

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. CR 345-2010
	:	
WAHEEB GIRGIS,	:	
Defendant	:	
Joseph Jude Matika, Esquire		Counsel for the Commonwealth
Patrick J. Reilly, Esquire		Counsel for the Defendant
Andrew H. Ralston, Jr., Esquire		Counsel for the Defendant

Nanovic, P.J. - January 13, 2011

MEMORANDUM OPINION

The Defendant, Waheeb Girgis, together with twelve other co-defendants have been separately charged, *inter alia*, with conspiracy and with violating the Corrupt Organizations Act. In his Omnibus Pretrial Motion now before us, Defendant requests that we sever the trial of his case from that of the other co-defendants and that we direct the Commonwealth to provide detailed information in response to Defendant's request for a bill of particulars.

PROCEDURAL AND FACTUAL BACKGROUND

The criminal complaint filed by the Commonwealth in this matter describes three levels of related criminal activity alleged to have been ongoing in and around Carbon, Lehigh, Northampton and Schuylkill Counties for more than two years: (1)

a burglary ring which entered property to steal items to pawn; (2) a middle level of pawn brokers used to convert stolen property into cash; and (3) a drug-trafficking ring which used the cash obtained from pawning stolen property to purchase heroin and/or cocaine for distribution and resale in Carbon County. According to the Commonwealth, Frank Munoz, and at least four others (Robert Cesanek, Edward Cesanek, Kira Cesanek and Wayne Thorpe) committed a series of residential and commercial burglaries in Carbon, Lehigh, Northampton and Schuylkill Counties to obtain stolen property. This property was pawned for cash with one of three pawnshop owners/operators, namely Defendant, Daniel Eremus, or Donald Dorward, Sr. The monies received in exchange for the items pawned were used by Munoz and others to fund the purchase of heroin and/or cocaine from three independent dealers located in Lehigh and/or Northampton Counties. The controlled substances were then transported to Carbon County where they were distributed and sold by Munoz and others, either directly or through a network of at least four subdealers (Zach Lienhard, Amanda Rogers, Jon Maury, and John Alekiewicz).

Defendant has been charged with one count of corrupt organizations,¹ one count of criminal conspiracy to receive

¹ 18 Pa.C.S.A. § 911(b)(3).

stolen property,² three counts of dealing in the proceeds of unlawful activity,³ and one count of receiving stolen property.⁴ In substance, the Commonwealth claims Defendant conspired with individual members of the burglary ring to pawn and did pawn stolen property and that, by this illegal conduct, Defendant was associated with and participated in the burglary ring's affairs through a pattern of racketeering activity.⁵ On October 6, 2010,

² 18 Pa.C.S.A. § 903(a)(1).

³ 18 Pa.C.S.A. §§ 5111(a)(1), (2) and (3).

⁴ 18 Pa.C.S.A. § 3925(a).

⁵ Defendant has been charged with having violated Subsection (b)(3) of the Corrupt Organizations Act, which states in pertinent part:

It shall be unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

18 Pa.C.S.A. § 911(b)(3). Under this Act, an enterprise is defined as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity, engaged in commerce and includes legitimate as well as illegitimate entities and governmental entities." 18 Pa.C.S.A. § 911(h)(3). For these purposes, the enterprise identified in the information filed by the Commonwealth is that "group of individuals associated in fact, although not a legal entity, engaged in commerce and consisting of Frank Munoz, Robert Cesanek, Edward Cesanek, Wayne Thorpe and/or others." (Information, Count 1). The named individuals in this group are alleged members of the burglary ring and perhaps, although this is unclear from the affidavit of probable cause attached to the criminal complaint, may also be members of the drug ring. Munoz is alleged to be the head of both the burglary and drug rings.

