NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
TYSON M. JOYNER,	:	
Appellee	:	No. 325 MDA 2012

Appeal from the Order Entered January 17, 2012
In the Court of Common Pleas of Lackawanna County
Criminal Division No(s).: CP-35-CR-0003252-2010

BEFORE: OLSON, OTT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED MAY 24, 2013**

The Commonwealth appeals from the order entered in the Lackawanna County Court of Common Pleas granting the petition for a writ of *habeas corpus* and dismissing all charges against Appellee, Tyson M. Joyner. The Commonwealth contends that the court erred by holding double jeopardy applies. As set forth below in further detail, we affirm in part, reverse in part, and remand for further proceedings.

We adopt the facts and procedural history set forth by the trial court's decision:

> On March 8, 2007, Agent Catherine Bianchi of the Pennsylvania State Attorney General's Office initiated an investigation against [Appellee]. Specifically, on March 12, 2007, Agent Bianchi utilized a confidential informant to

* Former Justice specially assigned to the Superior Court.

> arrange a drug transaction via telephone for one ounce of cocaine. The confidential informant introduced Agent Bianchi to . . . Appellee, who sold her one ounce of cocaine for $1,250.00. [The transaction occurred at the informant's residence. N.T. Hr'g, 4/18/11, at 8.] Agent Bianchi testified that a second drug transaction occurred on June 7, 2007 wherein, the confidential informant arranged the drug exchange via telephone. The confidential informant met . . . Appellee at his residence . . . . Agent Bianchi noted that the confidential informant was instructed to buy one ounce of cocaine for $1,250.00, however the lab results showed only 11.1 grams of cocaine mixed with a non-controlled substance. After completing the second transaction, both Agent Bianchi and the confidential informant were able to positively identify . . . Appellee as Tyson Joyner, via a JNET[1] photo. Before Agent Bianchi arranged a third drug transaction [for February 26, 2008], the confidential informant told Agent Bianchi that he had previously observed . . . Appellee cooking, [*i.e.*,] converting cocaine into crack cocaine in front of his girlfriend's five children, one of which was an infant. [As set forth in further detail below, Appellant pleaded guilty to possession with intent to deliver a controlled substance ("PWID"), 35 P.S. § 780-113(a)(30), in December of 2008.]
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> Meanwhile, during the course of her investigation, Agent Bianchi testified that on January 2, 2008, submissions were made in Appellee's case for a statewide investigative grand jury with the expectation of identifying local suppliers, partners, and co-conspirators. Based upon subscriber information, Agent Bianchi discovered individuals from the Philadelphia area as well as Luzerne, Monroe and Wayne County. She noted that it was necessary to utilize the resources of a grand jury given the range of subpoena power over individuals in various

[1] JNET, the Pennsylvania Justice Network, is "the Commonwealth's system of providing immediate justice information to law enforcement agencies [and] is designed to insure accuracy of information and facilitate the dissemination of this information in a timely and electronic manner." ***Commonwealth v. Carr***, 887 A.2d 782, 783 (Pa. Super. 2005).

> locations, who could testify to the drug trafficking of others. Accordingly, on January 8, 2008, the grand jury judge accepted the investigation. On February 21, 2008, Agent Bianchi testified before the grand jury giving an overview of the case. Specifically, Agent Bianchi testified to the two controlled purchases between the confidential informant and . . . Appellee, toll record information relative to . . . Appellee, subscriber information regarding . . . Appellee's cell phone and home number as well as . . . Appellee's criminal history. Agent Bianchi testified that she had prior knowledge of the partnership between Alphonso Dejarnette, Corey McCullough, and . . . Appellee in the cocaine business. Agent Bianchi also appeared before the grand jury and testified several times after February 21, 2008, but was unable to recall exact dates.
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> Subsequently, on February 26, 2008, after Agent Bianchi testified before the grand jury, she arranged a third drug transaction. In the presence of five minor children, the confidential informant exchanged $400.00 for 7 grams of cocaine at . . . Appellee's girlfriend's residence . . . . Based upon the presence of the five minor children, Agent Bianchi testified that even though the case was in the grand jury, the Commonwealth agreed that it would be in the best interest of the children to charge . . . Appellee with one set of delivery charges for the February 26, 2008 drug transaction in order to remove . . . Appellee from the residence. Accordingly, the Commonwealth charged . . . Appellee with one count of Delivery of a Controlled Substance, 35 [P.S.] § 780-113(a)(30); one count of Possession With Intent to Deliver Cocaine, 35 [P.S.] § 780-113(a)(30); and one count of Criminal Use of a Communication Facility, 18 Pa.C.S.A. § 7512 docketed in the Lackawanna County Court of Common Pleas to 08 CR 822. At the time of . . . Appellee's arrest, Agent Bianchi stated that she knew . . . Appellee was under investigation by two statewide grand juries. Moreover, she testified to the February 26, 2008 controlled buy before the grand jury. She noted that the Commonwealth possessed information regarding Appellee's involvement in a large cocaine trafficking ring. However at this juncture, the Commonwealth was unable to charge Appellee with either a conspiracy charge or a corrupt organizations charge.

