

2010 PA Super 195

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
DAVID W. ANDERSON	:	
	:	
Appellee	:	No. 495 WDA 2009

Appeal from the Order Entered February 6, 2009,
 In the Court of Common Pleas of Venango County
 Criminal Division at No(s): CP-61-CR-0000009-2001,
 CP-61-CR-0000636-2000

BEFORE: MUSMANNO, OLSON, and FREEDBERG*, JJ.

OPINION BY: FREEDBERG, J.:

Filed: October 22, 2010

This matter is before the Court on the appeal of the Commonwealth of Pennsylvania from the order entered by the Court of Common Pleas of Venango County, granting the motion of Appellee David W. Anderson, defendant below, and dismissing the prosecution because of prosecutorial misconduct. We reverse and remand.

Appellee was charged in April 2000 with sex-related offenses against three developmentally impaired individuals, D.M., J.L., and T.C., who resided at the Polk Center State Hospital, where Appellee was employed as a residential service aid. The charges were brought based on alleged incidents

* Retired Senior Judge assigned to the Superior Court.

of sexual abuse of each of the three victims; some incidents were reported by the victims and others were reported by third parties who observed the conduct. On February 13, 2001, after a jury trial, Appellee was found guilty of indecent assault¹ of D.M. The jury was deadlocked as to the charges relating to J.L. and T.C. On March 26, 2001, Appellee was retried and found guilty of indecent assault of J.L. and T.C. and involuntary deviate sexual intercourse² relating to J.L. Appellee appealed, and on April 21, 2004, a panel of this Court reversed. The conviction relating to D.M. was reversed because of late amendment of the information, and Appellee was discharged. The convictions relating to J.L. and T.C. were reversed based on prosecutorial misconduct during closing argument and were remanded for a new trial. ***Commonwealth v. Anderson***, 855 A.2d 127 (Pa. Super. 2004) (unpublished memorandum).

On September 8, 2005, a competency hearing was held for J.L. and T.C. The trial court found both individuals incompetent to testify.³ The

¹ 18 Pa.C.S.A. § 3126(a)(6).

² 18 Pa.C.S.A. § 3123(a)(5).

³ Appellee sought a new competency hearing, because competency must be determined near the time of trial. Here, over two years had passed since the previous competency hearing. See ***Commonwealth v. Harper***, 387 A.2d 824, 826 (Pa. 1978) (competency finding from twenty months prior to trial irrelevant to the appellant's mental status at the time of trial); ***Commonwealth v. Pifer***, 425 A.2d 757, 761 (Pa. Super. 1981) (competency determination made two months prior to trial was not per se unreliable).

Commonwealth appealed that determination, and this Court reversed the trial court's order, found J.L. and T.C. competent to testify, and remanded the matter for trial. ***Commonwealth v. Anderson***, 927 A.2d 647 (Pa. Super. 2007) (unpublished memorandum).

On October 3, 2007, Appellee moved again for a competency hearing, raising concerns about possible taint. On October 29, 2007, at a pre-trial conference, the trial court dictated an order, to remain in effect until the competency hearing was completed, which included the following relevant provisions:

The District Court Administrator should . . . schedule this case for two and a half hours as close as possible but prior to jury selection so the trial judge may conduct a competency hearing as to four disclosed witnesses, T.C., J.L., D.M. and H.G., all of whom have been patients or residents of Polk Center, two of whom are still patients at Polk Center. At that hearing the court will also hear testimony from Vicki Hutchinson and any other witnesses the Commonwealth would call that would assist the court in determining the competency of the witnesses.

In preparation for that hearing, the motion of the defense counsel for some form of protection concerning "taint" is granted. The Court sees no impediment to the Commonwealth if we order and we do hereby Order that the Commonwealth[,] when interviewing the four stated witnesses prior to the competency hearing, will have with him preferably Vicki Hutchinson, who has been a counsel for these witnesses, but if not her some other responsible person at Polk Center, such as an RSA. Interviews

will not be conducted unless such person is present. Counsel for the Commonwealth will keep a log showing when the interviews occurred and who was present. This is only up to the point of the competency hearing.

