IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-363-2014**
v.	:	
	:	
LEON PERRY, III.,	:	**CRIMINAL DIVISION**
Defendant	:	

OPINION AND ORDER

On November 6, 2014, the Defendant filed a Motion to Compel Placement into ARD Program. A hearing on the motion was held on December 4, 2014.

I. Background

The Defendant was charged with Driving under the Influence with the Highest Rate of Alcohol (First Offense),[1] Obedience to Traffic-Control Devices,[2] One-Way Roadways,[3] and Careless Driving.[4] The preliminary hearing was continued three times, all at the Defendant's request. On March 7, 2014, the Defendant did not appear at the fourth time scheduled for his preliminary hearing, so the Court issued a bench warrant. On March 24, 2014, the Defendant appeared in court and the bench warrant was vacated. On August 4, 2014, the Defendant submitted an application for Accelerated Rehabilitative Disposition (ARD). On August 8, 2014, the District Attorney of Lycoming County denied the Defendant's application because the Defendant failed to appear at his preliminary hearing after three continuances and a bench warrant was issued. On August 27, 2014, the Defendant requested that the District Attorney reconsider the denial. On September 4, 2014, the District Attorney communicated that he

[1] 75 Pa. C.S. § 3802(c).
[2] 75 Pa. C.S. § 3111(a).
[3] 75 Pa. C.S. § 3308(b).
[4] 75 Pa. C.S. § 3714(a).

remained "unwilling to place [the Defendant] on the ARD program for reasons previously indicated."

The Defendant argues that the District Attorney's denial was an arbitrary and capricious abuse of discretion. He argues that the denial is totally unrelated to the protection of society and/or the likelihood of the Defendant's success in rehabilitation. In addition, the Defendant argues that Commonwealth v. Melnyk[5] implies that it is inappropriate for a district attorney to deny a defendant ARD because the defendant did not appear at a court hearing. The Defendant asks this Court to order that the District Attorney grant the request for ARD.

The Commonwealth argues that the denial was not an abuse of discretion because a defendant's failure to appear in court reflects on the defendant's ability to rehabilitate.

II. Discussion

In Melnyk, the defendant appeared at an ARD hearing. 548 A.2d at 267. "For some unexplained reason, the hearing was not conducted." Id. Five days later, the defendant appeared on a scheduled "back-up trial date." Id. The defendant requested a continuance of the trial so an ARD hearing could be scheduled. Id. "Because [the defendant] lacked the ability to pay restitution, the district attorney's office refused to recommend her as an appropriate ARD candidate." Id. The Superior Court determined that "the State's refusal to place [the defendant] in the ARD program was fundamentally unfair and invidiously discriminated against [the defendant] because of her economic status." Id. at 272.

For two reasons, the Court disagrees with the Defendant's argument that Melnyk implies it is inappropriate for a district attorney to deny a defendant ARD because the defendant did not appear at the court hearing. First, the defendant in Melnyk appeared at her ARD hearing and

[5] 548 A.2d 266 (Pa. Super. 1988).

back-up trial date. Although the ARD hearing was not conducted, the defendant was present. Second, Melnyk held that when a defendant is willing and able to pay court costs and willing to make a good faith effort to pay restitution, a district attorney cannot deny ARD only because the defendant is unable to make full restitution within the ARD period. 548 A.2d at 272. Melnyk focused on the effect of a defendant's inability to make full restitution, not the effect of a defendant's failure to appear at a court hearing.

"[T]he decision to submit the case for ARD rests in the sound discretion of the district attorney, and absent an abuse of that discretion involving some criteria for admission to ARD wholly, patently and without doubt *unrelated* to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations, the attorney for the Commonwealth must be free to submit a case or not submit it for ARD consideration based on his view of what is most beneficial for society and the offender." Commonwealth v. Lutz, 495 A.2d 928, 935 (Pa. 1985).

The Court cannot say wholly, patently, and without doubt that the Defendant's failure to appear at a hearing is unrelated to the likelihood of his success in rehabilitation. A person in the ARD program must abide by certain conditions. If a defendant shows that he or she does not abide by a condition, such as appearing at a scheduled hearing, it is within the District Attorney's proper authority to decide that the defendant is less likely to abide by the conditions of the ARD program.

III. Conclusion

The District Attorney did not abuse his discretion because his reason for the denial was not wholly, patently, and without doubt unrelated to the likelihood of the Defendant's success in rehabilitation.

ORDER

AND NOW, this _____ day of January, 2015, based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Motion to Compel Placement into ARD Program is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge