

People v Diven

2014 NY Slip Op 33772(U)

June 5, 2014

Supreme Court, Westchester County

Docket Number: 12-1215

Judge: Richard A. Molea

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

FILED and ENTERED
June 5, 2014
**WESTCHESTER
COUNTY CLERK**

-against-

FILED
JUN 05 2014
COUNTY OF WESTCHESTER

DECISION & ORDER

Indictment No. 12-1215
Indictment No. 14-0175

CHARLES DIVEN,

Defendant.

-----X
MOLEA, J.

Upon consideration of the instant application brought by the People for an order of the Court consolidating the instant indictments for trial pursuant to Section 200.20(4) of the Criminal Procedure Law, the Court has considered the order to show cause, affirmation in support and memorandum of law of Assistant District Attorney Brian J. Conway, and the affirmation in opposition and memorandum of law of Walter L. Rich, Esq., counsel for the defendant.

By order to show cause, the People seek an order of this Court consolidating the instant indictments for trial pursuant to CPL 200.20(4), alleging that the indictments are otherwise joinable in the same indictment pursuant to CPL 200.20(2)(c) upon their claim that, in substance, one of the offenses charged in each of instant indictments are "defined by the same or similar statutory provisions and consequently are the same or similar in law". Pursuant to Indictment No. 12-1215, the defendant presently stands charged with two counts of Grand Larceny in the second degree pursuant to Penal Law §155.40(1), a single count of Criminal Possession of a Forged Instrument in the second degree pursuant to Penal Law §170.25, and three counts of Criminal Tax Fraud in the third degree pursuant to Tax Law §1804¹. In support of the crimes charged thereunder, the People

¹By Amended Decision and Order, filed and entered on January 24, 2014, the Westchester County Court (Zambelli, J.) dismissed Counts 3, 4, 5, 6, 7, 8 and 10 while granting leave to the People to re-present evidence in support of Count 3 to a new Grand Jury.

allege that the defendant, in his capacity as an attorney, used a client's funds for his own purposes without the permission or consent of that client, and thereafter generated and presented a banking document to that client to fraudulently make it appear that he had not used her funds for his own purposes. In further support of the crimes charged thereunder, the People allege that the defendant failed to file personal income tax return for the tax years of 2008, 2009 and 2011, with the intent to avoid tax liability imposed under the New York State Tax Law. The defendant was arraigned under Indictment No. 12-1215 before the Westchester County Court (Zambelli, J.) on August 13, 2013 and entered a plea of not guilty to all counts charged therein. By Trial Readiness Order, filed and entered on May 6, 2014, the Westchester County Court (Zambelli, J.) transferred Indictment No. 12-1215 to the Trial Assignment Part presided over by this Court for further proceedings.

Pursuant to Indictment No. 14-0175, the defendant is charged with a single count of Grand Larceny in the second degree pursuant to Penal Law §155.40(1). In support of the crime charged thereunder, the People allege that the defendant, in his capacity as an attorney, used a client's funds for his own purposes without the permission or consent of that client. The defendant was arraigned under Indictment No. 14-0175 before the Westchester County Court (Zambelli, J.) on March 4, 2014 and entered a plea of not guilty to the sole count charged therein. By Trial Readiness Order, filed and entered on May 6, 2014, the Westchester County Court (Zambelli, J.) transferred Indictment No. 14-0175 to the Trial Assignment Part presided over by this Court for further proceedings.

The People now move this Court for the entry of an order consolidating Indictment No. 12-1215 and Indictment No. 14-0175 pursuant to Criminal Procedure Law (CPL) 200.20(4) for the purpose of conducting a joint trial. In support of consolidation, the People claim that the instant indictments are properly joinable with one another under the applicable law due to the fact that both

indictments contain crimes charged under the same statutory provisions and that such joinder would constitute an appropriate exercise of discretion. The defense opposes the instant consolidation motion, arguing that the offenses charged under the two subject indictments are derived from distinct criminal transactions, are not part of a common scheme or plan, that there exists a risk of spillover prejudice from the evidence adduced in support of the crimes charged under Indictment No. 12-1215 to the jury's consideration of the crime charged under indictment No. 14-0175, and that no curative instruction can cure such prejudice. The instant consolidation motion is addressed as follows:

MOTION TO CONSOLIDATE INDICTMENTS FOR TRIAL

Consideration of an application to consolidate multiple indictments for trial is addressed to the sound discretion of the motion court (*see People v Lane*, 56 NY2d 1, 8). In connection with such an application, the motion court must weigh the public interest in avoiding duplicative, lengthy and expensive trials against the defendant's interest in being protected from unfair disadvantage (*People v Lane, supra; People v Gonzalez*, 229 AD2d 398, 399; *People v Matthews*, 222 AD2d 703). In this regard, it is well-settled that the proponent of an application made to obtain the consolidation of separate indictments for trial bears the burden of demonstrating to the satisfaction of the motion court that the offenses charged in the respective indictments are properly joinable in accordance with the terms of CPL 200.20 and that such action would constitute an appropriate exercise of discretion. Specifically, CPL 200.20(4) provides, in pertinent part, that "[w]hen two or more indictments against the same defendant . . . charge different offenses of a kind that are joinable pursuant to [CPL 200.20(2)] the court may . . .