If Polk Center has conducted competency assessments on these witnesses after January 1, 2004, then Polk Center will deliver the assessments, upon presentation of a copy of this Order by the Commonwealth, to the Commonwealth's counsel, and Commonwealth's counsel if such assessments are delivered to him, will copy same and deliver same to defense counsel.

. . . .

Both counsel are directed to produce a witness list to opposing counsel at least two weeks prior to jury selection. The witness list should identify the witness by name and address. If the witness is other than a fact witness, the nature of the witness, such as a reputation witness.

Notes of Testimony ("N.T."), 10/29/2007, at 50-52.

On February 6, 2009, the trial court granted Appellee's motion to dismiss the prosecution based on double jeopardy because of prosecutorial misconduct and dismissed all charges relating to J.L. and T.C. The dismissal was based on its findings, after hearing, that James P. Carbone, the first assistant district attorney for Venango County, violated the October 29, 2007 court order by meeting with J.L. without a third party present, by intentionally making false statements to the court about his meetings with J.L., and by failing to provide witness lists, capacity assessments, and

meeting logs to defense counsel. The trial court also found that Carbone improperly coached J.L. by providing him with some of the questions and answers that would be used at the competency hearing.

Initially, we address a motion to quash the appeal. Appellee raises seven grounds for dismissal of the Commonwealth's appeal: (1) the notice of appeal was untimely filed; (2) the brief and reproduced record were untimely filed with this Court; (3) the Pa.R.A.P. 1925(a) trial court opinion and Pa.R.A.P. 1925(b) statement of matters complained of on appeal are not attached to the Commonwealth's brief; (4) the reproduced record contains the 1925(a) opinion, but does not include the attachments to that opinion; (5) the reproduced record is not in chronological order; (6) the Commonwealth's 1925(b) statement is too vague for meaningful review; and (7) the Commonwealth did not mail a copy of its brief to Appellee. We are not persuaded that the appeal should be quashed for any of these reasons.

The order dismissing the case was entered February 6, 2009. The trial court docket lists March 3, 2009, as the date the notice of appeal was filed. Upon receipt of the notice of appeal, the clerk must immediately stamp it "and that date shall constitute the date when the appeal was taken. . . ." Pa.R.A.P. 905(a)(3). The trial court stated that as of March 26, 2009, the court docket had no notation of a notice of appeal having been filed. Appellee asserts that the notice of appeal was not docketed on March 3,

2009, because the Commonwealth did not pay the required fee. While an appellate court may dismiss an appeal based on the failure to pay the filing fee, dismissal is not mandated. ***First Union National Bank v. F. A. Realty Investors Corp.***, 812 A.2d 719 (Pa. Super. 2002). Based on the March 3, 2009, date listed on the docket, the filing was timely.

While the Commonwealth's Pa.R.A.P. 1925(b) statement of matters complained of on appeal is somewhat vague, it does notify the trial court of the essential issue raised herein, the claimed error in dismissing the prosecution based on prosecutorial misconduct. The trial court provided a comprehensive opinion addressing the issue presented in this appeal. We ought not be "too quick to find waiver, claiming that Rule 1925(b) statements are . . . too vague" ***Astorino v. New Jersey Transit Corp.***, 912 A.2d 308, 309 (Pa. Super. 2006), *appeal denied* 929 A.2d 1160 (Pa. 2007).

The remaining deficiencies raised by Appellee do not impede our review of the important issue raised in this matter; thus, we will not dismiss the appeal for those reasons. ***See Jacobs v. Jacobs***, 884 A.2d 301, 305 (Pa. Super. 2005) (" . . . if the failure to comply with the rules of appellate procedure does not impede review of the issues or prejudice the parties, we will address the merits of the appeal. ").

