

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA : NO. 00-10,984  
:   
vs. : CRIMINAL DIVISION  
: Pre-Trial Motion  
NORMAN E. JOHNSON, :   
Defendant :

OPINION AND ORDER

After a jury trial, completed on April 17, 2001, Defendant was convicted of criminal trespass, possessing an instrument of crime, and intimidation of a witness or victim, but the jury was hung on the remaining counts of rape by forcible compulsion, rape by threat of forcible compulsion, involuntary deviate sexual intercourse by forcible compulsion, involuntary deviate sexual intercourse by threat of forcible compulsion, sexual assault, indecent assault without consent, indecent assault by forcible compulsion, kidnaping to commit a felony, unlawful restraint, false imprisonment, simple assault by physical menace, terroristic threats, recklessly endangering another person, harassment by communication and stalking. Defendant was acquitted of the charge of kidnaping to inflict bodily injury. Post-trial motions were denied and Defendant was sentenced on the counts of which he was convicted, on July 5, 2001. He filed an appeal with respect to his denial of post-trial motions on the issue of double jeopardy with respect to retrial on the kidnaping and related charges. He also filed an appeal from the judgment of sentence with respect to the charges on which he was sentenced. Those charges not involved in the appeal, upon which the jury was hung, have been scheduled for retrial. Defendant filed a pre-trial motion August 22, 2001, and argument thereon was heard August 27, 2001.

First, Defendant contends that prosecutorial misconduct resulted in Defendant not having a fair trial and, thus, all charges should be dismissed as retrial is barred by the principles of double jeopardy. The Court does not agree.

It is true, as Defendant points out, that when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial, the double jeopardy clause of the Pennsylvania Constitution prohibits retrial. Commonwealth v Chmiel, 2001 WL 92348 (Pa. Super. 2001). The prosecutor's misconduct must have been deliberate, undertaken in bad faith and with a specific intent, however. Commonwealth v Hawkins, 701 A.2d 492 (Pa. 1997). Defendant contends the prosecutorial misconduct involved in the instant matter was the intentional withholding of certain discovery materials until just prior to the first trial. Defendant points out that he was required by the Commonwealth's actions to file a Motion to Compel Discovery<sup>1</sup>, and request a continuance of trial. The Court notes the Motion to Compel Discovery was withdrawn by Defendant by praecipe filed January 19, 2001, three (3) days prior to the scheduled argument. Defendant alleges no specifics with regard to his general contention he received an unfair trial, or with regard to his contention that the withholding of discovery prejudiced him. He also provides no specifics to show that the conduct of the District Attorney's Office in this matter was intentional, deliberate, and undertaken in bad faith with a specific intent to deny Defendant a fair trial. Based on his vague allegations, the Court cannot consider the matter further.

Second, Defendant contends this Court should recuse itself from hearing the matter, arguing that the Court has shown "severe prejudice" in prior proceedings. At argument, defense counsel indicated he was referring to this Court's consideration of Defendant's conduct during a protection from abuse hearing involving the same victim, in sentencing Defendant for the charges on which he was convicted in the instant matter. The Court does not agree that such consideration was improper and believes it did not show any prejudice against Defendant in its consideration of such factors. Further, Defendant was sentenced within the standard range. The Court does not believe it is necessary to recuse itself from hearing this matter.

Third, Defendant contends all charges should be dismissed for "lack of actual evidence of rape." To the extent Defendant is raising a sufficiency of the evidence claim at this juncture, the Court will consider such as a form of Writ of Habeas Corpus and, looking at the evidence in light of a

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<sup>1</sup>Such a motion was filed December 4, 2000.

“prima facie” standard, the Court finds the victim’s testimony clearly sufficient.

Finally, Defendant contends that certain evidence which the District Attorney’s office intends to use at the second trial is inadmissible. The Court will defer ruling on this contention until the time of trial.

ORDER

AND NOW, this 29<sup>th</sup> day of August, 2001, for the foregoing reasons, Defendant’s pre-trial motion is hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA  
Matt Zeigler, Esq.  
Gary Weber, Esq.  
Hon. Dudley N. Anderson