FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	**TRAFFIC CASE NO. 15-00616**
Plaintiff,	**ORDER DENYING COMMONWEALTH'S REQUEST FOR LEAVE TO AMEND INFORMATION AS TO COUNT II SINCE THIS COUNT WOULD ADD A MULTIPLICITOUS CHARGE**
v.	
ZHEN BIN LI	
Defendant.	

I. INTRODUCTION

This matter came before the Court on July 2, 2015 at 1:30 p.m. in Courtroom 220 on the Commonwealth's Request for Leave to Amend Information. Defendant Zhen Bin Li ("Defendant") was present and was represented by Attorney Claire Kelleher-Smith. The Commonwealth was represented by Assistant Attorney General Clayton Graef. On June 16, 2015, the Commonwealth filed its Request for Leave to Amend Information. The Defendant filed his opposition on July 1, 2015. The Commonwealth filed its reply on July 2, 2015.

Based on a review of the filings, oral arguments, and applicable law, the Court **DENIES** the Commonwealth's Request for Leave to Amend Information.

II. BACKGROUND

On February 13, 2015, the Defendant was involved in a traffic accident on Chalan Pale Arnold Road near Twins Supermarket. In the initial traffic crash report, the Defendant was cited for several traffic violations: 9 CMC § 4101(a), requiring activation of headlights; 9 CMC § 7104(b),

prohibiting reckless driving; 9 CMC § 7105(a)(1), prohibiting driving while having a blood alcohol concentration of 0.08 percent or more; and 9 CMC § 4108(d), requiring the use of a seatbelt while in transit.

On June 16, 2015, the Commonwealth filed its Request for Leave to Amend Information. In the Commonwealth's Proposed First Amended Information (the "Proposed FAI"), the Commonwealth added an additional charge under 9 CMC § 7105(a)(2). In the Proposed FAI there are two charges under 9 CMC § 7105: one for 9 CMC § 7105(a)(1) as Count I, which prohibits driving a vehicle while "[h]aving a Blood Alcohol Concentration (BAC) of 0.08 percent or more as measured by a breath or blood test," and one for 9 CMC § 7105(a)(2) as Count II, which prohibits driving a vehicle while "[u]nder the influence of alcohol." Proposed FAI at 1-2.

The Defendant argues that charging him with both 9 CMC § 7105(a)(1) and 9 CMC § 7501(a)(2) violates the prohibition against double jeopardy. The Defendant also argues Counts I, II and III of the Proposed FAI[1] do not include a "definite written statement of the essential facts constituting the offense charged" as required by Rule 7(c)(1) of the Commonwealth Rules of Criminal Procedure.

The Commonwealth, in its reply, does not address whether prosecuting both 9 CMC § 7105(a)(1) and 9 CMC § 7105(a)(2) would ultimately lead to double jeopardy. Instead, the Commonwealth focuses on the idea that double jeopardy prohibits multiple *punishments* for the same offense, rather than multiple *prosecutions*. Commonwealth's Reply at 1-3.

[1] Count I is driving under the influence of alcohol under 9 CMC § 7105(a)(1), Count II is driving under the influence of alcohol under 9 CMC § 7105(a)(2), and Count III is reckless driving under 9 CMC § 7104(a). Proposed FAI at 1-2.

III. DISCUSSION

A. Count II of the Proposed FAI Would Expose the Defendant to Double Jeopardy by Injecting a Multiplicitous Charge

Double jeopardy, or punishing an individual twice for one offense, is prohibited under both the United States Constitution and the Commonwealth Constitution. U.S. Const. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."); NMI Const. art. I, § 4(e) ("No person shall be put twice in jeopardy for the same offense regardless of the governmental entity that first institutes prosecution."). As the Commonwealth's Double Jeopardy Clause is modeled after the U.S. Constitution, Commonwealth courts turn to federal case law on this issue so that "the Commonwealth Constitution's double jeopardy provision provides at least the same protection granted defendants under the federal Double Jeopardy Clause." *Commonwealth v. Peter*, 2010 MP 15 ¶ 5 (quoting *Commonwealth v. Crisostomo*, 2007 MP 7 ¶ 13). Thus, the United States Constitution provides a floor, rather than a ceiling, for the protections granted to defendants in the Commonwealth.