The Commonwealth asserts on appeal that dismissal of the prosecution because of prosecutorial misconduct is an extreme sanction that is warranted only if there has been deliberate misconduct that results in incurable prejudice. The Commonwealth contends dismissal was not justified because the alleged misconduct did not take place during trial, was not deliberate, and did not cause incurable prejudice.

The standard and scope of review regarding whether prosecutorial misconduct invokes double jeopardy was set forth in ***Commonwealth v. Vargas***, 947 A.2d 777 (Pa. Super. 2008), as follows: “An appeal grounded in double jeopardy raises a question of constitutional law. This court’s scope of review in making a determination on a question of law is, as always, plenary. As with all questions of law, the appellate standard of review is de novo.” ***Id.*** at 780 (citations omitted). “A claim of prosecutorial misconduct must be viewed in light of the entire context in which the alleged misconduct arose.” ***Commonwealth v. Metts***, 787 A.2d 996, 1006 (Pa. Super. 2001). The trial court’s findings of fact are reviewed to determine whether there was an abuse of discretion. On appeal, this Court is limited to determining whether the trial court’s factual findings “rest on legally competent and sufficient evidence.” ***Commonwealth v. Davies***, 811 A.2d 600, 603 (Pa. Super. 2002) (citations omitted); ***see also Commonwealth v. Myers***, 722 A.2d 649, 651 (Pa. 1998).

Our consideration of the issue before this Court is informed by the following from ***Commonwealth v. Burke***, 781 A.2d 1136, 1144 (Pa. 2001):

Because of the compelling societal interest in prosecuting criminal defendants to conclusion, this Court has recognized that dismissal of charges is an extreme sanction that should be imposed sparingly and, relevant to the question here, only in cases of blatant prosecutorial misconduct. As . . . Justice Cappy, in his Opinion Announcing the Judgment of the Court in ***Commonwealth v. Shaffer***, 551 Pa. 622, 627, 712 A.2d 749, 752 (1998), explained:

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 the fullest 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 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.

Id. at 628, 712 A.2d at 742, see also ***Commonwealth v. McElligott***, 495 Pa. 75, 81, 432 A.2d 587, 589 (1981) (“The remedy of discharge without a fair and complete fact-finding procedure is extreme and will not be invoked absent deliberate bad faith prosecutorial misconduct”); ***Commonwealth v. Smith***, 532 Pa. 177, 186, 615 A.2d 321, 325 (1992) (dismissal of charges is appropriate only where “prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, [or where] the conduct of the prosecutor is

intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial”).

Appellee’s motion for dismissal of the prosecution is based on Article 1, Section 10 of the Pennsylvania Constitution: “No person shall, for the same offense, be twice put in jeopardy of life or limb.” In ***Commonwealth v. Smith***, 615 A.2d 321 (Pa. 1992), the Pennsylvania Supreme Court held that the double jeopardy clause of the Commonwealth Constitution provides broader protection than its federal counterpart.⁴ Smith was convicted of the murder of a co-conspirator’s fiancée and her two children. The Pennsylvania Supreme Court granted Smith a new trial because hearsay testimony of Smith’s co-conspirator was improperly admitted. Before the new trial began, Smith’s attorney discovered previously unknown misconduct committed by the Commonwealth. He moved for dismissal of the charges based on (1) the Commonwealth’s failure to turn over potentially exculpatory physical evidence that the Commonwealth knew was material to his defense, but suppressed for two years, and (2) the Commonwealth’s denial of the existence of an agreement for favorable sentencing with its chief witness.

⁴ The Fifth Amendment of the United States Constitution states: “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .”

While acknowledging that the defendant would not be entitled to relief under federal double jeopardy jurisprudence, the Pennsylvania Supreme Court held:

[T]he double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant and thereby deny him a fair trial.

