IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal Action No.
v.	)	10-00320-11-CR-W-DGK
	)	
ARMANDO MENDEZ,	)	
	)	
Defendant.	)	

O R D E R

Before the court is defendant's motion for severance of defendants on the grounds that (1) the defendants are improperly joined in counts one and two because rather than being one massive conspiracy there may be multiple conspiracies, (2) he cannot call Juan Marron as a witness, (3) he cannot call Juan Marron's wife as a witness because she would claim the marital privilege, (4) the jury will not be able to compartmentalize the evidence due to the negligible evidence against defendant Mendez. I find that defendant is properly joined and that he has raised no issues mandating severance. Therefore, his motion for severance is denied.

I. BACKGROUND

On November 18, 2010, an indictment was returned charging defendant and 18 others with one count of conspiracy to distribute cocaine, cocaine base, and marijuana, in violation of 21 U.S.C. § 846, and one count of conspiracy to conduct financial transactions involving the proceeds of the conspiracy to

distribute controlled substances, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (h). The indictment charges all 19 defendants with these two conspiracies and includes a criminal forfeiture allegation against nine of the defendants.

II. MOTION FOR SEVERANCE

The issues of joinder and severance are governed by Rules 8 and 14, Federal Rules of Criminal Procedure. Rule 8 establishes the requirements for joinder of offenses or defendants in the same indictment. Rule 14 allows the trial court to order severance, even though joinder of offenses or defendants is proper under Rule 8, if it appears that the defendant or government is prejudiced by the joinder. The objective of both rules is to balance the prejudice inherent in joint trials against the interests in judicial economy.

A. JOINDER

Joint trials play a vital role in the criminal justice system. Richardson v. Marsh, 481 U.S. 200, 209 (1987). They promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." Id., at 210.

Whether joinder of defendants is proper is a question of law which is reviewed de novo. United States v. Robaina, 39 F.3d 858, 861 (8th Cir. 1994). The specific joinder standards of Rule 8 are not themselves of Constitutional magnitude. United States

v. Lane, 474 U.S. 438, 446 (1986). Improper joinder does not, in itself, violate the Constitution; rather, misjoinder would rise to the level of a Constitutional violation only if it results in prejudice so great as to deny a defendant his or her Fifth Amendment right to a fair trial. Id. at 446 n. 8.

Whether joinder is proper is generally to be determined from the face of the indictment. United States v. Willis, 940 F.2d 1136, 1138 (8th Cir. 1991), cert. denied, 507 U.S. 971 (1993); United States v. Andrade, 788 F.2d 521, 529 (8th Cir.), cert. denied, 479 U.S. 963 (1986). Where an indictment charges all of the defendants with one overall count of conspiracy, joinder of defendants is proper under Rule 8. United States v. Lane, 474 U.S. at 447.

Defendant claims that there are really multiple conspiracies rather than one overall drug conspiracy (and presumably one overall financial conspiracy). Whether a single conspiracy or multiple conspiracies exist is a question for the jury and is not properly raised in a motion for severance. United States v. Willis, 940 F.2d 1136, 1139 (8th Cir. 1991), cert. denied, 507 U.S. 971 (1993); United States v. Regan, 940 F.2d 1134, 1135 (8th Cir. 1991).

Furthermore, there is no requirement that one conspirator be aware of the existence of all other conspirators in order to find that a single conspiracy exists. United States v. Watts, 950

F.2d 508, 512 (8th Cir. 1991); United States v. Alexander, 943 F.2d 825, 829-30 (8th Cir. 1991).

As the indictment in this case sets forth on its face a single conspiracy to distribute illegal drugs and a single conspiracy to conduct financial transactions using the proceeds of illegal activity, both naming all of the defendants, the defendants are properly joined for trial.

B. SEVERANCE

Once the Rule 8 requirements are met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14. United States v. Lane, 474 U.S. at 447. Rule 14 allows severance where joinder will result in unfair prejudice to a defendant.

The general rule is that persons charged in the same indictment should be tried together. Zafiro v. United States, 506 U.S. 534 (1993). Courts have long recognized that joint trials conserve government funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial. United States v. Lane, 474 U.S. at 449; Bruton v. United States, 391 U.S. 123, 134 (1968).

Severance under Rule 14 will not be granted absent a showing of unfair prejudice. United States v. Lane, 474 U.S. at 447. Severance is not required simply because a defendant might have a better chance of acquittal in a severed proceeding. United

States v. Blaylock, 421 F.3d 758, 766 (8th Cir. 2005); cert. denied, 546 U.S. 1126 (2006); United States v. Vue, 13 F.3d 1206, 1210 (8th Cir. 1994); United States v. Oakie, 12 F.3d 1436, 1441 (8th Cir. 1993). Furthermore, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion. Zafiro v. United States, 506 U.S. at 539. Where defendants are properly joined under Rule 8(b), severance should be granted only if there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. Accord United States v. Joiner, 418 F.3d 863, 868 (8th Cir. 2005); United States v. Horne, 4 F.3d 579, 590 (8th Cir. 1993), cert. denied, 510 U.S. 1138 (1994). Even when the risk of prejudice is high, limiting instructions often will suffice to cure any risk of prejudice. Zafiro v. United States, 506 U.S. at 539; Richardson v. Marsh, 481 U.S. at 211.

