

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**MICHAEL WILLS,
Defendant**

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**No. CR 1663-2012
CRIMINAL**

OPINION AND ORDER

AND NOW, this 17th day of **July, 2014**, upon motion by the Commonwealth to amend the information to add substantive offenses to the conspiracy charges, the Commonwealth's motion is **GRANTED in part and DENIED in part**.

Factual Background

On June 25, 2012, Trooper Tyson Havens of the Pennsylvania State Police filed a police criminal complaint with Magisterial District Justice Hon. Gary Whiteman. *See, Commonwealth Exhibit #1*. Trooper Havens charged defendant, Michael Wills, with the following eight offenses: burglary, robbery, aggravated assault, robbery, criminal trespass, theft by unlawful taking or disposition, receiving stolen property, and simple assault.¹ The offenses allegedly occurred on or about June 19, 2014 at the Econolodge in Loyalsock Township. For each offense, the complaint describes the alleged actions taken by Mr. Wills that constitute the offense. With respect to burglary, the two counts of robbery and receiving stolen property, the complaint describes Mr. Wills' actions as follows.

Offense #1 Burglary, "...THE DEFENDANT did conspire with Kenneth MARTIN, Terence FORSHYTE and others ... to enter a building ... occupied by Noor FORD, with the intent to commit a crime therein ... and THE DEFENDANT was not privileged or licensed to enter in violation of" 18 Pa.C.S. § 3502(a).

¹ 18 Pa.C.S. § 3502; 18 Pa.C.S. § 3701; 18 Pa.C.S. § 2702 (a) (4); 18 Pa.C.S. § 3701; 18 Pa.C.S. § 3503(a)(1)(i); 18 Pa.C.S. § 3921; 18 Pa.C.S. § 3925(a); 18 Pa.C.S. § 2701.

Offense #2 Robbery “... THE DEFENDANT did conspire with Kenneth MARTIN, Terence FORSHYTE and others, in the course of committing a theft, namely the theft of money and electronics, did threaten another, namely Noor FORD, with or intentionally put HIM in fear of immediate serious bodily injury, namely strike Victim with a pistol, and punch and kick him about the head and body in violation of” 18 Pa.C.S. § 3701(a)(1)(ii).

Offense #4 Robbery “... THE DEFENDANT did conspire with Kenneth MARTIN, Terence FORSHYTE and others, in the course of committing a theft, namely the theft of money and electronics, did inflict bodily injury upon, or threaten, or intentionally put another, namely Noor FORD, in fear of immediate bodily injury in violation of” 18 Pa.C.S. § 3701(a)(1)(iv).

Offense # 7 Receiving Stolen Property “THE DEFENDANT did conspire with Kenneth MARTIN, Terence FORSHYTE and others to intentionally receive, retain or dispose of movable property, namely \$500.00 cash, an Apple I phone, an X-box and hundreds of music CD’s valued at \$1000.00, belonging to Noor FORD, with no intent to restore it to the owner, knowing that such property was stolen, or believing that it had probably been stolen, in violation of” 18 Pa.C.S. § 3925(a).

The information filed on October 3, 2012 lists 8 counts of criminal charges against Mr. Wills. The counts in the information correspond to the similarly numbered offenses in the complaint. However, instead of listing the substantive offenses with their statutory sections, the information contains the conspiracy charges related to the corresponding offense and cites a violation of the criminal conspiracy statute, 18 Pa.C.S. § 903 only.

On October 3, 2012, the Commonwealth filed a notice joinder stating that the informations in the criminal cases of Michael T. Wills, CR. 1663-2012 and Kenneth Martin, CR. 1662-2012 would be tried together. On November 13, 2012, the Commonwealth filed a motion to consolidate the trials in the matter of Michael T. Wills, CR. 1663-2012, Kenneth Martin, CR. 1662-2012, and Terence Forsythe, CR. 1715-2012. The Commonwealth asserted that the complaints were identical and that the “defendants are alleged to have participated in the same series of acts constituting the offenses charged.” On January 11, 2013, the Court granted the

consolidation of the cases for trial. A preliminary hearing was held on September 13 and 18, 2012 before the Honorable Nancy L. Butts.² Following the preliminary hearing, the Court ruled that there was sufficient evidence of a prima facie case with respect to counts 2 through 8 against Mr. Wills. (Transcript of proceedings held on September 18, 2012, Tr. 124, l. 18-21; Tr. 122, l. 1-2)

On May 2, 2014, the Commonwealth filed a motion to amend the information to add the following substantive offenses: F1 Burglary, 18 Pa.C.S. §3502(a), F1 Robbery, 18 Pa.C.S. § 3701(a)(1)(ii), F2 Robbery, 18 Pa.C.S. § 3701(a)(1)(iv), and M1 Receiving Stolen Property, 18 Pa.C.S. § 3925(a).

