IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-893-2012**
	:	
vs.	:	
	:	
DARRAL E. DICKERSON,	:	
Defendant	:	

AMENDED OPINION AND ORDER

This matter came before the court on March 28, 2013 for a hearing and argument on Defendant's motion to dismiss nunc pro tunc. The relevant facts follow.

On May 13, 2012, Defendant arrived at the Williamsport Hospital with a gunshot wound to the inside of his right foot. Defendant allegedly first told the police that he was shot by an unknown person when he was stopped along Route 15 near the scenic overlook but, after the police confronted him with the fact that his initial statements were inconsistent with the trajectory of the bullet as evidenced by the entrance and exit wounds, he admitted that he accidentally shot himself in the foot with a rifle. The police believed Defendant had convictions in New York for felony delivery of a controlled substance and felony possession with intent to deliver a controlled substance. Therefore, the police charged Defendant with one count of persons not to possess a firearm, in violation of 18 Pa.C.S.A. §6105.

On September 17, 2012, Defendant entered an open plea to the charge. Within days, however, Defendant wrote to the court expressing his desire to withdraw his plea. The court forwarded Defendant's letter to the Lycoming County Prothonotary for filing and sent copies to defense counsel and the Commonwealth. Eventually, defense counsel

filed a written motion to withdraw the guilty plea, in which counsel averred that Defendant was not guilty of the charge.

At the hearing on Defendant's motion to withdraw his plea, the Commonwealth conceded that Defendant did not have convictions for delivery of a controlled substance or possession with intent to deliver a controlled substance, but rather an attempt to sell a controlled substance, which was not the equivalent of Pennsylvania's delivery of a controlled substance or possession with intent to deliver a controlled substance.[1] The Commonwealth asserted, however, that at least one of Defendant's convictions for criminal trespass was the equivalent of criminal trespass graded as a felony of the second degree in Pennsylvania. Based on a review of Defendant's testimony and provisions of New York penal law, it was clear to the court that Defendant was asserting that he was innocent because his New York convictions would not be disqualifying offenses under section 6105 of Pennsylvania's Crimes Code. Therefore, the court was satisfied that Defendant was asserting his innocence, which was a fair and just reason to permit him to withdraw his plea. The court did not determine whether any of Defendant's New York convictions constituted a disqualifying offense under Section 6105; that was a legal issue for another proceeding at which both parties would be free to present any relevant documents or testimony.

[1] See Commonwealth v. Clegg, 611 Pa. 468, 27 A.2d 1266 (Pa. 2011)(inchoate crimes are not enumerated offenses under the Uniform Firearms Act, 18 Pa.C.S.A. §6105).

On March 26, 2013, Defendant filed his motion to dismiss nunc pro tunc, in which he stated it appears as if there are no prior convictions out of New York that would prevent him from possessing a firearm. In response to Defendant's petition, the Commonwealth argued that, because Defendant had two prior New York convictions for possession of a controlled substance and the second conviction would be the equivalent of a second Pennsylvania offense which carries a maximum penalty of three years of incarceration, Defendant has a disqualifying offense pursuant to 18 Pa.C.S.A. §6105(c)(2) and can be charged with a felony of the second degree. The court cannot agree.

Section 6105(c)(2) states:

> In addition to any person who has been convicted of any offense listed under subsection (b), the following persons shall be subject to the prohibition of subsection (a):
>
> (2) A person who has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, or any equivalent Federal statute or equivalent statute of any other state, that may be punishable by a term of imprisonment exceeding two years.

18 Pa.C.S.A. §6105(c)(2).

Defendant has two New York convictions for criminal possession of a controlled substance in the seventh degree. The basis for each of these convictions was Defendant's unlawful possession of cocaine.

"A person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance…. Criminal possession of a controlled substance in the seventh degree is a class A

misdemeanor." N.Y. Penal Law, §220.03. A class A misdemeanor is punishable by a term of imprisonment which shall not exceed one year. N.Y. Penal Law, §70.15.

While Defendant's New York convictions would be equivalent to convictions for possession of a controlled substance pursuant to 35 P.S. §780-113(a)(16), these convictions do not satisfy the requirements for 18 Pa.C.S.A. §6105(c)(2), because they are not punishable by a term of imprisonment exceeding two years.

The Commonwealth argues that the last clause of section 6105(c)(2) only applies to Pennsylvania offenses. Furthermore, since Defendant has two convictions that are equivalent to convictions for possession of a controlled substance pursuant to 35 P.S. §780-113(a)(16) and a second conviction under Pennsylvania law can be punished by a maximum term of imprisonment of three years, Defendant meets the requirements of section 6105(c)(2) and is subject to criminal prosecution. Again, the court cannot agree.

Under the Statutory Construction Act, the object of all statutory construction is to ascertain and effectuate the General Assembly's intention. 1 Pa.C.S.A. §1921(a). When the words of a statute are clear and free from ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S.A. §1921(b). Words and phrases are to be construed according to the rules of grammar and according to their common and approved usage, unless they are technical words and phrases that have acquired a peculiar meaning or definition. 1 Pa.C.S.A. §1903(a). Further, penal statutes are to be strictly construed. 1 Pa.C.S.A. §1928(b)(1).

With these standards in mind, the court finds the phrase "that may be

punishable by a term of imprisonment exceeding two years" modifies offenses under any equivalent Federal statute or any equivalent statute of any other state, as well as offenses under The Controlled Substance, Drug, Device and Cosmetic Act. If the General Assembly intended that phrase to modify only offenses under The Controlled Substance, Drug, Device and Cosmetic Act, section 6105(c)(2) would have stated: A person who has been convicted of an offense under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act that may be punishable by a term of imprisonment exceeding two years, or an offense under any equivalent Federal statute or equivalent statute of any other state.[2]

Accordingly, the following order is entered:

ORDER

AND NOW, this ___ day of April 2013, the court GRANTS Defendant's motion to dismiss nunc pro tunc.

By The Court,

_____
Marc F. Lovecchio, Judge

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

[2] The Court also notes that the three year maximum for a second offense under Pennsylvania law only applies if the second **violation** occurred after the first conviction. See 35 P.S. §780-113(b). The Commonwealth only introduced evidence of the dates of conviction; it did not introduce any evidence to show the violation date for the second offense.