We will deny the prayer of the Petition for a Declaratory Judgment.

ORDER OF COURT

December 1, 1980, the Petitioner's Petition for a Declaratory Judgment is denied. The costs shall be paid by the Petitioner.

COMMONWEALTH v. KNABLE, C.P. Cr. D. Fulton County Branch, No. 76 of 1981

Criminal Law - Delivery of a Controlled Substance - "Substantive Error" in Complaint - Misnomer and incorrect statement of Birthdate of Defendant not substantive errors - Permitted Reopening of Case by Commonwealth to Offer Exhibits — Requisite Impartiality of Trial Judge - Demurrer to Evidence - Waiver by Proceeding to Present Defense

1. An error in the name of the defendant used in the complaint, whereby the suffix "Jr." is omitted and an error in his stated birthdate, by the use of "18" rather than "8," are not substantive errors and are therefore amendable.

2. When it is obvious from testimony about the same that it was the intention of the Commonwealth to offer certain exhibits in evidence, and when there is no doubt the exhibits are admissible but through apparent forgetfulness the Commonwealth has rested before offering the same, it is not error nor a showing of lack of impartiality for the trial judge to remind counsel of the oversight nor to permit reopening of the evidence to offer the exhibits.

3. The correctness of the Trial Court's ruling on a demurrer to the evidence is no longer an available question when the defendant fails to rest following the overruling of the demurrer and instead elects to put on a defense.

Merrill W. Kerlin, District Attorney, Attorney for the Commonwealth

Dennis A. Zeger, Esquire, Attorney for Defendant

OPINION AND ORDER

KELLER, J., September 17, 1982:

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The defendant was charged with two counts of delivery of a controlled substance in violation of Section 113(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act. The first count involved an alleged delivery of approximately one pound of marijuana and four bags of cocaine to Trooper Harold G. Wilson, an undercover State Police Officer, on January 21, 1981. The second count involved the alleged delivery of approximately 2 ounces of hashish to the same undercover officer on February 4, 1981.

The case was tried with jury on February 15 and 16, 1982, and verdicts of guilty were returned as to both counts by the jury. The defendant timely filed post-trial motions for a new trial and in arrest of judgment. Briefs were exchanged and arguments heard on August 24, 1982. The matter is now ripe for disposition.

The issues briefed and argued by the defendant in support of his post-trial motions are:

> 1. Did the Court err in refusing to dismiss the complaint and information based thereon for the reason that the defendant was not properly identified in the complaint filed against him?
>
> 2. Did the Court err in admitting Commonwealth's Exhibits 1, 1-A, and 2 after the Commonwealth had rested its case?
>
> 3. Did the Court err in failing to sustain defendant's demurrer in that the Commonwealth had presented no evidence that the substances sold by the defendant were controlled substances as defined by the Controlled Substance, Drug, Device and Cosmetic Act?

We note that the defendant alleged other grounds for post-trial relief. Since they were neither briefed nor argued, we will consider that they have been abandoned.

The criminal complaint filed by Trooper Larry R. Good of the Pennsylvania State Police on September 21, 1981 stated the defendant's name was "Carl Lee Knable"; that he was a white male whose date of birth was "June 18, 1959"; and that his address was "R.D. 1, Box 139-A, Needmore, Pennsylvania." The defendant asserts and the Commonwealth does not deny that the defendant's father, Carl Lee Knable, and the defendant, Carl Lee Knable, Jr., both resided at the address stated in the criminal complaint, and the defendant was, in fact, born on June 8, 1959. At the preliminary hearing held October 6, 1981 counsel for the defendant moved that the complaint be dismissed on the grounds that it contained a substantive defect. The District Magistrate, while acknowledging that the name was wrong and the birth date incorrect, amended

the complaint rather than dismissing it. On October 20, 1981 the defendant presented his application to discharge complaint and quash warrant of arrest, and the Court ordered a rule to issue upon the District Attorney to show cause why the relief prayed for should not be granted. The rule was returnable on December 8, 1981 at which time a hearing was held on the application, and the Honorable George C. Eppinger, P.J. entered an order which provided:

> "December 8, 1981, the matter having come before the Court on application of the Defendant to dismiss the Complaint on the grounds that the Pennsylvania Rules of Criminal Procedure 150(b) had been violated by not including in the Defendant's name that he is Carl Lee Knable, Jr., and his father is living with the name of Carl Lee Knable.
>
> "The Court finds that the Defendant's name is Carl Lee Knable, Jr., and is the son of Carl Lee Knable, and therefore is entitled to the suffix. Carl Lee Knable, Jr., was born in 1959, the date set forth in the Complaint. "The Court finds the error is not a substantive defect, and
>
> "IT IS ORDERED that the motion to dismiss is denied."

