

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 00-11,870
	:
	:
vs.	: CRIMINAL DIVISION
	: Motion for Severance
KURTIS WAYNE NIXON,	:
Defendant	:

OPINION AND ORDER

Defendant has been charged with four counts of delivery of a controlled substance, four counts of possession with intent to deliver a controlled substance, four counts of possession of a controlled substance, and one count of conspiracy, in connection with four alleged sales, three of marijuana and one of cocaine, to undercover officers on November 6, 1998, December 4, 1998, December 10, 1998, and December 14, 1998 respectively.¹ In the instant Motion for Severance, Defendant seeks a separate trial for each alleged transaction and the counts related thereto. Argument on the motion was heard October 22, 2002.²

Pursuant to Rule 583 of the Rules of Criminal Procedure, the Court may order separate trials of offenses if it appears that any party may be prejudiced by the offenses being tried together. Pa.R.Crim. P. Rule 583. The comment to that rule indicates that a defendant may request severance of offenses on the ground that trying them together would be improper under Rule 582. Rule 582 provides, in pertinent part, that offenses may be tried together if the evidence of each of the offenses

¹ Although the information refers in all 13 counts to cocaine, it appears from the Affidavit of Probable Cause, as well as from Defendant’s Omnibus Pre-Trial Motion, filed July 23, 2002, that on the first three dates it is alleged Defendant sold marijuana, not cocaine. The Court notes the Commonwealth has filed a Motion to Amend the Information, which is scheduled for argument April 2, 2003.

² Decision on the instant Motion was deferred pending resolution of a Rule 600 Motion also heard October 22, 2002. By Order dated February 18, 2003, the Rule 600 Motion was disposed of and the Motion to Sever may now be addressed.

would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion. Pa.R.Crim. P. Rule 582 (A)(1)(a). The Courts have interpreted these two rules together to mean that the Court must determine (1) whether the evidence of each of the offenses would be admissible in a separate trial for the other; (2) whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and (3) whether the defendant will be unduly prejudiced by the consolidation of the offenses. Commonwealth v Burton, 770 A.2d 771 (Pa. Super. 2001). In the instant case, Defendant contends that evidence of each of the offenses would not be admissible in a separate trial of any of the others.

In deciding this issue, the Court is mindful that while evidence of distinct crimes is not admissible against a defendant being prosecuted for another crime solely to show his bad character and his propensity for committing criminal acts, evidence of other crimes may be admissible where the evidence is relevant for some other legitimate purpose, including evidence to show (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish identity. Commonwealth v Burton, *supra*. In the instant case, the Commonwealth argues that evidence of each transaction would be admissible in a trial of any other transaction under the common scheme or plan exception. The Commonwealth contends that at the first transaction, a subsequent transaction was discussed, at that subsequent transaction a further transaction was discussed, and at the third transaction, the final transaction was discussed. The Court agrees with the Commonwealth that each transaction would therefore be admissible in a trial of the others, consistent with the Court's Opinion in Commonwealth v Taylor, 445 A.2d 174 (Pa. Super. 1982), wherein the Court allowed consolidation of two separate sets of drug charges because during the first transaction the defendant and undercover agent discussed the eventual second transaction. The Court in Taylor also went on to apply a balancing test, finding the judicial economy to override any possible prejudice to defendant. In the instant matter, the Court also finds any prejudice created by a single trial with respect to all four alleged drug transactions is overridden by the judicial economy of a single trial, rather than four separate trials. The Court notes Defendant has not offered an explanation of any defense so it is not possible for the Court to analyze whether a single trial affects

Defendant's ability to present a defense.

Defendant does not argue the offenses are incapable of separation by the jury and, indeed, the Court finds that they are easily separable.

Having found the Commonwealth's intent to proceed on all charges in a single trial satisfies the requirements of the Rules of Criminal Procedure, Defendant's Motion to Sever each set of charges will be denied.

ORDER

AND NOW, this 24th day of March, 2003, for the foregoing reasons, Defendant's Motion for Severance is hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA
Eric Linhardt, Esq.
Gary Weber, Esq.
Hon. Dudley N. Anderson