It is unclear in exactly what respect the Commonwealth claims Defendant was "employed by or associated with" this enterprise, however, the Commonwealth asserts Defendant conducted or participated, "directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity consisting of multiple acts of criminal conspiracy to commit violations of the Pennsylvania Crimes Code relating to theft and related offenses." (Information, Count 1). In this regard, it is important to note that the Commonwealth does not contend that the relevant enterprise for purposes of analyzing the corrupt organizations charge is Defendant's pawnbroker business. Cf. Commonwealth v. Dellisanti, 876 A.2d 366, 370 (Pa. 2005) (holding that a business owner who engages in a pattern of racketeering activity (i.e., selling drug paraphernalia) from a legitimate business entity (i.e., a retail store) owned by him, can be convicted of violating the Corrupt Organizations Act since the retail store meets the statutory definition of an "enterprise" and defendant's ownership of the store satisfies the statutory requirement that defendant be "associated with" the

the Commonwealth filed its notice of consolidation for trial of Defendant's case with that of twelve other co-defendants.⁶

In his Omnibus Pretrial Motion, Defendant asserts and the Commonwealth admits that Defendant was not involved in the conspiracy to burglarize homes to steal items or in the conspiracy to use the proceeds of the sale of the stolen items to purchase and resell drugs, and that Defendant has not been charged with either conspiring to commit burglary or conspiring to sell and/or purchase illegal drugs. (Omnibus Pretrial Motion and Answer, paragraphs 9, 13-15). The Commonwealth notes instead that Defendant's involvement in a corrupt organization relates to his direct involvement in actively facilitating the disposition of stolen property, whether or not Defendant had any knowledge of the burglary ring or what use was being made of the monies Defendant provided for the pawned items. (Omnibus Pretrial Motion and Answer, paragraphs 6-9, 12, 34). The Defendant further contends that even if the Commonwealth's suspicions as to his involvement in pawning stolen items is accurate, which he disputes, he would be unfairly prejudiced if

enterprise in question). Unlike in Commonwealth v. McCurdy, 943 A.2d 299 (Pa.Super. 2008), the Commonwealth does not claim that Defendant was part of an underlying enterprise whose affairs were intentionally or knowingly promoted by the Defendant's racketeering activity, only that Defendant's racketeering activity had the effect of benefiting and facilitating the enterprise, here the burglary ring, in the conduct of its business.

⁶ In addition to Defendant, the other co-defendants named in the Commonwealth's notice of consolidation are Frank Munoz, Janet Munoz, Robert Cesanek, Edward Cesanek, Kira Cesanek, Wayne Thorpe, Daniel Eremus, Donald Dorward, Sr., Zach Lienhard, Amanda Rogers, Jon Maury, and John Alekiejczyk.

required to stand trial with other defendants who are facing charges for burglary and drug-trafficking offenses with which he is not involved. In the requested bill of particulars, Defendant requests detailed factual information regarding all aspects of all crimes charged, such as specific times, places, associations and actions leading to the charges.

DISCUSSION

Severance

The standards for joining and severing offenses or defendants are set forth in the Pennsylvania Rules of Criminal Procedure. With respect to joinder, Rule 582 states:

Rule 582. Joinder-Trial of Separate Indictments or Informations

(A) Standards

(1) Offenses charged in separate indictments or informations may be tried together if:

(a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(b) the offenses charged are based on the same act or transaction.

(2) Defendants charged in separate indictments or informations may be tried together 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.

Pa.R.Crim.P. 582 (A) (1), (2). As to severance, Rule 583 states:

Rule 583. Severance of Offenses or Defendants

The court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together.

Pa.R.Crim.P. 583. These rules complement one another. When read together, they "limit the joinder of offenses and defendants charged in separate indictments relative to the nature of the evidence adduced and the number of criminal acts or transactions alleged." Commonwealth v. Brookins, 10 A.3d 1251, 1255 (Pa.Super. 2010).

In Commonwealth v. Collins, the Pennsylvania Supreme Court found that these rules set up a three-part test for deciding a motion to sever:

Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the court must therefore determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative, [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

703 A.2d 418, 422 (Pa. 1997) (quoting Commonwealth v. Lark, 543 A.2d 491, 496-97 (Pa. 1988)). Under this test, "a court must

first determine if the evidence of each of the offenses would be admissible in a separate trial for the other." *Id.*

As acknowledged by the Commonwealth in its answer to Defendant's Omnibus Pretrial Motion, the Commonwealth has no evidence to suggest that Defendant participated in burglaries or in the purchase or resale of drugs. (Omnibus Pretrial Motion and Answer, paragraph 34). At worst, Defendant is alleged to have conspired to receive and to have engaged in receiving stolen property and thereby participated, either directly or indirectly, in the conduct of a corrupt organization through a pattern of racketeering activity. See 18 Pa.C.S.A. § 911 (h)(1)(i) Chapter 39 (Theft and Related Offenses). Such association, however, does not render admissible the evidence of burglary and drug distribution which the Commonwealth would inevitably seek to present against the co-defendants and which has absolutely nothing to do with Defendant. As stated in Collins:

