

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

IN RE: PRIVATE CRIMINAL :
COMPLAINT OF : NO. MD-042-2014
GERALD J. SMITH :

Seth Miller, Esquire	Counsel for Commonwealth Assistant District Attorney
Cynthia A. Dynda-Hatton	Counsel for Commonwealth Assistant District Attorney
Gerald J. Smith	Pro Se

MEMORANDUM OPINION

Gerald J. Smith (hereinafter "Smith"), has appealed the Carbon County District Attorney's Office's decision to deny his private criminal complaint. After an arduous hearing held by this Court, for the reasons stated below the Court affirms the Carbon County District Attorney's Office's action in not approving Smith's private criminal complaint.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts, as it relates to Smith's filing of the private criminal complaint and appeal of the Carbon County District Attorney's Office's decision not to approve the complaint, are that on August 30, 2013, Smith, along with Tara Hertzog, (hereinafter "Hertzog"), were at the residence located at 24 North Allen Street in Nesquehoning, Pennsylvania.¹ Around four or five o'clock p.m., Pennsylvania

¹ There was testimony that 24 North Allen Street, Nesquehoning, Pennsylvania was the residence of Hertzog.

State Parole Agent Joseph Ruth, in addition to Nesquehoning Police Chief Sean Smith (hereinafter "Chief Smith"), and Nesquehoning Police Officer Steven Homanko (hereinafter "Homanko"), arrived at the residence for purposes of executing a search warrant in a matter unrelated to the current one before the Court. Upon entrance into the home, Homanko observed both Smith and Hertzog in the living room sitting on the couch. Smith, being the subject of the search warrant, was subsequently placed in handcuffs and positioned back on the couch. Similarly, Hertzog was also placed in custody and seated on the couch.²

As alleged in Smith's affidavit of probable cause, and reiterated at the hearing before the Court, in the living room of the residence where the police found both Smith and Hertzog was a coffee table. Located on this table, as Smith asserts, was money and lottery tickets belong to him. Accordingly, Smith contends that after both Hertzog and him were placed in handcuffs and seated on the couch, Hertzog confiscated a hundred and ninety dollars (\$190.00) that was located on the coffee table. Moreover, after Smith was eventually brought to the police station, Hertzog, who remained at the residence, also stole jewelry of his, and more specifically a ring with a

² Chief Smith testified that Hertzog was handcuffed with her hands in front of her as opposed to behind her back.

purported value of one hundred forty dollars (\$140.00) and a gold necklace Smith stressed to be worth twelve hundred dollars (\$1,200.00). Both items as alleged by Smith were located in a hygiene kit.

Smith, in persistence of his allegation that Hertzog stole his money and jewelry, stated in his affidavit of probable cause that his sister Carol Hunsicker, (hereinafter "Hunsicker"), met him at the Nesquehoning Police Station after he was transported there. Hunsicker thereafter went to Hertzog's residence, but was unable to find his alleged stolen property. More specifically, as further expanded upon at the hearing, while at the police station, Smith handed her, Hunsicker, money and lottery tickets that were on his person. Subsequently, Hunsicker went to Hertzog's residence to recover Smith's remaining property;³ however, upon retrieving her brother's belongings she was unable to find his jewelry. Further, Hunsicker asserted that none of the police officers that were at Hertzog's residence on the day at issue gave her any lottery tickets or money that was located on the coffee table in the living room, items Smith claims to have been stolen from him.

³ Chief Smith testified that Smith, based on an alleged parole violation, had his belongs packed and was set to abscond to New Jersey.

Succeeding to the day of the events at issue, Smith, based upon the above stated alleged facts, prepared a private criminal complaint erroneously captioned: "Gerald J. Smith v. Tara Hertzog". In the complaint, with the affidavit of probable cause attached thereto, Smith alleges Hertzog committed the crimes of theft by unlawful taking,⁴ and theft by receiving stolen property.⁵ While the record is devoid as to the exact date the complaint was submitted to the Carbon County District Attorney's Office, on January 27, 2014, Carbon County Assistant District Attorney Miller disapproved the complaint based upon a "lack of corroborating evidence."

Thereafter, on February 6, 2014, Smith appealed the Carbon County District Attorney's Office's decision not to approve his private criminal complaint pursuant to Pennsylvania Rule of Criminal Procedure 506(B)(2).

At the hearing before the Court, the Carbon County District Attorney's Office, in support of its decision not to approve the private criminal complaint, proffered the testimony of Chief Smith and Officer Homanko. Chief Smith testified that he went to the Allen Street property after obtaining a search warrant. Upon arrival at the home, he

⁴ 18 Pa.C.S.A. § 3921(a).

