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BOROUGH OF SHIPPENSBURG. COMMONWEALTH OF PENNSYLVANIA v. RICHARD C. KELLEY, SR. v. DONALD JOHNSON, C. P. Franklin County Branch, Criminal Action-Law, Vol. 2, Page 200

Shippensburg v. Kelley v. Johnson

Petition requesting review of the District Attorney's disapproval of two private criminal complaints.

1) The trial court does not have authority to change a prosecutor's policy-based decision to disapprove a private criminal complaint absent a showing of bad faith, fraud or unconstitutionality; proper deference must be given to the discretion of the prosecutor who is a member of the executive branch of government.

2) A "policy" is a definite course or method of action selected in light of certain conditions as a guide for present and future decisions.

3) The court must not substitute its judgment for that of the District Attorney absent a showing of bad faith, fraud or actions beyond constitutional limits when the District Attorney conducts a fair examination of the evidence and decides in a calculated manner in light of his experience not to prosecute given the likelihood of obtaining a conviction and the availability of both prosecutorial resources and civil remedies.

4) Although the court must intervene for the good of the public when a prosecutor exhibits a wilful failure to act or a neglect of his duties, the court cannot second-guess a prosecutor's good faith decision not to prosecute; the prosecutor's duty to exercise independent discretion uncontrolled by the judgment and conscience of others is at the heart of democracy which is founded on the separation of powers.

Charles E. Shields, III, Esquire, Counsel for the Borough of Shippensburg
J. McDowell Sharpe, Esquire, Counsel for the Borough of Shippensburg
John F. Nelson, District Attorney

OPINION AND ORDER OF COURT

HERMAN, J., January 27, 2000:

INTRODUCTION

Before the court is the petition of the Borough of Shippensburg, Pennsylvania, requesting review by the court of the Franklin County District Attorney's disapproval of two proposed private criminal complaints to be filed by the Borough of Shippensburg against Richard C. Kelley, Sr. and Donald Johnson. The petition was filed pursuant to Pennsylvania Rule of Criminal Procedure 106 which provides:

> (a) When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay.
>
> (b) if the attorney for the Commonwealth:
>
> . . . (2) disapproves the complaint, the attorney shall state the reasons on the complaint form and return it to the affiant. Thereafter, the affiant may petition the court of common pleas for review of the decision.

The Borough of Shippensburg sought to have Kelley and Johnson prosecuted in connection with the alleged theft of timber from the area of a reservoir owned by the Borough known as Gunter Valley. Kelley was Water Superintendent for the Borough Authority at all times relevant to this matter. Donald Johnson is a local timber cutter who operated a logging business with his father, Bert "A.C." Johnson.

In May of 1989, borough manager John Mausert-Mooney sent borough solicitor Forest N. Myers, Esquire, a memo indicating that A.C. Johnson (either alone or with his son's assistance) had stolen approximately $30,000.00 worth of live trees from Gunter Valley within the previous year. Attorney Myers contacted the District Attorney who found insufficient evidence of criminal wrongdoing to justify a prosecution. The District Attorney indicated a willingness to review the matter if investigation brought additional evidence to light. Mausert-Mooney left his position as borough manager in May of 1990

and was replaced by Kevin DeFebbo. The borough did not pursue the matter further at that time.

In the spring of 1993 it was discovered that a large amount of timber had been taken from several tracts in Gunter Valley at some unknown time. Solicitor Myers contacted the District Attorney who then turned the case over to the State Police. The State Police presented the results of their investigation to the District Attorney's office. That office indicated charges should not be filed against Kelley. The State Police nevertheless filed those charges on March 7, 1995. The District Attorney shortly thereafter ordered the charges withdrawn. This petition to review the District Attorney's decision was filed on March 20, 1998 and avers the Borough of Shippensburg sought the District Attorney's approval of their private criminal complaints on January 30, 1998. The complaint against Richard C. Kelley alleged one count of bribery, two counts of theft and one count of conspiracy. The complaint against Donald A. Johnson alleged one count of theft, one count of receiving stolen goods, one count of bribery and one count of criminal conspiracy. The complaints were formally disapproved on February 27, 1998 by way of a letter which simply indicated the disapproval was an exercise of the District Attorney's discretion to evaluate the filing of criminal charges and also noting the affiant has adequate civil remedies.

