

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :

v. :

ROBERT TUCK, :
Defendant :

CR-283-2013; 284-2013 :
CRIMINAL DIVISION :

OPINION AND ORDER

The Commonwealth filed a Motion to Amend Information on September 23, 2013. A hearing on the motion was held on October 18, 2013.

Background

On March 21, 2013, the Commonwealth filed an Information against Robert Tuck (Defendant) under docket number 284-2013, which included one (1) count of Persons Not to Possess,¹ one (1) count of Firearms Not to be Carried Without License,² two (2) counts of Possession with Intent to Deliver,³ one (1) count of Possession of a Controlled Substance,⁴ and one (1) count of Possessing Instruments of Crime.⁵ On the same day, the Commonwealth filed similar drug charges under docket number 283-2013, which also included two (2) counts of Criminal Use of a Communication Facility.⁶ When the Commonwealth filed the Motion to Amend Information, Michael Morrone, Esquire was representing the Defendant. Prior to argument on the Motion, the Defendant changed counsel to Edward J. Rymsza, Esquire.

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

¹ 18 Pa.C.S. § 6105(A)(1).

² 18 Pa.C.S. § 6106.

³ 35 P.S. § 780-113(a)(30).

⁴ 35 P.S. § 780-113(a)(16).

⁵ 18 Pa.C.S. § 907(a).

⁶ 18 Pa.C.S. § 7512.

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.⁷ 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 the Defendant the mandatory minimum sentences in 18 Pa.C.S. § 7508 (drug weights) and 42 Pa.C.S. § 9712.1 (weapon possession). The Defendant has argued that the amendment would substantially alter the charges, that the mandatory minimum laws should no longer be applied, and that if the Court does amend the terms that the case should be remanded back for a preliminary hearing.

Motion to Amend Information

The issue raised by the Commonwealth’s Motion to Amend Information and the Defendant’s applicability argument regarding the mandatory minimums are separate. The Commonwealth wants to amend the Information before trial, in accordance with Alleyne, so that the jury may decide the appropriate elements for mandatory minimums at sentencing. The Defendant, however, argues that the Pennsylvania mandatory minimum statutes may no longer be applied to him 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 Information.

⁷ 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).

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)).⁸ 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).

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

⁸ “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).

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 to the Information. The Commonwealth filed the motion well before the start of the trial, it did not alter the general factual theory upon which the charges were based, and did not add new specific facts. The preliminary hearing testimony and/or the additional discovery provided by the Commonwealth have placed the Defendant 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 Motion to Amend Information.

As the Commonwealth is entitled to amend the Information, the Court must still determine whether the Pennsylvania mandatory minimum statutes the Commonwealth is trying to apply by the amendment 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 trial of the Defendant. 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 Defendant is found guilty following a jury trial, this court will issue a decision at sentencing addressing the constitutional issues.

Finally, since this Court has granted the amendment of the Information, the Defendant argues that the case must be remanded for a preliminary hearing on the additional facts added to

the charges. 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/drug weight 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 December, 2013, based upon the foregoing Opinion, the Court finds that the Defendant is fully apprised of the charges and not sufficiently prejudiced by the Commonwealth's request to amend. Therefore, the Commonwealth's Motion to Amend Information is hereby GRANTED. It is ORDERED and DIRECTED that the Informations filed against Robert Tuck in the above captioned cases are amended to add the following language:

Docket number 283-2013, for Count 1 – “to wit: The controlled substance was cocaine. The aggregate weight of the compound or mixture containing the cocaine involved is at least ten grams but less than 100 grams.”

Docket number 283-2013, for Count 2 – “to wit: The controlled substance was cocaine. The aggregate weight of the compound or mixture containing the cocaine involved is at least ten grams but less than 100 grams.”

Docket number 283-2013, for Count 3 – “to wit: The controlled substance was cocaine. The aggregate weight of the compound or mixture containing the cocaine involved is at least ten grams but less than 100 grams.”

Docket number 283-2013, for Count 4 – “to wit: The controlled substance was cocaine. The aggregate weight of the compound or mixture containing the cocaine involved is at least ten grams but less than 100 grams.”

Docket number 284-2013, for Count 1 – “to wit: The controlled substance was cocaine. The aggregate weight of the compound or mixture containing the cocaine involved is at least ten grams but less than 100 grams. At the time of the offense, the actor was in physical possession or control of a firearm which was in close proximity to the cocaine.”

If the Defendant is 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
EJ Rymysza, Esq.