

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No's. CR-1990-2012
: CR-840-2013
vs. :
: ALIEK CARR, :
Defendant : Motions to Amend Information

OPINION AND ORDER

Before the Court are the Commonwealth Motions to Amend Informations filed on July 29, 2013.

The Information, filed against the Defendant under 1990-2012 on November 30, 2012, charges him with Possession with Intent to Deliver a Controlled Substance, Delivery of a Controlled Substance, and Possession with Intent to Deliver a Controlled Substance. The Information filed against the Defendant under 840-2013, charges him with Possession with Intent to Deliver a Controlled Substance.

Argument on the Commonwealth's Motion was held on August 21, 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 the Information under 199-2012 with respect to all Counts to indicate that: "The Defendant did possess with intent to deliver 1.25 grams of heroin," and the Information under 840-2013 with respect to the single Count to

indicate that: “The Defendant did possess with intent to deliver 6.85 grams of heroin.” The parties do not dispute that pursuant to 18 Pa. C.S.A. § 7508 (7) (i) if the weight of the compound or mixture containing the heroin involved is at least 1.0 gram but less than 5.0 grams, the sentence shall be a mandatory minimum term of two years in prison, and that pursuant to 18 Pa. C.S.A. § 7508 (7) (ii), if the weight of the compound or mixture combining the heroin involved is at least 5.0 grams but less than 50 grams, the sentence shall be a mandatory minimum term of three 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. 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 because he was denied the opportunity at a preliminary hearing to test the prima facie showing of the weight of the 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. With respect to 840-2013, the Criminal Complaint sets forth the weight and identity of the substance. Defendant waived the preliminary hearing. With respect to 1990-2012, the preliminary hearing was held on 11-16-2012. Testimony was presented verifying for prima facie purposes, an appropriate quantity and type of controlled substance (8 packets of heroin; 35 packets of heroin). This information was also set forth in the Criminal Complaint and partially in the Search Warrant Affidavit and Receipt. Moreover, subsequent to the preliminary hearing, defense counsel filed a Motion for Discovery requesting, among other things, all lab reports. The Commonwealth has agreed to provide said reports which will set forth the specifics with respect to the weight of 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 crimes specified in the amended Information. Finally, the amended charges are clearly cognate offenses to the original charges. See, for example, Sinclair, supra. (amended Information seeking to add a different blood alcohol content count was cognate to original counts).

Under all of these circumstances, the Court will grant the Commonwealth Motions to Amend the Informations.

ORDER

AND NOW, this 28th day of August 2013, following a hearing and argument, the Commonwealth Motions to Amend Informations are **GRANTED**. With respect to Count 1 under 840-2013, the Information is amended to add the following language:

“The Defendant did possess with intent to deliver 6.85 grams of heroin.”

With respect to all counts under 1990-2012, the Information is amended to add the following language:

“The Defendant did possess with intent to deliver 1.25 grams of heroin.”

By The Court,

Marc F. Lovecchio, Judge

cc: DA (AC)
E.J. Rymysza, Esquire
Gary Weber, Lycoming Reporter
Work File