The Double Jeopardy Clause protects defendants from: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) *multiple punishments for the same offense*." *Id.* (citing *Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 5) (emphasis added). To determine whether a defendant would be subject to multiple punishments for the same offense, courts first "determine whether the legislature intended to impose multiple sanctions for the same conduct." *Id.* (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). If the legislature did not intend to impose multiple sanctions for the same conduct, courts instead apply the test outlined in *Blockburger v. United States*, 284 U.S. 299 (1932). *Peter*, 2010 MP 15 ¶ 6.

Under *Blockburger*, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one,

is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. 299, 304 (1932) (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)). However, *Blockburger* "is not controlling when the legislative intent is clear from the face of the statute or legislative history." *Garrett v. United States*, 471 U.S. 773, 779 (1985) (citations omitted).

If the Legislature intended "to impose multiple punishments, imposition of such sentences does not violate the constitution." *Missouri v. Hunter*, 459 U.S. 359, 386 (1983) (quoting *Albernaz v. United States*, 450 U.S. 333, 344 (1981)). Any "doubt will be resolved against turning a single transaction into multiple offenses." *Bell v. United States*, 349 U.S. 81, 84 (1955).

Thus, the Court will first look to whether the Legislature intended to impose multiple sanctions for the same conduct. The Commonwealth Vehicle Code's provisions are to be "construed according to the plain meaning of their terms, with a view to effect its object and promote justice." 9 CMC § 1104(e). The Commonwealth seeks to charge the Defendant with both 9 CMC § 7105(a)(1) and 9 CMC § 7105(a)(2). Section 7105 of the Vehicle Code covers "Driving While Under the Influence of Alcohol or Drugs." Section 7105 states that:

> (a) A person shall not drive, operate or be in actual physical control of any vehicle while:
>
> (1) Having a Blood Alcohol Concentration (BAC) of 0.08 percent or more as measured by a breath or blood test; *or*
>
> (2) Under the influence of alcohol; *or*
>
> (3) Under the influence of any drug or combination of drugs to a degree which renders the person incapable of safely driving; *or*
>
> (4) Having a Blood Alcohol Concentration (BAC) of 0.01 percent or more for a person under the age of 21.

9 CMC § 7105(a) (emphasis added).

Each provision of 9 CMC § 7105 is separated by an "or." Construing this statute by the "plain meaning of its terms," as required by 9 CMC § 1104(e), shows that these are all alternate means of committing the same offense. Even in Public Law 03-61 § 705, the public law that 9 CMC § 7105 is based upon, the individual methods of driving under the influence of alcohol or drugs are

separated by "or." In 1995, the Legislature amended 9 CMC § 7105 with Public Law 09-44. Public Law 09-44 amended 9 CMC § 7105(a)(1) and 9 CMC § 7105(a)(4), and added a fifth method of violating Section 7105: "[h]aving a blood alcohol content (BAC) of 0.01% or more for a person under the age of 21." PL 09-44.[2] In Public Law 09-44, the methods of violating Section 7105 are separated by "or." By separating these individual sections by "or," the Legislature intended for these to be alternate means of committing the same offense, rather than separate offenses.

Punishment for 9 CMC § 7105 is governed by 9 CMC § 7109, "Penalties for Driving Under the Influence of Drugs or Alcohol." 9 CMC § 7109 outlines the punishment for "[e]very person who is convicted of a violation of 9 CMC § 7105," and also outlines the punishments for repeat offenders. By imposing a single punishment for all of 9 CMC § 7105, the Legislature did not intend to punish the separate subdivisions of 9 CMC § 7105 separately. 9 CMC § 7105(a)(1) and 9 CMC § 7105(a)(2) are alternate means of committing the same offense, which the Legislature did not intend to punish separately.[3] The Court notes that, because "the legislative intent is clear from the statute," the *Blockburger* test is not controlling and need not be applied in this case. *Garrett v. United States*, 471 U.S. at 779.[4]

Although the Federal "Double Jeopardy Clause may protect a defendant against cumulative punishments on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution." *Ohio v. Johnson*, 467 U.S. 493, 500

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[2] In Public Law 09-44, 9 CMC § 7105(a)(5) states that an individual under 21 driving while having "a blood alcohol **content** (BAC) of more than 0.01%" violates the statute. PL 09-44 (emphasis added). In the Vehicle Code, 9 CMC § 7105(a)(5) actually phrases this as "Blood Alcohol **Concentration** (BAC) of 0.01 percent or more." 9 CMC § 7105(a)(5) (emphasis added).