Evidence of crimes other than the one in question is not admissible solely to show the defendant's bad character or propensity to commit crime. Commonwealth v. Newman, 528 Pa. 393, 598 A.2d 275 (1991); Lark. However, evidence of other crimes is admissible to demonstrate (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) the identity of the person charged with the commission of the crime on trial. *Id.* Additionally, evidence of other crimes may be

admitted where such evidence is part of the history of the case and forms part of the natural development of the facts. Lark.

703 A.2d at 422-23.

In Commonwealth v. Brookins, the defendant was charged and convicted of possession with intent to deliver (PWID), criminal conspiracy, and corrupt organizations, 35 P.S. § 780-113 (a)(3), 18 Pa.C.S.A. §§ 903, 911 (respectively). Factually, the Commonwealth contended that Brookins and 21 others purchased drugs from Shannon McKeiver for their own use and for resale. Although charged by separate informations, all cases were joined for trial, the Commonwealth's theory of liability being that Brookins and the others who purchased drugs from McKeiver for resale participated in a drug trafficking ring headed by McKeiver and another co-defendant, Kevin Jordan.

In addition, the Commonwealth charged McKeiver, Jordan and Derrick Thompson, in a plan to rob and kidnap a wealthy drug dealer. These charges were joined for trial with the case against Brookins, the Commonwealth contending that the evidence of robbery and kidnapping was admissible against all defendants, as McKeiver and Jordan planned those offenses to obtain money and drugs which were necessary to keep the drug trafficking enterprise in operation. Thus, according to the Commonwealth, each robbery-related offense was admissible in the trial of the criminal enterprise/drug trafficking offenses, and vice versa.

Brookins was not charged with either the kidnapping or robbery offenses.

Brookins' request to sever her case from the charges of kidnapping and robbery involving co-defendants McKeiver, Jordan and Thompson was denied by the trial court. In reversing her conviction and awarding a new trial, the Superior Court found the joinder of Brookins' charges, which were limited to PWID, conspiracy, and corrupt organizations, untenable to the extent that it compelled the determination of Brookins' guilt in view of evidence germane only to the robbery and kidnapping charges levied against McKeiver, Jordan and Thompson. 10 A.3d at 1256. Noting that the PWID, conspiracy and corrupt organization charges against Brookins arose only from her participation in the drug distribution ring operated by McKeiver and Jordan, and finding it significant that Brookins' conduct appeared to bear no relationship to the planning and execution of the attempted kidnapping and robbery with which McKeiver, Jordan and Thompson were charged, the Court found no basis on which the attempted robbery and kidnapping was admissible against Brookins either as the same act(s) or transaction(s) or as "other crimes" evidence. *Id.* at 1257; see also Pa.R.E. 404 (b) (2).

Similarly, here, Defendant's only connection to the burglary and drug-trafficking rings is his receipt of stolen

property from individual members of the burglary ring and the use of cash received from the property pawned to purchase drugs by another ring. The Commonwealth has conceded that Defendant was not involved in either a conspiracy to commit burglary or a conspiracy to sell and/or purchase drugs, and it does not know whether Defendant was even aware or had any knowledge that a burglary ring existed or of what use the co-defendants made of the proceeds of the pawned items. Nor has Defendant been charged with any burglary or drug-related offenses. Because Defendant's conduct appears to bear no intended or knowing relationship to the planning and execution of either the burglary or drug rings, even though each may have directly or indirectly benefited from such conduct, as in Brookins, it can not be said that proof of the co-defendants' involvement in either ring connects Defendant to either enterprise, as distinct from proving only the existence of the enterprise. Consequently, if joinder were permitted, it can be anticipated that the majority of the evidence the Commonwealth intends to present in support of burglary and drug trafficking would be solely relevant to the other co-defendants and have absolutely nothing to do with the Defendant.

