

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :

v. :

KENNETH MARTIN, :
Defendant :

CR-1662-2012 :
CRIMINAL DIVISION :

OPINION AND ORDER

The Commonwealth filed a Motion to Amend Information on August 5, 2013. A hearing on the motion was held on August 12, 2013.

Background

On October 3, 2012, the Commonwealth filed an Information against Kenneth Martin, which included the charges of Robbery,¹ Burglary,² Criminal Conspiracy,³ Aggravated Assault,⁴ Criminal Trespass,⁵ Terroristic Threats,⁶ Theft by Unlawful Taking,⁷ Receiving Stolen Property,⁸ Simple Assault,⁹ and Recklessly Endangering Another Person.¹⁰ Following the United States Supreme Court’s decision in Alleyne, the Commonwealth filed a Motion 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

¹ 18 Pa.C.S. § 3502(a).

² 18 Pa.C.S. § 3701(a)(1).

³ 18 Pa.C.S. § 903(a)(1).

⁴ 18 Pa.C.S. § 2702(A)(4).

⁵ 18 Pa.C.S. § 3503(a)(1)(i).

⁶ 18 Pa.C.S. § 2706(A).

⁷ 18 Pa.C.S. § 3921(a).

⁸ 18 Pa.C.S. § 3925(a).

⁹ 18 Pa.C.S. § 2701(a)(1).

¹⁰ 18 Pa.C.S. § 2705.

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 the mandatory minimum sentences in 18 Pa.C.S. § 9712 (firearm mandatory) and 204 Pa. Code § 303.10 (deadly weapon enhancement) by adding the following language to the Information:

For Count 2 – ROBBERY (F1): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 4 – AGGRAVATED ASSAULT (F2): The offender possessed and used a deadly weapon during the commission of the offense.

For Count 5 – ROBBERY (F2): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 8 – TERRORISTIC THREATS (M1): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 9 – THEFT (M1): The offender possessed a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 10 – RECEIVING STOLEN PROPERTY (M1): The offender possessed a deadly weapon during the commission of the offense. The weapon was a firearm or replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 11 – SIMPLE ASSAULT (M2): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of

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).

a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 12: RECKLESSLY ENDANGERING ANOTHER PERSON (F2): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

In opposition, the Defendant argues that the Commonwealth is altering the terms the Defendant was charged under. Further, the Defendant requests that if the Court amends the Information, that the Defendant receive a preliminary hearing for the new elements.

Motion to Amend Information

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

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).

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).

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 Defendant has not shown sufficient prejudice to prohibit the amendment of the Information. The Commonwealth filed the motion well before the start of trial, did not alter the general factual theory upon which the charges are based, and did not add new specific facts. The preliminary hearing testimony along with the additional discovery provided by the Commonwealth has placed the Defendant on notice of the facts in support of the weapon enhancements/mandatories. In addition, even if the Defendant has to change defense strategies, which has not been argued, the Commonwealth has provided sufficient time for preparation. Therefore, the Court shall grant the Commonwealth's Motion to Amend Information.

The Defendant further argues that the case must be remanded for a preliminary hearing on the additional facts added to the Information. The Court finds that this argument is without merit because, as discussed above, the Defendant has not suffered sufficient prejudice. The Defendant is in possession through discovery of the Commonwealth's evidence to support the weapon enhancements/mandatories. Further, there is no federal or state constitutional right to a preliminary hearing. See Commonwealth v. Ruza, 511 A.2d 808, 810 (Pa. 1986); Commonwealth v. Jacobs, 640 A.2d 1326, 1327 (Pa. Super. 1994). Therefore, the Defendant is not entitled to an additional preliminary hearing.

ORDER

AND NOW, this _____ day of September, 2013, based upon the foregoing Opinion, the Court finds that the Defendant is fully apprised of his charges and not sufficiently prejudiced. Therefore, the Commonwealth's Motion to Amend Information is hereby GRANTED. The Information is amended to add the following language:

For Count 2 – ROBBERY (F1): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 4 – AGGRAVATED ASSAULT (F2): The offender possessed and used a deadly weapon during the commission of the offense.

For Count 5 – ROBBERY (F2): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 8 – TERRORISTIC THREATS (M1): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 9 – THEFT (M1): The offender possessed a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 10 – RECEIVING STOLEN PROPERTY (M1): The offender possessed a deadly weapon during the commission of the offense. The weapon was a firearm or replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

For Count 11 – SIMPLE ASSAULT (M2): The offender possessed and used a deadly weapon during the commission of the offense. The weapon was a firearm or a replica of a firearm that placed the victim, Noor Ford, in reasonable fear of death or serious bodily injury.

By the Court,

Nancy L. Butts, President Judge

xc: DA (MW)
Edward J. Rymsza, Esq.