

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-2177-2012
	:	
vs.	:	
	:	
AKMED B. GREENE,	:	
Defendant	:	Motion to Amend Information

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Amend Information filed on August 9, 2013.

The Information, filed against the Defendant on January 25, 2013, charges him with Possession with Intent to Deliver, Criminal Conspiracy to Possess with Intent to Deliver, Possession of a Controlled Substance, Possession of Drug Paraphernalia and Criminal Conspiracy to Tamper with or Fabricate Physical Evidence.

Argument on the Commonwealth's Motion was held on August 23, 2013.

By virtue of the United States Supreme Court's decision in Alleyne v. United States, 133 S. Ct. 2151 (2013), if a fact increases the mandatory minimum to which a Defendant may be exposed, it must be submitted to the jury and proved beyond a reasonable doubt. Moreover, the Information must contain every fact which is legally essential to the punishment to be inflicted. Accordingly, and consistent with Alleyne, the Commonwealth seeks to amend the Information with respect to Counts 1 and 2, to indicate that: "the controlled substance was heroin, the aggregate weight of the compound or mixture containing the heroin involved is at least 1.0 gram but less than 5.0 grams." The parties do not dispute that pursuant to 18 Pa. C.S.A. § 7508 (7) (i) if the

weight of the compound or mixture containing the heroin involved is at least 1.0 gram but less than 5.0 grams, the sentence shall be a mandatory minimum term of two years in prison.

Defendant argues that the Commonwealth should not be permitted to amend the Information, alleging prejudice because said facts were not established at the preliminary hearing by the required prima facie standard. Rule 564 of the Pennsylvania Rules of Criminal Procedure governs amendments to Informations. Rule 546 provides that a court may allow the amendment of an Information where, among other things, there is a defect in the description of the offense, provided the amendment does not charge an additional or different offense.

The purpose of Rule 564 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), quoting Commonwealth v. J.F., 800 A.2d 942, 945 (Pa. Super. 2002).

In determining prejudice, the lower courts are directed to consider several factors including the following:

(1) whether the amendment 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), citing Commonwealth v. Grekis, 601 A.2d 1284, 1292 (Pa. Super. 1992).

Furthermore, since the purpose of an Information is to apprise a defendant of the charges against him so that he may have a fair opportunity to prepare a defense, relief is awarded only when the variance between the original and the new charges prejudices the appellant by, for example, rendering defenses which might have been raised against the original charges ineffective with respect to the substituted charges. Sinclair, supra.; Commonwealth v. Brown, 727 A.2d 541, 543 (Pa. 1999). As well, “the mere possibility that the amendment of an Information may result in a more severe penalty due to the additional charges is not, of itself, prejudice.” Sinclair, 897 A.2d at 1224, citing Commonwealth v. Picchianti, 600 A.2d 597, 599 (1991), appeal denied, 530 Pa. 660, 609 A.2d 168 (1992).

Defendant’s allegation of prejudice because he was denied the opportunity at a preliminary hearing to test the prima facie showing of the content and weight of the substance does not constitute sufficient prejudice such as to prohibit the amendment. The Court notes that there is no federal or state constitutional right to a preliminary hearing. Commonwealth v. Ruza, 511 Pa. 59, 64, 511 A.2d 808, 810 (1986); Commonwealth v. Jacobs, 433 Pa. Super. 411, 640 A.2d 1326, 1327 (1994). The defense argument implicates only one of the many factors that the Court must consider in determining prejudice. Moreover, subsequent to the preliminary hearing defense has

been provided with discovery, including lab reports, verifying both the weight and identity of the substance at issue.

The proposed amendment does not deprive the Defendant of a fair opportunity to prepare a defense nor does it render any of his defenses ineffective. Moreover, the crimes specified in the original Information evolved out of the same factual situation as the crimes specified in the amended Information. Finally, the amended charges are clearly cognate offenses to the original charges. See, for example, Sinclair, supra. (amended Information seeking to add a different blood alcohol content count was cognate to original counts).

Under all of these circumstances, the Court will grant the Commonwealth's Motion to Amend Information.

ORDER

AND NOW, this 27th day of August 2013, following a hearing and argument, the Commonwealth's Motion Amend Information is GRANTED. With respect to Counts 1 and 2, the Information is amended to add the following language:

"TO WIT: The controlled substance was heroin, the aggregate weight of the compound or mixture containing the heroin involved is at least 1.0 gram but less than 5.0 grams."

By The Court,

Marc F. Lovecchio, Judge

cc: DA (AC)
Donald F. Martino, Esquire

Gary Weber, Lycoming Reporter
Work File