

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
MICHAEL GORRIO	:	
	:	
Appellant	:	No. 807 MDA 2022

Appeal from the Judgment of Sentence Entered May 19, 2022
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0003755-2021

BEFORE: PANELLA, P.J., MURRAY, J., and STEVENS, P.J.E.*

MEMORANDUM BY PANELLA, P.J.: **FILED: NOVEMBER 22, 2023**

Michael Gorrio appeals from the judgment of sentence entered by the Dauphin County Court of Common Pleas on May 19, 2022, following his convictions for robbery and retail theft. After careful review, we affirm.¹

On August 17, 2021, a criminal complaint was filed charging Gorrio with one count of robbery – inflicted bodily harm and one count of robbery - threatened bodily harm, stemming from an incident at a Boscov’s department

* Former Justice specially assigned to the Superior Court.

¹ We note with extreme displeasure the Commonwealth’s failure to file an appellee’s brief. “An appellee is required to file a brief that at minimum must contain ‘a summary of argument and the complete argument for appellee.’” ***Commonwealth v. Pappas***, 845 A.2d 829, 835 (Pa. Super. 2004) (quoting Pa.R.A.P. 2112). In ***Pappas***, the panel referred to the Commonwealth’s failure to file a proper appellee’s brief as “unacceptable.” ***Id.*** We echo that opinion and remind the Commonwealth of its obligation to file an appellee’s brief in future appeals.

store where two loss prevention officers attempted to detain him for retail theft. After a preliminary hearing, Gorrio filed a *pro se* motion for dismissal of legal representation. After a review of the record, we cannot locate any hearing held on this matter or any formal disposition of this request. However, all documents filed after October 28, 2021, treat Gorrio as having a *pro se* status.

On April 27, 2022, the Commonwealth filed a motion for leave to amend the information to include one count of retail theft.

On May 11, 2022, a hearing was held for pretrial motions and jury selection. At the start of the hearing, the trial court colloquied Gorrio on his decision to proceed *pro se*. **See** N.T, Pretrial Motions & Jury Selection, 5/11/2022, at 3-6. Following questioning, the court concluded Gorrio could proceed *pro se* based on his responses. **See id.** at 6. Next, the court proceeded to consider the Commonwealth's motion to amend the information. Gorrio objected to the amendment of the information, arguing he would be prejudiced. **See id.** at 14-18. The trial court permitted the amendment of the criminal information and proceeded to jury selection.

The jury trial took place on May 18-19, 2022. Gorrio represented himself with standby counsel. The two Boscov's loss-prevention officers involved in the incident testified for the Commonwealth, along with the police officer who responded to the scene. Gorrio did not testify on his own behalf. Following the trial, the jury found Gorrio guilty of both counts of robbery, and one count of

retail theft. The trial court sentenced Gorrio to concurrent terms of two and one-half to ten years' imprisonment for each robbery count, followed by one and one-half to three years' imprisonment for retail theft.

On May 27, 2022, Gorrio filed a timely notice of appeal, *pro se*. On June 29, 2022, this Court entered an order directing the trial court to determine whether Gorrio was eligible for court-appointed counsel. After a hearing, the trial court entered an order appointing appellate counsel. In the meantime, Gorrio had filed a *pro se* concise statement of errors raised on appeal at the direction of the trial court, alleging trial court error for (1) allowing the Commonwealth to amend the information, (2) denying Gorrio's motion to quash the jury box for racial discrimination, and (3) issuing an illegal sentence. We subsequently issued an order remanding the record to the trial court and directing newly appointed appellate counsel to file a counseled concise statement, and the trial court to file its 1925(a) opinion in response.

On September 7, 2022, counsel filed a new concise statement, raising a single issue challenging the amendment of the information: "The trial court abused its discretion in allowing the Commonwealth to amend the criminal information without providing a continuance or other relief to [Gorrio] in the interest of justice, thereby depriving him of due process." Concise Statement, filed 9/7/2022. The trial court thereafter filed an opinion responding to the sole issue.

