

A.C. 32747 (HHD-CR09-0628569-T; HHD-CR09-0635038-T)

STATE OF CONNECTICUT : SUPREME COURT
v. : STATE OF CONNECTICUT
EDDIE A. PEREZ : FEBRUARY 6, 2014

**DEFENDANT-APPELLANT'S OPPOSITION TO THE STATE'S PETITION FOR
CERTIFICATION**

The Defendant-Appellant, Eddie A. Perez, pursuant to Practice Book § 84-1 et seq., hereby submits his opposition to the State's petition to have this Court to review the Appellate Court's ruling in State v. Perez, 147 Conn. App. 53 (2013).

QUESTIONS PRESENTED BY THE STATE

- I. Whether the Appellate Court majority erred when it ruled that it was an abuse of discretion to join two political corruption cases pursuant to State v. Boscarino, 204 Conn. 714 (1987), and that joinder was not harmless?
- II. Whether the Appellate Court erred in finding that refusing to sever the cases violated the defendant's right to testify in one case while remaining silent in the other?

SUMMARY OF THE CASE

On January 27, 2009, the State charged the Defendant with bribe receiving and fabricating evidence. The State later charged Mr. Perez with larceny by extortion in connection with an unrelated matter. On September 10, 2009, the State moved to consolidate the two cases for trial. The Defendant objected to the consolidation and, after a hearing on November 4, 2009, the trial court granted the State's motion to consolidate. Several more times, including at the close of the State's case on the bribery charges, the close of its case on the extortion charges, and at the close of all evidence, the Defendant moved for severance. All of his motions were denied by the trial court.

The jury found Mr. Perez guilty on all counts but one count of fabricating physical evidence. He was sentenced to a total effective sentence of eight years, execution

suspended after three years, followed by a term of three years of probation. On appeal, the Appellate Court agreed with the Defendant that the trial court abused its discretion in joining the separate informations for trial and that it also later abused its discretion by failing to sever the cases after the State completed its evidence on the bribery charges.

REASONS CERTIFICATION SHOULD NOT BE GRANTED

- I. **The Appellate Court majority properly ruled that it was an abuse of discretion to join two political corruption cases pursuant to State v. Boscarino, 204 Conn. 714 (1987), and that the defendant was harmed**

- A. **The decision is not in conflict with this Court's precedent**

- i. **Retrospective Analysis of the Boscarino factors was appropriate**

As one of its bases for requesting certification, the State takes issue with the fact that the majority opinion evaluated the trial court's decision to join the cases with the benefit of hindsight, looking at the completed trial, and determining that the cases were too complex to keep separate. See State's Petition for Certification (hereafter "State's Petition"), p. 4. The State believes that Judge Lavine's analysis of the joinder issue, in his concurrence, which was based on the information the trial court had before it at the time of the decision, was the correct analysis. On that basis, Judge Lavine concluded that the trial court did not abuse its discretion when it joined the cases because defense counsel's proffer was insufficient. State v. Perez, supra, at 131. The State argues that this Court should clarify which analysis is correct. This, however, is not necessary because this Court has already provided the appropriate guidance to the lower courts on this issue. This Court has long evaluated the Boscarino factors retrospectively when analyzing whether a trial court abused its discretion in joining cases from separate Informations. Notwithstanding this, even if that is the inappropriate standard, the information placed before the trial court relative to the joinder argument on November 4, 2009 was sufficient for the court to deny the motion to consolidate, contrary to Judge Lavine's opinion.

