IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID. No. 0412009298
	)	
JOHN ZICKGRAF	)	
Defendant.	)	

Submitted: July 28, 2005
Decided: August 19, 2005

UPON DEFENDANT'S
MOTION TO DISMISS INDICTMENT
DENIED

William L. George, Jr. Deputy Attorney General, Attorney for the State.

John P. Deckers, Esquire, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

ORDER

It appears to the Court that:

1. The indictment alleges that, on December 8, 2004, a Delaware State Police officer found Defendant sitting in his wrecked car just off of Route 7. The officer believed that Defendant smelled of alcohol. The officer asked Defendant if he had been drinking, and Defendant admitted that he had been. The officer administered field sobriety tests, which Defendant failed. The officer then took Defendant to the police station to take an Intoxilyzer test, which he also failed.

2. The State first filed this case in JP Court as a normal DUI. Defendant demanded removal to the Court of Common Pleas so that he could receive a jury trial. The State then realized that this represents Defendant's fourth DUI charge, and therefore requires felony prosecution. Court of Common Pleas does not have jurisdiction over felony prosecutions for DUI.[1] The State therefore entered a *nolle prosequi* in Common Pleas in order to bring the charge in Superior Court.

3. The defendant argues that the indictment must be dismissed because the Attorney General's Office erroneously first filed the case in Common Pleas Court. Defendant cites the case of *State v. Pruitt*, in which the Supreme Court held,

> We have often noted our distaste for the State's practice of voluntarily dismissing charges in a lower court and commencing a new prosecution on those same charges in a higher court with concurrent jurisdiction. Although we recognize, and today reaffirm, the power of the Attorney General to choose the forum for a prosecution, that power is to be exercised only once. Any vacillation leaves the impression of the "unfair manipulation of

[1] 21 Del. C. § 4177(d)(8)

> the criminal process and undue disruption of court business." We hold that, absent compelling circumstances not present here, once the State engages in a prosecution in a court of competent jurisdiction, it should be prohibited from pursuing that prosecution to its ultimate conclusion in any forum other than one it initially chose.[2]

4. *Pruitt* and its companion cases do not apply to these facts. Key to the Supreme Court's analysis was that the Attorney General's Office re-filed the case in a court of concurrent jurisdiction in order to hide some defect in the indictment. In this case, the Court of Common Pleas did not have jurisdiction. 21 Del. C. § 4177(d)(8) specifically states "[t]he Court of Common Pleas and Justice of the Peace Courts shall not have jurisdiction over offenses which must be sentenced pursuant to paragraph (3),(4), or (5) of his subsection." Defendant's crime, if proven, falls under § 4177(d)(4), "a fourth or subsequent [DUI] offense occurring any time after 3 prior [DUI] offenses."

5. It is clear from these facts that the Attorney General's Office erred in filing this indictment in a court that lacked jurisdiction. The solution, however, is not to grant a windfall escape to a defendant who seems to have an alarming habit of driving drunk and crashing cars on Delaware's highways. The General Assembly decided such by enacting 11 Del. C. § 210: "A prosecution is not a bar … [when] (1) the former prosecution was before a court that lacked jurisdiction over the

[2] 805 A.2d 177, 183 (Del. 2002).

defendant or the offense". Defendant's Motion to Dismiss the Indictment therefore fails as a matter of law, and is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary – Civil
cc: William L. George, Jr. Deputy Attorney General
John P. Deckers, Esquire