

COMMONWEALTH OF PENNSYLVANIA,

CR – 948 - 2012

v.

HAKIM HOPKINS,  
*Defendant*

MOTION TO DISMISS COUNTS 1-4

OPINION AND ORDER

Before the Court is a motion filed on April 7, 2017 by Defendant, Hakim Hopkins, to dismiss all of the remaining counts against him. First, Hopkins contends that the remaining charges should be dismissed because the prohibition of his possession of firearms, based solely on his prior non-violent drug conviction, violates his fundamental right to bear arms as guaranteed by Pennsylvania's Constitution. Second, Hopkins contends that counts 3 and 4 (possession of loaded firearms without a license) must be dismissed because the Court erred in granting the Commonwealth's motion, over his objection, to sever counts 3 and 4 from 5, 7 and 8.<sup>1</sup> The matter is now ripe for decision.<sup>2</sup> After careful consideration, the Court denies the motion and respectfully submits the following in support of its rulings.

PERTINENT PROCEDURAL HISTORY

The pertinent procedural history follows. A criminal complaint against Hopkins was filed in this matter on June 9, 2012. On July 12, 2012, the Commonwealth filed the criminal information. On June 8, 2012, Attorney Shaka Mzee Johnson entered an appearance and waived the arraignment. On August 24, 2012, attorney Johnson filed a motion for removal of counsel.<sup>3</sup>

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<sup>1</sup> At the time of trial, the Commonwealth withdrew count 6, receiving stolen property.

<sup>2</sup> The Court scheduled argument on the motion to dismiss for April 28, 2017. The parties waived oral argument and submitted the matter for a decision on the briefs. Defendant filed his brief in support of his motion to dismiss on April 24, 2017. The Commonwealth filed its brief in opposition on April 25, 2017. On April 27, 2017, the Defendant filed a reply to the Commonwealth's brief.

<sup>3</sup> The Court granted the motion to withdraw as counsel on September 18, 2012.

The current attorney for Mr. Hopkins, Peter T. Campana, entered his appearance on August 27, 2012. Discovery ensued.

On October 31, 2012, Defendant filed his Omnibus Pre-Trial Motion. The omnibus motion included a petition for writ of habeas corpus, a motion to suppress evidence, a motion to sever counts 1 & 2,<sup>4</sup> and a motion for permission to file additional pretrial motions upon the completion of discovery. On January 29, 2013, the Honorable President Judge Nancy L. Butts, entered an Opinion and Order Denying Petition for Habeas Corpus. On May 2, 2013, the Honorable President Judge Nancy L. Butts entered an Opinion and Order denying the motion to suppress.

On July 31, 2013, the Commonwealth filed a Motion for Leave to Amend the Information to comply with the U.S. Supreme Court's decision in Alleyne<sup>5</sup> for imposing mandatory minimum sentences. On December 4, 2013, the Honorable President Judge Nancy L. Butts entered an Opinion and Order granting the motion to amend information. On February 13, 2014, the Commonwealth filed another motion for leave to amend information to include specific language for count 5. On February 19, 2014, the Defendant filed a motion for reconsideration of the Order granting the amendment of the information. On February 28, 2014, the Honorable President Judge Nancy L. Butts entered an Order granting the motion for reconsideration and striking the amended language. On March 19, 2014, the Honorable President Judge Nancy L. Butts entered an Order denying motion for leave to amend information that had been filed on February 13, 2014 by the Commonwealth. On March 28, 2014, the

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<sup>4</sup> In the omnibus motion, Defendant submitted that "he is entitled to a severance of counts 1 and 2 from the remaining counts because the Commonwealth will necessarily need to introduce evidence of the Defendant's prior convictions resulting in him being a prohibited person in its case in chief in order to prove these counts. The evidence is not relevant to the other counts in the Information and would be highly prejudicial." See, ¶19, Defendant's Omnibus Motion filed on October 31, 2013.

<sup>5</sup> Alleyne v. United States, 133 S. Ct. 2151 (2013).

Commonwealth filed notice of appeal to the Pennsylvania Supreme Court. On December 24, 2015, the Commonwealth filed a praecipe to discontinue appeal to the Pennsylvania Supreme Court. On January 12, 2016, the Court placed this matter on the February 2016 pretrial list, with a call of the list scheduled for February 15, 2016 and trial term of February 29, 2016 through March 18, 2016.