Joint trial of jointly indicted defendants is particularly appropriate when co-defendants are charged with conspiracy. United States v. Dijan, 37 F.3d 398, 402 (8th Cir. 1994), cert. denied, 514 U.S. 1043 (1995); United States v. Wint, 974 F.2d 961 (8th Cir. 1992), cert. denied, 506 U.S. 1062 (1993). Joint trial in those cases is favored especially when proof against the defendants is based upon the same evidence or acts. United

States v. Agofsky, 20 F.3d 866, 871 (8th Cir.), cert. denied, 513 U.S. 909 (1994); United States v. Rodgers, 18 F.3d 1425, 1431 (8th Cir. 1994). This will almost always be the case since all of the evidence presented against co-defendants will also be admissible against the moving defendant pursuant to Pinkerton v. United States, 328 U.S. 640 (1946), which held that a member of a conspiracy may be held responsible for a co-conspirator's acts and statements in furtherance of the conspiracy.

1. CO-DEFENDANT'S TESTIMONY

Defendant's assertion that he is entitled to a severance because of the potential for exculpatory testimony from co-defendant Juan Marron is without basis at this time. Before such a claim will mandate severance, it must first be shown that the co-defendant in question is actually willing to testify at a severed trial, and that the co-defendant's testimony will actually be substantially exculpatory. United States v. Vue, 13 F.3d 1206, 1210 (8th Cir. 1994). The Eighth Circuit has traditionally required a detailed showing of the particulars of the proffered testimony before requiring severance. United States v. Jackson, 549 F.2d 517, 524-25 (8th Cir.), cert. denied, 430 U.S. 985 (1977).

Defendant has identified Juan Marron as a co-defendant who cannot testify on defendant's behalf due to the joint trial. However, defendant does not even allege that Marron is willing to

testify. He merely states that Marron "cannot testify to Mr. Mendez's involvement or lack thereof without implicating his own involvement in the alleged conspiracy. As such, Defendant Marron refuses to testify for Mr. Mendez in the joint trial." Under these circumstances, severance will not automatically create an environment in which Juan Marron can testify without waiving his Fifth Amendment rights. If defendant is severed and tried first, Juan Marron will have to waive his Fifth Amendment rights in order to testify on defendant's behalf. United States v. Jackson, 549 F.2d 517, 524 (8th Cir. 1977). There is absolutely no indication that Juan Marron is willing to do this. Thus, his position that he will not waive his Fifth Amendment rights during a joint trial cannot be considered equivalent to assurances that he will testify for defendant at a separate trial. Id.

In addition to showing that a co-defendant would be willing to provide testimony, in order to obtain a severance, a defendant must also show that the co-defendant could give substantially exculpatory testimony. The question of whether severance should be granted cannot be answered in isolation by considering only the allegedly exculpatory evidence. Rather the court must consider the underlying acts which support the charges against the defendants, the nature of the evidence which the government intends to introduce to prove those charges, and the nature of the exculpatory evidence. United States v. Foote, 920 F.2d 1395,

1399 (8th Cir. 1990), cert. denied, 500 U.S. 946 (1991). The exculpatory evidence should be able to meet and genuinely call into doubt the evidence which the government has by more than mere denial before a severance is required. Id. Severance is not mandated simply because a co-defendant might testify and thereby only increase the chances of acquittal or tend to rebut some aspect of the government's case. Id.; United States v. Reed, 733 F.2d 492, 508 (8th Cir. 1984). The testimony must exculpate the defendant. A co-defendant's testimony that the defendant was not involved in any drug transactions does not meet this test. United States v. Foote, 920 F.2d at 1399.

According to his motion, defendant intends to call Juan Marron "to testify that Mr. Mendez was not involved in the [conspiracies] alleged by the prosecution." No further detail is offered. This proffer does not call into doubt the evidence which the government has against defendant. Testimony which consists of mere denial is not enough. Therefore, I find that defendant has not shown that co-defendant Juan Marron's testimony will actually be substantially exculpatory.

The same goes for defendant's allegation that he will be unable to call Juan Marron's wife if he is denied a severance. Defendant has alleged only that Mrs. Marron can say that defendant was simply a friend of the family and not involved in the conspiracies alleged by the government. There is no

indication that Mrs. Marron is willing to testify for defendant in the event of separate trials, and there is no allegation that Mrs. Marron will provide anything other than a general denial of defendant's involvement.[1]

2. JURY'S ABILITY TO COMPARTMENTALIZE THE EVIDENCE

Defendant argues that he is entitled to a severance because "a large portion of the evidence to be presented by the Government at trial will neither directly implicate Mr. Mendez of any wrongdoing nor even mention Defendant Mendez's involvement in any criminal acts."

