

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)
) I.D. No. 0201017168
 v.)
) Cr. A. No. IN02-02-0822
TYRONE A. PHILLIPS,)
 Defendant.)
)

Date Submitted: April 14, 2004
Date Decided: April 21, 2004

UPON DEFENDANT'S MOTION IN LIMINE
FOR BILL OF PARTICULARS
DENIED.

ORDER

Donald R. Roberts, Esquire, Maria P. Knoll, Esquire, Deputy Attorneys General,
New Castle County, State of Delaware, Attorneys for the State of Delaware.

Jennifer-Kate Aaronson, Esquire, Potter, Carmine, Leonard & Aaronson, P.A.,
Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

This 21st day of April, 2004, upon consideration of the defendant's Motion In Limine for Bill of Particulars, pursuant to Superior Court Criminal Procedure Rule 7(f), and the record in this case, it appears to this Court that:

1) On March 11, 2002, the movant, Tyrone A. Phillips ("Defendant"), was indicted by a Grand Jury and charged with Murder by Abuse or Neglect in the First Degree in violation of 11 *Del. C.* § 634. Defendant entered a plea of guilty to the indicted charge on November 26, 2002, only one week prior to the scheduled trial. The guilty plea was in connection with the death of Cynthia Ferris, a two-year old child. On December 30, 2002, before the Court was scheduled to sentence the Defendant, he wrote a letter to the Court expressing his desire to withdraw his guilty plea.

On April 14, 2003, Defendant filed a Motion for Recusal, which the Court denied on July 3, 2003. A few days later, on July 11, 2003, Defendant filed his Motion for Withdrawal of Guilty Plea. On January 16, 2004, the Court held an evidentiary hearing on Defendant's motion to withdraw his guilty plea. At the hearing, various evidence was presented including, but not limited to, a recorded videotape of the Defendant being questioned at the police station, testimony of Defendant's former counsel regarding his representation of the Defendant at the time he entered his plea, and testimony by the Defendant. On this same date,

based on the evidence presented at the hearing, the Court granted Defendant's motion to withdraw his guilty plea, without objection by the State.

2) Defendant filed the instant motion for a bill of particulars on April 5, 2004. The State filed its response in opposition to Defendant's motion on April 6, 2004, and Defendant then filed a reply to the State's opposition on April 13, 2004. In the motion, Defendant argues that he is "without sufficient knowledge of the facts concerning the alleged criminal act to enable him to prepare his defense." Specifically, the indictment charged him accordingly: TYRONE A. PHILLIPS, on or about the 23rd day of January 2002, in the County of New Castle, State of Delaware, did recklessly cause the death of Victoria Ferris, a child 2 ½ years of age, through an act of abuse and/or neglect of said child. Defendant relies on the holdings in *Rosa*¹ and *McFarlane*² for the proposition that, a "motion for bill of particulars should be granted whenever the indictment fails to provide factual or legal information which significantly impairs a defendant's ability to prepare his defense, or is likely to lead to prejudicial surprise at trial."

Pursuant to the instant motion, the Defendant seeks the following information: 1) the exact time and date of the alleged criminal act of abuse charged in the indictment; 2) the exact manner by which Defendant allegedly abused Victoria Ferris; 3) what means are referred to as "abuse" in the indictment; 4)

¹ *United States v. Rosa*, 891 F.2d 1063, 1066 (3rd Cir. 1989).

² *United States v. MacFarlane*, 759 F.Supp. 1163, 1169 (W.D. Pa. 1991).

detailed description of any force used in the alleged abuse; 5) the precise injuries alleged to have been sustained including the exact parts of the body injured; 6) factual statement showing the manner, mode or means by which the Defendant is alleged to have caused, affected or brought about the death of Victoria Ferris; 7) names and addresses of persons who participated, saw, or otherwise are qualified to testify in court about the commission of the alleged acts of abuse; 8) the exact manner by which the Defendant allegedly neglected Victoria Ferris; 9) names and addresses of persona [sic] who participated, saw or otherwise are qualified to testify about the alleged acts of neglect; and 9) factual statement outlining th[e] manner, mode or means by which the Defendant is alleged to have neglected Victoria Ferris.

