IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 2014-AP-900016-AXXX-MB
L.T. NO: 2013-MM-015440-AXXX-NB

LEROY PATTERSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: MAY 21 2015

Appeal from the County Court in and for Palm Beach County,
Judge Marni Bryson.

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PER CURIAM.

Defendant/Appellant, Leroy Patterson, was charged by Information with one count of Battery and one count of Assault. However, on the morning of trial, the State amended the

Information to include a third count: Disorderly Intoxication. Defense counsel moved for a continuance to address the additional charge, to which the State agreed. The court denied the continuance but allowed defense counsel the opportunity to speak with the arresting officer during the lunch break after opening statements. The jury returned a verdict of guilty as to Battery and Disorderly Intoxication and not guilty as to Assault. On appeal, Patterson argues that the trial court erred by denying his motion for continuance.[1] We agree and reverse.

Factual Background

On September 21, 2013, Patterson approached two men, Bruce Kraidman and Matthew Cummings, at a gas station in Riviera Beach, Palm Beach County, Florida. Patterson asked Kraidman for money, which Kraidman refused. Patterson followed Kraidman around the gas station and continued to ask for money. Kraidman returned to his vehicle, and Patterson began yelling that he knew where the men lived and was going to "rob and shoot" them. Patterson then reached into the truck and slapped Kraidman twice. Kraidman got out of the car and engaged in a fight with Patterson. Kraidman and Cummings then left the gas station and called the police on their way home.

Officer Verly Moyton of the Riviera Beach Police Department arrived at the house of Kraidman and Cummings and took their sworn statements. As Officer Moyton spoke with Kraidman and Cummings outside of the house, Patterson walked by on the street. According to the probable cause affidavit, Patterson appeared to be "extremely intoxicated uttering discombobulated words while stumbling over himself." Kraidman and Cummings identified

1 Patterson also alleges that the trial court erred by refusing to answer the jury's question during deliberations regarding the law of self defense. However, this Court finds Patterson's claim meritless as Patterson did not request a jury instruction on self defense and no evidence was adduced at trial indicating that Patterson acted in self defense.

Patterson as the man who had hit Kraidman at the gas station. Officer Moyton then placed Patterson under arrest for Battery, Assault, and Disorderly Intoxication.

The case was originally filed as a felony, but the Battery and Assault charges were ultimately down-filed in the county court. On October 17, 2013, Patterson was charged by Information with (1) Battery (a first-degree misdemeanor) and (2) Assault (a second-degree misdemeanor). The case proceeded to a jury trial.

On the morning of trial, the State amended the Information to include a third count: Disorderly Intoxication (a second-degree misdemeanor). Defense counsel moved for a continuance to address the additional charge. The court noted that (1) the probable cause affidavit described Patterson as extremely intoxicated, (2) Patterson was originally charged with Disorderly Intoxication on the night of his arrest, and (3) Patterson was charged with Disorderly Intoxication when the case was filed as a felony. Defense counsel stated that she had not spoken to Officer Moyton but that she would have deposed him regarding "whether Mr. Patterson was creating a disturbance at the time the officer observed him acting intoxicated." The court denied the motion for continuance but told Defense counsel that she did not believe Patterson would be prejudiced and that she would give counsel "enough time to speak to" Officer Moyton before he testified that afternoon.

After a recess, Defense counsel renewed its request and indicated that the State had agreed to the continuance. Defense counsel reiterated that Patterson would be prejudiced by denying the continuance because counsel "would have asked different and additional questions of the witnesses that we spoke to in this case," in addition to speaking to Officer Moyton and asking him about the Disorderly Intoxication charge. The court again denied the motion.

The State called three witnesses at trial: Bruce Kraidman, Matthew Cummings, and Officer Moyton. Kraidman and Cummings testified that Patterson had hit Kraidman twice while Kraidman was in his truck at the gas station and that a fight had ensued. Kraidman testified that he smelled alcohol on Patterson's breath at the gas station. Officer Moyton testified that Patterson was talking loudly and incoherently, smelled of alcohol, and was "stumbling over himself" as he walked by Kraidman's house. The jury returned a verdict of guilty as to Battery and Disorderly Intoxication and not guilty as to Assault.

Analysis and Ruling

"Adequate time to prepare a defense is inherent to due process and the right to counsel." *Peevey v. State*, 820 So. 2d 422, 423 (Fla. 4th DCA 2002). However, the state may substantively amend an information during trial, even over the objection of the defendant, unless there is a showing of prejudice to the substantial rights of the defendant. *Id.* (internal citations and quotations omitted). If a defendant is "afforded an adequate opportunity to investigate the evidence and prepare a defense, an amendment to the information is not improper even where the amendment adds a new charge with different elements of proof." *State v. Burgess*, 153 So. 3d 286, 289 (Fla. 2d DCA 2014), *reh'g denied* (Oct. 31, 2014); *Peevey v. State,* 820 So. 2d 422, 424 (Fla. 4th DCA 2002).

