

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	<b>CR-1679-2015</b>
v.	:	
	:	
<b>RICHARD WILLIAM GUTHRIE,</b>	:	<b>PRE TRIAL MOTION</b>
<b>Defendant</b>	:	

**OPINION AND ORDER**

Prior Defense Counsel filed a motion for Writ of Habeas Corpus regarding the charge of Escape, a felony of the third degree. The Commonwealth originally charged the alleged Escape as a misdemeanor of the second degree, and by motion of the Commonwealth, and after a hearing on the same, the criminal information was amended to reflect the correct section of the Escape statute<sup>1</sup> i.e. 5121(d)(1)(b):

§ 5121. Escape.

(a) Escape. -- A person commits an offense if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period.

...

(d) Grading.

(1) An offense under this section is a felony of the third degree where:

(i) the actor was:

(A) under arrest for or detained on a charge of felony;

(B) convicted of a crime; or

(C) found to be delinquent of an offense which, if committed by an adult, would be classified as a felony and the actor is at least 18 years of age at the time of the violation of this section;

(2) Otherwise an offense under this section is a misdemeanor of the second degree.

(e) Definition. -- As used in this section the phrase "official detention" means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but the phrase does not include supervision of probation or parole, or constraint incidental to release on bail.

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<sup>1</sup> Order of Trial Court, 1/21/16.

The undisputed facts are that the Defendant was an inmate at the county pre-release center when he ran from correctional officers at the worksite of 523 Hawthorne Ave, in Williamsport, PA. Defendant was confined at the pre-release center for a misdemeanor theft crime. Defense Counsel petitions for a writ of *habeas corpus* stating “the Commonwealth’s evidence is insufficient to prove any essential elements of the charge of Escape, i.e. the Defendant was not under arrest for a felony or detained on a charge of felony following conviction of a crime of felony.” The Escape was initially charged as a misdemeanor and Defendant initially planned to plead guilty to Escape as a misdemeanor for a minimum of 12 months in a state correctional institutional, consecutive to any other sentences. He would also not be made eligible for RRRI.

The Commonwealth argues that Commonwealth v. Kowalski, 2004 Pa. Super. 257, 854 A.2d 545 (Pa. Super. 2004) is binding on this Court. In Kowalski, the Defendant escaped from the Bucks County Women’s Correctional Center where she was serving time on a misdemeanor conviction. Defense counsel was successful at the Trial Court in having the criminal escape charge quashed as the Bucks County judge found the language in 5121(d)(1)(i) ambiguous and potentially interpreted as meaning that if convicted of a felony then an Escape would be charged as a felony and if convicted of a misdemeanor, then an Escape would be charged as a misdemeanor. At that time, the text of the Escape offense under Pennsylvania law mirrored that of the Model Penal Code:

Section 242.6 Escape (4) Grading of Offenses. An offense under this Section is a felony of the third degree where:

(a) the actor was under arrest for or detained on a charge of felony or following conviction of a crime;

.....

Otherwise an offense under this Section is a misdemeanor.

The Superior Court, reiterating its reasoning in Commonwealth v. Fenton, 388 Pa. Super. 538, 566 A.2d 260, 263 (Pa. Super 1989), appeal denied, 525 Pa. 662, 583 A.2d 792 (1990), explained the language of 5121(d)(1)(i):

The language used by the legislature provides that an actor who has been convicted of a crime, whether that crime be a felony, misdemeanor, or even a summary conviction, and who then commits the offense of escape, as defined by the statute, be charged with a felony of the third degree. Plainly, the legislature sought to draw a distinction between detention on charges and detention after conviction for misdemeanor and summary cases.

In 2014, the Pennsylvania Legislature amended the Escape offense to separate (d)(1)(i) into three sections (A), (B), and (C). Unfortunately that has not resolved confusion over the issue of how to determine the grade of a charge of Escape.

***Whether Escape should be charged as a misdemeanor or a felony***

Can the Commonwealth amend an information to reflect a different grading than originally charged? Pennsylvania Rule of Criminal Procedure 564 allows for the 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.

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. 20016) citing Commonwealth v. Duda, 831 A.2d 728, 732 (Pa. Super. 2003).

In determining prejudice, the lower courts are directed to consider several factors including the following:

(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 the 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/or (6) whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

Commonwealth v. Sinclair, 897 A.2d 1218, 1223 (Pa. Super. 2006).

