

Criminal Use of a Communication Facility.¹⁰ The Defendants' cases are unrelated but were argued together as they both have counsel from the same law firm and had the same legal arguments.

Following the United States Supreme Court's decision in Alleyne, the Commonwealth filed Motions to Amend Information. Alleyne v. United States, 133 S. Ct. 2151 (2013). In Alleyne, the United States Supreme Court overruled Harris v. United States, 536 U.S. 545 (2002). The Supreme Court instead held that any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.¹¹ The trial court, however, still has broad discretion at sentencing to consider various factors relating to the offense and the offender. The Supreme Court distinguished elements that established the punishment available by law (statutory maximum and statutory minimum) and a court setting a specific punishment within the bounds that the law has prescribed.

The Commonwealth requests to apply against Eiland the mandatory minimum sentences in 18 Pa.C.S. § 7508 (drug weights) and 42 Pa.C.S. § 9712.1 (weapon possession). For Goff, the Commonwealth requests to apply the mandatory in 18 Pa.C.S. § 6317 (school zone mandatory). The Defendants have argued that the mandatory minimum statutes have been rendered unconstitutional by Alleyne and may not be applied unless the legislature alone amends or alters the statutes.

Motion to Amend Information

The issues raised by the Commonwealth's Motions to Amend Information and the Defendants' constitutional argument regarding the mandatory minimums are separate. The

¹⁰ 18 Pa.C.S. § 7512.

¹¹ As explained by Justice Sotomayor in her concurring opinion, facts that increase the statutory minimum sentence are elements of the offense and must be found by a jury. This was in accordance with Apprendi, which held that facts that increased the statutory maximum were also elements. Apprendi v. New Jersey, 530 U.S. 466 (2000).

Commonwealth wants to amend the informations before trial, in accordance with Alleyne, so that the respective juries may decide the appropriate elements for mandatory minimums at sentencing. The Defendants, however, argue that the Pennsylvania mandatory minimum statutes may no longer be applied to them due to Alleyne and therefore there is no longer a need to amend. Before addressing the constitutional arguments, this Court will first determine whether the Commonwealth is even entitled to amend the Informations.

The Pennsylvania Rules of Criminal Procedure states when a court may allow an information to be amended:

The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information does not charge an additional or different offense. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

Pa.R.Crim.P. 564. The purpose of the rule is to “ensure that a defendant is fully apprised of the charges and to avoid prejudice by prohibiting the last minute addition of alleged criminal acts of which the defendant is uninformed.” Commonwealth v. Duda, 831 A.2d 728, 732 (Pa. Super. 2003) (citing Commonwealth v. J.F., 800 A.2d 942, 945 (Pa. Super. 2002)).¹² To determine prejudice the Court is to consider:

(1) Whether the amendments changes the factual scenario supporting the charges; (2) whether the amendment adds new facts previously unknown to the defendant; (3) whether the entire factual scenario was developed during the preliminary hearing; (4) whether the description of the charges changed with the amendment; (5) whether a change in defense strategy was necessitated by the amendment; (6) whether the timing of the Commonwealth’s request for amendment allowed for ample notice and preparation.

Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006).

¹² “Whether the crimes specified in the original indictment or information involve the same basic element and evolved out of the same factual situation as the crimes specified in the amended indictment or information. If so, then the defendant is deemed to have been placed on notice regarding his alleged criminal conduct.” Commonwealth v. Bricker, 882 A.2d 1008, 1019 (Pa. Super. 2005).

The Pennsylvania Superior Court has found insufficient prejudice for an amendment that increases a sentence. In Page, the trial court granted the Commonwealth's motion to amend information after the close of evidence but prior to closing arguments. Commonwealth v. Page, 965 A.2d 1212, 1223 (Pa. Super. 2009). The defendant was originally charged with Aggravated Indecent Assault under 18 Pa.C.S. § 3125(a)(1), (a)(3), and (a)(7). The trial court allowed the Commonwealth to change the Aggravated Indecent Assault charge to 18 Pa.C.S. § 3125(b), which states that the defendant committed a violation under subsection (a) and the victim was less than 13 years of age. The Superior Court found that the defendant was not prejudiced because the amendment did not alter the factual scenario, evolved out of the same factual situation as the original charge, did not add new facts, and the defendant was aware of the victim's age prior to the amendment. In addition, the Superior Court stated that "[t]he mere possibility that amendment of an information may result in a more severe penalty due to the additional charge is not, of itself prejudice." Id. at 1224 (citing Sinclair, 897 A.2d at 1224).