Smith, 615 A.2d at 325; *see also Commonwealth v. Strong*, 825 A.2d 658, 669 (Pa. Super. 2003), *appeal denied* 847 A.2d 59 (Pa. 2004), *certiorari denied*, 544 U.S. 927 (2005).

The Supreme Court concluded that the instances of misconduct in **Smith** “standing alone, would suffice to implicate the protection of the double jeopardy clause.” *Id.* at 323. The Supreme Court also noted that at trial the Commonwealth attempted to show that a state trooper was lying when he testified about physical evidence recovered during the investigation, which was missing at the time of trial. The Commonwealth located the missing evidence—adhesive lifters used to remove granular particles from between the victim’s toes—during trial, but withheld it and continued to argue for the imposition of the death penalty on direct appeal. The Supreme Court stated: “Because the prosecutor’s conduct in this case was intended to prejudice the defense and thereby deny him a fair trial,

appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second hearing.” *Id.* at 325.

The Commonwealth argues that the trial court erred in applying the *Smith* holding to this case. Thus, it asserts: “The guarantee against Double Jeopardy is invoked to remedy deliberate, prejudicial conduct occurring during trial for the purpose of preventing a fair trial, not after remand awaiting a new trial.” Brief for the Appellant, at 16.

We conclude that because the constitutional underpinning of *Smith* is the double jeopardy clause, for prosecutorial misconduct to preclude Appellant’s retrial, the prosecutorial misconduct must have impacted on a prior trial – that is, it must have either occurred during a prior trial or caused the prior trial to have been unfair. In the instant case, the prosecutorial misconduct at issue occurred after the remand for a new trial. The prosecutorial misconduct in this matter occurred before the jury was sworn in for Appellee’s retrial.⁵ Therefore, because the prosecutorial

⁵ *Commonwealth v. Ortega*, 995 A.2d 879, 887 (Pa. Super. 2010) (“In Pennsylvania, jeopardy does not attach and the constitutional prohibition against double jeopardy has no application until a defendant stands before a tribunal where guilt or innocence will be determined. *Id.* In a criminal jury trial, jeopardy attaches when the jury is sworn.”), citing *Commonwealth v. Micklos*, 672 A.2d 796, 799 (Pa. Super. 1996), *appeal denied*, 686 A.2d 1309 (1996) (internal citation and quotation omitted); *Commonwealth v. Vargas*, 947 A.2d 777, 780-781 (Pa. Super. 2008) (same).

misconduct in the instant case did not impact on the prior trials, and because the prosecutorial misconduct was discovered before the jury was sworn in on the retrial, the misconduct did not impact the fairness of Appellee's retrial. Consequently, the trial court's reliance on the double jeopardy clause to dismiss the prosecution was erroneous – jeopardy had not yet attached.

Although dismissal of the prosecution was not constitutionally required, the prosecutorial misconduct can be addressed. In ***Commonwealth v. Moose***, 602 A.2d 1265 (Pa. 1992), the Supreme Court referred the prosecutor's misconduct to the Disciplinary Board. Also, a finding of contempt of court may be warranted where the prosecutor willfully violates an order of court. ***See Commonwealth v. Tillia*** 518 A.2d 1246, 1256-1257 (Pa. Super. 1986). In the instant matter, the trial court can consider these options.

Order reversed. Case remanded.

Judge Musmanno files a Dissenting Opinion.

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BEFORE: MUSMANNO, OLSON, and FREEDBERG*, JJ.

DISSENTING OPINION BY: MUSMANNO, J.:

While I agree with the Majority's decision not to quash the instant appeal, I respectfully dissent. Contrary to the holding of the Majority, I agree with the trial court that the prosecutor's misconduct was so egregious as to require dismissal of the case pursuant to Pennsylvania's constitutional protection against double jeopardy. Specifically, I disagree with the Majority's legal conclusion that "[b]ecause the misconduct in this case was discovered before it impacted on the fairness of [Appellee's] trial, the trial court's reliance on the double jeopardy clause to dismiss the prosecution was erroneous." Majority Slip Opinion at 11. By this holding, the Majority

* Retired Senior Judge assigned to the Superior Court.

places an additional limitation on the double jeopardy analysis set forth by our Supreme Court in ***Commonwealth v. Smith***, 615 A.2d 321 (Pa. 1992).

