

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No . CR-1225-2012  
:   
vs. :   
:   
SILAS TRAFFORD, :   
Defendant : Motion to Amend Information

**OPINION AND ORDER**

Before the Court is the Commonwealth Motion to Amend Information filed on September 10, 2013.

The Information, filed against the Defendant on August 9, 2012, charges him with Possession with Intent to Deliver a Controlled Substance (PWID), Conspiracy to PWID, two counts of Receiving Stolen Property, two counts of Conspiracy to Receive Stolen Property, Possession of a Controlled Substance and two counts of Possession of Drug Paraphernalia.

Argument on the Commonwealth's Motion was held on October 7, 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 Count 1 of the Information to indicate that: "There was a firearm located in close proximity to the ten packages of heroin." The parties do not dispute that pursuant to 42 Pa. C.S.A. § 9712.1, if the Defendant is convicted of

Count 1, when at the time a firearm was in close proximity to the controlled substance, the sentence shall be a mandatory minimum term of five 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. Defendant argues further that the proposed amendment alleges a new, aggravated criminal charge and that he is entitled to a preliminary hearing and following such, he has a right to file appropriate motions. <sup>1</sup>

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:

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<sup>1</sup> Defendant has not challenged, at this stage, the constitutionality of the mandatory sentencing provisions of 42 Pa. C.S.A. §9712.1. The imposition of a mandatory sentence pursuant to this section, however, must comply with the mandates of Alleynes. Commonwealth v. Munday, 2013 Pa. Super. 273 (10-10-2013). In its present context, the constitutionality of § 9712.1 is highly doubtful.

- (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 proximity of the firearm to the controlled 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.

The affidavit to the Criminal Complaint alleges facts that support the amendment. It is clearly alleged that a firearm was found within six feet of the heroin. Defendant waived the preliminary hearing. During oral argument on the Motion to Amend, it was not disputed that Defendant was well aware through the affidavit and the discovery that the Commonwealth intends to prove that a firearm was found in close proximity to the heroin.

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 crime specified in the amended Information. Finally, despite the language in Alleyne regarding the “reality” that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, this does not alter the prejudice analysis.

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

**ORDER**

**AND NOW**, this 15<sup>th</sup> day of October 2013, following a hearing and argument, the Commonwealth's Motion to Amend Information is **GRANTED**. With respect to Count 1, the Information is amended to add the following language:

"To wit: there was a firearm located in close proximity to the ten packages of heroin."

By The Court,

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Marc F. Lovecchio, Judge

cc: DA (NI)  
Stephen Becker, Esquire  
Gary Weber, Lycoming Reporter  
Work File