

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 99-11,047

VS :

ESTHER KITHCART :

OPINION AND ORDER

Before the Court are the Defendant's Motion to Dismiss and Petition for Habeas Corpus. A hearing on the motions was held August 19, 1999. The parties submitted the transcript of the preliminary hearing, and offered argument with regard to the motions.

MOTION TO DISMISS

The Defendant argues in her Motion to Dismiss that the actions of the prosecutor and the police officer constituted prosecutorial misconduct and malicious prosecution.

A cause of action for malicious prosecution generally requires proof that the prosecutor (1) instituted criminal proceedings against a person (2) without probable cause (3) with malice and (4) that the proceedings terminated in favor of the person. Kelley v. General Teamsters, Chauffeurs, and Helpers, Local Union 249, 518 Pa. 517, 520-521, 544 A.2d 940, 941 (1988). See also DeSalle v. Penn Cent. Transp. Co., 263 Pa. Superior Ct. 485, 398 A.2d 680 (1979).

Instantly, the Defendant argues that the actions of the police officer and prosecuting officer constitute malicious prosecution because the charges lack probable cause for filing. The Court finds, however, that the Defendant has not made out a claim for malicious prosecution, as she has not met the fourth element of the cause of action.

The Court need not, therefore, determine whether probable cause existed for the arrest. The Defendants motion to dismiss on this basis is therefore denied.

The Defendant next argues that her case should be dismissed prior to trial because the actions of the officer and prosecutor constitute prosecutorial misconduct. The Court disagrees. An allegation of prosecutorial misconduct predicated on the ground of conduct undertaken in bad faith to prejudice or harass the defendant, must show an intent by the prosecutor to provoke a mistrial. See Commonwealth v. Lark, 330 Pa.Super. 225, 479 A.2d 522, (1984); Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Instantly, the Court finds that the conduct in this case was not done with the intent to provoke a mistrial. The Defendant's request to dismiss on this basis is therefore denied.

PETITION FOR HABEAS CORPUS

The Defendant next argues that her case should be dismissed because the Commonwealth has not established a prima facie case. The Defendant has been charged with perjury and false reports. A preliminary hearing was held June 25, 1999, before District Magistrate Page. At the conclusion of the hearing, District Magistrate Page bound over both charges. After a review of the transcript of the preliminary hearing, the Court finds the following facts.

Officer William B. Lynn of the Williamsport Bureau of Police testified that on June 15, 1998, he had contact with the Defendant at approximately 5:00 p.m.. Officer Lynn was dispatched to the Hepburn High Rise at Lycoming Street and Elmira Street to assist a Lycoming County Adult Probation Officer with an individual under their supervision who was believed to be DUI. Officer Lynn testified that the individual was already in

custody, so he talked to the Defendant. The Defendant initially relayed to Officer Lynn that she had been driving the vehicle, but after being told that there were several witnesses who saw the other individual driving, she recanted her statement and admitted that she had not been driving the vehicle, (N.T. 6/25/99, p. 5,6). The other individual was subsequently charged with driving under the influence of alcohol.

At the subsequent trial of the individual held June 21 and 22, 1999, the Defendant was called to testify on behalf of the Commonwealth. The Defendant testified under oath that she was the one who drove the truck that day, and not the individual that was subsequently charged. The Defendant testified at the trial that Officer Lynn had intimidated her on the date of the incident, and that Officer Lynn's mustache had "tickled her nose" (Id., p.7).

Brenda Phillips, an employee at the High Rise building testified that she was familiar with the individual charged with the DUI, as he had been staying with the Defendant for approximately three weeks prior to the date of the incident. She stated that when she was getting ready to leave work that day, she noticed the truck coming up Elmira Street. She then observed the Defendant get out of the passenger side of the truck. The other individual remained behind the wheel of the truck, waiting for the Defendant to return. She stated that he remained in the driver's seat of the truck until the adult probation officer arrived, (Id., p.13).

To successfully establish a prima facie case, the Commonwealth must present sufficient evidence that a crime was committed and the probability the defendant could be connected with the crime. Commonwealth v. Wodjak, 502 Pa 359, 466 A.2d 991 (1983). A person is guilty of perjury, under 18 Pa.C.S.A. § 4902(a) if in any official

proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true. Instantly, the Defense argues that the evidence is insufficient to support the charge of perjury because the Commonwealth did not provide more than the uncorroborated testimony of a single witness, which is required under 18 Pa.C.S.A. § 4902(f).

This additional requirement, known as the "two witness rule," requires that the falsity element of perjury must be supported either by the direct testimony of two witnesses or by the direct testimony of one witness plus corroborating evidence. Commonwealth v. Karafin, 224 Pa.Super. 449, 307 A.2d 327 (1973). The requirement of the testimony of at least two witnesses to establish perjury was implemented in order to protect the one so charged from his own or another's good-faith mistake, as well as from harassment by a single grudge witness. Commonwealth v. Broughton, 257 Pa.Super. 369, 390 A.2d 1282 (1978). Instantly, the Commonwealth introduced the testimony of Officer Lynn, who testified that he was dispatched to the scene because an individual's probation officer suspected that he was driving while intoxicated. Officer Lynn approached the probation officer when he arrived at the scene and was told that the individual had been taken into custody. Brenda Phillips testified that she observed the individual drive the vehicle to the apartment building and remain in the driver's seat of the vehicle until the adult probation officer arrived and took him into custody. Officer Lynn also spoke with the Defendant on the date of the incident. When confronted with the statements of other eyewitnesses that the other individual was the driver of the vehicle, she admitted that she was not the driver of the vehicle. The Court would find

that the Commonwealth produced direct testimony plus corroborating evidence of the falsity of the statement, thereby satisfying 18 Pa.C.S.A. § 4902(f). The Defendant's Petition for Writ of Habeas Corpus on this charge is therefore Denied.

The Defendant next argues that the Commonwealth did not present a prima facie case of false reports. In order to establish a prima facie case of false reports under 18 Pa.C.S.A. 4906, the Commonwealth must establish the probability that the Defendant gave false information to Officer Lynn with the intent to implicate another, or that she reported an offense to Officer Lynn, knowing that it did not occur. Instantly, the Court would find, based on the testimony presented at the preliminary hearing, that the Commonwealth established the probability that the Defendant knew that she was giving a false statement to Officer Lynn when she told him that she was driving the vehicle on the date of the incident. The Defendant's Petition for Writ of Habeas Corpus on this charge is therefore denied.

ORDER

AND NOW, this _____ day of November, 1999, after a review of the Defendant's Motion to Dismiss and Petition of Writ of Habeas Corpus, the same are hereby DENIED.

BY THE COURT,

Nancy L. Butts, Judge

xc: William Miele, Esquire
DA
Honorable Nancy L. Butts
Law Clerk
Gary Weber
Judges