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SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-16 - QUEENS COUNTY
125-01 QUEENS BLVD., KEW GARDENS, NY 11415

P R E S E N T:

HON. RANDALL T. ENG,
JUSTICE

THE PEOPLE OF THE STATE OF NEW YORK -against- ROBERT VERNACE A/K/A BARTOLOMEO VERNACE A/K/A "PEPE" VERNACE Defendant	Motion TO CONSOLIDATE CROSS-MOTION FOR SANCTIONS Ind. No. 3739/98
THE PEOPLE OF THE STATE OF NEW YORK -against- FRANK RICCARDI A/K/A FRENCHY, GEECH Defendant	Ind. No. 921/82

RUBINSTEIN & COROZZO, P.C.
BY JOSEPH R. COROZZO, JR., ESQ.
For the Cross-Motion for Sanctions

ROBERT J. SCHWERDT, ADA
For the Motion to Consolidate

ROBERT J. SCHWERDT, ADA
Opposed

RUBINSTEIN & COROZZO, P.C.
BY JOSEPH R. COROZZO, JR., ESQ.
FOR DEFENDANT VERNACE

LAWRENCE M. HERRMANN, ESQ.
FOR DEFENDANT RICCARDI
Opposed

The People's motion for an order consolidating for trial the above-captioned indictments is granted.

The Defendant Vernace's cross-motion for sanctions is denied in part and denied without prejudice to renewal with respect to Gun "B" and related ballistics documents (see, memorandum decision, dated January 28, 2002).

Date: January 28, 2002

RANDALL T. ENG, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-16

THE PEOPLE OF THE STATE OF NEW YORK	BY: RANDALL T. ENG, J.
	DATED: JANUARY 28, 2002
-against-	
	INDICTMENT NO. 3739/98
ROBERT VERNACE A/K/A BARTOLOMEO VERNACE A/K/A "PEPE" VERNACE	
Defendant	

THE PEOPLE OF THE STATE OF NEW YORK	INDICTMENT NO. 921/82
-against-	
FRANK RICCARDI A/K/A FRENCHY, GEECH	
Defendant	

The defendants are each charged in the above-captioned indictments with two counts of Murder in the Second Degree (PL 125.25(1); one count as to the victim, John D'Agnese, and one count as to the victim, Richard Godkin. The charges arise from an incident which occurred on April 11, 1981, at the Shamrock Bar, in Woodhaven, Queens. It is alleged that Robert Vernace and Frank

Riccardi, together with one Ronald Barlin[1], participated in the shooting deaths of the two victims.

For reasons found legally permissible by the Court of Appeals (People v. Vernace, 96 NY2d 886), the defendant Vernace was not indicted until November 19, 1998, some seventeen years after the incident. The defendant Riccardi, though under indictment, remained a fugitive until his apprehension upon an arrest warrant in the State of Florida, on or about August 20, 2001, some twenty years after the killings.

The People have now moved, pursuant to CPL 200.40(2), for an order consolidating Indictments 3379/98 and 921/82, so that the pending charges may be heard in a single trial. Both defendants have submitted affirmations in opposition to consolidation. In addition, the defendant Vernace has cross-moved for sanctions, pursuant to CPL 240.70(1). The People have opposed that application.

I. The Consolidation Motion

It is well settled that "consolidation of indictments is permissible unless a joint trial would so prejudice a defendant as to deny him a fair trial" (People v. Griffin, 137 AD2d 558, app. denied 70 NY2d 1006; citing People v. Grant, 96 AD2d 867; People v. Haynes, 88 AD2d 1070).

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[1]The indictment against Mr. Barlin was dismissed by the Court (J. Agresta) in 1983, upon a motion by the People. At that time, the defendant Riccardi was being sought as a fugitive pursuant to an arrest warrant.

