NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
GREGORY ALLEN BARTO	
Appellant	No. 2037 MDA 2011

Appeal from the Order Entered November 8, 2011
In the Court of Common Pleas of Lycoming County
Criminal Division at No(s): CP-41-CR-0001173-2010

BEFORE: SHOGAN, J., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J. Filed: January 31, 2013

Gregory Allen Barto appeals from the order entered on November 8, 2011, in the Court of Common Pleas of Lycoming County denying his motion to bar prosecution pursuant to 18 Pa.C.S. § 110, regarding compulsory joinder. Barto claims the charges he is currently facing were part of the same criminal episode as crimes for which he was previously convicted and is currently serving 35 to 70 years' incarceration. After a thorough review of the submissions by the parties, relevant law, and official record, we affirm.[1]

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[1] Regarding our review of an order issued pursuant to Section 110, "[a]s the issue before our Court raises a question of law, our standard of review is *de novo*, and our scope of review is plenary." ***Commonwealth v. Fithian***, 961 A.2d 66, 71 (Pa. 2008).

The underlying evidence in this matter shows that Barto and his wife engaged in a years' long pattern of behavior during which the two hired a series of underage females to work in the Barto owned tire shop. The employees were to do general work around the shop and duties typically included cleaning at the Barto residence. The employees would be exposed to pornography and/or offered illegal drugs. Sometimes, Barto and his wife would engage in sexual activity in front of an employee. Each employee would be asked to join in sexual activity with Barto and/or his wife. From 2001 through 2008, there were seven victims. One of the victims did not return to work after being shown pornography. Two of the victims were forcibly raped. Other victims, although underage, agreed to join in the sexual activity.

In May 2010, Barto was tried on charges related to five[2] of seven total vicitms. Barto was convicted and sentenced to an aggregate term of 35 to 70 years' incarceration. He filed a direct appeal and was afforded no relief.[3] The charges regarding the two remaining victims were filed on August 2, 2010. These vicitms were K.P., age 14/15, who was alleged to have been assaulted in 2004 and K.W., age 15/16, who was alleged to have been

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[2] The victims were, S.H., age 17, 2008; A.W., age 15, 2001; T.H., age 15, 2003-04; N.B., age 17, 2003-07; and N.W., age 15, 2007. The date represents the year(s) the crimes against the victim took place.

[3] ***See Commonwealth v. Barto***, 1748 MDA 2010, filed 08/17/11. Petition for allowance of appeal denied 2/16/12.

assaulted in 2005-06 and claims she was forcibly raped when she tried to stop the activity.

On March 24, 2011, prior trial counsel for Barto filed a motion to bar prosecution pursuant to 18 Pa.C.S. § 110.[4] The motion was briefed by the parties and a hearing was held on May 6, 2011. The motion was denied by the trial court on May 19, 2011. Although the denial of the motion was immediately appealable, no appeal was taken.[5]

On July 29, 2011, the Commonwealth filed its brief in the direct appeal of the first trial. In that brief, Barto claims the Commonwealth argued the

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[4] There is a four-prong test to determine if Section 110 applies: "(1) the former prosecution resulted in an acquittal or conviction; (2) the current prosecution is based on the same criminal conduct or arose from the same criminal episode; (3) the prosecutor is aware of the current charges before the commencement of trial of the former charges; and (4) the current charges and the former charges are within the same jurisdiction of a single court." ***Commonwealth v. M.D.P.***, 831 A.2d 714, 718 (Pa. Super. 2003). The only question at issue here was whether the criminal conduct arose from the same criminal episode.

[5] There is some confusion in case law over the applicable Rule of Appellate Procedure enabling the right to immediate appeal. ***Commonwealth v. Barber***, 940 A.2d 369 (Pa. Super. 2008), states the denial of a Section 110 motion implicates double jeopardy considerations and a defendant is "entitled to an immediate interlocutory appeal as of right," thereby implicating Pa.R.A.P. 311. ***See also***, ***Commonwealth v. Bracalielly***, 658 A.2d 755 (Pa. 1995). However, ***Commonwealth v. Brady***, 508 A.2d 286 (Pa. 1986), indicates it is appealable under the collateral order doctrine, indicating Pa.R.A.P. 313 applies. We need not address whether Barto retains the right to raise the issue in a direct appeal pursuant to Pa.R.A.P. 311(g)(1)(i).

five cases were properly consolidated for trial because, in part, the facts demonstrated a common plan, scheme or design.

On October 13, 2011, current counsel[6] filed a second motion to bar subsequent prosecution pursuant to 18 Pa.C.S. § 110. In that motion, Barto claimed the statement made in the Commonwealth's appellate brief, that the facts in the five prior cases demonstrated a common plan, scheme or design, constituted a binding admission and was new evidence such that the trial court could examine the issue of the application of Section 110 again. ***See*** Second Motion to Bar Subsequent Prosecution, 10/13/2011, at ¶¶ 7-13.

The trial court denied the second motion on November 4, 2011, based on two reasons. First, the trial court disagreed with Barto's contention that the common plan, scheme or design admission constituted new evidence. The trial court noted the Commonwealth had claimed the five prior cases showed a common plan, scheme or design well before the first motion. Second, the trial court reasoned that Barto was incorrectly equating common plan, scheme or design with the concept of "same criminal episode." ***See*** Order, 11/4/11.

