

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION- LONDON
INDICTMENT NO.: 6:20-CR-00011-REW-HAI**

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

MEMORANDUM IN SUPPORT OF SEVERANCE

MICHAEL WALLACE,

DEFENDANT.

The Defendant (hereinafter referred to as “Mr. Wallace”) and the Co-Defendant (hereinafter referred to as “Mr. Baldock”) were indicted on the 27th day of February, 2020 for allegedly conspiring to violate 18 U.S.C. § 241 (hereinafter referred to as “civil rights conspiracy allegations”). (R. 1). The Court subsequently sealed the indictment. (R. 3). The United States sought and obtained arrest warrants for both Mr. Wallace and Mr. Baldock. (R. 4, R. 15). Both Mr. Wallace and Mr. Baldock are duly elected Pulaski County Constables. The civil rights conspiracy allegations claim that Mr. Wallace and Mr. Baldock, while acting under the color of law, conspired to violate the civil rights of suspected criminals. (R. 1). The United States alleges the conspiracy commenced on the 18th day of November, 2018 and continued until the 24th day of September, 2019. (R. 1). Both Mr. Wallace and Mr. Baldock have denied the civil rights conspiracy allegations and entered pleas of not guilty (R. 14; R. 16).

Because the indictments were sealed by Court Order, neither Mr. Wallace nor Mr. Baldock had knowledge that they had been indicted. (R. 3). On the 6th day of March, 2020, agents for the Federal Bureau of Investigation (hereinafter referenced as the “F.B.I.”) executed simultaneous arrest warrants for both Mr. Wallace and Mr. Baldock. (R. 15, R. 21). Mr. Wallace was arrested at his residence, without issue, and released from custody later the same day. (R. 12).

However, gunfire was exchanged between Mr. Baldock and F.B.I. agents during the execution of Mr. Baldock's arrest warrant. (United States v. Gary Baldock, United States District Court, Eastern District of Kentucky, London Division Case No.: 6:20-mj-06032-HAI, R. 1). Both an F.B.I. agent and Mr. Baldock were wounded during the gunfire exchange. (United States v. Gary Baldock, United States District Court, Eastern District of Kentucky, London Division Case No.: 6:20-mj-06032-HAI, R. 1). As a result of the shooting incident, the United States sought and obtained a superseding indictment charging Mr. Baldock with the additional criminal offenses of attempted murder of an F.B.I. agent in violation of 18 U.S.C. § 1114 and discharge of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (hereinafter referenced as the "Baldock shooting incident"). (R. 26).

The indictments obtained by the United States do not claim the civil rights conspiracy allegations and the Baldock shooting incident are related. (R. 1; R. 26). The United States is not alleging Mr. Wallace committed a crime of violence, discharged a firearm in furtherance of a crime of violence, nor attempted to assault and/or murder an F.B.I. agent. (R. 1; R. 26). Simply put, the civil rights conspiracy allegations are not related to the Baldock shooting incident.

ARGUMENT

I. FED. R. CRIM. P. 8 REQUIRES THE CONSPIRACY CIVIL RIGHTS ALLEGATIONS OFFENSE TO BE SEVERED FROM THE BALDOCK SHOOTING INCIDENT OFFENSES.

The rule governing the joinder of offenses is set forth in Fed. R. Crim. P. 8(a).

"The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a).

If offenses joined in an indictment fail to comport with the strict mandates contained in Fed. R. Crim. P. 8, severance is required. *United States v. Chavis*, 296 F.3d 450, 456 (6th Cir. 2002); also see *United States v. Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982). The analysis to determine whether joinder is proper is confined to the face of the indictment. *United States v. Locklear*, 631 F.3d 364, 368 (6th Cir. 2011); also see *Chavis*, 296 F.3d at 456-457. Therefore, if from the face of the indictment, the charged offenses are not of the same or similar character, are not based on the same act or transaction, or not part of a common scheme or plan, severance is mandatory.

A. THE JOINED OFFENSES ARE NOT BASED ON THE SAME ACT OR TRANSACTION

The conspiracy civil rights allegations offense alleges that from November 2018 until September 2019 that Mr. Wallace and Mr. Baldock used their official capacities of duly elected and sworn Pulaski County constables to violate the civil rights of suspected criminals. The Baldock shooting incident offenses allege that on the morning of March 6, 2020 that Mr. Baldock attempted to murder an F.B.I. agent in the furtherance of his duties and discharged a firearm during the commission of a crime of violence. Clearly the civil rights allegations offense is not based on the same acts or transactions alleged in the Baldock shooting incident offenses as required for joinder pursuant to Fed. R. Crim. P. 8(a).

