SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 72

THE PEOPLE OF THE STATE OF NEW YORK

-against-

STEVEN DAVIS,
STEPHEN DICARMINE,
JOEL SANDERS,
ZACHARY WARREN,

Defendants.

PEOPLE'S RESPONSE TO DEFENDANTS DAVIS, DICARMINE AND SANDERS' MOTION TO SET THE ORDER OF TRIALS

Ind. No. 773/2014

Preliminary Statement

None of the four defendants has ever moved to sever his trial from any other defendant on the ground that the testimony of a codefendant is needed at his own trial. Defendant Warren requested a separate trial on the wholly different ground that he would be prejudiced by much of the evidence in a joint trial. The Court severed defendant Warren's trial, finding that in a joint trial with defendants Davis, DiCarmine, and Sanders (the "First Trial Defendants") there would be "a substantial danger of a spillover . . . that would make it difficult for the jury to consider the proof relating to Warren separately." November 7, 2014, Decision and Order, at 19. The Court rejected defendant Warren's bid to be tried first, finding that trying the First Trial Defendants first "will aid the [C]ourt in determining how much of the evidence which is admissible against those three defendants can be admitted against Warren, and in [the Court's] judgment be the most efficient way to administer the case." *Id.* at 19–20.

Now, the First Trial Defendants seek to exploit the severance and disregard the Court's reasoned decision on trial order by arguing for the first time that the trial of defendant Warren must proceed first, so that they can call defendant Warren to testify at their joint trial. The defendants' claim is transparently disingenuous, and the court should deny it, because it meets none of the criteria required by the Court of Appeals to sever a case or reorder trials.

Additional Relevant Facts

On March 6, 2014, the defendants were arrested and arraigned. On March 20, 2014, the People served on each defendant a copy of our Voluntary Disclosure Form ("VDF"), including copies of the substance of two statements made by defendant Warren. (Attached hereto as Exhibit 1.) Thus, all defendants knew the substance of defendant Warren's prior statements from the earliest days of the case. In court on April 21, 2014, counsel for defendant Warren announced his intention to file a severance motion (Transcript of April 21, 2014, at 13, 17), and defendant Warren filed the motion in court on May 13, 2014, claiming that a joint trial would prejudice him through the introduction of evidence of criminal activity that occurred after he had left Dewey & LeBoeuf. On that date, the People stated our position that, if severed, defendant Warren should not be tried first. (Transcript of May 13, 2014, at 28–29.) The severance issue was fully briefed with a response, a reply, and a surreply. At no point during that briefing schedule did any of the First Trial Defendants address severance.

Subsequently, in compliance with the court's schedule, the parties briefed issues raised in the defendants' omnibus motions. In setting the briefing schedule, the Court

was clear that it expected all appropriate motions to be addressed in the omnibus motions, stating:

> Now, in coming up with all that, does that conflate essentially what the CPL contemplates if you are making an Omnibus Motion that has everything in it that it should have in it and we are not going to be dealing seriatim with substantial motions from either side.

Id. at 22. At no point during omnibus motion briefing did the First Trial Defendants address severance.

In colloquy on July 11, 2014, the court reserved decision on defendant Warren's severance motion and asked that a record be made of the parties' positions on trial order. (Transcript of July 11, 2014, at 3–4.) The People reiterated our position that the First Trial Defendants should be tried first, and stated that we would want to be heard if the court were inclined to have defendant Warren tried first. *Id.* at 3–4. The court responded, "Well, I don't want to order at this point. But I just want to know what your position on that issue was. So that record is now complete." *Id.* at 4. Again, none of the First Trial Defendants said anything about severance or the order of trials.

