

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CP-41-CR-0000231-2023
Appellant	:	CP-41-CR-0000228-2023
vs.	:	CP-41-CR-0000197-2023
	:	
	:	
MARK T. ROBINSON,	:	
Appellee	:	1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's order dated January 29, 2024. In that order, the court denied as untimely the Commonwealth's motion to consolidate.

Background

On February 1, 2023, Mark Robinson ("Robinson") allegedly delivered methamphetamine to an undercover (UC) detective with the Lycoming County Narcotics Enforcement Unit (NEU) at an apartment on Northway Road. Robinson was surveilled from the apartment to his residence at 836 High Street, Apartment 1.

The following morning (February 2, 2023), a search warrant was executed at Robinson's residence. While members of the NEU were making entry, someone discarded a purse out of a window. The purse contained methamphetamines, packaging material, and a digital scale. While searching the master bedroom, law enforcement officers discovered another digital scale, packaging materials (plastic sandwich bags), and distribution marijuana in a safe. They also found cash, including the pre-recorded buy money from the sale to the UC. Robinson was not present during the search.

On February 2, 2023, Detective Tyson Havens filed a criminal complaint against Robinson charging him with Possession With Intent to Deliver Methamphetamines and Possession with Intent to Deliver Marijuana as a result of the controlled substances discovered at Robinson's residence. The filing of these charges resulted in the issuance of an arrest warrant for Robinson. These charges became case 197-2023. Arraignment was scheduled for February 27, 2023.

When Robinson returned to his residence and officers tried to arrest him, Robinson allegedly struggled with four officers for three minutes before they were able to overcome his resistance and secure him in handcuffs.

On February 8, 2023, Detective Havens filed a criminal complaint against Robinson charging him with Delivery of Methamphetamines to the UC. These charges were waived for court and were filed to case 231-2023. Arraignment was scheduled for March 6, 2023.

On February 16, 2023, Detective Havens filed a criminal complaint charging Robinson with resisting arrest. This charge was waived for court and filed to case 228-2023. Arraignment was scheduled for March 6, 2023.

On March 3, 2023, the Commonwealth filed a notice of joinder for cases 228-2023 and 231-2023, but it did not file a notice of joinder for case 197-2023.

The cases were scheduled for a pre-trial conference on November 21, 2023 with the first possible day of jury selection of December 4, 2023.

The pre-trial conference was held on November 21, 2023. The defense agreed to stipulate to the chain of custody and the lab results. It was anticipated that one day would be needed for trial.

On December 18, 2023, the Commonwealth filed a motion to consolidate all three cases for trial.

The motion was scheduled for hearing and argument on January 29, 2024. At the time of the hearing, defense counsel objected that the Commonwealth's motion was untimely. The court asked the Commonwealth why the motion was filed so long after arraignment. The Commonwealth conceded that the motion was untimely and it did not have any reason for the delay. The court sustained the defense objection and denied the motion to consolidate.

Cases 228-2023 and 231-2023 were scheduled for jury selection during the afternoon of February 26, 2024. Immediately prior to the scheduled jury selection, the Commonwealth filed its notice of appeal.

In its notice of appeal, the Commonwealth certified that the denial of its consolidation motion would substantially handicap the prosecution. The court directed the Commonwealth to file a concise statement of errors complained of on appeal.

On March 14, 2024, the Commonwealth filed a concise statement in which it asserted the following three issues:

1. The trial court abused its discretion by dismissing the Commonwealth's motion on timeliness grounds without conducting an analysis to determine whether [Robinson] would suffer any prejudice if the motion was granted.
2. The trial court in denying the Commonwealth's consolidation motion, abused its discretion by strictly construing the rules of criminal procedure while disregarding the compulsory joinder language of 18 Pa. C.S. §110 and its application to the Informations in this case.
3. The trial court abused its discretion by failing to consider whether consolidation was in the interests of justice, dismissing the motion

solely on grounds of timeliness.

DISCUSSION

1. Prejudice

The Commonwealth first asserts that the trial court abused its discretion by dismissing the Commonwealth's motion on timeliness grounds without conducting an analysis to determine whether Robinson would suffer any prejudice if the motion was granted.