> In September 2008, . . . Appellee agreed to interview with Agent Bianchi and her supervisor. Shortly after the interview, . . . Appellee was subpoenaed by the Commonwealth to testify before the grand jury. On September 16, 2008, . . . Appellee testified before the grand jury and stated that he began selling cocaine in February 2007 after visiting a friend in Irvington, New Jersey. . . . Appellee testified that he made arrangements with his friend to supply him cocaine. Initially, . . . Appellee was supplied with 7 grams of cocaine because he was beginning to establish his drug business. . . . Appellee testified that he sold cocaine to several individuals in Scranton. . . . Appellee admitted that he made several trips to New York to obtain quantities of crack cocaine and then transported the crack cocaine to Scranton for distribution. . . . Appellee testified that he sold both cocaine and crack cocaine in gram quantities to several customers.
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> . . . Appellee further testified as to local suppliers, partners, and co-conspirators. He noted that he re-established his friendship with co-Defendant, Brent Rafferty in February of 2007. Specifically, . . . Appellee admitted that the one ounce of cocaine he sold to Agent Bianchi on March 12, 2007 originated with Brent Rafferty. He admitted that after he sold Agent Bianchi the cocaine, he met with Brent Rafferty and paid him $850.00, while retaining $350.00 for his profit. . . . Appellee testified that between March and June 2007, he obtained quantities of cocaine and crack cocaine from Brent Rafferty, arranged drug transactions, engaged in telephone communications with Brent Rafferty, and met with Rafferty at his 2132 Pond Avenue residence in Scranton. During that time period, . . . Appellee admitted he sold to co-Defendants Alphonso Dejarnette, Anthony George, Maria Praefke, Daryl Pressley, Darryl Evans.
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> Moreover, . . . Appellee testified that in September 2009, Brent Rafferty's brother Nathaniel Rafferty moved into his former residence . . . . Appellee related that between June and September 2007, Nathaniel Rafferty drove him to New York to obtain cocaine and crack cocaine. As payment for the transportation, . . . Appellee provided Nathaniel Rafferty with one-eighth ounce of

> cocaine on each trip. . . . Appellee related that both Alphonso Dejarnette and Daryl Pressley knew he obtained cocaine and crack cocaine in New York. Furthermore, . . . Appellee testified that his girlfriend, Jennifer Jordan was also aware of his drug trafficking activities, and that she allowed . . . Appellee to sell cocaine and crack cocaine from her residence. Lastly, . . . Appellee acknowledged his close relationship with Corey McCullough and admitted that he would hang out with Corey McCullough and Alphonso Dejarnette at the Providence Barber Shop. He stated: "I would die for Corey McCullough." . . . Appellee denied that Corey McCullough ever supplied him cocaine, denied knowing who Corey McCullough supplied cocaine to, denied observing McCullough supply anyone cocaine, denied McCullough telling him he sold drugs, denied accompanying McCullough on trips to New York, and further denied that he was partners with McCullough in a drug business.
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> At the conclusion of . . . Appellee's testimony, Agent Bianchi testified that she did not have enough information to charge him with additional charges pertaining to corrupt organizations or criminal conspiracy. However, Agent Bianchi testified: "We try and corroborate all the information that we get through the witnesses that testify before the grand jury [. . .] As a matter of fact, with Mr. Joyner I had obtained prison telephone calls, recorded telephone calls [. . .] that I had obtained prior to Mr. Joyner testifying before the grand jury." Agent Bianchi testified that she listened to 32 phone conversations which revealed a drug trafficking relationship between Mr. McCullough and . . . Appellee. She noted: "there was a lot of information that I obtained through the telephone conversations at the prison that revealed [Appellee's] culpability in this drug trafficking ring."
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> After the first grand jury expired, another grand jury was empanelled during which several individuals were granted immunity in exchange for truthful testimony. Most importantly, the second grand jury submission occurred after the February 26, 2008 delivery, but prior to . . . Appellee's guilty plea in December 2008. During this time, Agent Bianchi testified that Anthony Tooson provided information regarding direct buys from . . . Appellee, Mr.

> Rafferty, and Mr. McCullough. Also, Agent Bianchi stated that Vernon Harrod testified before the grand jury on June 27, 2008 prior to . . . Appellee's guilty plea in December 2008. Mr. Harrod revealed that he made cocaine purchases from Daryl Pressley at the Providence Barber Shop. He stated that upon meeting with Mr. Pressley, Mr. McCullough and . . . Appellee would also be present. Specifically, Mr. Pressley would go in the back room and meet with Mr. McCullough and . . . Appellee. Mr. Pressley would then come back out and deliver the cocaine to him.
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> Before . . . Appellee was charged with the Commonwealth's intended counts of Corrupt Organizations and Criminal Conspiracy, he pled guilty to one count of [PWID] on December 15, 2008 and the remaining charges were nolle prossed. The Honorable Vito P. Geroulo sentenced . . . Appellee on March 25, 2009 to a minimum of three years and a maximum of eight years.

Trial Ct. Op., 12/18/12, at 1-6 (citations omitted).

In September 21, 2010, the grand jury signed its presentment. Presentment No. 45, 9/21/10. The presentment's findings of fact referenced, *inter alia*, the February 26, 2008 delivery. "On October 18, 2010,[2] Appellee was arrested along with 22 other individuals . . . ." Trial Ct. Op. at 6.

The Commonwealth charged Appellee with the following crimes: one count of corrupt organizations, 18 Pa.C.S. § 911(b)(3); one count of corrupt organizations, 18 Pa.C.S. § 911(b)(4); one count of conspiracy-PWID, 18

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[2] The certified record reflects that the deputy attorney general signed the criminal complaint on October 18, 2010, but Agent Bianchi and a Magistrate Judge signed the complaint on October 19, 2010. Thus, it appears that Appellee was actually arrested on October 19, 2010.

Pa.C.S. § 903; six counts of PWID; one count of criminal use of a communication facility; one count of perjury, 18 Pa.C.S. § 4902; and one count of false swearing, 18 Pa.C.S. § 4903(a)(2).

