

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1454-2014
 :
 JOSEPH JENNINGS, :
 Defendant :

OPINION AND ORDER

This matter came before the court on December 17, 2015 for a hearing and argument on the Commonwealth's motion to amend the Information and the Commonwealth's motion in limine. The relevant facts follow.

On July 27, 2014, parole agent Joshua Kriger observed a silver Jeep Wrangler being operated on Lycoming Creek Road and in the Garden View Plaza in Old Lycoming Township. According to Agent Kriger, Defendant Joseph Jennings was the driver and sole occupant of the vehicle. Agent Kriger knew that Defendant was a registered sexual offender who did not have a valid driver's license. Agent Kriger contacted the Old Lycoming Township police, but an officer was not available to respond. The information was relayed to Sergeant Joseph Hope, who located information on Pennsylvania's Megan's Law website that Jennings was a Tier III sexual offender and Jennings had not registered any vehicles as owned or operated by him. Sergeant Hope also obtained information that Jennings had been cited for operating the same vehicle on March 12, 2014, and Jennings' driver's history revealed that his license was suspended, revoked and/or expired.

On August 19, 2014, Sergeant Hope filed a criminal complaint against Jennings, charging him with failing to provide accurate information when registering as a

sexual offender, a felony of the first degree in violation of 18 Pa.C.S. §4915(a)(3), as well as traffic offenses related to his operating a motor vehicle with a suspended, revoked, and expired license.

On November 16, 2015, the Commonwealth filed a motion to amend the information to add a charge under 18 Pa.C.S. §4915(a)(1), a felony of the second degree, for failing to register a motor vehicle as required under 42 Pa.C.S. §§ 9799.15, 9799.19 or 9799.25.

On November 17, 2015, the Commonwealth filed a motion in limine to introduce evidence from Officer Thomas Bortz and Magisterial District Judge (MDJ) Allen Page regarding Jennings' operation of the same silver Jeep on March 12, 2104 and his guilty plea on June 11, 2014 before MDJ Page to the offense of operating that vehicle while his license was suspended or revoked.

Jennings was opposed to both motions.

With respect to the motion to amend the Information, the Commonwealth argued that a violation of (a)(1) was a lesser included offense of a violation of (a)(3) and if Defendant were convicted of both they would merge for sentencing purposes. The Commonwealth also asserted that the proposed amendment did not involve any additional facts and involved the same theory so that there was no prejudice to Defendant.

Defense counsel viewed the Commonwealth's motion to amend as "gamesmanship." He claimed that a violation of section (a)(1) was an entirely new charge, with new elements. He asserted that any amendment seventeen months into the prosecution

was unduly prejudicial and, in any event, he believed that Defendant was entitled to a preliminary hearing on the new charge and the opportunity to challenge it in a pretrial setting.

The amendment of an information is governed by Rule 564 of the Pennsylvania Rules of Criminal Procedure and case law. Rule 564 states:

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.

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 defendant 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)).

The amendment does not change the factual scenario supporting the charges. The Commonwealth has always asserted that Jennings was operating the silver Jeep on July 27, 2014 and he failed to register that vehicle in accordance with the requirements of the Sexual Offender Registration and Notification Act (SORNA).

The amendment also does not add any new facts previously unknown to Jennings. Although the court was not provided with a transcript of the preliminary hearing, the court believes that the entire factual scenario regarding Jennings’ alleged operation of the silver Jeep and his failure to update his registration information with respect to that vehicle was developed during the preliminary hearing.

The amendment does not change the description of the charges. Jennings is still charged with failing to comply with registration requirements. The charges still relate to his failure to register the silver Jeep that he was allegedly operating on or about July 27,

2014. The amendment simply adds what, under the facts and circumstances of this case, amounts to a lesser-included offense of failing to register the silver Jeep, which the Commonwealth contends was operated by Jennings. The original charge asserted that Jennings knowingly failed to provide accurate information when registering, which was based solely on his failure to provide any information with respect to his alleged operation of the silver Jeep.

