

THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)	
)	
v.)	
)	
DOMINIQUE L. BENSON and)	I.D.: 1409003743
AARON THOMPSON,)	I.D.: 1602016732
)	
Defendants.)	

Submitted: August 11, 2016
Decided: October 14, 2016

MEMORANDUM OPINION

*Upon Consideration of
Defendants Motions to Sever.*
DENIED.

Colleen K. Norris, Esquire, Karin M. Volker, Esquire and Jenna R. Milecki, Esquire. Attorneys for the State.

Patrick J. Collins, Esquire and Benjamin Gifford, Esquire. Attorneys for Defendant Dominique Benson.

Eugene J. Maurer, Jr., Esquire and Jonathan Layton, Esquire. Attorneys for Defendant Aaron Thompson.

BUTLER, J.

Factual and Procedural Background

Before the Court are two motions to sever, one each by defendants Benson and Thompson. They are currently indicted in a single indictment charging them with a double murder, conspiracy and related offenses.

The facts giving rise to the indictment have been discussed in previous opinions of the Court. They were further illuminated by a jury trial involving defendant Benson and Christopher Rivers. So a somewhat truncated version of the facts goes something like this.

Christopher Rivers and Joe Connell owned an auto repair business. Joe Connell was recently married to Olga Connell. For a variety of reasons the business fell on hard times and Rivers decided to alleviate the situation by having his business partner killed.

Rivers enlisted a co-conspirator, Joshua Bey to carry out the murder. Bey assured Rivers that he knew people who could do that. Bey made contact with codefendant Benson, who made contact with codefendant Thompson. Through the testimony of Bey and corroborating evidence consisting primarily of cell phone tower data, the State sought to place Thompson and Benson at or near the apartment complex where Joe and Olga Connell were living on the fateful night when, upon returning home from a night out with Rivers, they were set upon outside their apartment and murdered. Circumstantial evidence at the crime scene

suggested that the couple were killed by two individuals – or at least two different handguns.

After an investigation that apparently included the early “flipping” of codefendant Bey, Rivers and Benson (but not Thompson) were indicted for the murders. Indeed, the State did not identify Thompson at all until the Rivers/Benson trial was underway. Because the Court was unwilling to delay the trial of Rivers and Benson *ad infinitum* until the State indicted the hitherto unnamed coconspirator, it was fairly assumed that a second trial would be necessary once Thompson was identified and arrested.

The jury unanimously agreed upon the guilt of Rivers on all charges. It convicted Benson of conspiracy to commit murder but was unable to agree upon his guilt as to the primary charge of murder first degree. The State duly announced its intention to retry Benson on the murder count and obtained a superseding indictment charging Benson and Thompson with the murders and related offenses.

Legal Standard

We previously dealt with the question of severance in this case, but that was an effort to sever defendant Benson from Rivers. That motion was denied, but its precedential value is limited, as all severance issues must be analyzed on their own merits and severance may be inappropriate as to one pair of defendants but inappropriate as to another, even where the same crime is involved.

But our framework for analysis does not change. We have said it before as succinctly as necessary for these purposes as well.¹ Pursuant to Superior Court Criminal Rule 8(b), two or more defendants may be joined in a joint trial 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.”² “Normally, judicial economy dictates that the State should jointly try defendants indicted for the same crime or crimes. But, if the defendants can show a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial, the trial court may grant separate trials.”³

The factors that this Court must consider to determine whether severance should be granted include:

(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.⁴

But this is as far as we can take our previous analysis. We must consider these factors in light of the evidence – at least so far as we understand it – against each of these defendants in this pending indictment.

¹ *State v. Benson*, 2015 WL 3539358 (Del. Super. June 1, 2015)(ORDER).

² Del. Super. Ct. Crim. R. 8.

³ *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999) (citations omitted).

⁴ *Id.*

Analysis

1. Problems Involving a Co-defendant's Extra-judicial Statements

We observed in our last pass through severance in this case that Benson made what the parties characterized as a self-serving, exculpatory statement that implicated no one. In the pleadings before the Court, no party has alleged that Thompson made any extra judicial statement and so we must presume there is none. Both defendants essentially concede that the “*Bruton* problems”⁵ that this factor is designed to avoid are not present in this case.

2. An Absence of Substantial Independent Competent Evidence of the Movant's Guilt.

Defendants point out that the State has cell phone tower data that puts Thompson’s phone at the crime scene at or near the time of the murder. The State also has evidence that a second phone owned or controlled by Thompson was at or near the scene, but no evidence that Benson’s phone was present at the time of the murder. In fact, the evidence puts Benson’s cell phone in his own neighborhood, substantially away from the crime scene at the time of the murder. This is all interesting argument, but does not, without more, serve as a basis to grant severance. As defendants recognize, there is evidence of numerous phone calls between Benson and Thompson on the night of the murders that, coupled with Bey’s testimony, points to Benson and Thompson being intimately involved in the

⁵ *Bruton v. United States*, 391 U.S. 123 (1968).

planning and execution of the murder plot. Whether the jury believes that Benson was a principal or an accomplice does not affect the admissibility of the evidence of conspiratorial planning, as testified to by Bey at the first trial. It is true, as defendants point out, that the Court can and will admonish the jury to consider each charge and the evidence relevant thereto independently as to each defendant, but it is also true that much of the evidence is directed to proof of a conspiracy among these men and is equally admissible as against both of them.