The two corrupt organizations counts, one conspiracy count, and two PWID counts were based on criminal activity occurring between May 1, 2006 and March 31, 2010.[3] Crim. Compl., 11/30/10. Briefly, the Commonwealth accused Appellee of being employed by or associated with an enterprise engaged in the distribution of cocaine; the enterprise included, among many other people, Anthony George. ***Id.*** The two PWID counts specified that Appellee, "on or about May 1, 2006 through March 31, 2010" possessed and delivered cocaine. ***Id.*** The criminal use of a communication facility count was based on criminal activity between November 1, 2007 and March 31, 2010. The February 26, 2008 drug transaction that Appellee pleaded guilty to falls within this timeframe.

Of the remaining four PWID counts, two were based upon the initial March 12, 2007 drug buy and two were based on the June 7, 2008 drug buy. The perjury and false swearing counts were based on Appellee's September 16, 2008 testimony before the grand jury.

> On January 14, 2011, a Pretrial Conference was held, at which time discovery and motion deadlines were

[3] As noted above, Appellee was sentenced to three to eight years in prison on March 25, 2009, prior to the March 31, 2010 date set forth in the information.

> delineated. On February 18, 2011, . . . Appellee filed a Motion to Extend Motion Dates and a new Pretrial Order was issued by this Court on February 28, 2011. Thereafter, on March 25, 2011, . . . Appellee filed a Petition for Habeas Corpus arguing that prosecution of the 2010 charges was barred pursuant to Pa.C.S.A. § 110. On April 18, 2011, a hearing was held regarding . . . Appellee's Petition for Habeas Corpus and the parties were instructed to file supplemental briefs. Numerous supplemental briefs were filed between April 21, 2011 and January 6, 2012. On January 17, 201[2], upon an extensive review of the record, the facts of the case, and an analysis of the law, this Court granted . . . Appellee's Petition for Habeas Corpus dismissing all charges filed against . . . Appellee docketed to 10 CR 3252.

Trial Ct. Op. at 7 (citations omitted). The court's January 17, 2012 order indicated that an opinion would be forthcoming. The Commonwealth filed a notice of appeal on February 10, 2012. The court did not order the Commonwealth to comply with Pa.R.A.P. 1925(b).

On September 6, 2012, this Court ordered the trial court to file an opinion within thirty days.[4] On November 26, 2012, this Court again ordered the trial court to file an opinion within fourteen days. The trial court eventually filed an opinion on December 18, 2012. The Commonwealth subsequently moved to file a supplemental brief, which this Court granted. The Commonwealth and Appellee filed supplemental briefs.

The Commonwealth raises the following issue:

> Whether the lower court erred by granting [Appellee's] pre-trial motion to dismiss pursuant to 18 Pa.C.S.A. §

[4] This case was scheduled for oral argument on September 12, 2012. The parties, however, jointly elected to forego oral argument.

> 110(1)(ii) where the acts of [Appellee] did not constitute a single criminal episode and investigators did not have sufficient information to support the present offenses at the time of commencement of the guilty plea on the former charges?

Commonwealth's Brief at 4.

The Commonwealth asserts that the trial court erred by concluding that Appellee's acts were part of the same criminal episode. It contends that it lacked sufficient information to bring the present charges at the time it charged Appellee with the former charges. The Commonwealth acknowledges that in the published opinion of ***Commonwealth v. George***, 38 A.3d 893 (Pa. Super. 2012), this Court affirmed the dismissal of the prosecution of Anthony George—Appellee's co-defendant—on the basis of a § 110 violation. Commonwealth's Brief at 12 n.4. It insists, however, that ***George*** is distinguishable from the instant case and that this case is similar to ***Commonwealth v. Reid***, 35 A.3d 773 (Pa. Super.), *appeal granted*, 55 A.3d 1049 (Pa. 2012) (*per curiam*).[5] Unlike ***George***, the Commonwealth maintains, it was unaware of the extent of Appellee's involvement in the drug-trafficking enterprise until after Appellee testified at the grand jury:

> ***Commonwealth v. George***, on the other hand, is clearly distinguishable from the present case despite both defendants [*i.e.*, Mr. George and Appellee,] being part of

[5] Our Supreme Court granted allowance of appeal for the following issue: "Did the Superior Court of Pennsylvania err when it overturned the Trial Court's Order of September 8, 2010 barring the prosecution of [Petitioner] in the instant matter for a violation of Pennsylvania's Compulsory Joinder Rule [18 Pa.C.S.A. § 110(1)(ii)]?" ***George***, 55 A.3d at 1049.

> the same trafficking organization because they were in dramatically different positions. The defendant in ***George*** gave a full statement admitting and detailing his involvement in the drug enterprise **at the time of arrest on the former charges** which detailed the type of drugs he purchased for resale, the amount of drugs, the purchase and sale prices, the frequency of purchases made from his supplier, the number and frequency of sales made by George to his customers, the number of customers he had, his immediate supplier, as well as his supplier's supplier among other things. This information was known to law enforcement long before the Grand Jury investigation began. Therefore, unlike in the present case, a panel of this Court determined that the full nature and scope of George's involvement was known to and part of the same criminal episode as the former charges arising from the original arrest. . . .
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> Specifically, while law enforcement was aware of the deliveries pursuant to the controlled purchases involving [Appellee], the resources of the Grand Jury were necessary to establish the extensive cocaine and marijuana trafficking ring of which [Appellee] was a part.

Commonwealth's Supp. Brief, 1/16/13, at 7-8.

