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DAUPHIN COUNTY, PENNA

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : OF DAUPHIN COUNTY
v.	:
	: No. CP-22-CR-5164-2011
GARY CHARLES SCHULTZ, Defendant	: : CHARGES: PERJURY; PENALTIES : FOR FAILURE TO REPORT

COMMONWEALTH'S REPLY BRIEF IN OPPOSITION
TO MOTION TO QUASH COUNT ONE

TO THE HONORABLE TODD A. HOOVER, PRESIDENT JUDGE OF SAID COURT:

AND NOW, comes the Commonwealth of Pennsylvania by its attorneys, Linda L. Kelly, Attorney General, and Bruce R. Beemer, Chief of Staff, who files this Commonwealth's Reply Brief in Opposition to Motion to Quash Count One, and in support thereof represents as follows:

BACKGROUND:

On November 7, 2011, agents with the Pennsylvania Office of Attorney General filed criminal complaints charging the Defendant, Gary Charles Schultz, and his Co-Defendant, Timothy M. Curley, with one count each of Perjury and Penalties for Failure to Report or to Refer in violation of 18 Pa.C.S. § 4902(a) and 23 Pa.C.S. § 6319,

respectively. The charges were held for court at the conclusion of a preliminary hearing on December 16, 2011. On January 26, 2012, Schultz filed a Request for a Bill of Particulars, demanding that the Commonwealth identify what statement or statements made by Schultz to the Grand Jury are alleged to be false. According to Schultz, the Due Process Clause requires that he be provided with such notice so that he can defend against the allegations. On March 30, 2012, the Commonwealth filed a response to that motion, providing a list of false statements.

On May 4, 2012, Schultz filed a Reply to the Commonwealth's response as well as a Motion to Quash Count One of the Criminal Information. Schultz now complains *inter alia* that, despite having received the information that he demanded, the Commonwealth has alleged too many lies and he cannot defend against the allegations.

DISCUSSION:

The Superior Court has explained the principles governing review of a motion to quash a criminal information:

> Our standard of review is subject to the following principles:
>
> > The decision to grant a motion to quash a criminal information or indictment is within the sound discretion of the trial judge and will be reversed on appeal only where there has been a clear abuse of discretion.
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> *Commonwealth v. Lebron,* 765 A.2d 293, 294 (Pa. Super. 2000), *appeal denied,* 567 Pa. 722, 786 A.2d 986 (2001) (citations and quotation marks omitted).
>
> > Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration.
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> *Commonwealth v. Krick,* 164 Pa. Super. 516, 67 A.2d 746, 749 (1949). "Consequently, the court abuses its discretion if, in resolving the issue for

decision, it misapplies the law or [rules] in a manner lacking reason." *Coolbaugh v. Com., Dept. of Transp.,* 816 A.2d 307, 310 (Pa. Super. 2003).

> Additionally, we note:
>
> > A motion to quash is an appropriate means for raising defects apparent on the face of the information or other defects which would prevent prosecution. It is neither a guilt determining procedure nor a pre-trial means for determining the sufficiency of the Commonwealth's evidence. Neither the adequacy nor competency of the Commonwealth's evidence can be tested by a motion to quash the information.
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> *Commonwealth v. Shaffer,* 384 Pa. Super. 182, 557 A.2d 1106, 1106–07 (1989) (citations omitted).

Commonwealth v. Finley, 860 A.2d 132, 135 (Pa. Super. 2004).

As our Supreme Court has further explained:

> The purpose of an Information or an Indictment is to provide the accused with sufficient notice to prepare a defense, and to ensure that he will not be tried twice for the same act. *Commonwealth v. Ohle,* 503 Pa. 566, 588, 470 A.2d 61, 73 (1983); *Commonwealth v. Diaz,* 477 Pa. 122, 383 A.2d 852 (1978); *Commonwealth v. Rolinski,* 267 Pa. Super. 199, 406 A.2d 763 (1979). An Indictment or an Information is sufficient if it sets forth the elements of the offense intended to be charged with sufficient detail that the defendant is apprised of what he must be prepared to meet, and may plead double jeopardy in a future prosecution based on the same set of events. *Commonwealth v. Bell,* 512 Pa. 334, 343, 516 A.2d 1172, 1177 (1986); *Commonwealth v. Ohle,* 503 Pa. 566, 588, 470 A.2d 61, 73 (1983); *Russell v. United States,* 369 U.S. 749, 763, 82 S.Ct. 1038, 1046, 8 L.Ed.2d 240 (1962); See Pa.R.Crim.P. 225(b). This may be accomplished through use of the words of the statute itself as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States,* 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L.Ed.2d 590 (1974), quoting, *United States v. Carll,* 105 U.S. 611, 612, 26 L. Ed. 1135 (1882).

Commonwealth v. Alston, 539 Pa. 202, 209-210, 651 A.2d 1092, 1095-1096 (1994).

