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WHEN MORE IS NOT BETTER: JOINDER OF OFFENSES AND CONSOLIDATION OF CASES

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INTRODUCTION

In the criminal justice system, there is no one more confident than a prosecutor with a strong case. Like a gunslinger with a fast-action revolver and the sun at his/her back (think Sharon Stone in the Quick and the Dead), the ADA with multiple eyewitnesses and a confession knows that the defendant will be DOA if he/she doesn't plead guilty to the charge and throw him/herself at the mercy of the court.

When the evidence in a given case is not particularly strong, most prosecutors would probably prefer a gatling gun to a single shot Derringer because an indictment that charges a defendant with multiple crimes against different victims on separate occasions arguably gives them a better chance of convicting the defendant on some charge(s) rather than watching him/her ride off into the sunset with his/her reputation (and presumption of innocence) intact.

For criminal defense attorneys, multiple count indictments or motions to join offenses or consolidate indictments can be particularly problematic because they force counsel to fight several different battles and may cause weaker cases to appear stronger (thus increasing the chance of a conviction) by virtue of being bootstrapped to stronger ones.

Fortunately, CPL 200.20 (3) affords the defense the opportunity, in appropriate cases, to seek severance and separate trials of different counts, in the interest of justice and upon a showing of good cause that substantial prejudice will result if they are tried together. Conversely, the defense may oppose a prosecution motion to consolidate indictments for similar reasons.

THE STATUTE

CPL 200.20 (2)(a) states that two offenses are JOINABLE when they are based upon the same ACT or CRIMINAL TRANSACTION.

Pursuant to CPL 40.10 (2), a CRIMINAL TRANSACTION consists of conduct which establishes at least one OFFENSE (i.e., conduct that violates a statute defining an offense [CPL 40.10 (1)]) and which is comprised of TWO or MORE (or a group of) ACTS that are either

a. SO CLOSELY RELATED AND CONNECTED IN POINT OF TIME AND CIRCUMSTANCE OF COMMISSION as to constitute a SINGLE CRIMINAL INCIDENT, or
b. SO CLOSELY RELATED IN CRIMINAL PURPOSE OR OBJECTIVE as to constitute ELEMENTS or INTEGRAL PARTS of a SINGLE CRIMINAL VENTURE.

So, if a defendant robs a bank, jacks a car, and takes off on a high-speed chase, endangering other motorists and killing a pedestrian, the robbery, auto theft, reckless endangerment and vehicular homicide charges would likely qualify as a single criminal incident. Or, if codefendants discuss a bank robbery one day, obtain weapons the next week, case the bank, commit the robbery, get away and are found in possession of marked bills from the bank days later, the conspiracy, weapons possession robbery and possession of stolen property charges would arguably constitute elements of a single criminal venture so as to be properly joined in a single indictment.

See, for example, *People v Council*, (162 AD3d 1533 [4th Dept 2018]): Assault and weapons counts were properly joined even though the weapons used to commit the assault were seized two weeks later.

PROOF OF ONE CRIME AS EVIDENCE OF ANOTHER CRIME

Per CPL 200.20 (2)(b), two offenses that are based on DIFFERENT CRIMINAL TRANSACTIONS are JOINABLE if they (or the criminal transactions underlying them) are of SUCH NATURE that PROOF OF THE FIRST OFFENSE WOULD BE MATERIAL AND ADMISSIBLE AS EVIDENCE-IN-CHIEF UPON A TRIAL OF THE SECOND OFFENSE or vice versa.

It is worth noting that when offenses are properly joined because proof of one constitutes evidence of the other, the trial court has NO DISCRETION to sever such counts per CPL 200.20 (3) (See *People v Bongarzone*, 69 NY2d 892 [1987], *People v Almodovar*, 183 AD3d 1243 [4th Dept 2020]).

In *Almodovar*, the Fourth Department rejected the defendant's argument that the trial court erred in refusing to sever the attempted kidnapping charge (stemming from the defendant's alleged attempt to remove a child from her pre-school) from the weapons possession and menacing counts arising from a confrontation between the defendant and the child's father who sought him out on account of the earlier incident.

