IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL

IN RE: PRIVATE CRIMINAL COMPLAINT OF SMITRESKI : NO. MD 300 2009

Joseph J. Matika, Esquire, Assistant District Attorney — Counsel for Commonwealth
Edward J. Smitreski — Pro se

Criminal Law – Private Criminal Complaint – Disapproval by District Attorney – Court Review - Standard of Review – *De Novo* vs. Abuse of Discretion

1. The basis of the district attorney's decision not to approve a private criminal complaint determines the standard by which the court reviews that decision.
2. If a district attorney disapproves the filing of a private criminal complaint on purely legal grounds, the court reviews that decision on a *de novo* basis: did the district attorney reach a proper legal conclusion. Legal reasons include that the complaint does not state a *prima facie* case or that the evidence is insufficient to sustain a conviction.
3. If a district attorney disapproves the filing of a private criminal complaint as a matter of policy, or on a hybrid of both legal and policy reasons, the court reviews that decision against an abuse of discretion standard. The term "policy reasons" most often refers to a determination that, although a complaint has legal merit, prosecuting it would not serve the public interest. A decision not to prosecute because the likelihood of conviction is minimal and/or the likelihood of acquittal is great, or because the victim of has adequate civil remedies available to him, is policy based.
4. Under the abuse of discretion standard, a court must defer to the district attorney's prosecutorial discretion absent bad faith, fraud or unconstitutionality on the district attorney's part. This differential standard reflects the separation between the executive and judicial branches of government.
5. Affirming the district attorney's disapproval of private criminal complaint where *pro se* petitioner failed to allege facts or present evidence to support charges of harassment,

disorderly conduct, official oppression and intimidating a victim.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL

IN RE: PRIVATE CRIMINAL COMPLAINT OF SMITRESKI	: : :	NO. MD 300 2009

Joseph J. Matika, Esquire, Assistant District Attorney — Counsel for Commonwealth

Edward J. Smitreski — Pro se

MEMORANDUM OPINION

Nanovic, P.J. – June 24, 2010

In this case, Edward J. Smitreski asks the Court to reverse the District Attorney's disapproval of his private criminal complaint.

PROCEDURAL AND FACTUAL BACKGROUND

On September 11, 2009, Mr. Smitreski ("Smitreski") forwarded a private criminal complaint to the Carbon County District Attorney's Office for approval of criminal charges against Joseph M. Piosa. Therein, Smitreski claimed he had been harassed by Piosa on September 8, 2009, and, in addition, accused Piosa of disorderly conduct, official oppression, and intimidating a victim. The incident of which Smitreski complained occurred at work between two employees: Smitreski is a Park Ranger I and Piosa

is a Park Maintenance Supervisor. Both work at Beltzville State Park in Carbon County, Pennsylvania.

On October 9, 2009, Assistant District Attorney Cynthia Hatton disapproved the complaint designating it a "civil matter." Pursuant to Pa.R.Crim.P. 506, Smitreski sought review of this decision by the Court. A hearing on Smitreski's request was held on January 8, 2010.[1] At this hearing, Attorney Hatton testified that she reviewed Smitreski's complaint, reviewed with the person who had investigated the incident, Park Ranger II Duarte, the results of his investigation, and also spoke with Chief Thomas Beltz of Franklin Township, the municipality where the incident occurred.

On the day of the incident, both Chief Beltz and the Pennsylvania State Police responded to the park office and met with Smitreski. At that time, Smitreski explained what had happened and requested that charges be filed against Piosa. The state police advised Smitreski that they had already been in contact with the Park's manager, Tony Willoughby, and that he asked that the matter be handled internally, with Park Ranger IIs at Beltzville conducting the investigation. Park Ranger II Duarte

---

[1] "Under Rule 506 and settled case law, the private criminal complainant has no right to an evidentiary hearing in connection with the trial court's review of the district attorney's decision to disapprove the private criminal complaint." In re Private Criminal Complaint of Wilson, 879 A.2d 199, 212-13 (Pa.Super. 2005) (*en banc*). In order to better understand the respective positions of the parties and to offer each an opportunity to create a record, a hearing was held on Smitreski's challenge to the District Attorney's denial of his complaint.

then took written statements from Smitreski, Piosa, and two maintenance workers who were at the scene. Smitreski further gave Duarte the contact information he had obtained from Lawrence Kelly, a park patron who approached him about the incident, and asked that he interview and obtain a written statement from him. In addition, on the same date Smitreski reported the incident to the Department of Conservation and Natural Resources' personnel office in Harrisburg and requested that disciplinary action be taken against Piosa.

