IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0708003661
	)	
KEVIN DICKENS,	)	
	)	
Defendant.	)	

Submitted: May 8, 2008
Decided: May 16, 2008

On Defendant's Motion to Dismiss the Indictment. DENIED.
On Defendant's Motion to Sever Counts of the Indictment. DENIED.
On Defendant's Motion to Compel Discovery. GRANTED IN PART, DENIED IN PART.
On State's Motion to Admit Evidence of Prior Bad Acts under D.R.E. 404(b). RESERVED.

MEMORANDUM OPINION

John W. Downs, Esquire, Department of Justice, 820 North French Street, Wilmington, Delaware 19801.

Kevin Dickens, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977. *Pro se*.

CARPENTER, J.

INTRODUCTION

Before this Court are three motions filed by the *pro se* defendant, Kevin Dickens, ("Defendant") and one by the State. Upon the record and the briefs filed in this matter, the Court hereby denies Defendant's Motion to Dismiss the Indictment, denies Defendant's Motion to Sever Counts of the Indictment, denies the majority of Defendant's Motion to Compel Discovery, and reserves decision as to the State's Motion to Admit Evidence of Prior Bad Acts under D.R.E. 404(b).

BACKGROUND

Defendant was arrested on the current charges while incarcerated at the Delaware Correctional Center in Smyrna, Delaware based on the following facts alleged by the State. On July 25, 2007, the Defendant threw a mixture of hot water, urine and feces at Correctional Officer Kevin Lingenfelter while he was handing out laundry. Less than thirty minutes later, when Correctional Officer Michael McCreanor entered Defendant's cell in response to the earlier incident, Defendant threw a similar mixture at him. Two days later, on July 27, 2007, when Correctional Officer Clark Jordan removed a food tray from Defendant's cell, Defendant threw the same mixture of urine and feces at him. Subsequently, when Correctional Officer Chad Behney attempted to remove Defendant from his cell, he was put in a headlock by Defendant, who had coated his arms with feces prior to Behney's arrival. Five

days later, on August 1, 2007, Sergeant Jason Newman's shoulder was injured when he attempted to prevent the Defendant from lunging at Correctional Officer Jordan. All of these injuries were caused while the victims were in the lawful performance of their duties as Correctional Officers. On September 17, 2007 the Defendant was indicted on four counts of Assault Second Degree, four counts of Assault in a Detention Facility, and one Count of Promoting Prison Contraband (for a "stinger," a heating device Defendant used to heat the mixture). The Defendant was re-indicted on May 12, 2008. The new indictment charges Defendant with four counts of Assault in a Detention Facility, one count of Assault Second Degree, and one count of Promoting Prison Contraband. As such the Court will address Defendant's arguments as they relate to the new indictment.

MOTION TO DISMISS

The majority of Defendant's arguments in his motion to dismiss the indictment are rendered moot by the new May 12 indictment.[1] That indictment contains four counts of Assault in a Detention Facility each relating to a different incident, individual and factual circumstances, as does the count of Assault Second Degree for

[1]Defendant argues that the September 17 indictment was "defective and duplicitous" in charging four counts each of both Assault in a Detention Facility and Assault Second Degree. The Court need not address this issue because the May 12 indictment does not charge the four counts of Assault Second Degree, therefore, there is no repetition of facts.

injuring a correctional officer during a struggle, and the count of Promoting Prison Contraband.

Defendant's remaining contention that the Grand Jury process violates the Equal Protection Clause of the 14th Amendment is without merit. Defendant claims there is a systematic exclusion of African Americans and other minorities from the jury pool. However, the Defendant provides no basis for this argument other than his own self-serving opinion. In *State v. Puligini*, this Court held that absent a showing that a particular group had been significantly underrepresented or excluded, a challenge to the Grand Jury fails.[2] A Defendant is not guaranteed a Grand Jury that proportionally represents all groups, but rather, a pool chosen from a fair cross-section of the community,[3] which is accomplished by Delaware's random selection of potential jurors through their voter registration, driver's licenses and identification cards. As such, Defendant's motion to dismiss the indictment is denied.

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[2]366 A.2d 1198, 1200 (Del. Super. 1976)(*rev'd* on other grounds). *See also State v. Fusco*, 335 A.2d 268 (Del. Super. 1975).

[3]*Fusco*, 335 A.2d at 270 (citing *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975)).

MOTION TO SEVER THE CHARGES

In his next motion, Defendant moves to sever the charges pursuant to Superior Court Criminal Rule 14.[4] Specifically, Defendant argues that trial of the charges related to the July 25, 2007 incidents that occurred (counts 1 and 2 in the new indictment) together with the charges stemming from those occurring on July 27, 2007 (counts 3 and 4 in the new indictment) would cause undue prejudice.[5] The Defendant contends that because he will be presenting a different defense as to the July 25, 2007 incidents, and because the victims and witnesses involved are different from the July 27 and August 1 incidents, the charges should be severed. Defendant argues that trying these charges together would risk a jury verdict based on a "did it once, did it again" mentality.