Upon review of the petition this court determined the District Attorney's letter of February 27, 1998 did not provide an adequate basis to review his decision to disapprove the complaints and therefore the court entered an Order dated March 30, 1998 which provided the District Attorney with an opportunity to reconsider the petitioner's request for approval of the complaints. The court also directed the District Attorney to file a written statement of his reasons for disapproval should he reject the petitioner's complaints upon a second review.

On April 24, 1998 the District Attorney disapproved the complaints and filed a written statement of reasons for disapproval with the court. Paragraph three of the statement of reasons appeared to be based on an evaluation of the sufficiency of the evidence to support the complaint. The District Attorney noted in the statement an anticipation the court would offer a forum for any review the court would undertake regarding legal sufficiency. The court, by Order of May 4, 1998, directed the parties to appear to state their positions formally on the record.

The parties appeared on June 8, 1998 and the court directed the petitioner, the Borough of Shippensburg, to proceed first as the moving party. The Borough took the position that legal sufficiency of the complaint was at issue and therefore chose to present evidence of the existence of a prima facie case. Although the court allowed the opportunity to present evidence, the court also reserved ruling on whether it was appropriate to consider this evidence. The hearing could not be completed in the time allotted. Due to the scheduling conflicts of counsel for the parties the court could not reschedule the matter for further hearing until December 21, 1998. At the time the hearing was reconvened the parties advised the court an agreement had been reached whereby the District Attorney would refer the matter to the Attorney General under the Commonwealth Attorney's Act to determine if it would be appropriate for the Attorney General to take up the prosecution. No further hearing was held at that time and the court assumes such a referral was made.

According to a subsequent motion for further hearing filed by the Borough on April 7, 1999, the Attorney General declined to proceed in the matter. The court therefore ordered further hearing to take place on June 14, 1999. The hearing resumed on that date and the Borough presented several more witnesses in support of a prima facie case. The Borough also

offered to present evidence which was intended to show that the District Attorney's policy of disapproving private complaints where a party had adequate civil remedies worked an injustice in this particular case. In addition the Borough proposed to show that in fact no such policy existed. In support of this the Borough offered court records of cases where the District Attorney proceeded to prosecute under similar facts and did not apply the policy. The court declined to hear this offer of evidence. The District Attorney elected not to enter any evidence.

Upon conclusion of the hearing, the court set out a briefing schedule at the request of the parties. Briefs were received in accordance with the court's schedule and the issue of the propriety of the District Attorney's disapproval of the private complaints submitted by the Borough of Shippensburg is now before the court for decision.

DISCUSSION OF THE LAW

The parties appear to agree the Pennsylvania Superior court's decision in *Commonwealth v. Brown*, 447 Pa. Super. 454, 669 A.2d 984, (1995) (en banc) (plurality), *aff'd per curiam by an evenly divided court*, 550 Pa. 580, 708 A.2d 81 (1998) is the controlling precedent when the trial court is requested to review a prosecutor's disapproval of a private criminal complaint. Cases decided since that decision have followed the standard of review of a prosecutor's decision to disapprove a private complaint set by the Superior Court in *Brown*:

> When a trial court is asked to review a prosecutor's disapproval of a private criminal complaint, the trial court must first determine the rationale behind the prosecutor's decision. If the prosecutor's decision was based upon a legal evaluation of the sufficiency of the complaint, then the trial court must undertake a *de novo* review of the complaint to ascertain whether it establishes a *prima facie* cause of action. If, however, the prosecutor's decision was based upon a

policy determination that it would not be in the best interests of the Commonwealth to prosecute, then the trial court must defer to the prosecutor's discretion absent a gross abuse[1] of that discretion.

Michaels v. Barrasse, 452 Pa. Super. 325, 681 A.2d 1362 (1996).

Although the court held a hearing in this matter the issues raised by the parties do not concern the legal sufficiency of the proposed private criminal complaint. The District Attorney has conceded on the record the existence of a prima facie case and the court agrees the evidence considered by the District Attorney would be sufficient to support the complaint. It is apparent from the record the District Attorney has advanced specific policy decisions as the reason for his disapproval of the complaints. These decisions were placed in writing and filed with the court on April 24, 1998. We believe it fair to characterize these policy decisions as follows: 1) the complainant has adequate civil remedies, 2) there is evidence of a contractual arrangement between the complainant and one or both of the proposed defendants, 3) prosecutorial resources should not be expended given the likelihood of a conviction, 4) proposed defendant Richard C. Kelley has been prosecuted in a neighboring county for a theft charge arising out of the same employment circumstances as in the present case. This court is charged with determining whether the District Attorney abused his discretion by exercise of these policies in the disapproval of the proposed complaints.

