

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, : **CR-1324-2022**
:
V. :
:
ILEMPSI SANCHEZ-GARCIA, :
Defendant. :
: **Motion to Amend Information**

OPINION AND ORDER ON MOTION TO AMEND INFORMATION

I. BACKGROUND

This matter came before the Court on July 30, 2024, for oral argument on the Motion of the Commonwealth to Amend the Information (hereinafter the “Motion”), filed July 12, 2024, to include counts of Attempted Aggravated Indecent Assault of a person under 13 years of age, and Unlawful Contact with a Minor pursuant to 18 Pa.C.S.A. § 6318 (a)(1). At Paragraph 3 of the Motion, the Commonwealth lists the proposed new charge of Attempted Aggravated Assault of a child, 18 Pa.C.S.A. § 3125(a)(1). It appears to the Court that the proposed new charge would be either Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 3125(b), or Criminal Attempt, 18 Pa.C.S.A. § 901. During oral argument, counsel for the Defendant objected to the proposed amendment, on the basis that the proposed new charge of 18 Pa.C.S.A. § 3125(b) or 18 Pa.C.S.A. § 901, would involve either the element of penetration or a substantial step toward penetration, which is a claim beyond the scope of the preliminary hearing testimony. Defense counsel asserted that an amended Information should require a new preliminary hearing, or an extended deadline for filing a motion for a writ of habeas corpus.

The Court notes that this matter has already been the subject of a hearing on a habeas corpus motion, conducted before President Judge Nancy L. Butts. That hearing resulted in her Opinion and Order of June 12, 2023. It is difficult to imagine how the Commonwealth successfully defended that Motion, without considering whether the Information accurately charged crimes under the appropriate sections of Title 18. In the view of this Court, the proposed amendment should have been considered long ago. That issue notwithstanding, the Court will consider the Motion as filed.

II. ISSUE PRESENTED

Whether the Commonwealth should be permitted to amend the information to include counts of either Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 3125(b), or Criminal Attempt, 18 Pa.C.S.A. § 901, and Unlawful Contact with a Minor, 18 Pa.C.S.A. § 6318(a)(1).

III. ANSWER TO ISSUE PRESENTED

The Commonwealth will be permitted to amend the information to include counts of either Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 3125(b), or Criminal Attempt, 18 Pa.C.S.A. § 901, or Unlawful Contact with a Minor pursuant to 18 Pa.C.S.A. § 6318(a)(1), or some combination. If the Commonwealth adds either Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 3125(b), or Criminal Attempt, 18 Pa.C.S.A. § 901, the Defendant will be provided an opportunity for a second preliminary hearing.

IV. DISCUSSION

Motions to amend an information are controlled by Rule 564 of the Pennsylvania Rules of Criminal Procedure, which provides that the court may allow an amendment “provided that the information as amended does not charge offenses arising from a different set of events and that the amended charges are not so materially different from the original charge that the defendant would be unfairly prejudiced.”

Counsel for the Defendant provided the Court with a copy of a transcript of the preliminary hearing. The alleged victim testified to the nature of the incident. The alleged victim testified that she and the Defendant formerly lived in the same household, that he conducted a discussion with her, and that he touched her in an intimate location, all at a time when she was under 13 years of age. The Court notes that 18 Pa.C.S.A. § 6318 defines “contact” as being “direct or indirect contact or communication by any means, method or device, including contact or communication in person....” Since the discussion between the Defendant and the alleged victim would be a “contact” as defined in that Section, the testimony supported a charge of Unlawful Contact with a Minor pursuant to 18 Pa.C.S.A. § 6318(a)(1). In the view of the Court, the testimony did not support a charge of Aggravated Indecent Assault of a child pursuant to 18 Pa.C.S.A. § 3125(b). While the alleged victim testified to a touching at a time when the alleged victim was under 13 years of age, and while the alleged touching occurred during the same set of events, the testimony does not indicate that penetration took place. It is a closer question

whether the testimony supported a charge of Criminal Attempt pursuant to 18 Pa.C.S.A. § 901, since Criminal Attempt of that offense may not require proof that penetration take place. It is possible that the victim’s testimony at trial may support a charge of Aggravated Indecent Assault of a child pursuant to 18 Pa.C.S.A. § 3125(b), or a charge of Criminal Attempt, Aggravated Indecent Assault of a child pursuant to 18 Pa.C.S.A. § 901. In the view of this Court, however, requiring the Defendant to defend either charge without permitting a second preliminary hearing could present the “unfair prejudice” forbidden by Rule 564.

ORDER

AND NOW, this 2nd day of August 2024, it is hereby Ordered as follows:

- a. The Commonwealth’s Motion to Amend the Information, filed July 12, 2024, is granted in part. The Commonwealth is granted leave of Court to amend the Information to include counts of Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 3125(b), or Criminal Attempt, Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 901, or Unlawful Contact with a Minor pursuant to 18 Pa.C.S.A. § 6318(a)(1), or any combination of those charges. The amended Information shall be filed on or before Friday, August 9, 2024.
- b. If the Commonwealth amends the Information to include Aggravated Indecent Assault of a child, 18 Pa.C.S.A. § 3125(b), or Criminal Attempt, 18 Pa.C.S.A. § 901, or both, the Court grants the Defendant an opportunity to demand a second preliminary hearing. If the Defendant so chooses, the Defendant shall file a written demand, not later than Friday, August 16, 2024. In that event, and because remand to the issuing authority is not permitted pursuant to Rule 543(G) of the Pennsylvania Rules of Criminal Procedure, the second preliminary hearing will be conducted before this Court, as promptly as the Court’s schedule permits.

BY THE COURT,

William P. Carlucci, Judge

WPC/aml

CC: Court Administrator
District Attorney (PY)
Robert Hoffa, Esquire