Appellee, however, counters that the Commonwealth raised this "awareness" argument in ***George***, and this Court rejected it. Appellee further contends that this case is distinguishable from ***Reid***:

> On appeal, the [***Reid***] Court observed "Although the presentment to the grand jury cited controlled buys involving another distributor in the trafficking organization, **the presentment did not mention the November 2006 controlled buy [the basis for the 2007 charge], nor did it mention . . . any controlled buys with the [*Reid* defendant**]." ***Reid***, ***supra*** at 775. (Emphasis supplied)
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> In the matter *sub judice*, the presentment to the grand jury on September 16, 2008 specifically included testimony by Bianchi regarding the two (2) controlled purchases

> between the confidential informant and . . . Appellee, one of which was the basis for the 2008 charge. As testified by Agent Bianchi, although there was an ongoing investigation into . . . Appellee's activities, the Commonwealth made a conscience [sic] choice to charge him in 2008 with the delivery charge for the February 26, 2008 drug transaction. Bianchi explained that even though at the time of his arrest the Commonwealth knew that . . . Appellee was under investigation by two (2) statewide grand juries, it proceed with filing of the charges because there had been children in the home at the time of the buy.
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> **After** he pled guilty on December 1[5], 20[08] to the 2008 PWID charge, he was arrested [on the present charges.] The basis of these charges included the presentment to the grand jury of the controlled buy for which he was previously charged in 2008. Moreover, . . . Appellee admitted to participating in a larger drug-trafficking enterprise when he testified before the grand jury in September 2008. . . . ***Reid*** is clearly distinguishable and not controlling since in ***Reid*** the later charges did not include information of his prior PWID charge.

Appellee's Supp. Brief, 1/31/13, at 5-6.

In sum, the parties disagree on the date the Commonwealth had, or should be imputed with, knowledge of Appellee's involvement in the drug-trafficking enterprise. The Commonwealth contends that because it was unaware of the scope of Appellee's participation until after he testified at the grand jury, ***George*** is distinguishable and we should apply ***Reid***. Appellee counters that because (1) the basis of the instant charges included the February 26, 2008 drug transaction to which he already pleaded guilty in December of 2008 and (2) he admitted to participating in a criminal enterprise, the Commonwealth was aware of the instant charges. Both

arguments focus on the Commonwealth's awareness, as discussed in further detail below. We hold the Commonwealth is entitled to partial relief.

The standard of review follows:

> The decision to grant or deny a petition for writ of habeas corpus will be reversed on appeal only for a manifest abuse of discretion. It is settled that a petition for writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a prima facie case. Although a habeas corpus hearing is similar to a preliminary hearing, in a habeas corpus proceeding the Commonwealth has the opportunity to present additional evidence to establish that the defendant has committed the elements of the offense charged.

Commonwealth v. Karlson, 674 A.2d 249, 250-51 (Pa. Super. 1996) (citations and quotation marks omitted).

> An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record, discretion is abused.

Commonwealth v. Chambers, 685 A.2d 96, 104 (Pa. 1996) (citation omitted).

> [O]ur scope of review is limited to deciding whether a *prima facie* case was established at the preliminary hearing. Proof of guilt beyond a reasonable doubt is not required at this stage. Rather, the Commonwealth must show "sufficient probable cause" that the defendant committed the offense, and the evidence should be such that if presented at trial, and accepted as true, the judge would be warranted in allowing the case to go to the jury.

Commonwealth v. Kowalek, 647 A.2d 948, 949 (Pa. Super. 1994) (citations omitted); ***accord Commonwealth v. Wojdak***, 466 A.2d 991, 996 (Pa. 1983).

> While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. Thus[,] where the Commonwealth's case relies solely upon a **tenuous inference** to establish a material element of the charge, it has failed to meet its burden of showing that the crime charged was committed.

Wojdak, 466 A.2d at 997 (citations omitted).

The instant petition for a writ of *habeas corpus* relied on 18 Pa.C.S. § 110(1)(ii), which states:

> **§ 110. When prosecution barred by former prosecution for different offense**
>
> Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution barred by former prosecution for same offense) and the subsequent prosecution is for:
>
> * * *
>
> (ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of the commencement of the first trial and occurred within the same judicial district as the

> former prosecution unless the court ordered a separate trial of the charge of such offense . . . .

18 Pa.C.S. § 110(1)(ii).

> The compulsory joinder rule bars a subsequent prosecution if each prong of the following test is met: (1) the former prosecution resulted in an acquittal or conviction; (2) the current prosecution was based on the same criminal conduct or arose from the same criminal episode; (3) the prosecutor in the subsequent trial was aware of the charges before the first trial; and (4) all charges were within the same judicial district as the former prosecution.

Commonwealth v. Nolan, 855 A.2d 834, 839 (Pa. 2004) (footnote and citations omitted).

In ***Nolan***, our Supreme Court expounded upon the criminal episode prong, beginning with a discussion of ***Commonwealth v. Hude***, 458 A.2d 177 (Pa. 1983):

> In the seminal case of ***Hude***, courts were directed to look at the "logical and temporal relationship" between the criminal acts to determine whether they constituted the same "episode." In ***Hude***, both prosecutions contained a substantial duplication of issues of fact and law, which not only forced a defendant to "run the gauntlet" repeated times and confront the "awesome resources of the state" successively, but also sanctioned "an unjustifiable expenditure of judicial resources."
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> In later interpreting ***Hude***'s duplication guidance, this Court commented such an analysis cannot be made "by merely cataloguing simple factual similarities or differences between the various offenses with which the defendant was charged." We have been mindful to reaffirm ***Hude***'s expressed warning against interpreting "the term 'single criminal episode' . . . [from a] hypertechnical and rigid perspective which defeats the purposes for which it was created." This Court will temper such scrutiny against

allowing defendants a "volume discount" on multiple crimes.