In examining the District Attorney's exercise of discretion, this court must heed the caution of the Pennsylvania Supreme Court:

[1]As noted, "gross abuse of discretion" is indistinguishable from "abuse of discretion." *See Moore v. Moore*, 535 Pa. 18, 28 n. 4, 634 A.2d 163, 168 n. 4 (1993).

"[i]f the district attorney had stated policy reasons to support the decision not to prosecute, this Court would show the deference accorded to such a discretionary use of the executive powers conferred in that officer."

Commonwealth v. Benz, 523 Pa. 203, 208, n. 4 , 565 A.2d 764, 767, n. 4 (1989). In *Commonwealth v. Brown*, 550 Pa. 580, 708 A.2d 81(1998) the Supreme Court further supported the deference due the prosecutor's decision by stating:

> . . . we believe that a trial court should not interfere with a prosecutor's policy-based decision to disapprove a private complaint absent a showing of bad faith, fraud, or unconstitutionality. Application of this standard recognizes that proper deference must be given to the discretionary decisions of a prosecutor - a member of the executive branch - while acknowledging the authority and responsibility of the judiciary to ensure justice in the criminal court system.

Id at 588, at 84-85.

Finally with regard to the applicable law, the court will be guided by the Pennsylvania Superior Court's opinion in *Commonwealth v. Brown*, *supra*, wherein the court stated:

> . . . the common pleas court must consider whether the policy advanced by the prosecuting authority comports with both the law and justice. A policy must embrace the general principles by which the prosecutor is guided in the management of its public responsibilities. A policy connotes a definite course or method of action selected in light of given conditions to guide and determine both present and future decisions. Therefore, it is expected that a prosecutor should be prepared to advance evidence that confirms the establishment of the policy, as well as corroborates its application to matters of similar, or like, import.This in no way suggests that the common pleas court may substitute its judgment for that of the prosecutor. But where the prosecutor seeks to rest the decision not to prosecute on policy grounds, the prosecutor must be prepared to come forward with a clear statement as to the particular policy that dictates withholding prosecution as well as how that policy relates to the particular facts being advanced by the private prosecutor.

Id at 466, and 990.

With this guidance in mind, the court initially notes the policies claimed to be exercised by the District Attorney have generally met with approval in the appellate courts. *See Hearn v. Myers*, 699 A.2d 1265 (Pa. Super. 1997) for approval of adequate civil remedies as a policy reason for disapproval. *See Commonwealth v. Metzker*, 442 Pa. Super. 94, 658 A.2d 800 (1995) for approval of the policy decision that a case lacks prosecutorial merit from the standpoint that a conviction is attainable. We believe in conjunction with this last policy reason this court should consider the Pennsylvania Supreme Court's general approval of the District Attorney's exercise of discretion based on the expenditure of judicial and prosecutorial resources. *See Commonwealth v. Brown*, *supra*. It appears the District Attorney intended a combination of the latter two policy concerns as a basis for the exercise of his discretion in reasons number one, three and, to a certain extent, number four of the written statement filed with the court. Reason number two specifically stated the availability of adequate civil remedies as a reason for disapproval. We note, however, reason number four contains a statement that proposed defendant Richard C. Kelley's complaint was disapproved because he had been prosecuted and convicted in a neighboring county on a theft charge arising out of his employment with the Borough of Shippensburg. This theft occurred over the same time period as the events giving rise to the proposed complaints. While there may be other appropriate policy reasons not to proceed against Mr. Kelley, this is not one of them. In *Brown*, *supra*, the Pennsylvania Superior Court was faced with a similar situation where the defendant had been incarcerated on other charges. The Court declared that a policy which foregoes prosecution because the defendant was prosecuted for other crimes is an abuse of

discretion. Therefore Mr. Kelley's fate will depend on the existence of other legitimate policy reasons.

