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

STATE OF DELAWARE,	:	
	:	**ID NO. 1107013054 (Aeron Gibbs)**
_____v._____	:	**1107013050 (Dion Hicks)**
	:	
AERON GIBBS, and DION HICKS,	:	
	:	
Defendants.	:	

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Submitted: October 8, 2012
Decided: November 30, 2012

Upon Defendants' Motion for Severance
DENIED

ORDER AND OPINION

Kathleen A. Dickerson, Esq., and Christopher R. Parker, Esq., Deputy Attorneys General, Department of Justice, Dover, Delaware for the State of Delaware.

Patrick J. Collins, Esq., Collins & Roop, Wilmington, Delaware, and Natalie S. Woloshin, Esq., Woloshin, Lynch, Natalie & Gagne, P.A., Wilmington, Delaware for Defendant Aeron Gibbs.

James M. Stiller, Jr., Esq., Schwartz & Schwartz, Dover, Delaware, and Michael G. Rushe, Esq., Hudson, Jones, Jaywork & Fisher, Dover, Delaware for Defendant Dion Hicks.

Young, J.

SUMMARY

Dion Hicks ("Hicks") and Aeron Gibbs ("Gibbs") are co-defendants in a criminal case based on charges of capital murder and several other serious offenses. These charges relate to the homicide of Quinton Dorsey which occurred on March 24, 2010. Each Defendant has filed a Motion to Sever, asking to have a trial separate from that of his co-defendants. The Defendants claim that refusing to sever the trials will cause them substantial prejudice, asserting several arguments in support of that contention. The issues that could result from severance are of more concern than those posited for severance by Defendants. Three separate trials could bring about inconsistent verdicts or, at least, prejudice to some Defendants due to the order in which the separate trials would be held. Issues regarding the right to a speedy trial would probably ensue. Finally, consideration of judicial efficiency arises. For these reasons, Defendants' Motions for Severance are **DENIED**.

FACTS

On March 24, 2010, police were called to the White Oak Condominiums in Dover to investigate a shooting. When they arrived on the scene, the police found the victim, Quinton Dorsey, in the parking lot. He had sustained gunshot wounds, ultimately causing his death at Christiana Hospital. It is alleged that the victim was shot to death either as a result of a drug deal gone bad, or a drug deal set-up to allow for a robbery. Witnesses described to the police two black males jumping a fence behind Building M. Police searched the area, locating a cell phone belonging to Leroy Stratton ("Stratton"). One of the phone numbers in Stratton's cell phone belonged to Gibbs.

On March 25, 2010 Stratton was arrested. At that time he gave a statement claiming he knew nothing about the murder. However, Stratton later changed his story, at which point he admitted that he had witnessed the shooting. Then, on July 14, 2011, Stratton gave yet another statement, in the form of a proffer to the State to support favorable plea treatment and a substantial assistance motion. In that statement, Stratton admitted that he was involved in the drug transaction along with Gibbs. He said that twenty seconds after the drug deal, he went to the window and saw Hicks shoot the victim. Stratton also identified David Johnson as a second shooter. According to Stratton, Johnson picked up Dorsey's gun, and shot Dorsey with it. Johnson then, according to Stratton, took the backpack containing cash from the drug deal. Johnson is the third co-defendant in this case.

Dion Hicks has been charged with two counts of First Degree Murder and one count each of: Robbery First Degree, Wearing a Disguise During Commission of Felony, Conspiracy First Degree, Possession of a Firearm During Commission of a Felony, and Possession of a Firearm by a Person Prohibited.

Aeron Gibbs has been charged with two counts of First Degree Murder and one count each of: Robbery First Degree, Possession with Intent to Deliver a Narcotic Schedule II Controlled Substance, Trafficking in Cocaine, and Conspiracy First Degree.

Each defendant has filed a separate Motion for Severance. Each asks for his trial to be severed from the trial of his co-defendants. Nevertheless, because these Motions are related and argued on similar grounds, they will be addressed together by this Court.

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] That circumstance, certainly, suits the situation here. 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 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

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[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).

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

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 Hicks raises several arguments in support of his Motion to Sever. Hicks' 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 may make severance

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[6] *Id.*

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

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

[9] *Id.* at 1210.

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

appropriate.[11]

First, Hicks argues that his right to confront a witness would be violated if the State uses Johnson's custodial statements at trial, without having Johnson 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]

Hicks' Motion does not discuss the content of the custodial statements in question. According to the State, however, they are relatively innocuous. In fact, the prosecutor described them as more akin to "I don't know what you are talking about;

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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)).

must have been somebody else," than to "It wasn't me; it was him." Knowing that, it would be difficult to see how a *Bruton* issue would arise. Furthermore, the prosecutor also indicated that at this point in the case, the State sees little value in introducing the statements at all. Though he did acknowledge that his position on that may change, such a change would not impact the Court's decision on the issue. Based on the information and circumstances known to the Court at this time, the statements in question are not clearly inculpatory, and do not involve the type of finger-pointing that would implicate the antagonistic defense factor. At this point, the Defendant has not provided the Court with any statements which fit the definition of "clearly inculpatory standing alone" as required to implicate a *Bruton* problem. If that changes in the future, the matter conceivably could be re-addressed by the Court at that time.