In the defendant's first post-trial motion, he again contends the Court erred in refusing to dismiss the complaint on the grounds that he was not properly identified in that complaint. He cites *Commonwealth v. Brocklehurst*, 266 Pa. Super. 335, 404 A. 2d 1317 (1979), and *Commonwealth ex rel. Fitzpatrick v. Mirachi*, 481 Pa. 385, 392 A. 2d 1346 (1978).

In *Brocklehurst*, the original criminal complaint was filed against Gary Paul Brocklehurst. Subsequently, the police learned that the correct name of the defendant was Gary Douglas Brocklehurst, and they also discovered that they had stated the wrong address, birth date, and Social Security number. Pa. R. Crim, P. 150(b) which was in effect until July 1, 1982 provides:

> "(b) Substantive defects:
>
> "If a complaint, citation, summons or warrant contains a substantive defect, the defendant shall be discharged unless he waives the defect. Nothing in this rule shall prevent the filing of a new complaint or citation and the issuance of processing in which the defect is corrected in the proper manner."
>
> "Comment:
>
> "Substantive defects would include those cases in which the defendant's identity cannot be determined or in which the offense is not properly described."

The Superior Court held after quoting Pa. R. Crim. P. 150(b), supra, "When applying this rule to the instant case, it is clear that naming the wrong party along with the incorrect address, birth date and Social Security number in the original complaint was a substantive defect requiring a new complaint." (At page 338, 339.) The primary thrust of *Brocklehurst* was however that the Commonwealth had properly filed a new complaint, and that the 180-day period of Pa. R. Crim. P. 1100 commenced as of the date of the filing of a new complaint. In *Mirachi*, the Supreme Court held that Judge Mirachi of the Philadelphia Court of Common Pleas had correctly discharged the criminal complaint where the District Attorney desired to amend the criminal complaint by adding a new charge which the Supreme Court found to be a substantive defect. We, therefore, find neither case supports the position contended for by the defendant.

We concur in the judgment of Judge Eppinger that the absence of the suffix "Jr." and the typographical error "18" rather than 8 are not substantive defects warranting the dismissal of the criminal complaint. The defendant was positively identified by the undercover officer as the individual who made the sales of contraband to him, and the individual who was intended to be charged. It is also noted that at no time did the defendant contend that he was not the proper person to be before the Court.

Therefore, the first post-trial motion is dismissed.

The defendant contends in his second post-trial motion that the Court erred in admitting Commonwealth's Exhibits 1, 1-A and 2 in evidence after the Commonwealth had rested its case. Commonwealth's Exhibit 1 was a large brown bag in which the undercover officer testified he had placed the one pound of marijuana, and Commonwealth's Exhibit 1-A which was an enevelope which contained four small packets of a substance identifed as cocaine. The officer testified that he had sealed Exhibit 1 and Exhibit 1-A, and noted certain identification names, date, etc. on them. The Commonwealth's Exhibit 2 was a brown envelope which the undercover officer testified he used and in which he placed the two ounces of hashish he purchased from the defendant. The officer testified he had written certain identifying notes on the Commonwealth's Exhibit 2. The three exhibits were shown to the jury during the testimony of the undercover officer, and again were referred to and shown to the jury during the testimony of Mr. Regal, the Commonwealth's expert witness from the Pennsylvania State Crime Lab.

The defendant correctly asserts that the Commonwealth

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September 27, 1982

MEMORANDUM

TO: All Attorneys

FROM: William A. Sheaffer, Ct. Administrator

RE: Child Custody Mediation

It has been well over a year since Dr. Nutter has been involved as the court's child custody mediation officer. Experience has demonstrated that several changes have to be made in order to keep the system operating smoothly.

