SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
Resident Judge

Kent County Courthouse
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Dover, Delaware 19901
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January 15, 2010

Deborah J. Buswell, Esquire
Department of Justice
102 West Waster Street
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Eugene J. Maurer, Jr., Esquire
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Re: ***State v. George A. Shaheen***
I.D. No. 0812002606
Letter Decision on Defendant's Motion to Sever

Dear Counsel:

Defendant George Shaheen ("Shaheen") filed a Motion to Sever on December 17, 2009. The State filed a response to Shaheen's motion on December 29, 2009. Based upon the reasons set forth below, Shaheen's Motion to Sever must be denied.

FACTS

Shaheen is charged with trafficking in cocaine, delivery of cocaine and conspiracy in the second degree (Counts 1 through 3). These three counts refer to an incident alleged to have occurred on December 3, 2008. He is also charged with disregarding a police officer's signal, resisting arrest and related traffic offenses (Counts 7 through 15). These charges refer to the events which led to his arrest on

December 18, 2008. Shaheen was jointly indicted with Damien Stephens. There is also an unindicted co-conspirator identified as Roy Goicuria.

Shaheen is alleged to have, along with his co-defendants, devised a plan to "set up" an individual for drug charges. The alleged plan was to utilize this individual to facilitate the release of Stephens' then-incarcerated brother. An investigation ultimately revealed this plan.

Defendant Shaheen's Arguments

Shaheen first maintains that Counts 1 through 3 and Counts 7 through 15 are not of the same or similar character or based on the same act or transaction. Consequently, Shaheen asserts, joinder is inappropriate for these charges. Shaheen also contends that even if joinder was appropriate, the charges should be severed to avoid prejudicing the defendant. Shaheen asserts that there is a danger that the jury would cumulate the evidence if the charges are tried together. Shaheen maintains that this is especially true given the strength of the evidence against him on the driving offenses and the weakness of the State's case regarding the drug related offenses. Finally, Shaheen asserts that severance is appropriate to avoid prejudice due to the presence of separate defenses.

The State's Arguments

The State contends that the charges related to Shaheen's flight cannot be explained without referencing the events that led to the arrest warrant. That is, the State asserts, the two events are inextricably intertwined. Consequently, the State avers that joinder is appropriate. Moreover, the State maintains that Shaheen's flight is admissible as evidence of consciousness of guilt. The State, therefore, contends that joinder would not be unduly prejudicial because the evidence of the police

pursuit is admissible at trial.

DISCUSSION

The decision whether to grant or deny a motion for severance is a matter within the sound discretion of the trial court.[1] The defendant has the burden of establishing substantial prejudice.[2] Mere hypothetical prejudice, however, is not sufficient.[3] The interest of judicial economy outweighs the defendant's interests where the defendant makes unsubstantiated claims of prejudice.[4]

Delaware Superior Court Criminal Procedure Rule 8 permits the joinder of offenses in an indictment if the separate counts are of the same or similar character.[5] Separate trials may be ordered, however, where joinder would prejudice the defendant.[6]

In determining whether the defendant is prejudiced, the Court should consider whether:

> (1) the jury may accumulate evidence of the various offenses charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the offenses to infer a general criminal disposition of the defendant in order to find guilt of the other offense or offenses; and (3) the defendant was subject to embarrassment or confusion in presenting different and separate defenses to different

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[1] *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978); *see also,* Super. Ct. Crim. R. 14.

[2] *Id*.

[3] *Id*.

[4] *State v. Flagg*, 739 A.2d 797, 799 (Del. Super. Ct. 1999).

[5] Super. Ct. Crim. R. 8(a).

[6] Super. Ct. Crim. R. 14.

offenses.[7]

A defendant meets his burden of showing prejudice where "judicial economy concerns are outweighed by joinder so highly prejudicial the Court is compelled to sever the trial."[8]

Same or Similar Circumstances

The record, to date, suggests that the counts of the indictment are so inextricably intertwined as to warrant joinder.[9] Joinder is proper where the charged offenses are of the same general character, involve a similar course of conduct, and occur within a relatively brief period of time.[10]

Here, the alleged incidents all occurred within approximately 15 days. Although Counts 1 through 3 allege drug-related offenses and Counts 7 through 15 allege traffic-related offenses, all of the counts are tied together. That is, the State is correct to note that Shaheen's flight is related to the events that led to the arrest warrant. The mere fact that the crimes were separate and committed at different times does not require severance.[11] Joinder was therefore proper.

