NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellant v. JULIUS T. WILLIAMS, JR., Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 116 MDA 2012

Appeal from the Judgment of Sentence entered December 14, 2011
In the Court of Common Pleas of Lebanon County
Criminal Division at No(s): CP-38-CR-0000796-2011

BEFORE: BOWES, GANTMAN and OLSON, JJ.

MEMORANDUM BY OLSON, J.: **FILED MAY 07, 2013**

Appellant, the Commonwealth of Pennsylvania, appeals from the judgment of sentence entered December 14, 2011, sentencing Appellee, Julius T. Williams, Jr., to, *inter alia*, 11 and one-half months to two years' incarceration, for convictions of burglary,[1] simple assault,[2] and terroristic threats.[3] For the following reasons, we affirm.

The trial court summarized the relevant factual and procedural background of this matter as follows.

> The charges [in this matter] emanated from a domestic dispute when [Appellee's] wife was visiting the home of another man

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[1] 18 Pa.C.S.A. § 3502.

[2] 18 Pa.C.S.A. § 2701.

[3] 18 Pa.C.S.A. § 2706.

which was located at [] Street in the City of Lebanon. When his wife opened the door to leave the residence, [Appellee] was waiting outside, pushed past her into the residence and pointed a handgun at the man, threatening to kill him.

…

In [a] [c]riminal [c]omplaint filed December 28, 2010, [Appellee] was originally charged with **burglary, felony of the first degree**. A preliminary hearing was held on June 2, 2011 and the case was bound over for [c]ourt. The Commonwealth filed the original information on June 23, 2011, charging [Appellee] with **burglary of the second degree**, aggravated assault, terroristic threats and two counts of reckless endangerment. On September 29, 2011, the Commonwealth filed an [a]mended [i]nformation which added a count of simple assault, and contained only one count of reckless endangerment; however the charges of **burglary of the second degree**, aggravated assault, [and] terroristic threats remained. On October 5, 2011, a [s]econd [a]mended [c]omplaint was filed in which [Appellee] was yet again charged with **second-degree burglary**, aggravated assault, terroristic threats, simple assault and two counts of reckless endangerment. When the case went to trial on October 7, 2011, the Commonwealth orally amended the [s]econd [a]mended [i]nformation immediately prior thereto with regard to other charges, but proceeded with the charge of **second-degree burglary**.

Trial proceeded and the [trial court] gave the standard charge to the jury on the charge of burglary:

> …In order to find [Appellee] guilty of [b]urglary, you must be satisfied that the following five elements have been proved beyond a reasonable doubt. First, that [Appellee] entered [] Street in the City of Lebanon, the home of Gregory Jones. Second, that [Appellee] entered the residence with the intent – that address with the intent to commit a crime inside. Third, that [] Street was not open to the public at the time of entry. Fourth, that [Appellee] did not have permission or lawful entry to enter that location. And fifth, that [] Street was an occupied structure. For purposes of this last element, an occupied structure is any structure or place adopted for overnight accommodation of persons.

> (N.T. 10/7/11 at 198-199). [The trial court's charge] did not include a request that the jury make a finding as to whether any person was present inside the structure at the time of the offense as would be required for conviction of a first-degree felony.
>
> Once the jury's verdict was returned on October 7, 2011, the Commonwealth immediately put on the record its intention to seek the mandatory minimum sentence for crimes of violence committed with a firearm, pursuant to 42 Pa.C.S.A. § 9721(a).[]

Trial Court Opinion, 6/14/2012, at 1-4 (emphasis added).

The trial court scheduled Appellee's sentencing hearing for December 14, 2011. On October 10, 2011, however, the Commonwealth filed a motion to amend Appellee's criminal information, seeking to change the charge of burglary from a felony of the second degree to a felony of the first degree. Appellee opposed the Commonwealth's motion, and on December 2, 2011, the trial court issued an order denying the motion. The trial court sentenced Appellee on December 14, 2011. This appeal followed.

The Commonwealth raises the following issue for appeal:

> Whether the trial court erred when it denied the Commonwealth's motion to amend its criminal information, and correct a typographical error on count one - burglary, prior to the date the court sentenced Appellee.

Commonwealth's Brief at 4.