On February 11, 2016, the Defendant filed a motion to dismiss all charges against him for a violation his right to a speedy trial. On October 19, 2016, Honorable President Judge Nancy L. Butts issued an Opinion and Order denying that motion. On October 20, 2016, the Defendant executed a waiver of his right to a jury trial. In the midst of a trial on November 17, 2017, the Honorable Judge Dudley N. Anderson recused himself due to being acquainted with a rebuttal witness for the Commonwealth and declared a mistrial. The matter was relisted for the Call of the List on January 24, 2017.

At the time of jury selection, on January 27, 2017, this Court granted in part and denied in part the Defendant's motion to sever counts 1 and 2 from 3 through 8 and the Commonwealth's motion to sever counts 1 through 4 from 5 through 8. On that date, the Court severed counts 1 through 4 from counts 5 through 8. On March 9, 2017, the Commonwealth withdrew count 6, the charge of receiving stolen property. Trial was held on March 9-10, 2017. For purposes of that trial, the Court renumbered counts as count 1, possession with intent to deliver, count 2 possession of a controlled substance and count 3, possession of drug paraphernalia.<sup>6</sup> On March 10, 2017, the jury returned a verdict of guilty on all three counts. Sentencing is scheduled for June 15, 2017 as to those counts. As to the remaining counts for trial, a criminal pre-trial is scheduled for May 15, 2017. On April 7, 2017 Defendant filed the instant motion to dismiss those charges.

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<sup>6</sup> 35 P.S. § 780-113(a)(30), (16) and (32).

## BRIEF FACTUAL BACKGROUND

On April 9, 2012 police responded to a request to check on the welfare of Dasheka Wilson who was with Hopkins at the Day's Inn Hotel in South Williamsport. Police executed a search warrant on the vehicle used by Wilson and Hopkins to get to the Hotel. Police seized packaged crack cocaine and packaging and two firearms from the vehicle.

## DISCUSSION

Hopkins has filed a motion to dismiss the firearms charges for violating his constitutional right to bear arms and counts 3 and 4 for severing them from the drug charges. The Court first discusses the right to bear arms and next discusses the severance.

Hopkins waived the argument about his right to bear arms by failing to include it in his omnibus motion filed on October 31, 2012. The general rule is that a timely motion for suppression shall be contained in the omnibus pretrial motion set forth in Pa.R.Crim.P. Rule 578 or it is waived. However, Rule 581 permits a supplemental suppression motion when "the opportunity did not previously exist or the interests of justice otherwise require." Pa.R.Crim.P. 581(B) "Whether 'the opportunity did not previously exist, or the interests of justice otherwise require . . .' is a matter for the discretion of the trial judge." Commonwealth v. Williams, 229 Pa. Super. 390, 396, 323 A.2d 862, 864 (Pa. Super. 1974), *citing*, Commonwealth v. Pinno, 433 Pa. 1, 248 A. 2d 26 (Pa. 1968).

In the present case, nothing has been presented to the Court to suggest that the opportunity to raise the issue of Hopkins' right to bear arms did not previously exist or that the interest of justice otherwise requires consideration of this issue. The cases cited by Hopkins are

not persuasive in this matter.<sup>7</sup> Therefore, the Court denies the motion to dismiss on constitutional grounds as untimely.<sup>8</sup>

In the part of his motion to dismiss dealing with severance, Hopkins contends that counts 3 and 4 must be dismissed because the Court erred in its January 26, 2017 ruling severing the firearms charges from the drug charges. When the Court took up Defendant's motion to sever counts 1 and 2 from the remaining counts, the Commonwealth moved for the severance to include counts 3 and 4.<sup>9</sup> 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 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, Hopkins filed a motion to sever counts 1 and 2 from the remaining counts because "the Commonwealth will necessarily need to introduce evidence of the Defendant's prior convictions resulting in him being a prohibited person in its case in chief in

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<sup>7</sup>Defendant cites Commonwealth v. Arnold, 258 A.2d 885, 886 (Pa. Super. 1969) and Commonwealth v. Reitz, 39A.2d 522, 523-24 (Pa. Super. 1944). Neither of those cases involves a Defendant seeking to dismiss charges by way of a motion for judgment of acquittal. In both cases the Commonwealth prevailed on appeal.