The decision of whether to join or sever offenses for trial is within the discretion of the trial court and will not be reversed on appeal absent a manifest abuse thereof, or prejudice and clear injustice to the defendant. *Commonwealth v. Knoble*, 188 A.3d 1199, 1205 (Pa. Super. 2018), quoting *Commonwealth v. Wholaver*, 989 A.3d 883, 888 (Pa. 2010).

Rule 582(B) of the Pennsylvania Rules of Criminal Procedure governs the procedure for the joinder of separate information. Rule 582(B) states:

(1) Notice that offenses or defendants charged in separate indictments or informations will be tried together shall be in writing and filed with the clerk of courts. A copy of the notice shall be served on the defendant at or before arraignment.

(2) When notice has not been given under paragraph (B)(1), any party may move to consolidate for trial separate indictments or informations, which motion must ordinarily be included in the omnibus pretrial motion.

Pa. R. Crim. P. 582(B). Rule 579 governs the time for filing an omnibus pretrial motion.

Rule 579 requires a party to file an omnibus pretrial motion within 30 days after arraignment, "unless the opportunity therefor did not exist, or the defendant or the 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.

The Commonwealth did not file a notice of joinder for case 197-2023. Therefore, (B)(1) does not apply.¹

The Commonwealth filed its motion to consolidate on December 18, 2023. The arraignment dates for these cases were February 27, 2023 and March 6, 2023. Therefore, the motion to consolidate should have been filed on or before April 5, 2023. The Commonwealth's motion was filed more than eight months late. The Commonwealth would have been aware of the grounds for the motion. All of the criminal complaints were filed by Tyson Havens, a Detective in the District Attorney's Office, who is a member of the NEU. Moreover, the NEU is under the direction and control of the District Attorney's Office. In fact, at the time that these charges were filed, the NEU office was a space within the District Attorney's Office.² The Commonwealth never requested an extension to file the motion and the court never granted an extension. The Commonwealth had the opportunity to file a timely motion; it simply failed to do so. Furthermore, Detective Havens could have filed all of the charges in a single criminal complaint. Additionally, the rule does not mention a lack of prejudice as a justification for excusing a party's failure to comply with it.

2. *Compulsory Joinder*

The Commonwealth next asserts that the trial court abused its discretion by strictly construing the rules of criminal procedure while disregarding the compulsory joinder language of 18 Pa. C.S. §110 and its application to the Informations in this case.

With all due respect to the members of the District Attorney's Office and the NEU, it was these offices and their members that disregarded the requirements of section 110. If they

¹ The Commonwealth filed a notice for joinder in 228-2021 and 231-2021. Those cases will be tried together.

² The NEU office recently moved to the building directly across the street from the courthouse.

had been more cognizant of the compulsory joinder statutes, one or more of the following would have occurred: Detective Havens would have filed the charges in a single criminal complaint; the notice of joinder would have included CR-197-2023; the consolidation motion would have been filed in a timely manner; the Commonwealth would have argued at the hearing on its motion to consolidate that, due to compulsory joinder, the consolidation motion should be granted despite its untimeliness; or the Commonwealth would have filed a motion for reconsideration if it believed that the court had overlooked any of the issues that the Commonwealth is asserting in this appeal.³ Had any of these actions occurred, perhaps the result would have been different.

The same detective was the affiant in all three cases, and the same assistant district attorney was present for all three preliminary hearings (or waivers thereof). This is not a situation where there were multiple individuals who may not have realized the relationship between these cases. The Commonwealth had multiple opportunities to ensure that it complied with the compulsory joinder statute. In the court's view, the failures with respect to these cases not being consolidated for a single trial lie at the feet of the Commonwealth, not the court.

The court did not consider the compulsory joinder statute because the Commonwealth did not make an argument or present any evidence about compulsory joinder at the hearing and argument on the consolidation motion.

It is difficult to address the merits of the Commonwealth's issue when the compulsory joinder statute was not argued by the parties at the hearing and argument on the

³ Although the Commonwealth cited the compulsory joinder statute in its consolidation motion, *see* Motion to Consolidate at ¶8, the Commonwealth never argued it at the hearing.

consolidation motion. Although it is addressing this issue in a vacuum, the court will attempt to address the Commonwealth's current argument for the sake of the appellate courts.

The court asserts that the Commonwealth's arguments should fail on the merits. First, under the facts and circumstances of this case, section 109 of the Crimes Code might be the applicable statute, not section 110, and the Commonwealth did not cite to section 109.

