

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :  
 : No. CR-2006-2009  
 vs. :  
 :  
 MICHAEL BROWN, :  
 Defendant :

**OPINION AND ORDER**

Before the Court are three Commonwealth Motions and one Defendant's Motion. The first two Commonwealth Motions are oral Motions to Amend the Information. Specifically, the Commonwealth is requesting that the Information be amended to delete the date of October 13, 2009 and replace it with the date of December 10, 2009. The Commonwealth further requests that with respect to Counts one through six, that the substance at issue be amended from being heroin, to a non-controlled substance in violation of the Controlled Substance, Drugs, Device and Cosmetic Act. 35 P.S. § 780-133 (a) (35). The Commonwealth also filed a written Motion in Limine to admit certain acts of an alleged co-conspirator and prior bad acts of the Defendant. The Defendant filed a Motion to Preclude Financial Records.

Defendant is charged with three counts of conspiracy with Kevin Webster-one to deliver a controlled substance, one to possess a controlled substance with the intent to deliver it and one to possess a controlled substance; one count of delivery of a controlled substance; two counts of possession with intent to deliver a controlled substance; two counts of possession of a controlled substance; and one count of possession of drug paraphernalia.

The facts supporting these charges as alleged in the Affidavit of Probable

Cause are that a CI went to 708 ½ Locust Street on December 3, 2009 to purchase heroin. He provided the currency to Webster and received a bundle (10 packets) of heroin from Defendant. Seven packets were labeled “Hellboy” in red ink and three packets were labeled “Rush” in red ink. This incident gave rise to all of the conspiracy counts, as well as one count of delivery of a controlled substance, possession with intent to deliver a controlled substance and possession of a controlled substance.

On December 10, 2009, a search warrant was executed at 703 ½ Locust Street. Webster and the Defendant were found sleeping. The police found approximately 21.9 grams of cocaine in packets, along with empty zip lock bags consistent with the cocaine packaging, rubber bands consistent with that used in packaging of heroin and electronic scales.

A jury was selected in this matter on October 27, 2010. Prior to jury selection, the Commonwealth made the oral Motions to Amend the Information. The Court deferred a decision and directed the Court Administrator to schedule an argument on said Motion prior to November 18, 2010, the date set for trial.

Pursuant to Rule 564 of the Pennsylvania Rules of Criminal Procedure, a Court may allow an amendment of the Information when there is, among other things, a defect in the date charged. Defendant objects to the amendment of the Information with respect to the date at issue vaguely asserting that it is untimely. Defendant cannot, however, articulate any prejudice with respect to the proposed amendment. Moreover, the information with respect to the proper date of December 10, 2009 has been available to the Defendant

from the inception of this case.

The December 10, 2009 date references the date that the search warrant was executed at 708 ½ Locust Street. These facts are referenced in the Affidavit of Probable Cause attached to the Criminal Complaint. These facts were referenced at a May 28, 2010 hearing on the Commonwealth's Motion to Consolidate and Amend the Information. These facts were further referenced in the Court's Opinion and Order dated July 6, 2010. Accordingly, the Court will GRANT the Commonwealth's Motion to Amend with respect to the date of the alleged offense.

With respect to the Commonwealth's Motion to Amend to change the nature of the offenses set forth in Counts one through six to reflect the allegation that a non-controlled substance was allegedly possessed, possessed with intent to deliver and delivered, the Commonwealth requests such an amendment as a result of a lab report that was received in March of 2010 indicating that the alleged heroin was in fact a non-controlled substance. This lab report was disseminated to Defendant as part of the required pretrial discovery and has been in Defendant's possession for at least three months prior to jury selection. An Information may be amended to change or add a different offense even if on the day of trial if there is no showing of prejudice. Commonwealth v. Picchianti, 410 Pa. Super. 563, 600 A.2d 597, 599 (Pa. Super. 1991), citing Commonwealth v. Womack, 307 Pa. Super. 396, 453 A.2d 642 (1982).

Defendant asserts prejudice claiming that up to the time that the Motion was made, he had been preparing to defend against the heroin related charges by utilizing the lab

report to prove that it was not heroin. The Court finds this claim of prejudice to be somewhat disingenuous. Defendant could not elaborate on the claimed prejudice nor articulate any specific prejudice related to amending the charge. Indeed, the proposed amendment results in the dismissal of two charges and a lower sentencing range should Defendant be convicted. Moreover, Defendant refused to accept the Court's offer to continue the trial in order to provide the Defendant with additional time to prepare if needed. Accordingly, the Court will GRANT the Commonwealth's Motion.

In connection with such, the Court will dismiss Counts three and six of the Information. It is not illegal to conspire to possess a non-controlled substance nor is it illegal to possess a non-controlled substance.

