

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

CR - 948 - 2012

v.

HAKIM HOPKINS,

Defendant

MOTION TO SEVER

OPINION AND ORDER

Before the Court is a motion filed by Defendant, Hakim Hopkins, to sever counts 1 and 2 from counts 3 and 4. After careful consideration, the Court denies the motion and respectfully submits the following.¹

Hopkins has filed a motion to sever counts 1 and 2 (Persons not to possess, use, manufacture, control, sell or transfer firearms, 18 Pa.C.S. § 6105) from counts 3 and 4 (Firearms Not to Be Carried Without a License, 18 Pa. C.S. § 6106(a)) contending that Hopkins' prior criminal record is admissible for counts 1 and 2 but inadmissible for counts 3 and 4, *citing*, Commonwealth v. Galassi, 296 Pa. Super. 126, 130, 442 A.2d 328, 331 (1982). After careful review, the Court believes that a prior criminal conviction is admissible and required for counts 3 and 4 for grading purposes and therefore declines to sever.

The rules of criminal procedure provide that “[t]he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.” Pa. R. Crim. P. 583. A decision as to severance “will not be disturbed absent a manifest abuse of discretion. The critical consideration is whether [the] appellant was prejudiced by the trial court's decision not to sever. [The a]ppellant bears the burden of establishing such prejudice.” Commonwealth v. Dozzo, 991 A.2d

¹ The court adopts its procedural and factual history set forth in its opinion dated May 10, 2017.

898, 901 (Pa. Super. 2010), quoting, Commonwealth v. Melendez-Rodriguez, 856 A.2d 1278, 1282 (Pa. Super. 2004) (en banc) (internal citations and quotation marks omitted).

In the present case, the Defendant will not be prejudiced by a failure to sever. Judicial economy warrants that the counts to be tried together. In order to be convicted of a felony under 18 Pa. C.S. § 6106(a) as charged in this case, the Commonwealth must establish that Defendant is not “otherwise eligible to possess a valid license.” The felony grading increases the criminal penalty. To be guilty of the felony, evidence of the relevant criminal conviction is required to establish that Defendant is not “otherwise eligible to possess a valid license.” Under Alleyne v. United States, 133 S. Ct. 2151 (2013), a finding of fact that increases the penalty must be found by a jury. The case cited by the Defendant, Galassi, was decided prior to Alleyne and thus prior to U.S. Supreme Court the pronouncement that a jury must determine as elements facts that increase the penalty.

In Galassi, the trial court abused its discretion in refusing to sever the charge pursuant to 18 Pa.C.S. § 6105 which prohibited those convicted of a crime of violence from possessing a firearm from the charge of Firearms Not To Be Carried without a License under 18 Pa.C.S. § 6106(a). The Superior Court reached that conclusion because evidence that one had previously been convicted of a crime of violence would be required for the former but not required or admissible as to the latter. Commonwealth v. Galassi, 296 Pa. Super. 126, 130, 442 A.2d 328, 331 (Pa. Super. 1982). After Alleyne, the jury must determine the facts that increase the penalty, i.e. whether Defendant is not “otherwise eligible to possess a valid license.”² In sum,

² Approximately ten years prior to Alleyne, in Commonwealth v. Bavusa, 574 Pa. 620, 651-52, 832 A.2d 1042, 1044 (Pa. 2003), the Pennsylvania Supreme Court held “that the amendatory factors providing for the lesser grading of a Section 6106 offense as a misdemeanor -- license eligibility and non-commission of other criminal violations -- were intended to be sentencing factors, not a new element of the felony offense and not an affirmative defense.” Id. While this decision has not been specifically overruled, this Court believes that in light of Alleyne, and the statutory mandate that favor a constitutional construction of legislation, order to be convicted of a felony under 18 Pa. C.S. §

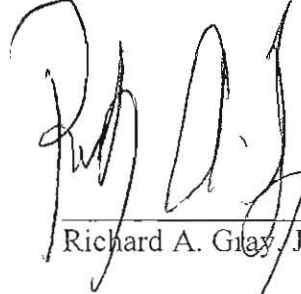
the Court agrees with the Commonwealth that it is required to present evidence to the jury that Mr. Hopkins was ineligible for a firearms license to sustain a conviction for the grading of counts 3 and 4 as charged.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this 23rd day of **August 2017**, for the foregoing reasons, the motion filed by Defendant on May 18, 2017 to sever counts 1 and 2 from 3 and 4 is DENIED.³

BY THE COURT,



Richard A. Gray, J.

May 10, 2017
Date

c: DA - Martin Wade, Esquire (ADA for Commonwealth)
Peter T. Campana, Esquire (for Defendant)

6106(a)) as charged in this case, the Commonwealth must present evidence to the jury to establish that Defendant is not "otherwise eligible to possess a valid license.

³ This decision is being communicated with counsel today by email and delivery via courthouse mail because jury selection is scheduled for August 24, 2017.