At the hearing, Attorney Hatton testified that she discussed with Duarte the statements he had obtained and that Duarte also informed her that he had attempted to obtain a statement from Mr. Kelly, but that Kelly never responded. After considering the information contained in Smitreski's complaint and that which she received from her investigation, and following her review of the law, Attorney Hatton concluded that there was insufficient evidence to support criminal charges and that the complaint lacked legal merit. Both Ranger Duarte and Chief Beltz concurred in this decision.[2]

DISCUSSION

The basis of the District Attorney's decision not to prosecute determines the standard of our review of that decision.

[2] According to Attorney Hatton, Duarte, in his capacity as a Park Ranger II, has the authority to file criminal charges. In her discussions with Duarte, he explained to Attorney Hatton why he felt charges were inappropriate.

If the decision is based on legal grounds, our review is *de novo*. If on policy reasons, or for a hybrid purpose, we review on an abuse of discretion basis. In Commonwealth ex rel. Guarrasi v. Carroll, the Superior Court stated the relevant legal principles as follows:

> A district attorney ("D.A.") has the authority to approve or disapprove private criminal complaints. Pa.R.Crim.P. 506(A). If the D.A. decides to disapprove a private complaint, the D.A. must advise the affiant of the reasons for the disapproval. Id. at (B)(2). A disapproval may be based on purely legal grounds (*e.g.*, the complaint does not state a *prima facie* case or, even if it does so, the D.A.'s investigation into the matter reveals there is no evidentiary merit to the complaint). In re Private Criminal Complaint of Wilson, 879 A.2d 199, 211-12 (Pa.Super. 2005). Alternatively, the choice to disapprove a complaint may be a matter of policy (*e.g.*, even if the case has legal merit, prosecution thereof would not serve the public interest). Id. at 212. Finally, the disapproval of a private complaint may be a hybrid of both legal and policy reasons. Id.
>
> If a D.A. disapproves a private criminal complaint, the private affiant may appeal that disapproval to the Court of Common Pleas. Pa.R.Crim.P. 506(B)(2). In such an appeal, the court must first correctly identify the nature of the D.A.'s reason(s) for disapproving the complaint. Wilson, 879 A.2d at 212. If the D.A.'s decision was based on legal grounds, the court undertakes *de novo* review to determine whether the D.A. reached a proper legal conclusion. Id. However, if the D.A. based the disapproval on policy reasons, the court applies an abuse of discretion standard, deferring to the D.A.'s decision absent bad faith, fraud or unconstitutionality on the latter's part. Id. Lastly, if the D.A. relied on a hybrid of legal

> and policy bases, the court reviews the D.A.'s decision for an abuse of discretion. Id.

979 A.2d 383, 385 (Pa.Super. 2009). The deferential standard which applies to policy or other like discretionary decisions made by the district attorney "recognizes the limitations on judicial power to interfere with the district attorney's discretion in these kinds of decisions." In re Ullman, 995 A.2d 1207, 1213 (Pa.Super. 2010).

A private criminal complaint must set forth a *prima facie* case of criminal conduct. *See* In re Private Criminal Complaint of Wilson, 879 A.2d 199, 211 (Pa.Super. 2005) (*en banc*). If it fails to do so, the district attorney is entitled to deny the complaint on its face. *See* Commonwealth v. Muroski, 506 A.2d 1312, 1317 (Pa.Super. 1986) (*en banc*). If the complaint puts forward a *prima facie* case, "[t]he district attorney must [then] investigate the allegations of the complaint to permit a proper decision whether to approve or disapprove the complaint." Ullman, 995 A.2d at 1213. If after investigation, the district attorney determines there is insufficient evidence to establish a *prima facie* case, he is duty bound not to prosecute. *See* Wilson, 879 A.2d at 211-12.