The defendants say “the State will likely portray the event as a continuum of Mr. River’s scheme, Mr. Bey’s facilitation of that scheme, Mr. Benson’s alleged hiring of Mr. Thompson and Mr. Thompson’s alleged consummation of the deed.” Assuming the defendants’ characterization is correct, it does not follow that the portrayal by the State constitutes such prejudice as to require severance. Rather, it is simply the rollout of the facts tending to implicate the two defendants in a conspiracy to commit murder; most or all of which would be admissible in a severed trial against each defendant in any event. Although the cell tower evidence against Benson may equivocate between his liability as a principal or an accomplice, that has to do with the strength of the State’s case against Benson; it does not implicate Thompson in any improper way. And in a severed trial against Benson alone, the State would be permitted to introduce evidence of the cell tower

data concerning Thompson's phone as it is evidence of the accomplice liability of Benson and tends to corroborate Bey, an admitted co-conspirator.

3. Antagonistic Defenses As Between The Co-defendant and the Movant

Antagonistic defenses between codefendants is surely a factor to be considered when determining whether a severance should be granted.⁶ But "mere inconsistencies in defenses or trial strategies," does not require severance.⁷ Defenses are only said to be antagonistic when "the defendants' defenses were so mutually antagonistic that a jury could not reasonably believe either one without rejecting the other."⁸ There is, of course, in this case as in all cases, the "reasonable doubt" defense that the State simply has not proven its case on the evidence presented.

Benson points out that the first trial included a healthy dose of cell phone evidence tending to implicate Thompson, but less so Benson. The point of all that evidence at the first trial was not to directly implicate Thompson – who was not on trial – but to corroborate Bey's testimony that Bey arranged the murder with Benson and was quite aware that Benson was conspiring with Thompson. While Benson expresses concern about the arguably more direct evidence against

⁶ *Outten v. State*, 650 A.2d 1291 (Del. Supr. 1994).

⁷ *Manley v. State*, 709 A.2d 643 (Del. Supr. 1998).

⁸ *Bradley v. State*, 559 A.2d 1234 (Del. Supr. 1989).

Thompson, a severed trial would not alleviate his concerns. A severed trial of Benson from Thompson would unavoidably include testimony from Bey – an admitted coconspirator in the plot – and the State’s effort to shore up his credibility by reference to points of objective corroboration, such as cell phone tower data. Whether Benson and Thompson are severed or not, Bey would still testify to the history of the conspiracy, its execution and efforts at avoiding detection. And the State would produce testimony of Thompson’s cell tower data, again tending to corroborate Bey’s testimony.

Benson had, and presumably will continue to have, arguments that the state cannot prove him guilty of the assassinations here. Thompson’s argument may be less compelling in light of the cell tower evidence, but that does not make Thompson’s defense antagonistic to Benson, or vice versa. Indeed, both defendants have a mutual interest in attacking Bey’s credibility, as well as a mutual interest in questioning the State’s theories, forensic and other evidence. There are multiple points of mutual interest. Defendants have not pointed to any real – as opposed to theoretical – antagonism between them.

Defendant’s only other argument is that since Benson was convicted of Conspiracy First Degree in his first trial, evidence of his conspiratorial behavior is inadmissible in this trial. Exactly where that argument comes from is a mystery to the Court: no cases are cited and the Court is unaware of any case that has so held.

While there is no motion pending addressing the matter, it is doubtful that the fact that Benson was convicted of conspiracy would be admissible in his trial for murder, but in his trial as a participant in a murder for hire plot, certainly evidence of his membership and activities as a coconspirator are highly relevant and admissible. If Benson can flesh this argument out by way of motion *in limine*, he is welcome to it. But recalling the issue before the Court is whether the defenses are “antagonistic,” the Court finds his argument unavailing.

4. Difficulty in Segregating the State's Evidence as Between the Co-defendant and the Movant

While Benson urges that it will be difficult to segregate the evidence of Thompson’s guilt from that of Benson, it was Benson himself who demonstrated his facility for doing just that in the first trial. He secured a hung jury on the murder count while his codefendant Rivers was found guilty of the same charge. It is completely understandable that Benson would very much like to distance himself from the evidence against Thompson, but the evidence against Thompson is very much a part of the evidence against Benson, both as it relates to what happened during the course of this conspiracy and as it relates to corroborating the testimony of Bey the “flipped” coconspirator.

Conclusion

Having duly considered and weighed the “*Floudiotis* factors” regarding severance in light of the evidence and history of this case, the Court denies the motions for severance.

IT IS SO ORDERED.



Judge Charles E. Butler