Discussion

As a preliminary matter, this Court notes that the Commonwealth moved to amend the information to include the substantive offense of burglary. However, the Honorable Nancy L. Butts has already ruled that there was insufficient evidence with respect to burglary in Mr. Wills' and Mr. Martin's cases. (9/18/12 Tr. 124, l. 18-21; Tr. 122, l. 1-2) Therefore, as the conspiracy to commit burglary count is no longer a part of this case, this Court will DENY the Commonwealth's motion to amend the information to add the offense of burglary to the information in this case.

In addition to burglary, the Commonwealth moved to add the substantive offenses of robbery, a felony 1 under 18 Pa.C.S. § 3701(a)(1)(ii), robbery, a felony 2 under 18 Pa.C.S. § 3701(a)(1)(iv) and receiving stolen property, a misdemeanor 1, under 18 Pa.C.S. § 3925(a) to the information which includes counts for the conspiracy to commit those offenses. When

² Due to evidentiary matters, the preliminary hearing was held before the President Judge as opposed to the District Magistrate.

determining whether to grant the Commonwealth's motion to amend the information, the Court must follow the requirements set forth in Pa. R. Crim. P. 564 which provides the following.

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 (emphasis added).

“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. Sinclair, 2006 PA Super 83, P8, 897 A.2d 1218, 1221 (Pa. Super. 2006)(citation omitted) Pennsylvania Courts have applied the following test for amending the information.

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 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. Sinclair, supra, quoting, Commonwealth v. Davalos, 2001 PA Super 197, 779 A.2d 1190, 1194 (Pa.Super. 2001)

In addition, the Pennsylvania Courts have set forth the factors to consider when evaluating the existence of prejudice. Those factors are as follows.

(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, supra, 779 A.2d at 1223 quoting Commonwealth v. Grekis, 411 Pa. Super. 513, 601 A.2d 1284, 1292 (Pa.Super. 1992).

In Grekis, supra, the Commonwealth was permitted to amend the information to add the three counts of solicitation to commit involuntary deviate sexual intercourse to counts of promoting prostitution, corrupting a minor, and solicitation to commit prostitution. Grekis, supra, 601 A.2d at 1286. In Commonwealth v. Fuller, 579 A.2d 879 (Pa. Super. 199), the Superior Court affirmed an amendment at the 11th hour, prior to the beginning of trial, to add aggravated assault to attempt to commit criminal homicide, conspiracy to commit criminal homicide and solicitation to commit criminal homicide, even though it changed the grade of the offense. Fuller, supra, 579 A.2d at 883, 885. The Court noted that it looks “more to substantial justice than to technicalities.” *Id.* “The charge of aggravated assault and criminal attempt murder arose out of the same set of facts[,]” and involved the same basic elements.

In the present case, the Commonwealth alleges a defect in the offenses listed on the information. The information includes only conspiracy counts and not the substantive underlying offense that the conspiracy involved. The commonwealth alleges this defect arose from the boxes check on the criminal complaint form. *See*, Motion to Amend Information, ¶ 4. Without question, the additional counts which the Commonwealth seeks to include arise from the same factual situation where Noor Ford was allegedly robbed at the Econolodge on June 25, 2012 and upon which Mr. Wills’ criminal involvement has already been alleged in the form of promotion, facilitation and an overt act required for conspiracy.

