

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK TINGLE,	§	No. 419, 2002
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
STATE OF DELAWARE,	§	Cr.A. I.D. No. 0111006860
	§	
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: December 10, 2002  
Decided: January 17, 2003

Before **VEASEY**, Chief Justice, **WALSH** and **BERGER**, Justices.

**ORDER**

This 17<sup>th</sup> day of January 2003, upon consideration of the briefs of the parties it appears to the Court that:

(1) Appellant, Mark Tingle, appeals from his conviction of 11 of 29 criminal charges related to an incident on November 9, 2001. Each of the 11 counts was based on the charge of Possession of a Firearm During the Commission of a Felony. Tingle's sole contention on appeal is that the Superior Court erred by permitting the State to amend its indictment, after the close of its case, by adding the felony count to which each of the 11 charges corresponded.

(2) On November 9, 2001, a group of people gathered in a garage behind Valerie Harmon's residence. Suddenly two men holding guns entered the garage and instructed everyone to get down on the ground. The older of the two men gave the orders and searched through the people's pockets, taking their money and personal items. The younger of the men stood back and mostly observed unless the older man asked him for help.

(3) Back at Valerie Harmon's home, a third man burst in armed with a gun. He instructed everyone present to get down on the floor and empty their pockets. He took money from them and then told them to get up and walk out to the garage. They were taken to the garage and told to lie face down on the ground with the others.

(4) After the two men inside the garage finished taking everyone's belongings, the older man asked for Kenneth Spady. Spady stood up and the men began to take him outside of the garage when a vehicle drove up. The two men went outside, took money from the driver of the car, and led him to the garage where he was also told to lay on the ground.

(5) Afterwards another vehicle drove up to the home. A passenger got out of the car and went around to the house. There she was taken by one of the men and told to go into the garage. Another of the men then went over to the vehicle and told the driver not to move. The driver thought the man was joking. The man then shot

the driver in his leg. About 15-20 minutes after this shooting the two men from the garage left and never returned.

(6) The police arrived at the Harmon residence and were given descriptions of the suspects. Not far from the residence the police located two males out walking who matched the description of the suspects. The police arrested the two men, one of whom was the appellant, Mark Tingle. The officers then searched Tingle and found \$373 and a knife, later identified as belonging to Spady. The following day, Tingle led police to the location of two of the weapons.

(7) The State indicted Tingle on 29 different charges.<sup>1</sup> Among these charges were 12 counts of Possession of a Firearm During the Commission of a Felony.<sup>2</sup> In the original indictment only the first count of possession specified the felony charge it related to. The remaining 11 counts did not list any corresponding felony.

(8) At the close of the State's case, Tingle made a motion for judgment of acquittal alleging that all of the Possession of a Firearm During the Commission of a Felony charges, except the first, should be dismissed because they did not relate to any specific felony in the indictment. The trial court denied the motion and instead

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<sup>1</sup>The original indictment contained 34 counts. Prior to the start of trial, the State requested removal of 5 of the counts and renumbered the remaining counts as necessary. The 29 counts consisted of 12 counts of Possession of a Firearm During the Commission of a Felony, 10 counts of Robbery in the First Degree, 3 counts of Kidnapping in the Second Degree, 2 counts of Aggravated Menacing, 1 count of Burglary in the First Degree, and 1 count of Conspiracy in the Second Degree.

<sup>2</sup>11 *Del. C.* § 1447(a).

permitted the State to amend the indictment. Subsequently the State changed the indictment so that the 11 counts of possession all related to a specific felony in the indictment.

(9) At trial, Tingle's defense was that one of his co-felons, Alvin Drummond, forced him to participate in the robbery. Tingle claimed Drummond gave him an unloaded gun with which to commit the robbery. He also claimed that he told Drummond he refused to participate in the robbery but that Drummond placed a gun to his head. Tingle then went along with the plan because he knew Drummond was capable of hurting him. At trial Tingle requested the court instruct the jury on the defense of duress.

(10) The jury did not accept Tingle's defense and on June 4, 2002, after a six day trial, convicted Tingle of all 29 counts, including the 11 amended counts. The court sentenced Tingle on July 12, 2002. Tingle now appeals claiming that the Superior Court erred by permitting the State to amend the indictment after the close of its case.

