

STATE OF MAINE
CUMBERLAND, ss.

STATE OF MAINE
CUMBERLAND, SS
CLERK OF SUPERIOR COURT

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-07-1451 ✓
JAW - CUM - 11/14/2007

STATE OF MAINE,

NOV 14 A 11:07
Plaintiff

v.

ORDER & DECISION

ZACKARY PEARSON

Defendant

DONALD L. GARBRECHT
LAW LIBRARY
FEB 06 2008

BACKGROUND

The defendant was charged with four counts of robbery on June 13, 2007 and was indicted on July 6. The State filed a notice of joinder on July 6, joining Pearson's case with those of six other defendants who were also accused of being involved in the robbery. Pearson filed the present motion for relief from prejudicial joinder on September 17. For the reasons discussed below, the court denies the motion.

DISCUSSION

While "the court must balance the general policy in favor of joint trials against the prejudice to a defendant which may result," the court is also afforded "substantial discretion" to grant or deny a motion to sever. *State v. Lakin*, 2006 ME 64, ¶¶ 7-8, 899 A.2d 777, 779. The burden is on the moving party "to show facts prior to trial that a joint trial would result in prejudice." *Id.* Here, the defendant has asserted that introduction of certain admissions made by his co-defendants would violate his constitutional right to confront the witnesses against him, as the United States Supreme Court decided in *Bruton v. U.S.*, 391 U.S. 123 (1968).

The Law Court recently discussed the *Bruton* holding in *Lakin*, and reiterated that when defendants are tried together in a single trial, an admission of a non-testifying

defendant that implicates a co-defendant may not be used. *Id.* n.2, 899 A.2d at 778. To do so violates the Confrontation Clause of the Sixth Amendment because the co-defendant is prevented from cross-examining a non-testifying defendant about the admission. *Id.* In these cases, it is appropriate to exclude or redact the admission, sever the trials, or empanel multiple juries. *Id.* ¶ 5, 899 A.2d at 778. The Law Court upheld the trial court's decision not to sever the trials of the two defendants, however, because the State had agreed not to use either of the inculpatory statements, and the presentation of mutually antagonistic defenses was not a ground for severance. *Id.* ¶¶ 5-13, 899 A.2d at 778-79.

In an earlier case, the Law Court discussed several post-*Bruton* decisions of the United States Supreme Court, and ultimately determined that even when a confession is redacted to exclude reference to a co-defendant, it may inappropriately implicate that co-defendant. *State v. Boucher*, 1998 ME 209, ¶¶ 11-16, 718 A.2d 1092, 1095-96. The Court acknowledged that "a fair deletion of all references, express or implied, to any other defendant is a proper and approved method of avoiding prejudice and the *Bruton* dilemma." *Id.* ¶ 12, 718 A.2d at 1095 (*quoting State v. Wing*, 294 A.2d 418, 422 (Me. 1972).) However, because testimony from witnesses indicated that four individuals were involved in the crime and the witnesses named three of the four participants, the deletion of the co-defendant from a defendant's confession was not enough to satisfy the requirements of *Bruton*, because the confession "obviously referred directly to [the codefendant]." *Id.* ¶ 16, 718 A.2d at 1096. Yet in spite of the *Bruton* violation, the Court affirmed the conviction because the inappropriately admitted confession was merely

cumulative, and "was entirely consistent with the rest of the State's evidence." *Id.* ¶¶ 20-21, 718 A.2d at 1097. ¹

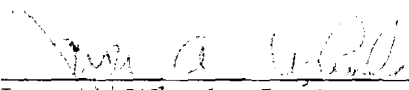
In this case, there were seven defendants initially charged with robbery. One defendant has already entered a plea and is available to testify. Three of the seven defendants, including the defendant who has entered a plea, gave statements to the police that implicate Pearson in the robbery. If the State sought to admit those statements into evidence through the law enforcement officer who took them, and not through the defendants who made them, Pearson's confrontation clause rights could be violated, as would those of every other defendant implicated by the statement who chooses not to testify. Redacting the statements to exclude any reference to the existence of any other defendant would be appropriate.

However, the mere possibility of a Bruton violation does not necessarily require severance (see footnote), and the State may choose to present its case in a way that does not present Bruton problems. Furthermore, the defendant's concerns about Bruton problems can be raised in a motion in limine or can be addressed at trial by the trial judge.

CONCLUSION

The defendant's motion for relief from prejudicial joinder is DENIED.

