

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-347-2015
	:	
vs.	:	
	:	
ATAA COLEMAN,	:	Motion to Amend Nolle Pros Order
Defendant	:	

OPINION AND ORDER

Defendant was charged by Information filed on March 20, 2015 with criminal use of a communication facility, possession with intent to deliver a controlled substance, delivery of a controlled substance and possession of a controlled substance. The incident supporting the charges allegedly occurred on January 22, 2015. Defendant is alleged to have sold \$80.00 worth of heroin to a third person.

Defendant waived his March 23, 2015 arraignment. A pretrial conference was held on May 5, 2015 and the case was placed on the trial list. The case was called for trial on May 19, 2015 and jury selection was scheduled for May 21, 2015. On May 20, 2015, Defendant filed a motion in limine to preclude the Commonwealth from utilizing at trial any of the evidence not previously disclosed in discovery. On May 21, 2015, the Commonwealth filed a motion to nolle pros the case and presented it to the Court with a proposed order regarding such. The motion noted that the Commonwealth desired to nolle pros the charges and that Defendant had no objection. The Court reviewed the motion and signed the order as presented by the Commonwealth.

The order states:

“AND NOW, this 21 day of May 2015, the Court being informed by the

Commonwealth that it will not prosecute the above-captioned case during the pending trial term, it is hereby ordered and directed that this case be nolle prossed and costs be placed on Lycoming County.”

On May 26, 2015, the Commonwealth filed a motion to amend the nolle pros order. The Commonwealth requested that the order be amended to include “without prejudice” language or to vacate the order in full.

Argument on the motion was held on June 15, 2015. The Commonwealth requested that the case should be reinstated. It argued that at the time of the nolle pros, it did not have sufficient evidence to prosecute but “now they do.”

Defendant argued that the Commonwealth’s actions amounted to prosecutorial misconduct and a clear violation of Defendant’s due process rights. Defendant argued that from the start of this case, the Commonwealth accelerated its position hoping for a guilty plea without having sufficient evidence to convict. Once the Commonwealth’s “bluff” was called, the Commonwealth “folded” and nolle prossed the charges.

The Pennsylvania Rules of Criminal Procedure permits a court, upon motion of the Commonwealth, to order a “nolle prosequi.” PA. R. CRIM. P. 585(A). A nolle prosequi is a voluntary withdraw by the prosecuting attorney. *Commonwealth v. Goldman*, 70 A.2d 874, 878 (Pa. Super. 2013), appeal denied, 85 A.3d 482 (2014). In evaluating a nolle prosequi request, a court may consider two factors: (1) whether the Commonwealth’s reason is reasonable; and (2) whether the defendant has a valid speedy trial claim. *Id.*

A nolle prosequi may, however, be lifted at any time in the future upon an appropriate motion in order to revive the charges. *Commonwealth v. Ahearn*, 543 Pa. 174,

670 A.2d 133, 135 (1996); *Goldman*, supra.

“Although it is established that a trial court has discretion in deciding whether to grant or deny a *nolle prosequi*, there is no clear standard of review where a trial court [considers] a motion to reinstate its charges following the grant of a *nolle prosequi*.”

Commonwealth v. Ahearn, 543 Pa. 174, 670 A.2d 133, 135 (1996). It appears, however, that an abuse of discretion standard is appropriate.

Dismissal of charges is an ‘extreme sanction’ that should be imposed sparingly and only in cases of blatant prosecutorial conduct. A dismissal punishes not only the prosecutor, but the public at large because ‘the public has a reasonable expectation that those who have been charged with crimes will be fairly prosecuted to the full extent of the law.’ Therefore, a trial court should consider dismissal of charges only where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed.

Here, there is no blatant prosecutorial misconduct or demonstrable prejudice to the defendants. Although the Commonwealth could have exercised greater diligence to ensure that the police witnesses appeared for trial, a ‘communication breakdown’ does not constitute blatant misconduct. Furthermore, the defendants did not claim that the delay prejudiced their ability to defend their cases. Therefore, we find that effectively dismissing charges by presenting a choice between a discharge and a *nolle prosequi* with prejudice absent blatant prosecutorial misconduct or demonstrable prejudice was an abuse of discretion.

Goldman, supra. at 881 (citations omitted).

The term ‘discretion’ imports the exercise of judgement, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions.

Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 753 (2000).

In this particular case, it does not appear that there was either blatant

prosecutorial misconduct by the Commonwealth or demonstrable prejudice to Defendant. The record belies Defendant's insinuation that the Commonwealth was essentially "bluffing" and was never ready to proceed to trial. First, following a preliminary hearing, all of the charges were held for court. Clearly, there was prima facie evidence of Defendant's guilt. Next, Defendant's reliance on his motion in limine is misplaced. Essentially, Defendant contends that because the Commonwealth failed to disclose the requested items, the Court would have entered an order prohibiting the Commonwealth from introducing the evidence. Said proposed sanction was certainly not a foregone conclusion and, in fact, would have been extraordinary. Indeed, it is far more likely that the Court would have ordered the discovery to be produced and granted Defendant additional time, if needed, to address such discovery. As well, there is nothing in the record to refute the Commonwealth's assertion that it was without the necessary evidence at the time the nolle pros was requested, but now would be able to proceed to trial.

With respect to potential prejudice, when asked if Defendant was at all prejudiced, defense counsel claimed during the argument in this matter "not really." Indeed, defense counsel conceded that he could not identify any specific prejudice. He argued in more general terms that to allow the Commonwealth's motion would allow the Commonwealth to "keep interfering with Defendant's freedom."

In exercising its discretion based on the standards as set forth above, the Court will GRANT the Commonwealth's motion. The nolle pros order previously entered in this case will be lifted and the charges shall be reinstated against Defendant.

ORDER

AND NOW, this ____ day of January 2016, the Court **GRANTS** the Commonwealth's motion to amend the nolle pros order. The previous nolle pros order entered in this matter on May 21, 2015 is **VACATED**. The charges against Defendant are reinstated. This case is placed on the February 2016 pretrial list. Call of the List is scheduled for the **February 16, 2016 at 8:30 a.m. in Courtroom No. 1**. Jury Selection will possibly be scheduled for **February 16, 17, 18 or 19th** with the trial term being between **March 7, 2016 and March 18, 2016**. Defense counsel shall file a motion to set bail. Defendant will be required to appear for such or a bench warrant shall be issued for his arrest.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire Assistant District Attorney
 Joshua Bower, Esquire, Assistant Public Defender
 Gary Weber, Lycoming Reporter
 Work File