While ***Hude***'s subjective "logical and temporal" inquiry has lead to numerous contradictory results when applied to varying factual scenarios, what must be remembered is § 110's constant purpose and rationale. As delineated in ***Commonwealth v. Spotz***, 563 Pa. 269, 759 A.2d 1280 (2000): "§ 110's compulsory joinder rule was designed to serve two distinct policy considerations: (1) to protect a person accused of crimes from governmental harassment by being forced to undergo successive trials for offenses stemming from the same criminal episode, and (2) to ensure judicial economy." These policy concerns must not be interpreted to sanction "volume discounting" or, as evidenced by this case, to label an "enterprise" an "episode." This Court has never categorized seven months of individual criminal activity, with distinct layers of illegality, as a single criminal episode; the purpose inherent in § 110 prevents such a result now. ***See*** [***Commonwealth v. McPhail***, 692 A.2d 139 (Pa. 1997) (plurality)] (four separate drug buys to same officer over three months same episode); [***Commonwealth v. Anthony***, 717 A.2d 1015 (Pa. 1998)] (five days of successive criminal activity one episode); ***Hude*** (20 days of drug sales same criminal episode).

Although ***McPhail*** designated three months of activity a single episode, that case involved one defendant selling drugs to one undercover officer; the officer was the major mover in the determination of the conduct, its extent, jurisdiction and venue, and potential mandatory penalties. Additionally, in ***McPhail***, the "Commonwealth conced[ed] that all the offenses arose from the same criminal episode." Here, over a seven-month period, appellee ran a profitable enterprise in which he stole at least 25 vehicles from numerous individuals and 11 dealerships and then resold them, creating even more victims. Much like a television sitcom, each week's story has similar characters, producers, and continuity of storyline, but each week is a separate episode-the series of episodes is an enterprise. Such is the scenario here; appellee starred in his own series with multiple episodes in each county.

Nolan, 855 A.2d at 839-40 (footnote and citations omitted). In reaching its holding, the ***Nolan*** Court placed a greater emphasis on the lengthy timespan within which the criminal activity occurred and the individualized nature of each criminal act. ***Id.***

Because the Commonwealth relies on ***Reid***, we set forth the facts of that case:

> [The defendant's] direct involvement with police began in November 2006, when police conducted a controlled buy through a confidential informant, who called [the defendant] and arranged to purchase cocaine from him. The informant picked up [the defendant] in the informant's car, then drove to the Hilltop Bar, where they parked for two minutes. The informant dropped [the defendant] off at a plaza and gave police the cocaine purchased from [the defendant].
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> Due to a number of circumstances, police did not arrest [the defendant] immediately. In March 2007, however, police encountered [the defendant] when he was the victim of a kidnapping. Detective Charles Shoemaker, who assisted in the 2006 controlled buy, interviewed [the defendant] and informed him about the 2006 investigation. [The defendant] eventually confessed to his involvement in selling drugs as part of a larger criminal enterprise, with his source of cocaine coming from New Jersey. Police soon charged [the defendant] with possession with intent to deliver ("PWID"), and on June 25, 2007, [the defendant] pleaded guilty to that charge at case number CP–18–0000079–2007 ("Case 79").
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> Prior to the controlled buy, Detective Shoemaker was involved in a larger-scale investigation targeting another seller, Damon Williams. This broader investigation largely began in August of 2006, when Williams was arrested. After the arrest, the Commonwealth investigated Williams's involvement in a larger drug-trafficking scheme. The investigation culminated in a grand jury investigation, which found [the defendant] to be one of the distributors

> in a cocaine trafficking organization. The grand jury presentment of March 11, 2009, specifically found that [the defendant] sold cocaine at his house and in bars, specifically mentioning the Two Tuesdays bar. The presentment also noted that [the defendant] would, at times, have a "middleman" deliver the cocaine when buyers purchased it from [the defendant]. Although the presentment cited controlled buys involving another distributor in the trafficking organization, the presentment did not mention the November 2006 controlled buy, nor did it mention the Hilltop Bar or any controlled buys involving [the defendant].
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> The grand jury presentment is the basis for the charges in the case *sub judice*, CP–18–0000264–2010 ("Case 264"). Although the criminal information in Case 264 charged [the defendant] with two counts of PWID and one count of conspiracy for acts occurring "between 2006 through 2007," the Commonwealth later clarified that the time period is between sometime in 2006 until March 7, 2007.

Reid, 35 A.3d at 774-75 (footnotes omitted).

The defendant in ***Reid*** filed a motion to dismiss the charges at Case 264, which the trial court granted. ***Id.*** at 775. The Commonwealth appealed and argued

> that the charges *sub judice*, from Case 264, are not logically related to the charges from Case 79. The Commonwealth contends that the facts, evidence, and witnesses are substantially different between the two cases because Case 264 involves a much broader scope of activity than that of Case 79. The Commonwealth claims the only primary similarity in the two cases is that they overlap in time, with Case 79 having occurred sometime within the scope of the Case–264 investigation.

Id.

The ***Reid*** Court held that the facts set forth above constituted "a criminal enterprise rather than a single criminal episode." ***Id.*** at 779. The Court distinguished the defendant's activities by observing that the grand jury presentment omitted details of the November 2006 controlled buy. ***Id.*** Further, the ***Reid*** Court observed, there was "no indication that the confidential informant from the controlled buy was the same 'victim' or 'major mover' as in Case 264." ***Id.*** The Court reasoned that although the defendant's method of delivering the drugs and sources may have been identical, there were "different 'victims' and 'major movers' in each case." ***Id.*** The ***Reid*** Court also emphasized the presentment's specific reference to the defendant's "occasional use of a middleman to conduct his deliveries" in Case 264, which was unlike Case 79, in which the defendant delivered the drugs himself. ***Id.*** The ***Reid*** Court concluded that because Case 264 was "multiple episodes of the same enterprise, rather than one continuous criminal episode" encompassing Case 79, the trial court erred in granting the motion to dismiss. ***Id.***

As noted above, the Commonwealth contends that the instant case is distinguishable from ***George***, which involved Anthony George, one of Appellee's co-defendants. We state the relevant facts in ***George***:

> The Defendant, Anthony George . . . was arrested on September 20, 2007 by agents of the Attorney General's Office. The Defendant was charged with two counts of delivery of a controlled substance (cocaine) stemming from purchases made by a confidential informant on April 17, 2007 and May 18, 2007, as well as an additional delivery

charge due to the two ounces of cocaine discovered in his residence at the time of his arrest. In the case before us at this time, the Defendant was arrested on October 20, 2010, and charged with two counts of Corrupt Organizations, and one count of Conspiracy to Deliver Cocaine allegedly stemming from his drug activity prior to aforementioned 2007 arrest.