<sup>8</sup>Even had the motion been timely, the constitutional challenge to these statutes as applied to Mr. Hopkins is without merit. "[S]ection 6106 (Firearms not to be carried without a license) does not violate the Pennsylvania Constitution." *See, e.g., Commonwealth v. McKown*, 79 A.3d 678, 691 (Pa. Super. 2013); *See also, R.H.S. v. Allegheny Cty. Dep't of Human Servs., Office of Mental Health*, 936 A.2d 1218, 1229 (Pa. Cmwlth. 2007) ("[T]he right to bear arms is not unlimited; it may be restricted in the exercise of police power for the good order of society and protection of citizens.") The constitutional challenge is particularly unpersuasive as applied to Hopkins in this case. Here, Hopkins (previously convicted of a drug delivery offense) possessed two loaded firearms in a vehicle which at the same also contained packaged crack cocaine, which Hopkins of possessed with the intent to deliver. It is not unconstitutional to apply the law to Hopkins under such circumstances.

<sup>9</sup>Severance of Counts 1 and 2 from the drug counts was agreed upon and appropriate under the reasoning of Commonwealth v. Galassi, 442 A.2d 328 (Pa. super. 1982).

order to prove these counts. The evidence is not relevant to the other counts in the Information and would be highly prejudicial.” See, ¶19, Defendant’s Omnibus Motion filed on October 31, 2013. This Court considered that motion at the time of jury selection. At that time, the Commonwealth indicated its intent to introduce evidence of Mr. Hopkins’ underlying drug conviction in its case in chief to meet its burden of proof to sustain a felony 3 conviction as to counts 3 and 4 as charged in the information. As a result, to be prudent, the Court severed all of the firearms counts from the remaining counts.

As a preliminary matter, the Court believes Defendant waived the argument that counts 3 and 4 would need to be dismissed under § 110 of the Crimes Code unless they were heard with the drug charges by not specifically seeking dismissal on January 26, 2017 of counts 3 and 4.<sup>10</sup>

On the merits of Defendant’s argument, the Court respectfully submits it was within its discretion to sever the firearms charges, including counts 3 and 4, from the drug charges that were tried on March 9 and 10, 2017. The Commonwealth indicated that it was required to present evidence that Mr. Hopkins was ineligible for a firearms license to sustain a jury determination for the grading of counts 3 and 4 as charged. Given the Commonwealth’s position, the Court indicated that the most prudent thing to do would be to sever counts 1-4 from the remaining counts, which appeared to be fine with all parties. Even if the Commonwealth was not required to establish that the conditions required for the felony grading,<sup>11</sup> the Commonwealth would be required to present evidence of the unlawfulness of Hopkins’

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<sup>10</sup> The proceedings of January 26, 2017 have not been transcribed.

<sup>11</sup> Commonwealth v. Bavusa, 574 Pa. 620, 651-52, 832 A.2d 1042, 1044 (Pa. 2003) (holding 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.”) Nonetheless “[t]he broader Apprendi issues discussed in Bavusa are difficult to resolve without definitive guidance from the United States Supreme Court.” Pa. SSJI (Crim) 15.6106.

possession of a firearm, which could be prejudicial and not otherwise be admissible in a trial on the drug offenses.

Hopkins cites Commonwealth v. Galassi, 442 A.2d 328 (Pa. super. 1982) in support of his motion to dismiss counts 3 and 4. In Galassi, the Superior Court concluded that the trial court abused its discretion “in refusing the severance requested by the appellant[.]” The appellant in that case requested that the charge pursuant to 18 Pa.C.S. § 6105 (prohibiting those convicted of a crime of violence from possessing a firearm) be severed from the charge of Firearms not be carried without a license under 18 Pa.C.S. § 6106(a) 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 (1982). In the present case, this Court has not refused any motion to sever.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this 10<sup>th</sup> day of **May 2017**, for the foregoing reasons, the motion filed by Defendant on April 7, 2017 to dismiss counts 1-4 of the information is DENIED. However the Defendant shall have ten (10) days to file a motion to sever or bifurcate counts 3 and 4 from counts 1 and 2 for a same day trial if Defendant objects to trying all four remaining counts together. Defense counsel shall inform the court at or before the time of pre-trial if such motion has been filed.

BY THE COURT,

May 10, 2017  
Date

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Richard A. Gray, J.

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