Section 109 provides that when a prosecution is for a violation of the same provision of the statutes and is based on the same facts as a former prosecution, it is barred by the former prosecution if: the former prosecution resulted in an acquittal; the prosecution was terminated by a final order or judgment for the defendant and which necessarily required a determination inconsistent with a fact or legal proposition that must be established for conviction of the offense; the former prosecution resulted in a conviction; or the former prosecution was improperly terminated after the first witness was sworn but before a verdict or after a plea of guilty was accepted by the court. 18 Pa. C.S. §109.

In case 231-2023, the Commonwealth charged Robinson with delivery of a controlled substance, a violation of 35 P.S. §780-113(a)(30). The affidavit of probable cause for that case indicates that Robinson delivered methamphetamines to an undercover officer and he was surveilled back to his residence at 836 High Street. A search warrant was obtained for that residence, and the controlled buy money and an additional approximately 90 grams of methamphetamines were found.

In case 197-2023, the case for which a notice of joinder was not filed, the Commonwealth charged Robinson with possession with intent to deliver methamphetamines, as well as possession with intent to deliver marijuana. These charges were based on the

search of the residence. These charges are also violations of 35 P.S. §780-113(a)(30) and count 1 involves the same controlled substance – methamphetamines.

Despite the fact that Robinson was not present for the search of the residence and the methamphetamines were located in his girlfriend's purse, which her son discarded out a window when the police arrived to conduct the search, it appears based on the Commonwealth's motion to consolidate that the Commonwealth believes evidence of each offense is admissible in the trial of the other. In other words, while the docket does not reflect that the Commonwealth has filed a Rule 404(b) notice, it appears that the Commonwealth intends to use the evidence of the delivery as well as statements from the girlfriend and the son, to establish that the methamphetamines found as a result of the search warrant belonged to Robinson and that he intended to deliver them and it intends to use the discovery of the methamphetamines and buy money from the search of the residence in the trial of the delivery. Therefore, it appears that these offenses are based on the same provision of the statutes and, at least from the Commonwealth's perspective,⁴ based on the same facts, which could make section 109 applicable, as opposed to section 110. If, however, the Commonwealth intended to only present the facts and evidence of the delivery (e.g., testimony from the CI and the UC), the offenses would likely be based on different witnesses and evidence and not so intertwined as to be part of the same criminal episode, particularly where Robinson was not present for the search and the methamphetamines were found in his girlfriend's purse and were thrown out the window by her son because he was afraid his mother would be charged.

⁴The court is not making a ruling one way or the other on the admissibility of this evidence at any trial.

Even if section 110 is the appropriate statute, it appears that the relevant provision would be section 110(1)(ii), which contains an exception for when the court orders separate trials. Specifically, this subparagraph states:

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in section 109 of this title (relating to when prosecution is barred by former prosecution for the same offense) and the subsequent prosecution is for:

* * *

(ii) any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the prosecuting officer at the time of the commencement of the first trial and occurred within the same judicial district as the former prosecution ***unless the court ordered a separate trial of the charge of such offense....***

18 Pa. C.S. §110(1)(ii)(emphasis added). By denying or dismissing the Commonwealth's motion to consolidate, the court arguably ordered separate trials. However, there may be an argument that this exception should not apply when the failure to join the offenses was due to the Commonwealth's failure to timely request joinder, as opposed to a motion for severance by the defense. If the Commonwealth had argued compulsory joinder at the argument on its Motion, perhaps the court would know the arguments of the parties regarding the applicability of this exception.

3. ***Interests of Justice***

Finally, the Commonwealth asserts that the trial court abused its discretion by failing to consider whether consolidation was in the interests of justice.

The court believes that this issue is waived. "Issues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a). The

Commonwealth did not present any argument or evidence during the hearing that consolidation was “in the interests of justice.” The defense opposed the motion to consolidate on the basis of timeliness. The Commonwealth conceded that the motion was not filed timely and that it did not have any reasons for its untimely filing. The Commonwealth never argued at the hearing that, despite the untimeliness, its motion should be granted in the interests of justice. It is not the function of the court to make arguments for the Commonwealth or to save the District Attorney’s Office from its mistakes or oversights. Instead, the court is to be a neutral arbiter and make its rulings based on the arguments and evidence presented to it.