Our Supreme Court has held that "[t]he decision of whether to allow the Commonwealth to amend the [i]nformation[] is a matter within the discretion of the trial court, and only an abuse of discretion will constitute reversible error." ***Commonwealth v. Small***, 741 A.2d 666, 681 (Pa. 1999). "An abuse of discretion exists when the trial court has rendered a

judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116, 1123 (Pa. 2000).

Pennsylvania Rule of Criminal Procedure 564 addresses the amendment of criminal informations. Pursuant to Rule 564:

> 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 necessary in the interests of justice.

Pa.R.Crim.P. 564.

As our Court has held, "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***, 897 A.2d 1218, 1221 (Pa. Super. 2006). The rule is applied "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 rule[]." ***Commonwealth v. Roser***, 914 A.2d 447, 453 (Pa. Super. 2006), *quoting* ***Commonwealth v. Grekis***, 601 A.2d 1284, 1288 (Pa. Super. 1992).

To further these underlying principles, we have articulated the following test for assessing the propriety of amendments to an 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.

Grekis, 601 A.2d at 1289.

Moreover, we have listed a number of factors that a court must consider in determining whether a defendant was prejudiced by an amendment. These factors include:

> (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, 897 A.2d at 1223.

Applying the above factors, the Commonwealth argues that the trial court abused its discretion in denying the requested amendment to Appellee's information. According to the Commonwealth, the amendment: did not alter the factual scenario supporting the charges; did not alter the description of the charged offense; did not, and would not have, changed Appellee's defense strategy at trial; and did not, and would not have, precluded Appellee from properly preparing for trial. Commonwealth's Brief

at 21-23. Furthermore, the Commonwealth argues that the timing of and late notice of the proposed amendment was not an issue in this matter because Appellee's original information correctly charged him with burglary as a first-degree felony. ***Id.*** at 23. Indeed, according to the Commonwealth, changing the original information and lessening the charge from burglary in the first degree to burglary in the second degree was nothing more than a clerical error, overlooked by all involved. ***Id.*** Similarly, the Commonwealth argues that Appellee would not have been prejudiced by the amendment, as he was on notice of the charge. ***Id.***

In support of its claim, the Commonwealth compares this case to ***Commonwealth v. Mentzler***, 18 A.3d 1200 (Pa. Super. 2011). In ***Mentzler***, a jury convicted the defendant of driving under the influence ("DUI"), as an ungraded misdemeanor. ***Id.*** at 1201. Prior to sentencing, however, the probation department learned that the defendant had a previous DUI conviction in another state. ***Id.*** Based upon that previous conviction, at the time of sentencing, the Commonwealth moved to amend the defendant's criminal information, to include the same charge, but to grade it as a misdemeanor of the first degree. ***Id.*** The trial court granted the amendment, and the defendant appealed. ***Id.*** at 1202.

On appeal, our Court found no abuse of discretion in the trial court's order permitting the amended information. ***Id.*** at 1203. Applying Rule 564 and precedent such as ***Sinclair***, our Court noted that sentencing was not too

late in the prosecution process to amend an information, and that "the mere possibility amendment of information may result in a more severe penalty … is not, of itself, prejudice." ***Id.***, *quoting* ***Commonwealth v. Picchianti***, 600 A.2d 597, 599 (Pa. Super. 1991). The panel then reviewed the certified record and determined that, based upon the record, it was "evident that the trial court fully considered the mandates of [Rule 564] and its accompanying case law prior to granting the Commonwealth's motion to amend the criminal information." ***Id.*** Our Court adopted the trial court's reasoning and held that the trial court did not abuse its discretion in granting the amendment. ***Id.***

Relying upon ***Mentzler***, the Commonwealth argues that the late timing of its requested amendment and the fact that the amendment would result in a harsher sentence should not, in itself, prohibit the amendment. ***See*** Commonwealth's Brief at 23. Consequently, the Commonwealth asks that we vacate Appellee's judgment of sentence, reverse the order denying the Commonwealth's motion to amend the information, and remand the matter for amendment of the information and re-sentencing.

The trial court in this matter acknowledged our Court's holding in ***Mentzler***, particularly with regard to the fact that an information may be amended just prior to sentencing, and that an amendment may increase the potential sentence without resulting in *per se* prejudice. Trial Court Opinion, 6/14/2012, at 7-9. The trial court, however, distinguished this matter from

that holding, stressing that in ***Mentzler*** the defendant was aware of the existence of his prior DUI conviction throughout the Pennsylvania proceedings, and even went so far as to fraudulently conceal its existence. ***Id.*** at 8. Consequently, the trial court explained that in ***Mentzler*** the defendant suffered no surprise or prejudice because of the amendment. ***Id.*** at 8-9.

