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SUPERIOR COURT OF NEW JERSEY
COUNTY OF CAPE MAY
LAW DIVISION – CRIMINAL
SUPERSEDING IND. NO. 23-7-00109-S
CASE NO. CPM-22-000535

STATE OF NEW JERSEY, :

Plaintiff, :

v. :

ERNEST V. TROIANO, JR., et al., :

Defendants. :

CRIMINAL ACTION

STATE'S RESPONSE TO MOTION TO SEVER BY DEFENDANT ERNEST V. TROIANO, JR.

TO: HON. BERNARD E. DELURY, JR., P.J.Cr.
Cape May County Courthouse
Criminal Division
9 North Main Street
Cape May Courthouse, New Jersey 08210

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Please accept this letter in lieu of a more formal brief in response to defendant Ernest V. Troiano, Jr.'s motion to sever his trial from that of his co-defendants in the above-captioned matter. For the reasons set forth herein, this Court should deny that motion.

BACKGROUND

On March 10, 2023, a State Grand Jury returned Indictment No. 23-3-00038-S charging defendant, Ernest V. Troiano, Jr., with second-degree Official Misconduct, in violation of N.J.S.A. 2C:30-2 (Count One), second-degree Theft by Unlawful Taking, in violation of N.J.S.A. 2C:20-3 (Count Four), third-degree Tampering with Public Records, in violation of

N.J.S.A. 2C:28-7a(2) (Count Seven), and fourth-degree Falsifying or Tampering with Records, in violation of N.J.S.A. 2C:21-4a (Count Ten).[1] Defendant subsequently filed a motion to dismiss the indictment, which this Court granted by way of a written decision dated June 23, 2023. On July 31, 2023, a State Grand Jury returned superseding Indictment No. 23-7-00109-S again charging defendant with the same four offenses.[2] Defendant again filed a motion to dismiss the indictment, which this Court denied by way of a written decision dated December 8, 2023. Defendant moved for leave to appeal that decision before the Appellate Division, which denied the motion.

The State will rely on statements of fact set forth more fully in its prior submissions other than to restate the following brief synopsis. The central allegations of this matter are as follows: state law requires local elected officials to work full-time in those positions to participate in the publicly funded State Health Benefits Program (SHBP); the defendants, as locally elected Wildwood City officials, were not working full-time hours, maintaining set schedules or even accurately documenting any of the time that they actually worked; instead, they had simply passed and/or relied upon a resolution declaring themselves to be full-time employees, at least in name, in order to gain access to SHBP coverage any way.

LEGAL ARGUMENT

The defendants in this matter were jointly indicted because they hold or held the same elected positions in the same municipality and the case against them involves the same general conduct, the same witnesses, the same type of evidence and the exact same applicable healthcare-coverage law. They should be jointly tried for the same reasons.

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[1] This indictment further charged co-defendants Peter J. Byron and Steven E. Mikulski separately and individually with those same four offenses.

[2] This superseding indictment also charged co-defendants Byron and Mikulski again separately and individually with those same four offenses.

Rule 3:7-7, governing joinder of defendants, provides that:

> Two or more defendants may be charged in the same indictment or accusation if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charge in each count. The disposition of the indictment or accusation as to one or more of several defendants joined in the same indictment or accusation shall not affect the right of the State to proceed against the other defendants.

Beyond that, there is a "general preference to try co-defendants jointly," State v. Robinson, 253 N.J. Super. 346, 364 (App. Div. 2012), particularly when "much of the same evidence is needed to prosecute each defendant," State v. Brown, 118 N.J. 595, 605 (1990). That said, "a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." State v. Sanchez, 143 N.J. 273, 290 (1996). In that respect, under certain circumstances, Rule 3:7-7 also states that "[r]elief from prejudicial joinder shall be afforded as provided by R. 3:15-2," which allows for separate trials where jointly indicted defendants may be prejudiced by being tried jointly.

> If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.
>
> [R. 3:15-2(b).]

Regarding that provision, separate trials generally are only "necessary when [the] co-defendants' defenses are antagonistic and mutually exclusive or irreconcilable." State v. Brown, 170 N.J. 138, 160 (2001) (internal quotations and citation omitted). But this requires one or both defendants to establish – by a "rigorous" showing – that their defenses "are not simply at odds, but are 'antagonistic at their core,' meaning that they are mutually exclusive and the jury could believe only one of them." State v. Weaver, 219 N.J. 131, 148-49 (2014) (citation omitted).

"Mutual exclusivity" in this context means that the jury's universe of choices has been limited to just two; that it can only believe either one defendant or the other; that to accept the core defense of one defendant, it must have to reject the core defense of the other; and that it can thus find only one of those defendants guilty. State v. Brown, 118 N.J. 595, 606 (1990). In that sense, defenses that do not demand that the jury choose one or the other to return a verdict, even if clearly in conflict and antagonistic, are not "mutually exclusive" and therefore would not warrant severance. Ibid.