The Commonwealth's Motion in Limine sets forth in detail certain specifics that it contends are relevant to the Commonwealth's case to show a conspiracy between the Defendant and Mr. Webster.

With respect to the proffered evidence set forth in Paragraphs 2, 3 and 4 of the Commonwealth's Motion, the Court is of the opinion that the proffered evidence is not relevant. The Court is of the opinion that the proffered evidence fails to tend to prove any contested fact.

Conversely, the Court finds that the proffered evidence set forth in Paragraphs 5, 6, 7, 8, 9 and 10 is relevant with respect to the formation, background and development of the alleged illegal conspiracy between the Defendant and Mr. Webster. If accepted by the factfinder, it would tend to prove that the Defendant knowingly participated in a common

scheme with Mr. Webster to sell drugs. It explains the history between the co-conspirators whose relationship is directly at issue and material to the case.

Moreover, the Court does not find that the relevance of the proffered evidence is outweighed by any potential prejudicial impact. The Court finds no danger that the proffered evidence will result in the jury convicting the Defendant on a basis not related to the charges. See Pa.R.E. 403, comment (“‘Unfair prejudice’ means a tendency to suggest a decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.”).

With respect to the proffered evidence set forth in Paragraph 12, the Court will defer a decision with respect to the Motion in Limine until the time of trial. Prior to the “second informant” being called to testify, the Court will conduct a hearing outside of the presence of the jury at which time a specific proffer must be made by the Commonwealth with respect to the second informant’s testimony. Among the factors that the Court will consider in determining whether to admit the proffered testimony will be the dates of the alleged purchases, the place of the alleged purchases, the participants involved in the purchases, the controlled substances involved in the purchases and the witness’s direct knowledge regarding the purchases. See Commonwealth v. Camperson, 417 Pa. Super. 280, 612 A.2d 482, 484 (1992)(“Important factors to be considered in making this determination include the proximity in time between the incidents; the similarity in the circumstances surrounding the incidents; and whether evidence of the prior crime is necessary to rebut the accused's evidence or contention of accident, mistake or lack of required intent.”)

The Court GRANTS the Commonwealth's Motion in Limine with respect to the second informant testifying that he witnessed the Defendant coming and going from 708 ½ Locust Street and sleeping at 708 ½ Locust Street from July 2009 until the arrest. Certainly this evidence is relevant to the alleged relationship between the Defendant and Mr. Webster, the possession of the controlled substances and non-controlled substance at issue and perhaps even the Defendant's intent with respect to delivering the controlled substances and non-controlled substance at issue.

With respect to Defendant's Motion in Limine, Defendant argues that the Commonwealth intends to present testimony and documentary evidence of Defendant's financial records. More specifically, these records consist of bank and governmental records verifying deposits, withdrawals and amounts of money contained in Defendant's accounts between 2005 and January of 2009. The Commonwealth contends that this evidence is relevant to show that the Defendant was a drug dealer in that the Defendant had no other source of income. At this time, the Court finds this evidence to be minimally relevant, if at all, to the contested facts. Moreover, the Court finds that its probative value is substantially outweighed by its prejudicial impact. Finally, if the information is permitted to be introduced in the Commonwealth's case in chief, it would place the Defendant in the untenable position of having to testify to rebut the evidence. Accordingly, the Court will GRANT the Defendant's Motion, without prejudice.

**ORDER**

**AND NOW**, this 10<sup>th</sup> day of November 2010, following a hearing, the Court **GRANTS** the Commonwealth's oral Motions to Amend the Information. The Information is amended to reflect the date of December 10, 2009 with respect to Counts 7, 8 and 9. The Information is further amended to reflect the substance at issue with respect to Counts 1, 2, 4 and 5 to be a non-controlled substance. Counts 3 and 6 of the Information are dismissed with prejudice.

The Court **GRANTS** the Commonwealth's Motion in Limine with respect to the information set forth in Paragraphs 5, 6, 7, 8, 9 and 10 of its Motion. The Court **DENIES** the Commonwealth's Motion in Limine with respect to the information set forth in Paragraphs 2, 3 and 4 of the Motion. The Court defers a ruling with respect to the information set forth in Paragraph 12 except that the Court will permit the witness to testify that he witnessed the Defendant coming and going and sleeping at 708 ½ Locust from July 2009 until the arrest.

The Court **GRANTS** the Defendant's Motion to Preclude Financial Records, without prejudice to the Commonwealth to move for the admission of said evidence depending on the specifics of the evidence, the other evidence introduced in the Commonwealth's case in chief and the proposed method of introducing the evidence.

By The Court,

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Marc F. Lovecchio, Judge

cc: Mary Kilgus, Esquire (ADA)  
James Protasio, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)