In this matter, however, the trial court examined the record and reasoned that Appellee would suffer undue prejudice were the court to allow the Commonwealth to amend the information to elevate the burglary charge to first-degree burglary. Significant to the trial court's analysis was the fact that, unlike in ***Mentzler***, the mistake in this case was not the result of the Appellee's deceit, but a result of the Commonwealth's carelessness. Indeed, the Commonwealth amended Appellee's information on three different occasions, but each time failed to recognize its mistake in the way in which Appellee's burglary charge was graded. The trial court then went on to consider the factors set forth in ***Sinclair***, and determined that, in this matter, the timing of the amendment, together with the Appellee's and the court's reliance on the provisions of the information, rendered it too prejudicial to Appellee to approve the requested amendment. ***Id.*** at 14.

We find no abuse of discretion in the trial court's analysis and, as the trial court has accurately and adequately addressed the issues raised by the Commonwealth on appeal, we adopt the trial court's rationale as our own.

See id. at 4-14. Indeed, the record supports the trial court's reasoning and its factual basis for concluding that amending the information would have prejudiced Appellee, particularly so late in the prosecution process. Because there is ample support in the record for the trial court's order, we conclude that the trial court did not abuse its discretion in denying the Commonwealth's motion to amend Appellee's criminal information.

We instruct the parties to attach a copy of the trial court's June 14, 2012 opinion to all future filings regarding this appeal. Prior to attaching that opinion, however, we instruct the parties to redact any reference to the street name and number where the incident in this matter took place.

Judgment of sentence affirmed.

Judgment Entered.

Mary A. Hoffman

Deputy Prothonotary

Date: 5/7/2013

J 402032/13

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY
PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO. CP-38-CR-796-2011
	:	
v.	:	
	:	
JULIUS T. WILLIAMS	:	

APPEARANCES:

PIER NOLL HESS, ESQUIRE
Assistant District Attorney

FOR COMMONWEALTH OF PENNSYLVANIA

KEVIN M. DUGAN, ESQUIRE
Feather and Feather, P.C.

FOR JULIUS T. WILLIAMS

Opinion, Tylwalk, P.J., June 14, 2012

Defendant was convicted of Burglary (F2), Simple Assault (M2) and Terroristic Threats (M1) after a jury trial was held on October 7, 2011. The charges emanated from a domestic dispute when Defendant's wife was visiting the home of another man which was located at 2208 West Lehman Street in the City of Lebanon. When his wife opened the door to leave the residence, Defendant was waiting outside, pushed past her into the residence and pointed a handgun at the man, threatening to kill him.

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Sentencing was scheduled for December 14, 2011. On October 10, 2011, the Commonwealth filed a Motion to Amend Criminal Information seeking to change the grade of the burglary charge to a felony of the first degree, claiming that the designation of the grade of that charge had been a typographical error. A Rule was issued and Defendant filed a Response, arguing that a post-sentence amendment was untimely and prejudicial. We denied the Motion and sentenced Defendant, in part, on the burglary of the second degree charge on December 14, 2011. The Commonwealth filed an appeal to the Superior Court of Pennsylvania and we submit this Opinion in support of our decision to deny the Motion to Amend.

In the Criminal Complaint filed December 28, 2010, Defendant was originally charged with burglary, felony of the first degree. A preliminary hearing was held on June 2, 2011 and the case was bound over for Court. The Commonwealth filed the original Information on June 23, 2011, charging Defendant with burglary of the second degree, aggravated assault, terroristic threats and two counts of reckless endangerment. On September 29, 2011, the Commonwealth filed an Amended Information which added a count of simple assault, and contained only one count for reckless endangerment; however, the charges of burglary of the second degree, aggravated assault, terroristic threats

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remained. On October 5, 2011, a Second Amended Complaint was filed in which Defendant was yet again charged with second –degree burglary, aggravated assault, terroristic threats, simple assault and two counts of reckless endangerment. When the case went to trial on October 7, 2011, the Commonwealth orally amended the Second Amended Information immediately prior thereto with regard to other charges, but proceeded with the charge of second-degree burglary.

