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Re: ***State of Delaware v. John Muhammad***
Case No.: 0609007835

MEMORANDUM OPINION
DEFENDANT'S MOTION TO DISMISS

Dear Counsel:

On Friday, November 9, 2007 defendant presented a Motion to Dismiss ("Motion") the above-captioned matter.[1] The Attorney Generally previously filed a written Response on October 16, 2007. Following oral argument and review of the memoranda filed by counsel the Court reserved decision. As will be noted below, based upon this record and for the reasons stated in this Opinion, the Court DENIES defendant's Motion.

I. THE FACTS

The defendant was arrested on January 12, 2007 for several charges including one Count Indecent Exposure, 2nd Degree, 11 *Del. C.* §764(a), and one Count Lewdness, 11 *Del. C.* §341, which were originally filed by the Attorney General in Case No.: 0701010818. Private First-Class Regan of

[1] Defendant's Motion to Compel was withdrawn and the State and Public Defender stipulated to an Order which the Court signed on the Motion to Suppress which appears in the Court Clerk's file. Defendant has not filed a Motion through the office of the Public Defender pursuant to CCP Crim. R. 14 for prejudicial joinder or to seek separate trials on both sets of Informations.

the New Castle County Police made the arrest. In this criminal action the alleged victim was Debra Grzbowski.

At that time there were also pending Criminal Informations filed by the Attorney General with the Clerk of the Court in Court of Common Pleas under Case No.: 0609007835. In that pending case, the defendant was charged with one Count Indecent Exposure, 2nd degree, 11 *Del C.* §764(a) and, one Count Lewdness, 11 *Del. C.* §341 for an incident that allegedly took place on September 12, 2006. Both charges were filed by two different alleged accusers or victims. In this criminal action the alleged victim was Kathy Barley.

A Motion to Dismiss was filed separate in both criminal cases but, only the Motion to Dismiss this criminal action was docketed and scheduled for a hearing. On April 23, 2007 the Attorney General entered a *nolle prosequi* on both misdemeanor Counts in case no.: 0701010818. These two Counts of Indecent Exposure, 2nd and Lewdness were then combined in one set of Informations Case No.: 0609007835. It is these two Counts that the Office of Public Defender asks this Court to Dismiss in this Motion which was previously Case No.: 0701010818.

(A.) <u>Legal Basis For Defendant's Motion To Dismiss.</u>

The defendant requests an Order dismissing the charges of Indecent Exposure, 2nd Degree and Lewdness in Police Complaint No.: 32070049821 because of an alleged Due Process Violation set forth in the United States Constitution, Delaware Constitution and any other applicable State and Federal Law. As noted, the defendant seeks the ultimate sanction of dismissal and did not file a Motion because of Prejudicial Joinder for Severance pursuant to CCP Crim. R. 14.

The defendant contends the State's action of refilling the charges that were dismissed or for which a *nolle prosequi* was entered under different case number and then refilling them as companion charges violates these protected constitutional rights.

The defendant also claims in his Motion his clients' right of notice of judicial action and opportunity to be heard were violated and constitute procedural due process guaranteed rights by the Fourteenth Amendment by the Attorney General' combining these charges in Case No. 0609007835. *See State v. Pruitt*, 805 A.2d 177, 180 (Del. 2002). Under the *Pruitt* standard defendant claims prejudice was caused by duplicative prosecution; anxiety suffered by the defendant; notoriety resulting from repeated prosecutions and additional expenses attendant to the new charges and therefore constitute a "deliberate manipulation of the judicial process".

(B) The Attorney General's Response.

The Department of Justice filed a written response to Defendant's Motion on October 16, 2007.[2] The Attorney General contends it was appropriate to join the offenses in a single Information with separate Counts for each offense as permitted by CCP Cr. R. 8(a). The Department of Justice noted at paragraph 6 of its Response that the Attorney General entered a *nolle prosequi* pursuant to CCP Cr. R. 48(a) under case number 0701010818 on May 9, 2007. On that exact same date the Attorney General notes an Information covering both incidents was filed in this Court under the original case number. The Attorney General contends both incidents are similar and constitute a common plan or scheme as set forth in CCP Crim. R. 8(a). The Attorney General, the Court notes, did not file a *nolle prosequi* at trial or without prejudice at trial with the intention of dismissing the first set of Informations. *See* CCP Crim. R. 8(a). The Attorney General asserted in its Response that the Informations defendant seeks to dismiss in this Motion were pending until the April 23, 2007 consolidation filing to include both sets of Informations, and one consolidated set of Informations was filed under Case No.: 0609007835.

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[2] In paragraph 5 of the Response to the Motion filed by the Department of Justice the Attorney General noted the defense filed a Motion to Dismiss on January 5, 2007 alleging the lewdness charge should be dismissed as overly broad and vague. Following briefing, this Court denied Defendant's Motion on June 8, 2007 finding that the lewdness statute is "not surplusage" and it "it does not reach a substantial amount of constitutionally protected conduct and is not void for vagueness." Op. at 4-5.

The Attorney General also contends in its written Response that it did not refile charges in a higher court, but in the same forum. Nor did the Attorney General increase the charges in this consolidated Information; the original charges were refiled in a consolidated Information and are the same charges pending with the same victims as the original charges. No "new" charges have been filed.

The Attorney General also asserts at page one (1) of its Response that "[CCP Crim. R.] 48(a) permits the State to enter a *nolle prosequi* on a case without leave of court," *State v. Smith*, 1993 WL 54209, (Del. Super. 1993). In addition, the Attorney General notes that at trial, CCP Crim. R. 13 also provides a venue to join cases at the time of trial.

