

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: APPEAL OF DISTRICT : MD-293-2014
ATTORNEY'S DENIAL OF :
PRIVATE CRIMINAL COMPLAINT :

OPINION AND ORDER

On May 27, 2014, the District Attorney of Lycoming County disapproved Dr. Lise Lund's (Complainant) private criminal complaint. The Complainant appealed the District Attorney's disapproval. A hearing was held on July 17, 2014.

I. Background

In 2003 and 2004, Sovereign Bank sent credit cards to the Complainant.¹ On June 15, 2004, Time Peace Equine, Inc.² entered into a loan agreement with Sovereign Bank.³ The Complainant is the president of Time Peace Equine and was an individual guarantor of the loan. The loan was also a U.S. Small Business Administration (SBA) guaranteed loan. The agreement and the guaranty were signed in the Danville, Pennsylvania⁴ branch of Sovereign Bank. In 2007, Time Peace Equine defaulted on the loan. After the default, the Complainant, her attorney, and Sovereign executives negotiated a settlement. According to the Complainant, the settlement was negotiated in Lycoming County. In 2011, the Complainant sued Sovereign Bank in Lycoming County. An arbitration hearing was held on June 27, 2013 in the Lycoming County Courthouse. An employee of Sovereign [hereinafter "Witness"] testified that Sovereign's records showed that three credit cards associated with the Complainant's account were created on December 1, 2003.

¹ During all relevant times, Complainant lived at Address, Millville, Pennsylvania. Millville is in Columbia County.

² Time Peace Equine's address is 406 Legion Road, Millville, Pennsylvania.

³ Sovereign Bank's address on the loan agreement is 2 Aldwyn Center, Villanova, Pennsylvania. 2 Aldwyn Center, Villanova is in Delaware County.

⁴ Danville is in Montour County.

In 2014, the Complainant filed a private criminal complaint with the District Attorney of Lycoming County. On May 27, 2014, Kenneth Osokow, First Assistant District Attorney, sent the Complainant a letter. In the letter, Osokow stated “after a thorough investigation and review of this matter, it does not arise to a level where criminal prosecution is warranted.” Lycoming County Chief Detective William Weber also sent the Complainant a letter on May 27, 2014. In that letter, Weber stated, “There is no basis for a perjury charge against [Witness]. [Witness] testified to information given to him by Santander [formerly Sovereign] Bank in preparing him to testify.”

The Complainant argues that the District Attorney erred in disapproving her private criminal complaint for the following reasons. First, theft by deception occurred when an employee in the Danville branch of Sovereign compelled her to sign a “personal” loan agreement even though she requested a “business” loan. Second, theft by deception occurred when a settlement contract was negotiated in Lycoming County “under extreme circumstances of criminal deception.” The Complainant was deceived because executives from Sovereign Bank “offer[ed] to settle a fraudulent debt obligation that they had previously created by way of false impression.” Furthermore, the Complainant was deceived when Sovereign executives “creat[ed] the false impression that they would provide satisfaction of . . . the debt that the bank could not legally offer.” In other words, Sovereign Bank deceived her by offering her a “full and final satisfaction of the debt” even though Sovereign could not release her from the debt she owed to the SBA. The Complainant had no way to determine that the settlement agreement was not a full and final satisfaction of her entire debt. Third, Sovereign Bank committed identity theft by creating a credit card in the Complainant’s name without her knowledge. Fourth, Witness committed perjury when he testified that three credit cards were created in December of 2003

because the credit card created without her knowledge was not created in December of 2003. Fifth, Witness tampered with physical evidence as he changed the contents of Sovereign Bank's records before testifying. "Everything else adds absolutely nothing to the discussion at hand and could quite easily have been typed into the assigned boxes by [Witness] before he printed the screen as could my name and the date that is the only identifiable piece information." Moreover, with the "peculiar insertion of the account number in question in between the two acknowledged numbers that identify the account," Witness "could, again, have simply added it for the purposes of printing the page"

II. Discussion

When determining whether a district attorney lawfully disapproved a private criminal complaint, "[t]he trial court must first correctly identify the nature of the district attorney's reason(s) for denying a private criminal complaint." In re Private Crim. Complaint of Wilson, 879 A.2d 199, 212 (Pa. Super. 2005).

"Where the district attorney's denial [of a private criminal complaint] is based on a legal evaluation of the evidence, the trial court undertakes a *de novo* review of the matter. Where the district attorney's disapproval is based on policy considerations, the trial court accords deference to the decision and will not interfere with it in the absence of bad faith, fraud or unconstitutionality. In the event the district attorney offers a hybrid of legal and policy reasons for disapproval, deference to the district attorney's decision, rather than *de novo* review is the appropriate standard." Id. (quoting In re Private Complaint of Adams, 764 A.2d 577, 579 (Pa. Super. 2000)).

The Court finds that the District Attorney's disapproval was based on a hybrid of legal and policy reasons. Osokow's statement that the matter "did not arise to a level where criminal

prosecution is warranted” indicates that there was a policy reason for the disapproval. On the other hand, Weber’s statement that “there is no basis for the perjury charge” indicates that there was a legal reason for the disapproval. During the appeal hearing, the Commonwealth argued that Witness had no personal knowledge of when the cards were created, so perjury was not warranted. This argument suggests that the complaint was disapproved for legal reasons. Because the Court has heard both policy and legal reasons, it must accord deference to the district attorney’s disapproval.