Although a joint trial may make it more difficult for a defendant to defend himself, difficulty alone is not a reason to reject joinder. A showing of clear prejudice must be made. United States v. Agofsky, 20 F.3d 866, 871 (8th Cir.), cert. denied, 513 U.S. 909 (1994). Whether or not prejudice occurs depends primarily on whether the jury could compartmentalize the evidence against each defendant. Id. This is a question directed to the discretion of the trial judge and can normally be resolved through applicable jury instructions. United States v. Nevils, 897 F.2d 300, 305 (8th Cir.), cert. denied, 498 U.S. 844 (1990).

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[1]Nor is there any explanation as to how Mrs. Marron would have any knowledge of defendant's involvement in the drug business (or lack thereof) since she is not charged in the indictment.

Eighth Circuit Model Criminal Jury Instruction 5.06I allows the jury to consider acts done and statements made by co-conspirators during and in furtherance of the conspiracy "as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant" if the jury finds that a conspiracy exists. In addition, the trial court, before submitting the case to the jury, must find by a preponderance of the evidence that a conspiracy exists. United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978). Therefore, if the trial court and the jury find that a conspiracy exists, all of the evidence introduced against co-defendants will also be admissible against defendant on the conspiracy charges.

Eighth Circuit Model Criminal Jury Instruction 3.08 instructs the jury to give separate consideration to the evidence about each individual defendant. "Each defendant is entitled to be treated separately, and you must return a separate verdict for each defendant. Also keep in mind that you must consider, separately, each crime charged against each individual defendant, and must return a separate verdict for each of those crimes charged."

Finally, Eighth Circuit Model Criminal Jury Instruction 2.14 instructs the jury to consider evidence only in the case against a particular defendant. This instruction may be read to the jury

immediately before or after the introduction of evidence which is admissible only against a particular defendant.

Defendant offers no support for his argument that the jury will not be able to compartmentalize the evidence other than the general statement that he is "loosely connected" to Juan Marron and has little or no contact with many of the other co-defendants. This is not persuasive.

A defendant is not entitled to severance simply because the evidence against a co-defendant may be more weighty or damaging than the evidence against him. United States v. Roach, 28 F.3d 729, 738 (8th Cir. 1994); United States v. Rimell, 21 F.3d 281, 289 (8th Cir.), cert. denied, 513 U.S. 976 (1994). It is not enough to show that evidence admissible against a co-defendant will not be admissible against the moving defendant. United States v. Sparks, 949 F.2d 1023, 1027 (8th Cir. 1991), cert. denied, 504 U.S. 927 (1992); United States v. Reeves, 674 F.2d 739, 746 (8th Cir. 1982). Moreover, disparity in the evidence against each of the defendants or allegations that evidence incriminating a co-defendant will have a spillover prejudicial effect against the moving defendant are, alone, insufficient grounds for severance. United States v. O'Meara, 895 F.2d 1216, 1919 (8th Cir.), cert. denied, 498 U.S. 943 (1990). Thus, preference for joint trial of jointly indicted defendants is not limited by any requirement that the quantum of evidence of each

defendant's culpability be quantitatively or qualitatively equivalent. United States v. Swinney, 970 F.2d 494 (8th Cir.), cert. denied, 506 U.S. 1011 (1992); United States v. Pecina, 956 F.2d 186 (8th Cir. 1992); United States v. Pou, 953 F.2d 363, 368-69 (8th Cir), cert. denied, 504 U.S. 926 (1992); United States v. Stephenson, 924 F.2d 753, 761 (8th Cir.), cert. denied, 502 U.S. 813 (1991).

In this case, defendant is charged with the same counts as every other defendant. Therefore, all of the evidence presented against his co-defendants will also be admissible against defendant pursuant to Pinkerton v. United States, 328 U.S. 640 (1946) (a member of a conspiracy may be held responsible for a co-conspirator's acts and statements in furtherance of the conspiracy). Considering the cautionary instructions available and the counts as charged in the indictment, I do not believe the evidence will be so complex or muddled as to prevent the jury from separately considering the evidence against defendant Mendez.

III. CONCLUSION

Because defendant is properly joined with the other defendants indicted in this case, and because he has raised no issues which require a severance, it is

ORDERED that defendant's motion for an order severing him from the trial of the other defendants is denied.

Counsel are reminded that objections to this order on the ground that it is clearly erroneous or contrary to law must be filed and served within ten days.

/s/ Robert E. Larsen
ROBERT E. LARSEN
United States Magistrate Judge

Kansas City, Missouri
July 28, 2011