

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
: :
vs. : :
: :
ANTHONY A. BIONDI : :
LAWRENCE C. MAZZERLE : :
THOMAS D. CARBO : NO. 05-418

MEMORANDUM AND ORDER

McLaughlin, J.

May 9, 2006

The three defendants have been charged with one count of conspiracy to commit honest services mail fraud and four counts of honest services mail fraud. Mr. Biondi has also been charged with one count of structuring monetary transactions for the purpose of evading currency requirements and two counts of filing false tax returns. Mr. Mazzerle has also been charged with one count of making false statements and five counts of filing false tax returns. All defendants move for severance of either certain counts or their entire case. The Court will deny the motions.

The indictment alleges: (1) that Mr. Biondi was the administrator of the Borough of Norristown, a high-ranking public official with the authority to award public contracts and pay vendors; and (2) that Messrs. Mazzerle and Carbo, two local businessmen, made secret cash payments to Mr. Biondi at the same time Mr. Biondi was exercising his discretion to award them more than one hundred thousand dollars in municipal contracts. The

scheme charged in the indictment involved the ownership of two commercial tri-axle dump trucks by Mr. Biondi and his use of the trucks in a secret profit-making business. The indictment contends that Mr. Biondi hid his unlawful interest in this business with the assistance of the other defendants.

Rule 14 of the Federal Rules of Criminal Procedure states in part:

If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

A defendant has "a heavy burden in gaining severance." United States v. Quintero, 38 F.3d 1317, 1343 (3d Cir. 1994). The burden is so high because "[t]here is a preference in the federal system for joint trials of defendants who are indicated together." Zafiro v. United States, 506 U.S. 534, 537 (1993); accord United States v. Urban, 404 F.3d 754, 775 (3d Cir. 2005).

Defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials or because the evidence is different as to each defendant. Rather, district courts should grant severance only if there is a serious risk that a joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment about guilt or innocence. Zafiro, 506 U.S. at 538. Because differing levels of evidence are inherent in joint trials, "[p]rejudice should not be found in a joint trial just because all evidence adduced is

not germane to all counts against each defendant or some evidence adduced is more damaging to one defendant than others." United States v. Console, 13 F.3d 641, 655 (3d Cir. 1993) (internal quotation marks omitted). Rather, the preferred remedy in such a situation is to instruct jurors regarding which evidence is admissible against which defendant. See Zafiro, 506 U.S. at 540-41; United States v. Voigt, 89 F.3d 1050, 1096 (3d Cir. 1996). Further, severance is not appropriate when the same or substantially the same evidence will be presented in both trials proposed by a defendant in a motion to sever. See Console, 13 F.3d at 655.

The United States Court of Appeals for the Third Circuit has instructed that the fact that only some defendants are charged in certain counts is not usually grounds for severance:

We see no reason why, in a joint trial of defendants charged with participating in a conspiracy, the fact that the grand jury charged one defendant separately with an additional criminal act somehow would interfere with the petite jury's ability to consider the evidence against each defendant on each count separately. . . . In fact, there was nothing unusual in the joinder of charges and defendants in this case for, as we have recognized, undoubtedly, there are many criminal cases in which defendants are tried together on different counts, so that all evidence is not germane to all the counts against each defendant. . . . Indeed, the Federal Rules of Criminal Procedure in allowing joinder of defendants expressly contemplate as much: 'All defendants need not be charged in each count.' Fed. R. Crim. P. 8(b).

United States v. Lore, 430 F.3d 190, 205 (3d Cir. 2005).

The defendants stress different arguments in their motions for severance. The Court will discuss each defendant's motion separately.

Mr. Biondi moves to sever count seven which charges only Mr. Mazzerle with making a false statement to federal agents, by falsely denying to federal agents that Mr. Biondi owned a truck titled in the name of Mr. Mazzerle's company and by falsely denying that he had made payments to Mr. Biondi. Mr. Biondi argues that Mr. Mazzerle's false statement directly implicates Mr. Biondi in the charged conspiracy and that, if Mr. Mazzerle's false statement is introduced at trial, the jury will be unable to follow this Court's instructions about the limited admissibility of the statement and will convict Mr. Biondi on improper grounds.

The Court is not persuaded by the concerns about the statement raised by Mr. Biondi. The statement is not going to be used "against" Mr. Biondi. It is not coming in for the truth of the matter asserted therein so it is not hearsay. The government's goal is the opposite -- to prove that the statement was false. Nor is this a situation where one defendant's confession implicates another. The Court will give limiting instructions that make clear to the jury that they must consider this alleged statement of Mr. Mazzerle in considering only the charges against Mr. Mazzerle.

Mr. Carbo moves for severance on the ground that he has a good faith basis to believe that Mr. Biondi would testify on Mr. Carbo's behalf at a separate trial. In deciding a motion to sever on this basis, the United States Court of Appeals for the Third Circuit has instructed district courts to consider the following four factors: "(1) the likelihood of co-defendants testifying; (2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendants could be impeached; [and] (4) judicial economy." United States v. Davis, 397 F.3d 173, 182-83 (3d Cir. 2005); United States v. Gonzales, 918 F.2d 1129, 1137 (3d Cir. 1990).