The Attorney General noted in paragraph eight (8) of its Response that CCP Crim. R. 13 permits this Court to order two Informations be tried together "if they could have been filed under a single Information." The Attorney General argues that it chose the Rule provisions in Court of Common Pleas under CCP Crim. Rule 8(a) to consolidate those two Informations; not at trial as permitted by CCP Crim. R. 13(a).

The Attorney General finally asserts at paragraph 6 of its Response that the "[r]eason for consolidating two cases was not to remedy an error in another court, but it was to consolidate two similar cases which establish a common plan or scheme." *See* CCP Cr. R. 8(a).

II. THE LAW

"…The concept of permitting consolidation of trials of similar or related offenses, absent a showing of prejudice to the defendant is well established." 2. *Wharton's Criminal Procedure* §302, p. 148; *State v. Ellis*, 375 A.2d 473 (Del. Super. Ct 1977); *State v. Carson*, 196 Del. Super., LEXIS 493 (Del. Super. Ct. 1993); and *Commonwealth v. Grusso*, 192 Pa. Super., 513, 162 A.2d 421 (1960).

As the Public Defender noted in its filing, CCP Cr. R. 8(a) in pertinent part reads as follows:

> . . .[t]wo or more offenses may be charged in the same Information in a separate count for each offense if the offense charged, are of the

> same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Court of Common Pleas Criminal Rule 14, reads in pertinent part, as follows:

> The Court may order two or more informations to be tried together if the offenses, and the defendants if there are more than one, could have been joined in a single information. The procedure shall be the same as if the prosecution were under such single information. (Emphasis Added).

Case law in this jurisdiction indicates the decision of whether charges filed by the Attorney General as in the case law are properly joined is within the sound discretion of the trial court. *See Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978). In addition, CCP Cr. R. 14 provides for relief from such prejudicial joinder, but the defendant has the burden of showing substantial prejudice.

As provided in *State v. Sipple*, 1996 WL 528396 at 2 (Del. Super.) the Court noted as follows:

> … "A defendant might suffer prejudice from joinder because: (1) a jury might improperly infer a criminal disposition on the part of the defendant for multiplicity of charges; (2) a jury may accumulate evidence on all offenses charge in order to justify finding of the guilt of particular offenses; or (3) the defendant may be subject to embarrassment or confusion in attempting to prevent different defense to different charges" *See State v. McKay*, Del. Super., 382 A.2d 260, 262 (1978).

Defendant does not seek severance as a prejudicial joinder but dismissal of the charges. Under the Standard set forth in *State v. McElroy*, 561 A.2d 154, 156 (Del. 1989) the Court has established two criteria before an Information indictment may be dismissed under Super. Cr. R. 48(b); (1) unnecessary delay attributed to the State and (2) . . . "delay [that has] a 'prejudicial effect upon defendant' beyond that normally associated with the criminal justice necessary estranged by a burgeoning case load." Id at 156.

This Court must determine in this record whether the defendant moving to dismiss in the instant case has shown notoriety has attached for his pending matters and also made a predicate

showing that there is legal expenses for multiple and subsequent prosecutions as a result of the consolidation by the Attorney General. In the *Pruitt* decision the Court noted that prejudice such as "unexplained commitments of duplicate prosecution, the anxiety suffered by the defendant as a result of the delay and uncertainty, the notoriety resulting from repeated prosecutions for the same offense and the additional expenses attendant to the renewal of the charges in a separate form are inherent when the State subjects any defendant to "deliberate manipulation of the judicial process." Id.

In the instant case the Court notes that before it enters a Motion to Dismiss these Information the Supreme Court has set forth a standard that "…[t]he ultimate sanction of dismissal, in the absence of any prejudice to the defendant, is an inappropriate remedy for improper actions by a prosecutor." *See e.g. State v. Smith*, 1993 WL 542029 (Del. Super.) (citing *State v. Harris,* Del. Supr. 61 A.2d 288, 291-292 (Del. 1992). (*See also*, paragraph 12 of State's Response).

III. DECISION AND ORDER

In the instant case the Court finds that the Informations were pending and as a result of the consolidation by the Attorney General in this case the prejudice defined in *Pruitt* as well as *McElroy* has not been met by the defendant. No unnecessary delay is attributable to the State. In addition, while the Informations were pending, a *nolle prosequi* was entered the same day and new Informations were filed by the Attorney General on the same day. The Public Defender is representing the defendant at taxpayer's expense and no additional legal expenses will be incurred to the represent identical pending charges. In addition, nothing in the record indicates notoriety has been established on the record as a result of the charges have been brought to the Court's attention on the record. The Court finds dismissal is an inappropriate remedy.

To be clear, the Court finds no mischief by the State on this record. The plain clear language of CCP Crim. R. 8(a) does not prohibit the Attorney General from entering a *nolle prosequi*

and re-filing the charges absent prejudice established in this record. The State exercised its discretion under CCP Crim. R. 48(a) and entered a *nolle prosequi* and consolidated both sets of Informations. CCP Crim. R. 8(a) allows such a consolidation. Finally, the defendant has not established a State or Federal constitutional violation in this record.

The motion is hereby DENIED.

IT IS SO ORDERED this 16th day of November, 2007

John K. Welch
Judge

/jb

cc: Theresa Bleakly, Scheduling
CCP, Criminal Division