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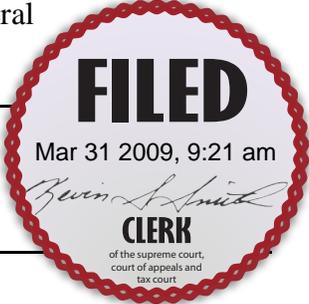
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**IN THE
COURT OF APPEALS OF INDIANA**



EARL R. SCHEPERS,)
)
Appellant/Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee/Plaintiff.)

No. 15A05-0809-CR-518

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Sally A. Blankenship, Judge
Cause No. 15D02-0701-FB-1

March 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Earl Schepers appeals from his conviction of and sentence for Class B felony Possession of a Firearm by a Serious Violent Felon (“SVF”).¹ Schepers contends that the trial court abused its discretion in allowing the State to amend its charging information shortly before trial and that his sentence is inappropriately long. We affirm.

FACTS

On or about January 6, 2007, a television station in Cincinnati, Ohio, aired a program alerting viewers that Schepers was wanted on several outstanding arrest warrants and that information on his whereabouts might result in a cash reward. After the broadcast, authorities received information that Schepers was staying at the State Line Motel in Dearborn County, Indiana. On the morning of January 8, 2007, several members of the United States Marshal’s Southern Ohio Fugitive Apprehension Strike Team arrived at the motel and determined that Schepers was staying in Room 8.

When a strike team member knocked on the door, Schepers began to open it but almost immediately tried to close it again. Strike team members were able to force the door open, however, and soon subdued Schepers. When one of the strike team members asked Schepers if he was armed, he told him that he had a firearm, and a loaded 9mm handgun and three 9mm cartridges were subsequently found on Schepers. Additionally, a forty-round box of 9mm ammunition, with ten rounds missing, was also recovered from the motel room.

¹ Ind. Code § 35-47-4-5 (2006).

On January 9, 2007, the State charged Schepers with Class B felony possession of a firearm by a SVF. Originally, the charging information alleged as predicate offenses that Schepers had been convicted of “Armed and Dangerous Aggravated Kidnapping and Robbery with a Deadly Weapon” in Texas on January 17, 1990. Appellant's App. p. 11. On June 4, 2008, the State moved to amend the charging information to read that Schepers’s Texas convictions had actually occurred on July 17, 1981, a motion the trial court granted on June 9, 2008. On June 12, 2008, a jury found Schepers guilty of possession of a firearm by a SVF. On July 31, 2008, the trial court sentenced Schepers to twenty years of incarceration.

DISCUSSION AND DECISION

I. Amendment of the Charging Information

Schepers contends that the trial court abused its discretion in allowing the State to amend its charging information shortly before trial. Schepers argues first that the Indiana Supreme Court’s opinion in *Fajardo v. State*, 859 N.E.2d 1201 (2007), *superseded in part on other grounds*, Ind. Code § 35-34-1-5, effective May 7, 2007, should apply to his prosecution, which was based on a crime that occurred prior to the issuance of *Fajardo*. *Fajardo* held that, under Indiana Code section 35-34-1-5 (2006) as it was then written, no amendment of substance to a charging information could be made more than thirty days before the omnibus date, regardless of prejudice to the defendant. *Id.* at 1207. Schepers then argues that the amendment at issue was one of substance and not form, entitling him to reversal.

The State counters that *Fajardo* should not apply to Schepers’s prosecution

because the General Assembly amended Indiana Code section 35-34-1-5 shortly after *Fajardo* was issued, and that this amendment should apply retroactively.² See, e.g., *Hurst v. State*, 890 N.E.2d 88, 94-95 (Ind. Ct. App. 2008), *trans. denied*. The State, however, notes that it makes no difference whether *Fajardo* applies to the instant case if the amendment at issue is one of form and not substance and did not prejudice Schepers's substantial rights, as such an amendment was permitted even under *Fajardo*. See *Fajardo*, 859 N.E.2d 1207 ("The statutory prerequisite requiring that an amendment not prejudice the substantial rights of the defendant applies only to amendments of certain immaterial defects under subsection 5(a)(9), and to amendments related to a defect, imperfection, or omission in form as provided in subsection 5(c)."). So, if the amendment here was one of form only and did not prejudice Schepers's substantial rights, we need not reach the question of retroactive application of *Fajardo*.

The first step, then, in evaluating Schepers's claim is to determine whether the amendment at issue was addressed to a matter of substance or one of form or immaterial

² The amended subsection provides, in relevant part, that

The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:

(1) up to:

(A) thirty (30) days if the defendant is charged with a felony; or

(B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date; or

(2) before the commencement of trial;

if the amendment does not prejudice the substantial rights of the defendant.

