

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX: KINGSHILL

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CRIMINAL NOS.156/1985
	)	157/1985
v.	)	158/1985
	)	
LUCIEN PETERSEN, BERTRAND	)	ILLEGAL POSSESSION OF
WILLIAMS & LOUIS SIMEON,	)	WEAPONS, CONSPIRACY
	)	
Defendants.	)	

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PETERSEN, Judge

MEMORANDUM OPINION
July/6 , 1985

Defendants are charged with conspiracy to sell firearms in violation of 14 V.I.C. §551 (1964) unlawful possession of firearms in violation of 14 V.I.C. §2253 (1984) and unlawful sale of firearms in violation of 23 V.I.C. §467 (1970). Defendant Petersen has pleaded guilty. Defendant Simeon has moved, pursuant to Rule 14 of the Federal Rules of

Criminal Procedure to have his trial severed from that of co-defendant Williams. This motion is based on the grounds that the co-defendants defenses are antagonistic and that the joinder of Defendant Williams, who has a criminal record, with Defendant Simeon would be prejudicial.

For the reasons stated herein, Defendant Simeon's motion is denied.

FACTS

The Government alleges that on or about January 29, 1985, an undercover agent bought seven firearms from Defendant Simeon and other co-defendants. Counsel for Defendant Simeon alleges that he learned for the first time on Monday, July 15, 1985, the day of jury selection, that co-defendant Williams' defense would be one of entrapment. On that same date he filed the instant motion. By Court Order, all pretrial motions were required to be filed ten (10) days prior to trial. No opposition to Defendant's motion has been filed.

DISCUSSION

This motion raises three issues: (1) Whether the motion is timely; (2) Whether co-defendant's criminal record creates sufficient prejudice so as to require severance; and (3) Whether co-defendants' defenses are sufficiently

antagonistic so as to require severance.

I.

Motions for severance of defendants under Rule 14 of the Federal Rules of Criminal Procedure must be made prior to trial. This motion was filed after the date ordered by the Court for pretrial motions to be filed. Nevertheless, this Court has a continuing duty throughout the trial to grant a severance whenever prejudice appears. Schaffer v. United States, 80 S.Ct. 945, 948 (1960). Failure to move for severance prior to trial is not fatal if the motion is based on grounds not known before trial. United States v. Hewes, 729 F.2d 1302, 1320 (11th Cir. 1984); accord United States v. Berkowitz, 662 F.2d 1127, 1132 (5th Cir. 1981). Accordingly, since Defendant's motion is based on grounds not known prior to trial, it is not considered untimely.

II.

Joining of defendants for trial is governed by Rule 8(b) of the Federal Rules of Criminal Procedure which states:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of facts or transactions constituting an offense or offenses.

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There is a public interest in joint trials. They avoid time consuming and expensive trials. They also avoid recalling witnesses, conserve judicial resources and lessen the burden on jurors who must make sacrifices. Joint trial is the rule; severance is the exception which applies where joinder of defendants yields such prejudice to a defendant as to deny him his fundamental right to a fair trial. Parker v. United States, 404 F.2d 1193, 1196 (9th Cir. 1968); accord Government of the Virgin Islands v. Ruiz, 354 F.Supp. 245, 249 (D.C.V.I. 1973). Joint trials are especially favored where, as here, the defendants are jointly charged and the offenses can be proven by the same evidence and is derived from the same transaction. United States v. Gambrill, 449 F.2d 1149, 1159 (D.C. Cir. 1971); accord United States v. Echeles, 352 F.2d 892, 896 (7th Cir. 1965).

It is clear that these co-defendants were properly joined under Rule 8(b). However, Rule 14 provides an exception to the general rule. It states:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

The key issue presented for this Court to resolve is whether the prejudice alleged by Defendant Simeon is sufficient to bring him within the exception of Rule 14. To do so, the prejudice alleged must outweigh the underlying purposes of joinder of defendants as outlined above. Within this framework, it is necessary to assess the prejudice alleged by Defendant with two additional points in mind: (1) Severance motions are directed to the sound discretion of the Court. United States v. Rickey, 457 F.2d 1027, 1030 (3d Cir. 1972). Such discretion is to be exercised considering judicial economy and tactical disadvantage to the government of disclosure of its case. United States v. DeLarosa, 450 F.2d 1057, 1064 (3d Cir. 1971); and (2) The defendant requesting severance has the burden of proving substantial prejudice. United States v. Lipowitz, 407 F.2d 597, 601 n.15 (3d Cir. 1969).

III.

Defendant asserts that he is prejudiced because co-defendant Williams has a criminal record. Such grounds lack sufficient weight to require severance. If "guilt by association" was a ground for severance there would indeed be few multi-defendant trials. See DeLarosa, supra, at 1065, ("Severance was not required by the unfavorable impression

which may have been created by one co-defendant's identification with an unpopular social and political group"); and United States v. Barber, 296 F.Supp. 795, 799 (D. Del. 1969) defendants' reason that some co-defendants have extensive criminal records have never been considered sufficient to justify severance). Accordingly, Defendant's allegation that his co-defendant has a criminal record does not establish sufficient prejudice to require a severance of the trials.

IV.

The Fifth Circuit has developed reasonable and fairly consistent rules concerning antagonistic defenses as a ground for severance. The general rule is that the defenses must be antagonistic to the point of being mutually exclusive. United States v. Crawford, 581 F.2d 489, 491 (5th Cir. 1978); United States v. Lee, 744 F.2d 1124, 1126 (5th Cir. 1984); accord United States v. Magdaniel-Mora, 746 F.2d 715, 719 (11th Cir. 1984). Reliance by a co-defendant on a theory of entrapment does not ipso facto require severance. The "essence or core" of the defenses must be in such conflict that the jury must necessarily disbelieve the core of one defense in order to believe the core of the other. United States v. Romanello, 726 F.2d 173, 177 (5th Cir. 1984). The

critical factor is that the defenses must be in conflict and not merely facts which do not constitute the core of the defenses.

Application of these principles to the facts of our case reveals no compelling prejudice to Defendant Simeon. It is worthwhile to note that Defendant has not alleged the substance of co-defendant Williams' testimony. This makes it somewhat premature at this juncture to assert prejudice. Defendant's defense is one of denial. He also does not intend to testify at trial. His participation in the alleged conspiracy and possession and sale of firearms is irrelevant to co-defendant's defense that he the (co-defendant) was entrapped into committing the crimes. A jury could believe that co-defendant was entrapped and still believe that Defendant took no part in the crimes. As the Fifth Circuit states, "the primary danger against which the rule is designed to guard is that of a defendant having to face what amounts to two prosecutors - the state and his co-defendant". Lee, supra at 1126. This situation arises where, unlike here, each defendant accuses the other and in effect relies on the guilt of the other for his acquittal. See Crawford, supra at 492 (Severance required. "The sole defense of each defendant was the guilt of the other".) This is not the case here. The co-defendant is not casting blame upon the Defendant. He

merely asserts that he was entrapped into committing the alleged crimes.

In Lee, the co-defendant admitted his involvement in the crime charged but asserted that he acted pursuant to orders from his superior and that he thought the act was legal. In his testimony, he identified the defendant as a participant in the crime. The defendant's defense was one of non-participation. The Court held that the defenses were not mutually irreconcilable because the jury need not have necessarily disbelieved the defendant's defense in order to believe the co-defendant's defense. The Lee case clearly illustrates the high stage of antagonism which must exist between the defenses before severance is required. See Magdaniel-Mora, supra at 719 (defendant's defense of lack of sufficient evidence upon which to convict was not irreconcilable with co-defendant's defense of entrapment although he was implicated during co-defendant's testimony). Accordingly, the prejudice alleged by Defendant is outweighed by the underlying purposes of joinder of defendants outlined above.

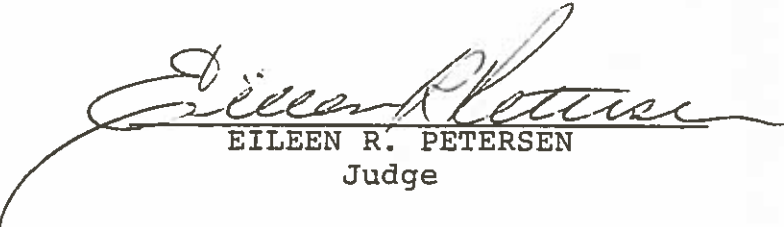
Defendant alluded to the requirement of DeLuna that co-defendant's counsel comment on Defendant's failure to testify. He relies on the following statements in DeLuna: "In a criminal trial in a federal court an accused has a

constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendant's be tried separately". United States v. DeLuna, 308 F.2d 140, 141 (5th Cir. 1962).

Defendant's reliance on DeLuna is misplaced. The DeLuna rule, requiring severance, applies only where the co-defendant's attorney has a duty to make a comment. This duty arises when the arguments of co-defendants are antagonistic where there is a head-on collision. In DeLuna, one defendant took the stand and blamed the other. The other defendant did not testify. Counsel for the testifying defendant thus had a duty to comment on co-defendant's failure to contradict defendant's version of the incident. This reading of DeLuna is supported by a subsequent case from the Fifth Circuit Court of Appeals. In Gurleski v. United States, 405 F.2d 253, 265 (5th Cir. 1968) (1968) the court stated: "The DeLuna rule applies only when it is counsel's duty to make a comment . . . Clearly, a duty arises only when the arguments of the co-defendants are antagonistic". It further stated that "no defendant attempted to implicate only the

other defendants. Thus, the telling consideration of DeLuna is not present in this case". There is no head on collision in the present case. The antagonism required by DeLuna is absent. Accordingly, since co-defendant's counsel has no duty to bring the silence of Defendant to the jury's attention, the DeLuna rule is inapplicable.

Accordingly, this Court concludes that the prejudice alleged by Defendant Simeon does not outweigh the compelling purposes of joinder of defendants. Moreover, Defendant Simeon cannot be granted a severance merely because of his belief that his chance of acquittal is greater with a separate trial. Defendant's motion for severance is hereby denied.


EILEEN R. PETERSEN
Judge