3) In response to Defendant's motion, the State sets forth both procedural and substantive defenses to Defendant's requests. First, the State asserts that, pursuant to Superior Court Criminal Procedure Rule 7(f), Defendant's motion is untimely, and the Defendant has not sought leave of court to file out of time. Second, the State argues that the information sought by the Defendant is "either unknown, already provided, otherwise available, not an element of the offense and, therefore, not properly demanded in a bill of particulars, defined by statute, and/or deals with the State's theory of the case." Moreover, the State asserts that since the inception of the case, it has maintained an "open file policy,"

supplying defense counsel “with any and all information requested which is not of a confidential nature.” Specifically, it is the State’s contention that in the case *sub judice*, the Court should deny Defendant’s motion because ample information and documentation has already been furnished and/or is available to put the Defendant on notice of what he needs to defend. Precisely, the information sought by the Defendant can be adduced or discerned from the: 1) arrest warrant; 2) affidavit of probable cause; 3) transcripts of the preliminary hearing; 4) transcripts of the Defendant’s earlier admission to the offense when he entered a guilty plea; and 5) transcripts of the Defendant’s Motion to Withdraw a Guilty Plea.

4) In rebuttal to the State’s opposition to Defendant’s motion, Defendant contends that his demand for a bill of particulars is not untimely. Defense counsel suggests that this case is marked by a “unique procedural posture.” Defendant withdrew his guilty plea, the Court accepted Defendant’s withdrawal of his guilty plea pursuant to the Court’s Order of January 16, 2004, and, at the January 29, 2004 office conference attended by counsel, the State, and the Court, the Court entered an order providing a cut-off date for all pretrial motions of April 30, 2004. In addition, Defendant re-emphasizes his contention that the indictment lacks a “plain, concise and definite written statement of the essential facts comprising the charged offense.” Defendant maintains that the indictment “alleges no facts” and is “totally void of any factual assertions regarding the Defendant’s conduct.”

5) The Delaware Supreme Court has defined the purpose of an indictment as two-fold: (1) it must put the defendant on notice of what he is to defend; and (2) it must provide a shield against subsequent prosecution for the same offense, i.e., against the possibility of double jeopardy.³ If an indictment is drafted with such particularity as to afford the defendant the ability to reasonably know the elements or essential facts of the charges against him, so that he may have an adequate opportunity to prepare a defense, it is deemed sufficient.⁴ The objective of a bill of particulars is to provide supplemental information, serving to protect the defendant against unfair surprises at trial and to preclude a second prosecution for an inadequately described offense.⁵ Basically, “[t]he bill of particulars is a discovery device that is used to request additional relevant information. A defendant seeks a bill of particulars in order to ‘fill any gap between the facts disclosed by the indictment and that ‘set of facts’ which will permit him the opportunity of preparation [of a defense].”⁶ While the significance of a bill of particulars, as an instrument that is designed to clarify the allegations posed against a defendant, remains paramount in the overall consideration; it is

³ *State v. General Chemical Corp.*, 559 A.2d 292, 298 (Del. Super. Ct. 1988) (citing *Malloy v. State*, 462 A.2d 1088, 1092 (Del. 1983)); *State v. Banther*, 1998 WL 283476, at *1 (Del. Super. Ct.) (quoting *State v. Gardner*, 1993 WL 393039, at *1 (Del. Super. Ct.)).

⁴ *Owens v. State*, 449 A.2d 200, 201 (Del. 1982); *Banther*, 1998 WL 283476, at *1; *Gardner*, 1993 WL 393039, at *1.

⁵ *Lovett v. State*, 516 A.2d 455, 467 (Del. 1986) (quoting *United States v. Cantu*, 557 F.2d 1173, 1178 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978)); *see also State v. Bittenbender*, 2001 WL 789663, at *1 (Del. Super. Ct.); *State v. Goldsborough*, 2000 WL 706790, at *2 (Del. Super. Ct.); *Banther*, 1998 WL 283476, at *1.