In its Pa.R.A.P. 1925(a) Opinion, prepared for this Court, the trial court reiterated its prior reasoning, expanding upon the substantive issues

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[6] Prior counsel, who was also appellate counsel in the previous case, was granted leave to withdraw for Barto on July 28, 2011. Current counsel entered his appearance on August 1, 2011.

regarding "same criminal episode". Additionally, the trial court questioned whether the second motion "was merely a thinly veiled attempt by [Barto] to reincarnate his right to appeal [the first motion] before trial." ***See*** Pa.R.A.P. 1925(a) Opinion, 4/16/12, at 4.

Although we agree with all of the trial court's determinations why Barto is not entitled to relief, we base our decision on the fact that the so-called admission found in the Commonwealth's appellate brief filed in the prior trial, does not constitute new evidence. Therefore, we agree with the trial court that the instant motion was merely an improper attempt to resurrect the right to interlocutory appeal and Barto's claim was not entitled to review.[7]

Pursuant to Pa.R.Crim.P. 578, all pretrial requests for relief, including a motion to quash, are to be filed in a single, omnibus motion. Therefore, as a general rule, a defendant in a criminal action is not entitled to file serial motions. The rule also provides an exception to the single motion limitation when "the interests of justice" demand. ***See*** Rule 578. In this matter, Barto

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[7] Because we resolve this matter on procedural grounds we need not address, in detail, the substantive claims. However, we note our agreement with the trial court analysis, particularly in its reliance on ***Commonwealth v. M.D.P.***, 831 A.2d 371 (Pa. Super. 2003). We disagree with Barto's assertion regarding the applicability of ***Commonwealth v. George***, 38 A.3d 893 (Pa. Super. 2011), which determined corrupt organization and conspiracy charges were properly dismissed under Section 110 after George had already been convicted of delivery of drugs in the same time period as the subsequent charges.

is claiming he has discovered new evidence, unavailable at the time of the first motion, that allows him to file for pretrial relief a second time. The claim of new evidence would also provide a new basis for altering the prior decision. Without new evidence and a new basis for a decision, the proper method of challenging the initial ruling would have been to file a motion for reconsideration and/or interlocutory appeal within 30 days of the original order.

Our inquiry begins by reviewing whether the trial court abused its discretion in determining Barto was not entitled, in the interest of justice, to a subsequent review of his Section 110 claim.[8]

New evidence is considered to be evidence that was not available at the time of the first proceeding and which could not have been discovered through reasonable diligence. ***Harnick v. Bethlehem***, 165 A. 36 (Pa. 1933). Barto's claim, that the Commonwealth's admission in its prior appellate brief constitutes new evidence, fails.

First, Barto claims the new evidence is found in a brief filed in a different case. However, that brief has not been made part of the official record in this matter. It is an appellant's responsibility to ensure that our

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[8] ***See Commonwealth v. English***, 699 A.2d 710 (Pa. 1997) (abuse of discretion standard for review of interest of justice determinations). Although the trial court did not specifically refer to the interest of justice, it is clear from Pa.R.Crim.P. 578 that a second motion would only be allowed if the interest of justice demanded it.

Court has a complete record for review. While the brief has been included in the reproduced record, we are only allowed to base our decision on that which is found in the official record.[9] We may find the issue waived based on the failure to supply a complete record.[10] However, because a copy of the brief is within the possession of this court, we will not find the issue waived.

The so-called admission in the prior brief addressed the claim that the charges on the five separate victims were improperly consolidated. Indictments may be consolidated for trial if evidence pertaining to one indictment would be admissible in a trial on another indictment to prove a common plan, scheme or design. ***Commonwealth v. Janda***, 14 A.3d 147, 156 (Pa. Super. 2011). Therefore, the Commonwealth argued the indictments regarding the prior five victims had been properly consolidated because the underlying facts proved a common plan, scheme or design. However, the Commonwealth made no argument in that brief regarding charges involving the instant victims. In fact, the instant victims, K.W. and K.P. were never mentioned in the Commonwealth's direct appeal brief. Therefore, the Commonwealth made no admission in its prior brief linking

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[9] ***Commonwealth v. Kennedy***, 868 A.2d 582, 593 (Pa. Super. 2005) (document not part of certified official record is non-existent and failure to include document may not be remedied by inclusion in reproduced record).

[10] ***Commonwealth v. Kennedy***, ***supra***.

the prior five victims to the current victims. Barto has not explained how this unrelated assertion constitutes new evidence in this matter.

Nonetheless, the Commonwealth did advance the concept that the facts of all seven cases show a common plan, scheme or design in a Pa.R.E. 404(b) notice filed February 28, 2011. In that notice, the Commonwealth sought to introduce evidence of the prior crimes in the instant matter in an effort to show a common plan. This 404(b) notice was filed one month prior to the filing of Barto's first Section 110 motion. Because the information was not only available prior to the filing of the first motion, but was demonstrably known by Barto, that same information cannot constitute new evidence by virtue of being restated in another document.

Based on the above, we find no abuse of discretion in the trial court's determination that Barto was not entitled to a second review of the Section 110 claim.

Order affirmed.