

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KENNETH JACKSON,	:	
	:	
Appellant	:	No. 828 EDA 2012

Appeal from the Order Entered February 29, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s): CP-51-CR-0007831-2011

BEFORE: FORD ELLIOTT, P.J.E., MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

Filed: April 25, 2013

Appellant, Kenneth Jackson, appeals from the order entered in the Philadelphia County Court of Common Pleas that granted the motion of the Commonwealth to vacate the entry of *nolle prosequi* and denied Appellant's motion for discharge under Pa.R.Crim.P. 1013(G). Appellant argues that the trial court erred by violating the coordinate jurisdiction rule and by holding that the Commonwealth did not violate his prompt trial rights under Rule 1013(G). We quash.

Appellant, on January 6, 2011, was arrested by Philadelphia Police Officer Michael Gwynn for driving under the influence of alcohol. On June

* Former Justice specially assigned to the Superior Court.

24, 2011, Appellant was found guilty of driving under the influence—incapable of safely driving,¹ and sentenced to ten days' imprisonment by the Philadelphia Municipal Court.

On July 7, 2011, Appellant filed a notice of appeal for a trial *de novo* in the Court of Common Pleas. After a series of continuances, the trial court, with Judge Robert P. Coleman presiding, scheduled trial for December 5, 2011, and entered a notation on the docket: "must be tried – Both." On December 5, 2011, the parties appeared for trial. However, the Commonwealth asserted that it was unable to proceed because the arresting officer was not available for trial. According to the Commonwealth, it initially requested a continuance, which the trial court denied. The Commonwealth thereafter moved for *nolle prosequi* of the charge, which the court accepted and entered.

The Commonwealth, on February 14, 2012, filed a motion to vacate entry of *nolle prosequi*. The trial court, with Judge Diane L. Anhalt presiding, convened a hearing on February 29, 2012. Appellant objected to the motion arguing that vacating the entry of *nolle prosequi* would violate a standing order of a different trial court judge. Moreover, Appellant argued that the reinstatement of the charge would violate his prompt trial rights under Rule 1013(G). The Commonwealth argued that it had moved for

¹ 75 Pa.C.S. § 3802(a)(1).

entry of *nolle prosequi* on the scheduled trial date of December 5, 2011, based on a request by the court. The Commonwealth also called the arresting officer to testify that he had not been available for trial on December 5, 2011, due to an injury. At the conclusion of the hearing, the court granted the Commonwealth's motion to vacate the entry of *nolle prosequi*, concluded that Appellant's prompt trial rights were not violated, and held that Appellant was not entitled to discharge under Rule 1013(G)

Appellant filed a timely notice of appeal. The trial court ordered Appellant to file a Pa.R.A.P. 1925(b) statement, and he complied.

Appellant presents the following questions for review:

When a court orders "must be tried Commonwealth" at the next listing and the Commonwealth is not ready, is the defendant entitled to a dismissal/*nolle prosequi*?

When a court orders a case *nolle prossed*/dismissed because the Commonwealth violates a court order may a judge of coordinate jurisdiction disregard the prior order and reopen the case?

Whether the running of time under the prompt trial rule, Pa.R.Crim.P. 1013(G), is tolled when a case is *nolle prossed*/dismissed and allows the Commonwealth to have an order dismissing the case vacated?

If the time for trial of a case under the prompt trial rule, Rule 1013, has expired may the Commonwealth revive the case by seeking to reopen more than two (2) months later?

Appellant's Brief at 2.

Preliminarily, we note that the trial court opined that the order granting the Commonwealth's motion to vacate the entry of *nolle prosequi*

and denying Appellant's motion for discharge under Pa.R.Crim.P. 1013(G) was interlocutory and not immediately appealable. Trial Ct. Op., 6/1/12, at 2-3.² Appellant has addressed the jurisdictional issue identified by the court and argues that this matter falls under the collateral order doctrine. **See** Appellant's Brief at 4 n.4.

It is well settled that "[t]he jurisdiction of this Court is generally confined to appeals from final orders of the courts of common pleas." **Commonwealth v. Knoeppel**, 788 A.2d 404, 406 (Pa. Super. 2001) (citation omitted); **see also** Pa.R.A.P. 341. A final order is one that "effectively puts a litigant out of court." **Id.** (citation omitted). "[P]retrial orders are ordinarily considered interlocutory and not appealable." **Id.** (citation omitted). Exceptions to these general rules include: (1) appeals as of right from interlocutory orders, **see** Pa.R.A.P. 311; (2) interlocutory appeals by permission, **see** Pa.R.A.P. 312, 1311; and (3) collateral orders, **see** Pa.R.A.P. 313.

In the present case, it is apparent that the order vacating the entry of *nolle prosequi* and denying his request for dismissal under Pa.R.Crim.P. 1013(G): (1) is not a final order under Pa.R.A.P. 341, since no party is put out of court; (2) is not the basis for an appeal as of right under Pa.R.A.P. 311; and (3) has not been the subject of petition for permission to appeal

² The Commonwealth, in its brief, also requested that the appeal be quashed, but did not file a separate motion for quashal.

under Pa.R.A.P. 312. Therefore, the sole basis for assuming jurisdiction in this matter is the collateral order rule set forth in Pa.R.A.P. 313.

Pa.R.A.P. 313 defines a collateral order as follows:

A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Pa.R.A.P. 313(b). There are three elements to a collateral order, all of which must be present in order for this Court to exercise jurisdiction: (1) severability from the main cause of action; (2) involvement of a right too important to deny immediate review; and (3) irreparable loss of the claim if review is postponed. **See *Commonwealth v. Montgomery***, 799 A.2d 149, 153 (Pa. Super. 2002).

Here, the grant of the Commonwealth's motion to vacate the entry of *nolle prosequi* and the denial of Appellant's motion for discharge under Pa.R.Crim.P. 1013(G) are inextricably intertwined. Specifically, Appellant argues that both the reinstatement of the charge and the denial of his Rule 1013(G) motion resulted in a violation of a fundamental constitution right to a prompt trial. However, we conclude that Appellant's claims that his prompt trial rights were violated would not be irreparably lost if review is postponed until final judgment. **See e.g. *Commonwealth v. Myers***, 322 A.2d 131, 133 (Pa. Super. 1974) (holding that although rights to a speedy trial are fundamental, they will not be lost if review is postponed until final

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judgment when hearing has been held). Therefore, we conclude that the order granting the Commonwealth's motion to vacate the entry of *nolle prosequi* and denying Appellant's Rule 1013(G) motion is interlocutory and not subject to an appeal as a collateral order.

Thus, finding no basis upon which to exercise our jurisdiction, we must quash this appeal.

Appeal quashed.