On November 4, 2009, defense counsel was forced to proffer the reasons why a joint trial would substantially prejudice the Defendant's right to a fair trial, before having even been presented with the State's voluminous discovery on the extortion case. Tr. 11/4/09, p.11. A task of this magnitude, in which defense counsel is asked to predict the future, is obviously based upon speculation and conjecture, and therefore can never be perfect. Even with those handicaps, however, defense counsel set forth numerous arguments in support of separate trials, going beyond the enumerated Boscarino factors, to include that [1] a critical witness, Abraham Giles, with significant exculpatory information, would not testify if the cases were consolidated (Tr.11/4/09, p. 8, 14); [2] the larceny case was expected to be highly complicated given that 100 witnesses testified before the grand juror (p.11); [3] the State conceded that the cases were not cross-admissible (p.15); [4] in cases where the evidence is not cross-admissible, and nevertheless the cases are joined, the jury will hear evidence it would not otherwise have heard if the cases remained separate, leading to the danger that the jury would accumulate the evidence against the Defendant (p.16); [5] many of the witnesses would overlap, confusing the jury and blending the cases together (p.16); [6] the legal issues presented in the cases were complex (p.17); and [7] the extortion charges were full of subplots, the explanation of which took up five pages in the arrest warrant affidavit alone (p.18). Based upon the foregoing, along with the arguments set forth in the Defendant's written Objection to the Motion to Consolidate, defense counsel sustained his burden of establishing that joinder would substantially prejudice the Defendant, prior to the commencement of the trial. The trial court therefore abused its discretion in granting the motion to consolidate, as the majority properly concluded.

It is perhaps because of this daunting task of having to predict the future that this Court's analysis of the Boscarino factors in determining whether a trial court abused its discretion in joining separate cases has largely been retrospective. The State claims that a

retrospective analysis is contrary to this Court's precedent. However, Boscarino, itself, reviewed the trial court's decision on a retrospective basis.

In State v. Boscarino, our Supreme Court concluded that where the trial lasted approximately ten weeks, the jury heard testimony from approximately fifty-five witnesses, some of whom testified in more than one case, and examined sixty-six exhibits, "it was highly likely that the jury might confuse the evidence in separate cases."

State v. Perez, at 102 (internal citation omitted). Indeed, in State v. Herring, this Court concluded that it would not limit its review of the defendant's claim because the defendant failed to raise any specific Boscarino factors as grounds for severance, acknowledging that it is difficult to predict how the denial of severance may affect the trial:

Despite the general rule that "this court will not consider claimed errors on the part of the trial court unless there has been a compliance with the provisions of § 652 [now § 4185] of the Practice Book"; that rule cannot foreclose a review in the present circumstances. Several of the factors that we stressed in State v. Boscarino require hindsight in determining whether the defendant received a fair trial. While it may be relevant to consider whether the defendant raised the question of prejudice at trial or requested appropriate curative instructions, the effect of a denial of severance may be difficult to predict in advance of the actual testimony at trial.

State v. Herring, 210 Conn. 78, 96, n. 16 (1989) (internal citations omitted); see also State v. Davis, 286 Conn. 17 (2008) ("to resolve the defendant's claim, we must compare the evidence adduced in the Standberry case with the evidence adduced in the Smith and Hughes cases to ascertain whether the defendant's conduct in the Standberry case was brutal and shocking in nature and, therefore, likely to have inflamed the passions of the jurors."); State v. Horne, 215 Conn. 538, 548-51 (1990) (determining that evidence adduced at trial exposed defendant to prejudice and then considering whether trial court's instruction was adequate to mitigate that prejudice); State v. Bell, 188 Conn. 406, 411 (1982); State v. Jonas, 169 Conn. 566, 571 (1975). Consequently, because the majority

properly applied this Court's precedent in finding that the trial court abused its discretion, this is not a basis upon which this Court should grant certification.

ii. The Majority's assessment of "complexity" was correct

The State also claims that the majority's decision must be reviewed because it misconstrues the meaning of "complexity" under Boscarino, claiming that Boscarino

...was concerned that, when the jury evaluated the evidence after the ten week trial, the repetitive testimony and witnesses would blend together. This would result in the jury convicting the defendant in one case based on facts from another. Id. It was the tangling of similar facts involving the same crimes and the difficulty disentangling the facts that constituted complexity in Boscarino. Here, by contrast, although there was a large quantity of evidence and the cases overlapped temporally, none of the evidence was tangled in the least bit. The two cases and their proof were distinct.

