

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 1302015290
v.	:	
	:	
JEMAL A. GREENE,	:	
	:	
Defendant.	:	

Submitted: January 31, 2014

Decided: February 21, 2014

ORDER

Upon Defendant's Motion to Sever.

Denied.

Marie O'Connor Graham, Esquire, Department of Justice, Dover, Delaware; attorney for the State of Delaware.

Adam D. Windett, Esquire of Hopkins & Windett, Esquire, Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

The issue before the Court is whether the Court should grant Defendant Greene's Motion to Sever so that his co-defendant can provide exculpatory testimony.

FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2013, Defendant Jemal Greene (hereinafter "Greene") was arrested at the Super 8 Hotel in Milford on charges of drug dealing and various firearms offenses. A black duffel bag containing a firearm and heroin was recovered by police. Other drugs and an additional firearm were found in the hotel room. Greene was indicted along with three other defendants from the same incident: Megan Maloney, Melissa Summers, and Robin Walls (hereinafter "Walls").

Following the arrest, Walls gave a statement to the arresting officers informing them that a black duffel bag containing a firearm and heroin belonged to Walls, and not the other defendants. According to Greene, Walls told the officers that Walls "had to man up and take responsibility so others wouldn't take the blame."

Greene filed the instant Motion to Sever pursuant to Criminal Rule 14 on January 27, 2014. Greene argues that Walls' statement is highly exculpatory as to Greene's involvement in the underlying crime, and thus Greene's trial should be severed from his co-defendants' so that Walls can testify about his statement. Neither of the other two defendants in this case has joined Greene's Motion to Sever. The State opposes the motion.

The Court heard arguments on Greene's motion on January 31, 2014. Greene informed the Court that Walls, through counsel, has expressed his intent to invoke his Fifth Amendment right against self-incrimination if there is a joint trial. Greene

contended that if the trials were severed, Walls would be available to testify. The State responded that even if the trials were severed, there was no guarantee that Walls would be available to testify because his availability would depend on whether Greene or Walls is tried first. The State also argued that there is sufficient independent evidence of Greene's guilt: Greene's DNA was found on the handgun contained in the duffel bag, and when Greene was arrested he was sitting on a pillow, under which police found a loaded handgun.

LEGAL STANDARD

Generally, defendants who are indicted together should also be tried together.¹ Superior Court Criminal Rule 14 allows a defendant to file a motion for separate trials if it appears that a joinder of defendants in a single trial would prejudice the movant.² The Court has "sound discretion" in determining whether to grant a defendant's motion to sever.³ The defendant who files a motion to sever bears the burden of demonstrating "substantial injustice and unfair prejudice" that would result if the Court declines to grant the motion.⁴

¹ *Jenkins v. State*, 230 A.2d 262, 272 (Del. 1967) (citing *Garner v. State*, 145 A.2d 68, 75 (Del. 1958)).

² Del. Super. Ct. Crim. R. 14.

³ *Lampkins v. State*, 465 A.2d 785, 794 (Del. 1983) (citing *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978)).

⁴ *Id.*

DISCUSSION

Motion is untimely

Under Kent County’s Criminal Case Management Plan, motions to sever filed pursuant to Criminal Rule 14 must be filed within ten days of the initial case review.⁵ The Superior Court has broad discretion to enforce its rules of procedures and pre-trial orders.⁶ When a defendant fails to file a motion in a timely manner, exceptional circumstances must exist to permit the late filing.⁷ Exceptional circumstances will not be found when a defendant’s attorney possesses “all the relevant information necessary to support filing the motion.”⁸

Greene’s initial case review was held on May 30, 2013; Greene filed his Motion to Sever on January 27, 2014—approximately eight months after the initial case review. When asked by the Court why the motion was untimely, Greene’s attorney responded that Walls had initially indicated that Walls would take a plea deal and then testify at Greene’s trial. The attorney also indicated that information about Walls’ statement did not come light until the attorney’s investigation into Greene’s case was well under way.

These reasons do not amount to exceptional circumstances justifying the late

⁵ Kent County Criminal Case Management Plan at 5.

⁶ *Carney v. State*, 931 A.2d 436, 2007 WL 2254543, at *2 (Del. Aug. 7, 2007) (TABLE) (citing *Barnett v. State*, 691 A.2d 614, 616 (Del. 1997)).