The Commonwealth filed its motion to amend in November. Therefore, the defense has now had months to investigate and prepare to meet the amended charge.

The amendment also does not materially alter the defense strategy in this case. Defendant can still assert that: he did not drive the silver Jeep on July 27, 2014; he did not regularly operate that vehicle; and/or he did not knowingly fail to register that vehicle because he was told or believed that he could occasionally operate a vehicle without having to register it.

The court recognizes that part of the defense in this case may have been that Jennings did not provide false or inaccurate information when he registered. If anything, it was merely an omission, as opposed to a knowing misrepresentation. In fact, during the prosecutor's argument he acknowledged that Ms. Rexroth made a comment to him about charging Jennings under the wrong subsection. The court, however, does not believe such precludes the amendment in this case. Rather, the court believes this situation is analogous to the situation in *Sinclair*.

In *Sinclair*, the defendant was charged with two driving under the influence of

alcohol (DUI) charges – one based on being incapable of safely driving and the other based on the defendant’s blood alcohol content being .16% or higher. Minutes before trial began, the Commonwealth moved to amend the charges to add a DUI charge based on the defendant’s blood alcohol content being at least .10% but less than .16%. The defendant objected to the amendment on the basis that it changed the defense strategy. The defendant had an expert witness who was going to provide testimony that the margin of error for the testing procedure would bring the defendant’s blood alcohol content below .16%, which would have resulted in a conviction of only the incapable offense and lesser penalties. The Pennsylvania Superior Court upheld the amendment and found that Sinclair suffered no prejudice as a result of the amendment.

Here, as in *Sinclair*, the amended charge is a cognate offense to the offense charged. The amended charge is a lesser offense.

When all the factors are considered, the court finds that Jennings is not prejudiced by the amendment in this case. Therefore, the court will permit the Commonwealth to amend the information to add count 5, failure to comply with registration requirements, a felony of the second degree, in violation of 18 Pa.C.S. §4915.1(a)(1).

The Commonwealth also filed a motion in limine seeking to introduce evidence regarding Jennings’ guilty plea to operating the silver Jeep on March 12, 2014. The Commonwealth argued that an element of the registration offense is that the defendant owned or operated the silver Jeep. The Commonwealth claimed it could show that Defendant operated the vehicle several ways including evidence of Defendant’s signature on

the citation, testimony from Defendant's parole agent, surveillance video from the Sunset Ice Cream Parlor in the Garden View Plaza, and testimony from the officer who charged Defendant and the MDJ who accepted his plea (on June 11, 2014) to driving under suspension on March 12, 2014. The Commonwealth also asserted that Defendant could be found guilty for failing to notify the PSP of his operation of the silver Jeep within three business days of either March 12, 2014 or July 27, 2014 (see motion in limine, para. 9). The Commonwealth indicated that if the court precluded the evidence related to the March 12, 2014 incident, it would file new charges against Defendant for the March 12 incident.

Defense counsel argued that the Commonwealth's current position was "diametrically different" from what it charged and that the Commonwealth was bound by what it alleged in the Information. Defense counsel also asserted the proposed testimony and evidence was propensity evidence that was inadmissible under Rule 404(b)(1) of the Pennsylvania Rules of Evidence. Furthermore, the evidence was more prejudicial than probative. Finally, defense counsel asserted that the admission of this evidence would change the defense in this case because a component of the defense was that Defendant was not driving the vehicle on July 27, 2014.

Initially, the court notes that Defendant is not charged with failing to register as a result of the March incident; the charges in the information relate solely to Defendant's failure to register the silver Jeep within three business days of his alleged driving on July 27, 2014. The Commonwealth has not filed a motion to amend to add any charges related to the March incident. Furthermore, at this late date the Commonwealth might not be able to do so,

because there is at least an argument that any registration offenses related to the March incident should have been filed at the same time as the traffic offenses related to that incident or at least prior to Defendant's guilty plea to the driving under suspension charge on June 11, 2014. Therefore, the court rejects the Commonwealth's contention that Defendant could be found guilty in this case for failing to notify the PSP of his operation of the silver Jeep within three business days of March 12, 2014.