The parties appeared before the Court for oral argument on the severance motion and omnibus motions on September 15, 2014. During oral argument on discovery, Mr. Little stated, "I think I speak for everybody except for the severed defendant. We intend to try this case in January." (Transcript of September 15, 2014, at 137.) Then, after arguments had concluded and the Court had set the next appearance date, Mr. Little changed course and stated:

> One very last point, super-short. *If the court decides to sever Mr. Warren*, we the three primary, ask that his trial go first for the very simple reason that if it doesn't, he will not be available to us to testify as a witness for

> obvious reasons. During his proffers he repeatedly said, "Joel Sanders did not ask me to do anything wrong." I want to be able to put that in evidence at our trial. If he goes second, we're not going to be able to do that. So we actually do have a very strong interest in that, your Honor.

(*Id.* at 152) (emphasis added). At no point during this litigation has any of the First Trial Defendants moved for a separate trial on any basis, let alone on the ground that they needed defendant Warren to testify on their behalf at their own trial.

Argument

In New York, it is customarily left to the discretion of the District Attorney to determine the order of severed trials. *See Patterson v. People*, 46 Barb. 625, 632–33 (Sup. Ct., Gen. Term 1866)[1]; *People v. Garnes*, 134 Misc. 2d 39, 43 (Sup Ct. Queens Cty. 1986); *cf.* Marks *et al.*, 7 New York Practice: New York Pretrial Criminal Procedure § 5:22 (2d ed.). This discretion is not absolute, however. For example, a different ordering of trials may be necessary where a defendant successfully moves to sever his trial because he needs a codefendant's exculpatory testimony, and further establishes that the "co-defendant will offer exculpatory testimony if, and only if, after severance the co-defendant's case is tried first." Marks *et al.*, 7 New York Practice: New York Pretrial Criminal Procedure § 5:22 (2d ed.). The Court of Appeals has identified a three-part analysis for determining when a severance based upon the need for a codefendant's testimony – and thus the potential reordering of trials in furtherance of the needed testimony – is required. First, the movant must establish a need for the testimony by

[1] In 1866, the General Term of the Supreme Court functioned as the first level of appellate court, equivalent to the Supreme Court, Appellate Division now. *See*, http://www.nycourts.gov/courts/ad2/aboutthecourt.shtml.

"clearly show[ing] what the codefendant would testify to and that such testimony would tend to exculpate the movant." *People v. Bornholdt*, 33 N.Y.2d 75, 87 (1973). Second, the movant must establish that the codefendant will in fact testify; it is not enough "where the possibility of the codefendant's testifying is merely colorable or speculative." *Id.* "Finally, the motion must be timely." *Id.* The First Trial Defendants have not satisfied any prong of this analysis.

The First Trial Defendants have not established a sincere intention to call defendant Warren, a reasonable need for his testimony, or that his testimony would tend to exculpate them.

Severance, and a specific order of trials, may be appropriate when a defendant can establish that there is a critical issue involving guilt or innocence or a critical witness who will be unavailable unless the cases are tried in a specific order. When the critical witness is a codefendant, "there must be a showing of intention to call the codefendant as a witness *and a need to do so*; the mere statement of intention is hardly sufficient *unless the circumstances indicate sincerity of intention and reasonable need.*" *People v. Owens*, 22 N.Y.2d 93, 98 (1968) (emphasis added). As the United States Court of Appeals for the Fifth Circuit stated in *Byrd v. Wainwright*, a case on which the *Bornholdt* court and the First Trial Defendants rely:

> [T]he judge is not required to sever [or reorder trials] on patent fabrications. If the testimony is purely cumulative, or of negligible weight or probative value, the court is not required to sever. The requirement is not a trial which guarantees the defendant every item of evidence he would like to offer but one which meets constitutional standards of due process.

