

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,

v.

JULIAN B. MICHEL,

Defendant.

)
)
)
)
)
)
)
)
)
)

Ct. A. No. 1601012468

Submitted: November 3, 2016

Decided: November 7, 2016

Erik H. Zubrow, Esquire
Deputy Attorney General
820 North French Street, 7th Floor
Wilmington, DE 19801
Attorney for the State of Delaware

Thomas A. Foley, Esquire
Law Office of Thomas A. Foley
1905 Delaware Avenue
Wilmington, DE 19806
Attorney for Defendant

MEMORANDUM OPINION AND ORDER
ON DEFENDANT'S MOTION TO SEVER

Defendant, Julian B. Michel, ("Defendant"), is charged with one count of Terroristic Threatening, in violation of *11 Del. C. § 621(a)(1)*, two counts of Releasing Motor Vehicle Driving History and License Records Under False Representation, in violation of *21 Del. C. § 305(m)(2)*, and four counts of Misuse of Computer System Information, in violation of *11 Del. C. § 935(1)*. The State filed Information consolidating all charges to have them heard in a single trial. Pending before the Court is Defendant's Motion to Sever Count I (the charge for Terroristic Threatening) from Counts II-VII (the charges for releasing motor vehicle records and misuse of computer system information). On November 3, 2016, a hearing was

held to allow the parties to present oral arguments on the Motion. After reviewing the parties' briefs and arguments, and for the reasons stated below, Defendant's Motion to Sever is hereby **GRANTED**.

BACKGROUND

Prior to the events which gave rise to these charges, Defendant was employed with the Wilmington Police Department. It is alleged that in the early morning of January 10, 2016, Defendant had an argument with his ex-girlfriend and her male friend (the "victim"). It is alleged that during the argument, Defendant identified himself as a Wilmington Police Officer and threatened the victim's life and liberty. Specifically, it is alleged that Defendant told the victim he would shoot him, and that "[he was] going to call [his] boys and have them come lock [the victim] up."¹ Based upon these statements made to the victim, Defendant was arrested for a single count of Terroristic Threatening in New Castle County.

The Wilmington Police Department initiated an internal investigation due to statements allegedly made by the Defendant to his ex-girlfriend and her friends about running their information, as a law enforcement officer, through the Delaware Criminal Justice Information System ("DELJIS"). Computer inquiries allegedly revealed that Defendant had used DELJIS to check the criminal records of his ex-girlfriend, the victim, and another witness who was present at the incident on January 10, 2016. Defendant was subsequently charged with six additional misdemeanors, all stemming from illegally accessing computer records from August 2015 to January 2016. Initially, these computer violations were charged in Kent County.

¹ State's Response at ¶ 1.

Plea negotiations were unsuccessful. Following the failure of the parties to come to an agreement, the State filed Informations in New Castle County, consolidating all the charges against the Defendant into one case. Thereafter, on October 5, 2016, Defendant filed the instant Motion to sever the Terroristic Threatening charge from the computer-related crimes involving improper DELJIS access. On October 20, 2016, the State filed its Response in opposition of Defendant's Motion. A hearing on the Motion was held on November 3, 2016 and, at the conclusion thereof, the Court reserved decision.

PARTIES' CONTENTIONS

Defendant argues the charges were improperly joined under *Court of Common Pleas Criminal Rule 8(a)*. Defendant contends that the charge of Terroristic Threatening is independent from the charges related to improper DELJIS access. Defendant argues the two sets of charges are not of the same or similar character, are not based upon the same acts or transactions, and do not constitute a common scheme or plan. Defendant also maintains that the crime of Terroristic Threatening falls under the criminal code's "Offenses against the Person" subchapter, while the allegations related to improper DELJIS use fall under the subchapter of "Computer-Related Offenses." Furthermore, Defendant argues the dates of the DELJIS offenses are varied, as are the names of the persons searched, while the Terroristic Threatening charge occurred on a single day and against one person. For these reasons, Defendant argues that the charges were improperly joined under *Court of Common Pleas Criminal Rule 8*.

Moreover, Defendant argues even if joinder is proper under *Rule 8(a)*, the Court should still use its discretion under *Court of Common Pleas Criminal Rule 14* to sever the charges

on the basis of potential unfair prejudice. In support of his position, Defendant asserts the fact that he is represented by two different attorneys: one for the Terroristic Threatening charge and another for the DELJIS violations. Defendant argues that joinder ought not to be used to conscript counsel for the one charge to represent Defendant in connection with the other charge. Furthermore, Defendant argues that he is more likely to testify in defending the DELJIS allegations, and less likely to testify in defending the Terroristic Threatening charge because there is surveillance footage showing a peaceful conversation between Defendant and the victim. By defending each set of charges in a single trial, Defendant argues it is more likely that a jury would view the evidence as cumulative, with the multiple offenses creating a general 'criminal disposition' which would be prejudicial to Defendant. Therefore, Defendant moves for severance of the Terroristic Threatening charge from the DELJIS violations.