⁶ *Gardner*, 1993 WL 393039, at *1 (quoting *State v. Traenker*, 314 A.2d 202, 208 (Del. Super. Ct. 1973)).

equally critical to recognize that a bill of particulars is not meant to compel the State to disclose its theory of the case or evidentiary information.⁷ Albeit, while the purpose of an indictment is to inform the accused of the charges brought against him, its validity is not governed by technical considerations, but by practical ones.⁸ Further, and foremost, “[a] bill of particulars may not serve as a discovery device and defendants may not use a bill of particulars to circumvent the rules governing discovery.”⁹

That being said, it is within the Court’s sound discretion to grant a motion for a bill of particulars.¹⁰ The trial judge is accorded broad discretion in weighing the interests of both the defendant and the State.¹¹ In particular, the Court performs a critical balancing test and “weighs the competing interests of the defendant who seeks additional information for purposes of preparing a defense versus the State’s interests in protecting witnesses or not ‘commit[ting] itself to a specific version of the facts before it is in a position to do so.’”¹² In *Banther*, this Court sought guidance on this issue from the Third Circuit Court of Appeals’ interpretation of

⁷ *Bittenbender*, 2001 WL 789663, at *1; *Goldsborough*, 2000 WL 706790, at *2 (citing *United States v. Hajecate*, 683 F.2d 894, 898 (5th Cir.1982)).

⁸ *Hajecate*, 683 F.2d at 897 (citing to *United States v. Mouton*, 657 F.2d 736, 739 (5th Cir. 1981) (per curiam)).

⁹ *Goldsborough*, 2000 WL 706790, at *2; *Banther*, 1998 WL 283476, at *1 (citing to *Cooper v. United States*, 282 F.2d 527, 532 (9th Cir. 1960) and to *United States v. Smith*, 776 F.2d 1104, 1111 (3rd Cir. 1985)).

¹⁰ SUPER CT. CRIM. R. 7(f) provides:

The Court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to the conditions as justice requires. *See also Bittenbender*, 2001 WL 789663, at *1; *accord Goldsborough*, 2000 WL 706790, at *2; *Banther*, 1998 WL 283476, at *1.

¹¹ *Banther*, 1998 WL 283476, at *1.

¹² *Goldsborough*, 2000 WL 706790, at *2 (citing *Banther*, 1998 WL 283476, at *1 n.7 (quoting *Rosa*, 891 F.2d at 1066)).

Federal Rule of Criminal Procedure 7(f), identical to Delaware's Superior Court Criminal Rule of Procedure 7(f), as allowing trial judges to:

[E]xercise broad discretion in order to strike a prudent balance between the defendant's legitimate interest in securing information concerning the government's case and numerous countervailing considerations ranging from personal security of witnesses to the unfairness that can result from forcing the government to commit itself to a specific version of the facts before it is in a position to do so.¹³

6) In the case at bar, the Court finds that, technically, Defendant's motion for a bill of particulars is untimely. Despite the Court's January 16, 2004 Order allowing the Defendant to withdraw his guilty plea, Rule 7(f) instructs that a motion for a bill of particulars may be made *before* the arraignment or *within ten days* after, *or as the court may allow at some later time*.¹⁴ Defense counsel is correct in assigning the moniker of "unique procedural posture" to the proceedings of this case. Defendant was arraigned in March of 2002; thus, the ten-day window of opportunity of Rule 7(f) has long since closed. With the advent of Defendant's withdrawal of his guilty plea, and in light of the Court's self-imposed cut-off date of April 30, 2004 for all pre-trial motions, the Court will permit Defendant to present his motion to the Court, and consider it timely for purposes of Rule 7(f). Interestingly, the Court does take note that Defendant's prior counsel did not necessitate the filing of a motion for bill of particulars at that juncture in the

¹³ *Banther*, 1998 WL 283476, at *1 n.7 (citing *United States v. Rosa*, 891 F.2d 1063, 1066 (1989)).

¹⁴ See *supra* note 10 (emphasis added).

proceedings when Defendant was initially arraigned, nor at any time thereafter, up until, and including, the time Defendant entered his guilty plea.