Prior to ***Smith***, the Pennsylvania Supreme Court had held that “double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct.” ***Commonwealth v. Simons***, 522 A.2d 537, 540 (Pa. 1987). In ***Smith***, the Pennsylvania Supreme Court extended the application of Pennsylvania’s double jeopardy clause to situations “when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.” ***Smith***, 615 A.2d at 325. Thus, in ***Smith***, our Supreme Court extended double jeopardy protections even in the absence of a mistrial.

The defendant in ***Smith*** had been accused of murder. ***Id.*** at 322. Following his direct appeal, the defendant discovered that the prosecutor had withheld information regarding a favorable sentencing recommendation given to the prosecution’s chief witness. ***Id.*** at 322-23. In addition, the prosecution had knowingly withheld exculpatory physical evidence. ***Id.*** at 323. Before the defendant could be retried, he filed a motion to preclude a new trial based on double jeopardy because of after-discovered evidence of prosecutorial misconduct. ***Id.*** at 322. In determining whether double jeopardy applied so as to bar re-trial, the Pennsylvania Supreme Court held that “[r]egardless of what may be required under the federal standard, ...

our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.” *Id.* at 325. The Supreme Court held that

the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the prosecutor’s conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Id.

In *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999), the Pennsylvania Supreme Court amplified the *Smith* standard and held that double jeopardy barred retrial of the defendant where the prosecutor’s action “evinces the prosecutor’s intent to deprive Appellant of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary[.]” *Id.* at 1223. Thus, in both *Smith* and *Martorano*, the Pennsylvania Supreme Court did not require that the prosecutor’s misconduct occur prior to or during the first trial for double jeopardy to attach. The lack of such limitation is consistent with the Article I, section 10, which mandates that “[n]o person shall, for the same offense,

be twice put in jeopardy of life or limb[.]” Pa. CONST. Art. I, § 10. Article I, section 10 requires only that a defendant be twice placed in jeopardy.

The record in the instant case discloses that Appellee would be subject to a third trial on the same offenses. In addition, the prosecutor’s actions evinced the prosecutor’s intent to deprive Appellee of a fair trial, ignored the bounds of legitimate advocacy and that the prosecutor sought to win a conviction by any means necessary. In fact, the prosecutor’s actions in this case are nothing short of egregious, appalling and reprehensible.

As set forth in the Majority’s rendition of the facts, Appellee was charged with sex offenses related to three mentally impaired individuals: D.M., J.L. and T.C. After a jury trial, Appellee was convicted of the indecent assault of D.M., but the jury deadlocked as to the charges involving J.L. and T.C. This Court ultimately reversed Appellee’s judgment of sentence as to D.M., based upon a late amendment of the information.

After a second trial, the jury convicted Appellee of indecent assault as to J.L and T.C., and involuntary deviate sexual intercourse as to J.L. On appeal, this Court reversed and remanded for a new trial based upon prosecutorial misconduct. ***Commonwealth v. Anderson***, 855 A.2d 127 (Pa. Super. 2004) (unpublished memorandum). On remand, in September 2005, a competency hearing was held for J.L. and T.C. At that time, the trial court found both incompetent to testify. On appeal, this Court reversed

that determination. *Commonwealth v. Anderson*, 927 A.2d 647 (Pa. Super. 2007).