[3] Generally 9 CMC § 7105(a)(1) is used when an individual submits to a breath or blood test. 9 CMC § 7105(a)(2), on the other hand, is often used if the individual refuses to submit to a test or is physically unable to complete the test.

[4] Even under *Blockburger*, 9 CMC 9 CMC § 7105 does not describe multiple offenses but multiple methods of committing the same offense. Under *Blockburger*, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. In the present case, if the Commonwealth were to prove that the Defendant had a Blood Alcohol Concentration of 0.08 or higher under 9 CMC § 7105(a)(1), nothing further would be needed to prove that the Defendant was "under the influence of alcohol" under 9 CMC § 7105(a)(2).

(1984). Despite this, the Court notes "the Commonwealth Constitution's double jeopardy provision provides at least the same protection granted defendants under the federal Double Jeopardy Clause." *Peter*, 2010 MP 15 ¶ 5 (quoting *Crisostomo*, 2007 MP 7 ¶ 13). Protections under the Commonwealth Constitution may not be any less than those provided under the United States Constitution, but instead may exceed the protections provided by the United States Constitution.

Multiplicitous charges introduce a defect into the proceedings. "Multiplicity refers to multiple counts of an indictment which cover the same criminal behavior." *United States v. Johnson*, 130 F.3d 1420, 1424 (10th Cir. 1997) (citing *United States v. Morehead*, 959 F.2d 1489, 1505 (10th Cir. 1992)). Multiplicity, while "not fatal to an indictment" does expose a defendant to potential Double Jeopardy violations through "the threat of multiple sentences for the same offense." *Id.* (quoting *Morehead*, 959 F.2d at 1505).

Courts have discretion in choosing a remedy for multiplicitous charges, either pre- or post-trial. "A decision of whether to require the prosecution to elect between multiplicitous counts before trial is within the discretion of the trial court." *United States v. Johnson*, 130 F.3d at 1426. Post-trial, trial courts must exercise their "discretion to vacate one of the underlying convictions." *Ball v. United States*, 470 U.S. 856, 864 (1985). The Court has in the past dismissed multiplicitous charges due to due process violations. *See Commonwealth v. Kapileo*, Traffic Case No. 12-01675 (Super. Ct. June 28, 2013) (Published Sept. 1, 2015) (Order Granting Motion to Dismiss Counts IV and V Due to Double Jeopardy, and Denying Motion to Dismiss Count III).

The prohibition on double jeopardy protects against multiple *punishments*, therefore the Court declines to allow the Commonwealth to inject a defect into the proceeding and expose the Defendant to multiple punishments for a single offense. Thus, Count II of the Proposed FAI is stricken.

B. Although the Information and Discovery May be Taken Together to Put Defendant on Notice to the Charges Against Him, the Court Has Received No Filings Indicating that Discovery Continues to be Deficient

The Defendant also argues that Counts I, II,[5] and III of the Commonwealth's Proposed FAI are insufficient under Rule 7(c) of the Commonwealth Rules of Criminal Procedure.[6] Under Rule 7(c), the information must "be a plain, concise and definite written statement of the essential facts constituting the offense charged." NMI R. Crim. P. 7(c)(1). Further, the information must "state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." *Id.*

The Defendant requests that "the Court grant leave to amend the information to include additional facts related to the original counts and instruct the Commonwealth to submit an amended information that complies with the requirements of Rule 7(c) of the Commonwealth Rules of Criminal Procedure." Def.'s Opp'n. at 8. The Court notes that this request is not styled as a motion for bill of particulars, a request for which may be made "before arraignment or within ten (10) days after arraignment or at such later time as the court may permit." NMI R. Crim. P. 7(f).