Hicks' next argument is that the three main pieces of evidence allegedly tying him to the crime scene, do not meet the requirement of substantial independent evidence of defendant's guilt, as discussed in *Floudiotis*. Counsel raises issues with each piece of evidence, but the concerns are actually more about the credibility of the evidence rather than support for a motion for severance. Arguments, such as those with respect to the alleged motivation behind a phone call or the credibility of a witness, are the types of concerns appropriately addressed by counsel through cross-examination during trial. In *Jenkins v. State* the trial court was found to have abused its discretion in denying a motion for severance, "based on the fact that there existed no other substantial., competent evidence against a co-defendant except for the

statement of another co-defendant."[16] The potential evidence in this case is much more extensive than the limited evidence presented to the jury in *Jenkins*.

Hicks' next argument is that the facts and circumstances of this case inherently create a situation where each defendant must portray another as the shooter, if tried together, in order to minimize his own risk of being found culpable. Defendant Hicks asserts that, in a capital case, there is a vast difference between being a participant and being the shooter who fired the fatal shot. While the option of a joint trial may not be perfect, "defendant is entitled to a fair trial but not a perfect one."[17] Under the circumstances, trying the issues before a single jury is likely the most fair and reasonable way to conduct the process. It is, after all, the jury's obligation to sort through testimony and other evidence; to make decisions about credibility; and ultimately to decide what really happened in the situation at issue.[18] The issues raised by the Defendant are minor in comparison to the problems that could result if severance were granted. Those problems will be discussed more thoroughly below. In addition, the parties should be reminded that the death penalty is not a "hot potato." The jury could recommend it for none or for all or for any combination of the co-defendants. It is not necessarily going to be recommended for anyone. Moreover, of course, the jury's determination is but a recommendation. The Court makes the final decision, 11 Del. Code § 4209(d). Therefore, any discussion relating to

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[16] *Skinner v. State*, 575 A.2d 1108, 1120 (Del. 1990) (contrasting the amount of evidence against that presented in *Jenkins v. State*, 230 A.2d 262 (Del. 1967)).

[17] *Bruton v. United States*, 391 U.S. 123, 135 (1968).

[18] *See State v. Manley*, 1996 WL 527322, at *3-4.

minimizing the risk of being "the one" who is receives the death penalty is not persuasive.

The existence of antagonistic defenses between co-defendants is a factor to be considered in determining whether severance should be granted.[19] "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."[20] 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.[21] This is particularly the case in light of the issues that such a decision would cause in the present situation.

Hicks' Motion claims that the *Bradley* opinion includes a mandate requiring severance when antagonistic defenses exist. The Court in *Bradley* did hold that the presence of antagonistic defenses is a factor to be considered.[22] While it is a factor that could be determinative, severance is not always required.[23] Severance is required

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

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

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

[22] *Bradley*, 559 A.2d at 1241.

[23] *See Manley v. State*, 709 A.2d 643, 652 (Del. 1998) *aff'g* 1996 WL 527322 (Del. Super. Aug. 1, 1996); *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994) (quoting *Bradley v. State*, 559, A.2d 1234, 1241 (Del. 1989)); *see also Zafiro v. United States,* 506 U.S. 534, 538 (1993); Annotation, *Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Case*, 82 A.L.R.3d § 2, at 250 (1978)).

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 offered by his co-defendant."[24] At that point, the defenses are considered "sufficiently antagonistic to mandate separate trials."[25] Such a showing has not been made in the instant case.

Defendant Hicks also raises an argument that issues fulfilling the fourth *Floudiotis* factor exist. That factor pertains to the ability to segregate the state's evidence as between co-defendants.[26] Hicks argues that the DNA evidence found on the baseball caps in the laundry room is problematic. Apparently, Johnson's DNA was on both caps, whereas Hicks' DNA was on only one. The Motion argues that "this leaves the impossible question of who put the hat with both defendants' DNA on it in the laundry room." The evidence regarding that hat, Defendant argues, cannot be segregated between Johnson and Hicks.

The fourth prong of the *Floudiotis* test, the ability to segregate the state's evidence as between co-defendants, is intended to prevent a jury from making a judgment about guilt or innocence on the basis of evidence that should not be considered as to one or more co-defendants. "Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant."[27] The pieces of

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

[25] *Id.*

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

[27] *State v. Manley*, 1996 WL 527322, at *7 (Del. Super. Aug. 1, 1996).

evidence Hicks raises issue with under the fourth prong of *Floudiotis* do not pose the sort of risk intended to protect against. Hicks' DNA is on one of the hats in question. Therefore, that hat, and perhaps other items found with it, could be acceptably introduced against him were he tried alone. Furthermore, Delaware Courts have held that "the mere possibility that in a joint trial some evidence may be admitted against one defendant which is inadmissible against another is not, standing alone a sufficient reason to require separate trials."[28] At this stage of the proceedings, the Defendants' discussion regarding what evidence will be admitted is merely speculative. Therefore, even assuming Defendant might ultimately have a good argument with regard to certain pieces of evidence, it is not justification for severance. That is, it does not create the prejudice *Floudiotis* fears. It merely creates the area for cross-examination that would exist in either a joint trial or separate trials.