The court held that the charges were properly joined because the latter counts related directly to the earlier incident and as such, the trial court had no authority to separate them (citing *People v Murphy*, 28 AD3d 1096 [4th Dept 2006]). Moreover, that the defendant was acquitted of the attempted kidnapping charge suggested that the jury was able to consider the proof relating to each offense separately.

The same conclusion was reached in *People v Smith,* (109 AD3d 1150 [4th Dept 2013]), where the Fourth Department found no error in the trial court's denial of the defendant's motion to sever counts of an indictment charging Rape 1st degree of one victim and Murder 2nd degree arising from a similar sexual attack and strangulation (with a thin rope) of a different victim six months later.

Both victims lived in the same apartment building in which the defendant also resided. Right after the first attack, the victim told the defendant's girlfriend that he had threatened to strangle her with a thin rope.

With respect to the second incident, DNA testing revealed that the defendant's sperm was present in the victim's rectal area. DNA consistent with the defendant was also found under her fingertips and there was evidence of trauma to her face and hands. For his part, the defendant claimed that both sexual encounters were consensual.

The Fourth Department held that evidence of the first rape was material and admissible to prove the defendant's intent to commit a forcible sex attack upon the second victim. (Citing *People v Wise*, 46 AD3d 1397 [4th Dept 2007]). Consequently, since the charges were properly joined under CPL 200.20(2)(b), the trial court had no authority to sever them (citing *People v Bongarzone*, supra). The court also found no reason to sever the counts as a matter of discretion.

In view of the presence of the defendant's DNA in the second case, his admission of sexual contact with both victims, and the cause of the second victim's death by the same type of instrumentality threatened in the first incident, it is interesting (though not necessarily surprising), that the trial court saw fit to deny severance. Under the circumstances, the introduction of what amounted to modus operandi evidence involving multiple victims (often seen in a Molineux context where the perpetrator's identity is in dispute), had to be nothing short of damning.

CRIMES THAT ARE THE SAME OR SIMILAR IN LAW

CPL 200.20 (2)(c) states that offenses that are based on different transactions and which are not joinable under paragraph (b) above may still be joined if they are defined by the same or similar statutory provisions and thus are the same (or similar) in law (See *People v Ferrer*, 17 AD3d 925 [3d Dept 2005]).

Nevertheless, when different offenses/transactions are joined solely by their similarity in law, the court has the discretion to order them to be tried separately in the interest of justice if either party can establish good cause for dividing the offenses (CPL 200.20 [3]).

GOOD CAUSE (which may be established orally or in writing per subdivision 3 [b][i]) includes situations where there is:

(a) SUBSTANTIALLY MORE PROOF on one or more such joinable offenses and there is a SUBSTANTIAL LIKELIHHOOD that the JURY WOULD BE UNABLE to CONSIDER SEPARATELY the proof as it relates to each offense. (See People v Shapiro 50 NY2d 747 [1980]).
(b) A CONVINCING SHOWING that the defendant has both IMPORTANT TESTIMONY to give concerning one offense and a GENUINE NEED to refrain from testifying on the other, thus satisfying the court that the RISK OF PREJUDICE is SUBSTANTIAL (See *People v Moore*, 181 AD3d 719 [2d Dept 2020]).

As is evident, severance of offenses in this context is not simply available for the asking. Rather, counsel must make a CONVINCING SHOWING of GOOD CAUSE based on facts not supposition that such relief is necessary to avoid unfair prejudice (See *People v Milford*, 118 AD3d 166 [2d Dept 2014]).

In Milford, the Third Department held that the trial court properly denied the defendant's motion to sever counts of Sexual Abuse 1st degree arising from three separate incidents of inappropriate touching of two young girls on three separate dates (10/2 for one victim and 9/5 and 10/18 for the other). The defendant was found guilty of sexual abuse for the events of 9/5 and 10/2 but was acquitted of the charge relating to 10/18.