In this case, the Criminal Information tracks the language of the statute governing Perjury,[1] setting forth the elements that the Commonwealth must prove at trial beyond a reasonable doubt. Schultz has been provided with a specific list of the statements that the Commonwealth believes to have been false when Schultz made them to the Grand Jury. There can be no question that Schultz is on notice as to the alleged criminal behavior for purposes of preparing a defense. That is, all he need do is to convince a jury that the Commonwealth has not borne its burden of proof that the statements are false, that he did not believe them to be true, and that the statements are material.

In his Motion, Schultz recites, "The Information's failure to provide any description of the false statements or their falsity violates the requirement that that [sic] the defendant be given fair notice of the charge he must answer, ..." Motion to Quash at 2 ¶ 5. The premise of this argument, that the Criminal Information is required to recite the false statements themselves, is contradicted by *Alston*, which requires only that the Commonwealth recite the relevant statutory language.

Further, Rule 109 of the Rules of Criminal Procedure provides:

> A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

Pa.R.Crim.P. 109. Not only did Schultz fail to raise the purported defect in the criminal complaint (which was substantially the same as the Criminal Information in that it

[1] "A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true." 18 Pa.C.S. § 4902(a).

tracked the statutory language) prior to the preliminary hearing, but Schultz cannot claim to be prejudiced by the purported defect. The Commonwealth has provided Schultz with a list of the false statements that will be at issue sufficiently in advance of trial so that he is able to prepare a defense, and charges based on the falsity of Schultz's Grand Jury testimony plainly would be barred by double jeopardy once jeopardy attaches in this case. That is, not only is the Criminal Information adequate, Schultz is not prejudiced by the purported inadequacy that he raises. There is no basis for quashing Count One of the Criminal Information.

In response to the Commonwealth's identification of the false statements that he made to the Grand Jury, Schultz claims that the Commonwealth has engaged in "duplicity," Defendant Gary C. Schultz' Combined Reply to Commonwealth's Answers at 3, because the Commonwealth demonstrated the falsity of a lesser number of his statements during the preliminary hearing. This argument is itself an exercise in duplicity.

This case arose from a Grand Jury investigation into allegations of child sexual abuse by a former assistant football coach at the Pennsylvania State University (PSU). Separate charges have been filed against the coach, Jerry Sandusky, in Centre County. Schultz has known since the time that charges were filed that the Grand Jury continues to investigate the case. As a result of that ongoing investigation, the Commonwealth has continued to receive information and evidence relating to the alleged abuse. The charges against Schultz are based on his testimony before the Grand Jury as it investigated Sandusky's conduct. Because that investigation is ongoing, further evidence of the falsity of Schultz's testimony has been uncovered.

As an example, the Grand Jury long ago subpoenaed any evidence possessed by PSU relating to Sandusky, his employment with PSU, and any investigation of his criminal conduct. Only recently was the Commonwealth provided with a file containing documents relating to incident's involving Sandusky. This file was created, maintained, and possessed by Schultz.[2] Documents in that file are inconsistent with statements by Schultz and his codefendant, Curley, to the Grand Jury. The Commonwealth is entirely justified in using those documents as evidence to support the charge of Perjury against Schultz. Also, the Commonwealth has come into possession of computer data (again, subpoenaed long ago but not received from PSU until after the charges had been filed in this case) in the form of emails between Schultz, Curley, and others that contradict their testimony before the Grand Jury. Again, the Commonwealth is entirely justified in relying on this evidence to support the charge of Perjury.

Schultz's argument amounts to the following: (1) At the time that the Grand Jury returned its Presentment, it was unaware of a number of lies that Schultz told during his testimony. (2) The Commonwealth may not prove any lie that the Grand Jury did not recognize as such at the time that it returned the Presentment. (3) Schultz told so many lies during his Grand Jury testimony that it is unfair for the Commonwealth to allege and prove so many lies. (4) Because the Commonwealth relied on specific lies during the preliminary hearing, it may not prove that Schultz told other lies to the Grand Jury. (5) Because evidence was withheld from the Grand Jury, it is unfair for the Commonwealth to use that evidence against Schultz.

[2] This file was provided to the Commonwealth after the Commonwealth provided the defense with the list of misrepresentations made during Schultz's testimony. This timing underscores the need for the Commonwealth to be permitted to prove known misrepresentations with the evidence available and not be limited to the Presentment.

The entirety of this spurious line of argument is premised on incorrect legal principles. As set forth above, the Criminal Information is sufficient and Schultz has not been prejudiced in any way by the manner in which the Criminal Information was drafted. Further, there is no requirement that the Grand Jury specify every misrepresentation that is alleged to have been made by the subject of a Presentment. Indeed, the Grand Jury can hardly be expected to be able to discern every misrepresentation that a witness makes, as proof of the falsity of a statement ordinarily would depend on evidence that is not presented to the Grand Jury. In this case, relevant evidence was specifically withheld from the Grand Jury despite the issuance of subpoenas that covered the evidence. The principles of due process on which Schultz relies hardly require dismissal of charges when evidence supporting the charges is withheld from a Grand Jury and, as a result, the prosecution.