Accordingly, in light of the broad discretionary power imbued in this Court when considering a motion for a bill of particulars, and after weighing the competing interests of the Defendant and the State, the Court finds that, not only does the indictment sufficiently inform the Defendant of the charge against him, but that he has been either provided with, or has had made available to him, a sufficient amount of material information at the behest of the State. The scope of the Defendant's bill of particulars is rather extensive, eliciting specific, particularized, and exacting factual information and detailed events, and is, therefore, prone to the type of information requests normally sought and solicited during discovery. The cut-off date for any remaining outstanding discovery was March 1, 2004. As the discovery cut-off date has elapsed, a bill of particulars may not substitute as a discovery device, and a defendant may not invoke a bill of particulars to circumvent the rules governing discovery.¹⁵ Without specifically addressing each and every one of Defendant's surreptitiously veiled, yet pointed requests for information in his bill of particulars, the Court takes assurance in the fact that the information the Defendant seeks was, and/or is, available through alternate sources.

¹⁵ See *supra* note 9.

Based on the record in this case, and in consideration of the parties' submissions to the Court, the Court is persuaded by the State's contention that the information the Defendant seeks has either already been provided, is unidentifiable, or otherwise not able to be ascertained, not related to the offense, not defined by statute, and/or is integral to the State's stratagem and theory of the case, and therefore, not obligated to be revealed. Without overly pontificating with a detailed examination of each of Defendant's particular inquiries in his motion, the Court remains firmly convinced that notwithstanding the indictment itself, the State has afforded and/or supplied the Defendant with ample information to put the defendant on notice of what he is to defend. Sufficient factual information can be gleaned, not only from the arrest warrant and the affidavit of probable cause, but from the transcripts of the preliminary hearing, from the transcripts of Defendant's earlier admission to the offense and entry of guilty plea, and from the transcripts of the Motion to Withdraw a Guilty Plea, to provide the defendant with the reasonable knowledge and sufficient detail of the *elements or essential facts* of the charge against him, granting the Defendant an adequate opportunity to prepare a defense. This Court has already defined "essential facts," which constitute the offense charged in an information or in an indictment, as those that will "clearly inform the defendant of the precise offense charged, so that he may prepare his

defense and will be protected against later prosecution for the same offense.”¹⁶ Further, “it is enough if the charges as set forth in the indictment substantially follow the statutory language or the equivalent.”¹⁷ Such clarity of information, and furtherance of statutory definition of the offense charged, exist in the case at hand.

For instance, the indictment plainly indicates that there is one distinct charge against the Defendant, that the abuse or neglect was inflicted on Victoria Ferris, that she was 2 ½ years of age at the time, and that the crime occurred “on or about” January 23, 2002. It is well settled that where the date is not an essential element of the crime, the date alleged in the indictment is immaterial if it is proven to the satisfaction of the trier of fact that the offense was committed within the statutory period of limitations prior to the filing of the indictment.¹⁸ The State’s omission of the specific date of the alleged crime is not fatal to the indictment, having neither prejudiced nor impeded the Defendant’s ability to formulate an adequate defense. The same holds true for Defendant’s request for a definition of what “abuse” connotes in the indictment. It is statutorily defined. As to the Defendant’s requests for detailed descriptions of alleged force used, and of the manner, mode and means of neglect alleged by the Defendant, the Court looks to the transcripts derived from the preliminary hearing, guilty plea hearing, and from the withdrawal of guilty plea

¹⁶ *State v. Colasuonno*, 432 A.2d 334, 341 (Del. Super. Ct. 1981).

¹⁷ *State v. DiMaio*, 185 A.2d 269, 271 (Del. Super. Ct. 1962).

hearing, to remedy any lack of description or nature of the alleged acts of abuse and/or neglect. The Court is more than satisfied that the information contained in these transcripts alone, more than substantially provide the information needed by the Defendant, and a bill of particulars is not necessitated in this matter.

