

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 1344 – 2010  
:   
vs. : CRIMINAL DIVISION  
:   
DEBORAH McKISSICK, :   
Defendant : Motion for Severance

**OPINION IN SUPPORT OF ORDER OF FEBRUARY 16, 2012**

Before the Court is Defendant's Motion for Severance of Counts, filed February 10, 2012.<sup>1</sup> Argument on the motion was heard February 16, 2012, after which the Court entered an Order granting the motion. The instant opinion is written in support of that Order.

Defendant has been charged in one Information with two counts of theft by unlawful taking, one count of criminal attempt, two counts of identity theft, two counts of forgery and two counts of theft by deception, in connection with the alleged theft of funds from two individuals who were clients of the attorney for whom Defendant worked. In the instant motion, Defendant seeks to have separate trials with respect to the crimes alleged against each victim.

Pennsylvania Rules of Criminal Procedure 582, Joinder, and 583, Severance, have been read together to require a three-part test for deciding a motion to sever:

Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the court must therefore 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, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Collins, 703 A.2d 418, 422 (Pa. 1997), quoting Commonwealth v. Lark, 543 A.2d 491, 496-97 (Pa. 1988). In deciding the first question, whether evidence of each of the

---

<sup>1</sup> Although the motion was not filed within thirty days of arraignment, the Commonwealth waived the time requirement at argument.

offenses would be admissible in a separate trial for the other, the court starts with the proposition that evidence of crimes other than the one in question is not admissible solely to show the defendant's bad character or propensity to commit crime. Commonwealth v. Newman, 598 A.2d 275 (Pa. 1991). Evidence of other crimes is admissible, however, to demonstrate (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. Commonwealth v. Collins, *supra*. Additionally, evidence of other crimes may be admitted where such evidence is part of the history of the case and forms part of the natural development of the facts. Id.

In the instant case, the Commonwealth argues that evidence of each alleged theft is admissible in a trial of the other as they constitute a common scheme or plan. The Court does not agree.

The Affidavit of Probable Cause indicates that the first set of charges is based on allegations that Defendant surreptitiously obtained the first victim's signature on a Power of Attorney document naming her the victim's power of attorney and then used the power of attorney to manipulate the victim's bank accounts, transferring funds from the accounts to pay her own credit card debt, or simply withdrawing funds. The second set of charges is based on allegations that Defendant wrote credit card courtesy checks belonging to the second victim to herself and cashed those checks, thus debiting the victim's credit card account. The Commonwealth argues that Defendant was engaged in a common scheme or plan as she was able to commit the thefts because of her position at the law office. It cannot be said, however, that the two thefts are so related to each other that proof of one tends to prove the other. Moreover, to the extent that a common scheme or plan argument embraces the issue of proving identity, the identity exception applies only when the facts are distinctive and unusual enough to show a common modus operandi: "the Commonwealth must show more than the other crimes are of the same class as the one for which the defendant is being tried. Rather, there must be such a high correlation in the details of the crimes that proof that the defendant committed one makes it very unlikely that anyone else but the defendant committed the

others.” Commonwealth v. Morris, 425 A.2d 715, 721 (Pa. 1981). Here, the facts of the alleged thefts are completely different, the only connection being that both victims were clients of Defendant’s employer. The Commonwealth’s argument that proof that Defendant committed one of the thefts would serve as proof of the other is therefore necessarily based on only the presumption that someone who would commit a theft of one type would also commit the other, which purpose is exactly what evidence of other crimes is not allowed to serve.

As the Court believes that neither of the offenses would be admissible in a separate trial for the other, the remainder of the three-part test need not be examined, and the motion was, therefore, granted.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA  
Peter T. Campana, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson