NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
GERALD CHILDS,	:	No. 3080 EDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, October 3, 2012,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0013528-2011

BEFORE: FORD ELLIOTT, P.J.E., DONOHUE AND JENKINS, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 25, 2014**

Appellant, Gerald Childs, appeals from the judgment of sentence imposed on October 3, 2012, following his conviction of harassment. The sole issue raised on appeal is whether the trial court erred in denying his pre-trial motion, which sought, pursuant to 18 Pa.C.S.A. § 110, the dismissal of his current prosecution for allegedly violating double jeopardy protection. No relief is due.

The facts and procedural history of this case are as follows. In June of 2010, appellant pushed his ex-wife, Darlene Riehl ("the victim"), into a wall, punched her four or five times, and stole her purse at 21st Street and Washington Avenue in Philadelphia. (Notes of testimony, 10/3/12 at 53-55.) In response, she obtained a PFA order against him. (***Id.*** at 55-56.) On February 22, 2011, appellant had another altercation with his ex-wife. (***Id.***

at 56.) He grabbed the victim by the neck and dragged her around the room. (***Id.***)

On February 26, 2011, appellant was arrested for violating the PFA. (***Id.*** at 67-68.) From prison, on February 27, 2011, he proceeded to call the victim between 40 and 60 times. The victim answered two or three of these calls and directed appellant not to call her anymore. During one of the calls, appellant stated, "get me out of here, get me out of here or someone is gonna end up dead." (***Id.*** at 71.) On February 28, 2011, the victim received another call and appellant told her, "you are dead, bitch." (***Id.*** at 69-73.)

Appellant appeared before the Honorable Joel Johnson in the Philadelphia Municipal Court on May 17, 2011, and entered guilty pleas at MC-51-0008233-2011 for stalking and at MC-51-CR-0011094-2011 for terroristic threats. At MC-51-0008233-2011, the relevant facts were recited by the Commonwealth:

> Between February 22, 2011, and February 26, 2011, that was in violation from the Protection of Abuse order, No. 0912V7415, prohibiting the defendant from being at the complainant's location. Where, he did show up on the location on the 22nd and engaged in a verbal and physical dispute with her and continued to call . . . [the victim].

Notes of testimony, 5/17/11 at 17. The relevant facts at MC-51-CR-0011094-2011 were recited by the Commonwealth as follows:

> Beginning on February 28th, two days after being arrested on the previous transcript, the defendant

> began calling [the] complaining witness from prison. He called her fifty-three times over the course of four days, in violation of the Protection from Abuse Order as well as made threats, including, "If you don't get me out of here, you're dead bitch" which meets terroristic threats.

Id. at 19. In both cases, the relevant police paperwork and letters appellant mailed to the victim were admitted as evidence. The court accepted appellant's pleas and sentenced him to 11½ to 23 months' imprisonment followed by two years' probation for stalking, and a consecutive 5-year period of probation for terroristic threats.

In August 2011, appellant was released early from custody and repeatedly attempted to contact the victim by texting her father, Edward Riehl. (Notes of testimony, 10/3/12 at 100-116.) Riehl received five text messages from appellant, repeatedly asking that the victim call him, stating he was sending her something in the mail, and asserting that he loved her. (***Id.*** at 114-115.) Riehl forwarded the text messages to his daughter.

Chelsea Erdmanis, the victim's outpatient group counselor at Thomas Jefferson Narcotics Addiction Rehabilitation Program ("the program") in Philadelphia, testified. Erdmanis explained that in August of 2011, she received multiple telephone calls from a man who pretended to be different people and tried to trick Erdmanis into having the victim call his phone number. (***Id.*** at 7-9, 21-27, 99-105.)

On September 9, 2011, appellant was arrested. He was originally charged with retaliation against a witness, intimidation of a witness, stalking, terroristic threats, and harassment. The information listed the offense date as February 27, 2011. The charges of retaliation and intimidation were dismissed for lack of evidence.

On June 5, 2012, appellant filed a motion to "dismiss the information pursuant to 18 Pa.C.S.A. § 109 and the Double Jeopardy Clause of the State and Federal Constitutions." (Docket #3.) ***See Commonwealth v. Campana***, 304 A.2d 432 (Pa. 1973), ***vacated and remanded***, 414 U.S. 808 (1973), ***reinstated***, 314 A.2d 854 (Pa. 1974), ***cert denied***, 417 U.S. 969 (1974).

The case was continued until September 5, 2012. At the hearing on this date, appellant argued that the bill of information listed the offense date as February 27, 2011, and appellant had already pled guilty to stalking and terroristic threats encompassing the February 2011 time period. At the hearing, the Commonwealth moved to amend the information to cover the period of time from February 27, 2011 until September 8, 2011.[1] The court amended the information accordingly and denied appellant's motion to bar prosecution.

On September 19, 2012, appellant filed a petition to bar prosecution on ***Campana*** and § 110 grounds. (Docket #10). On October 3, 2012, the

[1] The Commonwealth ***nolle prossed*** the charge of terroristic threats.

trial court denied appellant's petition. A bench trial was conducted. The Commonwealth introduced evidence regarding the entire history of interactions between appellant and the victim.[2] Specifically, evidence was admitted of appellant's prior bad acts on June 10, 2011, the acts that led to his earlier convictions of stalking and terroristic threats in February of 2011, and the incidents in August of 2011 that led to appellant's arrest in September 2011. At the conclusion of the trial, appellant was convicted of harassment and acquitted of stalking. As stated previously, on October 3, 2012, he was sentenced to 90 days' imprisonment, graded as a summary offense, and given credit for time served.

A timely appeal was filed on November 2, 2012. After extensions of time were granted, appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court has filed an opinion. The following question has been presented for our review:

> Did the lower court err by denying appellant's motion to dismiss pursuant to [***Campana***, ***supra***] and 18 Pa.C.S.A. § 110, inasmuch as appellant pled guilty to stalking and terroristic threats and was sentenced, and was ***then*** subsequently tried and convicted of harassment against the complainant when the facts arose out of the same criminal episode?

[2] Following a pre-trial hearing, this evidence had been ruled admissible to show appellant's intent at the time he attempted to contact the victim. (***See*** Docket #12.)

Appellant's brief at 3 (emphasis in original).[3]

In reviewing a trial court's decision to dismiss charges under 18 Pa.C.S.A. § 110, we must ascertain whether the trial court has committed an error of law. ***Commonwealth v. Hockenbury***, 701 A.2d 1334, 1336 n.3 (Pa. 1997). Our scope of review is therefore plenary. ***Id.***; ***Commonwealth v. Peifer***, 730 A.2d 489, 491 (Pa.Super. 1999).

Appellant relies on the overlapping February 2011 time-frame and argues that the new charges were barred by his prior guilty pleas, as both the new and old charges stemmed from the same underlying course of events in February 2011; in other words, the same criminal episode. He essentially relies on 18 Pa.C.S.A. § 110(1)(ii), averring that his current prosecution should have been barred because the offenses arise from the same criminal episode as his prior prosecution. (Appellant's brief at 14-16.)

Section 110 requires that all known charges based upon the same conduct or arising from the same criminal episode be consolidated for trial unless the court orders separate trials. 18 Pa.C.S.A. § 110; ***Commonwealth v. Hude***, 458 A.2d 177, 181 (Pa. 1983). Section 110(1)(ii) provides in pertinent part:

> Although a prosecution is for a violation of a different provision of the statutes than a former prosecution

[3] Because of the constitutional ramifications of a double jeopardy claim, a defendant may challenge the denial of a pre-trial motion asserting double jeopardy immediately or defer the challenge until the conclusion of the trial. ***Commonwealth v. Lee***, 416 A.2d 503, 504 (Pa. 1980). There is no waiver if an immediate appeal is not taken.

> or is based on different facts, it is barred by such former prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal or in a conviction . . . and the subsequent prosecution is for:
>
> (i) any offense of which the defendant could have been convicted on the first prosecution;
>
> (ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial . . .; or
>
> (iii) the same conduct, unless:
>
> (A) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil; or
>
> (B) the second offense was not consummated when

> the former trial began.

