

People v Pena
2023 NY Slip Op 35043(U)
December 6, 2023
Supreme Court, Westchester County
Docket Number: Indictment No. 71248-23
Judge: James A. McCarty
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**TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER**

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

Indictment Nos.: 71248-23
and 72850-23

JOSE PENA,

Defendant.

-----X

McCarty, J.

The People move, pursuant to Criminal Procedure Law §200.20[4], to consolidate the allegations charged under Westchester County indictment numbers 71248-23 and 72850-23. Defendant, through counseled motion, opposes this application. To dispose of this application, the court read and considered the following:

Notice of Motion to Consolidate, Affirmation in Support of Motion to Consolidate, and Memorandum of Law; Attorney's Affirmation in Opposition

RELEVANT PROCEDURAL BACKGROUND

The defendant, Jose Pena, is charged, under indictment number 71248-23 with attempted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the third degree. These charges arose in connection with allegations that, on February 1, 2023, the defendant lured an individual, said to have owed him money, into an alleyway where he stabbed this individual in the back lacerating his kidney and, in addition, swung a sharp object in the direction of his face.

The charges against the defendant were initiated in the Yonkers City Court. A felony hearing was scheduled to proceed on April 10, 2023. On that date, the victim informed an Assistant District Attorney that the defendant had offered him money not to testify at the hearing. Specifically, the victim reported that the defendant had stated, in sum and substance, "I'll give

you two hundred dollars today if I'm good tomorrow". An ensuing investigation which included, but was not limited to, the review of taped recorded telephone calls made by the defendant while in custody at the Westchester County Jail corroborated the victim's account and showed that the defendant had requested the assistance of others to ensure the victim did not appear to testify. In connection with this conduct, the defendant is charged, under Westchester County indictment number 72850-23, with bribing a witness and tampering with a witness in the fourth degree.

Through the within application, the People move to consolidate Westchester County indictments 71248-23 and 72850-23 for purposes of trial. Through counseled motion, the defendant opposes this application.

CONCLUSIONS OF LAW

New York State Criminal Procedure Law ("CPL") §200.20 governs consolidation of two or more indictments against the same defendant. This statute authorizes joinder of offenses when, "[e]ven though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (CPL§200.20[2]; *People v. Johnson*, 64 AD2d 140, 141 [1978], *aff'd*. 48 NY2d 925)

As the party moving for consolidation, the People bear the burden of demonstrating that combining the presently separate indictments for trial is an appropriate exercise of this court's discretion (*People v Lane*, 56 NY2d 1, 7 [1982]). It is well-settled that where, as here, joinder is

permissible but not mandatory, the decision whether to grant a motion to consolidate falls squarely within the trial court's sound discretion. In exercising its discretion, the court is required to "weigh the public interest in avoiding duplicative, lengthy and expensive trials against the defendant's interest in being protected from unfair disadvantage" (*Lane, supra*, p. 8).

Upon the facts presented, this court finds consolidation is appropriate as it furthers judicial economy without placing the defendant at an unfair disadvantage. Consolidation is proper as the victim is anticipated to provide testimonial evidence with respect to the alleged assault, charged under indictment 71248-23, and the defendant's attempts to bribe a witness and tamper with a witness under indictment 72850-23. These separate and distinct criminal transactions are joinable based on the overlap of evidence and on grounds that the evidence of one case is admissible as evidence-in-chief of the other (CPL 200.20 [2] [b]; *People v Bongarzone*, 69 NY2d 892, 895 [1987]; *People v Scott*, 276 AD2d 380 [1st Dept 2000], lv denied 96 NY2d 738; *People v Paraschiv*, 169 AD2d 739 [2d Dept 1991], lv denied 77 NY2d 909 [1991]). A contrary determination will require the victim to testify repeatedly and repetitively.

This court would be remiss if it did not note that *People v. Whittaker*, upon which the defense relies, supports consolidation in this instance (193 AD2d 1055 [4th Dept. 1993]). The defendant in *Whittaker* was charged with having committed two distinct robberies. In denying his application for severance of the charges, the court observed that defendant had not set forth a genuine basis upon which it was reasonable to conclude that he had important testimony to give as to one of the charged offenses and an equal need not to testify with respect to the other (*Id.*). Defendant herein has also not made such a showing. Further, the defense's reliance upon *People*

v. *Stanley* is misplaced. In that case, “the first three counts and the last three counts of the indictment covered two separate and unrelated incidents” and each charged offense concerned a drunken argument that escalated. The *Stanley* court found there existed “a strong possibility of conviction by reason of the cumulative effect of the evidence rather than by its separate and distinct relevance to each incident” (81 AD2d 842 [2d Dept. 1981]). No such concern exists here where the indictments charge related events.

Accordingly, for the foregoing reasons, it is hereby

ORDERED, that the People’s Motion to Consolidate is granted; and it is further

ORDERED, that Westchester County indictments 71248-23 and 72850-23 shall from this point forward be consolidated under indictment number 71248-23.

The foregoing constitutes the opinion, decision, and order of this Court.

Dated: White Plains, New York
December 6th, 2023


HON. JAMES A. McCARTY
NYS Supreme Court Judge

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