Dr. Nutter has requested, and the court has approved, increasing the time allotted for the mediation sessions from two hours to three hours. Consequently, the deposit for his services will be increased from $100.00 to $150.00.

Secondly, no mediation sessions or hearings will be scheduled until the full deposit is received. This will eliminate the problem of trying to collect fees after the case is completed.

If there are any questions, please contact this office.

P.S. The sample face order should be corrected to show that Dr. Nutter is an Ed. D., not a Ph. D.

had rested its case without offering the exhibits into evidence. The undersigned judge then inquired whether the Commonwealth did not intend to offer the exhibits into evidence, and then admitted them over the objection of the defendant. The defendant contends the Court failed to maintain its sense of impartiality and assumed the position of an advocate for the prosecution by its reminder to the District Attorney that the exhibits had not been offered, and compounded its error by admitting the exhibits into evidence over objection after the Commonwealth had rested its case.

It has been the experience of this Court that from time to time in criminal and civil cases even the most experienced of attorneys will on occasion inadvertently overlook the offering of exhibits into evidence after they have been repeatedly observed by the jury, and referred to by the witnesses in their testimony before the jury. When such incidents have occurred, and the exhibits are in our judgment beyond any doubt admissible in evidence, we have without hesitation reminded the forgetful counsel, no matter which side he represents, of the omission; and we have also reopened the evidence to admit such exhibits to make the presentation of evidence to the jury complete in all respects. To do otherwise would in our judgment be to worship form over substance, and this we decline to do.

We did not intend to exhibit any partiality or adopt the position of an advocate by our reminder to the District Attorney; and we are not persuaded that we committed any error by this common courtesy, which has on many occasions also been extended to the defense. We are further satisfied that the trial court has broad discretion in permitting a party to reopen its case and offer additional evidence as was done in the case at bar. We are further satisifed that the admission into evidence of the three exhibits was not an abuse of discretion.

Therefore, the defendant's second post-trial motion will be dismissed.

The defendant's third and final post-trial motion is based on the contention that the Court erred in failing to sustain the defendant's demurrer to the evidence which was predicated upon the fact that the Commonwealth introduced no evidence that the substances identified by the Commonwealth's expert witness as marijuana, cocaine, and hashish were, in fact, controlled substances as defined by the Controlled Substance, Drug, Device and Cosmetic Act.

Subsequent to the Court's denial of the defendant's demurrer to the evidence the defendant took the stand in his own behalf and called several witnesses in his case in chief. Therefore, the correctness of the Court's ruling on the demurrer was

no longer an available issue because the defendant did not rest following the overruling of the demurrer, and elected to put on a defense. *Commonwealth v. Cristina*, 481 Pa. 44, 391 A. 2d 1307 (1978); *Commonwealth v. Short*, 278 Pa. Super. 581, 595, 596 (1980).

As a practical matter, we find no merit to the defendant's contention. We are well acquainted with the familiar canard that lawyers should not assume the bench knows any law but we do not accept that old joke as binding legal authority. In our judgment the Commonwealth was entitled to assume the Court was familiar with the Act under which the prosecution was brought, and was capable of determining the substances identified by the expert witnesses were controlled substances the sale of which would constitute the crime of delivery.

Therefore, the third post-trial motion will be dismissed.

ORDER OF COURT

NOW, this 17th day of September, 1982, the post-trial motions of Carl Lee Knable, Jr. are dismissed.

The Probation Department of Fulton County will proceed with the preparation and filing of a Pre-Sentence Investigation Report. Sentence is deferred until the filing of the same.

Upon the filing of the Pre-Sentence Investigation Report the defendant shall appear for sentencing upon the call of the District Attorney.

Exceptions are granted the defendant.

FOOSE v. ROHRER, C.P. Franklin County Branch, A.D. 1982 - 81

Assumpsit - Appeal from District Justice - Use of Mail/Notice Receptacle in Recorder's Office

1. The Court does not have discretion to strike a judgment of non-pros where the party obtaining the judgment has strictly complied with the Rules of Civil Procedure.

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