Both the sufficiency of the complaint to make out a *prima facie* case and the sufficiency of the evidence to support a *prima facie* case are legal assessments regarding which the

district attorney's decisions are subject to *de novo* review by the court. *See* id. at 214, 216-17. "This is to be distinguished from the prosecutorial discretion not to bring prosecution even if a *prima facie* case may be established from the evidence available." Commonwealth v. Benz, 565 A.2d 764, 767 (Pa. 1989); *see also* Wilson, 879 A.2d at 217.[3] Such a decision is reviewed to determine whether the district attorney abused his discretion. *See* id. at 218.

In his criminal complaint, Smitreski alleges that when he reported to work on September 8, 2009, the day after Labor Day, Piosa asked him to empty the trash can in the employees' restroom of the first aid station. Smitreski states he indicated he would do so, but then Piosa "began to berate [him] with humiliating insults using the word 'fuck' in every sentence." (Private Criminal Complaint). These insults, according to Smitreski, were made in a loud voice which could be heard by park patrons between 50 and 100 feet away, one of whom, Lawrence Kelly, commented to Smitreski afterwards that "in thirty years of working, I never seen a supervisor treat a worker that way." (Private Criminal Complaint). When this verbal attack ended, Smitreski states that

---

[3] In In re Ullman, the Court stated:

> **The district attorney is permitted to exercise sound discretion to refrain from proceeding in a criminal case whenever he, in good faith, thinks that the prosecution would not serve the best interests of the state. This decision not to prosecute may be implemented by the district attorney's refusal to approve the private criminal complaint at the outset.**

995 A.2d 1207, 1214 (Pa.Super. 2010).

he told Piosa he would be filling charges against him at the magistrate's office.

Smitreski admits in the criminal complaint that the trash can in the employees' restroom was overflowing, the toilet needed scrubbing, and the sink was dirty. He also acknowledges that some of Piosa's comments directed toward him concerned the cleanliness of the first aid station. Smitreski further admits that when he advised Piosa he intended to file criminal charges, Piosa responded that he could do so but that he was acting like a child and that by letting the trash can overflow, he had not done his job.

Shortly after this first encounter on September 8, after Smitreski had gone to the first aid station and noted its condition, Smitreski again saw Piosa. In this second encounter, Piosa told Smitreski that Smitreski had refused to obey a direct order of his (i.e., to empty the trash can); that when the Park Manager (Tony Willoughby) was absent, he, Piosa, was in charge; and that Smitreski was forbidden from leaving the park during work hours to file charges at the magistrate's office. Smitreski replied that he would then call the state police from the park office. This was done and, as previously indicated, both the state police and Chief Beltz from Franklin Township responded. At no point in his complaint does Smitreski acknowledge having performed the work requested by Piosa.

The criminal complaint submitted by Smitreski claims violations of 18 Pa.C.S.A. §§ 5301(1) and (2) (official oppression), 4952(a)(1) (intimidation of victims), 2709(a)(2), (3), and (4) (harassment), and 5503(a)(3) and (4) (disorderly conduct). Each of these offenses requires proof that the defendant acted intentionally, knowingly, or willfully. The Assistant District Attorney found from her review of the complaint and Duarte's investigation that all counts of the complaint failed for different reasons to set forth the necessary elements of a *prima facie* case and that, for each count, the evidence was insufficient to show criminal intent. As a consequence, the Assistant District Attorney determined that all charges lacked legal merit. Because this decision is based on legal conclusions, our review of that decision is *de novo*.[4]

---

[4] Contrary to the District Attorney's assertion in its post-hearing memorandum, a decision not to prosecute based on the insufficiency of the evidence to sustain a conviction, is a decision based on the law, not on policy. "[F]or the purposes of reviewing the propriety of rejecting a private complaint, the term 'policy reasons' most often refers to a determination that, although a complaint has legal merit, prosecuting it would not serve the public interest." Commonwealth ex rel. Guarrasi v. Carroll, 979 A.2d 383, 386 (Pa.Super. 2009). A claim, as here, that the district attorney "has a policy of not accepting private criminal complaints that lack legal merit does not transform the law-based rejection of such a complaint into a public policy decision or a hybrid of legal and public policy reasons." Id. If this were the case, "the [district attorney's] decisions to reject private complaints would never be subject to *de novo* review even though the law requires that standard of review for rejections based on lack of legal merit." Id. Also, at the time of hearing, the Assistant District Attorney explained that when she initially denied the complaint, designating it a civil matter, this was her way of indicating that there was no evidence of criminal intent. In contrast, a decision not to prosecute because "the likelihood of conviction is minimal and/or the likelihood of acquittal is great" or because "the victim has adequate civil remedies available to him" is policy based. Wilson, 879 A.2d at 217.