B. THE JOINED OFFENSES ARE NOT OF THE SAME OR SIMILAR CHARACTER

To meet the “same or similar” requirement of Fed. R. Crim. P. 8(a), the charged offenses must be substantially similar. *United States v. Hersh*, 297 F.3d 1233, 1242 (11th Cir. 2002). Factors considered for the “substantially similar” analysis are the elements of the charged offenses, the temporal proximity of the acts, the extent the evidence for the offenses overlap, the physical location of the charged acts, the modus operandi for the charged offenses, and the identity of the alleged

victims. United States v. Jawara, 474 F.3d 565, 578 (9th Cir. 2007). Applying the factors set forth Jawara, the civil rights conspiracy allegations offense should be severed from the Baldock shooting incident offenses.

The statutory elements required to prove the conspiracy to violate civil rights offense are set forth in 18 U.S.C. § 241 and are clearly distinct from the statutory elements required to prove the offenses of attempted murder of a federal agent in the furtherance of his duties as set forth in 18 U.S.C. § 1114 and discharge a firearm in furtherance of a crime of violence set forth in 18 U.S.C. § 924(c). Therefore, the elements of the offense factor weighs in favor of severing the civil rights conspiracy allegations offense from the Baldock shooting incident offenses.

While temporal proximity is not a controlling factor, it still must be considered. United States v. Nolan, 162 F. App'x 575, 578 (6th Cir. 2006). The civil rights conspiracy allegations are alleged to have occurred from November 2018 through September 2019. (R. 1 & R. 26). The Baldock shooting incident is alleged to have occurred on the morning of March 6, 2020—nearly six (6) months after the civil rights conspiracy allegations. Therefore, the temporal proximity factor weighs in favor of severing the civil rights conspiracy allegations offense from the Baldock shooting incident offenses.

The evidence required to prove the civil rights conspiracy allegations offense will be vastly different than the evidence required to prove the Baldock shooting incident offenses. The lack of overlapping evidence indicates that the joined offenses are not of the same or similar character and/or do not arise out of the same events. Chavis, 296 F.3d at 460. The evidence that will be presented for the Baldock shooting incident offenses will only pertain to Mr. Baldock and is irrelevant against Mr. Wallace regarding the charged civil rights conspiracy allegations offense.

Therefore, the lack of overlapping evidence weighs in favor of severing the civil rights conspiracy allegations offense from the Baldock shooting incident offenses.

Not a single event contained within the civil rights conspiracy allegations offense is alleged to have occurred at Mr. Baldock's personal residence. Instead, the civil rights conspiracy allegations are alleged to have occurred during official law enforcement investigations that Mr. Wallace and Mr. Baldock were conducting of suspected criminals. The Baldock shooting incident occurred at Mr. Baldock's personal residence. Therefore, because the civil rights conspiracy allegations offense is alleged to have occurred at different locations than the Baldock shooting incident offenses, the civil rights conspiracy allegations offense should be severed from the Baldock shooting incident offenses.

The alleged modus operandi for the charged offenses are different. The modus operandi alleged in the civil rights conspiracy allegations offense is that Mr. Wallace and Mr. Baldock used their authority as constables to deprive suspected criminals of their civil rights. The civil rights conspiracy allegations offense does claim Mr. Wallace and Mr. Baldock were conspiring to assault and/or murder law enforcement officers in the furtherance of their official duties and/or the discharge firearms during the commission of violent crimes. Accordingly, the modus operandi factor weighs in favor of severing the civil rights conspiracy allegations offense from the Baldock shooting incident offenses.

The alleged victims for the civil rights conspiracy allegations and the Baldock shooting incident are different. The alleged victims of the charged civil rights conspiracy allegations offense are the individuals suspected of committing criminal offenses against the peace and dignity of the Commonwealth of Kentucky. The alleged victim of the Baldock shooting incident offenses is a wounded F.B.I. agent. Thus, because the alleged victims of the civil rights conspiracy allegations

offense are not the same as the victim in the Baldock civil rights allegation offenses, the civil rights conspiracy allegations offense should be severed from the Baldock shooting incident offenses.

In summary, because the civil rights conspiracy allegations offense is not substantially similar to Baldock shooting incident offenses, Fed. R. Crim. P. 8(a) requires the offenses to be severed.

C. THE JOINED OFFENSES WERE NOT PART OF A COMMON SCHEME OR PLAN

As set forth above, the civil rights conspiracy allegations offense and the Baldock shooting incident offenses are not related. A nexus between joined offenses is required for proper joinder. *Jawara*, 474 F.3d at 574. Neither the allegations contained in the initial indictment nor the superseding indictment contain allegations that the civil rights conspiracy allegations offense and the Baldock shooting incident offenses are related. (R. 1; R. 26). As argued above, the government does not claim that the civil rights conspiracy allegations offense included a pattern of conduct that resulted in bodily injury and/or death to law enforcement officers in furtherance of their official duties and/or use of firearms during the commission of violent crimes. Accordingly, the civil rights conspiracy allegations offense and the Baldock shooting incident offenses were not part of a common scheme or plan as required for proper joinder under Fed. R. Crim. P. 8(a). Therefore, the civil rights conspiracy allegations offense should be severed from the Baldock shooting incident offenses.

