

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1362-2012  
:   
vs. :   
:   
MARCO WARD, :   
Defendant :

**OPINION AND ORDER**

This matter came before the Court on Defendant’s petition for writ of habeas corpus and the Commonwealth’s oral motion to amend the charges to add a charge of simple assault. The relevant facts follow.

On August 4, 2012, Officers Thomas Bortz and Ed Lucas were patrolling the City of Williamsport as part of drug interdiction unit. At approximately 8:32 p.m., the officers drove into the parking lot at Timberland Apartments. As they drove past a parked van, Officer Bortz detected a strong odor of burnt and fresh marijuana and he saw an individual, later identified as Defendant, seated on a big electric box and a female standing next to him. Officer Bortz noticed that Defendant was cupping a burning blunt cigar in his right hand. When Defendant saw the officers, he dropped the blunt down below the electric box.

After radioing County Communications, the officers exited their vehicle and approached the individuals. The officers determined that the odor of marijuana was coming from Defendant. Officer Lucas asked Defendant to produce some identification. Defendant pulled out his wallet, but then became argumentative about producing his identification for Officer Lucas. As Defendant pulled out his wallet, the officers confirmed that the odor of

marijuana was coming from Defendant. Officer Lucas ordered Defendant to the ground or to at least have a seat in front of the box. Defendant started to sit in front of the box, but then quickly looked to his right as if looking for an avenue of escape. As Officer Bortz was again ordering Defendant to sit down, Defendant quickly thrust himself upward and ran south to flee. Officer Bortz tased Defendant in the back, which caused him to fall onto the hood of a car. The officers attempted to handcuff Defendant but he was fighting against them with everything he had and persistently trying to reach into one of his pockets. Officer Lucas got a handcuff on one of Defendant's hands, but Defendant managed to reach his other hand into one of the cargo pockets in his shorts and get his some of his fingers around a six inch knife. When Defendant's hand came out of the pocket, the knife came out of the pocket. Officer Lucas swatted the knife and it landed three or four feet away. Officer Bortz was able to radio for backup. Eight or nine additional units showed up and Defendant was subdued and taken into custody. During the melee, however, Officer Lucas' middle finger was injured and it was swollen about twice its normal size.

Defendant was taken to the police station and handcuffed to the wall while the officers prepared the charges against him. Defendant maneuvered his lower body so that a baggie of a white substance fell from his shorts to the floor. Defendant kicked the baggie near or under the fingerprint machine. The police retrieved the baggie and tested the contents, which field tested positive for cocaine.

Defendant was charged with aggravated assault by attempting to cause or intentionally or knowingly causing bodily injury to a police officer who was making or

attempting to make an arrest, a felony of the second degree; possession of a controlled substance (cocaine), an ungraded misdemeanor; resisting arrest, a misdemeanor of the second degree; and possession of a small amount of marijuana, an ungraded misdemeanor.

Defendant filed a petition for writ of habeas corpus, in which he averred that the evidence was insufficient to show that Defendant acted with the specific intent to cause bodily injury and therefore was insufficient to prove that Defendant attempted to cause bodily injury with a deadly weapon.<sup>1</sup>

When reviewing a motion for habeas corpus, the Court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. See Commonwealth v. Santos, 583 Pa. 96, 101; 876 A.2d 360, 363 (2005). At this stage of the proceedings, the Commonwealth must present a prima facie case that a crime has been committed and Defendant was the one who probably committed it. Commonwealth v. Mullen, 460 Pa. 336; 333 A.2d 755 (Pa. 1975). A prima facie case exists when the Commonwealth presents evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant a belief that the accused committed the offenses. Santos, supra., quoting Commonwealth v. Huggins, 575 Pa. 395, 836 A.2d 862, 866 (2003).

Defendant contends the evidence was insufficient to establish his intent. The Court cannot agree. Intent frequently is proven through circumstantial evidence because “there is rarely any direct evidence of one’s subjective state of mind.” Commonwealth v.

---

<sup>1</sup> The Court notes that Defendant is not charged with attempting to cause bodily injury with a deadly weapon pursuant to 18 Pa.C.S. §2702(a)(4), but rather attempting to cause or intentionally or knowingly causing bodily

Utter, 279 Pa. Super. 557, 421 A.2d 339, 341 (1980); Pa.SSJI (Crim) 7.02B. Furthermore, the “finder of fact is free to conclude that the accused intended the natural and probable consequences of his actions.” Commonwealth v. Rosado, 454 Pa. Super. 17, 684 A.2d 605, 608 (1996), citing Commonwealth v. Lopez, 439 Pa. Super. 625, 654 A.2d 1150, 1154 (1995).

When the evidence is viewed in a light most favorable to the Commonwealth, it shows that Defendant fought against the police with everything he had. He was violently kicking, twisting, turning, and flailing while the police were tasing him and trying to place him in handcuffs. Commonwealth’s Exhibit 1, Preliminary Hearing Transcript, at pp. 6-8, 21. The natural and probable consequences of the nature and extent of Defendant’s efforts to resist arrest were that one of the police officers would suffer bodily injury.

