the prosecution that causes the Court concern are those during the April 2011 trial. During the testimony of the *first* Commonwealth witness, Defendants moved for mistrial twice; both of these requests centered on Defendants' refusal of a consent to search. Initially, the Court found the first mention of the search warrant application to be a de minimis violation of Defendants' Fourth Amendment rights. After this ruling, the prosecutor should have been careful not to inquire into any areas of

questioning where the search warrant application would be discussed. The prosecution appeared to steer clear of the search warrant issue until she played the video taken from the Trooper's squad car. The transcript accompanying this video, shown on a projection screen to the jury, clearly showed the Trooper asking for a consent to search the vehicle and the Defendants exercising their right to refuse the search. This violation compelled the Court to grant a mistrial on the basis of Defendants' Fourth Amendment rights.

Despite this clear violation of Defendants' rights, the Court cannot conclude that the prosecutor intentionally undertook these actions to deny Defendants a fair trial. During the motion to dismiss hearing, the prosecutor testified that she did not intend for a mistrial to occur. The prosecutor also testified that she believed Defendants' refusal to consent was admissible evidence. She testified that she told her intern, who was controlling the video for her, that the jury could not hear Defendants' refusal statements. The Court finds her testimony to be credible. Additionally, her intern testified that he intended cut off the end video where the Troopers were blatantly discussing the search warrant application with Defendants; however, Defendants objected to the video prior to the intern's intended stopping point. The Court finds that the beginning of the video and transcript showed the Troopers clearly asking Defendants if they would consent to the search and Defendants refusing to do so. The Court agrees with its prior ruling that this violation warranted a mistrial; however, this Court does not believe that the prosecutor *intentionally* provoked this request.

The Court enters the following Order.

O R D E R

AND NOW, this 2nd day of November, 2012, after a hearing on Defendants' motions to dismiss and a supplemental briefing period, it is hereby ORDERED and DIRECTED that Defendants' motions are DENIED. Separate pre-trial and transport orders will be issued.

BY THE COURT,

_____ _____

Date Richard A. Gray, J.

RAG/abn

cc: Kenneth Osokow, Esquire
Nicole Spring, Esquire
George Lepley, Esquire
Michael C. Morrone, Esquire
Mary Kilgus, Esquire
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