

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1362-2012
:
vs. :
:
MARCO WARD, :
Defendant : Motion to Amend Information

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Amend Information filed on July 19, 2013.

The Information, filed against the Defendant September 14, 2012, charges him with, among other things, Aggravated Assault (Count 1) and Resisting Arrest (Count 3).

Argument on the Commonwealth's Motion was held on July 29, 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 to apparently comply with Alleyne, the Commonwealth seeks to amend the Information with respect to Counts 1 and 3, to add that: "The offender possessed a deadly weapon (knife) during the commission of the offense." The parties do not dispute that pursuant to 42 Pa. C.S.A. § 9721 (204 Pa. Code § 303.10 (a) and § 303.17) if the Court determines that the Defendant possessed a deadly weapon (knife) during the commission of the offenses,

the Court would be required to consider the sentencing guideline DWE/Possessed Matrix which increases the guidelines from the Basic Sentencing Matrix (§ 303.16).

Defendant argues that the Commonwealth should not be permitted to amend the Information, alleging prejudice because it alleges facts that may result in a more severe penalty.

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 merely because he may be subject to an increased penalty does not constitute sufficient prejudice such as to prohibit the amendment.

The Defendant has been put on notice of the alleged criminal conduct well in advance of trial. The original criminal complaint mentions Defendant’s attempts to reach the knife in his pocket under the aggravated assault charges. These charges under 18 Pa. C.S.A. § 2702 (a)(3), do not statutorily require possession of a knife or deadly weapon, unlike other subsections of this offense. 18 Pa. C.S.A. § 2702 (a) (4). Still, Defendant has been on notice of his alleged criminal conduct from the onset of this

case. No new facts are alleged that were not already contained in the Affidavit of Probable Cause, the Criminal Complaint, and the subsequent Motion to Amend Information. Defense counsel has known about the alleged possession of the weapon and therefore it is unlikely that a change of defense strategy is required. Defense can still argue that the possessed weapon was not “used or intended to be used...to produce death or serious bodily injury.” 18 Pa. C.S.A. § 2301; Commonwealth v. Blake, 605 A.2d 427 (Pa. Super. 1992). Additionally, the amended Information will not subject Defendant to a mandatory minimum sentence. The Court finds that this proposed amendment does not sufficiently raise any of the concerns enumerated in Sinclair to prohibit the amendment.

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 scenario as the crimes specified in the amended Information.

Finally, and despite the Court permitting the Amendment pursuant to Sinclair, the Court expresses no opinion on whether the decision in Alleyne requires the amended facts to be submitted to the jury and proved beyond a reasonable doubt. As the Supreme Court clearly notes “[It’s] ruling...does not mean that any fact that influences judicial discretion must be found by a jury.” Alleyne, at 2163.

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 3, the Information is amended to add the following language:

"The offender possessed a deadly weapon (knife) during the commission of the crime."

By The Court,

Marc F. Lovecchio, Judge

cc: DA (MW)
PD (RC)
Gary Weber, Lycoming Reporter
Work File