DATED: November 13, 2007



Joyce A. Wheeler, Justice

¹ It is also important to note that the Court upheld the trial court's decision not to sever the trials because the defendant hadn't alleged anything other than the possibility of a Bruton violation. *Id.* ¶ 10, 718 A.2d at 1095. Although there was indeed a Bruton violation, it would have been possible for the State to present the confession in a way that didn't violate the co-defendant's rights. *Id.* The only other arguments that Pearson has made for severance are that the statements will directly contradict his defense theory, and that the statements would be inadmissible hearsay if the trials were severed. However, the Law Court has said that mutually antagonistic defenses are not grounds for severance. *Lakin*, 2006 ME 64, ¶ 12, 899 A.2d 780.

STATE OF MAINE
KELLY L PEARSON
100 BOX 1894
PORTLAND ME 04062

SUPERIOR COURT
CUMBERLAND, ss.
Docket No. PORSC-CR-2007-01451

DOCKET RECORD

DOB: 11/25/1986

Attorney: ROBERT LEBRASSEUR
PROCLMAN & LEBRASSEUR, PC
482 CONGRESS ST. SUITE 300
PORTLAND ME 04101
APPOINTED 06/19/2007

State's Attorney: STEPHANIE ANDERSON

Charge(s)

1 ROBBERY 05/29/2007 SCARBOROUGH
Seq 4294 17-A 651(1)(E) Class A

2 ROBBERY 05/24/2007 SCARBOROUGH
Seq 4274 17-A 651(1)(E) Class A Charged with COMPLAINT on Suppleme
HOUSE / SCA

3 ROBBERY 05/24/2007 SCARBOROUGH
Seq 4884 17-A 651(1)(B)(1) Class B Charged with COMPLAINT on Suppleme
HOUSE / SCA

4 ROBBERY 05/24/2007 SCARBOROUGH
Seq 1884 17-A 651(1)(B)(1) Class B Charged with COMPLAINT on Suppleme
HOUSE / SCA

Docket Events:

05/31/2007 FILING DOCUMENT - CASH BAIL BOND FILED ON 05/31/2007

05/31/2007 BAIL BOND - \$50,000.00 SURETY BAIL BOND FILED ON 05/31/2007

Bail Amt: \$50,000 Surety Type: SINGLE Surety Value: \$100,000
County: CUMBERLAND County Book ID: 25140 Book Page: 343
Date Bailed: 05/29/2007 Prvdr Name: KELLY L PEARSON
Date Issued: 05/29/2007 Rtrn Name: KELLY L PEARSON
Date Discharged:
THIRD PARTY. SEE CONDITIONS.

06/13/2007 Charge(s): 1

HEARING - INITIAL APPEARANCE SCHEDULED FOR 06/18/2007 @ 8:30

NOTICE TO PARTIES/COUNSEL

06/29/2007 Charge(s): 1,2,3,4

SUPPLEMENTAL FILING - COMPLAINT FILED ON 06/13/2007

FILE

Charge(s): 1,2,3,4

MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 06/19/2007

Charge(s): 1,2,3,4

MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 06/19/2007
THOMAS E DELAHANTY II, JUSTICE
COPY TO PARTIES/COUNSEL

DEFENDANT IS
PRESENTLY INDIGENT AND SHALL RETURN TO COURT ON OR BEFORE 7-31-07 TO BE REEXAMINED AS TO
INDIGENCY. IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL SEEK EMPLOYMENT.

8/21/2007 Party(s): ZACKARY PEARSON

ATTORNEY - APPOINTED ORDERED ON 06/19/2007

Attorney: ROBERT LEBRASSEUR

07/07/2007 Charge(s): 1

HEARING - INITIAL APPEARANCE HELD ON 06/18/2007

JOYCE A WHEELER , JUSTICE

DA: MEGIN ELAM Reporter: KIMBERLY MCCULLOCH

Defendant Present in Court

SAME BAIL CONTINUED WITH ADDED CONDITIONS.

RS

07/18/2007 BAIL BOND - \$50,000.00 SURETY BAIL BOND CONTINUED AS POSTED ON 06/18/2007

JOYCE A WHEELER , JUSTICE

WITH ADDED CONDITIONS.

RS

08/01/2007 HEARING - STATUS CONFERENCE SCHEDULED FOR 08/27/2007 @ 11:00

07/11/2007 Charge(s): 1,2,3,4

SUPPLEMENTAL FILING - INDICTMENT FILED ON 07/06/2007

RS

07/11/2007 HEARING - STATUS CONFERENCE NOT HELD ON 07/06/2007

DEFENDANT INDICTED.

RS

07/20/2007 Charge(s): 1,2,3,4

HEARING - ARRAIGNMENT SCHEDULED FOR 08/27/2007 @ 11:00 in Room No. 7

WILLIAM BRODRICK , JUSTICE

RS

07/11/2007 Charge(s): 1,2,3,4

HEARING - ARRAIGNMENT NOTICE SENT ON 07/11/2007

RS

07/20/2007 OTHER FILING - NOTICE OF JOINDER FILED BY STATE ON 07/06/2007

CASE JOINED WITH CR07-1410, 07-1441, 07-1409, 07-1444, 07-1408, 07-1443.