The Commonwealth is required to provide a defendant, through a combination of the information and discovery, with "the elements of the offenses with which he was charged, as well as the underlying facts supporting those charges." *Commonwealth v. Castro*, 2008 MP 18 ¶ 14. In *Castro*, the information included "the language of the statutes [the defendant] allegedly violated," as well as the date, the minor victim's initials, and the allegation that the defendant had touched the minor victim's breast. *Id.* The information in *Castro* was supplemented by "thirty pages of discovery materials." *Id.* This combination of the information and the discovery materials was

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[5] Count II of the Proposed FAI has been stricken as a multiplicitous charge.
[6] The Court notes that the Defendant's request is not styled as a motion for bill of particulars.

sufficient to provide the defendant with "the elements of the offenses" and the "underlying facts supporting those charges." *Id.*

An information "which is cast in the language of the statute is legally sufficient if, and only if, it states with requisite clarity the essential facts of the offense charged." *Mims v. United States*, 332 F.2d 994, 946 (10th Cir. 1964). If a statute uses "generic terms" in defining the offense, the information must "particularize the species of the generic terminology." *Id.* In *Mims*, the defendant was indicted for assaulting, intimidating, and threatening a pilot in an aircraft, without specifying how exactly the defendant accomplished the alleged assaulting, intimidating, and threatening. *Id.* Although the indictment in *Mims* did not spell out exactly how the defendant assaulted, intimidated, and threatened the victim, the court held that "the species of the assault, threat or intimidation is not an essential element of the offense charged," and that even if "the accused is entitled to a specification" of how the assault occurred, that the prosecution was "not required to plead the factual details of the offense in the indictment." *Id.* The court noted that if these details were later found necessary, that the trial court could, in its discretion, order a bill of particulars. *Id.*[7]

In the present case, the information provides the statutory language, the elements of each alleged offense, as well as the date. Although this, on its own, does not provide all of the "underlying facts," under *Castro* the information may be take together with discovery to provide both the elements and underlying facts. *Castro*, 2008 MP 18 ¶ 14. In *Castro*, the thirty pages of discovery materials were sufficient, together with the information, to provide the defendant with the elements of each offense and the underlying facts. *Id.*

[7] "The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten (10) days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires." NMI R. Crim. P. 7(f).

At the July 2, 2015 hearing, the Defendant alleged that they had not received sufficient discovery from the Commonwealth.[8] The Commonwealth stated that they would provide complete discovery no later than July 10, 2015. The Court has not received any motion to compel discovery from the Defendant, and thus has no information regarding whether or not the discovery received from the Commonwealth was sufficient. Discovery from the Commonwealth may well render this issue moot, as the information may be taken together with discovery to provide the defendant with both the elements of the charges and the underlying facts. *Castro*, 2008 MP 18 ¶ 14.

As the Court has received nothing from the Defendant indicating that discovery continues to be deficient, the Court declines to grant the Defendant's request, as sufficient discovery taken together with the information may be enough to put the Defendant on notice to the charges he is facing. *Castro*, 2008 MP 18 ¶ 14. If discovery continues to be deficient, the Court encourages the parties to make the requisite motions. As the Court is not privy to the status of discovery in this case, the Court lacks sufficient information to determine if the discovery and information taken together are sufficient to place the Defendant on notice to the charges against him.

IV. CONCLUSION

Accordingly, the Commonwealth's Request for Leave to Amend Information is **DENIED** as to Count II, which charges the Defendant with driving under the influence of alcohol in violation of 9 CMC § 7105(a)(2).

As to Counts I and III, the Court stays deciding on the Defendant's request that the Court instruct the Commonwealth to file an amended information in compliance with Commonwealth

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[8] Prior to the July 2, 2015 hearing, the Commonwealth stated that the Defendant has received "several pages of discovery." Commonwealth's Reply at 4.

Rule of Criminal Procedure 7(c), as the Court has not received any filings indicating that discovery in this case has been insufficient.

IT IS SO ORDERED this 15th day of September, 2015.

JOSEPH N. CAMACHO
Associate Judge