In Sinclair, the Defendant was charged with violating 3802(a) and 3802(c) of the Motor Vehicle Code. On the day of the trial, the Commonwealth amended the information to include a count under 3802(b). The Defense did not move to continue the trial, but rather appealed to the Superior Court raising the issue of whether the trial court erred in granting the Commonwealth's motion to amend the criminal information to add the additional count under 3802(b) "minutes before the trial began". The Superior Court found no error in the trial court's decision to amend the information as the facts underlying the additional charge were known to the defendant, the additional charge was a cognate to the crimes already charged, and the defendant suffered no prejudice regarding the amendment. The Sinclair facts only gave the Superior Court pause on factors five and six of the analysis i.e. whether a change in defense strategy was necessitated by amendment, and whether timing of the notice Commonwealth's request for amendment allowed for ample notice and preparation. The Superior Court found that Sinclair's defense strategy was indeed affected by the amendment, i.e. his defense to 3802(c) was that his blood alcohol level 0.164% given the standard deviation of .006% as acknowledged by the Commonwealth would not be a viable defense as to the new charge

under 3802(b). Though the Court noted that the amendment “vitiates” the defense strategy, it also noted that no continuance request was made. *Id.* p. 223.

The case at bar is similar to Sinclair. No new facts are being alleged by the amendment, and unlike Sinclair, no additional count is being added; but, the defense strategy has changed possibly due to the amendment. Whereas in October, Defendant was willing to plead to a misdemeanor charge, he now goes to trial on the information as amended to a felony. In Commonwealth v. Johnson, 1983 Pa. Super. LEXIS 3094 (Pa. Super. Ct. May 13, 1983), the Commonwealth moved prior to trial to amend the information to include a pecuniary loss of \$5,000 rather than the pecuniary loss of less than \$500. The change in the amount of loss meant a change in grade from a summary offense to a felony of the third degree. The Superior Court held that the changing of a grade does not amount to an additional charge or a charging of another offense and so it sustained the amendment to the criminal information.

Defense Counsel cites Commonwealth v. McNeil, 439 A.2d 131, (Pa. Super. 1981) for the proposition that if an information fails to set forth the degree of the offense, a conviction for escape must be graded as a misdemeanor of the second degree, and also Commonwealth v. Sparks, 737 A.2d 787 (Pa. Super. 1999), for the proposition that whatever the grade of the offense is the defendant is incarcerated for is the grade of the escape offense. In McNeil, no grade was charged in the criminal information so the appellate court found that the sentencing court could not sentence defendant to the greater penalties of a felony conviction, and at maximum could sentence the defendant to two years incarceration. In the case at bar, there was an initial indictment of misdemeanor, a charge for which Defendant at one time was willing to plead. The McNeil case cites Commonwealth v. Herstine, 264 Pa. Super 414, (1979) also cited by the Sinclair court for

the proposition that for purposes of amending an information, a substantive amendment is one that changes the nature or grade of the offense charged. Sinclair p. 1223.

The Sparks case is unpersuasive in its entirety. In Sparks, the defendant was found guilty of a felony escape, and the Superior Court did reason as cited above that the escape was a felony as defendant was escaping from the arrest of parole officers. The real issue in the case was whether escape from parole officers meant escape from official detention. The Court found that it did. Additionally, the court found that as defendant was on parole for two felony convictions, when he escaped from the arrest of parole officers, he was escaping as a convicted person. This Court finds the factual background and legal reasoning in Sparks to be inapplicable to the case at bar. Applying the reason from Kowalski and Sinclair, the Court finds that the amendment to the information was appropriate in light of a black letter reading of the Escape statute and though unfortunate that Defendant will no longer plead to the Escape charge, the Court does not find that this is prejudicial to the Defendant as no new facts are being alleged nor are new charges being brought that Defendant is not aware of and therefore unable to prepare an adequate defense. Quoting the Superior Court in Kowalski:

The cold logic of these interpretations of this Section [5121] is derived from the imperative that persons convicted of any crime and sentenced to custodial disposition have had due process and their day in court and should not be permitted to trivialize the process by absconding. We find no vagueness or ambiguity in a statute which must be read to inform the convicted miscreant that any escape from legally imposed custody upon conviction of any grade of crime is to be treated with the same degree of severity. Uniformity in this regard eliminates confusion and ambiguity rather than produces it.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of October, 2016, for the reasons state above,  
the Motion for a Writ of Habeas Corpus, is hereby DENIED.

BY THE COURT,

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Nancy L. Butts, President Judge

cc: Julian G. Allatt, Defense Counsel  
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