The first victim testified that in early October, the defendant (who was a friend of her mother's boyfriend) came into her bedroom late at night after a birthday party, knelt by her bedside and put his hand between her legs. The next morning, the girl told her mother that the defendant had touched her where boys are not supposed to touch girls. The mother informed her boyfriend who confronted the

defendant. He replied that he was drunk and didn't remember anything after passing out on the living room floor.

The second victim testified that in September, the defendant (who was friends with her stepfather) stopped by to visit her parents who were not at home and left their two daughters in the care of their great grandmother. The defendant saw the girls playing in the back yard and sent one of them to go inside to get him a beer. As she did so, the defendant fondled this victim in a similar fashion inside a play tent. The defendant told the victim not to tell anyone. He then drank his beer and left. Several weeks later, after the mother of victim # 1 told victim #2's mother what her daughter had told her, victim #2's mother confronted her daughter who revealed what had happened to her. (She said she did not come forward on her own because she thought that she had done something wrong). For his part, the defendant admitted his presence on the day in question but denied having any inappropriate contact with the child.

In affirming the convictions, the AD noted that charges were properly joined because they were the same in law, and the defendant's severance motion alleged nothing more than that there "might be substantially more proof regarding one complainant than the other." (In fact, the proof at trial refuted this conclusory allegation).

The court also noted that the evidence as to each offense was separately presented, straightforward and readily distinguishable, thus eliminating the risk of comingling of the facts underlying each charge (citing *People v Lakatosz*, 59 AD3d 813 [3d Dept 2009]). That the jury acquitted the defendant of the third such offense gave the court confidence that the jury was able to parse the proof appropriately, thereby removing any possibility of prejudice (See also *People v Davey*, 134 AD3d 1448 [4th Dept 2018]).

PROSECUTORIAL PILING ON

But in *People v Shaprio*, supra, the Court of Appeals reversed the defendant's convictions for numerous counts of sodomy (sexual contact with several high school boys under age 17 over the course of 18 months) charged in one indictment and promoting prostitution under another indictment and sodomy charged under a third indictment. The latter two indictments arose from one incident where the defendant, after allegedly arranging with friends to bring two underage, out-of-state male prostitutes to the defendant's home for compensated sex, was found by police (who were executing a search warrant) in bed with a 13-year-old boy.

The defendant argued that he was a customer not a promoter and there was no proof of any actual sexual contact other than the testimony of the 13-year-old. In the defendant' view, trying these latter cases along with an indictment charging 64 counts of unlawful sexual conduct with eight different underage boys who had no connection whatsoever with the promoting prostitution/sodomy charges created a substantial risk of a guilty verdict based on propensity toward pedophilia.

The trial court rejected the defendant's arguments and granted the People's motion to consolidate the indictments for trial. In doing so, the court noted that the defendant was the sole remaining untried offender (the co-defendants were tried separately), all the charges involved sex acts with underage boys and most of them occurred in the defendant's home.

The Court of Appeals held that while the charges were similar in law, under the circumstances, it was likely that the trial of the promoting prostitution and singular sodomy counts would be compromised by the "strongest of suggestions that the defendant's conduct was the inevitable outgrowth of the defendant's untoward sexual predisposition" (citing *People v Dodge*, 72 Misc 2d 345 [Nassau County Court 1972]). The Court also remarked that the defendant had good reason to testify in defense of the more serious promoting case but not in the multiple victim case. All things considered, the juxtaposition of the separate sets of charges, in the Court's estimation, created too great a risk of prejudice, and the decision to try them en masse constituted an abuse of discretion.

The Court also took umbrage with the prosecution's heavy-handed treatment of certain witnesses, threatening to prosecute them for perjury if they strayed from their grand jury testimony and testified for the defendant. As a result, they declined to waive their privilege against self-incrimination and the defendant was foreclosed from calling witnesses in his defense. The Court construed such intimidation as depriving the defendant of due process.