Likewise, "the potential for prejudice inherent in the mere fact of joinder does not of itself encompass a sufficient threat to compel a separate trial." State v. Scioscia, 200 N.J. Super. 28, 42 (App. Div. 1985). So "severance should not be granted merely because it would offer [a given] defendant a better chance of acquittal." Id. at 42-43 (internal quotations and citation omitted). For example, courts have specifically held that severance was not warranted where the only basis for separate trials was that some evidence would be admissible as to only one codefendant, State v. Mayberry, 52 N.J. 413, 421 (1968), or where the evidence against one defendant was stronger than that against another, State v. Laws, 50 N.J. 159, 175-76 (1967). The "danger of guilt by association . . . can generally be defeated by forceful instructions to the jury to consider each defendant separately." Scioscia, supra, 200 N.J. Super. at 43.

Here, defendant Troiano suggests that he and his co-defendants should receive separate trials for a few mistaken reasons, one being because there may have been no collusion among them. But that fact fails to afford a legitimate basis for severance. Collusion, conspiracy, common scheme, none of this is necessary to justify a joint trial of multiple defendants. Even if the defendants were not conspiring together to defraud the SHBP, they all basically committed the same offenses while holding the same public offices in the same municipality during

overlapping timeframes. The evidence against the defendants all takes the same basic form and involves all of the same witnesses, particularly the multitude of city officials with whom they worked. Likewise, the defendants' timekeeping records, their timesheets, were all of the same type and all, but for defendant Mikulski's from March 2020 forward, were completed in the same manner showing the same uniformly (mis)reported seven-hour weekday workdays. That defendant Troiano may have worked more city hours than his co-defendants does not mean, as he appears to suggest, (see Defendant's Brief at 3), that he was working enough city hours to satisfy the full-time weekly 35-hour requirement for SHBP participation, let alone that he should receive a separate trial. And regardless of any "official" employment status described in a resolution or on paper, the State's various witnesses described the commissioners' positions as, in reality, part-time posts requiring no more than part-time hours. On that, of defendant, they spoke no differently.[3]

Further asserting the State's evidence against each individual defendant is irrelevant to the others, defendant Troiano also seeks severance based on his characterization of the State's case as unique as to each of the three charged defendants. He suggests that evidence of timekeeping, work schedules and outside employment is only relevant if related to a particular defendant. In that regard, he further suggests that such evidence concerning the schedules of his co-defendants would be irrelevant as to him, as to a determination whether he himself was regularly working full-time, 35-hour weekly schedules. Defendant is most assuredly mistaken.

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[3] Regardless of the commissioners' varying tasks or responsibilities overseeing different city departments, the State's proofs rely not on assumptions based on such enumerated duties. They instead rely, among other things, on actual timekeeping records and the testimony of city-official witness accounts, themselves based on direct observation and experience. They further rely on the non-city work in which defendants were involved, their other jobs, primary employment and personally owned businesses. See Defendant's Brief at 3.

The proofs against his co-defendants are not at all as "distinct and irrelevant" as to defendant Troiano as his brief asserts, not remotely. The work schedules of co-defendants Byron and Mikulski are as relevant to Troiano as they are to each other and, for that matter, to those of former Commissioner [redacted] and current Commissioner [redacted]. These are the only five people to have held a city commissioner's position during the subject period.[4] The first three have been indicted for, in part, fraudulently obtaining SHBP coverage by falsely claiming to be full-time city employees. The latter two, who were not indicted, instead acknowledged the commissioners' positions were indeed part-time in nature, as did the array of city officials with whom the State's detectives spoke.

One of the State's fundamental arguments in this matter is that none of these defendants and commissioners were regularly working full-time hours because the positions simply do not involve schedules and workloads regularly requiring that much time. Of that, those city-official witnesses, including the two unindicted commissioners, spoke similarly. So, in that respect, considering the timekeeping records and general schedules of all five individuals who held a commissioner's post during the relevant period, such proofs are not necessarily just "personal" to each individual defendant. And the proofs as such establish more than just how defendant Troiano was not regularly working full-time hours. They reinforce that fact by further showing how none of the commissioners were doing so because the commissioners' positions neither call for nor entail regular full-time hours or schedules.

Finally, to the extent that defendant points out how "there is simply no direct evidence of how many hours the Commissioners were working for several years, and that no one generally

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[4] These commissioners' positions were held: by defendant Troiano from 2011 through 2019 and again from January 2024 through the present; defendant Byron from 2011 until his resignation in 2023; defendant Mikulski from 2020 through the present; [redacted] from 2011 through 2019; and [redacted] from 2020 through the present.

monitored or recorded their time," (see Defendant's Brief at 4), the State for the most part would agree. That was a large part of the problem, the defendants' commonly shared complete lack of accountability.

CONCLUSION

Based on the foregoing, this Court should deny defendant Troiano's trial severance motion.

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Date: February 2, 2024