IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	**ID NO. 1209001736**
v.	:	
	:	
WALTER MORRIS,	:	
	:	
Defendant.	:	

Submitted: April 19, 2013
Decided: April 24, 2013

Upon Defendant's Motion for Severance
DENIED

ORDER

Nicole S. Hartman, Esq., Deputy Attorney General, Department of Justice, Dover, Delaware for the State of Delaware.

Anthony J. Capone, Esq., Office of the Public Defender, Dover, Delaware for Defendant Walter Morris.

Alexander W. Funk, Curley & Benton, LLC, Dover, Delaware for Co-Defendant Darren R. Foreman.

Young, J.

SUMMARY

This matter comes to the Court on the Motion of Defendant, Walter Morris, to sever the trials of the two defendants, Mr. Morris and Darren R. Foreman. Movant's position is that, while the events of this joint indictment all arose out of a common occurrence, prejudice would befall Movant because of the potential for antagonistic defenses between the co-defendant in a joint trial.

The circumstances of the case fail to demonstrate any reasonable likelihood or serious risk of prejudice to Defendant rising to a level calling for a severance of these Defendants. Accordingly, Defendant's Motion is **DENIED**.

FACTS

On or about September 2, 2012, Defendants Morris and Foreman were evidently engaged in playing "craps," when a police intervention resulted in a hasty dispersal of the participants. Among those severally apprehended by the police were Defendant Morris and co-defendant Foreman. Allegedly, various examples of illegal substances were recovered from each of the defendants. In the course of the entire adventure, the actions of the defendants engendered multiple charges against each; some overlapping, some distinct, but all emerging from the "craps" game observed by the police, and its direct aftermath. Defendant Morris was ultimately charged with drug dealing, resisting arrest, possession of paraphernalia, disorderly conduct, engaging in crap game and loitering. Co-Defendant Foreman was charged with all the same (except for the crap game engagement), plus marijuana possession and non-compliance with bond. The drug dealing charges (two against Foreman; one against Morris) arise out of allegations of each defendant's respectively having a quantity of

cocaine on his person, and a plastic wrap of Ecstacy pills located on the ground the possession of which has been attributed to Defendant Foreman. Additionally, Defendant Foreman confronts a felony bond breach. The remaining various misdemeanor charges are all distinct to each defendant.

STANDARD OF REVIEW

Superior Court Criminal Rule 8(b) permits two or more defendants to be charged in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses"[1] Generally, when defendants are indicted jointly, they will also be tried together.[2] On the other hand, Superior Court Criminal Rule 14 provides the trial court with authority to grant a motion for separate trials, if trying the defendants jointly would prejudice any of the parties. The defendant bears the burden of demonstrating that denial of the motion would result in substantial injustice and unfair prejudice.[3]

The decision to grant or deny such a motion is a matter of discretion addressed to the trial judge.[4] This discretion may be considered to be abused when a denial brings about a reasonable probability that substantial injustice will result from the

[1] Super. Ct. Crim. R. 8(b).

[2] *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967).

[3] *Lampkins v. State*, 465 A.2d 785, 794 (Del. 1983).

[4] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1985); *Younger v. State*, 496 A.2d 546, 549-50 (Del. 1985).

holding of a joint trial.[5] The Delaware Supreme Court has held that an abuse of discretion "usually depends upon the facts and circumstances of each case", although some general rules may applied.[6] However, the motion should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[7]

DISCUSSION

Defendant Morris, in his Motion for Severance, asserts that the potential for antagonistic defenses between him and co-defendant Foreman necessitates severed or separate trials. This entire, twelve count indictment concerns an event involving one location, identical witnesses, and a very brief period of time.

Three of the charges against both defendants are disorderly conduct and loitering, all misdemeanors. Antagonistic defenses are not issues as to any of them. The two felony cocaine drug charges are entirely distinct as to which defendant is alleged to have possessed what. The misdemeanor marijuana possession charge concerns only Defendant Foreman, as does the bond violation charge.

The misdemeanor craps game charge is against Defendant Morris only. The allegations involving that state that he and three others – but not including

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[5] *Bradley v. State*, 559, A.2d 1234, 1241 (Del. 1989) (quoting *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978)).

[6] *Id.*

[7] *Stevenson v. State*, 709 A.2d 619, 630 (Del. 1998) (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)).

Defendant Foreman – were the only ones seen playing, and that one of those other three was found with the dice. Hence, nothing antagonistic between Morris and Foreman exists here.

That leaves only the bag of Ecstacy (as paraphernalia) and the Ecstacy itself. That material, found on the ground (but attributed to Foreman due to an allegation of his having been seen tossing it there), constitutes the sole apparent subject matter open to any possible "finger pointing" between Morris and Foreman.