DISCUSSION OF THE PETITIONER'S ARGUMENT THE DISTRICT ATTORNEY ABUSED HIS DISCRETION

I.
"EVIDENTIAL REASONS"

The petitioner, the Borough of Shippensburg, (hereinafter the Borough) characterizes the District Attorney's disapproval as falling into two categories, "evidential and policy". Although we immediately recognize the claimed policy aspects of the District Attorney's decision and this court's standard of review of them, we are uncertain how to address the "evidential" reasons for disapproval cited by the Borough. As noted previously, our review of legal sufficiency of the compliant is limited to a *de novo* review of the District Attorney's decision that no prima facie case exists. In this case legal sufficiency of the complaint is not at issue. There are ten "evidential issues" set out in the Borough's brief which have been extracted from the District Attorney's written statement. These appear to be the factual underpinning for the application of the District Attorney's policy decisions. The Borough's written argument deals with each individually. They are as follows:

1. There was a contractual relationship and/or the relationship resulted from a contractual agreement.

2. Johnson conducted his timbering operation openly and made no attempt to hide his activities from the Borough employees, including the Borough Manager, who frequented the Gunter Valley area.

3. Borough employees were involved in assisting the cleanup of tree tops left by Johnson's cutting.

4. When questioned by other loggers in Gunter Valley, Johnson indicated that he had an agreement with the Borough and was permitted to cut there. Such belief belies any criminal intent.

5. There is no independent evidence that any crime was committed and as a result there is a corpus delicti problem involved in the admission of the confessions either Johnson or Kelley provided to police.

6. The failure of the Borough to reduce the alleged agreement for the timbering to writing substantially impairs the ability to ascertain the scope of Johnson's authorization to timber.

7. The extended period of time that has passed since the events occurred poses a problem in cases where there are largely undocumented activities and recollections must be relied upon.

8. There is a statute of limitations problem. (See also II-123).

9. There has been no substantial new evidence forthcoming since the time of the originally filed complaint.

10. There is a question of the adequacy and sufficiency of the evidence.

(Brief of Petitioner, Borough of Shippensburg, pp. 25-29).

In examining the Borough's argument as to these "evidential" reasons, we find all of them, with the exception of number 8 which argues against the District Attorney's statute of limitations consideration and number 9 which asserts new evidence, are essentially a disagreement with the District Attorney's evaluation as to what the proposed evidence would prove and/or the probative force of that evidence. As an example, we look at the argument of the Borough concerning the District Attorney's assertion in his statement of reasons that there was evidence of a contractual relationship between the proposed defendants and the Borough. The District Attorney claims this evidence would tend to negate the specific intent for the crimes of theft, receiving stolen goods and bribery. The Borough argues various reasons why the proposed defendants

could not prevail on a defense of a contract. These reasons deal mostly with the legitimacy and validity of the contractual relationship. But there is no question of the existence of some evidence of an agreement between the proposed defendants and the agents or representatives of the Borough. The evidence in toto considered by the District Attorney can fairly be described as consistent in part with guilt and consistent in part with innocence.

Essentially, the Borough argues in each of these "evidential" arguments what it believes the outcome would be or should be if the matter reached a trier of fact. We believe this is the kind of second guessing that is specifically prohibited by our Supreme Court and the Superior Court in the cases cited in this opinion. We must be careful to distinguish between the court's review of the District Attorney's decision on the sufficiency of evidence for a prima facie case and its review of the decision on sufficiency of the evidence to convict. The latter decision not to prosecute based on the likelihood of conviction, even in the face of a prima facie case, is a matter of policy if the District Attorney conducts a fair examination of the evidence and makes an assessment of the likelihood of conviction. In *Commonwealth v. Metzker*, *supra*, Judge Del Sole noted

> While we said in *Jury* the complainant is not required to prove the case beyond a reasonable doubt where disapproval is based on a legal assessment of the complaint, as a policy matter, a prosecutor can consider if a conviction is attainable. Where the District Attorney concludes, based on investigation, that a conviction is doubtful or impossible, discretion can and should be exercised to refuse approval.

Id at 96-97, at 801.