Here, the Defendants have not shown sufficient prejudice to prohibit the amendments to their Informations. The Commonwealth filed the motions well before the start of the trials, they do not alter the general factual theory upon which the charges are based, and do not add new specific facts. The preliminary hearing testimony and/or the additional discovery provided by the Commonwealth have placed the Defendants on notice of the facts in support of the mandatories. In addition, the Commonwealth has provided sufficient time for preparation of trial. Therefore, the Court shall grant the Commonwealth's Motions to Amend Information for the above captioned Defendants.

As the Commonwealth is entitled to amend the Informations, the remaining issue is whether the Pennsylvania mandatory minimum statutes the Commonwealth is trying to apply by

the amendments can continue to be used following Alleyne. In the interest of justice, the Court believes that this issue would best be addressed following the jury trials of the Defendants. Addressing the constitutional matter at sentencing would allow the case to proceed to trial and if the Pennsylvania appellate courts disagree with the finding the case would merely be remanded for a new sentencing hearing. Therefore, if the Defendants are found guilty following a jury trial, this court will issue a decision at sentencing addressing the constitutional issues. The Court will consider the oral arguments made before this Court as well as the briefs submitted.

ORDER

AND NOW, this _____ day of November, 2013, based upon the foregoing Opinion, the Court finds that the Defendants are fully apprised of their charges and not sufficiently prejudiced by the Commonwealth's request to amend. Therefore, the Commonwealth's Motions to Amend Information are hereby GRANTED. It is ORDERED and DIRECTED that the Information filed against Timothy Eiland is amended to add the following language:

For Count 1 – The controlled substance was heroin. The aggregate weight of the compound or mixture containing the heroin involved was at least 5.0 grams but less than 50 grams, as defined in 19 Pa.C.S. § 7508(a)(7). At the time of the offense, the actor or the actor's accomplice were in physical possession or control of one or more firearms, as defined in 42 Pa.C.S. § 9712.1(a).

For Count 2 – The controlled substance was cocaine. The aggregate weight of the compound or mixture containing cocaine was at least 2.0 grams and less than 100 grams, as defined in 18 Pa.C.S. § 7508(a)(3). At the time of the offense, the actor or the actor's accomplice were in physical possession or control of one or more firearms, as defined in 42 Pa.C.S. § 9712.1(a).

For Count 9 – The controlled substance was heroin. The aggregate weight of the compound or mixture containing the heroin involved was 50 grams or greater, as defined in 18 Pa.C.S. § 7508(a)(7). At the time of the offense, the actor or the actor's accomplice were in physical possession or control of one or more firearms, as defined in 42 Pa.C.S. § 9712.1(a).

For Count 10 – The controlled substance was heroin. The aggregate weight of the compound or mixture containing the heroin involved was at least 1.0 grams but less than 50 grams, as defined in 18 Pa.C.S. § 7508(a)(7). At the time of the offense, the actor or the actor’s accomplice were in physical possession or control of one or more firearms, as defined in 42 Pa.C.S. § 9712.1(a).

The Information filed against Robert Goff is amended to add the following language:

For Count 1 – The delivery of the cocaine occurred within 1,000 feet of the real property on which is located a public school. The delivery occurred within 250 feet of the real property on which is located a public school.

For Count 2 – The delivery of the cocaine occurred within 1,000 feet of the real property on which is located a public school. The delivery occurred within 250 feet of the real property on which is located a public school.

For Count 3 – TO WIT: COCAINE. The possession with intent to deliver the cocaine occurred within 1,000 feet of the real property on which is located a public school. The delivery occurred within 250 feet of the real property on which is located a public school

If the Defendants are found guilty following a jury trial, the Court will make a decision at the time of sentencing on the constitutional issues raised and whether the Pennsylvania mandatory minimum statutes can be applied.

By the Court,

Nancy L. Butts, President Judge

xc: DA (MW)
Peter Campana, Esq.
Robert Hoffa, Esq.