Moreover, Defendant continually tried to reach into his pocket to remove a knife while he was resisting the police officers’ efforts to arrest him. He got his hand into his pocket and grasped the knife in some of his fingers, but was prevented from opening and using it when the knife came out of his pocket and was swatted away by Officer Lucas. Officer Bortz testified that when he saw the knife come out of Defendant’s pocket, he was absolutely convinced that Defendant would have taken the knife and stabbed either of the officers to get away. Preliminary Hearing Transcript, pp. 24-25. From these circumstances, the Court believes a jury could reasonably infer that Defendant intended to use the knife to cause bodily injury to one or both of the officers and escape from their custody. Whether a jury chooses to take such an inference is an issue for trial.

---

injury to a police officer while in the performance of duty pursuant to 18 Pa.C.S. §2702(a)(3).

At the argument on Defendant's habeas corpus motion, the Commonwealth made an oral motion to amend the Information to add a count of simple assault for attempting to cause or intentionally, knowingly or recklessly causing bodily injury to another in violation of section 2701(a)(1) of the Crimes Code, 18 Pa.C.S. §2701(a)(1).

Pennsylvania Rule of Criminal Procedure 564 governs amending a criminal information. Rule 564 provides:

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 as amended 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. "[O]ur courts apply the rule with an eye toward its underlying purposes and with a commitment to do justice rather than be bound by a literal or narrow reading of the procedural rules." Commonwealth v. Roser, 914 A.2d 447, 453 (Pa. Super. 2006), quoting Commonwealth v. Grekis, 411 Pa. Super. 513, 601 A.2d 1284, 1288 (1992). In ruling on a motion to amend, the court considers:

[w] hether the crimes specified in the original indictment or information involve the same basic elements 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. If, however, the amended provision alleges a different set of events, or the elements or defenses to the amended crime are materially different from the elements or defenses to the crime originally charged, such that the defendant would be prejudiced by the change, then the amendment is not permitted.

Commonwealth v. Sinclair, 897 A.2d 1218, 1221 (Pa. Super. 2006), quoting Commonwealth

v. Davalos, 779 A.2d 1190, 1194 (Pa. Super. 2001) (citation omitted).

Defendant is charged with aggravated assault. A person is guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to certain enumerated officers, agents and employees while in the performance of duty. 18 Pa.C.S. §2702(a)(3). A police officer is one of the enumerated officers. 18 Pa.C.S. §2702(c)(1).

The Commonwealth seeks to amend the information to add a charge of simple assault under section 2701(a)(1) of the Crimes Code which provides that a person is guilty if he “attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another.” 18 Pa.C.S. §2701(a)(1). “A person acts recklessly with respect to a material element of any offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation.” 18 Pa.C.S. §302(b)(3).

Simple assault is a lesser-included offense of aggravated assault. See Commonwealth v. Novak, 564 A.2d 988, 998 (Pa. Super. 1989). It involves the same basic elements and evolves out of the same factual situation as the aggravated assault charge.

Defendant claims simple assault is not a lesser-included offense and he would be prejudiced by the amendment because the aggravated assault charge does not include the

element of recklessly causing bodily injury.

In determining whether a defendant is prejudiced, the court considers the following factors:

(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 a 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; and (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Sinclair, 897 A.2d at 1223.

The Court rejects Defendant's claim that he would be prejudiced by the amendment in this case. The amendment does not change the factual scenario at all. The factual scenario was developed at the preliminary hearing, and the amendment does not add any new facts.

The description of the charges is nearly identical. Aggravated assault as charged in this case requires an attempt to cause or intentionally or knowingly causing bodily injury to a police officer in the performance of duty. Simple assault requires an attempt to cause or intentionally, knowingly or recklessly causing bodily injury to another. Although the amendment permits a finding of guilt based on recklessness, recklessness is a culpability that would be satisfied if the person acted intentionally or knowingly. See 18 Pa.C.S. 302(e).

The Commonwealth's request allowed for ample notice and preparation. The Commonwealth orally requested to amend the information on February 12, 2013. The next

available jury selection dates are April 2-4, 2013. Since the charges are so similar, Defendant should not need a lot of time to prepare to meet the amended charge. Furthermore, there is nothing in the record to suggest that the amendment would necessitate a change in defense strategy. Defendant will have about seven weeks from the time the Commonwealth gave notice until the first available jury selection date to prepare.

cc: Martin Wade, Esquire (ADA)  
Robert Cronin, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Work file



IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1362-2012  
:   
vs. :   
:   
MARCO WARD, :   
Defendant :

**ORDER**

AND NOW, this \_\_\_ day of March 2013, the Court DENIES Defendant's petition for writ of habeas corpus and GRANTS the Commonwealth's motion to amend the information to add Count 5, Simple Assault, 18 Pa.C.S. §2701(a)(1).

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)  
Robert Cronin, Esquire (APD)  
Gary Weber, Esquire (Lycoming Reporter)  
Work File  
Prothonotary