We believe the court's obligation is to insure the District Attorney in fact exercised his discretion by carefully examining the evidence in light of available prosecutorial resources. It must appear that he made a calculated decision based on his

experience, wisdom and skill as a prosecutor. The Borough has not argued this did not occur. The Borough's brief in this matter acknowledges the District Attorney's initiation of the investigation by referral to the Pennsylvania State Police and the meetings between the investigators and assistant prosecutors in the District Attorney's office. Eventually the District Attorney appeared at a Borough council meeting at the request of council to discuss the evidence and the case in general. The Borough simply disagrees with the ultimate decision made by the District Attorney as to the likelihood of conviction. It would be easy for the court in this case to say for a number of reasons that in exercise of its own judgment this matter should proceed to prosecution. Aside from the fact the court is poorly equipped as a practical matter to make such a decision, the law absolutely forbids substitution of the court's own judgment for that of the District Attorney. The court cannot agree with what the Borough advanced as "evidential" reasons that the District Attorney abused his discretion by disapproving the private complaints.

As to the statute of limitations reason advanced by the District Attorney, we can see by the evidence produced the issue would certainly be raised in the case. The Borough has acknowledged as much although it believes the prosecution would survive. Again, it would not be appropriate nor does the court have authority to second guess this issue and rule on the statute of limitations defense in this context. The District Attorney obviously weighed this issue as part of his evaluation as to the likelihood of conviction. This is typical of the decisions prosecutors are required to make on a regular basis. The Borough argues strenuously this would be an unsuccessful defense. As discussed previously, this is not the issue. We cannot agree the District Attorney abused his discretion in considering the defense of statute of limitations on the likelihood of conviction.

Finally, as to the "evidential" reasons, we turn to the Borough's assertion the District Attorney has failed to consider new evidence. We believe, as the District Attorney argues, the court's review of prosecutorial discretion should be based solely on the evidence presented to the District Attorney at the time he reviewed the Borough's proposed complaint. We agree with the Borough the District Attorney can consider new or additional evidence at any time and change his decision. This, however, is entirely a matter between the Borough and the District Attorney outside the context of the issues raised by the Borough's petition. The Borough did have an opportunity to present some evidence at the hearing which it claims was not available to the District Attorney through the testimony of it own investigator, Mr. Paul Weachter. Apparently this information did not cause the District Attorney to reconsider his policy decisions. Nonetheless it would be grossly unfair and contrary to the law to hold the District Attorney abused his discretion when the evidence which the Borough claims supports approval of the complaints was not made available to him at the time he made his decision.

II.
POLICY REASONS

In the Borough's challenge to the District Attorney's policy reasons for disapproval it argues the law imposes a burden of production and a burden of persuasion on the District Attorney. The Borough has drawn this interpretation from the statements of the Superior Court in *Commonwealth v. Brown*, *supra*. If this is a correct interpretation, the Commonwealth would be required to come forward with credible evidence on the record sufficient to persuade the trial court that not only are the policies valid but also their exercise under the facts advanced by the Commonwealth are in accordance with the law and bring about fairness and justice to the victim.

We do not share this expanded interpretation of any of the appellate court decisions regarding the trial court's review of the District Attorney's discretion. To do so would place the court in the position of substituting its own judgment for that of the prosecutor. *Brown* and the other cases intended to require only a clear statement of the policy and how it is applied to the evidence which may support the prosecution. In this case the District Attorney has shown in his written statement of reasons for disapproval that he evaluated the evidence presented in the Borough's affidavit of probable cause. This evaluation was done in light of the availability of adequate civil remedies, the evidence of the contractual nature of the relationship of the parties, and the likelihood of conviction with due regard for prosecutorial resources. Nothing more is required of the District Attorney to get the issue of proper exercise of discretion before the court.

As an additional indirect challenge to the District Attorney's decision, the Borough argues the decision to disapprove was a naked assertion and no real policy existed. The Borough proposed to prove this by entering into evidence a substantial number of records obtained from the Clerk of the Criminal Court. The records were offered as a survey of the history of the prosecution of cases in which the policy reasons asserted by the District Attorney in this case arguably would apply but were not. It is not directly stated but the implication of this argument is these policies were never applied or were irregularly applied and there was no actual policy in existence at the time of the decision to disapprove. We do not believe it was error for the court to decline to hear this evidence because the existence of a policy does not require its exercise in each case or even in most cases. A policy by definition is a guide to be used with discretion. The evidence did not purport to show how many cases to which the District Attorney actually applied those policies. We believe this evidence was not reliable and was irrelevant.

The Borough specifically challenges the application of the policy of adequate civil remedies to this case because it believes the criminal justice system offers the best hope of restoring the economic loss caused by the proposed defendants. The Borough describes the District Attorney's policy statement as stating ". . .the Borough has a *more* adequate remedy in its civil litigation. . .".