The next question is whether the crimes of conspiracy to commit robbery and conspiracy to receive stolen property comprise materially different elements as the substantive offenses of robbery and receiving stolen property, “such that the defendant would be prejudiced by the change.” Sinclair, supra, 897 A.2d at 1221, 897 A.2d at 1221 (*quoting Commonwealth v. Davalos*, 2001 PA Super 197, 779 A.2d 1190, 1194 (Pa. Super. 2001), appeal denied, 567 Pa. 756, 790 A.2d 1013 (2001) (citation omitted)). The Court believes that the elements are

sufficiently similar to place the defendant on notice as to his alleged criminal conduct. For Mr. Wills to be guilty of conspiracy to commit the crime of robbery and receiving stolen property, he must, “with the intent of promoting or facilitating” the commission of those crimes, must agree with Mr. Martin “that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime[,]” and he must have committed an “overt act in pursuance of such conspiracy[.]” 18 Pa.C.S. § 903.

With respect to the robbery counts, the Commonwealth would have to prove: Mr. Willis, with intent of promoting or facilitating a theft by means of threats or intentionally putting Mr. Ford in fear of immediate serious bodily injury or by means of inflicting “bodily injury upon another,” and must prove Mr. Wills committed an overt act in pursuance of the robbery. 18 Pa.C.S. § 3701(a)(1)(ii) & (iv). For the substantive offense, the Commonwealth must prove not only the intent of promotion and facilitation and an overt act in pursuance of the robbery, but the Commonwealth must also prove Mr. Wills committed the theft by means of threats or intentionally putting Mr. Ford in fear of immediate serious bodily injury or by means of inflicting “bodily injury upon another.” The court does not believe that there is a significant factual leap between the two that would prejudice the defendant in preparing a defense.

Similarly, the Court does not believe that there is a significant difference in the elements of conspiracy to receive stolen property compared to the substantive offense of receiving stolen property. To be guilty of conspiracy to receive stolen property, Mr. Willis, with intent of promoting or facilitating the intentional receipt, retention, or disposition of “\$500.00 in cash, his Apple I phone, an X-box and hundreds of music CD’s valued at \$1000.00, belonging to Noor FORD, with no intent to restore it to the owner, knowing that such property was stolen, or believing that it had probably been stolen[,]” committed an overt act in pursuance of that offense. *See*, 18 Pa.C.S. § 903, and 18 Pa.C.S. § 3925(a). For the substantive offense, Mr. Wills is guilty

if “he intentionally receives, retains, or disposes of” the “\$500.00 in cash, his Apple I phone, an X-box and hundreds of music CD’s valued at \$1000.00, belonging to Noor FORD “knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.” 18 Pa.C.S. § 3925(a).

As a whole, the Court concludes that the defendant will not be prejudiced by the amendment to the information to include the underlying substantive offenses after evaluating the 6 factors outlined above as required. *See, Sinclair, supra*, 779 A.2d at 1223 *quoting Commonwealth v. Grekis*, 411 Pa. Super. 513, 601 A.2d 1284, 1292 (Pa.Super. 1992). First, the amendment arises from the same factual scenario supporting the charges that are already present in the information. Second, the amendment does not add new facts previously unknown to the defendant. Third the entire factual scenario was developed during a preliminary hearing held on September 13 and 18, 2012. Fourth, while the counts were added with the amendment, as discussed in detail above, the court does not believe that there is a material difference that would prejudice the defendant. Fifth, the court does not believe that there is a significant factual leap between the elements and description of the charges that would prejudice the defendant in preparing a defense. Lastly, the timing of the Commonwealth's request for amendment allows for ample notice and preparation by the defense. This is not a case where the Commonwealth waited until the eve of trial or attempted to add last minute facts; the defendant has been fully apprised of the factual basis underlying the charges since the criminal complaint was filed on June 25, 2012. According to the CPCMS Case Profile a pre-trial conference is scheduled for August 12, 2014.

Accordingly, the Court enters the following Order.

ORDER

AND NOW, this 17th day of **July, 2014**, upon motion by the Commonwealth to amend the information to add substantive offenses to the conspiracy charges, the Commonwealth's motion is **GRANTED in part and DENIED in part**. It is **ORDERED AND DIRECTED** as follows.

1. The information of charges against Michael Tyrone Wills is amended to include F1 Robbery, F2 Robbery and M1 Receiving Stolen Property.
2. The motion to amend the information to include burglary is **DENIED**.

BY THE COURT,

July 17, 2014

Date

Richard A. Gray, J.

cc: DA (MW)
Jerry Lynch, Esq. for Defendant