

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 :  
 vs. : No. CR-62-2013  
 :  
 GARY LAMAR COLEMAN, :  
 Defendant :  
 OPINION AND ORDER

This matter came before the Court for a hearing and argument on May 29, 2013 on Defendant’s omnibus pretrial motion, in which Defendant seeks dismissal of the charges filed against him on three bases: (1) a violation of the compulsory joinder rule in 18 Pa.C.S. §110, (2) prosecutorial vindictiveness; and (3) a violation of Rule 600. The relevant facts follow.

On April 30, 2008, May 8, 2008 and May 15, 2008, Defendant allegedly delivered cocaine and heroin to a confidential informant (CI) who was working with Trooper Brett Herbst. The deliveries occurred in the area of Park Avenue and Grier Street, Wayne Avenue and Dove Street, and Wayne Avenue and West Fourth Street. Defendant’s Exhibit 1.

The drug investigation broadened into a federal inquiry, and Trooper Herbst lost contact with the CI. The federal case did not go the way the police would have liked and they had nothing to hold over the CI’s head. The CI, however, eventually slipped up again, and Trooper Herbst was able to “bring him into the fold.”

On March 14, 2012, Trooper Herbst spoke with the District Attorney and received verbal approval to file the charges in this case. Trooper Herbst, though, did not file the charges until June 1, 2012, because the CI told Trooper Herbst that he was having

surgery for debilitating arthritis and it would be three to four months before he would be physically able to come to court. A warrant for Defendant's arrest also was issued on June 1, 2012.

Between the dates of the deliveries in this case and the filing of the charges, Defendant was arrested and charged with additional drug offenses.

On three occasions in February and March 2010, Defendant delivered crack cocaine or conspired with another individual to deliver crack cocaine to a different confidential informant who was working with Trooper John Whipple. The deliveries occurred in the areas of Park Avenue and Locust Street, Park Avenue and First Avenue, and First Avenue and High Street. Trooper David Burns and Trooper Herbst assisted Trooper Whipple with searching the CI and his vehicle and conducting surveillance during the transactions. Defendant's Exhibit 2. The criminal charges arising from these transactions were filed to case CP-41-CR-433-2011. Defendant entered guilty pleas to those charges on February 15, 2012. On May 15, 2012, Defendant was sentenced to 21 months to 4 years of incarceration in a state correctional institution. Defendant's Exhibit 3.

Although Defendant was incarcerated in a state correctional institution, the arrest warrant that was issued on June 1, 2012 was not served on Defendant until December 18, 2012.

Defendant filed his omnibus pretrial motion on March 21, 2013. Prior to the filing of the omnibus pretrial motion, the defense did not file any continuance requests.

## DISCUSSION

Defendant first asserts that the charges in this case must be dismissed pursuant to 18 Pa.C.S. §110.

Section 110 states, in relevant part:

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

- (1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for the same offense) and the subsequent prosecution is for:
  - (i) any offense of which the defendant could have been convicted on the first prosecution;
  - (ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and occurred within the same judicial district as the former prosecution unless the court ordered a separate trial of the charge of such offense;

....

18 Pa.C.S. §110(1)(i) and (ii).

Defendant argues that if the Commonwealth had not delayed in filing the charges, these offenses could have been consolidated for trial with the 2010 drugs charges filed under 433-2011; therefore pursuant to section 110(1)(i) he could have been convicted of these offenses on the first prosecution. The Court cannot agree.

Defendant relies on this Court's decision in Commonwealth v. Michael Wills for his argument that the offenses in this case could have been consolidated with the offenses in 433-2011. Wills is clearly distinguishable from the case at bar. Although Wills also involved drug deliveries to two different confidential informants, the deliveries were made

under similar circumstances in close temporal proximity to each other, i.e. they were less than one month apart. The alleged drug offenses in this case occurred nearly two years before the drug offenses in case 433-2011. Therefore, they were much less relevant to show motive, intent, identity or common plan or scheme and much more likely to merely show a propensity to commit drug offenses, and the Court would not have been inclined to consolidate these cases for trial. Furthermore, the charges in this case were not even filed when Defendant entered his guilty pleas in case 433-2011. Therefore, the Court rejects Defendant's assertion that he could have been convicted of these offenses on the prosecution of case 433-2011.

Defendant also asserts that these offenses were part of the same criminal episode or based on the same conduct as the charges he was convicted of in case 433-2011. Again, the Court cannot agree.

