

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
VS.	:	
	:	
STEPHEN KEEFER	:	NO. 4653 CR 2008
EARL J. MOSLEY	:	NO. 4654 CR 2008
BRETT COTT	:	NO. 4655 CR 2008
MICHAEL VEON	:	NO. 4656 CR 2008
ANNA MARIE PERRETTA- ROSEPINK	:	NO. 4663 CR 2008
SEAN RAMALEY	:	NO. 4664 CR 2008

2009 JUL 22 AM 10:32

MEMORANDUM OPINION

Presently before this court is the Motion to Dismiss - Selective Prosecution, joined in by all above captioned Defendants and filed as part of their various Omnibus Pre-Trial Motions. For the reasons which follow, this court finds Defendants have not made a *prima facie* showing of selective prosecution. Therefore, this court is constrained to DENY the Motion.

The elements of a *prima facie* claim of selective prosecution are well settled; “first, that others similarly situated were not prosecuted for similar conduct, and, second, that the Commonwealth's discriminatory prosecutorial selection was based on impermissible grounds such as race, religion, the exercise of some constitutional right, or any other such arbitrary classification.” *Commonwealth v. Murphy*, 795 A.2d 997, 1000 (Pa. Super. Ct. 2002) (internal citations omitted). Importantly, “[the defendant] must establish that he was prosecuted for an incorrect reason, not that the Commonwealth failed to prosecute another guilty person.” *Commonwealth v. Childress*, 799 A.2d 805, 811 (Pa. Super Ct. 2002). It is this latter requisite showing which this court cannot find Defendants to have made.

As a preliminary matter, “[t]he burden is on the defense to establish the claim; it is error to shift the burden to the prosecution to establish or refute the claim. Because of the doctrine of separation of powers, the courts will not lightly interfere with an executive's decision of whom to

prosecute.” *Murphy*, 795 A.2d 997 (internal citations omitted). The threshold which must be met is high; “[o]ur cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996). The United States Supreme Court continued “[t]he justifications for a rigorous standard for the elements of a selective prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.” Indeed the heavy burden placed on the defendant in making a *prima facie* showing of selective prosecution is meant to thwart spurious claims. *See, Id.* at 463-64. Moreover, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

As to the first element of selective prosecution, Defendants submit an extensive list of persons they believe engaged in conduct similar to that for which Defendants were charged and who were not prosecuted¹. But, persuasive or not, that showing is not dispositive without a demonstration that Defendants were themselves prosecuted for a constitutionally impermissible reason.

Turning then to the second element of the claim, there is no allegation that Defendants are part of a protected class based on race, religion, or the exercise of a constitutional right. Indeed, at argument on the motion defense counsel emphasized that there is no requirement that Defendants be part of such a class. Their argument must then be predicated on the last clause of the test, “or any other such arbitrary classification.” The only classification common to all

¹ This court notes the concomitant requirement that such persons be ‘similarly situated.’ It is by no means clear that the individuals Defendants believe ought to have been prosecuted are so situated. However, this court need not reach that question since, as will be discussed, Defendants have failed to demonstrate the necessary discriminatory intent.

Defendants is affiliation with a particular political party. The question of whether such affiliation is a sufficient basis upon which to make out a claim for selective prosecution appears to be one of first impression. But this court need not reach that question since Defendants cannot show the requisite discriminatory intent.

Assuming, *arguendo*, that party affiliation constitutes an illicit “arbitrary classification,” Defendants still must show that they were vindictively prosecuted² based upon it. Defendants allege the “invidious” reason for their prosecution was “because a Republican³ wanted to get re-elected (and more) on the backs of Democrats whose conduct was neither illegal nor unusual.” (Defendant Veon’s Supplemental Omnibus Pretrial Motions at 7.) Defendants then refer this court to *Baumgardner Oil Co. v. Commonwealth*, 146 Pa. Commw. 530 (1992) and *Commonwealth v. Murphy*⁴ (*See, supra*).

In *Baumgardner*, defendants specialized in the reprocessing of used oil for resale as fuel oil. They were prosecuted for failure to comply with the Solid Waste Management Act and for violations of the crimes code. Defendants sought to dismiss or quash the criminal information on eight grounds, the fifth of which was selective prosecution.

Defendants claimed that a confrontation had occurred between its staff and an inspector sent to its facility by the Department of Environmental Resources. This confrontation, defendants claimed, led to vindictive and selective prosecution. In rejecting the selective prosecution claim, the court noted “The Commonwealth conceded below that no other oil recycling facilities have been prosecuted. [Defendant’s] claim, however, that the Commonwealth

² “The Supreme Court cases dealing with vindictive prosecution have recognized two distinct situations in which the appearance of vindictiveness may require inquiry and judicial intervention. The first is where a prosecutive decision is based on discriminatory grounds of race, religion, national origin or other impermissible classification. The other situation is where the accused is treated more harshly because he has successfully exercised a lawful right, e.g. the right to seek a new trial.” *Commonwealth v. Rocco*, 375 Pa. Super. 330, 334 (1988) (internal citations omitted).

³ This court believes Defendants’ reference is to Pennsylvania Attorney General Tom Corbett.

⁴ This court notes that in neither of these cases was a finding of selective prosecution made.

prosecuted it due to spite and ill will on the part of the DER is a mere allegation, unsupported by any evidence.” *Baumgardner*, 146 Pa. Commw. 530, 545 (1992).