Official Oppression

The offense of official oppression (18 Pa.C.S.A. § 5301(1) and (2)) requires, *inter alia*, that the victim be mistreated by the defendant who was acting or purporting to act in an official capacity and who knows that his conduct is illegal. Nowhere is it asserted in Smitreski's complaint that Piosa, who claimed that Smitreski failed to perform his job and disobeyed a direct order, knowingly acted illegally in his criticism and conduct directed at Smitreski. *See* Commonwealth v. Eisemann, 453 A.2d 1045, 1048 (Pa.Super. 1982) (equating the term "knowing" to acting in "bad faith").

We also question whether the offense of official oppression is intended to address conduct undertaken in an employment relationship. In substance, Smitreski's complaint alleges that he was berated and demeaned by a superior while at work. The official oppression statute is "intended to protect the *public* from an abuse of power by public officials, and to punish those officials for such abuse." D'Errico v. DeFazio, 763 A.2d 424, 430 (Pa.Super. 2000) (emphasis added), *appeal denied*, 782 A.2d 546 (Pa. 2001).

Intimidation of Victims

The offense of intimidation of victims with which Smitreski seeks to charge Piosa (18 Pa.C.S.A. § 4952(a)(1)) requires, *inter alia*, that the defendant, with the intent to or knowledge that his conduct will obstruct the administration of justice, intimidates or attempts to intimidate the victim of a crime from reporting the commission of the crime to law enforcement personnel. Here, while Piosa allegedly forbid Smitreski to leave the park during working hours to file a complaint with the magistrate, he did not prevent or attempt to prevent Smitreski through intimidation from contacting the police or filing charges. To the contrary, according to the allegations of Smitreski's complaint, when Smitreski advised Piosa he would be filing charges against him, Piosa, in effect, told Smitreski that was his right, and when Smitreski later told Piosa that he was headed to the park office to call the state police, Piosa took no action to threaten or dissuade Smitreski.

Harassment

To prove Piosa guilty of harassment as charged by Smitreski (18 Pa.C.S.A. § 2709(a)(2), (3), and (4)), it must be shown that "with the intent to harass, annoy or alarm another," Piosa (1) followed Smitreski in or about a public place or places; (2) engaged in a course of conduct or repeatedly committed acts which served no legitimate purpose; or (3) communicated to or

about Smitreski any lewd, lascivious, threatening, or obscene words or language. Here, the circumstances described by Smitreski evidence a person in a supervisory position, upset with the performance of an employee, criticizing that performance in blunt terms. While we do not condone Piosa's conduct, as described by Smitreski in his complaint, the facts, as alleged, do not show that Piosa was following Smitreski around or that the language used by Piosa was other than protected speech under the First Amendment. *See* Commonwealth v. Zullinger, 676 A.2d 687 (Pa.Super. 1996) (holding that the words "fuck you" appearing on a T-shirt worn in a district justice's office were protected under the First Amendment and could not form the basis for a charge of summary harassment). Nor do the facts alleged support a course of conduct engaged in by Piosa which served no legitimate purpose.

Disorderly Conduct

Finally, as to the charge of disorderly conduct set forth by Smitreski (18 Pa.C.S.A. § 5503(a)(3) and (4)), to be guilty, it must be shown that Piosa "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," used obscene language or created a hazardous or physically offensive condition which served no legitimate purpose. For the reasons already discussed, the language used by Piosa is constitutionally protected. *See generally* Zullinger, 676 A.2d

687. Nor, can it fairly be said that Piosa's verbal and personal attack against Smitreski created a "hazardous or physically offensive condition" within the meaning of the statute. *See* Commonwealth v. Williams, 574 A.2d 1161, 1164 (Pa.Super. 1990) (detailing what constitutes a "hazardous or physically offensive condition").

CONCLUSION

For the foregoing reasons, we affirm the refusal of the District Attorney to prosecute Smitreski's private criminal complaint.

BY THE COURT:

_____

P.J.