For a prosecution to be barred under section 110(1)(ii), each prong of the following test must be met: (1) the former prosecution resulted in an acquittal or conviction; (2) the current prosecution was based on the same criminal conduct or arose from the same criminal episode; (3) the prosecutor in the subsequent trial was aware of the charges before the first trial; and (4) all charges were within the same judicial district as the former prosecution. Commonwealth v. Nolan, 579 Pa. 300, 855 A.2d 834, 839 (2004). In determining whether the current prosecution arose from the same criminal episode, the court must look at the "logical and temporal relationship" between the criminal acts. Id. citing Commonwealth v. Hude, 500 Pa. 482, 458 A.2d 177, 183 (1983).

The offenses in this case are neither logically nor temporally related to the charges to which Defendant entered a guilty plea in case 433-2011. Although both cases involved drug offenses, they involved different confidential informants, different witnesses and they occurred nearly two years apart.

As the Pennsylvania Supreme Court noted in Nolan, the compulsory joinder rule:

was designed to serve two distinct policy considerations: (1) to protect a person accused of crimes from governmental harassment by being forced to undergo successive trials for offenses stemming from the same criminal episode, and (2) to ensure judicial economy. These policy concerns must not be interpreted to sanction 'volume discounting' or, as evidenced by this case, to label an 'enterprise' an 'episode.' This Court has never categorized seven months of individual criminal activity, with distinct layers of illegality, as a single criminal episode; the purpose inherent in §110 prevents such a result now....

...Here, over a seven-month period, appellee ran a profitable enterprise in which he stole at least 25 vehicles from numerous individuals and 11 dealerships and then resold them, creating even more victims. Much like a television's sitcom, each week's story has similar characters, producers, and continuity of storyline, but each week is a separate episode- the series of episodes is an enterprise....

Nolan, 855 A.2d at 840 (citations omitted).

As evidenced by his guilty pleas in other cases, Defendant also was engaged in a profitable criminal enterprise, which was composed of separate episodes of drug deliveries spanning nearly two years. Dismissal in this case would not further the policy considerations of the compulsory joinder rule; it would only serve to insulate Defendant from punishment for one of the criminal episodes that make up his drug dealing enterprise.

Therefore, the Court will deny Defendant's motion to dismiss based on §110.

Defendant next asserts that the charges should be dismissed based on prosecutorial vindictiveness.

“The defense of prosecutorial vindictiveness is based upon the theory that due process prohibits a prosecutor from punishing a criminal defendant in retaliation for that defendant’s exercise of a constitutional right.” Commonwealth v. Butler, 529 Pa. 7, 601 A.2d 268, 270 (1991), citing Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). “[T]he threshold event required for a showing of prosecutorial vindictiveness would be the imposition, after the defendant’s exercise of a statutory or constitutional right, of more severe charges or penalties than those included in or contemplated under the original indictment.” Commonwealth v. Ward, 493 Pa. 115, 425 A.2d 401, 409 (1981). A prima facie case of prosecutorial vindictiveness, however, can be subject to rebuttal by evidence explaining or justifying the action taken, thus negating any inference of actual vindictiveness. Id.

The Court rejects Defendant’s claim of prosecutorial vindictiveness. The delay in filing the charges had nothing to do with Defendant’s acquittal in another drug case or the fact that the police and District Attorney have been unable to charge Defendant for some other “serious charge.” Although there is nothing in the record to indicate when this alleged “serious charge” occurred, it is clear from Defendant’s assertions in his omnibus pretrial motion that the alleged drug deliveries in this case occurred before he even committed or was charged with the drug deliveries in case 105-2010, 986-2010 and 433-2011.

According to Defendant's motion, Defendant was charged in case 105-2010 on January 9, 2010 and acquitted on October 18, 2010. He committed and was charged with the drug offenses in case 986-2010 on June 2, 2010 and was convicted of those offenses on December 16, 2011. In case 433-2011, the offenses occurred in February and March of 2010, Defendant pled guilty to those charges on February 15, 2010, and he was sentenced on May 15, 2012.

The alleged drug offenses in this case occurred in April and May of 2008. At that time, the police and the District Attorney had no way of knowing that Defendant would commit those other crimes or what the outcome of those charges would be. Obviously, there was some other reason why the charges in this case were not filed for several years. Trooper Herbst credibly testified that the reason for the delay was related to losing contact with the CI and then the CI being unable to appear for court for a few months due to medical issues. Therefore, the Court will deny Defendant's request to dismiss the charges based on prosecutorial vindictiveness.

Defendant also seeks dismissal for a violation of Rule 600. Defendant's argument is premised on an allegation that his Rule 600 date should begin on March 14, 2012 when the District Attorney approved the charges. Although Defendant's argument is creative, it is not supported by the text of the Rule or the case law interpreting it.

Both the version of Rule 600 in effect at the time Defendant filed his motion and the current version of Rule 600 provide 365 days "from the date on which the complaint is filed" for trial to commence. There is no mention of the date the district attorney approved

the charges in any version of Rule 600 or its predecessor, Rule 1100.