Trial proceeded and the standard charge was given to the jury on the charge of burglary:

> ... In order to find Mr. Williams guilty of Burglary, you must be satisfied that the following five elements have been proven beyond a reasonable doubt. First, that Mr. Williams entered 2208 West Lehman Street in the City of Lebanon, the home of Gregory Jones. Second, that Mr. Williams entered the residence with the intent – that address with the intent to commit a crime inside. Third, that 2208 West Lehman Street was not open to the public at the time of entry. Fourth, that Mr. Williams did not have permission or lawful entry to enter that location. And fifth, that 2208 West Lehman Street was an occupied structure. For purposes of this last element, an occupied structure is any structure or place adopted for overnight accommodation of persons.

(N.T. 10/7/11 at 198 – 199). As we relied on the charge as set forth in the Information, our charge did not include a request that the jury make a finding as

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to whether any person was present inside the structure at the time of the offense as would be required for conviction of a first-degree burglary.

Once the jury's verdict was returned on October 7, 2011, the Commonwealth immediately put on the record its intention to seek the mandatory minimum sentence for crimes of violence committed with a firearm, pursuant to 42 Pa.C.S.A. §9712(a).[1] At no time prior to that, did the Defendant have any indication that the Commonwealth was contemplating an amendment to the grade of the burglary charge. Defendant was also provided written notice of the Commonwealth's intention. The Commonwealth filed the Motion to Amend to change the burglary to a felony of the first degree on October 10, 2011.

The Crimes Code, at 18 Pa.C.S.A. §3502 provides, in part, the following with regard to a charge of burglary:

> **§ 3502. Burglary**
>
> **(a) Offense defined.**--A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licenses or privileged to enter.
>
> **(c) Grading.—**

[1] It was the Commonwealth's position that Defendant committed burglary of a structure adapted for overnight accommodation in which at the time of the offense any person is present, which is defined as a crime of violence in 42 Pa.C.S.A. §9714(g).

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(1) Except as provided in paragraph (2), burglary is a felony of the first degree.

(2) If the building, structure or portion entered is not adapted for overnight accommodation and if no individual is present at the time of entry, burglary is a felony of the second degree.

18 Pa.C.S.A. §3502(a)(c)(1)(2).

A criminal information must provide fair notice of every crime of which a criminal defendant is accused in order to allow the defendant to prepare all available defenses. ***Commonwealth v. Sims,*** 919 A.2d 931 (Pa. 2007). A criminal information must set forth "the official or customary citation of the statute and section thereof, or other provision of law that the defendant is alleged therein to have violated; but the omission of or error in such citation shall not affect the validity or sufficiency of the information." Pa.R.Crim.P. 560(C). Rule 560 also provides that "[i]n all court cases tried on an information, the issues at trial shall be defined by such information." Pa.R.Crim.P. 560(D). "Upon the filing of the information, any charge not listed on the information shall be deemed withdrawn by the attorney for the Commonwealth." Pa.R.Crim.P. 561(B).

With regard to amendment of a criminal information, Pa.R.Crim.P. 564 provides as follows:

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

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person or any property, or the date charges, 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 supplied).

The purpose of this rule 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. Hoke,*** 928 A.2d 300, 303 (Pa. Super. 2007), appeal granted in part 946 A.2d 645 (Pa. 2008), vacated on other grounds, 962 A.2d 664 (Pa. 2009). The test to be applied is:

> 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.

Id. at 304.

This rule contemplates amendments of formal defects, and not substantive matters. ***Commonwealth v. Herstine,*** 399 A.2d 1118 (Pa. Super. 1979). A substantive amendment is one that changes the nature or grade of the

offense charged. ***Commonwealth v. Sinclair,*** 897 A.2d 1218, 1223, n.8 (Pa. Super. 2006); ***Commonwealth v. Gray,*** 478 A.2d 822 (Pa. Super. 1984). However, the mere possibility that amendment of an information may result in a more severe penalty due to the additional charge is not, of itself, prejudice. ***Commonwealth v. Sinclair,*** *supra.* In determining whether a defendant is prejudiced by the amendment of an information, the Court must consider the following factors: (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.. ***Id.*** at 1223.

