

On March 11, 2010, the Pennsylvania State Police went to 1652 Randall Circle in Loyalsock Township. Defendant Tennis resides at this address. A witness previously related to the Pennsylvania State Police that she observed Defendant Banks frequenting that address.

Upon arriving at the residence, the police identified Defendant Banks. He permitted entry into the residence. While speaking with Defendant Banks, the police observed two marijuana stem pieces in plain view on a shelf in the living room.

After speaking with Defendant Banks, the police then met with Defendant Tennis. Defendant Tennis provided verbal consent to search the residence. The search uncovered controlled substances and paraphernalia.

Each Defendant spoke separately with the police. Defendant Tennis related that the cash found in the residence did not belong to her and that she did not give Defendant Banks the cash that was in his possession.

Among the items confiscated from Defendant Banks following his arrest was a cell phone. The cell phone rang continuously while Defendant Banks was in custody. Trooper Tyson Havens of the Pennsylvania State Police answered the telephone and identified himself as "T", a friend of Defendant Banks. The individual making the call eventually admitted to the police that he was calling Defendant Banks to purchase marijuana and that Defendant Banks had previously sold him marijuana out of the 1652 Randall Circle address.

Consolidation of separate Informations is governed by the Pennsylvania Rules of Criminal Procedure. Defendants charged in separate Informations may be tried together if they are alleged to have participated in the e same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Pa. R.Crim. P. 582 (A) (2).

Rule 583 of the Pennsylvania Rules of Criminal Procedure governs severance. The Court may order separate trials of defendants if it appears that any party may be prejudiced by the defendants being tried together. Pa.R.Crim.P. 583.

“As a general policy, joint trials are encouraged when judicial economy will be promoted by avoiding the expense and time-consuming duplication of evidence.” Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491, 501 (1998). In this particular matter, the Defendants are alleged to have participated in the same acts or transactions. As well, Defendant Banks has been charged with conspiracy wherein Defendant Tennis is named as the co-conspirator. When Defendants have been charged with a conspiracy, a joint trial is preferable. Jones, 668 A.2d at 501, citing Commonwealth v. Jackson, 451 Pa. 462, 303 A.2d 924 (1973).

Under Rule 583, the prejudice the defendants suffer due to consolidation must be greater than the general prejudice any defendant suffers when the Commonwealth’s evidence links him to a crime. Commonwealth v. Dozzo, 991 A.2d 898, 902 (Pa. Super. 2010), citing Commonwealth v. Lauro, 819 A.2d 100, 107 (Pa. Super. 2003), appeal denied, 574 Pa. 752, 830 A.2d 975 (2003). Defendants assert that they may be prejudiced due to either contrary statements they may have made to the police or what was vaguely described as pressure on Defendant Banks to protect Defendant Tennis, because she is the mother of Defendant Banks’ children.

More than a bare assertion of prejudice, however, is required. It must be stated with particularity, and merely arguing abstractly that there may be prejudice in that a defense is “inconsistent” or “in conflict” with a co-defendant is insufficient. Commonwealth v. Morales,

494 A.2d 367, 373 (Pa. 1985). Further, “the fact that defendants have conflicting versions of what took place, or the extent to which they participated in it, is a reason for, rather than against, a joint trial because the truth may be more easily determined if all are tried together.” Commonwealth v. Marinelli, 690 A.2d 203, 213 (Pa. 1997), citing Commonwealth v. Chester, 587 A.2d 1367, 1373 (Pa. 1991). Finally, the fact that one Defendant may try to save himself at the expense of the other constitutes insufficient grounds to require severance. Id.

Accordingly, the Court finds that consolidation is proper and will grant the Commonwealth’s Motion to Consolidate.

Next before the Court is Defendant Banks’ Motion to Suppress. The Commonwealth argues, however, that the Omnibus Pretrial Motion which includes a Motion to Suppress is untimely and accordingly should be dismissed.

The Information in this matter was filed on May 7, 2010. Defendant was arraigned on May 10, 2010. The Omnibus Pretrial Motion was filed on September 13, 2010.

Defendant conceded that discovery pursuant to the Pennsylvania Rules of Criminal Procedure was provided on May 21, 2010. Defendant argues, however, that he delayed in the filing of the Omnibus Pretrial Motion pending his initial application for admission to the Lycoming County Drug Court Program and his subsequent request for reconsideration.

Defendant’s initial application for admission into the Drug Court Program was denied prior to April 16, 2010. On April 16, 2010, Defendant submitted a request for reconsideration (Commonwealth’s Exhibit No. 1). Defense counsel indicated that she did not receive a final decision on the Drug Court denial until August 3, 2010.

Defendant concedes that the Omnibus Pretrial Motion was filed out of time but requests “in the interest of justice” that it be heard nonetheless.

Rule 581 of the Pennsylvania Rules of Criminal Procedure governs the timeliness of suppression motions. Unless the opportunity did not previously exist, or the interests of justice otherwise require, a suppression motion must be made in an omnibus pretrial motion as set forth in Rule 578. If a timely motion is not made, the issue of suppression is deemed to be waived. Pa. R. Crim. P. 581 (B). An omnibus pretrial motion must be filed within 30 days after arraignment unless the opportunity therefor did not exist or the defendant, defense attorney or the attorney for the Commonwealth was not aware of the grounds for the motion, or unless the time for filing has been extended by the court for cause shown. Pa. R. Crim. P. 579 (A).

Defendant has not argued that he was not aware of the grounds for the motion or that an opportunity did not previously exist to file such in a timely manner. Instead, Defendant argues that the interests of justice require that the motion be heard at this time. More specifically, Defendant argues that the issues raised in the motion to suppress are of constitutional import and that it would be unfair to Defendant if he were required to proceed to trial with the Commonwealth being permitted to utilize evidence that was arguably seized in violation of his constitutional rights. A trial judge may excuse a defendant’s tardy presentation of a suppression motion when required in the interests of justice. Commonwealth v. Johonoson, 844 A.2d 556, 561 (Pa. Super. 2004).

Under the circumstances in this particular case, the Court declines to conclude that the interests of justice require that the suppression motion be heard at this time. First,

Defendant clearly had knowledge of the facts in support of the motion for months prior to the time that the motion was filed. The information upon which the motion is based was set forth in the affidavit of probable cause attached to the criminal complaint as well as the application for search warrant and attached affidavit that were supplied to Defendant on or prior to May 21, 2010. Next, from the inception of this case, Defendant has been represented by the same attorney and/or attorney's office. Further, the merits of the underlying suppression motion are not so apparent that the interests of justice require it to be heard. Indeed, the case of Commonwealth v. Cruttenden, 976 A.2d 1176 (Pa. Super. 2009) is clearly distinguishable. In this particular case, the conversation that was intercepted was not a conversation between Defendant and a third party but rather a conversation between Trooper Havens, who identified himself as an individual other than Defendant, and a third party. Finally, no representation whatsoever was made by the Commonwealth to Defendant that if Defendant applied for Drug Court, his application could or would be compromised by the filing of any suppression motion.

Accordingly, Defendant's Suppression Motion will be dismissed as untimely. The Court further notes that because Defendant's Petition for Writ of Habeas Corpus is based on the assumed suppression of the alleged illegally obtained evidence, that motion shall also be denied as both untimely and without basis.

ORDER

AND NOW, this 22nd day of November 2010 following a hearing and argument, the Court **GRANTS** the Commonwealth's Motion to Consolidate. The Informations set forth as No. 505-2010 and 561-2010 shall be tried together. The Court **DENIES** the Defendant's Omnibus Pretrial Motion.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: PD (JL)
DA (MK)
Joel McDermott, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work File