State's Petition, at p. 5. The State, however, is attempting to limit the meaning of "complexity", when in fact there can be no mechanical approach to making that assessment. Even Judge Lavine, in his concurrence, acknowledges that "every case must be evaluated in light of its own facts and circumstances; no mechanical test can be applied." State v. Perez, at 132. In the present case, the majority outlined in great detail the complexity of this dual prosecution, including the number of witnesses, exhibits, trial days and a summary of the nature of the evidence submitted to the jury for consideration, including voluminous documents related to bids for city contracts, and so forth. Id. at 101-102. Based upon the particular facts of this case, Judge Lavine's assessment that the cases were nothing more than a "kitchen renovation and streetscape project and a parking lot purchase" seems a bit of an oversimplification. Id. at 132. Though the cases involved two separate scenarios, they were anything but "distinct", particularly in light of the State's blurring of the lines in its closing, lumping the two Informations together, stating that it was "a case about how the [defendant] abused [his] power for his own benefit, both financially and politically." Id. at 107. In addition to the State's closing remarks, the time periods in which these crimes were alleged to have occurred overlapped, and were not discrete

events, but rather spanned over the course of several years. Witnesses also overlapped, having testified in both cases.

Furthermore, this Court's precedent has given the Appellate Court sufficient guidance for determining the relative complexity of a case, thus requiring no further clarification from this Court. See State v. Payne, 303 Conn. 538, 552 (2012) ("The trial in this case lasted only two weeks, consisting of merely eight days of testimony and twenty-one witnesses" and therefore was not unduly long or complex); State v. Ancona, 256 Conn. 214, 220 (2001) ("we conclude that the length of the trial and number of witnesses in the present case are indicators of a trial that was neither too lengthy nor too complex for the jury to follow properly."); State v. Delgado, 243 Conn. 523, 536 (1998) ("the trial, which lasted eleven days and involved the testimony of twenty-five witnesses, was not unusually lengthy or complex."); State v. Atkinson, 235 Conn. 748, 766 (1996) ("the trial was not particularly complex or lengthy. In fact, the entire trial, including all testimony, closing arguments, jury instructions and jury deliberations, lasted only five days and consisted of fifteen witnesses, with the first nine addressing the murder incident and the last six addressing the escape incident."); State v. Jennings, 216 Conn. 647, 659-60 (1990) ("the trial was of short duration and the evidence was not complex. The jury heard testimony of fourteen witnesses over five days with the admission of twenty-eight exhibits."); State v. Herring, 210 Conn. 78, 97 (1989) (trial lasting eight days with twenty-three witnesses was not unduly long or complex).

The State claims that "'complex' must mean more than cases like these with many witnesses and exhibits," State's Petition, at 5, and in doing so, relies upon United States v. Casamento, 887 F.2d 1141, 1150 (2d Cir. 1989). This reliance is misplaced for at least two reasons. First, Casamento is a Second Circuit opinion and, although persuasive, is not the precedent of this jurisdiction. Boscarino governs the "complexity" analysis in this State. Second, Casamento was a multi-defendant case, involving the indictment of a massive

drug conspiracy, where evidence of the acts of one conspirator in furtherance of the conspiracy is evidence against all other conspirators. In that case, twenty-one defendants went to trial. Had the district court severed the cases, the prosecution would have been required to enter the **same evidence** against each defendant **twenty-one times**. Thus, this was not a case where the evidence was not cross-admissible between co-defendants. Notwithstanding that the Second Circuit found no error in the district court's decision not to sever the cases, it explained that it did "have misgivings about trials of this magnitude", including the great burden that they present upon jurors." Id. at 1151. Going forward, the Second Circuit warned that district courts should make an "assessment based upon various factors including the number of defendants, the time and territorial scope of the crimes charged, the number of witnesses likely to be called, and the number and size of exhibits likely to be introduced..." Id. at 1152.