On the other hand, defense counsel has indicated in the past that a component of the defense in this case is that Defendant was not required to register the vehicle and/or he did not knowingly fail to register in this case because he did not regularly operate the silver Jeep. In support of this defense (and others), counsel obtained email correspondence between and/or among Defendant's parole agents and the police, which included an email from Trooper Angela Bieber to Parole Agent Matt Kieski on March 13, 2014 in which Trooper Bieber indicated that a registrant can occasionally use someone else's vehicle and not register it under Megan's Law. While the relevant provision of SORNA does not appear to make such a distinction, if Defendant asserts in any manner that he did not knowingly fail to register the vehicle because July 27, 2014 was an isolated incident or he was informed by Trooper Bieber or others that he was not required to register the vehicle unless he regularly used the vehicle, such a defense makes relevant any and all prior instances of Defendant driving the silver Jeep. Therefore, if Defendant presents such a claim or defense either during cross-examination of the Commonwealth's witnesses or in his case in chief, the court will permit the Commonwealth to present evidence that Defendant drove or operated the

silver Jeep on other occasions, including March 12, 2014. If Defendant wishes, however, the court will give the jury a cautionary or limiting instruction that the jury cannot find Defendant guilty based on the fact that he drove the vehicle on March 12, 2014 and failed to register the vehicle within three business days thereafter as he is not charged with that offense and that the jury may only use evidence regarding instances of other driving to determine whether Defendant owned or operated the silver Jeep such that he was required to register it within three business days after allegedly driving it on July 27, 2014.

The more difficult question, however, is whether the Commonwealth should be permitted to introduce evidence before the jury of Defendant's **conviction** for driving while his operating privilege was suspended or revoked if Defendant presents the defense that he did not regularly operate the vehicle. While evidence that Defendant's operating privilege was suspended or revoked is relevant to the summary offenses, it is not relevant to his registration offenses which are the only offenses that will be heard by the jury.¹ The only evidence relevant to these registration offenses is whether Defendant was "operating" the silver Jeep on July 27, 2014 such that he was required to register it under SORNA, because that is the only date the Commonwealth has alleged that Defendant committed these offenses.

Generally, the court believes the conviction and evidence that Defendant did not have a license or his license was suspended or revoked is unduly prejudicial in this case, because of the danger or risk that the jury would find him guilty of the registration offense

¹ While this information is relevant to the summary offenses, the jury does not decide summary offenses; the

simply because it is angry that Defendant in the past (on March 12, 2014) drove a vehicle that he did not register under SORNA and which he never should have been driving in the first place. Therefore, unless Defendant opens the door to this evidence by denying that he drove the Jeep on March 12, 2014 or raising a defense through presentation of his own witnesses or cross-examination of the Commonwealth's witnesses that he could not register the vehicle under SORNA because he did not have a license, the court will not permit the Commonwealth to introduce Defendant's June 11, 2014 conviction for driving while his operating privilege was suspended or revoked on March 12, 2014.

ORDER

AND NOW, this ___ day of April 2016, the court grants the Commonwealth's motion to amend the Information to add count 5, failure to comply with registration requirements, a felony of the second degree, in violation of 18 Pa.C.S. §4915.1(a)(1). The clerk of courts is directed to add this offense in CPCMS.

In accordance with the following opinion, the court denies the Commonwealth's motion in limine to introduce evidence regarding Defendant's June 11, 2014 conviction for driving while his operating was suspended or revoked on March 12, 2014, unless Defendant opens the door to such evidence.

By The Court,

Marc F. Lovecchio, Judge

court does.

cc: Martin Wade, Esquire (ADA)
Lori Rexroth, Esquire
Edward J. Rymza, Esquire
Work file