In Response, the State argues that judicial economy would be best served by incorporating all of Defendant's charged offenses into one trial. The State maintains that charges need not be inextricably intertwined in order to be joined, so long as they are part of the same common scheme or course of conduct. The State contends that Defendant's actions are a clear course of conduct focused on his ex-girlfriend. The State argues that both Defendant's threat and DELJIS record reviews are 'domestic-violence-like' attempts at exercising control over his ex-girlfriend. The State insists the motives behind both crimes are the same, and the State would call the same witnesses to prove both sets of charges. The State maintains that time lapses and codebook locations do not disqualify joinder of offenses. Instead, the State argues that the Court should view Defendant's wielding of

police power to bully his ex-girlfriend and her friends as the type of course of conduct contemplated under *Rule 8(a)*.

Additionally, the State contends that *Rule 14* provides no basis in this case to sever the charges. The State argues the Defendant has the initial burden of demonstrating substantial prejudice if the charges are tried together. The State maintains that Defendant has failed to present any basis to show anything other than a hypothetical prejudice, which is insufficient under *Rule 14*. Furthermore, the State argues that Defendant's choice to hire two different attorneys is irrelevant. Similarly, the State argues a preference to testify to one incident, but not the other, is not enough to warrant the severance of offense. Finally, it is the State's contention that simply claiming a jury will infer a 'criminal disposition,' without any basis for doing so, does not meet the high burden a defendant needs to show in order to justify severance. As such, the State argues that Defendant has failed to meet the burden to warrant severing Defendant's charges into two separate trials and, as such, Defendant's Motion must be denied.

LEGAL STANDARD

Whether to grant or deny a motion for severance of offenses is a matter left to the sound discretion of the trial court, determined by the facts and circumstances of each case.² A trial court will abuse its discretion if it denies severance when there is a reasonable probability substantial injustice may result from a joint trial.³ "On a motion to sever, the defendant bears the burden of demonstrating unfair prejudice and substantial injustice

² See *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988); *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978).

³ *State v. Cooke*, 909 A.2d 596, 599 (Del. Super. Ct. 2006).

associated with the joinder of the offenses.”⁴ Mere hypothetical prejudice is not enough to warrant severance of offense.⁵ “The test for determining whether the defendant has met his or her burden of showing prejudice is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the Court's discretion to sever.”⁶

DISCUSSION

Court of Common Pleas Criminal Rule 8(a) permits two or more criminal offenses to be joined in the same information provided that one of the following circumstances exists: (1) the offenses are of the same or similar character; (2) the offenses are based on the same act or transaction; (3) the offenses are based on two or more connected acts or transactions; or (4) the offenses are based on two or more acts constituting parts of a common scheme or plan.⁷ *Rule 8* is “designed to promote judicial economy and efficiency, provided that the realization of those objectives is consistent with the rights of the accused.”⁸

Rule 8(a), however, must be read in conjunction with *Court of Common Pleas Criminal Rule 14*, which grants the Court discretion to order severance if it appears that either party will be prejudice by the joinder of offenses.⁹ The defendant has the burden of demonstrating prejudice from the denial of his motion to sever.¹⁰ Merely arguing the crimes were separate and committed against different individuals with a lapse of time between

⁴ *State v. Sisson*, 2005 WL 914464, at *2 (Del. Super. Ct. Apr. 7, 2005).

⁵ See *Skinner v. State*, 575 A.2d 1108, 1118 (Del. 1990).

⁶ *State v. Caldwell*, 1999 WL 743556, at *2 (Del. Super. Ct. July 7, 1999), *aff'd*, 780 A.2d 1037 (Del. 2001).

⁷ CCP Crim. R. 8(a); see also *State v. Garden*, 2000 WL 33114325, at *2 (Del. Super. Ct. Nov. 1, 2000).

⁸ *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974).

⁹ See *State v. Flagg*, 739 A.2d 797, 799 (Del. Super. Ct. 1999).

¹⁰ *Wiest*, 542 A.2d at 1195.

them, is not enough to warrant severance.¹¹ The Delaware Supreme Court noted three ways in which a defendant may suffer prejudice from the joinder of offenses: (1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.¹²

A pertinent factor a trial court must consider in determining whether to grant or deny severance is the reciprocal admissibility of the evidence presented.¹³ If the evidence pertaining to one crime would be admissible in the trial of another crime, no prejudicial effect will result from the joinder of the trials.¹⁴ “However, evidence of one crime is inadmissible if it is to prove a general disposition to commit another crime, even when the crime is of the same nature and character of the offense charged.”¹⁵

In the case *sub judice*, after reviewing and considering the filings and arguments of both parties, I find that the Count I (Terroristic Threatening) was improperly joined pursuant to *Rule 8(a)* with Counts II-VII (releasing motor vehicle records and misuse of computer system information). The charge for Terroristic Threatening is wholly separate and independent from the DELJIS violations. Furthermore, the charged offenses are not of the same or similar character. Count I relates to threats against a person, while Counts II-VII concern computer based crimes. Additionally, these offenses are not based upon the

¹¹ See *Ashley v. State*, 85 A.3d 81, 85 (Del. 2014).