In *Peevey v. State*, the defendant was originally charged with one count of aggravated assault by pointing a bow and arrow at the victim. 820 So. 2d 422 (Fla. 4th DCA 2002). On the day of trial, the state moved to amend the information to add an additional count of aggravated assault on a second victim. The defendant moved for a continuance, arguing that he would be prejudiced because his counsel "deposed witnesses based upon only one charge of aggravated assault" and "did not depose the witnesses with regard to the new charge because he had no

reason to do so at the time." *Id.* at 424. The state responded by arguing that the second victim would not testify and that the defendant knew that victim was listed as a potential witness. The state also argued that defense counsel had deposed both prosecution witnesses, who both testified that the defendant had pointed the bow and arrow at both alleged victims. The court denied the defendant's motion for continuance and granted the motion to amend the information. Defendant was found guilty on both counts of aggravated assault.

On appeal, the Fourth District Court of Appeal reversed and remanded for a new trial. The court noted that it had "reversed convictions involving morning of trial amendments where the new crime charged a different state of mind, thus substantively altering the elements of the crime charged." *Id.* at 424 (citing *Hahn v. State*, 626 So. 2d 1056 (Fla. 4th DCA 1993)). There is a significant difference, however, between "amending a charged offense and the filing of a new and entirely different offense." *Id.* (citing *Green v. State*, 728 So. 2d 779, 781 (Fla. 4th DCA 1999)). The *Peevey* court determined that, in that case, "the nature of the defense was significantly altered by the amendment, and the amended information charged the Defendant with an entirely new offense." *Id.* The court also found that defense counsel could have investigated what evidence the state had and could have prepared a defense if the state had added the charge earlier than the morning of trial. Ultimately, the court found that, under these circumstances, "the trial court should have either granted the defense a continuance to prepare for the charge or denied the amendment." *Id.*

The *Peevey* court distinguished *Henderson v. State*, 810 So. 2d 999 (Fla. 4th DCA 2002), in which the Fourth District Court of Appeals found that the state's amendment of the information on the day of trial did not prejudice the substantial rights of the defendant. In *Henderson*, the state notified defense counsel three days before trial that it intended to file an

amended information charging the defendant with attempted burglary rather than burglary. The *Peevey* court found that *Henderson* was factually distinct because in *Henderson*, (1) the advance notice of the intent to amend the information provided defense counsel an "adequate opportunity to investigate and prepare a defense to the new charge," and (2) the resulting amendment did not "drastically change the elements of proof." *Peevey*, 810 So. 2d at 424. However, in *Peevey*, the defendant did not have advance notice of the amendment, and the new charge required different proof.

Although the State attempts to analogize the instant case to *Henderson*, the present facts are essentially indistinguishable from *Peevey*. Here, the State amended the Information on the morning of trial without providing advance notice to Defense counsel and included an additional charge that involved different proof from the other charges. The State argues that Defendant was on notice of the Disorderly Intoxication charge because he was originally charged with it on the night of his arrest and because Defense counsel had access to Officer Moyton's "thorough report detailing his observations of impairment." However, in *Peevey*, defense counsel also knew that the defendant could have been charged with a second count of aggravated assault on another victim because counsel had deposed both alleged victims, who testified that the defendant had pointed the bow and arrow at both of them. *Peevey*, 820 So. 2d at 423.

Here, the nature of the defense was significantly altered by the amended Information, which charged Defendant with an entirely new offense. Defense counsel could have investigated what evidence the State had and could have prepared a defense if the State had amended the Information prior to the day of trial. Despite the State agreeing to the continuance, the trial court denied the continuance and instead allowed Defense counsel to speak to Officer Moyton during the lunch break, after the parties had already presented their opening statements. Under these

circumstances, the trial court abused its discretion by denying Defendant's motion for continuance. Accordingly, we REVERSE and REMAND for a new trial.[2]

KELLEY, FEUER, and SCHER, JJ., concur.

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2 The State argues that if the Court finds that the trial court abused its discretion by denying the continuance, then the Court should reverse only the Disorderly Intoxication conviction. However, the State does not support its claim with relevant case law. In *Peevey*, the Fourth District Court of Appeal reversed and remanded for a new trial when the state added an additional charge to the information and the defendant was convicted of both counts. 620 So. 2d 422 (Fla. 4th DCA 2002). The *Peevey* court did not reverse only as to the charge that was not included in the original information. Accordingly, the Court reverses both the Assault and Disorderly Intoxication convictions and remands for new trial.