IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
vs.	**:**	**No. CR-214-2012**
	:	
JIMMY RODRIGUEZ,	**:**	
Defendant	**:**	**Motion to Dismiss**

OPINION AND ORDER

Before the court is Defendant's Motion to Dismiss pursuant to 18 Pa. C.S.A. § 110 filed on September 8, 2014. Argument on said Motion was held before the court on November 18, 2014.

The parties do not dispute the relevant facts. On November 29, 2011, a Penn College student reported that his father's 1993 Honda Civic was stolen from a Penn College parking lot. On December 2, 2011, police officers from the Pocono Mountain Regional Police were dispatched to 4365 Memorial Boulevard, Tobyhanna, Monroe County, PA in reference to a suspicious vehicle. The homeowner at that residence reported a vehicle on her property that did not belong there. The police ran the registration and found that the vehicle was the 1993 Honda Civic that had been reported stolen from the Penn College parking lot.

On December 4, 2011, the Pocono Mountain Regional Police filed a criminal complaint against Defendant in Monroe County charging him with receiving stolen property and conspiring to receiving stolen property with two other individuals. Defendant waived his preliminary hearing on December 7, 2011 and agreed to cooperate and testify against his co-conspirators in exchange for a recommendation for ARD on one count and dismissal of the

other count.

On December 9, 2011, the Penn College police filed a criminal complaint against Defendant in Lycoming County charging him with theft by unlawful taking, conspiracy to commit theft by unlawful taking, receiving stolen property and driving under suspension related to the theft of the 1993 Honda Civic from the Penn College parking lot.

When Defendant appeared for his co-conspirators' preliminary hearing in Monroe County on January 18, 2012, he was informed that their charges were going to be transferred to Lycoming County.

On March 1, 2012 Defendant filed a motion to enforce the agreement for ARD in Monroe County.

In connection with the Lycoming County case, on April 9, 2012, Defendant filed a motion to transfer the case to the Court of Common Pleas of Monroe County.

On May 16, 2012, the Monroe County Court of Common Pleas granted Defendant's motion to enforce the agreement for ARD. The Commonwealth appealed, but was unsuccessful in overturning that decision. ***Commonwealth v. Rodriguez***, 1474 EDA 2012 (Pa. Super. 2013), petition for allowance of appeal denied, 590 MAL 2013 (Pa. 2014).

On June 21, 2012, this court denied Defendant's motion to transfer the Lycoming County charges to Monroe County.

On June 10, 2014, Defendant was placed on ARD for six months in Monroe County for the crime of conspiracy to commit receiving stolen property.

On September 8, 2014, Defendant filed his motion to dismiss the Lycoming

County charges.

Defendant argues that the Monroe County charges were resolved by the final ARD order which was not appealed. Defendant in fact successfully completed his ARD on December 10, 2014.

Defendant argues that the Lycoming County charges should be dismissed pursuant to § 110 and the double jeopardy clauses of the constitutions of Pennsylvania and the United States because "the purpose of the constitutional double jeopardy protections is, in part, to protect individuals from the financial, emotional and social consequences of successive prosecutions. Defendant in the instant case has endured prosecution in two jurisdictions for almost three years as a result of one criminal episode. His life has been on hold during the course of appeals and he has now…completed his court ordered probationary period in Monroe County." Defendant submits that "in the interest of justice" the Criminal Information should be dismissed.

In an order dated September 17, 2014, the court directed the Commonwealth, as the responding party, to file a brief five days prior to the November 18, 2014 argument. The Commonwealth either failed or refused to do so contrary to the court's order. While the court permitted the Commonwealth to present argument at the proceeding on November 18, 2014, it was error for the court to do so. Because the Commonwealth failed to file its brief, the court will not consider any argument made by it on November 18, 2014.

Section 110, upon which Defendant relies, bars prosecutions under certain circumstances. By its terms, the court cannot conclude that a scenario exists which would

justify Defendant's argument.

Section 110(1) requires that said former prosecution resulted in an acquittal or conviction and the subsequent prosecution is for:

> (i) any offense of which the defendant could have been convicted on the first prosecution; or
> (ii) any offense based upon 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; or
> (iii) the same conduct, unless: (A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or (B) the second offense was not consummated when the former trial began.

These provisions do not apply because the former prosecution did not result in an acquittal or conviction as defined in § 109 and the prosecutions did not occur within the same judicial district as required for subparagraph (ii).

Section 110(2) requires that the former prosecution be terminated by a final order that has not been set aside and that said final order necessarily required a determination inconsistent with the fact which needs to be established for a conviction of the second offense. Again, this is not the case here. While the former prosecution was terminated by a final order, that order did not require a determination of any fact, let alone a fact inconsistent with a fact that must be established for conviction in Lycoming County.

Section 110(3) requires proof that the former prosecution was improperly terminated and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated. There is no

proof whatsoever in this case and it cannot be established that the former prosecution was improperly terminated as defined in18 Pa.C.S. §109.

Accordingly, it is clear from the language of Section 110 that Defendant's motion to dismiss fails to the extent it relies on Section 110. See ***Commonwealth v. Davies***, 492 A.2d 1139, 1146 (Pa. Super. 1985).

Defendant also contends, however, that the double jeopardy provisions of the United States constitution and the constitution of Pennsylvania warrant dismissal. For the most part, the court agrees.