(11) We review this issue to determine whether the trial court abused its discretion by permitting the State to amend the indictment.<sup>3</sup> An abuse of discretion occurs where the trial court's ruling is unreasonable or capricious.<sup>4</sup>

(12) Delaware Superior Court Criminal Rule 7(e) permits the court to amend an indictment any time before verdict or finding if no additional or different offense is charged and if the defendant's rights are not prejudiced.<sup>5</sup> In interpreting this Rule, this Court has held that a request to amend an indictment requires the judge to determine, "not only whether the proposed amendment compromises an individual's right to a probable cause determination by a grand jury, but also whether the amendment would create prejudice to the defendant incompatible with our conception of due process."<sup>6</sup> Thus an amendment to an indictment must provide the defendant with two protections: (1) notice of the charges against him so that he has an opportunity to prepare an adequate defense, and (2) prevention from twice being placed in jeopardy for the same offense.<sup>7</sup> Tingle argues the amendment failed to notify him of the charges in enough time to prepare an adequate defense.

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<sup>3</sup>*Coffield v. State*, 794 A.2d 588, 590 (Del. 2002).

<sup>4</sup>*Zimmerman v. State*, 628 A.2d 62, 65 (Del. 1993).

<sup>5</sup>DEL. SUPER. CT. CRIM. R. 7(e).

<sup>6</sup>*Coffield*, 794 A.2d at 591.

<sup>7</sup>*Keller v. State*, 425 A.2d 152, 155 (Del. 1981).

(13) An indictment that only amends a mistake of form and does not result in substantial harm or prejudice to the defendant is permissible.<sup>8</sup> A court cannot authorize an amendment that alters the substance of the grand jury charge.<sup>9</sup> “The principal test for determining the appropriateness of an amendment . . . must focus on the extent to which the amendment substantively changes the material elements of the crime alleged in the original indictment.”<sup>10</sup>

(14) In *Coffield v. State*, the appellant made a very similar claim as the one Tingle now asserts. Coffield argued that the trial court erred by allowing the State to amend its indictment with respect to three counts of Possession of a Firearm During the Commission of a Felony.<sup>11</sup> The State failed to specify in the indictment which felony the possession counts corresponded to, however, the State had charged only one possession count for each robbery count. The amendment the State requested sought to correct the flaw in the indictment.<sup>12</sup> The trial court granted the amendment after the close of the State’s case.<sup>13</sup>

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<sup>8</sup>*Coffield*, 794 A.2d at 591.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 592.

<sup>11</sup>*Id.* at 590.

<sup>12</sup>*Id.* at 594.

<sup>13</sup>*Id.* at 590.

(15) In reviewing the actions of the trial court, this Court found that no error occurred in permitting the State to amend the indictment. This Court ruled that the amendments only clarified the charges by assigning each count to a robbery. The State did not allege a new or different behavior. Furthermore, the Court found Coffield was aware he was being charged with Possession of a Firearm during each alleged robbery.<sup>14</sup>

(16) The reasoning of the Court in *Coffield* applies here. Tingle, by the original indictment, received adequate notice that he was being charged with Possession of a Firearm during each alleged felony.<sup>15</sup> The amendments only served to clarify the charges by assigning each count to its corresponding felony. The amendments did not charge separate offenses or create new ones.

(17) The State is correct in its assertion that if Tingle was truly confused by the indictment he could have made a pretrial motion based on the defects in the indictment.<sup>16</sup> Moreover, Tingle does not argue that his defense would have differed had the original indictment been accurate. Tingle was not prejudiced by the indictment and it afforded him adequate time to prepare his defense.

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<sup>14</sup>*Id.* at 594.

<sup>15</sup>The felonies charged were either First Degree Robbery or Aggravated Menacing.

<sup>16</sup>DEL. SUPER. CT. CRIM. R. 12(b)(2).

(18) Accordingly, the trial court did not err by permitting the State to amend the indictment, subsequent to the close of the State's case, to specify the Possession of a Firearm During the Commission of a Felony counts by assigning each to a corresponding felony.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ E. Norman Veasey  
Chief Justice