It is certainly not unprecedented for a court to permit amendment after a trial has begun. *See,* ***Commonwealth v. Hoke,*** *supra.* (amendment permitted at close of testimony, prior to verdict); ***Commonwealth v. Roser,*** 914 A.2d 447 (Pa. Super. 2006), appeal denied 927 A.2d 624 (Pa. 2007)(amendment of information permitted just prior to closing argument). We also recognize that an amendment to an information after conviction and prior to sentencing was approved by the

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Superior Court in **Commonwealth v. Mentzer,** 18 A.3d 1200 (Pa. Super. 2011). In that case, after the defendant was convicted of DUI, general impairment, first offense, a second-degree misdemeanor, the Commonwealth learned that he actually had a prior DUI conviction in Maryland, a fact which only surfaced when the presentencing report was being prepared. The defendant, of course, had been aware of the Maryland DUI conviction, had failed to disclose it throughout the proceedings, and had even verified in his application for ARD that he had no record for DUI or an equivalent offense. At sentencing, the trial court granted the Commonwealth's motion to amend the information to charge the defendant with DUI, general impairment, second offense, a first-degree misdemeanor. In addition to the increase in grading, the amendment increased the maximum sentence imposed. In holding that "the amendment was proper in light of the totality of the circumstances discovered prior to sentencing," 18 A.3d at 1204, the Superior Court adopted the lower court's opinion and analysis which stated, in part, as follows:

> In this case, the Court permitted the Commonwealth to amend the information to allege Defendant's prior DUI in Maryland, a prior criminal act of which Defendant was already well aware and which was of record. Although the amendment increased the grade of the offense from an ungraded misdemeanor to a first degree misdemeanor, Defendant was not prejudiced for the following reasons. First, the charges in the original information and in the amended information both came from the same

factual setting, namely Defendant's refusal to submit to blood testing after police found him asleep in his Ford Focus parked in the middle of the road. Second, Defendant's prior DUI constituted the only new fact alleged,[FN3] and Defendant alone was aware of his prior DUI. Third, the fact of the prior DUI was almost certainly not developed during a preliminary hearing, but Defendant was very much aware of it throughout the pendency of his case and it was of record at the time of the preliminary hearing and at trial. Fourth, the description of the charges after amendment remains the same as before, namely "driving under influence of alcohol ... general impairment." 75 Pa.C.S.A. § 3802(a)(1). Fifth, no change in defense strategy was necessitated by the amendment, because a court may find a prior conviction from the record without any other proof or defense whatsoever. *Commonwealth v. Aponte*, 579 Pa. 246, 855 A.2d 800, 812 (2004). Sixth, although the Commonwealth sought amendment after trial and before sentencing, the Commonwealth's request allowed Defendant ample notice and preparation because the Court continued sentencing for one month to allow Defendant to address the amendment and Defendant was aware of his prior DUI long before sentencing. Furthermore, Defendant's prior DUI was irrelevant at trial and had significance only at sentencing. Thus, the amendment was proper, and Defendant suffered no prejudice. Defendant's post-sentence motion to be re-sentenced will be denied.

Commonwealth v. Mentzer, *supra.* at 1205, quoting ***Commonwealth v. Mentzer,*** No. 160-2008, (Fulton Cnty. C.C.P.), Opinion June 23, 2010, Walsh, J.

Here, the Commonwealth argues that both the first and second degree burglary charges arose from the same factual scenario and that Defendant knew that he was being charged with a first degree felony since December 28, 2011 when the criminal complaint was filed against him. It contends the Motion to Amend was a request to correct a mere typographical error, a formal defect in the

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Second Amended Information, and that the change would not have necessitated any shift in defense strategies had it been done earlier.

In determining whether the proposed amendment would have prejudiced Defendant, we note that the same factual scenario presented by the testimony at trial would have supported charges of both a burglary of the first degree and a burglary of the second degree. However, based on this factual scenario and the offense listed in the Information, the jury was instructed on a burglary of the second degree, rather than a burglary of the first degree. The proposed amendment would not add new facts previously unknown to Defendant; however, the amendment would have made the allegation that a person was inside the residence at the time of the offense relevant to the jury's verdict. The fact of the import of this issue was unknown to Defendant prior to this request to amend, for as previously noted, the jury was never asked to make any such finding in the instructions. Furthermore, although the factual scenario of the incident was developed during a preliminary hearing, the description of the charges would have changed the grade of the offense of burglary.