While Rule 579 regarding the time for filing an omnibus pretrial motion does not mention the interests of justice, Rule 578 states: “Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus motion.” Pa. R. Crim. P. 578. The court believes this exception would permit more than one motion in the interests of justice and not excuse the failure to timely file a first and only omnibus motion. For example, if a party filed an omnibus pretrial motion and later discovered information that would provide a basis for filing a motion to suppress, the party may be permitted to file a second omnibus motion outside of the 30-day time period because the party was not aware of the grounds for the motion as contemplated by Rule 579 and the interests of justice may require a second motion and the suppression of the evidence due to a constitutional violation. The Commonwealth did not cite Rule 578 in its motion or its argument. Therefore, the defense did not have the opportunity to argue about the meaning of Rule 578 or its application to this circumstance and this issue should be considered waived.

Even if this issue were not waived, the court may not have granted consolidation in these cases. Rule 582(A)(1) of the Pennsylvania Rules of Criminal Procedure provides the standards for joinder of separate informations against a single defendant and states:

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.

Pa. R. Crim. P. 582(A)(1). In its motion to consolidate, the Commonwealth relied solely on subparagraph (a) and contended that the evidence of each was admissible in the other based solely on a common plan, 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 other. Motion to Consolidate, ¶¶ 5-7.

At the end of the hearing, the court noted that it was going to dismiss the motion on procedural ground, but common scheme or plan was the reason alleged in the petition, which the court would not have found anyway. Transcript, 01/29/2024, at 8.

For other crimes evidence to be admissible as a common plan or scheme, the crimes must be examined for shared similarities. *Commonwealth v. O'Brien*, 836 A.3d 966, 969 (Pa. Super. 2003). Generally, the similarities are in the manner of the commission of the offense. For example, in *O'Brien*, the Commonwealth sought to introduce into evidence the defendant's prior convictions for sexual crimes against boys. In each instance, the boys were between the ages of eight and eleven years old, O'Brien was friends with the boy's parents, and O'Brien engaged in involuntary deviate sexual intercourse (oral or anal) with the boy. *O'Brien* is distinguishable from this case.

Here, the crimes do not share similarities. In 231-2023, Robinson is charged with delivery of methamphetamines to the UC at an apartment on Northway Road. In 197-2023, Robinson is charged with possession with intent to deliver methamphetamines (PWID-methamphetamines) and possession with intent to deliver marijuana (PWID-marijuana) in his apartment at 836 High Street. Robinson was not present when the controlled substances were found and they were not found on his person or in his personal items such as clothing inside the apartment. Instead, the methamphetamines were found in his girlfriend's purse. It appears that the evidence that the methamphetamines belonged to Robinson are the statements of his girlfriend (who is also charged with possession with intent to deliver these methamphetamines) and her son. In case 231-2023, Robinson is charged with resisting arrest, because he put up a struggle for three or four minutes when officers tried to arrest him for the PWID charges. The court does not have any factual information about the resistance. It could be anything from Robinson attempting to flee or screaming that he should not be arrested because the drugs were not his. Since the offenses do not share similarities, they do not evidence a common plan or scheme. As this was the only basis for joinder asserted in the Commonwealth's motion and the offenses do not meet the test for a common plan or scheme, the court would not have ordered joinder on this basis.

Conclusion

The court did not deny the Commonwealth's motion based on partiality, bias, prejudice, or ill-will. The court denied the Commonwealth's motion because it failed to

follow the procedures and time limits set forth in the Pennsylvania Rules of Criminal Procedure and it provided no good cause for its failure to do so.

The Commonwealth failed to present any argument or evidence to the court regarding the compulsory joinder language of 18 Pa. C.S. §110 or that joinder was required in the interests of justice.

The only basis for joinder was that the evidence was admissible in the trial of the others based on a common plan or scheme. The crimes did not have shared similarities to constitute a common plan or scheme. Therefore, the court would have denied joinder on this basis.⁵

DATE: March 25, 2024

By The Court,

Nancy L. Butts, President Judge

cc: Martin Wade, Esquire (ADA)/Phoebe Yates, Esquire (ADA)
Nicole Spring, Esquire (PD)/Taylor Paulhamus, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)

⁵ While there may be other bases to join these cases, they were not asserted by the Commonwealth; therefore, they are waived.