Ind. Code § 35-34-1-5(b) (2008). The amendment essentially overturned *Fajardo*'s holding that the previous version of Indiana Code section 35-34-1-5 did not allow substantive amendments beyond statutory deadlines, even if they did not prejudice the substantial rights of the defendant. *Fajardo*, 859 N.E.2d at 1208.

defect. *Id.* “An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused's evidence would apply equally to the information in either form.” *McIntyre v. State*, 717 N.E.2d 114, 125 (Ind. 1999). “Further, an amendment is of substance only if it is essential to making a valid charge of the crime.” *Id.*

The Indiana Supreme Court’s considered the question of whether an amendment was essential to making a valid charge in *McIntyre*, a case we believe to be closely analogous to this one. In *McIntyre*, the defendant was charged with double murder, and the State sought the death penalty on the basis that he had “committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.” *Id.* at 124 (quoting Ind. Code § 35-50-2-9(b)(8)). In the original charging information, the State had alleged that the defendant had killed one victim before killing the other, but later sought to amend the information so that the State would not be required to prove the specific order of the deaths. *Id.* at 124-25. The Court concluded that the amendment was one of form and not substance because “the prosecutor did not need to prove the order of killing to request the death penalty; he only needed to allege that the defendant had committed another murder ‘at any time.’” *Id.* at 126 (quoting Ind. Code § 35-50-2-9(b)(8)).

In this case, the amendment at issue satisfies the first two requirements for an amendment of substance listed in *McIntyre* in that it denied Schepers the defense that he had never been convicted of the crimes listed on the date originally listed on the information, and evidence that he had never been convicted of those crimes on that date

did not apply to the amended information. The amendment, however, as with the amendment in *McIntyre*, does not satisfy the final requirement, because the State was not required to prove that Schepers was convicted of a serious violent felony on any particular date, only that the conviction existed. Indiana Code section 35-47-4-5 defines “serious violent felon” [as] a person who has been convicted of ... committing a serious violent felony³ in ... Indiana ... or ... any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of a serious violent felony” and otherwise provides that “[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony.” In other words, the State was required to prove Schepers’s status as a SVF by virtue of a prior serious violent felony conviction but *not* that the conviction occurred on any particular date. Applying *McIntyre*’s analysis to the instant case, we conclude that the amendment was one of form and not substance.

We also conclude that Schepers’s substantial rights were not affected by the amendment. “These substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge.” *Sides v. State*, 693 N.E.2d 1310, 1312-13 (Ind. 1998) (citing *Hegg v. State*, 514 N.E.2d 1061, 1063 (Ind. 1987)), *abrogated in part on other grounds*, *Fajardo*, 859 N.E.2d at 1206. “Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges.” *Id.* at 1313. Schepers has not established that he was unfairly prejudiced by the

³ Schepers does not claim that his Texas convictions for “Armed and Dangerous Aggravated Kidnapping and Robbery with a Deadly Weapon” do not qualify as serious violent felonies under Indiana Code section 35-47-4-5.

amendment here. Discovery materials provided on December 27, 2007, over five months before trial, clearly indicate that the convictions at issue occurred on July 16, 1981. Significantly, Schepers does not claim to have been misled, surprised, or prejudiced by the amendment beyond noting that he could not make use of evidence or the defense that he had never been convicted on the dates originally listed on the charging information. As previously mentioned, however, this is not enough. We conclude that Schepers's substantial rights were not affected by the amendment of form. *See id.* (concluding, in case where trial court allowed State to amend habitual offender information to change "auto theft" to "theft" when discovery documents indicated that prior conviction was for theft, that defendant "was neither surprised nor substantively affected by the State's amendment, and we find no error in allowing it"). Consequently, the trial court did not abuse its discretion in allowing the amendment, and we need not reach the question of retroactive application of *Fajardo*.

II. Appropriateness of Sentence

Schepers also contends that his maximum twenty-year sentence is inappropriate. We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied*

(citations and quotation marks omitted).

Here, we find the nature of Schepers's offense to be very egregious. Schepers's firearm possession occurred when he was a fugitive from justice, being the subject of a total of four active arrest warrants from three states. Moreover, Schepers was carrying the handgun on his person, fully loaded and ready to fire, which could only have increased the likelihood that the incident would escalate. We would also note that Schepers forcibly attempted to prevent the strike team members from entering the motel room after they had identified themselves, conduct that could have supported an additional charge of resisting law enforcement. *See* Ind. Code § 35-44-3-3 (2006). The nature of Schepers's offense justifies an enhanced sentence.

Schepers's character also justifies an enhanced sentence. While we acknowledge that the trial court did not consider Schepers's Texas convictions for aggravated robbery and aggravated kidnapping in sentencing him, only one of those convictions was necessary to qualify Schepers for SVF status. As such, we may consider one of these convictions, both of which reflected quite serious crimes, in assessing Schepers's character. The record indicates that Schepers and another robbed a drugstore at gunpoint and then kidnapped a person, also at gunpoint, during their attempted escape. Needless to say, neither of those crimes speaks well of Schepers's character, regardless of which one we consider. We also believe that Schepers's failure to respond to the several arrest warrants issued against him is evidence of a general lack of respect for the law. In light of the egregious nature of Schepers's offense and his character, we cannot say that a twenty-year sentence is inappropriate.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.