“The private criminal complainant has the burden to prove the district attorney abused his discretion, and that burden is a heavy one. In the Rule 506 petition for review, the private criminal complainant must demonstrate the district attorney’s decision amounted to bad faith, fraud or unconstitutionality. The complainant must do more than merely assert the district attorney’s decision is flawed in these regards. The complainant must show the facts of the case lead only to the conclusion that the district attorney’s decision was patently discriminatory, arbitrary or pretextual, and therefore not in the public interest. In the absence of such evidence, the trial court cannot presume to supervise the district attorney’s exercise of prosecutorial discretion, and should leave the district attorney’s decision undisturbed.” 879 A.2d at 215.

Here, the Complainant has not presented any evidence that the District Attorney’s decision was patently discriminatory, arbitrary, or pretextual. Therefore, the Court will leave the District Attorney’s decision undisturbed.

Given the Commonwealth’s focus on legal reasons during the hearing, the Court also conducted a *de novo* review. The Court agrees with the District Attorney that there is no legal basis to bring charges in Lycoming County for the acts alleged by the Complainant.

Regarding the Complainant's first argument, the Complainant has not shown that she was a victim of a theft committed by Sovereign in Lycoming County in 2004. "Venue in a criminal action properly belongs in the place where the crime occurred." Commonwealth v. Bethea, 828 A.2d 1066, 1075 (Pa. 2003). In 2004, Complainant lived in Columbia County. She signed the loan agreement and guaranty in Montour County. Therefore, Complainant has not shown that she was a victim of a theft committed by Sovereign in Lycoming County in 2004.

Regarding the Complainant's second argument, documents provided by the Complainant show that neither the Complainant nor her attorney was deceived during settlement negotiations in 2007. On September 17, 2007, an executive of Sovereign Bank sent an e-mail to the Complainant. In the e-mail, the executive wrote, "The terms of the agreement will call for payment of \$5,400.00, payable \$300.00 over 18 months (with first payment reportedly already mailed to the bank last Friday 9/14/07). Upon receipt of the full \$5,400.00, the bank will release you and Time Peace Equine, Inc. from the remaining balance owed on the loan obligation." The settlement agreement between Time Peace Equine and Sovereign was signed on October 4, 2007. Paragraph (2.)(a.) of the agreement provides, "Notwithstanding the amounts due and owing under the Note, Sovereign Bank agrees to accept a negotiated settlement of Indebtedness in the amount of \$5,400.00 in full and final satisfaction of the Claimants' liability under the Indebtedness payable via eighteen (18) monthly payments of \$300.00 per month beginning on or before September 15, 2007, receipt of the first payment is hereby acknowledged."

The Complainant is incorrect in her argument that she had no way of knowing that Sovereign could not release her from debt she owed to the SBA. The Borrower's Certification, which the Complainant references in her brief, provides, "If [Time Peace Equine] defaults on Loan, SBA may be required to pay [Sovereign] under the SBA guarantee. SBA may then seek

recovery of these funds from the [Time Peace Equine].” The Certification also provides, “Payments by SBA to [Sovereign] under SBA’s guarantee will not apply to the Loan account of [Time Peace Equine], or diminish the indebtedness of [Time Peace Equine] under the Note or the obligations of any personal guarantor of the Note.” Therefore, the Complainant could have known that payments by the SBA to Sovereign did not apply to the loan and that the SBA could seek recovery of its payments.

Regarding the Complainant’s third argument, the Complainant has not shown that she was a victim of identity theft committed by Sovereign in Lycoming County. “A person commits the offense of identity theft of another person if he possesses or uses, through any means, identifying information of another person without the consent of that other person to further any unlawful purpose.” 18 Pa. C.S. § 4120(a). The Complainant did not present any evidence that Sovereign Bank possessed or used a credit card with her name in Lycoming County. Therefore, she has not shown that she was a victim of identity theft committed by Sovereign in Lycoming County.

Regarding the Complainant’s fourth argument, the documents provided by the Complainant do not show that Witness committed perjury. “A person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.” 18 Pa. C.S. § 4902(a). For perjury, “the Commonwealth ha[s] to prove three items – the individual falsehood was a statement, that statement *by itself* ‘could have affected the course or outcome of the proceeding,’ and that [the witness] did not believe the statement to be true.” Commonwealth v. King, 939 A.2d 877, 880-81 (Pa. 2007). During the arbitration hearing, Witness testified that Sovereign’s records showed that three credit cards were

created on December 1, 2003. According to the records referenced by Witness, three cards were created on December 1, 2003. The Complainant failed to provide any evidence that Witness did not believe that the records showed three credit cards were created in December of 2003. The Complainant only argues that Witness *could have* added information to the records. She does not provide evidence that Witness *did* add information to the records. Because the Complainant failed to provide any evidence that Witness did not believe the records showed three credit cards were created in December of 2003, the Complainant has not shown that Witness committed perjury.

Regarding the Complainant's fifth argument, the documents provided by the Complainant do not show that Witness tampered with Sovereign's records. A person tampers with evidence "if, believing that an official proceeding or investigation is pending or about to be instituted, he alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation." 18 Pa. C.S. § 4910. Again, the Complainant did not provide any evidence that Witness altered Sovereign's records. Therefore, she has not shown that Witness tampered with evidence.

III. Conclusion

The Court will not disturb the District Attorney's decision to disapprove the private criminal complaint because the Complainant has not shown that the decision was patently discriminatory, arbitrary, or pretextual. Furthermore, there is no legal basis to bring charges in Lycoming County for the acts alleged by the Complainant.

ORDER

AND NOW, this _____ day of January, 2015, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Complainant's appeal is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge