**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

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| **COMMONWEALTH** | **:** | |
| | **:** | |
| **vs.** | **:** | **No. CR-1454-2014** |
| | **:** | |
| **JOSEPH JENNINGS,** | **:** | |
| **Defendant** | **:** | |

## OPINION AND ORDER

This matter came before the court on Defendant's motion to dismiss. The relevant facts follow.

Defendant allegedly operated a silver Jeep on July 27, 2014, while his operating privileges were suspended or revoked and without registering the Jeep within three business days thereafter in accordance with his sexual offender registration requirements under SORNA. There is a dispute between the Commonwealth and the defense whether Defendant must register any vehicle he ever operates or only a vehicle that he operates regularly.

In discovery, defense counsel sought emails and correspondence between or among the Pennsylvania Board of Probation and Parole and law enforcement that led to the filing of the charges against Defendant in this case. Initially, the Commonwealth contended that such correspondence was not discoverable. Defense counsel filed a motion to compel. On June 12, 2015, the court granted the motion to compel and directed the Commonwealth to provide to Defendant within 30 days any such emails and correspondence.

On June 19, 2015, the prosecuting attorney sent an email to defense counsel which stated: "In compliance with the court's June 12, 2015 Order, attached is the only

existing email between state parole and law enforcement. All parole agents and police officers mentioned in this case searched their email databases, and this is the only email that was found. If something else turns up later, I will be sure to supplement." On July 6, 2015, an email was sent by the prosecutor's assistant to defense counsel that attached a 16-page packet of emails that the prosecutor received from the Pennsylvania Board of Probation and Parole.

On August 10, 2015, Defendant filed a motion to enforce court Order and/or for sanctions. In this motion, Defendant asserted that the emails were disjointed and incomplete. He sought sworn testimony or an affidavit that every document has been produced and, in the event the obligations under the June 12 Order were not satisfied, Defendant sought sanctions in the form of dismissal of the charges. On September 8, 2015, the court entered an order requiring all parole agents and officers to submit written verification to the prosecutor verifying that they have searched all of their databases and files and that all emails and correspondence have been disclosed to Defendant.

On September 22, 2015, Defendant filed a motion to dismiss or prohibit introduction of evidence because the Commonwealth produced letters instead of verifications and the letters limited the inquiry to emails and did not address other correspondence. On September 23, 2015, the court summarily denied Defendant's motion, but directed that the letters/verifications be amended to reference correspondence as well as emails. On September 25, Defendant filed a motion for reconsideration, which the court summarily denied.

Defense counsel sent a subpoena to the Pennsylvania State Police for Defendant's Megan's Law file. On February 25, 2016, defense counsel received a response to the subpoena which allegedly included emails that were not previously disclosed and were contradictory to the verifications/letters submitted by law enforcement. On March 4, 2016, Defendant again filed a motion to dismiss this case or prohibit introduction of evidence by the Commonwealth. In the motion Defendant asserted the response to the subpoena showed that the Commonwealth did not comply with the court's June 12, 2015 order, the verifications were untrue and no verification had been supplied by some individuals.

After receiving the motion, the prosecutor reviewed the materials in his possession on March 7, 2016, and realized that he had received a PDF file with approximately 25 emails from Corporal Joseph Akers on September 9, 2015 that he had inadvertently failed to disclose to defense counsel. He immediately forwarded these materials to defense counsel.

The court held a hearing and argument on Defendant's motion on April 20, 2016. Defense counsel zealously argued that that the Commonwealth was "playing fast and loose" with its discovery obligations and its excuses were "too convenient," "too easy," and "disingenuous." In defense counsel's opinion, dismissal of this case or preclusion of all of the Commonwealth's witnesses is the only appropriate sanction.

The prosecutor argued that this is not a case where he just let discovery go by the wayside. He provided many emails and verifications, and his failure to provide the emails from Corporal Akers was merely inadvertent. He also noted that the defense

arguments have gone beyond the initial request for emails between the Board and law enforcement that led to the filing of the charges in this case, to any emails regarding Defendant regardless of who they are from or their relationship to the filing of the charges.

The prosecutor also argued that case law did not support dismissal in this case. Citing ***Commonwealth v. (Jay) Smith***, 615 A.2d 321, 325 (Pa. 1992) and ***Commonwealth v. Burke***, 781 A.2d 1136, 1144 (Pa. 2001), he asserted that dismissal is an extreme sanction which is justified only in cases of blatant prosecutorial misconduct, which was not present in this case. He also contended that Defendant was not prejudiced because many of the emails were the same as emails the Commonwealth had already provided, the defense had obtained the same information through its subpoena for Defendant's Megan's Law file, and the emails were not particularly relevant to this case in that most of the individuals would not be witnesses for the Commonwealth at trial.