B. There was no public policy violation because the jury was not improperly underestimated by the majority

The State also argues, seemingly in agreement with Judge Lavine, that "the majority 'significantly underestimates the ability of [Connecticut] juries to understand judicial proceedings and properly evaluate evidence.'" State v. Perez, supra, at 134 (Lavine J., concurring). State Petition, at 4. The State claims that because the jury questioned the trial court concerning whether or not presenting a false bill constituted fabricating evidence, and then later acquitted the Defendant on that charge, this must mean that the jury was able to consider each element of each crime and the facts relevant to each element separately. State's Petition, at 7. The State claims that "[t]he majority brushes aside this incontrovertible fulfillment of the presumption that jurors follow court's instructions..." Id.

That the panel was divided on the issue of whether this acquittal established a lack of prejudice is irrelevant in the overall analysis; the majority's finding of prejudice did not

rely on this one issue. The majority went through a lengthy error analysis, State v. Perez, at 109-114, and concluded that:

In a single trial, the jury was presented with a portrait of the defendant as a corrupt politician for two unrelated series of charges. It may well have accepted this characterization of the defendant and accumulated the evidence against him, used the evidence in one case to find him guilty in another, or used the sum of all of the evidence to find the defendant guilty of most of the individual counts contained in the two informations. The duration, nature, and complexity of the two cases created a situation where the prejudice from joinder could not be remedied by the court's instructions.

Id., at 112-13.

As a result, there is no public policy issue in this case that requires certification to this Court. The State takes the majority's conclusions out of the context of the particular facts of this case – a complex, white collar case involving two legally distinct crimes, each which took place over the course of years, requiring voluminous amounts of exhibits and the testimony of forty-two witnesses. The record further established that the cases were not as “impeccably distinguished” as the State claims. “[T]he intricate and overlapping fact patterns regarding the bribery and extortion cases...do not fall into easily identifiable scenarios”, like a murder and narcotics charge. State v. Perez, supra, at 108. Further, the State blurred the lines that it tried to demarcate throughout the trial in its closing arguments, explaining to the jury that the case “was about how the [defendant] abused [the power he had as the mayor of Hartford] for his own benefit, both financially and politically.” Id. “These statements, taken in context, painted the defendant as a politician who used his elected office as a conduit for both personal and political gain. As a result, the prosecutor’s comments obscured the lines between the bribery and extortion cases.” Id. The State makes references to the “near herculean” measures taken by the trial court to instruct the jury to keep the crimes separate. Curative instructions, however, are not always sufficient to overcome the prejudicial impact of inadmissible “other crimes” evidence. State v.

Boscarino, supra, at 724-25. Indeed, even Judge Lavine indicated that “it is an inherently suspect practice to require a defendant charged with political corruption to defend against multiple informations in one trial” because of the difficulty in evaluating intent. State v. Perez, at 134, n. 11.

II. The Appellate Court properly held that failing to sever the cases violated the defendant’s right to testify in one case while remaining silent in the other

The State next claims that the Appellate Court’s finding that the trial court’s denial of the motion to sever violated the Defendant’s right to testify was reviewed from inaccurate legal and factual premises because the Appellate Court reviewed the ruling on the wrong date. The State claims that the Appellate Court should not have reviewed the Defendant’s May 20, 2010 argument on severance, which was made at the close of the State’s bribery case, because the proffer made was insufficient. This is the opinion of the State’s counsel, not of the entirety of the panel, who did, in fact, view the May 20, 2010 proffer sufficient.

On May 20, 2010, in both the motion and at the subsequent hearing, the defendant explained the important need to testify in the bribery case, i.e., his reason for lying to Sullivan and the defendant’s responses to Costa’s testimony, and the strong need to refrain from testifying in the extortion case, i.e., avoiding cross-examination on areas of uncharged misconduct.