At the time of Defendant's 2007 arrest, he provided investigators with a statement in which he indicated that he was involved in a drug distribution ring. That statement was read into the record at the Habeas hearing before this Court on January 26, 2011. In that 2007 statement, he identified Brent Rafferty, street name "B," as his source of cocaine. He met Rafferty at the Providence Barber Shop on West Market Street, Scranton. Individuals involved in drug trafficking would frequent the barber shop. During the eight months preceding his arrest he purchased one ounce quantities on a weekly basis from Rafferty, and then distributed the cocaine to his customers. Rafferty purchased the drugs in New York City, and he would contact Rafferty by cellular telephone. He also purchased drugs from Rafferty's girlfriends, one who lived on Pond Avenue, and one who lived on Washburn Street, Scranton. He also engaged in drug transactions at Fresno's restaurant and Uno's restaurant in Dickson City. The statement provided the names of the Defendant's previous supplier, namely Walter Pearson.

The Defendant testified that he provided the statement and cooperated with the Office of the Attorney General because he had been promised leniency, and that no new charges would be filed against him. . . .

The testimony presented by the Commonwealth at the January 26, 2011 hearing reveals that [Appellee] Tyson Joyner was the overall target of the Attorney's General Office at the time the Defendant was initially arrested in 2007. Agent [Catherine] Bianchi testified that she became aware that the Defendant was involved in a drug trafficking ring with [Appellee] and Brent Rafferty only as a result of the Grand Jury investigation. Agent Bianchi further testified that the Defendant's statement alone did not provide a sufficient basis for corrupt organization

> charges. While she suspected that a corrupt organization existed, she needed more than allegations to justify charges. However, both Agent Bianchi and Supervisor Jerome Smith testified that the Defendant's statement indicated that he was involved in drug trafficking with a group of individuals.
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> A State Wide Investigating Grand Jury was convened to investigate narcotics trafficking in Lackawanna County after the 2007 initial arrest of the Defendant. Over a hundred individuals testified before the grand jury. Supervisor Jerome Smith testified that the Defendant was called before the State Wide Investigating Grand Jury to verify the statement that he had provided, linking himself and Brent Rafferty (among others) to cocaine trafficking in the area. The Defendant had agreed to testify before the grand jury as part of his cooperation, however, prior to his appearance, he invoked his Fifth Amendment rights.
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> The Defendant ultimately pled guilty to Possession with Intent to Deliver a Controlled Substance (cocaine), and was sentenced on April 1, 2008 to three to six years incarceration. . . .
>
> On September 22, 2010, the 29th State Wide Investigating Grand Jury handed down Presentment Notice # 45, recommending criminal charges against twenty-two defendants. The Defendant was included in the group. On October 20, 2010, the Defendant was arrested and charged with two counts of Corrupt Organization, and one count of Conspiracy to Deliver Cocaine stemming from his narcotic trafficking activity prior to his 2007 arrest.

George, 38 A.3d at 894-96 (citations omitted).

Mr. George filed a successful petition for a writ of *habeas corpus*, claiming that the Commonwealth was barred under § 110 from prosecuting him on the 2010 charges. ***Id.*** at 896. The Commonwealth appealed to this Court, arguing that the 2010 charges did not arise from the same criminal

episode. ***Id.*** The Commonwealth made the following arguments to the ***George*** Court:

> The Commonwealth contends that [the defendant] failed to establish that a logical relationship existed between the former and current prosecutions. The Commonwealth insists that the difference in the evidence that would be presented is quite significant, the former prosecution being limited to specific instances of possession with intent to deliver, the latter being focused on numerous eyewitnesses who would testify generally as to [the defendant's] drug trafficking over a period of years. The Commonwealth characterizes any duplication as "*de minimis*." Additionally, the Commonwealth argues that the former prosecution was limited to a single day in 2007, while "the present charges are based upon criminal activity alleged to have occurred between May 1, 2006 and March 31, 2010."
>
> * * *
>
> It points to the fact that the grand jury investigation had not even begun when [the defendant] pled guilty and maintains that until it concluded its investigation and issued its presentment, the Commonwealth could not charge [the defendant] with the later crimes.

Id. at 897-98 (citations and quotation marks omitted).

The ***George*** Court adopted the trial court's analysis regarding whether the offense at issue was based on the same conduct or arose from the same criminal episode:

> Finding it apparent from [the defendant's] statement that he was involved in a drug distribution ring in 2007 when he was arrested for delivery of cocaine, the [trial] court concluded: "In 2007 the Defendant was charged with delivery of cocaine, and then in 2010, he was charged with conspiring to do so."[2] . . .