08/07/2007 Charge(s): 1,2,3,4

HEARING - ARRAIGNMENT HELD ON 08/27/2007

WILLIAM BRODRICK , JUSTICE

Attorney: HEATHER GONZALES

DA: MEGIN ELAM Reporter: JANETTE COOK

Defendant Present in Court

HEARING WAIVED. DEFENDANT INFORMED OF CHARGES. COPY OF INDICTMENT/INFORMATION GIVEN TO
DEFENDANT. 21 DAYS TO FILE MOTIONS. SAME BAIL CONTINUED. RS

08/27/2007 Charge(s): 1,2,3,4

PLEA - NOT GUILTY ENTERED BY DEFENDANT ON 08/27/2007

08/27/2007 BAIL BOND - \$50,000.00 SURETY BAIL BOND CONTINUED AS POSTED ON 08/27/2007

WILLIAM BRODRICK , JUSTICE

ALREADY POSTED. WITH CONDITIONS.

RS

09/04/2007 TRIAL - DOCKET CALL SCHEDULED FOR 02/22/2008 @ 8:30 in Room No. 11
ROLAND A COLE , JUSTICE
ES

11/03/07 MOTION - MOTION FOR FUNDS FILED BY DEFENDANT ON 08/03/2007

EX PARTE

11/03/07 MOTION - MOTION FOR FUNDS GRANTED ON 08/07/2007

WILLIAM BRODRICK , JUSTICE

COPY TO PARTIES/COUNSEL

EX-PARTE

TOTAL AMOUNT APPROVED FOR A

PRIVATE INVESTIGATOR \$500.00.

MRP

09/03/2007 Charge(s): 1,2,3,4

TRIAL - DOCKET CALL SCHEDULED FOR 02/08/2008 @ 8:30 in Room No. 11

ROLAND A COLE , JUSTICE

09/14/07 Charge(s): 1,2,3,4

MOTION - MOTION TO SUPPRESS FILED BY DEFENDANT ON 09/14/2007

09/14/07 Charge(s): 1,2,3,4

MOTION - MOTION RELIEF PREJUDICIAL JOIN FILED BY DEFENDANT ON 09/14/2007

09/28/07 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 11/06/2007 @ 2:00 in Room No. 7

NOTICE TO PARTIES/COUNSEL

09/28/07 HEARING - MOTION TO SUPPRESS NOTICE SENT ON 09/28/2007

09/28/07 Charge(s): 1,2,3,4

HEARING - MOTION RELIEF PREJUDICIAL JOIN SCHEDULED FOR 11/06/2007 @ 2:00 in Room No. 7

09/28/07 Charge(s): 1,2,3,4

HEARING - MOTION RELIEF PREJUDICIAL JOIN NOTICE SENT ON 09/28/2007

11/06/07 HEARING - MOTION TO SUPPRESS CONTINUED ON 11/06/2007

JOYCE A WHEELER , JUSTICE

Attorney: ROBERT LEBRASSEUR

DA: JULIA SHERIDAN

Reporter: PENNY PHILBRICK-CARVER

Defendant Present in Court

FOR 1/2 HOUR HEARING

TSK

11/21/07 HEARING - MOTION TO SUPPRESS SCHEDULED FOR 11/21/2007 @ 1:00 in Room No. 7

NOTICE TO PARTIES/COUNSEL

TSK

HEARING - MOTION TO SUPPRESS NOTICE SENT ON 11/15/2007

TERESA KELLEY , ASSISTANT CLERK-E

11/06/07 Charge(s): 1,2,3,4

MOTION - MOTION RELIEF PREJUDICIAL JOIN UNDER ADVISEMENT ON 11/06/2007

JOYCE A WHEELER , JUSTICE

MP

11/06/07 Charge(s): 1,2,3,4

HEARING - MOTION RELIEF PREJUDICIAL JOIN NOT HELD ON 11/06/2007

JOYCE A WHEELER , JUSTICE

Attorney: ROBERT LEBRASSEUR

DA: JULIA SHERIDAN Reporter: PENNY PHILBRICK-CARVER
Defendant Present in Court

PSK

HEARING - MOTION TO SUPPRESS NOT HELD ON 11/15/2007

WITHDRAWN BY PHONE

MRP

11/15/2007 Charge(s): 1,2,3,4

MOTION - MOTION TO SUPPRESS WITHDRAWN ON 11/15/2007

BY PHONE

MRP

11/20/07 Charge(s): 1,2,3,4

MOTION - MOTION RELIEF PREJUDICIAL JOIN DENIED ON 11/14/2007

JOYCE A WHEELER , JUDGE

JOYCE A WHEELER

CLERK

Clerk