Defendant Gibbs also raises each of the four *Floudiotis* factors as grounds for severance. Gibbs' arguments are similar to those raised by Hicks' Motion for Severance, which will not be discussed again. However, there is one area where Gibbs' arguments differ. According to his Motion, Johnson and Hicks are the alleged shooters; Gibbs is not. Gibbs argues that, therefore, a danger exists that the jury would impermissibly aggregate the evidence to reach a conclusion about all three defendants.

Both Hicks and Gibbs argue that, as this is a capital murder case, a higher standard of separate trial consideration is imposed. In a capital murder trial, each

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

defendant is entitled to an "individualized determination on the basis of the character of the individual and the circumstances of the crime."[29] Hicks argues, then, that, during the sentencing phase of the trial, any evidence which is mitigating for one defendant will most likely be aggravating for the other co-defendants. He also argues that there is a great danger that the jury will base its life or death decisions on the defendants in the aggregate. The Court can find no support for such an inference. In addition, this contention seems to contradict his first argument based on *Floudiotis*. In that argument, the Defendant stated that a joint trial would be unfair, because there would be finger-pointing as a result of antagonistic defenses. He argued that the co-defendant viewed as "worst of the worst" would be punished most severely. Now, for the purpose of this argument, Defendant is claiming that there will be no "worst of the worst;" all Defendants will be punished for the others actions. Regardless, Defendant's argument on this point is not persuasive.

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.[30] 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.[31] This Court is well aware of the complexities and complications caused by the holding of a joint

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[29] *Zant v. Stephens*, 462 U.S. 862, 884-84 (1983).

[30] *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).

[31] *Id*. at *8.

trial. Though sympathetic to the concerns of the Defendants, 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.[32] The arguments raised by the defendants in this case are not enough to outweigh the interests of efficiency and economy. The Court is also concerned about issues involving: fairness, trial order and the Fifth Amendment; the possibility of inconsistent verdicts; and the Defendants' respective rights to speedy trials. The case at hand will involve a trial that is both complex and lengthy. Not only are there multiple defendants, there are multiple charges to be considered as well. As a capital case, all parties involved will treat this matter with the utmost seriousness and care. The result will be a process that is involved, complicated and time consuming. It would be markedly inefficient and impractical to ask the state to put on the same case, likely involving the same witnesses and evidence, three times. A further issue concerns the witnesses. Several of the potential witnesses in this case are ordinary people, who were minding their own business at home when a crime occurred. It is not only inefficient to bring them in to offer the same testimony three times, it is likely troubling and burdensome. Finally, if three trials were to be held, issues regarding defendants' rights to speedy trial may be implicated. Whoever is tried last may be waiting a very substantial period of time for the opportunity for a trial. This provides a good transition into the next matter of concern to the Court.

If Defendants' Motions were granted, three trials would have to be held, one

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

after the other. The Court is concerned about potential inherent unfairness, and the possible resulting battle to be tried first which could ensue if severance were granted. In the first trial, each co-defendant's Fifth Amendment rights would still be intact. This could lead to a variety of serious issues. In the first trial, each defendant might elect not to testify for fear of incriminating himself. However, in each subsequent trial, the defendants whose cases have already reached a verdict would no longer have 5th Amendment rights. The result could be a situation where the two defendants tried earlier could summarily blame a prior person tried, or assume the blame for the offense that he might have been acquitted of. The result could be inconsistent verdicts or an inability to arrive at the truth. Accordingly, the co-defendants may all want to be tried last on the presumption that "a person would refuse to testify for a co-defendant in a joint trial for fear of incriminating himself, yet if tried separately and convicted might thereafter be willing to testify and might give testimony exculpating the other defendant."[33] Other variations can be hypothesized. The point is that maneuvering for trial position and how evidence comes to a jury become paramount concerns, when they should not be issues at all.

While a jury instruction may not be sufficient to avoid an actual *Bruton* problem, limiting instructions could assist in resolving some of the other issues raised by the Defendants in their Motions. For example, in response to Defendants' concerns regarding the jury's ability to segregate the evidence, the jury would be instructed that evidence admitted against only one defendant is not to be used in determining the

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[33] *State v. Manley*, 1996 WL 527322, at *5 (Del. Super. Aug. 1, 1996) *aff'd,* 709 A.2d 643 (Del. 1998).

guilt of other defendants.[34] The jury would also be instructed specifically to consider the culpability of each defendant separately.[35]

CONCLUSION

For the forgoing reasons, Defendants' Motions for Severance are **DENIED**.

SO ORDERED this 30th day of November, 2012.

/s/ Robert B. Young
J.

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[34] *Robertson v. State*, 630 A.2d 1084, 1094 (Del. 1993).

[35] *Robertson*, 630 A.2d at 1094 (citing *Zafiro v. United States*, 506 U.S. 534 (1993)).