

**People v Barnette**

2013 NY Slip Op 30227(U)

February 4, 2013

Sup Ct, Kings County

Docket Number: 9928/11

Judge: Elizabeth A. Foley

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,

Present:  
Hon. Elizabeth A. Foley

v.

INDICTMENT  
NO. 9928/11

ANDREW BARNETTE,  
BERTRAM BARNETTE,

Defendants.

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,

v.

INDICTMENT  
NO. 9718/12

CALVIN COLE,

DECISION AND  
ORDER

Defendant.

-----X

Defendant Bertram Barnette moves to sever his case from that of his brother, defendant Andrew Barnette, both charged under Indictment No. 9928/11, for purposes of separate trials. The People oppose this motion, and cross move for consolidation of this Indictment with Indictment No. 9718/12, under which defendant Cole is charged, for a single trial of these two Indictments. Defendant Bertram Barnette and defendant Cole oppose consolidation. After a review of the moving and cross moving papers and the respective opposition papers, the

pertinent Supreme Court file and relevant statutory and caselaw authority, defendant Bertram Barnette's motion is denied and the People's cross motion is granted.<sup>1</sup>

It must be noted there is no dispute that all three defendants are charged with the same counts of kidnapping, robbery, assault and other related charges, all of which were allegedly committed by them against the same victim on the same date. As posited by the People, the three perpetrators were acting in concert with each other to commit the crimes charged, *i.e.*, on November 21, 2011 at approximately 2:45pm, defendant Bertram Barnette drove defendant Andrew Barnette and defendant Calvin Cole to the Quality Inn located at 2473 Atlantic Avenue, Brooklyn, New York, where defendant Andrew Barnette and Calvin Cole exited the vehicle and grabbed Alicea Arter, dragged her to the car in which defendant Bertram Barnette was waiting, and then forced her inside, whereupon she was subsequently held, beaten and robbed.

Defendant Bertram Barnette requests that the Court sever Indictment No. 9928/11 as to defendant Andrew Barnette, pursuant to the good cause provision of CPL §200.40(1), based upon his denial of participation in any of the criminal

---

<sup>1</sup> No papers have been submitted in connection with the applications under consideration by defendant Andrew Barnette.

activity which is the subject of Indictment No. 9928/11, and because he will be prejudiced by a single trial, in that there is a likelihood a jury will be unable to distinguish the proof as pertains to each defendant individually, and due to the People's intention to proffer statements at trial made by defendant Andrew Barnette purportedly inculcating defendant Bertram Barnette as the driver of the vehicle involved in the crimes charged.

A motion for a severance is addressed to the sound discretion of the trial court, and where, as here, proof against the jointly indicted defendants is supplied by the same evidence, only the most cogent reasons warrant a severance. *People v. Mahboubian*, 74 NY2d 174 (1989); *People v. Hernandez*, 67 AD3d 820 (2<sup>nd</sup> Dept. 2009), *lv denied*, 13 NY3d 939 (2010). Severance is not required solely because of hostilities among the defendants, differences in their trial strategies, or inconsistencies in their defenses, and is compelled only where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger that the conflict alone would lead the jury to infer a defendant's guilt. *People v. Cardwell*, 78 NY2d 996 (1991); *People v. Echevvaria*, 282 AD2d 470 (2<sup>nd</sup> Dept.), *lv denied*, 96 NY2d 862 (2001).

In this case, defendant Bertram Barnette has failed to establish substantial prejudice would impact his right to a fair trial. Contrary to his contention, any

defense by his codefendant is not in irreconcilable conflict nor is there a danger that such conflict alone, if any, would lead a jury to improperly infer defendant Bertram Barnette's guilt. *People v. Terry*, 78 AD3d 1207 (2<sup>nd</sup> Dept. 2010), *lv denied*, 16 NY3d 800 (2011). This is particularly so, because defendant Andrew Barnette has not joined in the motion for severance. Therefore, his defense strategy is not known, and mere speculation alone in that regard does not rise to the level of unfair prejudice. Moreover, a review of the statements allegedly made by each defendant -- which were found to be admissible at trial following a *Huntley* hearing -- reveals, in essence, that each defendant denies involvement in any criminal activity, and, the statements are consistent, to the extent that defendant Andrew Barnette, as well as defendant Bertram Barnette himself, place defendant Bertram Barnette in the driver's seat of the car allegedly used during the commission of the crimes charged.<sup>2</sup> This does not, in the Court's opinion, establish that defendant Andrew Barnette has implicated defendant Bertram Barnette directly as a knowing participant in the commission of any kidnapping, robbery or assault of the complainant, nor does it evince any irreconcilable conflict or that any unfair prejudice would result to defendant Bertram Barnette

