

**People v Kee**

2008 NY Slip Op 30084(U)

January 3, 2008

Supreme Court, Kings County

Docket Number: 0008011/2006

Judge: Patricia M. Di Mango

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, CRIMINAL TERM: PART 30

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :  
 :  
 :  
 -against- :  
 :  
 GORDON KEE, :  
 :  
 Defendant. :

Indictment No. 8011/2006

-----X  
DECISION AND ORDER

-----X  
THE PEOPLE OF THE STATE OF NEW YORK :  
 :  
 :  
 -against- :  
 :  
 LAMAR CARTER, :  
 :  
 Defendant. :

Indictment No. 10149/2006

-----X  
HON. PATRICIA M. Di MANGO:

The People seek an order, pursuant to CPL § 200.40 (1)(c) and (2), consolidating the above-captioned indictments for trial on the ground that all of the offenses charged under these two indictments are based upon the same criminal transaction.

Defendant Gordon Kee is charged under Indictment No. 8011/2006 with Assault in the First, Second, and Third Degrees, Attempted Assault in the First Degree, Criminal Possession of a Weapon in the Fourth Degree, Menacing in the Second Degree, and Harassment in the Second Degree, all relating to events which took place on July 8, 2006, during which the victim was slashed in the face and neck (necessitating surgery and 350 stitches), allegedly by defendant Kee, and following which, the victim claimed that Kee pulled out a gun, fired off a shot and threatened to kill him next time. Meanwhile, the proposed co-defendant, Lamar Carter, had apparently stayed in Kee's vehicle during the actual assault, as noted by the complainant.

Two months after Kee was indicted, the People presented their case against Lamar Carter. Upon this presentation the complainant indicated that Carter was a passenger in Kee's vehicle and had stayed inside the vehicle while Kee had attacked him with the knife. However, when the victim tried to flee the scene after getting cut, Carter allegedly jumped into the driver's seat, accelerated, and repeatedly physically blocked the victim's

avenue of escape with the vehicle and chased him in the car, all the while preventing the victim from crossing the street and getting away. Ultimately, Carter picked up Kee and the two drove off. Unlike his proposed co-defendant, Mr. Carter elected to testify before the Grand Jury.

Before the Grand Jury, Lamar Carter essentially indicated that he had been at the scene, but stated that he stayed in his own vehicle, parked up the block, and had only seen his friend Kee talking with the victim (with whom Carter was also acquainted) and had not observed any assault upon the victim (although there had been one “playful” push by the victim upon Kee), and only learned of the slashing incident days later.

Upon his arrest in late November (2006) Carter also made statements to the police, which statements were also presented to the Grand Jury. In his account to the police, Carter indicated that he had been with Gordon Kee before and after the alleged incident. However, it was while he, Carter, waited in his car<sup>1</sup> and was talking on his [cellular] telephone, that Kee had encountered the complainant and the two engaged in conversation and subsequently appeared to have an argument, with the victim pushing defendant Kee. Carter could not see them very well and apparently allegedly did not pay much attention to them and only afterwards learned that the victim “got cut,” although Kee had appeared to be angry when he rejoined defendant Carter.

The Grand Jury which heard this case ultimately charged Carter, under Indictment No. 10149/2006, with acting in concert with another in the commission of Assault in the First, Second, and Third Degrees.

It is against this backdrop that the People had moved to consolidate these two indictments for trial. Both defendants opposed the motion.

In his opposition to consolidation, defendant Carter’s attorney asserts that his client’s right to testify at trial on his own behalf would be negatively affected by a consolidation since co-counsel would not be bound by the court’s Sandoval ruling and prejudicial matter could be pursued by co-counsel. Furthermore, Carter’s counsel opines that the defenses of the two defendants would be antagonistic, given Carter’s statements and Grand Jury testimony (placing co-defendant Kee at the scene and interacting with the victim, all in juxtaposition to Carter’s account of being merely present).