II. BECAUSE MR. WALLACE WILL INCUR A SUBSTANTIAL PREJUDICE IF THE CIVIL RIGHTS CONSPIRACY ALLEGATIONS OFFENSE IS NOT SEVERED FROM THE BALDOCK SHOOTING INCIDENT OFFENSES, FED. R. CRIM. P. 14 REQUIRES THE OFFENSES TO BE SEVERED.

Fed. R. Crim. P. 14 mandates severance if it appears that joinder will prejudice the accused.

“If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court

may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14.

Prejudice occurs when it appears that a "jury would be unable to keep the evidence from each offense separate and unable to render a fair and impartial verdict on each offense." *United States v. Rox*, 692 F.2d 453, 454 (6th Cir. 1982). Evidence admissible against a charged defendant but not the other charged defendant creates the risk of prejudice. *Zafiro v. United States*, 506 U.S. 534, 539 quoting *Bruton v. United States*, 391 U.S. 123 (1968). Further, when different degrees of culpability for each charged defendant is alleged, there is a risk of prejudice. *Zafiro*, 506 U.S. at 539 quoting *Kotteakos v. United States*, 328 U.S. 750, 774-775 (1946). As such, if joinder of offenses results in a prejudice to the accused, the offenses should be severed.

Based on discovery produced by the government thus far, it appears the government intends to introduce a large volume evidence in regard to the civil rights conspiracy allegations offense against Mr. Wallace. To successfully defend against the government's allegations, Mr. Wallace will likewise present a large volume of rebuttal evidence. Hence, the government's projection it expects the jury trial will last five (5) days. (R. 14). Because of the large volume of evidence the government intends to introduce at trial in regard to the civil rights conspiracy allegations offense against Mr. Wallace and the large volume of evidence that will be presented by Mr. Wallace to disprove the offense, there is a substantial risk that a jury will not be able to separate the evidence from the evidence pertaining to the Baldock shooting incident offenses. As such, there is a real danger a jury may return an impermissible verdict for Mr. Wallace based, in part, on evidence pertaining to the Baldock shooting incident. Therefore, due to the danger of a real and substantial prejudice to Mr. Wallace, the civil rights conspiracy allegations offense should be severed from the Baldock shooting incident offenses.

Moreover, none of the evidence relevant to the Baldock shooting incident offenses is relevant to the civil rights conspiracy allegations offense against Mr. Wallace. Not only does Mr. Wallace risk being prejudiced by an improperly rendered verdict, he faces the prejudice of having irrelevant evidence presented during his trial that would not otherwise be admissible but for the civil rights conspiracy allegations offense being improperly joined with the Baldock shooting incident offenses.

Finally, Mr. Baldock faces up to twenty (20) years imprisonment for the attempted murder offense and up to life imprisonment for the discharge of a firearm in relation to a crime of violence offense. Both Mr. Wallace and Mr. Baldock faces up to ten (10) years imprisonment for the civil rights conspiracy allegations offense. Clearly, Mr. Baldock is facing substantially more serious charges and, if convicted, penalties than what Mr. Wallace is facing. The degree of culpability alleged by the government obviously will be substantially greater against Mr. Baldock than will be alleged against Mr. Wallace. The charges of attempted murder of a law enforcement official in the performance of his/her duties and the discharge of a firearm during the commission of a violent crime requires substantially more culpability than the offense of conspiracy to violate the civil rights of suspected criminals. Mr. Baldock is solely charged with the offenses related to the Baldock shooting incident, while both Mr. Baldock and Mr. Wallace are charged with the civil rights conspiracy allegations offense. Therefore, the degree of culpability alleged by the government against Mr. Baldock will be to a substantially higher degree than the degree of culpability the government will attempt to prove against Mr. Wallace. Because of significant difference of the degrees of culpability the government will be attempting to prove against Mr.

Wallace and Mr. Baldock, their cases should be completely severed or, at a minimum, the civil rights conspiracy allegations offense severed from the Baldock shooting incident offenses¹.

CONCLUSION

Based on the above, the Court should either sever Mr. Wallace's case from Mr. Baldock's case, or in the alternative, sever the civil rights conspiracy allegations offense from the Baldock shooting incident offenses.

Respectfully submitted,

/s/: Robert E. Norfleet

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed with the Clerk of the Court by using the CM/ECF system, which will electronically forward a copy of the foregoing to all counsel of record.

All on this 27th day of March, 2020.

/s/: Robert E. Norfleet

ROBERT E. NORFLEET

Counsel for Defendant Wallace

¹ Mr. Wallace would not object to a motion from either the government or Mr. Baldock requesting be tried separately on all offenses from Mr. Baldock. From the discovery provided by the government it appears that Mr. Wallace was the sole target of the civil rights conspiracy allegations and nearly all of the government's evidence regarding the civil rights conspiracy allegations pertain to Mr. Wallace.