Moreover, this Court reminds the Defendant that both the State, and this Court, have extended the utmost consideration to his requests for information. Heeding Defendant's contentions that the confidential Division of Family Services records concerning the victim/victim's family in this case may contain potential *Brady* material, and in response to Defendant's request, the State turned these records over to the Court. In its March 30, 2004 letter addressed to both Defendant's counsel and to the State, the Court granted Defendant's request to make these records available to his counsel for review in the Court's chambers.¹⁹ This Court already maintained in *Banther* that, just as "[n]o bill of particulars is required if a defendant has been provided the requested information sought through alternative sources,"²⁰ a bill of particulars is not to be used to force the State to disclose its evidence or its legal theory.²¹ "Nor may the government be required to

¹⁸ *Bittenbender*, 2001 WL 789663, at *2 (citations omitted).

¹⁹ The Court reviewed, *in camera*, the Division of Family Services records concerning the family involved in this case. The Court determined that there did not appear to be any *Brady* materials in those records. However, since the Court does not know the theory of Defendant's defense in his case, the Court reasoned that it would make these records available for the benefit of the Defendant's defense.

²⁰ *Banther*, 1998 WL 283476, at *1 n.8 (citing *United States v. Laughlin*, 768 F.Supp. 957, 967 (N.D.N.Y. 1991)); see also *United States v. Leonard*, 817 F.Supp. 286, 301 (E.D.N.Y. 1992).

²¹ *Banther*, 1998 WL 283476, at *1 n.10 (citing *United State v. Weinberg*, 656 F.Supp. 1020, 1029 (E.D.N.Y. 1987)).

describe the precise manner in which the crime . . . is alleged to have been committed.”²²

In the end, “[t]he ultimate test of the appropriateness of a bill of particulars is ‘whether the information is necessary, not whether it is helpful to the defendant.’”²³ The Court cannot discern anything in the present case that necessitates a further disclosure of information or requires any greater specificity that would suggest that, without such, the Defendant’s ability to prepare his case will be impaired or that his defense will be prejudiced. The total extent of the Court’s determination has necessarily focused upon whether: 1) the Defendant is sufficiently informed of the nature of the charges being brought against him; 2) avoidance of surprise at trial; and 3) to protect against double jeopardy because of an inadequately described offense.²⁴ Therefore, Defendant’s motion must be denied for all the aforementioned reasons. In essence, a bill of particulars is the appropriate vehicle to be used to fill in the informational gap between the facts disclosed by the indictment and the “aggregation of facts,” which will allow the defendant the opportunity to prepare his defense. A bill of particulars is not fittingly pursued when, as in this case, a defendant invokes it as the “rod and bait”

²² *United States v. Andrews*, 381 F.2d 377, 377-78 (2nd Cir. 1967), *cert. denied*, 390 U.S. 960 (1968).

²³ *United States v. Ramirez*, 602 F.Supp. 783, 793 (S.D.N.Y. 1985) (quoting *United States v. Leighton*, 265 F.Supp. 27, 35 (S.D.N.Y. 1967), *aff’d*, 386 F.2d 822 (2nd Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968)).

²⁴ See *supra* notes 1-3, 5; see also *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Shorer*, 555 F.Supp. 346, 349 (S.D.N.Y. 1983).

to be cast on an “informational fishing expedition” in lieu of proper discovery techniques.

7) To the extent that Defendant’s claim, asserted in his reply to the State’s opposition to his motion, that pursuant to Superior Court Criminal Rule of Procedure 16(a)(1)(E), the State has failed to supply, during discovery, the substance of the medical expert opinion(s) of any medical expert(s) it intends to call at trial opining as to whether Defendant’s conduct was abuse, abuse and neglect, or neglect, with respect to causing the death of Victoria Ferris, is well-founded in fact, the Court orders the State to disclose any such medical expert opinion(s) to defense counsel.

For the foregoing reason, Defendant’s Motion In Limine for Bill of Particulars, pursuant to Superior Court Criminal Rule 7(f), is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Jennifer-Kate Aaronson, Esquire
Donald R. Roberts, Esquire
Maria T. Knoll, Esquire
Prothonotary