18 Pa.C.S.A. § 110. This compulsory joinder rule serves two distinct policy considerations. First, it protects a defendant from the governmental harassment of being subjected to successive trials for offenses stemming from the same criminal episode. Secondly, the rule assures finality without unduly burdening the judicial process by repetitious litigation. ***See Hude***, 458 A.2d at 180.

For Section 110(1)(ii) to bar the instant prosecution as appellant suggests, the following four requirements must be met:

> (1) the former prosecution resulted in an acquittal or a conviction;
>
> (2) the current prosecution must be based on the same criminal conduct or have arisen from the same criminal episode as the former prosecution;
>
> (3) the prosecutor must have been aware of the current charges before the commencement of the trial for the former charges; and
>
> (4) the current charges and the former charges must be within the jurisdiction of a single court.

Commonwealth v. Anthony, 717 A.2d 1015, 1018 (Pa. 1998).

As the Commonwealth's argument suggests, the difficulty with this position is that the conduct giving rise to the instant conviction obviously did not occur until after the guilty plea and appellant's release from custody following his related sentence of incarceration. It was a distinct offense

demanding a separate prosecution. Thus, we find that Section 110(1)(ii) is inapplicable to this matter, and we need not address this theory of relief regarding whether the current prosecution was based on the same criminal episode.

We first note that there is no dispute that the first and fourth requirements have been met in the instant matter. Appellant's prior prosecutions ended in a guilty plea. A guilty plea is treated as the equivalent of a conviction under Section 110. ***Anthony***, 717 A.2d at 1018. Additionally, the prior charges and the instant charges were both within the jurisdiction of the Court of Common Pleas of Philadelphia County. However, the third prong cannot be met under the instant facts. Our case law occasionally restates this "knowledge" requirement as the "opportunity to prosecute," ***i.e.***, if the opportunity to prosecute for the second offense was not present when the first offense was disposed of, neither ***Campana*** nor § 110 bars the subsequent prosecution. ***Commonwealth v. Allen***, 486 A.2d 363 (Pa. 1984), overruled on other grounds by ***Commonwealth v. Yerby***, 679 A.2d 217, 218 (Pa. 1996) (criminal contempt convictions do give rise to double jeopardy considerations). ***See also Commonwealth v. Waters***, 418 A.2d 312 (Pa. 1980) (When a defendant was convicted of assault, he could subsequently be tried for murder when the victim later died.) As the Commonwealth notes, "the prosecutor assigned to the courtroom in May

could not have known what would happen in August (unless he was a soothsayer)." (Commonwealth's brief at 10.)

Next, we note our disagreement with the rationale provided in the trial court's Rule 1925(a) opinion. In its opinion, relying on Section 110(1)(i),[4] the trial court requests that we vacate judgment of sentence concluding that it erred in denying appellant's motion. (Trial court opinion, 6/26/13 at 4.) The trial court states appellant "could have been convicted of Harassment and Stalking for the February 27 and February 28 telephone calls at that time." While the bill of information does include this late-February time-frame, the trial court specifically states that it relied solely on appellant's conduct in August when reaching a guilty verdict on the harassment charge. (***Id.***) As the Commonwealth notes, double

[4] Again, in relevant part:

> (1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title . . . and the subsequent prosecution is for:
>
> (i) any offense of which the defendant could have been convicted on the first prosecution.

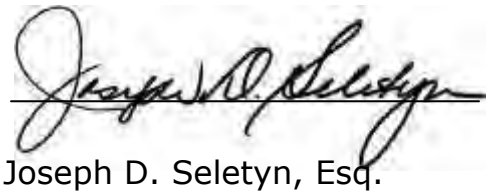
18 Pa.C.S.A. § 110(1)(i).

jeopardy principles do not prohibit the introduction of evidence that was the subject matter of a prior prosecution. ***See***, ***e.g.***, ***Dowling v. United States***, 493 U.S. 342 (1990) (holding that the introduction of evidence relating to a crime of which the defendant had been acquitted previously did not implicate double jeopardy or violate due process).

Judgment of sentence affirmed.

Jenkins, J. concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/25/2014