The first factor to consider when determining prejudice is whether the jury would cumulate the evidence. Severance is appropriate where the "sheer mass of the

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[7] *State v. McKay*, 382 A.2d 260, 262 (Del. Super. Ct. 1978).

[8] *State v. Cooke*, 909 A.2d 596, 600-01 (Del. Super. Ct. 2006).

[9] *See Cooke*, 909 A.2d at 604.

[10] *Id.*, *citing Younger v. State*, 496 A.2d 540, 550 (Del. 1985).

[11] *Younger*, 496 A.2d 546, *citing McDonald v. State*, 307 A.2d 796, 798 (Del. 1973).

charges . . . render it extremely unlikely that a jury will be able to resist the cumulative effect of evidence linking the defendant to separate charges.[12] The total number of counts, however, is not *per se* determinative of "sheer mass."[13] There are 15 counts in this indictment.

In the case *sub judice*, it is also relevant to consider whether the jury would "use the evidence of one of the crimes to infer a general criminal disposition."[14] Courts will generally presume prejudice and exclude evidence unless the evidence is admissible for some substantial, legitimate purpose.[15] Thus, the Court should consider whether the evidence of one offense would be admissible in the trial of the other offenses.[16]

Here, evidence of Shaheen's flight appears to be admissible at trial as evidence of consciousness of guilt.[17] Contrary to Shaheen's contentions, the State must only prove that a defendant knew of the pending arrest warrant where the only evidence of identity is the defendant's flight.[18] Here, the State intends to identify Shaheen via the testimony of his co-defendant and his own statements to the police. His flight, therefore, is likely admissible. Consequently, joinder would not result in undue

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[12] *McKay*, 382 A.2d 260.

[13] *State v. Siple*, 1996 WL 528396, at *3 (Del. Super.).

[14] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988).

[15] *Cooke*, 909 A.2d at 607, *citing Boyer v. United States*, 132 F.2d 12, 13 (C.A.D.C. 1942).

[16] *Wiest*, 542 A.2d at 1195.

[17] *See Johnson v. State*, 312 A.2d 630 (Del. 1973); *Tice v. State*, 382 A.2d 231 (Del. 1977).

[18] *Staats v. State,* 902 A.2d 1125, 1129 (Del. 2006).

prejudice.

Shaheen contends that prejudice also exists because there are two separate defenses to the aforementioned series of counts. For example, Shaheen asserts that while he may deny involvement in the events leading to the drug-related charges, he may be unable to deny involvement in the police pursuit.

In *State v. Flagg*, the defendant acknowledged his role in one incident, but completely denied any involvement in the other.[19] The *Flagg* Court noted, in that case, that joinder would force the defendant to "offer an insanity defense to [one charge and] challeng[e] identity in [the other] incident."[20] Confusion would then arise because the evidence concerning identity would destroy any meaningful consideration of the psychiatric defense.[21]

Approximately fifteen days transpired between the date of the drug charges and the date of the charges related to the police pursuit. The Court is not convinced that Shaheen would be placed in a "compromising and confusing position" if severance is denied.[22] That is, the Court is not convinced that the jury would be confused if Shaheen maintained both that he was not involved with the drug related counts and that he did in fact flee from the police. The Court emphasizes that, to establish prejudice, the defenses must not only be different, but must also cause embarrassment and confusion. No such confusion exists in the case *sub judice*.

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[19] 739 A.2d at 800.

[20] *Id.*

[21] *Id.*

[22] *See id.*

CONCLUSION

For the foregoing reasons, Shaheen's Motion to Sever is ***denied***. IT IS SO ORDERED.

/s/ William L. Witham, Jr.

RJW/dmh
oc: Prothonotary
xc: Counsel