Meanwhile, counsel for defendant Kee states their intention to present either an alibi defense or a defense establishing that Kee was simply not present at the scene. In

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<sup>1</sup> In this version, there does not appear to be any reference to a second vehicle.

this counsel's view, it will be impossible for the jury to credit Kee's defense and also credit Carter's defense of mere presence, and thus, she maintains that the defendants' respective defenses are antagonistic and in irreconcilable conflict with one another. It is also asserted on behalf of defendant Kee that he too would be prejudiced by the questioning of co-counsel and the fact that co-counsel would not be limited by a Sandoval/Molineux ruling, and, in order to support his own defense, Carter would have to discredit defendant Kee. Moreover, likewise, Kee will have to discredit Carter, who places him on the scene whereas Kee maintains he had no involvement whatsoever in this incident. Finally, Kee asserts that he must have a separate trial due to the Bruton/Cruz (Bruton v United States, 391 U.S. 123; Cruz v New York, 481 U.S. 186) Confrontation Clause implications here, given that, in the defense's view, Carter's statements could not be effectively redacted for use at a joint trial and defendant Kee's Sixth Amendment right of confrontation would be denied if Carter chose not to take the stand as the People have stated their intention to use Carter's statements. Thus, the only appropriate solution would be severance (or, in this case, denial of consolidation in the first place).

In response, the People dispute that the defendants' defenses are in irreconcilable conflict or that [either]<sup>2</sup> defendant would suffer undue prejudice upon a joint trial. Additionally, the People maintain that defendant Carter's statement (and similar Grand Jury testimony) could be effectively redacted for use at a joint trial of the defendants without compromising defendant Kee's confrontation rights.

The court has considered all of the parties' submissions as well as having heard extensive oral argument on the matter.

It is indisputable that both defendants are charged with the same assault offenses, "based upon . . . the 'same criminal transaction'" (see, CPL §§ 200.40[1][c] and 40.10[2]) and therefore, standing alone, these indictments would be "joinable." The court's inquiry does not, however, end here. The determination whether to consolidate these two indictments rests in the sound discretion of this court.

In the case of a joint trial of two defendants, severance is required "where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (People v Mahboubian, 74 NY2d 174, 184; see also, People v Seshadri, 249 AD2d 336, lv. denied, 92 NY2d 860).

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<sup>2</sup> The People's "Reply" only addresses defendant Kee's opposition, but this court is considering the People's arguments as they would relate to defendant Carter as well.

Notwithstanding that joint trials expedite the judicial process, conserve judicial economy, and avoid duplicativeness, this court determines that it is not appropriate to consolidate these two indictments for trial here. Firstly, and most importantly, this court does not agree that defendant Carter's statements (to the police and before the Grand Jury), both of which the People are intent upon introducing at trial, can be effectively redacted for use upon a joint trial. Simply deleting the references to co-defendant Kee or changing names to pronouns will not suffice. It would still be obvious that Carter was referring to his co-defendant, the only other party alleged to have been present and to have taken part in the incident. Thus, defendant Kee's defense would be severely prejudiced by the introduction of these statements and his right of confrontation denied in the event defendant Carter chose not to take the stand.

Additionally, and aside from the effect of the introduction of Carter's statements, this court further concludes that the cores of the defendants' defenses are in irreconcilable conflict (see, People v Mahboubian, supra), as Carter cannot have been "merely present" with his friend Kee, the only other person charged with being present and having participated in the brutal slashing, if Kee will claim not to have been present at all. In the court's view, such conflict would lead the jury to infer both defendants' guilt, or at least the guilt of defendant Kee, simply by virtue of the conflict. One cannot believe Carter's defense (whereby Carter denies any participation in or even contemporaneous knowledge of the attack upon the victim but steadfastly places Kee with the victim) without disbelieving Kee's account, given that they are the only people alleged to be at the scene.

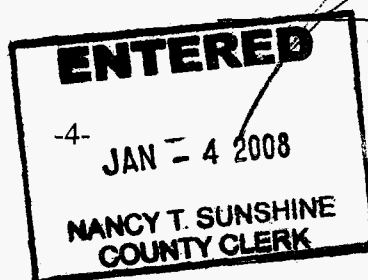
In sum, this court concludes that "good cause" has been shown as to why there should be separate trials herein given the court's finding that defendant Kee would be unduly prejudiced by a joint trial under the above circumstances (see, CPL § 200.40 [1]).

On the other hand, if the People would agree to forego the use of Carter's statements upon a joint trial, a fair, joint trial could probably be had; however the People insist on using same at such a joint trial.

Accordingly, the People's application for consolidation is, respectfully, denied.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York  
January 3, 2008



J.S.C.