

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	:	
	:	I.D. No. 0201002651
v.	:	
	:	
GARY R. WASHAM,	:	
	:	
Defendant.	:	

Submitted: January 10, 2003

Decided: January 21, 2003

ORDER

Upon Defendant's Motion to Sever. Denied.

Marie O'Connor Graham, Esquire, Deputy Attorney General, Dover, Delaware, attorney for the State.

Thomas D. Donovan, Esquire, Dover, Delaware, attorney for the Defendant.

WITHAM, J.

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I. Introduction

Before this Court is Defendant Gary Washam's Motion to Sever certain offenses from an Indictment in which he was jointly indicted with his co-defendant. After reviewing Defendant's motion and the oral arguments presented by both Defendant and the State, this Court must deny Defendant's motion.

II. Background

Defendants, Michael Downes and Gary Washam, were jointly indicted by the Grand Jury on February 4, 2002, and were re-indicted by the Grand Jury on April 1, 2002. There are nine counts listed on the second indictment. Both defendants were charged in Counts 1-4 and Counts 8 and 9; however, only Defendant Washam is charged in Counts 5 and 6. Counts 1 and 3 charge both defendants with Possession of a Firearm during the Commission of a Felony. Counts 2 and 4 charge both defendants with Reckless Endangering First Degree. Count 7 charges both defendants with Conspiracy Second Degree in reference to the underlying felonies charged in Counts 2 and 4. Counts 8 and 9 charge both defendants with misdemeanor Criminal Mischief. The controversy is over Counts 5 and 6 which charge only Defendant Washam with Possession with Intent to Deliver a Non-Narcotic Schedule I Controlled Substance, namely marijuana, and Maintaining a Vehicle for keeping Controlled Substances.

The facts of this case as best as this Court can surmise from the oral arguments of the parties are as follows. Both defendants were involved in firing guns on New Street in Dover. There is some indication that this may have been a "shoot-out" involving an unidentified vehicle. During the course of the gun fire, stray bullets passed

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through a house on New Street. The police were called and a police officer stopped defendants' Chevrolet Corsica¹ because it was suspected to be involved in the "shoot out." After the vehicle was stopped the police patted down the two defendants. On Defendant Washam the police found bullet clips for a gun in one pocket and the marijuana in the other pocket.

The State contends that the drugs were found as part of the same transaction and occurrence. Moreover, the State argues that the facts surrounding the car being stopped which lead to the drugs being found are inextricably intertwined with the facts of the other charges. Furthermore, the State argues that in order to present a contextually complete case on the drug charges, the State would have to explain the reason why the car was stopped which was because of the shooting.

Defendant argues that Counts 5 and 6 represent charges unrelated to the other charges for which the defendants are jointly indicted. Defendant argues, therefore, that he would be required to defend these separate and unrelated charges in a joint trial with his co-defendant which would create substantial injustice and unfair prejudice.

III. Analysis

Superior Court Criminal Rule 8(a) provides the standard for joinder of offenses explaining that two or more offenses may be joined in the same indictment provided that one of the following circumstances exists: the offenses are of the same or similar character; the offenses are based on the same act or transaction; the offenses are based

¹ It is unclear from the facts presented at oral argument as to who owned or was driving the car.

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on two or more connected acts or transactions; or the offenses are based on two or more acts constituting parts of a common scheme or plan.² Superior Court Criminal Rule 8(b) specifically deals with joinder of defendants providing that “Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.”³ Rule 8(b) further provides that “such defendants may be charged in one or more counts together or separately and *all of the defendants need not be charged in each count.*”⁴ Therefore, joinder is proper even if each defendant is not charged with each offense on the indictment.

If a defendant can prove that he/she will be prejudiced by a joinder, then the defendant should move for a severance . Superior Court Criminal Rule 14 provides such relief from prejudicial joinder:

If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief

² Super. Ct. Crim. R. 8(a). Rule 8(a) specifically states:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

³ Super. Ct. Crim. R. 8(b).

⁴ *Id.* (emphasis added).

justice requires.⁵

According to *Jenkins v. State*, “A motion for severance is addressed to the *sound discretion of the trial court*.”⁶ This motion implicates the severance rules concerning both severance from co-defendants and severance of an offense. Therefore, this Court will first address both standards for severance.