Subsequently, counsel filed an application for remand in this Court, in order to supplement the 1925(b) concise statement. In the application, counsel acknowledged that he had only raised one issue in the original concise statement. However, after performing further review of the record, counsel sought to raise a claim challenging the validity of Gorrio's waiver of counsel colloquy. Specifically, counsel argued the colloquy was deficient because the trial court failed to note the elements of the offenses charged. This Court denied the application for remand. **See** Order, 11/3/2022.²

Preliminarily, despite the denial of the application for remand, Gorrio nevertheless attempts to raise the supplementary issue above in his first issue on appeal. It is well-established that any issue not raised in a Rule 1925(b) statement will be deemed waived for appellate review. **See Commonwealth v. Lord**, 719 A.2d 306, 309 (Pa. 1998).

However, Gorrio's appellate counsel attempts to avoid waiver on constitutional grounds. Specifically, counsel argues that similar to a claim of an illegal sentence, a claim challenging the validity of a waiver-of-counsel

² In denying the motion for remand, we cited to Pa.R.A.P. 1925(c)(3), which permits remand for filing a concise statement in criminal cases where counsel was ordered to file a concise statement and either failed to do so or untimely filed such statement, such that the appellate court is convinced counsel was *per se* ineffective, and where the trial court has not filed an opinion.

Here, counsel filed a timely concise statement preserving an issue for review. Additionally, the trial court had already filed its opinion, responding to that issue. Accordingly, a remand was not warranted.

colloquy can never be waived because it implicates the legality of the process. **See** Appellant's Brief at 20. Nevertheless, Gorrio concedes that there is conflicting authority regarding whether such a claim is subject to traditional waiver analysis. **See id.** at 26.

After reviewing Gorrio's argument, we conclude that our existing case law mandates waiver under these circumstances. As Gorrio notes, nearly 20 years ago this Court held that an appellant's failure to raise a challenge to the waiver of counsel colloquy in his Rule 1925(b) statement results in waiver of the challenge on appeal. **See Commonwealth v. Berry**, 877 A.2d 479, 485 (Pa. Super. 2005). And we find the cases cited by Gorrio for the contrary proposition distinguishable.

In **Commonwealth v. Johnson**, the *pro se* appellant entirely failed to raise a challenge to the trial court's complete failure to colloquy the appellant before allowing him to proceed *pro se*. **See Johnson**, 158 A.3d 117, 123 (Pa. Super. 2017). While Johnson subsequently retained counsel for the purposes of trial, he ultimately proceeded *pro se* on appeal. **See id.** at 120. This Court raised the issue of Johnson's waiver of counsel *sua sponte*. **See id.** at 122. After noting that the record was devoid of any indication that Johnson had ever been colloquied pursuant to Rule 121, the panel held he was entitled to a new trial.

Gorrio argues that **Johnson** demonstrates that challenges to the waiver of counsel colloquy are non-waiveable. We disagree. The important distinction

is that Johnson was proceeding *pro se* on appeal. And further that there was no evidence Johnson had ever received an oral waiver colloquy. Under those circumstances, any mistake Johnson made on appeal could arguably be tied to the fact that he was proceeding *pro se*. Since he had not knowingly, intelligently, and voluntarily waived his right to counsel, he could not be held responsible for his mistakes on appeal, up to and including his failure to raise the challenge in his appellate brief. ***See id.*** at 121 (“as a general rule, failure to raise an issue in a criminal proceeding does not constitute a waiver where the defendant is not represented by counsel in the proceeding.”).

While not exactly identical, the analysis in ***Commonwealth v. Murphy***, 214 A.3d 675 (Pa. Super. 2019) is similar. There, Murphy was not provided counsel at a violation of probation hearing. ***See id.*** at 677. The ***Murphy*** decision is not clear about the timing, but Murphy did subsequently have counsel for his appeal. ***See id.*** at 676 (identifying the public defender’s office as counsel for Murphy on appeal). In any event, Murphy’s 1925(b) statement did raise a challenge to the probation court’s failure to allow him to obtain counsel, even though the trial court there opined that the challenge was insufficiently specific. ***See id.*** at 678 n.2. So ***Murphy*** is distinguishable from the procedure here, where counsel entirely failed to include the waiver challenge in Gorrio’s 1925(b) statement.