Defense counsel contended a hearing or more of a record to show misconduct was not necessary. He argued that this case was similar to the ***Camp*** case in which Judge Anderson directed the Commonwealth to file an answer to a request for a bill of particulars, the Commonwealth failed to comply, Judge Anderson dismissed the case and the Superior Court affirmed. The court asked defense counsel to provide the opinion in the ***Camp*** case.

Following the argument, defense counsel sent an email to the court with the ***Camp*** case. He acknowledged that the Superior Court quashed the appeal and did not address the substantive merits. He also argued that the cases cited by the Commonwealth were inapposite, because they did not involve a violation of several court orders. On April

25, 2016, the Commonwealth filed a brief in opposition to the Defendant's motion to dismiss, and on May 2, 2016, defense counsel filed a reply brief in support of the motion.

The court recognizes that counsel for both sides have an obligation to be a zealous advocate for their respective positions; however, when the court gets past the bluster and rhetoric and examines the evidence and the law, the court cannot grant Defendant's motion in this case.

The remedies for discovery violations are found in Rule 573(E) of the Pennsylvania Rules of Criminal Procedure, which states:

> **(E) Remedy.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit a party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

PA. R. CRIM. P. 573(E). "Although not expressly included in the list of remedies, a trial court does have the discretion to dismiss the charges, but only for the most extreme and egregious violations." ***Commonwealth v. Hemmingway***, 13 A.3d 491, 502 (Pa. Super. 2011)(citing ***Burke***, supra and ***Commonwealth v. (William) Smith***, 955 A.2d 291, 395 (Pa. Super. 2008)(en banc)).[1]

The Pennsylvania Supreme Court has recognized the competing societal interests involved in this issue:

> Dismissal of criminal charges punishes not only the prosecutor . . . but also the public at large, since the public has a reasonable expectation that those who have been charged with crimes will be fairly prosecuted to

[1] The court notes that ***Hemmingway*** involved a violation of an agreed upon court order.

> the full extent of the law. Thus, the sanction of dismissal of criminal charges should be utilized only in the most blatant cases. Given the public policy goal of protecting the public from criminal conduct, a trial court should consider dismissal of the charges where the actions of the Commonwealth are egregious and where demonstrable prejudice will be suffered by the defendant if the charges are not dismissed.

***Burke***, 781 A.2d at 1144 (2001)(quoting ***Commonwealth v. Shaffer***, 551 Pa. 622, 627, 712 A.2d 749, 752 (1988)).

The record in this case shows neither egregious prosecutorial misconduct nor demonstrable prejudice to the defendant. The court accepts the prosecutor's statements that he inadvertently failed to forward to defense counsel the PDF file of 25 emails that he received from Corporal Akers. The court also notes that many of the emails were duplicative of other emails that the Commonwealth had previously provided. Defense counsel identified approximately eight (8) emails that the Commonwealth did not previously provide but defense counsel had already obtained most, if not all, of those emails when he subpoenaed Defendant's Megan's Law file from the Pennsylvania State Police Megan's Law Unit in Harrisburg.

The court does not want either of the parties to misconstrue this ruling as the court condoning the Commonwealth's failure to comply with the order dated June 12, 2015. To the contrary, the court is dismayed by the fact that the Commonwealth was directed to provide defense counsel with these emails and correspondence within 30 days, i.e. by July 12, 2015, and apparently Corporal Akers did not provide numerous emails to the Commonwealth until September 9, nearly two months beyond the deadline set by the June 12 court order. The court does not know whether the prosecutor failed to timely request this

information from Corporal Akers, whether Corporal Akers failed to timely respond to the Commonwealth's request or whether there was some difficulty finding the information on the PSP servers or databases. Nevertheless, the court is not convinced that the extreme sanction of dismissal or preclusion of all of the Commonwealth's witnesses, which would be the functional equivalent of dismissal, is an appropriate sanction for any such violation. If the violation was willful, the court believes traditional contempt sanctions (such as fines, attorney fees and/or incarceration) would be sufficient to impress upon the Commonwealth or law enforcement the seriousness of compliance with discovery orders. Although defense counsel has not sought such "lesser" remedies or sanctions, the court finds that a contempt hearing is appropriate to vindicate the authority of the court if there was a willful violation. Accordingly, the following order is entered:

**ORDER**

**AND NOW**, this ___ day of May 2016, the court DENIES Defendant's motion to dismiss filed on March 4, 2016. A rule is issued upon Martin Wade, Esquire and Corporal Joseph Akers to show cause why they should not be held in contempt for failing to comply with the court's order entered on June 12, 2015. The rule is returnable on July 5, 2016 at 2:00 p.m. in courtroom #4 of the Lycoming County Courthouse. This is a collateral matter that shall not delay the trial in this case.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Edward J. Rymsza, Esquire
Lori Rexroth, Esquire
Corporal Joseph Akers, PSP- Montoursville
Gary Weber, Esquire (Lycoming Reporter)
Work file