⁷ *See id.*

⁸ *Id.*

filing. Walls made his statement to the arresting officers at the time of his arrest; this information was readily available to Greene's counsel and could have been discovered in the course of investigation well within ten days of the initial case review. The failed discussions with Walls about Walls taking a plea deal also fail to amount to exceptional circumstances, as Greene's decision whether or not to file a motion to sever should not have hinged on Walls' independent decisions.

Because Greene has failed to show exceptional circumstances justifying the untimely filing of his motion, Greene's Motion to Sever is denied as untimely.

Motion fails on its merits

Even if the Court were to consider the merits of Greene's untimely motion, the Motion to Sever must still be denied because Greene cannot establish that substantial injustice and unfair prejudice would result if the motion is denied.

Greene urges the Court to apply the standard utilized in *Harris v. State*⁹ to determine whether to sever Greene's and Walls' trials. In *Harris*, the Superior Court, relying on a case from the Fifth Circuit, held that a defendant must establish four factors in order to demonstrate an entitlement to separate trials on the basis of a co-defendant's exculpatory testimony.¹⁰ These factors include: "(1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and

⁹ 1989 WL 64111 (Del. Super. May 11, 1989).

¹⁰ *Id.* at *2 (citing *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980)).

effect; and (4) that the co-defendant will, in fact, testify if the cases are severed.”¹¹

Harris has not been cited in any other Delaware case, and does not appear to have been followed since it was first decided in 1989. Rather, the Delaware Supreme Court’s decision in *Floudiotis v. State*¹² appears to be the controlling case on motions to sever based on statements by co-defendants. In *Floudiotis*—issued nearly a decade after *Harris*—the Supreme Court explained that if a trial court finds any of the following factors to exist, the trial court may decide that severance is appropriate:

- (1) problems involving a co-defendant’s extra-judicial statements;
- (2) an absence of substantial independent competent evidence of the movant’s guilt; (3) antagonistic defenses as between the co-defendant and the movant; and (4) difficulty in segregating the State’s evidence as between the co-defendant and the movant.¹³

Applying the *Floudiotis* factors to the instant case, the Court finds no basis to grant Greene’s Motion to Sever. The parties have indicated that there are no problems (such as *Miranda* problems) involving Walls’ extrajudicial statement. There appear to be no antagonistic defenses between Greene and Walls, nor does the record reveal any difficulty in segregating the evidence between the two co-defendants. Particularly fatal to Greene’s motion is the presence of substantial independent evidence of Greene’s guilt: Greene’s DNA was found on the gun inside

¹¹ *Id.*

¹² 726 A.2d 1196 (Del. 1999).

¹³ *Id.* at 1210 (citing *Manley v. State*, 709 A.2d 643, 652 (Del. 1998)).

the duffel bag, and another firearm was found in proximity to Greene when he was arrested. Based on these factors, the Court finds no basis to sever the trials of Greene and Walls.

Even if the Court were to apply the *Harris* factors, the result would be the same. It is questionable whether there is even a bona fide need for Walls' statement because, as stated *supra*, the duffel bag which Walls stated belonged to him is not the only evidence against Greene. It would be a different scenario if Walls' statement were to the effect that Greene had no idea what was in the duffel bag. But Walls' statement is simply that the bag belonged to Walls and, in any event, the fact that Greene's DNA was found on the firearm inside the bag would contradict that argument. Further, Greene and the other defendants could still be found by a jury to have constructively possessed the firearm and drugs inside the duffel bag.¹⁴ Finally, and perhaps most importantly, as to the fourth *Harris* factor, Greene has provided no guarantee that Walls will in fact testify at Greene's trial if the cases are severed. Greene's counsel informed the Court that Walls has already indicated his intent to invoke his right against self-incrimination at a joint trial, and has provided no evidence whatsoever that Walls would testify even if the trials were severed.

Thus, Greene has also failed to meet his burden under *Harris*. Whether Greene's motion is analyzed under the controlling test of *Floudiotis* or the alternative

¹⁴ See *Lecates v. State*, 987 A.2d 413, 418-19 (Del. 2009) (citing *Mack v. State*, 312 A.2d 319, 322 (Del. 1973) (noting availability and accessibility as the test for constructive possession of firearms and contraband)).

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test of *Harris*, Greene's Motion to Sever fails on its merits.

CONCLUSION

Greene's Motion to Sever is **DENIED** as untimely and lacking in merit.

IT IS SO ORDERED.

/s/ William L. Witham, Jr. _____
Resident Judge

WLW/dmh

oc: Prothonotary
xc: Marie O'Connor Graham, Esquire
Adam D. Windett, Esquire