⁵ 18 Pa.C.S.A. § 3925(a).

found Smith and Hertzog in the living room on the couch. Shortly after placing both occupants in handcuffs and back on the couch, Smith observed Hertzog stand up from her seated position on the couch and reach towards the coffee table. However, as Chief Smith avowed, before Hertzog could reach any of the items on the coffee table, he sternly told Hertzog to sit back down. Accordingly, Chief Smith, who stated that he was within three feet of Hertzog during this timeframe, affirmed that Hertzog did not seize any of the items on the coffee table.⁶

Thereafter, as testified to, Chief Smith procured Smith's personal property that was on the coffee table, which included monies and lottery tickets, and handed said property to Officer Homanko, who then in turn delivered said property to Smith's sister, Hunsicker.⁷

Moreover, both Chief Smith and Officer Homanko stated that while at the residence, neither saw the ring or gold necklace Smith proclaims to be stolen.⁸

⁶ Notwithstanding such proclamation, Smith, on his direct testimony, claimed he yelled to Chief Smith that she, Hertzog, was attempting to confiscate his money that was sitting on the coffee table.

⁷ Officer Homanko, who was sequestered, corroborated these events.

⁸ Chief Smith did acknowledge, in his incident report, that Agent Ruth located, in a tin, several broken pieces of a gold necklace but nothing more.

Lastly, the Commonwealth, in support of the District Attorney's Office's determination to disapprove the private criminal complaint, called to the stand Assistant District Attorney Seth Miller, who was the prosecutor that was ultimately tasked with the decision of whether or not to approve the complaint. Assistant District Attorney Miller stated that upon receiving the private criminal complaint, he wrote to Smith posing several questions to him about the supposed events; Smith, accordingly, responded. After reviewing Smith's answers, Assistant District Attorney Miller then contacted Chief Smith in regards to the allegations made by Smith and the events on the day in question.

Subsequent to discussing the matter with Chief Smith, and after reviewing all the information available to him, Attorney Miller stated he believed the allegations made by Smith lacked corroborating evidence and thus decided to disapprove the complaint accordingly.

After reviewing all the relevant evidence and supplemental briefs submitted by the Commonwealth and Smith in support of their respective positions, the matter is now ripe for disposition.

DISCUSSION

This Court's standard of review of the District Attorney's Office's denial to approve a private criminal complaint is dictated by the reason for which the complaint was disapproved. If the decision is based upon a legal ground, the Court's review is *de novo*; if the complaint was denied for policy reasons, the Court must apply an abuse of discretion standard. If however, the denial of a private criminal complaint is a hybrid of both legal grounds and policy reasons, an abuse of discretion standard will apply. *In re Wilson*, 879 A.2d 199 (Pa. Super. Ct. 2005) (en banc). When the district attorney disapproves a private criminal complaint where the evidence necessary to establish the elements of the crime or crimes charged is lacking, that decision is a legal conclusion subject to a *de novo* review. *Commonwealth ex rel. Guarrasi v. Carroll*, 979 A.2d 383, 385 (Pa. Super. Ct. 2009).

As testified to by Assistant District Attorney Miller, his determination to disapprove Smith's private criminal complaint was based upon what he considered a combination of a legal basis, that being a lack of corroborating evidence, and a policy reason, namely Smith's complaint lacked prosecutorial merit. Notwithstanding Attorney Miller's characterization

that his denial to approve Smith's complaint for lack of prosecutorial merit was for policy reasons, the Court holds otherwise. Lack of prosecutorial merit suggests to the Court a lack of legal merit based upon the conclusion that there was insufficient corroborating evidence to support the allegations set forth in the complaint. Therefore, the Court finds the decision not to approve Smith's complaint to be a purely legal conclusion and thus the standard of review in this matter is *de novo*.

Smith, in the complaint, asserts that Hertzog should be charged with two separate criminal offenses: 1) theft by unlawful taking; and 2) theft by receiving stolen property. Accordingly, for the Commonwealth to approve the complaint, the affiant, that being Smith in this matter, must set forth a *prima facie* case of the crimes alleged to have occurred. *Wilson*, 879 A.2d at 211. If the affiant is successful in establishing such requirement, then an investigation needs to be conducted to determine whether or not to approve the complaint. *Ullman*, 995 A.2d 1207, 1213 (Pa. Super. Ct. 2010). If after the investigation the district attorney concludes there is insufficient evidence to proceed forward, then the district attorney is within his right to disapprove the complaint. *Commonwealth v. Muroski*, 506 A.2d 1312, 1317 (Pa.