Here, it was counsel’s actions that led to waiver of the issue. And Pa.R.A.P. 1925(c)(3) does not provide any exception to the waiver mandated

by (b)(4)(vii) under these circumstances. We are therefore left with **Berry**. **Berry** is still valid authority, and Gorrio has failed to provide us any authority that otherwise limits its precedential value. As such, we are bound by **Berry**. **See Commonwealth v. Karash**, 175 A.3d 306 (Pa. Super. 2017). Gorrio has waived this issue on appeal.

In his sole preserved issue on appeal, Gorrio argues the trial court abused its discretion by permitting the Commonwealth to amend the criminal information. In support, Gorrio contends he suffered prejudice because he was *pro se*, his trial strategy was impacted, and the trial was only one week away.

We review a trial court's decision to grant or deny a motion to amend an information for an abuse of discretion. **See Commonwealth v. Small**, 741 A.2d 666, 681 (Pa. 1999). As we have explained,

[a]n abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record. If in reaching a conclusion the trial court overrides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error.

Commonwealth v. Belknap, 105 A.3d 7, 10 (Pa. Super. 2014) (citations omitted).

Pennsylvania Rule of Criminal Procedure 564 provides as follows:

The court may allow an information to be amended, 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. 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.

"[T]he 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) (citation omitted).

When presented with a question concerning the propriety of an amendment, we consider:

[w]hether 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.

Sinclair, 897 A.2d at 1221 (citation omitted).

Since the purpose of the information is to apprise the defendant of the charges against him so that he may have a fair opportunity to prepare a defense, our Supreme Court has stated that following an amendment, relief is warranted only when the variance between the original and the new charges prejudices [a defendant] by, for example, rendering defenses which might have been raised against the original charges ineffective with respect to the substituted charges.

Id. at 1223 (citation omitted).

The factors the trial court must consider in determining whether an amendment is prejudicial are:

(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. (citation omitted). Gorrio concedes there were no new facts; Gorrio had an opportunity during the preliminary hearing to hear the case before him; and the inclusion of retail theft did not alter the nature of the charges against him. **See** Appellant's Brief, at 38. Accordingly, Gorrio is only challenging factors 2, 5, and 6 – "whether the amendment adds new facts previously unknown to the defendant; whether it changed [] Gorrio's defense strategy and whether this provided [] Gorrio adequate time to prepare." Appellant's brief, at 38 (quotation marks omitted).

The trial court addressed the amendment to the criminal information as follows:

Here, the original information charged [Gorrio] with two (2) counts of robbery[] and the amended information included one count of retail theft. The amendment arose out of the same factual scenario as the original charges. [Gorrio] was charged with taking various items from a Boscov's Department Store and then fighting store security personnel during the course of the theft. From the outset, [Gorrio] was aware that the factual scenario alleging he committed the robbery counts was exactly the same as the factual scenario supporting the retail theft charge in the amended information. Testimony provided during the preliminary hearing

supported the allegation that [Gorrio] was committing a retail theft at the time the robbery occurred. Further, [Gorrio] was given ample notice that the Commonwealth intended to add the count of retail theft to the criminal information. Because theft is an element included in the charge of robbery, the amendment did not introduce an additional or different offense, and therefore, there was no violation of Pennsylvania Rule of Criminal Procedure 564. As such, [Gorrio] was not prejudiced by the amendment of the information, and no error occurred.

Trial Court Opinion, 9/15/2022, at 4-5 (citations and unnecessary capitalization omitted).

Based on our review of the record, we discern no abuse of discretion by the trial court in granting the Commonwealth's motion to amend the information. We acknowledge the Commonwealth filed the motion to amend the information only one week prior to trial. However, while Rule 564 allows for a continuance in order to prepare for the new information, no such request was made by Gorrio. ***See Commonwealth v. Fowler***, 393 A.2d 844, 847 (Pa. Super. 1978) (finding failure to request continuance after information amended supports a conclusion that amendment caused no prejudice). Under these circumstances, we conclude Gorrio has not established prejudice as a result of the amendment. Therefore, Gorrio is not entitled to relief.

As we find Gorrio's issues are either waived or without merit, we affirm his judgment of sentence.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 11/22/2023