State v. Perez, at 122-23. The State cites to State v. Schroff, 198 Conn. 405, 409 (1986) in support of its claim that the Defendant did not make a convincing showing of the need to testify in one matter while refraining from testifying relative to another matter. The State seems to imply that in order to make a “convincing showing”, the Defendant must give a preview of his entire testimony and defense. This has never been required by this Court. All that is required is that the defendant present “*enough information...to satisfy the court that the claim of prejudice is genuine.*” State v. Schroff, supra, at 409 (emphasis supplied). The Appellate Court’s **unanimous** finding that the May 20, 2010 proffer was sufficient was based upon the Defendant’s Motion to Sever and the subsequent oral argument. In his

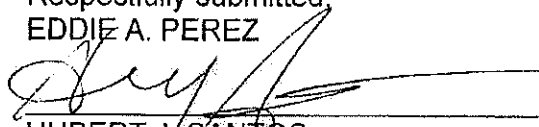
motion at paragraph 7, the Defendant explained four important reasons for needing to testify relative to the bribery charges. See Motion to Sever, p. 5-6. He also set forth three critical reasons why he could not testify relative to the extortion charges. Id. at p. 6-7. In further support, defense counsel proffered during the May 20th argument several additional reasons for severance, Tr.5/20/10, p. 145-155, including the fact that the cases were not cross-admissible, while also explaining that he could not have made this assessment any earlier in the case because he needed to evaluate the strength of the State's bribery case and its key witness' testimony. Id. at 151-52. The Appellate Court properly concluded that the trial court abused its discretion when it failed to sever the cases after this proffer by the Defendant. State v. Perez, at 114-115.

The State claims that the Appellate Court should have made its assessment based upon the June 11, 2010 proffer, which was made at the close of all of the State's evidence, because it was only then that the Defendant made a sufficient showing. That the Defendant's proffer was more specific on June 11, 2010 is of no moment. It is obvious that this later proffer was fully informed; counsel had the benefit of analyzing the entirety of the State's case and explaining the Defendant's reasons for wanting to testify in one case and not the other. This does not mean, however, that the May 20, 2010 proffer was insufficient.

The State also claims that the trial court's response to the June 11th proffer, that of allowing the Defendant to testify only on the bribery charges and remain silent on the extortion charges, was ignored by the Appellate Court. Tr.6/11/10, p. 20. This so-called remedy of the trial court was not ignored by the Appellate Court. Rather, the Appellate Court's decision that the May 20, 2010 proffer was sufficient to warrant a severance alleviated the need to address the trial court's proposed remedy at the conclusion of the State's case, which was a remedy without any teeth, since the jury would obviously be left to speculate as to why the Defendant chose to defend himself relative to only one set of charges.

Respectfully submitted,
EDDIE A. PEREZ

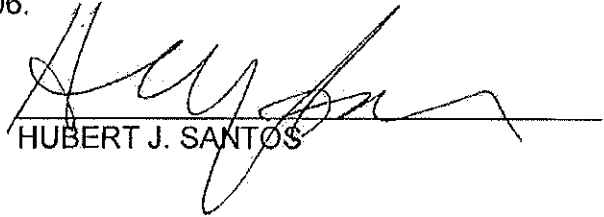
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CERTIFICATION OF FORMAT AND SERVICE

The undersigned hereby certifies that this document complies with all provisions Pursuant to Rules of Appellate Procedure §§ 62-7 and 84-6 and General Statutes § 52-259a, and further certifies that a copy of said document was mailed, postage prepaid, this 6th day of February, 2014 to: Harry Weller Senior Assistant State's Attorney, Office of the Chief State's Attorney, Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067, Tel. 860-258-5807, Fax 860-258-5828 and to Hartford Judicial District, Attn: Trial Court Clerk, 101 Lafayette Street, Hartford, CT 06106.



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