The next consideration requires us to speculate somewhat as to how the defense would have been otherwise conducted had defense counsel realized that Defendant could be facing the mandatory minimum of Section 9712. We cannot

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say for certain that, had the amendment been sought prior to the jury deliberations, the defense would not have sought some type of relief from the Court, pursued a different line of questioning on cross-examination or employed some other type of trial strategy.[2]

It is the last factor of this analysis which most troubles us in light of the particular facts of this case – the timing of the motion to amend and the numerous opportunities to correct this error prior to conviction which were afforded the Commonwealth. We recognize the liberal view toward amendment of informations and that amendments are often permitted on the day of trial, as was the case in the third amendment here. At that point in time, there is still at least something which can be attempted in order to allow the defendant to respond to the amendment. However, the present request for amendment was sought *after* the conclusion of the trial and *after* the jury had rendered its verdict and was advanced for purposes of sentencing.

This case is vastly different from ***Mentzer.*** In ***Mentzer,*** the defendant was well aware of and concealed his prior conviction prior to trial and the

[2] We recognize that Commonwealth is not required to give notice of its intention to seek mandatory minimum sentences pursuant to 42 Pa.C.S.A. § 9712 prior to conviction, that the specific provisions of that statute are not considered elements of the crime and that the court is to make the findings necessary for the application of this statute based on a preponderance of the evidence. See, 42 Pa.C.S.A. §9712(b); ***Commonwealth v. Samuel,*** 961 A.2d 57 (Pa. 2008).

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Commonwealth had no knowledge of that fact until the presentencing report was being prepared. There was no deception, concealment of any relevant facts or fault on the part of Defendant here.

Here, the Commonwealth was well aware of all the facts of this case prior to trial and had every opportunity to make necessary corrections and proceed to trial with an Information setting forth the grade of the charges it wished to pursue. Defendant was not required to question or call attention to the Commonwealth's failure to correct what it terms a typographical error and he had every right to know the charges for which he was being tried prior to the jury rendering its verdict. In fact, after that number of Amended Informations being filed without any change to the grade of the burglary charge, it was within reason for Defendant to conclude that the Commonwealth had abandoned its pursuit of a first-degree felony conviction pursuant to Pa.R.Crim.P. 561(B), perhaps due to the facts of the case. As the Commonwealth pointed out during sentencing during a discussion regarding merger of offenses, this was not strictly a burglary case, but rather arose from a domestic situation:

> ... [T]here was ample testimony during this trial that Mr. Williams had never met Greg Jones before, didn't really know who was in that house; and, in fact, he was chasing his wife. I would argue ... that whatever he was intending when he entered that home really had nothing to do with Greg Jones. At the time he didn't know who he was. He didn't know that was

his house or anything like that, so I would argue ... either Simple Assault or Terroristic Threats should not merge with Burglary because that was not specific what this Defendant intended to commit when he entered the residence.

(N.T., 12/14/11, 9 – 10)

Furthermore, despite the holding in ***Mentzer,*** we do not think the timing of this situation is generally contemplated by Rule 564 in the absence of unusual circumstances such as those present in that case. It is clear that Rule 564 envisions some type of relief being available to a defendant when a motion to amend is granted. We question what we could have done by that stage of the proceedings. When this amendment was sought, no suitable relief was available to Defendant here.

The amendment sought would have been a substantive matter, rather than a formal defect, in that the grade of the offense differed from that which was charged prior to trial. The jury verdict was based on findings of fact sufficient to support a conviction of a second-degree burglary, but not a first-degree burglary. Had we allowed the fourth amendment in this case, Defendant would have been sentenced on a charge in which the grade differed from that for which the jury returned a conviction. This amendment would have severely prejudiced

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Defendant as he would have been tried and convicted on one charge and sentenced on a different charge.

Notwithstanding the liberal attitude of the law toward the amendment of informations, we still believe that a Criminal Information should mean what it says and that a criminal defendant is entitled to rely on what is set forth in the Information. It is encumbent upon the Commonwealth to ensure that the Informations filed against criminal defendants are accurate and clearly set forth the charges upon which a defendant will be tried. Here, the Commonwealth had three opportunities to correct its mistake, yet failed to do so prior to the conclusion of the trial and the jury returning a verdict.

For these reasons, we conclude that the timing of the amendment, together with Defendant's and the Court's reliance on the provisions of the Information after the previous amendments and the possibility of a change in defense strategy which might have been pursued rendered it prejudicial to Defendant. We do not feel that our decision places form above substance. After our liberal allowance of the Commonwealth's prior amendments, and its failure to provide a document upon which the defense could rely, we believe that the denial of the Commonwealth's Motion to Amend was justified in light of the totality of the circumstances.

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