

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No's. CR-1107-2014
vs. :
:
:
DWAYNE MAYS, :
Defendant : Motion to Dismiss

OPINION AND ORDER

Defendant is charged by Information filed on July 11, 2014 with two counts of possession with intent to deliver a controlled substance, two counts of criminal use of a communication facility and two counts of a possession of a controlled substance.

On October 6, 2015, Defendant filed a motion to dismiss pursuant to 18 Pa. C.S.A. § 109 and § 110. Defendant submits in his motion that the criminal charges were filed against him on October 31, 2013 for alleged offenses that occurred on March 13, 2013 and April 2, 2013. Specifically, Defendant is alleged to have engaged in the sale of heroin to a confidential informant on both dates.

Under Information No. 156-2015, Defendant was charged with numerous drug related offenses that allegedly occurred between May 1, 2012 and July of 2013. Following a non-jury trial, Defendant was convicted of all said offenses.

This matter was not joined with the offenses under Information 156-2015. Defendant alleges that the present charges are barred because they were “part of a larger enterprise which constituted said acts.” More specifically, Defendant alleges that the charges are barred by the compulsory joinder rule.

The compulsory joinder rule is codified at 18 Pa. C.S. § 110. Under said

section, defendant contends that the present prosecution should be barred because he was formerly prosecuted and convicted of offenses allegedly based on the same conduct or arising from the same criminal episode, and the present offenses were known to the appropriate prosecuting officers at the time of the commencement of the first trial. 18 Pa. C.S.A. § 110 (1) (ii).

The “compulsory joinder rule” set forth in the Crimes Code has a dual purpose. First, it protects a person accused of crimes from governmental harassment by being forced to undergo successive trials stemming from the same criminal episode. Second, it ensures judicial economy. *Commonwealth v. Spatz*, 563 Pa. 269, 759 A.2d 1280, 1285 (2000), *cert. denied*, 534 U.S. 1104 (2002); *Commonwealth v. Hude*, 500 Pa. 482, 458 A.2d 177, 180 (1983).

For a prosecution to be barred under § 110, 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).

The only issue in dispute is whether the current prosecution was based on the same criminal conduct or arose from the same criminal episode.

A criminal episode has been defined as “an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of

a larger or more comprehensive series.” *Commonwealth v. Schmidt*, 919 A.2d 241, 245-246 (Pa. Super. 2007), quoting *Commonwealth v. Lee*, 291 Pa. Super. 164, 435 A.2d 620, 621 (Pa. Super. 1981) (citation omitted).

A single criminal episode analysis is a totality of circumstances analysis. *Schmidt*, supra. at 246; *Commonwealth v. M.D.P.*, 831 A.2d 714, 719 n.3 (Pa. Super. 2003), *appeal denied*, 847 A.2d 1281 (Pa. 2004). The courts consider the logical and/or temporal relationship between the charges, whether the charges share common issues of law, whether the charges share common issues of fact, whether separate trials would involve substantial duplication of evidence and whether separate trials would be a waste of scarce judicial resources. *Schmidt*, supra.

Based upon the totality of the circumstances, the court finds that the two controlled buys in Williamsport on March 13, 2013 and April 2, 2013 are distinct and apart from the conspiracy to possess with intent to deliver and deliver controlled substances in and around Williamsport and State College between May of 2012 and May 2013, as well as the delivery of controlled substances on February 26, 2013 at 230 West Third Street in Williamsport.

While there is some temporal overlap, it is not determinative. In fact, the definition of a “single criminal episode” is not limited to acts which are immediately connected in time. *Commonwealth v. Hunter*, 768 A.2d 1136, 1141 (Pa. Super. 2001).

The key in determining whether different acts constitute the same criminal episode depends upon the totality of the circumstances and their logical relationship if any.

Schmidt, 919 A.2d at 248, citing *Hunter* supra.

There are only a few common issues of fact between the two set of charges. The Centre County case started with a 2012 wiretap investigation. It was conducted by the Attorney General's office. It was initiated against individuals who were originally selling heroin in the State College area out of an individual's residence. One of those individuals, Mandy Mabry was found over a period of time to have purchased heroin from Defendant and then provided it to another individual to sell in State College. The Attorney General's office utilized a confidential informant to specifically purchase heroin from Defendant on February 26, 2013. The conspiracy charge involved numerous purchases and transactions involving many different individuals in both the Williamsport and State College areas.

The Pennsylvania State Police were involved in the other investigation. Different confidential informants were used. The purchases were made at the same residence, that being 230 West Third Street but none of the law enforcement officers involved in the Attorney General's office investigation were involved in the Pennsylvania State Police investigation. The only similarity with the conspiracy and the present charges is that Defendant was allegedly involved.

There are, of course, some common issues of law. The elements for possession with intent to deliver are the same in each case, as are the elements for criminal use of a communications facility. A conspiracy case, however, is far different from a legal standpoint than a "straightforward" possession with intent to deliver, criminal use or possession case.

There would absolutely be no duplication of evidence. Judicial resources would not at all be wasted.

The Lycoming County case involved sales to a confidential informant who had arranged for the purchases and was cooperating with the Pennsylvania State Police. These were isolated incidents and not part of a broader investigation.

The combined Centre County and Lycoming County investigation was far more expansive, involved numerous actors, involved many different sets of charges against many different defendants over a far longer period of time, and Defendant's charges were part of this much broader investigation by a grand jury and law enforcement agents working with the Pennsylvania Attorney General's office.

In fact, under very similar circumstances, the Superior Court has decided that Rule 110 would not bar a subsequent prosecution. *Schmidt*, supra.

With respect to Defendant's argument that the charges against him must be dismissed pursuant to 18 Pa. C.S.A. § 109, the court cannot agree.

A present prosecution is barred under § 109 when the prosecution is for a violation of the same provision of the statutes and is based upon the same facts as the former prosecution. Clearly, this is not the case.

ORDER

AND NOW, this ____ day of December 2015, following a hearing and argument, the court **DENIES** Defendant's motion to dismiss based on §§ 109 and 110 of the Crimes Code.

By The Court,

Marc F. Lovecchio, Judge

cc: Kenneth Osokow, Esquire (ADA)
Matthew Slivinski, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file