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FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH OF THE)
NORTHERN MARIANA ISLANDS,)
)
Plaintiff,)
)
v.)
)
GUANG QIU WU,)
)
Defendant.)

CRIMINAL ACTION NO. 16-0194

**ORDER GRANTING THE
COMMONWEALTH'S MOTION TO
AMEND THE INFORMATION**

I. INTRODUCTION

THIS MATTER came before the Court on May 4, 2017 at 1:30 p.m. in Courtroom 202A for a hearing on the Commonwealth's second motion to amend the information pursuant to NMI R. CRIM. P. 7(e). Assistant Attorney General Chester Hinds represented the Commonwealth of the Northern Mariana Islands ("Commonwealth"). Attorney Robert T. Torres represented Defendant Guang Qiu Wu ("Defendant"). After reviewing the facts of this case as well as the relevant law the Court **GRANTS** the Commonwealth's second motion to amend the information pursuant to NMI R. CRIM. P. 7(e).

II. BACKGROUND

This case stems from Defendant's arrest on October 14, 2016. The arrest was pursuant to an arrest and search warrant obtained by the Commonwealth's Drug Task Force ("DTF"). Prior to his arrest, the Court had previously authorized an eavesdrop warrant relating to Defendant. During its investigation of Defendant the DTF worked with a confidential informant who helped procure

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1 pertinent audio recordings. These audio recordings helped form the basis of the Commonwealth's
2 charges of: (1) Trafficking of a Controlled Substance, 6 CMC § 2141(a)(1); and (2) Illegal
3 Possession of a Controlled Substance, 6 CMC § 2142(a). Defendant was charged with the
4 aforementioned offenses on October 24, 2016.

5 On October 25, 2016, Defendant appeared before the Court for a preliminary hearing.
6 Before the hearing, the Commonwealth and Defendant agreed that Defendant would waive his
7 preliminary hearing and in exchange the Commonwealth would provide him with a plea offer.¹ The
8 offer was for Defendant to plead to the possession count and in return the trafficking count would
9 be dismissed. On October 31, 2016, Defendant was arraigned on both counts contained in the
10 October 24, 2016 information. Defendant remained in the custody of the Department of Corrections
11 from the time of his arrest until he posted his bail, \$100,000 cash, in December 2016.

12 After his release on bail, Defendant hired private counsel, Robert T. Torres, to represent him
13 in this matter. In early January 2017, the Commonwealth provided Defendant with its initial
14 production of discovery, which did not include confirmatory drug testing results and did not include
15 the recordings and information pertaining to the confidential informant. In its January 17, 2017
16 email, the Commonwealth indicated that it would not produce discovery related to the confidential
17 informant until a motion to compel is granted by the Court.

18 The January 17, 2017 email also included a renewed plea offer for Defendant to plead guilty
19 to the possession count. After receiving the email from the Commonwealth, Defendant requested a
20 meeting to discuss the plea offer made by the Commonwealth. On February 27, 2017, during a
21

22 ¹ Defendant received advice from his counsel at the time, Assistant Public Defender Michael Sato, before waiving his
23 preliminary hearing.

1 scheduled status conference, Defendant executed the Commonwealth's plea agreement, which
2 provided that Defendant would plead guilty to the possession count.²

3 The Court scheduled a change of plea hearing for March 7, 2017, which was changed to
4 March 14, 2017 pursuant to a stipulation by the parties. On February 28, 2017, the Commonwealth
5 filed Defendant's signed plea agreement as well as a motion to amend the information so as to
6 dismiss the trafficking count.³ Then, on March 12, 2017, Defendant notified the Commonwealth via
7 email that he was going to withdraw from the plea agreement, i.e. would not change his plea to
8 guilty on the possession count. In response, on March 13, 2017, the Commonwealth moved to
9 amend the information again so as to reinstate the trafficking count since the plea agreement had
10 fallen through. At the March 14, 2017 hearing, Defendant objected to the Commonwealth's second
11 motion to amend the information and the Court ordered the parties to brief the matter, which is now
12 before the Court.

13 III. LEGAL STANDARD

14 NMI R. CRIM. P. 7(e) provides: "[t]he court may permit an information to be amended at
15 any time before verdict or finding if no additional or different offense is charged and if substantial
16 rights of the defendant are not prejudiced." The decision of whether to grant or deny a motion to
17 amend an information is made on a case by case basis with an eye to the specific circumstances of
18 the request. *See generally Commonwealth v. Mendiola*, Crim. No. 15-0077 (NMI Super. Ct. Jan. 8,
19 2016) (Order Denying Commonwealth's Motion to Amend Information Due to "Additional or

20 _____
21 ² The plea agreement provided: "Defendant now desires to plead guilty in Criminal Case No [16-0194] to Count I:
Possession. In consideration for the plea of guilty, the Commonwealth agrees to dismiss the other charges with
prejudice."

22 ³ The Commonwealth's February 28, 2017 motion to amend the information was granted by the Court on March 1,
23 2017. *See Commonwealth v. Wu*, Crim. No. 16-0194 (NMI Super. Ct. Mar. 1, 2017) (Order).

1 Different” Charge and Prejudice to the Defendants) (showing that a court must wade into the
2 specific circumstances of the case at bar to determine if amendment of the information is proper).

3 IV. DISCUSSION

4 In this case, the Court is tasked with determining whether the Commonwealth’s motion to
5 amend the information should be granted or denied. In doing so, the Court must determine whether
6 the trafficking charge was an additional or different offense and whether Defendant’s substantial
7 rights were prejudiced. At this time, both parties are in agreement that the trafficking charge is not
8 an additional or different offense because Defendant was originally charged with the trafficking
9 count, i.e. the Commonwealth is merely seeking to reinstate a count versus trying to bring a totally
10 new count. As such, the question before the Court turns to whether Defendant’s substantial rights
11 are prejudiced by the proposed amendment.

12 Defendant presents two main arguments as to how he is prejudiced, which would make
13 denial of the Commonwealth’s motion the appropriate course: (A) Defendant waived his
14 constitutional and statutory right to a preliminary hearing in exchange for the Commonwealth
15 dropping the trafficking count and (B) the Commonwealth has failed to provide Defendant with the
16 discovery materials, which make up the basis of the trafficking count in violation of the Court’s
17 Case Management Order. *See Commonwealth v. Wu*, Crim. No. 16–0194 (NMI Super. Ct. Nov. 2,
18 2016) (Case Management Order).

19 The Commonwealth responds that Defendant’s substantial rights have not been prejudiced.
20 Specifically, the Commonwealth argues that Defendant has fundamentally misrepresented the terms
21 and the nature of the agreement for Defendant to waive his preliminary hearing; the agreement was
22

1 for Defendant to waive his preliminary hearing in exchange for receiving a plea offer,⁴ not waive
2 the preliminary hearing and the trafficking count would be dismissed. Further, the Commonwealth
3 contends that Defendant's discovery arguments are premature because there is still plenty of time
4 for Defendant to prepare for his eventual trial since no trial date has even been scheduled in this
5 case. Moreover, the Commonwealth contends that the Court's prior case law makes clear that the
6 Commonwealth can delay producing discovery when a confidential informant is involved.

7 **A. Whether Defendant's Waiver of His Right to a Preliminary Hearing Makes Denial of the**
8 **Commonwealth's Motion Appropriate.**

9 NMI R. CRIM. P. 7(e) requires the Court to determine whether the proposed amendment to
10 the information prejudices Defendant's substantial rights.

11 The test as to whether the defendant is prejudiced by an amendment to an indictment
12 has been said to be whether a defense under an indictment as it originally stood
13 would be equally available after the amendment is made, and whether any evidence
the defendant might have would be equally applicable to the indictment in the one
form as in the other.

14 *People v. Diaz*, 2007 Guam 3 ¶ 17 (quoting *United States v. Fawcett*, 115 F.2d 764, 767 (3rd Cir.
15 1940).⁵ A defendant is prejudiced when an amendment results in the defendant losing the ability to
16 raise an argument and/or exercise a right.

17 Here, Defendant argues that he is prejudiced because he gave up his statutory and
18 constitutional right to a preliminary hearing based on the representations of the Commonwealth. 6
19 CMC § 6303 details a defendant's statutory right to a preliminary hearing:

20 _____
21 ⁴ The offer was for Defendant to plead to the possession count in exchange for dismissal of the trafficking count.

22 ⁵ The Supreme Court of Guam's articulation of what constitutes prejudice when applying Rule 7(e) is persuasive
23 because the court was applying federal case law interpreting FED. R. CRIM. P. 7(e); NMI R. CRIM. P. 7(e) is patterned
24 off the federal rule and as such the Court looks to the federal interpretation. See *Ishimatsu v. Royal Crown Ins. Corp.*,
2010 MP 8 ¶ 60 (citing *Ishimatsu v. Royal Crown Ins. Corp.*, 2006 MP 9 ¶ 7 n.3).

1 (a) If the arrested person does not waive preliminary examination, the official shall
2 hear the evidence within a reasonable time.