Subdivision 2 of Section 200.40 of the CPL provides that "when two or more defendants are charged in separate indictments with an offense or offenses but could have been so charged in a single indictment under subdivision one...the court may, upon application of the People, order that such indictments be consolidated and the charges be heard in a single trial." Subdivision one (CPL 200.40) provides, in pertinent part, that: "two or more defendants may be jointly charged in a single indictment provided that:

(a) all such defendants are jointly charged with every offense alleged therein; or

(c) all the offenses charged are based upon the same criminal transaction as that term is defined in subdivision two of section 40.10."

In the case at bar, but for the problems in the identification of the defendant Vernace as the alleged third gunman, both defendants could have been charged under Indictment 921/82. Each defendant is charged with the same two violations of the Penal Law (2 counts of PL 125.25(1)) and all of the offenses are based upon the same criminal transaction. The proof at trial will be the same as against both defendants and will be supplied by the same witnesses.

In opposing the People's motion to consolidate, the defendant Riccardi alleges that there is a likelihood that his proposed alibi defense will conflict with and be inconsistent with the defense of Vernace. The defendant does not attempt to explain just how that defense will be in conflict with Vernace's defense strategy, but merely alleges same in conclusory language. The seminal case which discusses conflicting and antagonistic defenses is People v. Mahboubian (74 NY2d 174), wherein the Court of Appeals, in addressing a severance issue, stated; "a severance is compelled where the core of each defense is in irreconcilable conflict with each other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer the defendant's guilt" (74 NY2d 174, at 184).

Mere differences in trial strategies or inconsistencies in defenses are not, standing alone, sufficient cause to deny consolidation where the provisions of CPL 200.40(1) would have originally permitted joinder of the two defendants in a single indictment. Judicial economy and the convenience of witnesses must be taken into account, especially where the defendant Riccardi has failed show how an ordinary alibi defense is in irreconcilable conflict with the trial defense of Vernace[2].

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[2]The defendant Vernace has not made known what his defense at trial will be and so the defendant Riccardi is left to mere speculation.

The defendant Riccardi also contends that joinder should not be permitted since to do so would result in his being moved to trial prematurely. A review of the certified court minutes for December 3, 2001, the date of the defendant's arraignment on the instant charges, reveals that counsel for defendant did not object to the schedule that the Court set for the defendant's omnibus motion. Counsel did ask for additional time to answer the People's motion to consolidate and the Court granted that application. Pursuant to the defendant's omnibus motion, certain pre-trial suppression hearings were ordered and they will proceed in a timely fashion. Should the defendant need additional time to prepare his case for trial, then, upon proper application, the Court will consider the defendant's request and, upon good cause being demonstrated, will allow a reasonable delay.

The defendant Vernace has also opposed the People's motion to consolidate. This defendant's opposition is based upon a fear that should the Court grant his cross-motion, wherein the defendant seeks sanctions in the form of preclusion of evidence and/or adverse inference charges at trial, jury confusion and possible prejudice would result as the jury would unavoidably wonder why these remedies would only be directed in favor of one defendant and not the other.

As will be discussed herein, the Court is not in a position at this state of the proceedings to address with finality certain aspects of the defendant's cross-motion for sanctions. However, should sanctions be, in fact, imposed at trial, the

defendant Riccardi would more than likely also receive the benefits of any preclusion order and/or any adverse inference charge(s), since both defendants are identically charged and will be facing the same evidence at trial. Consequently, the jury would not be left to speculate why both defendants were not similarly situated, thereby obviating any potential undue prejudice to the defendant Vernace.

Moreover, the possibility that only one defendant might receive the benefit of a sanction is not reason to bar a consolidation of two indictments. Evidence, in the form of testimony or physical evidence, is very often admitted as against only one defendant at a joint trial and the jury is then curatively instructed by the court as to the manner in which it should consider that piece of evidence.

Accordingly, the People's motion to consolidate Indictments 3739/98 and 921/82 for trial is granted.

II. The Vernace Cross-Motion for Sanctions

In support of the application for sanctions, the defendant alleges that the following discoverable pieces of evidence are no longer available for inspection by the defense: two .38 caliber revolvers allegedly linked to the crime and found at he scene and various police reports. The documents no longer available may consist of ballistic reports and DDS interviews of witnesses.