Schultz also cites a number of inapposite opinions to support his contention that Count One should be quashed. He points to *Commonwealth v. Morgan*, 174 Pa. Super. 586, 102 A.2d 194 (1954), for the proposition that general statements of falsity are insufficient. Actually, *Morgan* involved a charge of perjury without a specification as to the false statements. *Id.* at 587-588, 102 A.2d at 194-195. Because both defendants in that case had sworn to a large amount of information and the indictments did not specify what statements were false, the charges properly were quashed. *See esp. id.* at 588-589, 102 A.2d at 195 ("The alleged falsehoods of these defendants were general in that they swore to the accuracy of general and detailed financial accountings. The indictments should therefore have specified the particular parts of the statements that

were false."). In contrast, the Commonwealth in this case has identified for the defense those statements alleged to constitute misrepresentations, and *Morgan* does not apply.

In *Commonwealth v. Buford*, 179 Pa. Super. 312, 116 A.2d 759 (1955), the Superior Court found both that the indictment was sufficient and that, in any event, if it were not, "a bill of particulars may be ordered." *Id.* at 315, 116 A.2d at 760. In this case, Schultz has been provided with all of the information necessary to defend against the charge.[3] In *Commonwealth v. Davenport*, 255 Pa. Super. 131, 386 A.2d 543 (1978), the Superior Court held that an indictment did not have to set forth the precise language of the defendant's testimony when he was charged with making inconsistent statements to a grand jury; notice of the substance of the inconsistency was sufficient. *Id.* at 138, 386 A.2d at 546.[4]

In *Commonwealth v. Lafferty*, 276 Pa. Super. 400, 408-409, 419 A.2d 518, 523 (1980), the criminal information alleged that the defendant had testified in civil proceedings that he had made certain improvements to machinery when, in fact, no such improvements had been made. Because the evidence at the defendant's perjury trial showed that there had been alterations, the defendant claimed that there was a fatal variance between the Commonwealth's allegations and its proof at trial. The Superior Court concluded that "the information was sufficient to alert defendant to the charges being brought against him and was sufficient to enable him to prepare a defense to those charges." *Id.* at 409, 419 A.2d at 523. The Court further held "that

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[3] *See also generally Commonwealth v. Champney*, 574 Pa. 435, 450-451, 832 A.2d 403, 412-413 (2003) (when defendant has been provided with sufficient notice of charges to prepare a defense, avoid surprise and intelligently raise double jeopardy or statute of limitations, bill of particulars is not appropriate).

[4] The Superior Court added: "As regards appellant's ability to prepare a defense, we note that the indictment was supplemented by a bill of particulars with specific passages of the transcripts marked to show the testimony in question." *Id.* at 138, 386 A.2d at 546. As noted above, the defense has been provided with a specific list of the alleged misrepresentations in this case.

sufficient evidence was produced to demonstrate that defendant did in fact testify falsely as to certain, specific alterations he claimed to have performed on the machinery which he did not perform and which he knew he did not perform." *Id.*

Similarly, in *Commonwealth v. Edwards*, 399 Pa. Super. 545, 582 A.2d 1078 (1990),[5] the defendant claimed a fatal variance between the allegations of the criminal information and the proof at trial. Among other offenses, the defendant was charged with perjury arising from his testimony before a county investigating grand jury.[6] The defendant claimed in his testimony that he had directed that stone masonry work be performed, when in fact he was covering up for overpayment for work done for the City of Philadelphia after rigging a bid for the City work. The Superior Court found the allegations to be sufficient, found no variance between the allegations and the proof, and held that the evidence was sufficient to support the conviction. *Id.* at 562-564, 583 A.2d at 1087-1088.

Plainly, none of these cases requires a court to quash a criminal information that sets forth the statutory language for the offense at issue where the defendant has been provided with a list of the specific acts (in this case, statements) that comprise the criminal conduct. Schultz has been provided with such a list, knows the offense and the elements that the Commonwealth must prove, and knows the statements that are at issue. This information is sufficient to prepare a defense and assert limitations and double jeopardy if appropriate. Simply stated, quashing the Criminal Information in this case is not warranted.

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[5] Cited in error as "582 A.2d 1077" in Schultz's Reply (at 7).

[6] The charges arose from fraud in the rebuilding of the area of Philadelphia destroyed by the fire that resulted from the bombing of a house in which the radical group MOVE had been barricaded. *Id.* at 552-553, 583 A.2d at 1082.

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court enter an Order denying Defendant's Motion to Quash Count One.

Respectfully submitted,
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VERIFICATION

The facts recited in the foregoing Commonwealth's Answer to Motion to Quash Count One are true and correct to the best of my knowledge and belief. This statement is made with knowledge that a false statement is punishable by law under 18 Pa. C.S. § 4904(b).

By: Bruce R. Beemer per JPB

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing Commonwealth's Reply Brief in Opposition to Motion to Quash Count One upon the persons and in the manner indicated below:

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