DAMNED IF HE DOES AND DAMNED IF HE DOESN'T

In *People v Moore*, (181 AD3d 719 [2d Dept 2020]), the Second Department held that the trial court erred in denying severance of two separate Robbery 1st degree counts where the defendant had important testimony to give on the first (to establish his affirmative defense of duress) and a genuine need to stay mum on the second one. (The trial court ruled, per People v Sandoval, 34 NY2d 371 [1974]), that the People could cross examine the defendant about the underlying facts of Y.O. adjudications of two similar robberies).

The first robbery involved the gunpoint theft of money from a pizza delivery woman in her vehicle. The defendant had given a written statement to police, claiming that a person whom he owed $250.00 threatened to shoot him unless he repaid him what he owed. The creditor gave him a gun and told him to rob a pizza delivery person. The defendant obliged and handed over the proceeds to bring down his debt.

The second one involved a robbery of a female pedestrian. After the trial court's adverse *Sandoval* ruling, the defendant argued that while he had good reason to refrain from testifying in this case, he had important testimony to give on the first one to support his affirmative defense.

The trial court concluded that since the People declared their intent to introduce the defendant's police statement into evidence (duress claim and all), the defendant was relieved of having to testify. There was also no need, then, to sever the two charges. (The court also ruled that the People could introduce evidence of the facts of the two Y.O. robberies to rebut the defendant's duress claim).

The AD held that the trial court's conclusion that the introduction of the defendant's statement obviated the need for him to testify was erroneous because the statement did not account for either the defendant's failure to abandon the robbery plan or the removal of any immediate threat of physical harm once he was given a gun.

The court said that the People's offer to introduce the defendant's statement did NOT eliminate his genuine need to testify because presenting their version of a defense theory does NOT satisfy the defendant's right to present his OWN testimony to the jury and have it weighed by the jury (citing *People v Thompson*, 111 AD3d 56 [2nd Dept 2013], *People v Calderon*, 146 AD3d 967 [2nd Dept 2017]).

In light of the trial court's ruling, the defendant was placed in the untenable position of either testifying and exposing himself to cross examination about the prior similar robberies or not testifying and compromising his ability to present evidence in support of his affirmative defense of duress. Consequently, the defendant was deemed to have been denied his right to a fair trial (citing *People v Shapiro*, supra).

In *People v Gaston* (100 AD3d 1463 [4th Dept 2012), the Fourth Department held that separate assault counts (one alleging an attack with a belt upon the defendant's girlfriend and the other involving a physical beating of her on another occasion) were defined by similar statutory provisions (Penal Law § 120.05 [1] and [2]), and were thus joinable as being similar in law pursuant to CPL 200.20 (2)(c)(citing *People v Mahboubian*, 74 NY2d 174 [1989]).

The court also noted that the defendant failed to establish good cause to sever the offenses, and the defendant's acquittal on one of them demonstrated the jury's ability to consider the evidence as to each count separately (citing *People v Davis*, 19 AD3d 1007 [4th Dept 2005]).

In *Davis*, the Fourth Department held that the trial court did not err in denying the defendant's motion to sever the sex offense charges involving two different victims because the offenses were similar in law and the defendant failed to demonstrate that there was substantially more proof on one of the joinable offenses or that the jury would not be able to distinguish the proof relating to each offense. (Citing *People v Jones*, 236 AD2d 846 [4th Dept 1997]). The court also pointed to the jury's acquittal on the charge involving one of the victims as indicating that the proof as to each victim was straightforward and divisible.

The conviction was reversed, however, due to the court's erroneous denial of the defendant's cause challenge to a prospective juror who could not provide an unequivocal assurance of impartiality after hearing a fellow venireman (a corrections officer) state that he was familiar with the defendant.

See also *People v Sharp*, (104 AD3d 1325 [4th Dept 2013]) where the trial court was deemed to have properly denied severance of criminal contempt and custodial interference charges arising from the defendant's having taken a child from its mother for an overnight trip to Niagara Falls in violation of an order of protection permitting only limited supervised visitation.