The weapons in question have been heretofore identified as Gun "A" and Gun "B." The first gun found at the scene, Gun "A," belonged to one of the victims, John D' Agnese. Gun "A" was ballistically examined by the police in 1981. It was found to be

operable and to contain 5 live cartridges in its 5 chambers. The ballistic report, a copy of which has been furnished to the defendant, further found that Gun "A," properly licensed to the victim, contained no evidence of recent discharge. Gun "A' is no longer in the possession of the police, having been presumably released to a representative of the victim's family some 20 years ago. Prior to its release, the gun was not compared to the bullet recovered from the ceiling of the Shamrock Bar by the police forensic team.

The defense does not allege bad faith upon the part of the People in releasing this particular weapon, an item admittedly belonging to one of the victims. Nor does the Court find that the defendant has been prejudiced by the failure of the police to compare the gun to the slug removed from the bar's ceiling or by the fact that Gun "A" is not now available for testing. Although the Court has not yet heard testimony from live eyewitnesses to the shooting, it is sufficiently acquainted with the facts and circumstances of this case to find that it is unreasonable and illogical to suggest that the victim of the homicide was responsible for a slug being found in the ceiling of the bar. To posit, in the alternative, that it might have been his gun that fired a bullet into the ceiling on "a different night" is pure speculation[3]. Therefore, that branch of the defendant's motion seeking sanctions with respect to the unavailability of Gun "A" is found to lack merit

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[3]Should the evidence at trial disclose otherwise, the Court would be constrained to re-visit the question of sanctions as to Gun "A".

and is denied as a matter of discretion by this Court.

Turning to Gun "B," it is conceded by the People that this gun, as well as the report of the original ballistics comparison test performed in 1981, are both missing. However, before the gun was destroyed by the police, a new comparison test was performed in 1998. The test rounds from the weapon were preserved for possible defense examination, along with the deformed bullet taken from the ceiling of the bar.

Again, the defense does not claim that the weapon or the report was lost or destroyed in bad faith, or that the gun was destroyed other than in the regular course of business of the police department (see, PL 400.05; People v. Pilbeam, 209 AD2d 935). Nevertheless, since the matter was still "technically" open, it would have served the People's interests to maintain the weapon in a secure location. In fact, the Appellate Division in reversing this Court's decision to dismiss the indictment because of pre-indictment delay stated as follows:

> "The defendant claims that he is prejudiced because a .38 caliber revolver which had been linked to these homicides is missing, as are several police reports. The absence of those items does not prejudice the defendant, rather, it serves to undermine the People's ability to prosecute the case" (People v. Vernace, 274 AD2d 595, 597).

Since the People have an affirmative obligation to preserve all discoverable evidence within their possession (People v. James, 93 NY2d 620; People v. Martinez, 71 NY2d 937; People v. Kelly, 62 NY2d 516), the Court will, during the course of the trial, consider the issue of possible and appropriate sanctions against the People. The trial not having commenced, it is premature to announce what, if any, sanctions may be then be imposed. Additional factors such as actual prejudice, if any, to the defendant; the length of time between the seizure of the evidence and its loss and/or destruction; any possible future testing by the defense; cross-examination of witnesses; and, the objective reason, whether routine police activity or negligence, for the destruction of the weapon must be considered in toto by the Court. Therefore, that branch of the defendant's motion seeking sanctions with respect to Gun "B" and related ballistics report is denied, without prejudice to renewal during the course of trial.

Finally, the People have affirmatively stated, both during the lengthy pre-trial proceedings held herein and in their affirmation in opposition to the defendant's cross-motion for sanctions, that the only missing documents, or DDS's relating to witnesses are those prepared in conjunction with interviews of an eyewitness named Linda Gotti. Ms. Gotti will not be a People's witness at this trial. Therefore, the issue of sanctions with regard to those documents is moot and that branch of the cross-motion is denied.

The foregoing constitutes the opinion and decision of the Court.

Order signed herewith.

The Clerk shall forward copies of this decision and the accompanying order to counsel for both defendants and to the People.

RANDALL T. ENG, J.S.C.