¹² *Id.*

¹³ See *State v. Cooke*, 909 A.2d 596, 600 (Del. Super. Ct. 2006).

¹⁴ See *Cooke*, 909 A.2d at 600.

¹⁵ *Id.*

same act or transaction. It is alleged that Defendant committed Counts II-VII over the course of several months and searched the records of several people, while Count I occurred on one night and against one individual.

Moreover, the Court is not persuaded by the State's argument that these charges are a common scheme or plan by Defendant in 'domestic-violence-like' attempts to control his ex-girlfriend. Although the State offers an interesting theory of the case, the events on January 10th are distinct and separate from the DELJIS violations. The Defendant is accused of accessing the records of not only his ex-girlfriend, but also several other individuals. Given the fact that the offenses were aimed at different individuals, it is difficult to conclude that Defendant's common scheme or plan was attempting to exercise control over his ex-girlfriend. The rule provides that charged offenses will be joined pursuant to *Rule 8(a)* when they are of the same general nature and give evidence of a similar *modus operandi*.¹⁶ The facts presented thus far leads the Court to conclude that the charges are not of the same general nature and do not give evidence of a similar *modus operandi*. Therefore, joinder of Defendant's offenses was improper pursuant to *Rule 8(a)*.

Assuming arguendo that joinder was proper under *Rule 8(a)*, Defendant still presented adequate evidence to demonstrate a showing of prejudice sufficient to warrant severance pursuant to *Rule 14*. The Court does agree with the State's argument that being represented by two different attorneys for the different sets of charges is irrelevant. However, the Court is convinced by Defendant's argument that he will suffer prejudice at trial if he is forced to try these charges together. The Court must decide motions to sever on a case-by-case basis

¹⁶ *Garden*, 2000 WL 33114325, at *2.

determined by the facts and circumstances presented. In the case at hand, Defendant is a former Wilmington Police Officer accused of breaching his duty by improperly accessing the State's computer based records system. Defendant is also accused of Terroristic Threatening based upon statements made to an individual on January 10, 2016. If these charges were tried together, a jury is more inclined to use the evidence demonstrating that Defendant would threaten an individual's life and liberty to infer a general criminal disposition that Defendant breached his duty as a police officer by improperly accessing criminal records. Furthermore, Defendant argues that he is more inclined to testify to the charges concerning DELJIS violations than to the Terroristic Threatening charge. If these offenses were tried together, the Defendant may be subject to embarrassment or confusion in his willingness to testify to the DELJIS violations and his unwillingness to testify to the Terroristic Threatening charge.¹⁷ Though his unwillingness to testify is not enough by itself to justify severance, when it is coupled with a jury's inference of a general criminal disposition, there is a basis for substantial prejudice and severance is granted.

Moreover, a pertinent factor in determining whether to grant or deny a motion for severance is the reciprocal admissibility of the evidence presented. The testimony and evidence needed to prove beyond a reasonable doubt that Defendant is guilty of the DELJIS violations, would not be the same in order to prove the Defendant committed the offense of Terroristic Threatening. Furthermore, the evidence of Defendant's misuse of the DELJIS system would not be admissible in a trial for Terroristic Threatening, if the charges were in

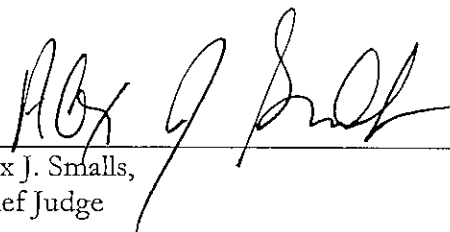
¹⁷ Defendant's willingness to testify in his own defense against one charge, but not the other charges, creates a substantial possibility of prejudice because a jury may infer guilt from a partial refusal to testify if these charges are tried together. While not dispositive, I nevertheless consider this to be relevant in the determination.

fact tried separately. For these reasons, I find that there is reasonable probability that substantial injustice may result from a joint trial, and Count I must be severed from Counts II-VII.

CONCLUSION

Regardless of the means by which it is accomplished, the Court's ability to balance the needs of the parties and to ensure the fairness of the proceedings in separate trials outweighs any judicial economy that may be realized at a single trial. For the foregoing reasons, Defendant's Motion to Sever Count I from Counts II-VII is hereby **GRANTED**.

IT IS SO ORDERED.



Alex J. Smalls,
Chief Judge

cc: John Malik, Esquire
100 East 14th Street
Wilmington, DE 19801

State v. Michel-OP Nov 7 2016