

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA,**

v.

**JOHN WILEY,  
Defendant**

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**CR-546-2012  
CRIMINAL DIVISION**

**OPINION AND ORDER**

The Commonwealth filed a Motion to Dismiss Charges on June 20, 2012. A hearing on the motion was held on July 24, 2012.

***Background***

On December 6, 2011, John Wiley (Defendant) pled guilty to Theft by Unlawful Taking, a felony three offense. On February 22, 2012, Defendant received a sentence of four (4) months to twenty-four (24) months less one (1) day in the Lycoming County Prison. The Defendant's sentence was deferred and he was to report no later than 9:00 a.m. on February 27, 2012. On February 29, 2012, a bench warrant was issued for the Defendant because he failed to appear at the Lycoming County Prison. The bench warrant was vacated on March 16, 2012 and in an Order dated the same day, which modified his sentencing order, he received a sanction that he would not be eligible to be transferred to the pre-release center for a period of fourteen (14) days from the date of the Order. On March 23, 2012, the Defendant was charged with Default in Required Appearance, a felony three offense, for his failure to appear at Lycoming County Prison to begin serving his sentence on February 27, 2012.

***Discussion***

The Defendant contends that the sanctions for his failure to appear incurred at his bench warrant hearing on March 16, 2012 make the charge of Default in Required Appearance a

violation of the United States Constitution’s Double Jeopardy Clause. The Double Jeopardy Clause “provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.” Commonwealth v. Decker, 664 A.2d 1028, 1029 (Pa. Super. 1995). The United States Supreme Court has established a “same-elements” test to determine whether the Double Jeopardy Clause has been violated.

In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the “same-elements” test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the “*Blockburger*” test, inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and successive prosecution.

United States v. Dixon, 509 U.S. 688 (1993); see also Commonwealth v. Yerby, 679 A.2d 217 (Pa. 1996); Commonwealth v. Young, 35 A.3d 54 (Pa. Super. 2011). When making such a comparison, overlap in proof between the two prosecutions does not establish double jeopardy violation. Commonwealth v. Jackson, 10 A.3d 341, 345 (Pa. Super. 2010).

In this case, the Defendant was first charged with Theft by Unlawful Taking or Disposition, which “[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over movable property of another with in intent to deprive him thereof.” 18 Pa.C.S. § 3921. The Defendant was then charged in a separate case with Default in Required Appearance, which states:

A person set at liberty by court order, with or without bail, upon condition that he will subsequently appear at a specified time and place, commits a misdemeanor of the second degree if, without lawful excuse, he fails to appear at that time and place. The offense constitutes a felony of the third degree where the required appearance was to answer to a charge of felony, or for disposition of any such charge, and the actor took flight or went into hiding to avoid apprehension, trial or punishment.

18 Pa.C.S. § 5124. None of the elements of these crimes are similar. Therefore, no two crimes

or offenses the Defendant was charged with have the same elements.

The Defendant alleges, on the other hand, that the sanction given to the Defendant for failing to appear on his Theft by Unlawful Taking or Disposition charge establishes a Double Jeopardy violation. The Defendant, however, was not charged with a crime. In a jury case, jeopardy attaches when the jury is sworn, and in a non-jury case, jeopardy does not attach until the trial judge has begun to hear evidence. Commonwealth v. Carson, 393 A.2d 778, 782 (Pa. Super. 1978). The Defendant was not charged or tried off of the actions of failing to appear but merely sanctioned based off this Courts power.

Every Court shall have power to issue, under its judicial seal, every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order which it may make and all legal and equitable powers required for or incidental to the exercise of its jurisdiction, and, except as otherwise prescribed by general rules, every court shall have power to make such rules and orders of court as the interest of justice or the business of the court may require.

42 Pa.C.S. § 323. The use of these powers for the enforcement of an order does not equate to new criminal charges brought by the Commonwealth. Here, the Court used these powers to deter the Defendant and future Defendants that received a deferred sentence, from abusing the privilege without any consequences.<sup>1</sup> As a result, the Court, within its powers, further defined the sentence that he had already received. Therefore, this Court, applying the “same-elements” test as dictated by the United States Supreme Court, is unable to find a violation of the Double Jeopardy Clause.

### **ORDER**

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<sup>1</sup>This was in fact what was stated to the Defendant by the Court when he received his sanction at the Bench Warrant Hearing on March 16, 2012. N.T. 3/16/2012, p.4.

**AND NOW**, this \_\_\_\_\_ day of August, 2012, based upon the foregoing Opinion, the Court finds that Double Jeopardy Clause of the United States Constitution has not attached in this case. Therefore, the Defendant's Motion to Dismiss is DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA (KO)  
PD (KB)  
Eileen Dgien, Dep. CA  
Gary Weber