The double jeopardy clauses of the United States and Pennsylvania constitutions are coextensive. ***Commonwealth v. States***, 938 A.2d 1016, 1019 (Pa. 2007). "The prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." ***Commonwealth v. McKane***, 539 A.2d 340, 345-346 (Pa. 1988) (citing ***North Carolina v. Pearce***, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)).

The court searched for precedent from the Pennsylvania courts discussing double jeopardy protections in the context of a diversionary program, such as ARD. The only case the court found was ***Commonwealth v. McSorley***, 485 A.2d 15 (Pa. Super. 1984). The court recognizes that this case is an "Opinion Announcing the Judgment of the Court" because while a majority agreed with the judgment, a majority did not join in the opinion.[1]

[1] The Court also notes that the Pennsylvania Supreme Court affirmed McSorley in a per curiam order, but it

In ***McSorley***, the defendant believed he had been accepted into the ARD program based on a letter written by the Director of the Main Line Council on Alcoholism on letterhead of the District Attorney's ARD/DUI Division directing him to attend the Safe Driving Clinic and to pay a $50 fee for the interview and classes. After the defendant attended all the classes and received a certificate of completion from the Director, the defendant received a letter from the Chief of the ARD Division stating that he was ineligible for ARD because of two prior arrests in Philadelphia. The case was then scheduled for trial. The defendant filed a motion to dismiss on double jeopardy grounds and asserted dismissal was necessary to protect him from multiple punishments.

Relying on ***State v. Urvan***, 4 Ohio App.3d 151, 446 N.E.2d 1161 (1982), a case factually similar to the case sub judice, the Opinion Announcing the Judgment of the Court restrained the Commonwealth from prosecuting the defendant on double jeopardy principles and directed the Commonwealth to divert the defendant into ARD. The Opinion, quoting extensively from Urvan, stated:

> Any view of diversion processes not at war with their purposes must include a conception of them (when successfully completed) as the equivalent of served or probated time with the consequent expiation of the crime …. Moreover, if the program is to make logical sense and traffic at all in fair treatment, the state's election to pursue the crime of stolen property forecloses its right to undertake pursuit of the grand theft charge through a second agent (Cuyahoga County). Jeopardy must attach as a result of the activity of the first (Medina County)…. For the state to be allowed to …bring a second prosecution … after all the terms of the diversion contract have been met, violates the spirit and the letter of constitutional double jeopardy policy and the spirit of the legislative

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specifically stated that the order was not to be interpreted as adopting the reasoning of the Superior Court Opinion Announcing the Judgment of the Court insofar as it relates to the prohibition against double jeopardy.

policy in the state.

McSorley, 485 A.2d at 19, quoting ***Urvan***, 466 N.E.2d at 1166, 1167.[2]

Judge Cirillo filed a concurring opinion. The concurring opinion did not agree with the double jeopardy rationale of the Opinion Announcing the Judgment of the Court, because the defendant had not yet completed ARD. Instead, the concurring opinion agreed that the defendant should be given the opportunity to complete ARD, but on contract principles. In discussing double jeopardy, however, Judge Cirillo stated:

> Certainly, a criminal defendant, once convicted, may rest confident that he will not be retried for the same offense. A participant in an ARD program, however, is not entitled to the same confidence. Admission to an ARD program is not equivalent to a conviction under any circumstances. Rather, participation in a diversion program results in deferral of criminal charges until completion of the program. In the event that the program is successfully completed, the charges are dismissed and no conviction ever results. Only when the program is completed may an ARD participant feel secure in final disposition of the charges, not before. Only then may he shield himself with the protection of the double jeopardy clause.

McSorley, 485 A.2d at 20-21 (concurring opinion)(citations omitted).

Based on the foregoing, the court concludes that double jeopardy principles preclude the Commonwealth from proceeding against Defendant on any charges that could be considered the "same offense" as the charges from Monroe County.

The agreement in Monroe County resulted in the dismissal of the receiving stolen property charge and Defendant's admission onto the ARD program for conspiracy.

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[2] The defendant in ***Urvan*** was charged under an allied offense statute, which permitted an accused to be tried for offenses of similar import, but convicted and sentenced for only one. Similarly, in Pennsylvania, Defendant's theft by unlawful taking and theft by receiving stolen property of the same vehicle would constitute a single

The Lycoming County charges are theft by unlawful taking, conspiracy, receiving stolen property, and driving while operating privilege suspended or revoked. Clearly, the conspiracy and receiving stolen property charges in both counties constitute the "same offenses."

The Crimes Code also provides, however, that conduct denominated theft constitutes a single offense. 18 Pa.C.S.A. §3902. Therefore, the Lycoming County theft by unlawful taking charge that related to the same 1993 Honda Civic would be considered the same offense as the Monroe County receiving stolen property charge.

Accordingly, the following order is entered:

ORDER

AND NOW, this ____ day of March 2015, the Court **GRANTS IN PART and DENIES IN PART** Defendant's motion to dismiss. The Court GRANTS the motion with respect to Count 1, theft by unlawful taking; Count 2, criminal conspiracy; and Count 3, receiving stolen property. The court DENIES the motion with respect to Count 4, driving while operating privilege suspended or revoked.

By The Court,

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Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Janet Jackson, Esquire
607 Monroe Street
Stroudsburg, PA 18360

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offense. 18 Pa.C.S.A. §3902.

Work file
Gary Weber, Lycoming Reporter