428 F.2d 1017, 1021 (5th Cir. 1970).

Here, dispositive evidence that the First Trial Defendants have no sincere intention to call defendant Warren or a reasonable need for his testimony comes directly from the First Trial Defendants themselves: They never moved for severance on that ground or any other. Indeed, once they finally raised the issue of trial order, albeit too late, Mr. Little made clear that they would only seek to have defendant Warren testify for them – if at all – "[i]f the court decide[d] to sever Mr. Warren [on other grounds]." (Transcript of September 15, 2014, at 152.) They would have the Court believe that they left the availability of a "crucial" witness to chance. This is not a demonstration of "sincerity of intention and reasonable need;" it is a demonstration of strategic opportunism. Moreover, the purportedly exculpatory evidence cited by Mr. Little at the time, that "[d]uring his proffers [defendant Warren] repeatedly said, 'Joel Sanders did not ask me to do anything wrong,'" *id.*, is simply a "conclusory statement" that does not warrant severance or reordering of trials. *Bornholdt*, 33 N.Y.2d at 87.

The First Trial Defendants offer little more specificity in their motion papers about what they claim defendant Warren's testimony will be, and none of what they offer is exculpatory or admissible. In Exhibits B and C to their moving papers, the defendants cite the substance of nine statements taken from the disclosure attached to the People's VDF. [2] But these statements are taken out of context, are defendant Warren's opinions, are claims by defendant that he doesn't remember seemingly crucial

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[2] The Dewey Executive Defendants' additional assertions in their motion of what defendant Warren's testimony will be must be rejected, as they rely on counsel's statements in filings and not the substance of statements contained in the People's VDF disclosure. Mr. Schechtman's letter states only that defendant Warren "would testify in a manner that was generally consistent with the statements that he gave to [law enforcement]." It does not state that defendant Warren will testify in a manner consistent with assertions made by counsel in court filings. (Defendants' Exhibit A.)

facts of the case, or are contradicted by emails authored by defendant Warren. For example, the first fact the defendants claim they want to elicit from defendant Warren is, "When SANDERS told WARREN to do something, WARREN never thought it was unreasonable . . . ." (Defendants' Exhibit B, at DANY-710.30-006.) The defendants strategically left out the remainder of the sentence, ". . . but WARREN knew little about accounting." (People's Exhibit 1, at DANY-710.30-006.) In that phrase Warren disclaims knowing what might have been unreasonable.

Both of the statements the defendants cite from DANY-710.30-008 express opinions defendant Warren has about what went on at Dewey & LeBoeuf. Since defendant Warren's state of mind is not at issue at the trial of the First Trial Defendants, those statements of his thoughts are inadmissible.

The statements the defendants cite from DANY-710.30-012 and -002 describe defendant Warren's professed personal lack of involvement in particular activities and things he "can't recall." Similarly, both of the statements they cite from DANY-710.30-004 focus on things defendant Warren "can't recall." It is difficult to understand how the statement, "Can't recall discussions of adjustments being made to meet covenants – just remember cash flow issues and income targets," or with reference to the dinner at Del Frisco's, "Remember dinner pretty well, carried over a bunch of A/R reports. Can't recall 'Master Plan' spreadsheet – would not have added those entries," in any way exculpates the First Trial Defendants. Moreover, the defendants completely disregard defendant Warren's additional statement that he "could not answer whether

or not he would remember inappropriate conduct if it happened." (People's Exhibit 1, at DANY-710.30-012.)

Finally, it bears noting that at least two of defendant Warren's statements identified by the First Trial Defendants are directly contradicted by emails authored by defendant Warren: Defendant Warren's statement that he "never felt he did anything ... that needed to be kept from [the] partners of the firm," (Defendants' Exhibit B, at DANY-710.30-008), is directly contradicted by a February 24, 2009, email he authored. (Attached hereto as Exhibit 2.) And defendant Warren's statement that his compensation was not tied to information reported to the banks, (Defendants' Exhibit C, at DANY-710.30-002), is directly contradicted by an email he wrote to defendant Sanders on February 3, 2009. (Attached hereto as Exhibit 3.)

These statements cited by the defense are inadmissible, are "conclusory statements," are "of negligible weight or probative value," or are "patent fabrications." They are simply not the sort of exculpatory evidence that has led other courts to weigh whether severance – and the concomitant ordering of trials – is required. A simple review of the cases cited by the First Trial Defendants demonstrates this:

- *People v. Bornholdt*: Codefendant made a pre-trial statement saying the defendant "had nothing to do with the shooting .... I alone did the shooting." 33 N.Y.2d 75, 86–87 (1973).