The Borough argues several specific legal devices such as pension forfeiture and the laws of restitution are not available in the civil court. The Superior Court in *Commonwealth v. McGinley*, 449 Pa. Super. 130, 673 A.2d 343 (1996) stated,

> The private prosecutor, even if he or she was the victim, "has no legitimate interest, other than as a member of the general public, in seeing a violator of the laws brought to justice by the Commonwealth and punished for his misdeeds. **If a private prosecutor feels individually harmed his remedy is a civil suit for damages."** *Id* [at 496], 344 A.2d at 661-62. **It would make little sense to grant to the attorney for the Commonwealth broad prosecutorial discretion in his role as advocate for the Commonwealth, only to allow private affiants the ability to file complaints without the approval of the District Attorney. . .**

Id at 346-347, citing *Petition of Piscanio*, 235 Pa Super. 490, 496, 344 A.2d 568, 661-62.

We carefully reviewed the District Attorney's written statement and could not find that he asserted the availability of a "more" adequate civil remedy.

We do not necessarily agree the criminal justice court offers a better chance of making the victim whole but it is not the efficacy of the civil remedy that is at issue. The policy is valid if civil remedies are available.

Having dealt with what we believe can be fairly described as collateral challenges to the policy decision of the District

Attorney we turn now to the heart of the matter. Did the District Attorney abuse his discretion by the exercise of policy as stated in his written reasons for disapproval of the Borough's proposed private criminal complaints. The court noted previously these policies have met with general approval in the courts and are born of the typical situations which prosecutors face on a regular basis. When the prosecutor legitimately exercises his discretion by evaluating the evidence in light of the valid policies it is only left for the court to decide if the prosecutor acted in bad faith, fraudulently or beyond constitutional limits. *Commonwealth v. Brown*, 550 Pa. 580, 708 A2d 81 (1998). In this case there is no evidence of any of the badges of bad faith or unconstitutionality. In fact the Borough implies agreement with this in its eloquent and compelling argument that in order to do justice this court must do more than simply say there was no wrongdoing or bad faith. While the Commonwealth dismissed the Borough's argument as little more than a civic's lesson, the court found embedded in it a historical perspective on a foundational principle of democracy which we believe supports the decision in this case. That principle, of course, is the separation of powers.

The Borough contends because the alleged crimes of Kelley and Johnson involve the theft of a relatively large amount of taxpayer money the people of the Commonwealth are harmed far worse than the economic loss incurred. It is the Borough's position that unless the court intervenes the taxpayers of the Borough of Shippensburg and the people of the Commonwealth will have lost not just money but the binding force of society which is the protection afforded by the law. This argument implies, if not directly states, the refusal to prosecute in this case is equivalent to the practice of the Stuart kings in England prior to the English Bill of Rights. In that situation the law was used as a tool of the king to capriciously and arbitrarily punish enemies and favor friends and supporters.

Even worse, argues the Borough, the refusal to prosecute is based on such light and transient reasons as prosecutorial resources.

The Borough's position is succinctly stated in a quote from a decision of the New Jersey state Supreme Court in the case of *State v. Winne*, 12 N.J. 152, 170-171, 96 A.2d 63, 72(1953):

> If the law were as the [prosecutor] contends, an honest but negligent prosecutor would have it within his power to cripple or nullify the enforcement of the criminal law in his county or to choose at his pleasure the portion of the criminal law he would enforce. He would have, in his county, the suspending power sought so strenuously by the Stuart kings, 2 Holdsworth, History of the English Law (3rd ed. 1923), 440, 4 Idem (1924), 205, 6 Idem 192, 204, 217-225, 241-2, and Maitland, The Constitutional Law of England, 188, 302-306, but denied to them in the English Bill of Rights: "The pretended power of suspending laws, or the execution of laws, without consent of Parliament, is illegal," 1 Wm. & M. sess. 2, c.2, sec. ii. There is no difference in principle and there would be no difference in effect except as to territorial range between a Stuart openly defying and preventing the execution of the law and a county prosecutor winking at and tolerating the violation of the laws. Each is utterly inconsistent with the range of law that is the ideal and goal of the common law and equality before the law which is a fundamental tenet of American polity. In his county, as we have seen, the prosecutor is the foremost representative of the executive branch of government in the enforcement of the criminal law. As epitomized in *State ex rel. Johnston v. Foster*, 32 Kan. 14, 3 P. 534, 538 (Sup. Ct. 1884): "He is the officer upon whom the state relies for the prosecution of all criminal offenses within his jurisdiction. If he fails or refuses to act, the law is voiceless and powerless. It is paralyzed.

