

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MELISSA A. SARVEY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 968 WDA 2012

Appeal from the Judgment of Sentence May 16, 2012
In the Court of Common Pleas of Jefferson County
Criminal Division at No(s): CP-33-CR-0000014-2012

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.:

Filed: February 21, 2013

Melissa A. Sarvey appeals from the judgment of sentence of nine and one-half to twenty-two years incarceration imposed after a jury convicted her of two counts each of possession of a controlled substance with intent to deliver ("PWID"), possession of a controlled substance by an inmate, selling, giving, transmitting or furnishing a controlled substance to a confined person, and criminal attempt to commit selling, giving, transmitting or furnishing a controlled substance to a confined person.¹ We affirm.

¹ The court also revoked Appellant's probation for several other criminal matters on the same date. Her total period of incarceration was eleven and one-half to twenty-six years incarceration followed by five years probation.

Appellant was incarcerated at the Jefferson County Correctional Facility. While imprisoned, Appellant attempted to deliver prescription drugs to another inmate, specifically Zolpidem and Oxycodone. The Commonwealth charged her with two counts each of PWID and possession of a controlled substance by an inmate under 18 Pa.C.S. § 5123(a.2).² On the day of trial, the Commonwealth moved to amend the criminal information to include two additional counts each of selling, giving, transmitting or furnishing a controlled substance to a confined person, under 18 Pa.C.S. § 5123(a),³ and criminal attempt.⁴ The added § 5123(a)

² 18 Pa.C.S. § 5123(a.2) provides:

(a.2) Possession of controlled substance contraband by inmate prohibited.--A prisoner or inmate commits a felony of the second degree if he unlawfully has in his possession or under his control any controlled substance in violation of section 13(a)(16) of The Controlled Substance, Drug, Device and Cosmetic Act. For purposes of this subsection, no amount shall be deemed *de minimis*.

Id. (footnote omitted).

³ 18 Pa.C.S. § 5123(a) reads:

(a) Controlled substance contraband to confined persons prohibited.--A person commits a felony of the second degree if he sells, gives, transmits or furnishes to any convict in a prison, or inmate in a mental hospital, or gives away in or brings into any prison, mental hospital, or any building appurtenant thereto, or on the land granted to or owned or leased by the Commonwealth or county for the use and benefit of the prisoners or inmates, or puts in any place where it may be secured by a convict of a prison, inmate of a mental hospital, or

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employee thereof, any controlled substance included in Schedules I through V of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, (except the ordinary hospital supply of the prison or mental hospital) without a written permit signed by the physician of such institution, specifying the quantity and quality of the substance which may be furnished to any convict, inmate, or employee in the prison or mental hospital, the name of the prisoner, inmate, or employee for whom, and the time when the same may be furnished, which permit shall be delivered to and kept by the warden or superintendent of the prison or mental hospital.

(a.1) Mandatory minimum penalty.--Any person convicted of a violation of subsection (a) shall be sentenced to a minimum sentence of at least two years of total confinement, notwithstanding any other provision of this title or any other statute to the contrary. Nothing in this subsection shall prevent the sentencing court from imposing a sentence greater than that provided in this subsection, up to the maximum penalty prescribed by this title for a felony of the second degree. There shall be no authority in any court to impose on an offender to which this subsection is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this subsection. If a sentencing court refuses to apply this subsection where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this subsection if it finds that the sentence was imposed in violation of this subsection.

Id. (footnote omitted).

⁴ The Commonwealth also amended one PWID count and one possession-of-by-an-inmate charge to reflect that the controlled substance was Oxycodone. The original information indicated that the substance was a
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charges subjected her to a mandatory minimum sentence of two years for each count. The trial court permitted the amendment over Appellant's objection. Thereafter, the jury found Appellant guilty of the aforementioned charges.

The trial court sentenced Appellant on May 16, 2012. Appellant received consecutive sentences at each count that the court imposed a sentence. Specifically, the court sentenced her to one to three years incarceration for one PWID charge and one and one-half to three years at the other PWID count. In addition, the court imposed sentences of one and one-half to three years for both counts of possession of a controlled substance by an inmate, and two to five years each for the two counts of furnishing of a controlled substance to a confined person. The court did not impose a sentence for the criminal attempt convictions.