Super. Ct. 1986) (en banc). However, the Court notes that if the affiant fails to establish his prerequisite *prima facie* case, the district attorney, at this point in his review of the matter, is within his right to deny the complaint. *Id.*

In the case *sub judice*, upon his initial review, Assistant District Attorney Miller had various questions about the alleged events and accordingly wrote to Smith seeking answers to his questions. Upon receipt of those answers, Attorney Miller discussed the matter with Chief Smith. After meeting with the Chief, and armed with the answers to his questions as provided by Smith, Assistant District Attorney Miller concluded that Smith's account of the events as alleged to have happen, lack corroborating evidence for the Commonwealth to proceed with the private criminal complaint.

Attorney Miller, in reaching his ultimate conclusion not to approve the complaint, found that the facts alleged in the affidavit of probable cause failed to establish a *prima facie* case that Hertzog committed either alleged criminal acts. In order to establish a *prima facie* case that Hertzog perpetrated either of the two offenses, Smith was mandated to proffer certain facts and evidence, namely, facts that support the elements of each crime. Consequently, for Smith to meet his burden that Hertzog committed the criminal act of theft by

unlawful taking, he needed to establish that Hertzog unlawfully exercised control over his moveable personal property, more specifically his money and jewelry, with the intent to deprive him thereof. See, 18 Pa.C.S.A. § 3921(a). Additionally, for the Commonwealth to approve the charge of theft by receiving stolen property, Smith was compelled to set forth certain facts that would establish Hertzog was in possession of certain property that was stolen, namely, his money and jewelry, and Hertzog received or retained this property knowing or believing such property was stolen. See, Pa.C.S.A. § 3925(a).

Pursuant to Smith's affidavit, he alleges that Hertzog procured one hundred and ninety dollars of his while both he and she were handcuffed. However, nowhere is it set forth in detail as to how this occurred. Contrarily, Chief Smith testified that any money belonging to Smith that was lying on the coffee table in the living room was retrieved by him and handed to Officer Homanko, who in turn, delivered said money to Smith's sister.⁹ Chief Smith was adamant that no one stole money off the coffee table, especially Hertzog.

Smith additionally averred in the affidavit of probable cause that "after being taken to police station Tara Hertzog

⁹ Despite this testimony, Hunsicker testified that no one gave her money at the Allen Street property, but rather Smith gave her sixty-five dollars (\$65.00) and lottery tickets at the Nesquehoning Police station.

took Plaintiff[']s jewelry" However, the affidavit of probable cause is devoid, and Smith's testimony at the hearing was left wanting for specific facts or evidence to support this claim. Since Smith was at the police station when he alleges Hertzog stole his gold necklace and ring, and his sister was not present at the residence until after the alleged criminal activity occurred, the crux of Smith's allegation is rooted in assumptions and conjectures. Smith, and for that matter Hunsicker, were unable to set forth any ascertainable facts that Hertzog committed the alleged criminal acts.¹⁰

Thus, in his investigation of the alleged facts as purported by Smith, Assistant District Attorney Miller concluded there was a lack of corroborating evidence, especially given Chief Smith's and Officer Homanko's opposing recollection of the facts at issue, to approve this complaint.

Moreover, in judging the merits of the complaint, and examining the evidence and the record in the light most favorable to Smith with all inferences granted in his favor, the private criminal complaint still falls short of establishing a *prima facie* case for the offenses alleged to have been committed by Hertzog. Most importantly, there is

¹⁰ Other than the pieces of broken jewelry alluded to by Chief Smith in his incident report, no other mention of any other jewelry was made.

absolutely no evidence that Hertzog was the person responsible for the alleged theft of Smith's property, if such property was even stolen. The nature of a *prima facie* case is one in which the evidence illustrates that certain crimes were committed by the defendant, and more specifically as it relates to the matter before the Court, Hertzog more than likely committed such crimes. The Court cannot and will not conclude that the evidence presented before it demonstrates that Hertzog more than likely committed the criminal acts alleged to have occurred, particularly in light of the conflicting testimony presented at the hearing. Smith requests this Court, as he did with the District Attorney's Office, to assume Hertzog pocketed his money and jewelry; however, the Court as the factfinder does not, nor will it, base its decision on bald assumptions without facts to support such assumptions.

For the foregoing reasons, the Court enters the following order:

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ORDER OF COURT

AND NOW, this _____ day of June, 2014, after a hearing held on Smith's appeal of the Carbon County District Attorney's Office's decision not to approve the private criminal complaint, it is hereby

ORDERED AND DECREED that the Court **AFFIRMS** the decision of the Carbon County District Attorney's Office to disapprove Gerald J. Smith's Private Criminal Complaint against Tara Hertzog.

BY THE COURT:

Joseph J. Matika, J.