> [T]he present charges are intertwined with [the defendant's] admitted criminal activity in 2006 and 2007, and for which he was prosecuted in 2007. The bulk of the grand jury evidence implicating [the defendant] and leading to the instant prosecution referenced [the defendant's] 2007 arrest and statement. Additionally, the evidence at the preliminary hearing on the 2010 charges arose from the same factual nucleus as the 2007 prosecution. The trial court observed that, "[l]ogically, the Defendant should have been charged with Conspiracy and Corrupt Organizations back in 2007 when the Commonwealth became aware of his criminal activity." Trial Court Opinion, 5/18/11, at 11. We agree . . . .
>
> [2] The target of the investigation, **Tyson Joyner**, made two sales to undercover agents in 2007, but was not arrested until 2010. Agent Jerome Smith acknowledged that Joyner was not arrested in 2007 because they "were looking for the whole organization." N.T. *Habeas* Hearing, 1/26/11, at 38–39. He confirmed that [the defendant] was arrested, at least in part, because they thought he would cooperate and assist in the investigation.

Id. at 898 (citations omitted and emphasis added).

With respect to the third prong—whether the prosecutor in the current trial was aware of the charges in the prior trial—the ***George*** Court again adopted the trial court's analysis:

> the test is not whether [the defendant] could be charged, but whether prosecuting officers knew of the offense. ***See*** 18 Pa.C.S. § 110(1)(ii). [The defendant] provided a statement admitting his involvement in a drug trafficking organization long before the grand jury investigated his involvement. He named Brent Rafferty as his supplier and advised that he had eight or nine customers. At the time of the statement, Rafferty was known to Agent Jerome Smith only as the owner of a vehicle that transported the target of the investigation, **Tyson Joyner**, to a drug buy conducted by Agent Catherine Bianchi in March of 2007. When Agent Bianchi read [the defendant's] statement in September of 2007, in which he named Rafferty, a.k.a. "B," as his supplier, and provided Rafferty's cellular phone

> number, prices, and delivery locations, she admittedly knew that Rafferty was associated with **Joyner** in the sale of drugs. Such testimony seriously undermined Agent Bianchi's subsequent testimony that she only became aware that [the defendant] was involved in a drug trafficking ring with **Tyson Joyner** and Brent Rafferty **as a result** of the grand jury investigation. Furthermore, it was consistent with the concessions of Agent Bianchi and her supervisor, Jerome Smith, that [the defendant's] earlier statement indicated that he was involved in drug trafficking with a group of individuals.

Id. at 898-99 (citations omitted and emphases added).

Instantly, we initially address the two corrupt organization counts, one conspiracy count, the first two PWID counts listed in the complaint, and one count of criminal use of a communication facility. Crim. Compl., 11/30/10. The Commonwealth averred that the first five counts are based on criminal activity occurring between May 1, 2006 and March 31, 2010. ***Id.*** The Commonwealth also contends that the sixth count, criminal use of a communication facility, encompasses criminal activity from November 1, 2007 through March 31, 2010. ***Id.***

The Commonwealth's own criminal complaint contends that these six counts are based on, *inter alia*, criminal activity occurring within a timeframe that includes February of 2008.[6] The Commonwealth failed to exclude the February 26, 2008 drug buy from the criminal complaint. Therefore, the current prosecution is based on the same criminal conduct that resulted in a December 2008 guilty plea. ***See Nolan***, 855 A.2d at 839.

[6] As noted above, Appellee was incarcerated in February of 2008.

We disagree with the Commonwealth's contention that ***Reid*** should apply to this case. In ***Reid***, the grand jury presentment omitted mention of the controlled buy that led to the prior conviction. Unlike ***Reid***, the instant grand jury presentment referenced the February 26, 2008 drug buy that resulted in the prior conviction. ***See*** Presentment at 3.[7] Further, the Commonwealth's own criminal complaint charged Appellee with crimes occurring in a timeframe encompassing the February 26, 2008 drug buy, to which Appellant had pleaded guilty. Similar to ***George***, these six charges are intertwined with or duplicative of Appellee's admitted criminal activity in February of 2008. ***See George***, 38 A.3d at 898. Appellee was charged with PWID in February of 2008, and then charged in 2012 with conspiring to do so. ***See id.*** To paraphrase the ***George*** Court, logically, Appellee should have been charged with these counts prior to his December 2008 guilty plea—either in February of 2008 or after the September 2008 grand jury hearing. ***See id.***

Having concluded that these six counts could be based on the same February 2008 criminal conduct, we next examine whether the Commonwealth had knowledge of these charges before Appellee's December 2008 guilty plea. ***See Nolan***, 855 A.2d at 839. Prior to Appellee's guilty

[7] We do not, unlike the ***Reid*** Court, discuss the factual differences in the transactions at issue because the instant presentment—unlike the presentment in ***Reid***—includes a prior criminal act for which Appellee pleaded guilty. Given the complaint's imprecision, we observe that the two PWID charges could refer to the February 26, 2008 drug buy.

plea, the Commonwealth identified various individuals involved in an alleged corrupt organization to possess and deliver narcotics. ***See*** Trial Ct. Op. at 2. On January 2, 2008, the Commonwealth submitted the information to the grand jury and Agent Bianchi testified before the grand jury on February 21, 2008. ***See id.*** Her testimony tended to inculpate Appellee with the charges at issue. Appellee also testified at the grand jury on September 16, 2008. As the trial court accurately observed, Appellee testified—as recounted by Agent Bianchi—to facts tending to demonstrate his culpability for corrupt organizations, PWID, conspiracy, and criminal use of a communication facility. ***See id.*** at 3-4. Although the Commonwealth contends it was unaware of the **extent** of Appellee's involvement until he testified at the grand jury on September 16, 2008, the Commonwealth was aware of this testimony prior to Appellee's guilty plea in December of 2008. Thus, the Commonwealth was aware of the instant charges prior to Appellee's first "trial" in December of 2008. ***See Nolan***, 855 A.2d at 839.