3 (b) A reasonable continuance shall be granted at the request of the arrested person or
4 the prosecution to permit preparation of evidence. The arrested person has the right
5 to be released on bail as provided by law during the period of a continuance.

6 (c) The arrested person may cross-examine adverse witnesses and may introduce
7 evidence in his or her own behalf.

8 (d) If the arrested person waives preliminary examination, or if from the evidence it
9 appears to the official that there is probable cause to believe that a criminal offense
10 has been committed and that the arrested person committed it, the official shall
11 forthwith:

- 12 (1) Hold the arrested person to answer in court;
- 13 (2) Fix, continue, or alter the bail as provided by law; and
- 14 (3) If bail is not provided, or a personal recognizance accepted, commit the
15 person to jail to await trial.

16 (e) If during the preliminary examination it appears to the official that the warrant of
17 arrest, complaint or other statements of the charge or charges does not properly name
18 or describe the person arrested or that although not guilty of the offense specified
19 there is probable cause to believe the person arrested has committed some other
20 offense, the official may not discharge the person but shall forthwith hold the person
21 to answer for the offense shown by the evidence.

22 (f) If the arrested person does not waive preliminary examination and from the
23 evidence it does not appear to the official that there is probable cause to believe that
24 a criminal offense has been committed and that the arrested person committed it, the
official shall discharge the arrested person.

Moreover, 6 CMC § 6303 codifies many of the due process protections required by the Fifth, Sixth,
and Fourteenth Amendments of the United States Constitution.

Defendant argues that the only reason he forfeited his right to a preliminary hearing was
because it was his understanding that in exchange for his waiver the Commonwealth would dismiss
the trafficking count. In theory, Defendant is correct that the loss of a preliminary hearing as a result

1 possession count. The Commonwealth did not have to dismiss the trafficking charge because
2 Defendant never completed phase two.

3 Defendant argues that the agreement only consisted of one phase; waive the preliminary
4 hearing in exchange for dropping the trafficking count. Yet, the text of the Commonwealth's
5 January 17, 2017 email not only does not support Defendant's argument it convincingly shows the
6 Court that the Commonwealth's two phase argument should prevail.

7 Further, even if the Court were to accept Defendant's interpretation of the January 17, 2017
8 email, there are a number of other factors, which suggest that Defendant's argument should fail.
9 First, the Commonwealth's February 28, 2017 amendment, which dismissed the trafficking count
10 specifically states:

11 *Pursuant to plea negotiations*, Defendant's potential future cooperation with the
12 Office of the Attorney General and Department of Public Safety and after careful
13 review of the evidence, additional investigation conducted by the Office of the
14 Attorney General; The Office of Attorney General now asserts that it is in the best
interests of the Commonwealth to amend Count I of the information to reflect:
Illegal Possession of Controlled Substance and dismiss all other counts.

15 The amendment dismissing the trafficking count specifically states the Commonwealth's reasoning,
16 which is primarily that Defendant is going to accept a plea of possession.

17 The timeline of events further strengthens the Commonwealth's argument because the plea
18 agreement was signed the day before the Commonwealth filed its amendment. This closeness in
19 time shows that the trafficking count was only dismissed pursuant to the plea agreement that
20 Defendant signed. Further, the long delay between the preliminary hearing, October 25, 2016, and
21 the amendment to remove trafficking, February 28, 2017, suggests that the Commonwealth's
22 position is the correct one. If Defendant was convinced that dismissal of the trafficking charge was

1 the consideration for the waiver of the preliminary hearing then it makes no sense why he never
2 pressed to have the Commonwealth amend the information earlier. Moreover, the long delay
3 indicates that the Commonwealth never had the kind of agreement with Defendant that Defendant
4 argues existed.

5 Additionally, the plea agreement itself evidences the Commonwealth's two phase position.
6 The plea agreement provided: "Defendant now desires to plead guilty in Criminal Case No [16-
7 0194] to Count I: Possession. *In consideration for the plea of guilty, the Commonwealth agrees to*
8 *dismiss the other charges with prejudice.*" If the original preliminary hearing agreement was to
9 drop the trafficking charge then it would make no sense for the Commonwealth to state in the plea
10 agreement that the consideration provided to Defendant is the dismissal of the trafficking offense.

11 In principle, the Court agrees with Defendant's argument that waiver of a preliminary
12 hearing as a result of an agreement with the Commonwealth could be grounds for a determination
13 of prejudice. However, the facts of this case suggest that Defendant was not prejudiced in any way.
14 In exchange for waiving his preliminary hearing the Commonwealth provided Defendant with a
15 plea offer that he would not otherwise be entitled to. Defendant's preliminary hearing prejudice
16 argument fails for the foregoing reasons.