. order that such indictments be consolidated . . . for trial purposes”. It is now well-settled that charges arising out of two distinct criminal transactions are properly joinable when the offenses are defined by the same or similar statutory provisions (*see* CPL 200.20[2][c]), subject only to a discretionary severance in the interest of justice and for good cause shown (*see* CPL 200.20[3]; *People v Ferrer*, 17 AD3d 777, 778).

Here, as the defendant stands charged under Indictment No. 12-1215 with two charged counts of Grand Larceny in the second degree pertaining to his alleged theft, in his capacity as an attorney, of two distinct client’s funds for his own purposes without the permission or consent of those clients, and is similarly charged under Indictment No. 14-0175 with a charged count of Grand Larceny in the second degree pertaining to his alleged theft, in his capacity as an attorney, of a third distinct client’s funds for his own purposes without the permission or consent of that client, the Court finds that the instant indictments are properly joinable pursuant to CPL 200.20(2)(c) (*see People v Reome*, 309 AD2d 1067, 1068, *lv. denied* 2 NY3d 805; *People v McQueen*, 266 AD2d 240; *People v Rose*, 187 AD2d 617; *People v Moses*, 169 AD2d 786; *People v Ndeye*, 159 AD2d 397).

Turning next to consider whether the consolidation of the instant indictments would constitute an appropriate exercise of discretion, the Court finds that the defendant’s speculative assertion of general “spillover prejudice” does not constitute the requisite showing of good cause demonstrating that the instant indictments should be tried separately pursuant to CPL 200.20(3). Furthermore, it is anticipated that evidence of the defendant’s guilt of the charges under each indictment will be presented separately to the jury and that the trial court will properly instruct the jury to consider the proof concerning each charge on its own merit (*People v McQueen*,

supra).

Turning next to consider the defendant's claim that he has a strong need to refrain from testifying during the trial of the two distinct larcenies and related crimes charged under Indictment No. 12-1215 and a belief that it is essential that he testify during the trial of the distinct larceny charged under Indictment No. 14-0175, the Court finds that same is based upon his speculative claims concerning the anticipated nature of the testimony of the theft victim of the crime charged under indictment No. 14-0175, as well as his speculative claim concerning the trial court's possible determination following a so-called *Sandoval* hearing which has not yet been conducted. Although the defendant does claim that there are additional reasons for his desire to testify during the trial of the larceny charged under Indictment No. 14-0175 and to refrain from testifying during the trial the two distinct larcenies and related crimes charged under Indictment No. 12-1215 which he cannot disclose without revealing his trial strategy and trial witnesses, he invites the Court to entertain an *ex parte* examination of defense counsel in camera pursuant to CPL 200.20(3)(b)(ii) to enable to him to amplify his argument in this regard.

However, despite defense counsel's invitation to amplify his argument, the Court does not find that the defendant has adequately established a threshold showing which establishes the potential benefit to the Court of amplification of an extant argument previously framed by the defense which otherwise lacked requisite detail. In this regard, the Court notes that the defendant's claims concerning the significantly greater number of prosecution witnesses and items of documentary evidence which would be likely be presented by the People during the trial of Indictment 12-1215 as opposed to the trial of Indictment 14-0175, and his speculative claims concerning the evidence to be relied upon the People during trial are patently insufficient to

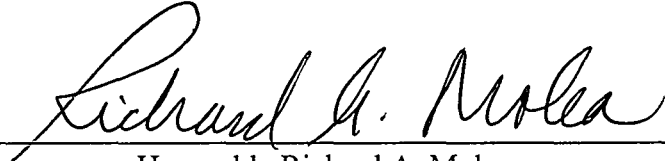
establish a threshold showing that “there [is] substantially more proof against him on one set of charges and that it [is] likely that the jury would be unable to consider separately the proof as it related to each offense” (*People v Rogers*, 245 AD2d 1041 quoting CPL 200.20[3][a]), as well as to establish that he has “both important testimony to give concerning one [indictment] and strong need to refrain from testifying on the other”(see *People v Billups*, 234 AD2d 937, quoting *People v Lane*, *supra*, at 8; see also *People v Boyea*, 222 AD2d 937, 939, *lv. denied* 88 NY2d 934; *People v Bankston*, 63 AD3d 1616), leaving this Court without any basis to believe that amplification by the defense of the already proffered speculative claims would be beneficial to the Court in evaluating the defendant’s showing of good cause within the meaning of CPL 200.20(3). Accordingly, upon the record presented, the Court finds that the defendant has failed to make the requisite showing of good cause demonstrating that the instant indictments should be tried separately pursuant to CPL 200.20(3).

Based upon the foregoing, as the defense has failed to articulate a sustainable theory establishing a likelihood of prejudice resulting from the consolidation of the instant indictments which is sufficient to constitute the requisite showing of good cause demonstrating that the instant indictments should be tried separately pursuant to CPL 200.20(3), it is

ORDERED that the People's motion seeking to consolidate the instant indictments for trial pursuant to CPL 200.20(2)(c) is granted and the instant indictments shall be heretofore listed solely under Indictment No. 14-0175, and insofar as the charged counts contained within these consolidated indictments must be re-numbered, Count 1 charged under Indictment No. 14-0175 shall remain as the first charged count to be considered for submission to the jury at trial, and Counts 1, 2, 9, 11, 12 and 13 of Indictment No. 12-1215, inclusive, shall be re-numbered to be considered Counts 2-7 of the heretofore consolidated Indictment Number 14-0175.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
June 5, 2014



Honorable Richard A. Molea
Acting Justice of the Supreme Court

TO:

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