We next examine the four PWID counts for the March 12 and June 7, 2007 drug purchases. Specifically, we ascertain whether these four criminal acts have a "logical and temporal relationship" to the February 26, 2008 drug transaction such that all three should be considered the same criminal episode. ***See id.*** at 839-40. Initially, we observe that the March 12, 2007 criminal act is temporally distant—almost a full year—from the February 26,

2008 transaction. Similarly, the June 7, 2007 criminal act occurred almost eight months prior to the February 26, 2008 drug buy.

Second, there are factual distinctions among all three transactions, primarily location and purchaser.[8] For example,[9] the March 12, 2007 drug transaction occurred at a confidential informant's residence and involved Agent Bianchi purchasing one ounce of cocaine from Appellee. In contrast, on June 7, 2007, while at Appellee's residence, a confidential informant purchased one ounce of cocaine from Appellee. Finally, on February 26, 2008, and at the residence of Appellee's girlfriend,[10] a confidential informant purchased cocaine from Appellee. Such a temporal lapse of time, in conjunction with the ***Nolan*** Court's admonition against granting defendants a "volume discount" on multiple crimes, militates against a holding that all three drug transactions should be construed as a single criminal episode. ***See id.*** at 840. In sum, because the ***Nolan*** Court rejected the proposition that "seven months of individual criminal activity, with distinct layers of illegality, [was] a single criminal episode," we similarly rebuff the contention that two distinguishable criminal acts—taking place between roughly eight

[8] This Court is mindful of not applying a "hypertechnical" catalog of the "simple factual similarities or differences between the various offenses." ***See Nolan***, 855 A.2d at 839.

[9] We do not catalog all the factual differences.

[10] The presentment alleges that Appellee moved into the residence of his girlfriend. Presentment No. 45, 9/21/10, at 13.

and twelve months prior to the February 2008 criminal act—constitute one criminal episode. ***See id.*** at 840.

Moreover, the facts are comparable to ***Reid*** and distinguishable from ***George***. Similar to ***Reid***, the actors and locales vary. ***Cf. Reid***, 35 A.3d at 779 (cataloging factual differences in transactions at issue). Unlike the counts in ***George***, however, the instant four PWID counts stand independently of the two PWID counts in February 2008. ***Cf. George***, 38 A.3d at 894 (noting defendant was charged with corrupt organizations and conspiracy to deliver cocaine based on two counts of PWID that he pleaded guilty to). Accordingly, after weighing the totality of circumstances, and mindful of not adopting "a hypertechnical and rigid" approach in ascertaining the existence of a "single criminal episode," based upon the foregoing distinctions, we conclude the trial court erred as a matter of law in construing all three drug transactions as one criminal episode.[11] ***See Nolan***, 855 A.2d at 839-40. Because the trial court misapplied the law, we reverse the portion of the order dismissing the PWID charges associated with the March 12, 2007 and June 7, 2007 drug transactions. ***See Chambers***, 685 A.2d at 104; ***Karlson***, 674 A.2d at 250-51.

[11] Because we conclude these four PWID counts are not part of the same criminal episode as the February 2008 counts, we need not examine whether the Commonwealth knew of the facts underlying the four PWID charges prior to Appellee's guilty plea in December of 2008. ***See Nolan***, 855 A.2d at 839.

Finally, with respect to the remaining charges of perjury and false swearing charges, the Commonwealth contends that both crimes allegedly occurred on September 16, 2008, the date Appellee testified before the grand jury. The Commonwealth argues that Appellee gave false testimony about certain aspects of the alleged enterprise.

The offense of perjury is defined as follows:

> **(a) Offense defined.—**A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

18 Pa.C.S. § 4902. Section 4903 sets forth the offense of false swearing:

> **(a) False swearing in official matters.—**A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true is guilty of a misdemeanor of the second degree if:
>
> (1) the falsification occurs in an official proceeding; or
>
> (2) the falsification is intended to mislead a public servant in performing his official function.

18 Pa.C.S. § 4903. The Commonwealth's burden of proof for PWID is substantially different. ***See*** 35 P.S. § 780-113(a)(30).

Initially, it is indisputable that there is no substantial duplication of the law when comparing the offenses of PWID, perjury, and false swearing. ***Compare id.***, ***with*** 18 Pa.C.S. §§ 4902, 4903. Similarly, the facts substantiating the offense of PWID differ materially from the facts

establishing the offenses of perjury and false swearing. The PWID statute, for example, lacks the element of an oath. ***See*** 35 P.S. § 780-113(a)(30). Simply, we discern a minimal logical and temporal connection between the September 16, 2008 alleged crimes of perjury and false swearing and the February 26, 2008 crime of possession with intent to deliver cocaine. ***See Nolan***, 855 A.2d at 839-40. Based upon the tangential linkage, we have no qualms in concluding that these three crimes are not part of the same "episode." ***See*** 18 Pa.C.S. § 110(1)(ii); ***Nolan***, 855 A.2d at 839. Accordingly, we need not examine whether the Commonwealth was aware of these charges prior to Appellee's guilty plea in December 2008. ***See Nolan***, 855 A.2d at 839.

For these reasons, we affirm the order with respect to the two corrupt organization counts, the conspiracy count, the two PWID counts addressing the timespan between May 1, 2006 and March 31, 2010, and the criminal use of a communication facility. We reverse the order with respect to the remaining counts, specifically the two PWID counts for the March 12, 2007 drug purchase, the two PWID counts for the June 7, 2007 drug transaction, perjury, and false swearing.

Order affirmed in part and reversed in part. Case remanded for further proceedings not inconsistent with this memorandum.[12] Panel jurisdiction relinquished.

Judgment Entered.

Mary A. Hrabell

Deputy Prothonotary

Date: 5/24/2013

[12] We note that nothing in this memorandum would preclude the Commonwealth from filing an information that excludes the February 26, 2008 drug transaction.