17 **B. Whether the Commonwealth's Refusal to Provide Defendant with all Requested**
18 **Discovery Material Makes Denial of the Commonwealth's Motion Appropriate.**

19 Defendant also contends that his substantial rights have been prejudiced because the
20 Commonwealth has not provided him with all NMI R. CRIM. P. 16 discovery materials.
21 Specifically, the Commonwealth has not provided Defendant with drug testing results and refuses
22 to provide him with the information touching on the confidential informant. Defendant is correct

1 that failure to provide NMI R. CRIM. P. 16 discovery could amount to prejudice by impacting his
2 ability to prepare for trial. Yet, the Court need not dive into defining the exact contours of when a
3 discovery issue would rise to the level of prejudice for purposes of NMI R. CRIM. P. 7(e) because
4 this case is not a close call, Defendant has not been prejudiced.

5 In *Commonwealth v. Wang*, Crim. No. 10-0058 (NMI Super. Ct. June 16, 2010) (Order
6 Granting Defendant's Motion to Disclose Confidential Source), the Court detailed the analysis for
7 determining when the Commonwealth must provide discovery relating to a confidential informant.

8 The Court stated:

9 In determining whether to order disclosure, the court must balance the government's
10 interest in concealing the informant's identity to protect the flow of information to
11 law enforcement officials against the accused's due process right to prepare a
12 defense. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). The same
13 considerations govern the court's determination of when informants must be
14 disclosed.

15 *Id.* at 3 (short citation converted to full citation for clarity). In *Wang*, the Court determined that
16 disclosure was necessary because trial was looming and the defendant needed to access the
17 information regarding the confidential informant to prepare his defense. *Id.* at 4.

18 Here, the Commonwealth has not provided the requested discovery because it is so early in
19 the process and there has not been a motion to compel. The Court understands Defendant's
20 concerns and there will come a time when disclosure of the drug tests and the confidential
21 informant will be necessary,⁶ but that time has not arrived. However, the Commonwealth should
22 not interpret the Court's ruling as a free pass to delay providing discovery now or in the future.
23 Defendant has a right to discovery and the Court does not take the rights of a criminal defendant

⁶ Once a trial date is selected, the Court will issue a more detailed pretrial order, which will address the issues surrounding the eventual disclosure of information pertaining to the confidential informant.

1 lightly. At this time, Defendant has not been prejudiced by the Commonwealth's lack of production
2 because there is still plenty of time for a motion to compel and trial is not looming. Defendant's
3 prejudice argument due to discovery delays is theoretically possible, but the facts of the present
4 case to not justify denying the Commonwealth's motion to amend the information. At this early
5 stage, the Court is more than capable of handling the discovery issues raised by Defendant.⁷

6 **V. CONCLUSION**

7 In sum, the Commonwealth's second motion to amend the information pursuant to NMI R.
8 CRIM. P. 7(e) is **GRANTED**. The Commonwealth is seeking to reinstate a trafficking count, which
9 was only dropped because a plea agreement was signed and it appeared as though Defendant was
10 going to go through with a change of plea.⁸ Based on the foregoing, the Court accepts the
11 Commonwealth's Second Amended Information dated March 13, 2017.

12 **IT IS SO ORDERED** this 18th day of May, 2017.

13
14 
15 **ROBERTO C. NARAÑA**
16 Presiding Judge

17 ⁷ Defendant also argues that the Commonwealth's failure to provide all discovery materials further supports his
18 argument because the Commonwealth violated the Court's Case Management Order. *See Commonwealth v. Wu*, Crim.
19 No. 16-0194 (NMI Super. Ct. Nov. 2, 2016) (Case Management Order). While the Commonwealth has not fully
20 complied with the Court's order, there is no indication that the Commonwealth defied the Court's order in bad faith.
The Commonwealth withheld discovery because: first, it does not have the drug testing results due to its agreement with
the Guam testing lab and, second, it has a good faith legal argument that it should be allowed to withhold information
regarding the confidential informant. In sum, the Commonwealth's non-compliance with the Court's order has not
prejudiced Defendant.

21 ⁸ Also, the Court is concerned denying the Commonwealth's motion to amend would have the effect of incentivizing
22 defense counsels to try and "game the system" by having their clients appear to accept a plea deal, wait for the
23 Commonwealth to amend, and then claim that the Commonwealth should not be able to reinstate the charge[s]. Here,
24 the Court is not implying that Defendant attempted such a scheme, but nonetheless to rule in Defendant's favor would
negatively impact plea bargaining between the Commonwealth and criminal defendants.