At the hearing on the severance motion, counsel for Mr. Biondi stated that Mr. Biondi would be willing to testify on Mr. Carbo's behalf at a separate trial as long as that trial occurred after his own trial so that he would not waive any Fifth Amendment privilege. Mr. Carbo would illicit the following facts from Mr. Biondi at a separate trial: Mr. Carbo has been doing business in the Borough since 1998; Mr. Biondi's decisions to award business to Mr. Carbo have never been influenced by any award or any money that Mr. Carbo ever gave to Mr. Biondi for the use of his trucks; no truck Mr. Biondi ever owned or any other asset that he ever owned was concealed in any way by titling or insuring that asset in the name of Mr. Carbo or Mr. Carbo's businesses; none of the trucks used by Mr. Carbo was ever used in a Borough job; Mr. Carbo paid Mr. Biondi the prevailing rate for

the use of his trucks; the work was actually performed and actually needed; no payments were made through straw men or through third parties; Mr. Carbo had no involvement in helping Mr. Biondi conceal whatever ownership or interest he had in the two trucks at issue; and, Mr. Biondi never spoke with Mr. Carbo concerning Mr. Biondi's reporting obligations.

The government responds that during a three hour meeting of Mr. Biondi with the government, Mr. Biondi inculcated himself as well as the two co-defendants. He told the government that he had titled trucks in Mr. Mazzerle's name and received cash payments from Mr. Mazzerle and Mr. Carbo at the same time that he was awarding them over one hundred thousand dollars of Borough work. Mr. Biondi approved the payments to them and signed the checks. The government also argues that many of the facts that Mr. Carbo would like to elicit from Mr. Biondi are not exculpatory. For example, the government contends that whether or not Mr. Biondi was influenced by the cash payments at issue is not exculpatory because it is irrelevant to an honest services charge in a non-disclosure conflict of interest case.

The government also argues that Mr. Biondi could be impeached. According to the government, Mr. Biondi has conceded that he lied on ethics forms and on his tax returns. The government contends that there are also a number of other transactions in which Mr. Biondi engaged with the defendants

which were designed to conceal his relationship with them and his use of the trucks and his receiving cash payments from them.

When the Court evaluates the four factors set out by the Third Circuit in Davis, it concludes that severance is not appropriate here. Although there is a strong likelihood that Mr. Biondi would testify at a later trial of Mr. Carbo, much of the testimony Mr. Carbo intends to elicit from Mr. Biondi is not exculpatory and Mr. Biondi would be impeached in substantial ways by the government. Judicial economy strongly favors a joint trial here.

Mr. Mazzerle bases his severance motion primarily on the ground that statements made by Mr. Biondi or Mr. Carbo to the government's confidential informant are inadmissible hearsay and if introduced in a trial of Mr. Mazzerle would deprive him of his rights to a fair and impartial trial.

The government proposes to introduce portions of approximately four recorded conversations at trial. Mr. Mazzerle is a party to two of the conversations, one on October 20, 2003, and one on November 6, 2003. Mr. Mazzerle is not a participant in two other conversations, one on November 17, 2003, and one on November 20, 2003. Mr. Mazzerle argues that these statements are inadmissible hearsay against him. The government does not contend that these statements qualify under any exception to the hearsay rule. The government's argument is that either they are not being brought in for the truth of the matter asserted or that

they are entirely consistent with the conversations involving Mr. Mazzerle.

The Court has reviewed all four of these conversations and finds that the government's description of them in its response to Mr. Mazzerle's motion for severance is accurate. In the November 17, 2003, conversation, Mr. Biondi stated that Mr. Mazzerle and his business partner are able to do maintenance work on dump trucks themselves, that Mr. Mazzerle's company and others in the hauling business make money, and that Mr. Mazzerle and his business partner would try to "f--k" the government informant if he approached them for work. The only mention of Mr. Mazzerle in the November 20, 2003, conversation is when Mr. Carbo stated that he knew that Mr. Biondi's truck is titled in Mr. Mazzerle's name. There does not appear to be anything in either of these conversations that is in any way inconsistent with what Mr. Mazzerle stated in the two conversations in which he was a participant. If there is some specific section of one of the tapes that one of the defendants seeks to redact, he may raise that issue. For example, in the November 17, 2003, tape, Mr. Biondi says that Mr. Mazzerle and his business partner were trying to "f--k" Mr. Corropelese if he approached them for work. The Court will consider redacting that statement.

An appropriate Order follows.

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ORDER

AND NOW, this 9th day of May, 2006, upon consideration of defendants' motions to sever (Docket Nos. 41, 51, 58, and 71), the government's oppositions, the defendants' replies thereto, and after oral argument on February 24, 2006, IT IS HEREBY ORDERED that said motions are DENIED for the reasons stated in a memorandum of today's date.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.