

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No . CR-1478-2013
	:	
vs.	:	
	:	
CHARLES ENGLISH,	:	Motion to Compel Discovery
Defendant	:	Motion to Amend Information

OPINION AND ORDER

Before the Court are two Motions. The first is a Motion to Amend Information filed by the Commonwealth. Said Motion was filed on October 1, 2013. The second is a Motion by Defendant to Compel Discovery. Said Motion was filed on October 7, 2013. Argument on both Motions was held before the Court on October 15, 2013.

The Court will first address Defendant's Motion to Compel Discovery. During the argument, defense counsel addressed several specified items of discovery to which he claims he is entitled to pursuant to either the mandatory provisions of discovery or the discretionary provisions of discovery as set forth in the Pennsylvania Rules of Criminal Procedure. Defense counsel also argued that he should be provided with a written response to his discovery request. In response, the Commonwealth noted that it has a "open file policy" and would be willing to turn over to the Defendant the particular items identified if in fact it was in possession of such or could readily obtain possession. The Commonwealth rejected, however, defense counsel's argument that he should be provided with a written response to the discovery requests indicating that it was "not necessary."

In response to a discovery request, which has failed to have been complied with, the Court may enter an appropriate Order including such Order as it deems just under the circumstances. Pa.R.Cr.P. 573 (E). Given the significance of the charges against Defendant and the particular nature of Defendant's discovery requests, the Court deems it just to require the Commonwealth to file a written response to Defendant's Motion to Compel Discovery and to identify the items in response which have or will be provided.

With specific reference to Paragraph 18 of Defendant's Motion, Defendant requests specified recorded telephone contacts made to the 911 Center. The Commonwealth countered that the tapes were equally available to both parties and, accordingly, it need not provide them to Defendant.

The Commonwealth's assertion, however, is not correct. Indeed, in order for Defendant to obtain the 911 tapes, he would need to secure subpoenas and serve them upon the 911 Center. Contrary to this procedure, the 911 Center's policy with respect to providing the tapes to law enforcement, including the District Attorney's office, is that the agency simply identify the requested tapes on a written form and submit the form to the 911 Center. As a result, the process is far easier for the Commonwealth, and the costs are non-existent. Accordingly, the Court will direct the Commonwealth to obtain the requested tapes and provide them to the Defendant.

The Court will next address the Commonwealth's Motion to Amend the Information. The Commonwealth seeks to amend Count 1 of the Information to allege

that Defendant possessed with intent to deliver the specified amount of heroin within 1000 feet of a school zone or within 250 feet of a playground. The Information filed on September 18, 2013 identifies the controlled substance as heroin and includes an averment with respect to its weight, but it does not address the school zone or playground proximity issue.

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. The parties do not dispute that pursuant to 18 Pa. C.S.A. § 6317, if an individual, 18 years of age or older, is convicted of possession with intent to deliver and if said possession with intent to deliver occurred within 1000 feet of a school or 250 feet of a playground, the Court must sentence the individual to at least two years of total confinement if the Commonwealth provides notice of its intention to proceed under said section.

In arguing against the Commonwealth's Motion, Defendant asserts that at the time the preliminary hearing was held on September 3, 2013, Alleyne had already been decided, as had Opinions in this Court addressing amendments in light of Alleyne. Defendant asserts that the failure to allege the determinative facts in light of the applicable law is prejudicial to him in that he no longer has an opportunity to discovery

the specifics regarding the playground and/or school zone applicability as he would have had during the preliminary hearing. Defendant argues that clearly he was prejudiced, because the Commonwealth was permitted to proceed in connection with the charge and the charge was bound over for court when the Commonwealth knew, yet failed to even address, let alone prove by a prima facie standard, the required “element” implicating the mandatory.

In response, the Commonwealth argues that the facts set forth in the Affidavit attached to the Criminal Complaint and adduced at the preliminary hearing clearly show where the possession with intent to deliver occurred and accordingly, Defendant is not prejudiced. The Commonwealth agrees that Defendant is entitled to discovery with respect to the issue, but it asserts that he is not entitled to another preliminary hearing.

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 interest 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: “Whether 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 provisions allege a different set of facts, 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).

While the mere possibility that the amendment of an Information may result in a more severe penalty due to the additional charge is not, in and of itself, prejudice, Sinclair, 897 A.2d at 1224, citing Commonwealth v. Picchianti, 600 A.2d 597, 599 (Pa. Super. 1991), appeal denied, 530 Pa. 660, 609 A.2d 168 (1992), the Court is concerned that the Commonwealth’s failure to allege all of the determinative sentencing factors in direct contravention to Alleyne constitutes some degree of prejudice to Defendant. Although there is certainly no federal or state constitutional right to a preliminary hearing and the defense argument implicates only one of the

many factors that the courts must consider in determining prejudice, neither a bill of particulars nor a response to a discovery request satisfies the Commonwealth's burden to establish a prima facie case for each "element" of the offense or provides Defendant with an opportunity to challenge the Commonwealth's evidence with respect to the school zone mandatory as would a preliminary hearing or a petition for habeas corpus relief.

On the other hand, the degree of prejudice is not such that it cannot be remedied through an appropriate Court Order. Accordingly, the Court will permit the amendment yet in accordance with Rule 564 direct appropriate relief as is necessary in the interest of justice. Said relief will be to entitle the Defendant to file a Petition for Habeas Corpus addressing the school zone mandatory.

ORDER

AND NOW, this 21st day of October 2013, following argument on Defendant's Motion to Compel Discovery and the Commonwealth's Motion to Amend the Information, the following is directed:

- (1) Defendant's Motion to Compel Discovery is **GRANTED**. Within fourteen (14) days of the date of this order, the Commonwealth shall file and serve on Defendant a written response to Defendant's Motion to Compel. The Commonwealth shall address each item of discovery requested and provide to Defendant a listing of the particular documents or tangible items that were or will be provided that are in

response to said discovery request. To the extent the Commonwealth identifies a document or tangible item that has not been provided, said document or tangible item must be provided within thirty (30) days of the date that the Commonwealth files its response. This Order is without prejudice to Defendant to file a supplemental Motion to Compel Discovery if the Commonwealth fails to provide the requested discovery.

- (2) The Commonwealth's Motion to Amend the Information is **GRANTED**. The Information is amended with respect to Count 1 to add the following language :

To Wit: The Defendant did possess with intent to deliver at least one (1) gram, but less than five (5) grams of heroin within one thousand (1000) feet of a school zone or within two hundred fifty (250) feet of a playground.

Within thirty (30) days of the date he receives all of the requested discovery, Defendant may file an Omnibus Pretrial Motion which includes, but is not limited to, a Petition for Habeas Corpus with respect to the playground and/or school zone issue. If such a Petition is filed, the Commonwealth will be required to present sufficient evidence to establish a prima facie case that the playground and/or school zone mandatory applies.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (MK)
Ron Travis, Esquire
Gary Weber, Lycoming Reporter
Work File