

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-30-2011
vs. :
FITZGERALD ROBINSON, : Opinion and Order re
Defendant : Commonwealth's Motion to Consolidate
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COMMONWEALTH : No. CR-106-2011
vs. :
DERRICK JONES, :
Defendant :

OPINION AND ORDER

This matter came before the court on the Commonwealth's Motion to Consolidate the above-captioned cases. The facts as gleaned from the affidavits of probable cause are as follows.

The police were working with a confidential informant (CI), who informed the police that the CI had been regularly purchasing heroin from "G", who was later identified as Fitzgerald Robinson (Robinson), and if the CI could not make a purchase from Robinson the CI could purchase from "Red," who was later identified as Derrick Jones (Jones). The CI also reported that Robinson and Jones lived at 2421 ½ West Fourth Street. The police then arranged for the CI to make five controlled buys of heroin.

The first controlled buy occurred on November 2, 2010. The CI called Robinson's cell phone number to arrange the purchase of a bundle or ten bags of heroin. Robinson agreed to sell heroin to the CI and told him to meet at Robinson's residence at 2421 ½ West Fourth Street (the residence). The CI went inside the residence where he met

Jones. The CI handed Jones \$100 in pre-recorded currency and Jones handed the CI five bags of heroin. The CI told the police Robinson and Jones only had five bags left, so the deal was changed to five bags for \$100 instead of ten bags for \$200.

A second controlled buy occurred on November 9, 2010. The CI again called Robinson's cell phone number to arrange a purchase of ten bags of heroin. Robinson agreed to sell heroin to the CI and directed him to come to the residence. The CI entered the residence and met Jones, who handed the CI seven bags of heroin in exchange for \$140 in pre-recorded funds.

A third controlled buy occurred on November 17, 2010. As with the previous buys, the CI called Robinson's cell phone number to purchase ten bags of heroin and Robinson directed the CI to come to the residence. The CI entered the residence and met Robinson, who handed him ten bags of heroin in exchange for \$200 in pre-recorded funds.

A fourth controlled buy occurred on December 9, 2010. The CI called Robinson's cell phone and arranged to meet Robinson at his residence to purchase ten bags of heroin. The CI entered the residence and met both Robinson and Jones. The CI handed Robinson \$200 in pre-recorded funds and Jones handed the CI ten bags of heroin.

A fifth controlled buy occurred on December 17, 2010. The CI called Robinson's cell phone and arranged to meet Robinson at his residence to purchase ten bags of heroin. The CI entered the residence and met Robinson and Jones. The CI handed Robinson \$200 in pre-recorded funds and Jones handed the CI ten bags of heroin.

Prior to each controlled buy the CI was searched and provided \$200 in pre-

recorded funds. Subsequent to each buy, the substance purchased field-tested positive for heroin.

After the December 17th purchase, the police obtained a search warrant for the residence and discovered 100 bags of heroin in the kitchen.

By Information filed on February 17, 2011, the Commonwealth charged Robinson with one count of conspiracy to deliver a controlled substance with Jones; five counts of criminal use of a communication facility; one count of delivery of a controlled substance relating to the controlled buy on November 17, 2010; and two counts of possession with intent to deliver a controlled substance, one relating to the November 17th transaction and one related to the 100 bags of heroin found in the residence pursuant to the search warrant.

By Information filed on February 24, 2011, Jones was charged with one count of conspiracy to deliver a controlled substance with Robinson, four counts of delivery of a controlled substance (November 2, November 9, December 9 and December 17) and four counts of possession with intent to deliver a controlled substance (one count for each transaction on November 2, November 9 and December 9, and one count for the 100 bags of heroin found in the residence on December 17 pursuant to the search warrant).

The Commonwealth filed a motion to consolidate these cases for trial.

Robinson had no objection to the Commonwealth's motion, but Jones objected to consolidation. Jones argued that he would be prejudiced by joinder, because Robinson gave an oral statement to the police implicating Jones, which would create a

Bruton¹ problem and shows that Robinson and Jones would have adverse defenses. Jones asserted the Bruton issue could not be remedied by redaction because the statement in this case was oral. Jones also argued that even if Robinson testified and could be cross-examined about the statement he gave to the police, Jones would still be prejudiced because he has crimen falsi convictions and he would look guilty to the jury if Robinson testified and he didn't.

The Commonwealth countered that the Bruton issue and Jones' concerns could be addressed through appropriate jury instructions such as instructions limiting the use of the statement and evidence regarding the November 17 transaction to Robinson.