The State argues that there is no substantial prejudice to Defendant if the charges remain joined in the indictment. Additionally, the issue of joinder must be

[4]"If it appears that a defendant or the state is prejudiced by a joinder of offenses or of 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 other relief justice requires." Super. Ct. Crim. R. 14.

[5]Defendant does not contest that counts 3 and 4 should be joined with count 5, the Assault Second Degree from the August 1, 2007 incident because "they specifically refer to ongoing and similar incidents involving the same witnesses and alleged victims." Def.'s Motion to Sever Counts of Indictment at ¶ 3.

viewed in light of Rule 8, which promotes judicial efficiency and economy.[6] The state points to *Younger v. State*[7] for support, arguing that the offenses at issue here are of the same general character, involve a similar course of conduct, and occurred within a relatively short period of time, and therefore joinder is proper.

The Court agrees with the State. The criminal activities the Defendant is charged with are identical in nature, are separated only by a few days, and are reflective of a pattern of conduct. The Court believes that since the incidents involve different victims it will not be difficult for the jury to compartmentalize the evidence, and the jury's instruction requiring that they consider each offense separately will prevent any risk of a cumulative effect of the evidence. Additionally, because the offenses are so similar in nature, as both incidents involve throwing a mixture of feces and urine at specific correctional officers, the risk of confusion or embarrassment is hard to imagine. For these reasons, Defendant's motion to sever is denied.

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[6] "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Super. Ct. Crim. Rule 8(a). *See also Sexton v. State*, 397 A.2d 540 (Del. 1979)(holding that the interests in judicial economy can outweigh a defendant's unsubstantiated claims of prejudice).

[7] 496 A.2d 548, 550 (Del. 1985).

MOTION TO COMPEL DISCOVERY

Also before the Court is Defendant's motion to compel discovery from the State. Superior Court Criminal Rule 16 governs discovery and disclosure of evidence by the State, and the following represents the Court's decision on the motion.

Defendant's first request, for copies of all incident reports for the events at issue, are not discoverable under Rule 16(a)(2).[8] If there are any relevant statements of the correctional officers in their reports, they are not required to be produced until that witness has testified at trial.

Defendant's second request is denied, as there are no surveillance tapes available for the incidents at issue.

As to Defendant's third through seventh requests, the Court finds that the Defendant has failed to indicate how these documents would be material to the preparation of his defense as required by Rule 16(a)(C), nor is there any indication the State intends to offer these materials into evidence. A general request for documents without any obvious relevancy does not require their production. As such these materials are not discoverable.

The Defendant next requests copies of medical records and treatment documentation for those allegedly injured during the assaults. The State has advised

[8] "[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the attorney general or other state agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses."

the Court they have provided these reports to the Defendant and therefore this issue is moot.

Defendant makes no showing of relevance or materiality in his ninth request for copies of the Standard Operating Procedure Rules for the Quick Response Team. As such this request is denied.

The Court grants the Defendant's tenth request and requires the State to produce the names and identities of the maintenance officer and K-9 unit officer who responded to the August 1, 2007 incident. The identities are required to be produced on Monday, May 19, 2008.

As to Defendant's requests 11 and 12, no such scientific testing was completed, and these requests are therefore denied.

As to the Defendant's request for *Brady* material, the obligation to provide such exculpatory material rests with the State. The Delaware Supreme Court has stated, "The State must release evidence to the defendant if (1) 'the evidence is requested by the accused but production is withheld by the State,' (2) 'the information is favorable to the accused's case,' and (3) the evidence is material to guilt or punishment."[9] It appears from the State 's response that it has no exculpatory evidence to offer, and as such, the Court cannot order what the State cannot provide.

MOTION TO ADMIT PRIOR BAD ACTS UNDER 404(b)

[9]*Cabrera v. State*, 840 A.2d 1256, 1269 (Del. 2004) (citing *Dawson v. State*, 673 A.2d 1186,1193 (Del. 1996)).

The State moves to admit evidence and testimony related to a similar incident in 2005 when Defendant threw urine and feces through a food flap while he was incarcerated. The State contends this evidence is admissible under D.R.E. 404(b) to show intent, plan, and modus operandi of the Defendant.[10] A decision will be made by the trial judge when the issue is presented.

CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss the Indictment is hereby DENIED. Defendant's Motion to Sever the Counts of the Indictment is hereby DENIED. Defendant's Motion to Compel Discovery is hereby DENIED in part and GRANTED in part. The State's Motion to Admit Evidence of Prior Bad Acts Pursuant to D.R.E. 404(b) is RESERVED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[10] "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." D.R.E. 404(b).