Defendant Morris raises several arguments in support of his Motion to Sever. Morris' first argument is that failure to sever implicates all of the *Floudiotis* factors, demonstrating the probability that substantial prejudice may result from a joint trial.[8] *Floudiotis* reasserts and applies the four-factor analysis adapted in *Manley*, originally set forth in *Jenkins*.[9] The four factors a court ought to consider in reaching a determination as to whether a motion for severance should be granted are: "problems involving a co-defendant's extra-judicial statements; an absence of substantial independent competent evidence of the movant's guilt; antagonistic defenses as between the co-defendant and the movant; and difficulty in segregating the State's evidence as between the co-defendant and the movant."[10] If a trial court properly considers these factors, finding the existence of any one

[8] *Floudiotis, v. State,* 726 A.2d 1196, 1210 (Del. 1999).

[9] *Id.* at 1210.

[10] *Stevenson*, 709 A.2d at 629.

may make severance appropriate.[11]

Morris argues that his right to confront a witness would be violated if the State uses any custodial statements of Foreman at trial, without having Foreman take the stand. The first prong of the four part analysis is aimed at preventing so-called *Bruton* problems. The United States Supreme Court has held that a defendant is deprived of his rights under the Confrontation Clause when the statement or confession of a non-testifying co-defendant, incriminating the defendant, is introduced at a joint trial.[12] Such a problem, it is said, cannot be adequately corrected through a preventative jury instruction, telling the jury to consider the confession only against the statement-making co-defendant.[13] However, a *Bruton* problem exists only when the co-defendant's statement is "clearly inculpatory standing alone."[14] Where the statement of a co-defendant is not incriminating on its face, but becomes so only when linked to evidence introduced later in the trial, it is admissible.[15]

To date, no such statement has been identified, let alone suggested as something to be utilized by the prosecution. Certainly, at this point, no *Bruton*

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[11] *Floudiotis*, 726 A.2d at 1210.

[12] *Bruton v. United States*, 391 U.S. 123 (1968).

[13] *Bruton,* 391 U.S. at 137.

[14] *Manley v. State*, 709 A.2d 643, 656 (Del. 1998) *aff'g* 1996 WL 527322 (Del. Super. Aug. 1, 1996).

[15] *Id.* at 657 (citing *Richardson v. Marsh*, 481 U.S. 200 (1987)).

problem exists at all.

As to the *Floudiotis* test itself, Defendant Morris fails to satisfy any prong which might suggest a severance. As just mentioned, there do not appear to be any problems involving a co-defendant's extra-judicial statements. Clearly, substantial independent competent evidence of Defendant Morris' guilt exists, as the affidavit of probable cause describes. As noted earlier, there is no difficulty in segregating the State's evidence as between the defendants.

Relative to the remaining prong, the existence of antagonistic defenses between co-defendants is a factor to be considered in determining whether severance should be granted.[16] "However, it is clear that the presence of hostility between a defendant and his co-defendants or mere inconsistencies in defenses or trial strategies will not require a severance."[17] All that the defendants are offering to the Court is the hypothesis that mutually antagonistic defenses exist. That hypothesis, that antagonistic defenses exist, is not a sufficient basis for the Court to grant a severance.[18]

Severance is required only when "the jury can reasonably accept the core of the defense offered by either defendant only if it rejects the core of the defense

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[16] *Bradley v. State*, 559 A.2d 1234 (Del. 1989).

[17] *Stevenson v. State*, 709 A.2d 619, 628 (Del. 1998) (quoting *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994)).

[18] *Stevenson*, 709 A.2d at 629.

offered by his co-defendant."[19] At that point, the defenses are considered "sufficiently antagonistic to mandate separate trials."[20] Such a showing has not been made in the instant case.

Joint trials are preferred, for reasons of judicial economy and efficiency, in cases where defendants are being tried for offenses that occur out of the same act or transaction.[21] So long as these objectives can be achieved without substantial prejudice to the right of a defendant to a fair trial, the Court's decision to deny severance generally will be viewed as a proper exercise of discretion.[22] The Court firmly believes that severance is not an appropriate option in the case at hand.

The general rule is that jointly indicted defendants are also tried together.[23] The arguments raised by the defendants in this case are not enough to outweigh the interests of efficiency and economy. Absent a serious risk that a joint trial would compromise a specific trial right or would prevent a jury from making a reliable judgment, the preference for the joint trial will prevail. Here we have, at best, a hypothetical possibility of conflicting accusations on one of the bases of indictment. This possibility does not demonstrate any serious risk of prejudice to

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[19] *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989) (quoting *State v. Vinal*, 504 A.2d 1364, 1368 (Conn. Supr. 1986)).

[20] *Id.*

[21] *State v. Manley*, 1996 WL 527322, at *2 (Del. Super. Aug. 1, 1996) *aff'd,* 709 A.2d 643 (Del. 1998); *see also Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967).

[22] *Id*. at *8.

[23] *Bradley v. State,* 559 A.2d 1234, 1241 (Del. 1989).

Defendant Morris.

CONCLUSION

For the forgoing reasons, the Motion of Defendant Morris for Severance is **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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