- *People v. Garnes*: Codefendant would testify that the illegal drugs at issue in the case were placed in the vehicle without the knowledge of the defendant. 134 Misc. 2d 39, 40 (Sup. Ct. Queens Cty. 1986).

- *People v. Wang*: Codefendants would testify that, unbeknownst to defendant, they hatched a plan to rob a convenience store after the defendant entered the store alone to ask for directions. 140 A.D.2d 567, 568 (2d Dep't 1988).

- *Byrd v. Wainwright*: Four of six codefendants who confessed to being present at mass rape of a young woman would testify that defendant was not even present. 428 F.2d 1017, 1018 (5th Cir. 1970).

- *Taylor v. Singletary*: Codefendant would testify that he went to murder victim's house with someone else—not the defendant. 122 F.3d 1390, 1392 (11th Cir. 1997).

- *State v. Walland*: In a case jointly charging possession of a stolen vehicle, co-defendant would testify that defendant had "no involvement with the stolen vehicle." 555 So. 2d 478, 479 (La. Ct. App. 1989).

Because the First Trial Defendants have failed to establish a sincere intention to call defendant Warren, or reasonable need for his testimony, their opportunistic bid to reorder trials should be rejected.

The First Trial Defendants have not established that defendant Warren will testify for them.

In order to warrant severance, or a specific order of trials, a defendant must also establish that his codefendant will testify; it is not enough if "the possibility of the codefendant's testifying is merely colorable or speculative." *Bornholdt*, 33 N.Y.2d at 87. The First Trial Defendants have failed to satisfy this requirement. In their motion the defendants state that defendant Warren's attorney has proffered that if defendant Warren is tried *and acquitted*, he would be willing to testify. They attach a letter to that effect to their motion. The obvious conclusion from this proffer is that defendant Warren would maintain his Fifth Amendment privilege against self-incrimination were he tried first, convicted, and called to testify at a subsequent trial of the First Trial Defendants. The First Trial Defendants' hope for defendant Warren's testimony is

"merely colorable or speculative," and they point to no case where such a proffer is enough to warrant severance or a reordering of trials.

The First Trial Defendants' motion is not timely.

A motion involving calling a codefendant as a witness "must be made in advance of trial, indeed, as early as it is reasonably feasible." *Owens*, 22 N.Y.2d at 98. Indeed, a severance motion, including the concomitant request for trial order, is a pre-trial motion that must be included in omnibus motions. CPL §§ 255.10(1)(g); 255.20(2). "The time restrictions fixed by CPL 255.20 are not casual. Rather, the deadlines imposed by the statute rest on the strong public policy to further orderly trial procedures and preserve scarce trial resources." *People v. Davidson*, 98 N.Y.2d 738, 739 (2002) (internal quotations omitted). The court may summarily deny as untimely any pre-trial motion made outside the schedule the court sets. CPL § 255.20(3).

Here, the First Trial Defendants offer no justification for their delay in moving for the severance-related issue of trial order. And that is because they haven't any. As discussed, they have had the statements on which they rely since shortly after arraignments; the Court made clear its desire not to have seriatim motions; and the Court sought the parties' positions on trial order on multiple occasions. Not until after briefing was complete and arguments made did the First Trial Defendants weigh-in. They had defendant Warren's severance motion for four months before uttering a peep, and then waited nearly two more months to request to brief the issue. Six months of delay is inexcusable under the facts of this case, and even setting aside the timeliness requirements of the CPL, the First Trial Defendants were on repeated notice that the

issue of severance and trial order was before the Court, and they repeatedly failed to, or strategically chose not to, weigh-in. Their motion should be denied as untimely.

Conclusion

For the forgoing reasons, the First Trial Defendants' motion to set the order of trials should be denied.

Respectfully submitted,

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Dated: November 18, 2014
New York, New York