This timely appeal ensued. The trial court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the matter is now ready for our review. The sole issue Appellant raises on appeal is "Whether the trial [c]ourt erred in allowing the Commonwealth, over objection, to amend the charges against the defendant, which amendment was done just prior to trial." Appellant's brief at v.

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Hydrocodone containing drug, Vicodin. Counsel did not object to these changes.

Appellant argues that the Commonwealth's amendment of the criminal information immediately before trial was prejudicial. She asserts that the last-second addition of the new charges did not allow her sufficient time to adjust her defense strategy and deprived her of notice and the ability to prepare for trial. Additionally, Appellant notes that the newly added drug charges subjected her to mandatory minimum sentences that increased the severity of her penalty.

The Commonwealth has failed to comply with its duty to submit an appellee's brief and presents no argument against Appellant's position. The trial court, however, found that the amendment did not alter the factual underpinnings of her original charges and would not have altered her defense strategy. It also opined that the evidence used by the Commonwealth to support the additional charges "was information to which Sarvey would have already been privy." Trial Court Opinion, 8/15/12, at 2. We agree.

Pennsylvania Rule of Criminal Procedure 564 governs amending a criminal information. That rule reads:

Rule 564. Amendment of Information

The court may allow an information to be amended when there is a defect in form, the description of the offense(s), the description of any person or any property, or the date charged, provided the information as amended does not charge an additional or different offense. Upon amendment, the court may grant such postponement of trial or other relief as is necessary in the interests of justice.

Pa.R.Crim.P. 564. The terms “additional or different offense” have been construed to apply to offenses that are premised on additional facts and different elements. ***Commonwealth v. Roser***, 914 A.2d 447 (Pa.Super. 2006); ***see also Commonwealth v. Davalos***, 779 A.2d 1190, 1194 (Pa.Super. 2001) (discussing Rule 564’s predecessor, Rule 229). Thus, the addition of a criminal charge based on identical facts to the charges already advanced does not automatically violate the rule. ***Roser, supra; Commonwealth v. Picchianti***, 600 A.2d 597 (Pa.Super. 1991). Indeed, it is settled that,

In reviewing a grant to amend an information, the Court will look to whether the appellant was fully apprised of the factual scenario which supports the charges against him. Where the crimes specified in the original information involved the same basic elements and arose out of the same factual situation as the crime added by the amendment, the appellant is deemed to have been placed on notice regarding his alleged criminal conduct and no prejudice to defendant results.

Commonwealth v. Sinclair, 897 A.2d 1218, 1222 (Pa.Super. 2006) (citation omitted). Only where “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,” ***id.*** at 1221, is the amendment prohibited.

Additionally,

our Supreme Court has stated that following an amendment, relief is warranted only when the variance between the original and the new charges prejudices an appellant by, for example,

rendering defenses which might have been raised against the original charges ineffective with respect to the substituted charges. **Commonwealth v. Brown**, 556 Pa. 131, 135, 727 A.2d 541, 543 (1999). Factors that we must consider in determining whether a defendant was prejudiced by an amendment 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. **Commonwealth v. Grekis**, 411 Pa.Super. 513, 601 A.2d 1284, 1292 (1992).

Id. at 1223.

Instantly, the added charges did not arise from different facts nor would they have altered Appellant's trial strategy or defense, as a defense applicable to the original charges would also have been a valid defense to the added counts. Thus, Appellant would not have had to change her defense strategy. To the extent that the addition of the § 5123(a) charges subjected her to a mandatory minimum sentence, we have previously rejected the contention that the possibility of a more severe penalty constitutes prejudice. **Sinclair, supra** at 1224 ("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."); **see also Picchianti, supra** at 599. Further, an amendment is permitted on the day of trial. **Sinclair, supra** at 1224. Since Appellant has failed to indicate in any manner how her defense strategy would have changed, and that the facts

underlying the new charges were identical to the previously included counts, Appellant has not established prejudice. Hence, we affirm.

Judgment of sentence affirmed.