In *Murphy*, the defendant was prosecuted for various violations of the Wiretap Act when it was discovered he had placed an illegal wiretap on his girlfriend’s phone. He raised three issues on appeal, one of which was selective prosecution based on race.

The Superior Court dismissed the selective prosecution claim, stating Appellant failed to prove that his prosecution was racially motivated. “[The District Attorney] stated he did not know the race of Appellant when he made the decision to prosecute, and he expressed specific, non-invidious reasons for filing charges against Appellant.” *Murphy*, 2002 PA Super 83, P9 (2002).

The instant case is analogous to *Baumgardner* and *Murphy*; but only in that Defendants have similarly fallen short of a *prima facie* showing. Unlike *Baumgardner*, Defendants do not cite any particular confrontation or altercation as the origin of the Commonwealth’s alleged vindictiveness. Instead, they point to the generalized antipathy it is, unhappily, assumed exists between members of different political parties. As in *Baumgardner*, Defendants here cannot point to any specific evidence that they were singled out for prosecution based on a constitutionally impermissible reason.

As in *Murphy*, the Commonwealth here has submitted a host of non-invidious reasons for the charges brought against Defendants. As the Commonwealth rightly points out the “decision to file charges . . . was based upon the recommendation of *two* statewide investigating grand juries The resulting presentments explain in excruciating detail the reasons why [Defendants] should be prosecuted, and there is nothing in either presentment even remotely suggesting a partisan purpose.” (Commonwealth’s Reply to Defendant [Veon’s] Omnibus

Pretrial Motions at 3.) As in *Murphy*, the bald assertion of discriminatory intent is wholly insufficient to overcome the presumption of prosecutorial propriety where probable cause exists to believe violations of our criminal law have occurred.

Because Defendants cannot make out a *prima facie* showing that their prosecution was the product of prosecutorial vindictiveness, their joint Motion must be DENIED.

Absent a showing of selective prosecution this court is constrained to quash those subpoenas issued in furtherance of that claim and to enter a protective order prohibiting the service of such subpoenas in the future.

Accordingly, the following is entered:

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ORDER

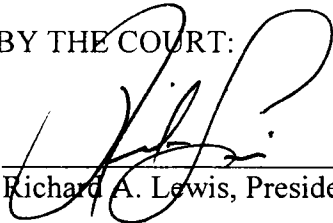
AND NOW, this 22nd day of July, 2009, upon consideration of Defendants' joint Motion to Dismiss - Selective Prosecution, IT IS HEREBY ORDERED said Motion is DENIED.

Those subpoenas which were issued in aid of the selective prosecution claim are hereby QUASHED.

A protective order is hereby entered prohibiting the service of any further subpoena to any person or persons in connection with a selective prosecution claim.

2009 JUL 22 AM 10:32

BY THE COURT:



Richard A. Lewis, President Judge

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The Hon. Barry Feudale, Supervising Judge
Lowell A. Witmer, Clerk of Court of Dauphin County
Victor D. Riley, Esq., Deputy Court Administrator - Criminal

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ORDER

AND NOW, this 22nd day of July, 2009, upon consideration of Defendants various Omnibus Pretrial Motions, IT IS HEREBY ORDERED AS FOLLOWS:

Motion to Dismiss - Selective Prosecution, filed on behalf of all Defendants, is DENIED. A Memorandum Opinion addressing this issue has been filed this day.

Motion to Dismiss - Prosecutorial Misconduct, filed on behalf of all Defendants, is DENIED. A finding of prosecutorial misconduct prior to trial is not supported by caselaw. As the United States Supreme Court has held “the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

Motion to Produce Documents and Other Things, or, in the Alternative, to Preclude Evidence – Re: Computer Hard Drives, that issue is within the scope of a Joint Motion, dated July 14, 2009, filed by Defendants before the Hon. Barry Feudale, Supervising Judge of the Twenty-Sixth and Twenty-Eighth Statewide Investigating Grand Juries.

Motion to Produce *Brady* Material, filed on behalf of all Defendants, is DENIED.

Motion to Suppress Evidence, filed on behalf of all Defendants, is DENIED.

Motion for a Bill of Particulars, filed on behalf of all Defendants, is DENIED. As the Pennsylvania Supreme court has held “[a] bill of particulars, an anachronism of past procedural rules, serves a narrow purpose; it is not an appropriate vehicle by which to obtain discovery of the Commonwealth's evidence” *Commonwealth v. Champney*, 832 A.2d 403, 412 (Pa. 2003)(internal citations omitted).

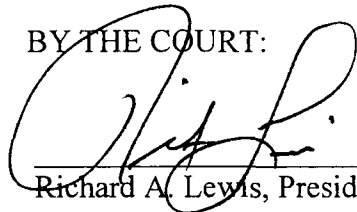
Motion for Discovery of Witness Statements Pursuant to Pa.R.Crim.P. 573(B)(2), filed on behalf of all Defendants, final resolution of this Motion is held in abeyance pending review by Supervising Judge Barry Feudale.

Motion for Early Release of Grand Jury Testimony Pursuant to Pa.R.Crim.P. 230, filed on behalf of all Defendants, final resolution of this Motion is held in abeyance pending review by Supervising Judge Barry Feudale.

Motion for Change of Venue, filed on behalf of all Defendants is DENIED.

Motion for Severance, filed on behalf of all Defendants, is GRANTED with respect to Defendant Ramaley and DENIED with respect to all other Defendants.

BY THE COURT:


Richard A. Lewis, President Judge

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