In the court's assessment, the charges were similar in law and the defendant failed to make out a sufficient showing of good cause to warrant severance.

IMPROPER JOINDER OF CHARGES IN A SUPERIOR COURT INFORMATION (SCI)

In People v Pierce, (14 NY3d 564 [2010]), the Court of Appeals held that a charge of Criminal Possession of Stolen Property (CPSP) 3d degree (a Class D felony) arising from the alleged unlawful possession of a motor vehicle was improperly joined for plea purposes in an SCI with a charge of Grand Larceny 4th degree (a Class E felony) stemming from an unrelated theft of money by fraudulent use of the victim's credit card.

The defendant had been held for the grand jury on a charge of Criminal Possession of Stolen Property 4TH degree (a Class E felony) on one date and separately for Grand Larceny 4th degree on another date. Thereafter, the defendant WAIVED INDICTMENT and consented to be prosecuted by an SCI charging Grand Larceny 4TH degree and Criminal Possession of Stolen Property 3RD degree based on a new felony

complaint filed in Superior Court which only charged the grand larceny offense. He pled guilty and was sentenced concurrently to 1 and ½ to 3 years and 3 and ½ to 7 years respectively.

On appeal, the defendant argued that the Stolen Property 3d degree charge was not properly included in the SCI, but the Fourth Department affirmed the judgment of conviction. (57 AD3d 1397).

The Court of Appeals reversed. Noting that the waiver of indictment included the Grand Larceny 4th degree charged for which the defendant had been held for grand jury action, it also included a separate charge (CPSP 3d degree) that was of a higher degree. The People's rationale was that the stolen property charge was joinable with the larceny charge based on similarity in law. (CPL 200.20 [c]).

The Court stated the issue as whether the stolen property count that was NOT charged in the superior court felony complaint but included under a joinder theory in the waiver of indictment and SCI satisfied the requirements of CPL 195.20. In other words, were the offenses either held for the grand jury or properly joinable under CPL 200.20 and CPL 20.40?

The defendant, as noted above, was separately held on for the grand jury on Grand Larceny 4th degree and Stolen Property 4th degree (NOT 3d degree which later found its way into the waiver of indictment and SCI).

In the Court's view, there was little if any commonality between the two charges. The elements were different (theft of money over $1000.00 and possession of a stolen vehicle) and the two crimes were completely unrelated in time (a few weeks apart) and circumstances of commission. As such, the inclusion of both offenses in the waiver of indictment and the SCI amounted to a jurisdictional nullity.

MISDEMEANOR PROSECUTIONS

CPL 100.45 (1) states, in pertinent part that the provisions od CPL 200.20 apply to INFORMATIONS, PROSECUTOR'S INFORMATIONS and to MISDEMEANOR COMPLAINTS.

FINAL THOUGHT

When defense counsel has determined that multiple counts charging arguably joinable offenses present too great a risk of a finding of guilt by association, a well-crafted motion setting forth facts establishing a disparity of proof, a danger of jury confusion of the evidence, a genuine need to testify with respect to one or more counts but not on others, may well be in order.

It is worth noting that any written or recorded showing with respect to the defendant's genuine need to refrain from testifying on some matters shall, upon request, be considered EX PARTE and IN CAMERA. (CPL 200.20 [3][b][ii]).

The in camera showing shall be sealed but the court may order unsealing upon a showing of good cause. Any representations made by counsel during such an application MAY NOT be offered against the defendant in any criminal action for impeachment purposes or otherwise.

While trial courts generally prefer to try as many different counts as possible (whether in the same or separate indictments) in one fell swoop, sometimes the risk of fatal prejudice is just too high when the prosecution walks in too heavily armed and loaded.

If counsel is successful in obtaining severance, thus replacing the People's six-gun with a pea shooter, hopefully, at the end of trial, their case will be left lying in the dust while counsel and his/her client saddle up and ride out of Dodge.