Similarly, case law does not support Defendant's position. In Commonwealth v. Lomax, 324 Pa. Super. 549, 472 A.2d 217 (1984), a retail theft charge was filed by a store security guard without first obtaining the district attorney's approval. The district justice accepted the complaint, signed it and issued a summons against the defendant. The defendant appeared to be fingerprinted but he failed to appear at his hearing, and a warrant was issued for his arrest. The defendant was arrested several months later, preliminarily arraigned, and incarcerated. The complaint was not approved by the district attorney until a month after the defendant's arrest. When the defendant sought dismissal pursuant to Rule 1100, the Commonwealth argued that the time period did not commence until the complaint was approved by the district attorney's office. The trial court denied the defendant's motion, convicted him of a felony retail theft, and sentenced him to 3 ½ to 7 years imprisonment.

On appeal, the defendant argued that the trial court erred in denying his motion to dismiss pursuant to Rule 1100. The Superior Court agreed and found that, regardless of whether the district attorney's approval had been obtained or should have been obtained, the time period commenced with the filing of the complaint because that is when the defendant had been confronted "with the prosecutorial forces of organized society." 472 A.2d at 220.

Here, as in Lomax, the prosecutorial forces were brought to bear against Defendant with the filing of the criminal complaint. It was the filing of the criminal complaint that triggered the issuance of a summons and ultimately an arrest warrant against



Defendant, not the approval of the charges by the district attorney. Therefore, the Court will deny Defendant's motion to dismiss for violation of Rule 600.

At the hearing on Defendant's motion to dismiss, defense counsel orally moved to amend Defendant's motion to include a general due process/speedy trial violation. The Commonwealth objected for the record. The Court permits Defendant to orally amend his motion, but finds that he is not entitled to relief on this claim.

When considering a general claim that a defendant's due process/speedy trial rights have been violated, the court must consider the following four factors: "(1) whether the delay itself is sufficient to trigger further inquiry; (2) if so, the reason for the delay; (3) whether the defendant timely asserted his rights; and (4) whether there is any prejudice to the defendant from the delay." Commonwealth v. West, 595 Pa. 483, 938 A.2d 1034, 1040 (2007); see also Commonwealth v. Snyder, 552 Pa. 44, 713 A.2d 596, 601 (1998)("a defendant must show the passing of time caused actual prejudice and that the prosecution lacked sufficient and proper reasons for postponing the prosecution.").

The delay of approximately four years in filing the charges in this case is sufficient to trigger further inquiry. Although Defendant did not include this claim in his written omnibus pretrial motion, he orally amended his motion to include this claim, so that it could be considered along with the other claims in his pretrial motion. Therefore, the Court finds that Defendant timely asserted his rights.

Unfortunately, however, the Court finds that Defendant has not shown that he has suffered any actual prejudice as a result of the delay. While he generally argues that he

is prejudiced because witnesses memories may have faded, he has not presented any testimony or evidence to show that any witness has become unavailable or that any witness's memory has been impaired due to the passage of time. Defendant also seems to argue that the delay has affected his ability to have these charges tried with his 2010 charges, or, in the event of a conviction, to receive a concurrent sentence with his other convictions. Such a prospect, though, would have been unlikely even if the charges had been filed shortly after the alleged offenses were committed. If Defendant had been charged during the summer of 2008 and tried and convicted within a year thereafter as contemplated by Rule 600, he likely would have been on probation or parole at the time of his 2010 offenses. In fact, one could argue that Defendant has inadvertently benefitted from the delay in filing the charges because if he is convicted, his convictions in 986-2010 and 433-2011 cannot be used in determining his prior record score because they occurred after the commission of the current offenses. 204 Pa.Code §303.8(a) ("In order for an offense to be considered in the Prior Record Score, both the commission of and conviction for the previous offense must occur before the commission of the current offense.").

The Commonwealth also has shown sufficient reasons for the delay. The charges in this case broadened into a federal investigation and Trooper Herbst lost contact with the confidential informant. When Trooper Herbst regained contact with the confidential informant, the informant told him he was having surgery for debilitating arthritis and would not be physically able to come to court for three or four months.

Since Defendant has not established any actual prejudice as a result of the

delay and the Commonwealth has provided credible testimony to explain the reasons for the delay, the Court will deny Defendant's oral motion to dismiss based on an alleged general violation of his due process/speed trial rights.

**ORDER**

**AND NOW**, this \_\_\_\_ day of August 2013, the Court DENIES Defendant's omnibus pretrial motion.

By The Court,

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Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)  
Nicole Spring, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Work file