Upon careful review of the entire decision of the New Jersey Supreme Court in *State v. Winne*, *supra*, we found it sets out the common roots of our current policy of review. That court also carefully described the nature of the District Attorney's discretion:

Obviously many of the duties of a county prosecutor involve the exercise of discretion. His discretion, however, is not unregulated or absolute for the statute expressly commands that he "*shall use all reasonable and lawful diligence* for the detection, arrest, indictment and conviction of offenders against the laws." The kind of discretion that he must exercise is admirably stated *in State ex rel. McKittrick v. Wallach*, 353 Mo. 312, 182 S.W.2d 313, 318, 155 A.L.R. 1 (Sup. Ct. 1944):

> The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other; that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate. Such duties of necessity involve a good faith exercise of the sound discretion of the prosecuting attorney. "Discretion" in that sense means power or right conferred by law upon the prosecuting officer of acting officially in such circumstances, and upon each separate case, **according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person.** Such discretion must be exercised in accordance with established principles of law, fairly, wisely, and with skill and reason. It includes the right to choose a course of action or non-action, chosen not willfully or in bad faith, but chosen with regard to what is right under the circumstances. * * * Such discretion exercised in good faith authorizes the prosecuting officer to personally determine, in conference and in collaboration with peace officers and liquor enforcement officers, that a certain plan of action or a certain policy of enforcement will be best productive of law enforcement, and will best result in general law observance. That there were such conferences, and repeated contacts and collaboration between respondent and such governmental agencies in the case at bar, is a circumstance shedding light upon whether the prosecuting attorney's action or non-action in a case or cases was an arbitrary exercise of discretion or a good faith exercise of discretion.

(Emphasis supplied).

We learn from reading this decision that the New Jersey court in applying these tests made an important distinction. This distinction is present in this case as well. It is the distinction between exercise of discretion in good faith and a willful failure to act. In the latter case the court must always intervene for the good of the Commonwealth. But to do so at any other time puts at risk a principle much weightier and more important than the immediate protection of a certain law or an individual case. It is the exercise of independent discretion "...uncontrolled by the judgment and conscience of any other person" that preserves the very ability of the prosecutor to protect the citizens. Without this independence, who would be next after the judiciary to prevail upon the prosecutor to punish enemies or reward friends. The free exercise of this discretion is at the very heart of our democracy which relies on the separation of powers and a system of checks and balances to insure the protection of the law. We believe when viewed in this light even the strong public interest asserted by the Borough has to stand down.

We also note the proper exercise of discretion, even if it results in a decision not to prosecute does not in any way damage or injure the prosecutor's role as chief law enforcement officer in the community. The prosecutor who is diligent and visible in evaluating and monitoring criminal conduct in conference with law enforcement officers will have a deterrent effect even if prosecutions are not initiated. The community should have confidence the prosecutor is acting on its behalf even in these circumstances.

We believe the District Attorney's actions in this case amount to the proper exercise of discretion under the test derived from the common law and the specific authorities discussed herein. His actions were not a willful failure to act or

neglect of a duty in bad faith which would require the court to intervene. We will enter an Order affirming the District Attorney's disapproval of the petitioner's proposed private criminal complaints.

ORDER OF COURT

NOW this 27th day of January, 2000 the petition requesting review of the proposed private criminal complaints against Richard C. Kelley, Sr. and Donald Johnson is hereby denied and the District Attorney's decision of April 24, 1998 disapproving the complaints is affirmed.

MODERN MYTHS

MYTH #1: The disease of alcoholism is caused by drinking alcohol.

MYTH #2: Alcoholism is caused by stress.

MYTH #3: Alcoholism is the symptom of an underlying psychological disorder.

MYTH #4: Alcoholics must drink to excess on a daily basis.

MYTH #5: Alcoholism is cured by not drinking.

Alcoholism is:

a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with drug/alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.

There is no cure for alcoholism; however, with proper treatment the disease can be placed in remission.

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