In addition, joinder pursuant to Rule 582 (A) (2) of different defendants charged in separate informations requires that all charges against all defendants arise out of the same

"act or transaction" or "series of acts or transactions." The alleged criminal activities of Defendant are distinct and separate from the burglary and drug-trafficking charges facing the other defendants. Absent proof of Defendant's agreement to promote or facilitate, or intent to participate in the conduct of, either alleged enterprise, which the Commonwealth concedes it is unable to present, there is no basis to conclude that Defendant's knowing receipt of stolen property is part of the same "act or transaction" out of which the charges of burglary and drug trafficking arise as required by Rule 582. By itself, a defendant's contact with another defendant for one purpose, or even a common point of contact between two separate defendants, does not make the defendant criminally liable for all other criminal activities in which the other may be involved. Brookins, 10 A.3d at 1256-58.

Lastly, even if evidence of the co-defendants' burglary and drug trafficking were admissible in separate trials of the Defendant and his co-defendants, it would be prejudicial.⁷ In Brookins, the Court noted three factors which courts

⁷ In discussing the prejudice referred to in former Rule 1128, now Rule 583, the Pennsylvania Supreme Court in Commonwealth v. Lark, stated:

The "prejudice" of which Rule 1128 speaks is not simply prejudice in the sense that appellant will be linked to the crimes for which he is being prosecuted, for that sort of prejudice is ostensibly the purpose of all Commonwealth evidence. The prejudice of which Rule 1128 speaks is, rather, that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.

543 A.2d 491, 499 (Pa. 1988).

recognize as persuasive in determining whether prejudice suffered by the defendants on trial is sufficient to warrant severance:

(1) Whether the number of defendants or the complexity of the evidence as to the several defendants is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; (2) Whether evidence not admissible against all the defendants probably will be considered against a defendant notwithstanding admonitory instructions; and (3) Whether there are antagonistic defenses.

Brookins, 10 A.3d at 1256. (quoting Commonwealth v. Tolassi, 392 A.2d 750, 753 (Pa.Super. 1978)). Here, at a minimum, the nature and volume of the evidence regarding burglary and drug trafficking which would otherwise be inadmissible against the Defendant would be overwhelming and would deprive the Defendant of a fair and objective trial. Cf. Brookins, 10 A.3d at 1258 n.3.

Bill of Particulars

The remainder of Defendant's Motion consists of a request for a bill of particulars. In this request Defendant seeks specific information, such as dates, times, actions, and particular evidence in regard to each charge which the Defendant faces.

"A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid surprise, or intelligently raise pleas of double jeopardy and the statute of limitations. [It] is not a substitute for discovery and the Commonwealth's evidence is not a proper subject to which a petition for a bill may be directed." Commonwealth v. Dreibelbis, 426 A.2d 1111, 1114 (Pa. 1981) (citation omitted); see also Pa.R.Crim.P. 572 (Comment) ("The traditional function of a bill of particulars is to clarify the pleadings and to limit the evidence which can be offered to support the information."). A request for discovery disguised as a request for a bill of particulars may be properly denied by the trial court. See Commonwealth v. Davis, 368 A.2d 260, 261 (Pa. 1977).

If the requested information is beyond the scope of a bill of particulars, the Commonwealth is justified in refusing to respond to the request; but if it does so respond, the Commonwealth is bound by its answer, meaning, for example, that the Commonwealth may not introduce evidence at trial concerning admissions made by the accused if they were not disclosed in its answer to the bill, even if it was not technically required to answer the request for the bill. See Dreibelbis, 426 A.2d at 1114.

The use of a bill of particulars is within the discretion of the trial court. See Commonwealth v. Scott, 365 A.2d 140, 143 (Pa. 1976); see also Commonwealth v. Mercado, 649 A.2d 946, 959 (Pa.Super. 1994); Pa.R.Crim.P. 572(D) (Bill of Particulars) ("When a motion for relief is made, the court may make such order as it deems necessary in the interests of justice."). "The appropriate remedy to be applied 'in the interests of justice' when the Commonwealth fails to provide a full bill of particulars has been left to the discretion of the trial court. The Superior Court will reverse the trial judge's decision in such matters only in the face of a 'flagrant abuse of discretion.'" Commonwealth v. Montalvo, 641 A.2d 1176, 1183 (Pa.Super. 1994) (citations omitted).

Relief may be appropriately denied where it appears that the defendant will not suffer prejudice without such relief. See id. at 1187. When the defendant has actual notice of the theories the Commonwealth intends to pursue at trial and when it does not appear that the result of the defendant's trial will be different "but for" failure of the Commonwealth to provide a written answer to the defendant's request for a bill of particulars, relief may be denied. See id.