DISCUSSION

Rule 582 of the Pennsylvania Rules of Criminal Procedure governs the joinder of separate indictments or informations for trial and states in relevant part:

- (1) Offenses charged in separate indictments or informations may be tried together if:
 - (a) the evidence of each of the offenses 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; or
 - (b) the offenses charged are based on the same act or transaction.
- (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions

¹ Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). “The Bruton Court held that, if a non-testifying co-defendant’s confession directly and powerfully implicates the defendant in the crime, then an instruction to the jury to consider the evidence only against the co-defendant is insufficient, essentially as a matter of law, to protect the defendant’s confrontation rights.” Commonwealth v. Brown, 592 Pa. 376, 925 A.2d 147, 157 (Pa. 2007), citing Bruton, 391 U.S. at 135-36, 88 S.Ct. at 1628. The United States Supreme Court narrowed the scope of the Bruton rule in Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987), wherein the Court held the Confrontation Clause is not violated by the admission of a non-testifying co-defendant’s statement where the statement is redacted to eliminate any reference to the defendant and is accompanied by a limiting instruction.

constituting an offense or offenses.

Pa.R.Crim.P. 582(A)(1), (2). Rule 583 governs severance and states: “The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by the offenses or defendants being tried together.” Pa.R.Cr.P. 583.

Both Robinson and Jones are charged with conspiring with the other to possess controlled substances with the intent to deliver them during November and December of 2010. In order to prove a conspiracy, the Commonwealth must show an agreement to commit a specific crime, here possession with intent to deliver a controlled substance, and an overt act in furtherance thereof. The Court finds that since all the transactions, including the one that occurred on November 17, 2010 are encompassed in the conspiracy charge, the cases would meet the requirements for joinder under Rule 582. Moreover, even if the cases were tried separately, the Court believes the November 17 transaction would be admissible in Jones’ trial as an overt act by his alleged co-defendant, Robinson, in furtherance of the alleged conspiracy or to show that Robinson also had the intent to deliver controlled substances.

Jones’ attorney argues that the cases should not be joined because Jones would be prejudiced by the oral statement Robinson made to the police that also implicated Jones. According to Jones, in addition to creating a Bruton issue, the statement shows that Robinson and Jones have adverse defenses. The Court cannot agree.

The Court does not know whether or not Robinson will testify at trial. If

Robinson testifies, there is no Bruton issue. See Commonwealth v. Housman, 604 Pa. 596, 619-20, 986 A.2d 822, 835-36 (2009). Even if Robinson does not testify, the Court believes any Bruton issue could be addressed through redaction and an instruction to the jury that it cannot consider Robinson's statement in determining the guilt or innocence of Jones.

Jones' attorney argued that redaction could not be accomplished because Robinson's statement was oral, not written. It is somewhat difficult to address this issue when neither party provided the Court with the content of the statement at issue. Nevertheless, the Court does not believe the fact that the statement was oral necessarily is an insurmountable hurdle to joinder in this case. Frequently, oral statements are reduced to writing by transcribing them. The Court is not aware of anything that would preclude the statement in this case from being transcribed and then redacted by replacing Jones' name with a phrase such as "the other guy." See Commonwealth v. Travers, 564 Pa. 362, 768 A.2d 845, 851 (2001). Another option would be to simply have the police officer to whom the statement was made testify about the statement made by Robinson without mentioning anything that Robinson said about Jones.²

The Court also does not believe the mere fact that Robinson also implicated Jones shows that they have adverse defenses. In Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491 (1995), the Pennsylvania Supreme Court stated:

As a general policy, joint trials are encouraged when judicial

² If the statement is an audio or video taped statement, the combination of joinder and Jones' rights under the Confrontation Clause might preclude the Commonwealth from playing the tape for the jury. The Court assumes the Commonwealth has weighed the advantages of joinder such as convenience of the witnesses and judicial economy against the drawbacks of using the other methods of establishing the statement, such as the possibility of Robinson claiming any transcript is inaccurate or asserting that the testifying officer did not recall the statement correctly or the like.

economy will be promoted by avoiding the expensive and time-consuming duplication of evidence. Where, as here, defendants have been charged with conspiracy, joint rather than separate trials are preferred. However, severance may be proper when a defendant can show that he will be prejudiced by a joint trial.

While the possibility of conflicting or antagonistic defenses is a factor to be considered in determining whether to grant a motion for severance, appellant must show a real potential for prejudice and not just mere speculation. The fact that hostility exists between the defendants or that one defendant may try to save himself at the expense of the other constitutes insufficient ground to require severance. Moreover, the mere fact that one defendant might have a better chance of acquittal if tried separately is an insufficient ground to require severance. Further, defenses only become antagonistic when the jury, in order to believe the testimony offered on behalf of the one defendant, must believe the testimony offered by his or her co-defendant.

542 Pa. at 485-86, 668 A.2d at 501 (citations omitted).

Accordingly, the following Order is entered:

ORDER

AND NOW, this ____ day of September 2011, the Court GRANTS the Commonwealth's Motion to Consolidate.

By The Court,

Marc F. Lovecchio, Judge

cc: A. Melissa Kalaus, Esquire (ADA)
Lori Rexroth, Esquire
Jeffrey Rowe, Esquire (APD)

Gary Weber, Esquire (Lycoming Reporter)