In the next remand, in October 2007, Appellee again requested a competency hearing, this time alleging the possible taint of these witnesses. To protect against possible taint prior to the competency hearing, the trial court ordered that (1) either Vicki Hutchinson or some other responsible person from Polk Center must be present with the prosecutor when interviewing the witnesses prior to the hearing; (2) interviews are not to be conducted in the absence of this person; (3) the prosecutor is to keep a log of the interviews and the persons present during the interviews; (4) any competency assessments performed by Polk Center must be given to the prosecutor, who will then copy and deliver the assessment(s) to defense counsel; and (5) both counsel must produce witness lists to opposing counsel two weeks before jury selection. N.T., 11/29/07, at 50-52. As the trial court explained in its thorough and cogent 54-page Opinion, "there were legitimate concerns that [the prosecutor] was tainting the mentally retarded witnesses by prepping them prior to hearings before the Court." Trial Court Opinion, 2/6/09, at 52.

After a hearing on Appellee's Motions to dismiss, the trial court found that the prosecutor brazenly violated the trial court's Order by meeting with J.L. just six days before the competency hearing. *Id.* This meeting lasted

for "hours," during which time the prosecutor coached J.L. as to the questions that would be posed at the competency hearing and the desired answers. *Id.* At the subsequent competency hearing, the prosecutor, in fact, asked those questions of J.L., eliciting the pre-determined answers. *Id.* The trial court found that the prosecutor then "lied to [the trial court] about the existence of the meeting, as well as what happened at the meeting." *Id.* The trial court further found that the prosecutor "intended that his taint of the witness J.L. would never be discovered." *Id.* at 52-53. Finally, the trial court found that the prosecutor failed to comply with the trial court's Order by not providing the defense with the mental capacity assessments. *Id.* at 53. These findings are supported in the record.

In addition to the prosecutor's violations of the prior Order, the trial court took exception to the prosecutor's continuing conduct at the hearing on Appellee's Motions to dismiss:

The Court finds that at the July 31, 2008 Motions to Dismiss hearing, [the prosecutor] continued to perpetrate his fraud on this Court and [Appellee]. The Court finds that at this proceeding, [the prosecutor] made many material misstatements of fact. The Court finds that [the prosecutor] was hostile and verbally abusive to defense counsel. The Court finds that [the prosecutor] made improper allegations about the integrity of the Judiciary in order to vindicate his own misconduct in this case.

The Court recognizes that [the prosecutor] committed prosecutorial misconduct at the second trial against [the Appellee], who was being prosecuted for alleged criminal

acts perpetrated against J.L. and T.C. The Court recognizes that [Appellee] is currently being prosecuted for the same alleged criminal acts perpetrated against J.L. and T.C. The Court finds that [the prosecutor] has again committed prosecutorial misconduct. The Court finds that [the prosecutor's] misconduct is especially egregious due to its cumulative effect. The Court finds that both the prior misconduct and the current misconduct are properly before this Court because [Appellee] has not waived his double jeopardy protection and is now being retried, after remand due to prosecutorial misconduct, for the same alleged criminal conduct.

Id. Finally, in granting the Motion to dismiss, the trial court found that

(1) [the prosecutor] intended to subvert the truth-seeking process, (2) [the prosecutor] intended to forever conceal his misconduct in order to win a conviction at any costs, and (3) [the prosecutor's] misconduct was intended to violate [Appellee's] right to a fair trial.

Id. at 54.

The trial court's findings are well-supported in the record, and its conclusion is sound. As required to invoke the protections of Article I, section 10 of the Pennsylvania Constitution, Appellee will, for the third time, be placed in jeopardy for the same offenses. Further, the circumstances in this case fall squarely within the Pennsylvania Supreme Court's holdings in **Smith** and **Martorano**, as the prosecutor's actions "evinced the prosecutor's intent to deprive Appellant of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary[.]" **Martorano**, 741 A.2d at 1223. On this basis, I dissent from

the result reached by the Majority, and would affirm the Order of the trial court dismissing the case on double jeopardy grounds.