It is also appropriate to deny relief when the information requested in the bill of particulars is available in the affidavit of probable cause, the criminal complaint, the

information, the discovery provided pursuant to other rules, and a habeas corpus hearing, and where it does not appear that the Commonwealth is violating its discovery obligations. See Mercado, 649 A.2d at 960. "Absent allegations of exceptional circumstances, we will uphold the trial court's denial of relief where there is no indication that the Commonwealth deliberately withheld either exculpatory evidence or evidence otherwise favorable to the defense, where the defendant did receive information from the Commonwealth's compliance with other rules of procedure, and where the accused possessed adequate information on which to prepare a proper defense." Montalvo, 641 A.2d at 1183-84. In Commonwealth v. Judd, 897 A.2d 1224, 1230 (Pa.Super. 2006), *appeal denied*, 912 A.2d 1291 (Pa. 2006), the Superior Court held that without evidence or argument that the Commonwealth withheld favorable evidence, exceptional circumstances existed, or surprises occurred at trial, there was no abuse of discretion in denying the defendant's request for a bill of particulars.

In the instant case, the Defendant's request for a bill of particulars contains mostly inappropriate requests for discovery.⁸ The request goes far beyond a request for

⁸ See, e.g., U.S. v. Cheatham, 500 F.Supp.2d 528, 533 (W.D.Pa. 2007) ("[A] request for the 'when, where and how' of any overt acts not alleged in the indictment is tantamount to a request for 'wholesale discovery of the Government's evidence,' which is not the purpose of a bill of particulars . . .").

clarification of the nature of the offenses charged or to resolve ambiguities in describing what Defendant is accused of.

In objecting to the form of the request, the Commonwealth's Answer further refers Defendant to the affidavit of probable cause, criminal complaint, information, discovery,⁹ and the preliminary hearing for the information requested. Much, if not all, of what Defendant seeks can presumably be found in these records. Significant also is the absence of any evidence that the Commonwealth is withholding any information necessary for a fair trial, which would be cause for the granting of a bill of particulars.

Under the circumstances, we believe Defendant's requests are more appropriately allowed as discovery pursuant to Pa.R.Crim.P. 573. To the extent Defendant claims critical information necessary to prepare his defense and to avoid surprise and prejudice has not been produced, Defendant may file a motion for pre-trial discovery - to which the Commonwealth will be provided an opportunity to respond - identifying that information whose disclosure Defendant contends is necessary in the interests of justice. See Pa.Crim.P. 573(B)(2)(a)(iv). Such approach will require Defendant to identify specific information requested rather than the wholesale discovery

⁹ At the time of argument, the Commonwealth represented that it has produced voluminous materials to Defendant in response to discovery.

presently sought in Defendant's requested bill of particulars and, in so doing, will protect the interests of both the Commonwealth and the Defendant.

CONCLUSION

When acting on a request to sever the Commonwealth's joinder of two or more defendants charged in separate informations, we focus on the two basic and fundamental tests of the admissibility of evidence: relevance and prejudice. First, material evidence as to the offenses must be relevant and admissible against all defendants. If it is not, the defendants should not all be tried together. Second, even if the evidence is relevant, if it would be unduly prejudicial to one or more defendants, the trial of those defendants should be severed from the trial of the others. For the reasons already discussed, we find neither test has been met and grant Defendant's motion to sever the trial of his case from the trial of the other co-defendants named in the Commonwealth's notice of joinder.

As to the Defendant's request for a bill of particulars, the Defendant's request confuses the purpose of a bill of particulars with a request for discovery. While both seek information and, to that extent, share a common bond, they are not the same. The primary function of a bill of particulars is to clarify the complaint such that the defendant knows the

nature of the offenses charged and, by so doing, limits the evidence to be introduced at trial. Conversely, the function of discovery is to provide detailed factual information with respect to both evidence and the sources of evidence relevant to the proceedings. Because the information sought by Defendant in his request is primarily evidentiary in nature, with some of this information - according to the Commonwealth - having already been provided, we have denied Defendant's request and refer him to the rules of discovery which provide for specific mandatory and discretionary subjects of discovery, including, when appropriate, the opportunity to specifically identify evidence sought which has not been produced and to show that its disclosure would be in the interests of justice.

BY THE COURT:

P.J.