---

<sup>2</sup> Apparently, defendant Bertram Barnette was captured on a video surveillance camera as the driver of the vehicle at the time in question.

thereby substantially impairing either his ability to confront witnesses or his defense at trial. *See, generally, People v. Smalls*, 55 NY2d 407 (1982); *People v. Allaway*, 172 AD2d 617 (2<sup>nd</sup> Dept.), *lv denied*, 78 NY2d 1009 (1991); *People v. Glover*, 165 AD2d 761 (1<sup>st</sup> Dept. 1990), *lv denied*, 77 NY2d 877 (1991); *People v. Melendez*, 285 AD2d 819 (3<sup>rd</sup> Dept. 2001), *lv denied*, 97 NY2d 731 (2002); *People v. Gaymon*, \_\_ Misc3d \_\_, 2004 WL 5546651 (S. Ct. N.Y. Co.); *cf., People v. Sutton*, 122 AD2d 896 (2<sup>nd</sup> Dept. 1986).

As for the People's cross motion to consolidate, pursuant to the same force of logic, consolidation of Indictment Nos. 9928/11 and 9718/12 is appropriate. In addition, as with the denial of severance, granting consolidation is particularly apt because here the defendants are charged with acting in concert, and public policy considerations in situations where potential prejudice to defendants is outweighed favor consolidation because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses as well as duplicative trials. *See, CPL §200.20(2)(a), (4); People v. Mahboubian, supra; People v. Gonzalez*, 229 AD2d 398 (2<sup>nd</sup> Dept.), *lv denied*, 88 NY2d 985 (1996). Moreover, contrary to counsel's equivocal assertion, *i.e.*, statements made by defendant Andrew Barnette and defendant Bertram Barnette "may" incriminate defendant Cole and the use of such evidence at trial would therefore enable the People to

lead the jury to the inference that the third individual perpetrator is defendant Cole, the separate statements by defendant Andrew Barnette and defendant Bertram Barnette do not incriminate defendant Cole at all. Here, defendant Cole has not made a sufficient showing that he will suffer unfair prejudice as a result of a single trial of these two indictments.

Finally, with respect to the request to sever as well as the opposition to consolidation, there is no reason to believe, as defendant Bertram Barnette and defendant Cole claim, that the finder of fact will be unable to separately consider the proof of each crime as it relates to the three individual defendants, or that it would be impossible for the jury to credit and understand separate defenses.

*People v. Streitferdt*, 169 AD2d 171 (1<sup>st</sup> Dept.), *lv denied*, 78 NY2d 1015 (1991);

*People v. Fosmer*, 293 AD2d 824 (3<sup>rd</sup> Dept.), *lv denied*, 98 NY2d 696 (2002);

*People v. Fabian*, 154 Misc2d 957 (S. Ct. Bronx Co. 1992).

The Court finds that as to Indictment No. 9928/11, the circumstances do not warrant severance and separate trials, and moreover, that the separate Indictments are properly joined for a single trial. Thus, defendant Bertram Barnette's motion is denied, and the People's cross motion is granted. The Court has reviewed defendants' remaining arguments and finds them to be without merit.

Accordingly, it is hereby

ORDERED, that defendant Bertram Barnette's motion for severance of the charges under Indictment No. 9928/11 as pertains to defendant Andrew Barnette for purposes of separate trials is denied; and it is further

ORDERED, that the People's cross motion for consolidation of Indictment Nos. 9929/11 and 9718/12 for purposes of a single trial of all charges under each Indictment is granted.

ENTER

Dated: February 4, 2013

\_\_\_\_\_  
ELIZABETH A. FOLEY, J.S.C.