A. Severance of Co-Defendants

The Supreme Court in *Jenkins* stated:

Ordinarily, defendants indicted jointly should be tried together; but, if justice requires it, the trial court should grant separate trials. What constitutes abuse of discretion depends upon the facts and circumstances of each case. As a general rule, however, it may be said that discretion has been abused by denial of severance when there is reasonable probability that, because of a co-defendant's extra-judicial statement, substantial injustice and denial of a fair trial may result from a joint trial.⁷

Jenkins laid out additional factors to determine if a co-defendant should be severed such as “(1) absence of other substantial, competent evidence of the movant's guilt; (2) antagonistic defenses as between the co-defendant and the movant; and (3) difficulty of segregating the evidence as between the co-defendant and the movant.”⁸

B. Severance of Offenses

⁵ Super. Ct. Crim. R. 14.

⁶ *Jenkins v. State*, 230 A.2d 262, 272-273 (Del. 1967) (emphasis added).

⁷ *Id.*

⁸ *Id.*

The rule of joinder is designed to promote judicial economy and efficiency, so long as the defendant's rights are not compromised by the joinder.⁹ “The defendant bears the burden of showing prejudice sufficient to require severance, and a hypothetical assertion of prejudice is not enough. If a defendant makes unsubstantiated claims of prejudice, the defendant's interests are outweighed by the interest of judicial economy.”¹⁰ The Court in *State v. McKay* stated some factors to consider when determining if a motion to sever should be granted including: “(1) the defendant was subject to embarrassment or confusion in attempting to present different defenses to different charges; (2) the jury may improperly infer a general criminal disposition on the part of the defendant from the multiplicity of charges, and (3) the jury may accumulate evidence presented on all offenses charged in order to justify a finding of guilt of particular offenses.”¹¹ Severance may be denied if the offenses are of the same general nature.¹²

C. Severance of Counts 5 and 6 from the Joint Indictment

To begin, it should be noted that Defendant Washam is not requesting severance from his co-defendant for Counts 1 thru 4 and 8 and 9. Defendant Washam is only requesting that Counts 5 and 6 be severed from the joint indictment. Under Rule 8(a)

⁹ *State v. Flagg*, 739 A.2d 797, 799 (Del. Super. Ct. 1999).

¹⁰ *Id.*

¹¹ *State v. McKay*, 382 A.2d 260, 262 (Del. Super. Ct. 1978).

¹² *Id.*

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offenses may be charged in the same indictment if the charges arise out of the same transaction or occurrence. In this case it is apparent that the drugs were found on Defendant Washam during the same transaction or occurrence that gave rise to other charges. Thus, in order for these charges to be severed the Defendant bears the burden of showing actual prejudice, as opposed to hypothetical prejudice, from the joinder. In *McKay*, the court stated that a few reasons to sever offenses are confusion in presenting a defense, jury may infer a criminal disposition, or the jury may accumulate the evidence.¹³ The Defendant in this case does not rely on any of these factors in his motion for severance, nor does the Defendant explain to this Court why trying these charges together would actually prejudice the Defendant. Defendant merely asserts that since the charges are unrelated, defending these charges in a joint trial would create substantial and unfair prejudice. This Court finds that in this case Defendant has not met his burden of showing prejudice sufficient to warrant severance.

Briefly, this Court will also note that not only is it proper that these offenses be tried together, it is also proper that these offenses be tried in the joint trial with Defendant Washam's co-defendant. Under Rule 8(b) two defendants may be tried together if both defendants participated in the same transaction or occurrence that is the basis for the charges. In this case, as noted above, it is established that all the charges relate to an ongoing transaction. Under Rule 8(b) these defendants may be tried together even if they are not both charged with every count of the indictment. Therefore, it is proper to try the Defendant in a joint trial even though only Defendant

¹³ *Id.*

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Washam is charged with Counts 5 and 6, unless there is a showing of prejudice from the joinder. In this case, given the facts as presented to this Court, there does not appear to be prejudice such that a separate trial on these counts is warranted.

IV. Conclusion

In conclusion, this Court is not satisfied neither by Defendant Washam's written motion nor by defense counsel's presentation at oral argument that there would be sufficient prejudice in this case to require severance of Counts 5 and 6. Thus, the Defendant's motion to sever the offenses is hereby *denied*.

IT IS SO ORDERED.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File