"THE FEDERAL CORNER"

An Unusual Basis for a Motion for Severance – With the Usual Result

Buck Files

I have vivid memories of the trial of a conspiracy case that took place 40 years ago. There were seven of us sitting at the defense table representing our clients. Early on, it became obvious that we had almost as much to worry about from one of our brethren as we did from the Government.

I thought about that old case when I read the opinion of the United States Court of Appeals for the Eleventh Circuit in *United States v. Jesus Hernando Angulo Mosquera, Juan Rodriguez Acosta, Arley Lopez Enciso, Efrain Bilbao Varela*, ___F.3d___, 2018 WL 1545594 (11th Cir. March 30, 2018) [Panel: Circuit Judges Marcus, Martin and Newsom. Opinion by Circuit Judge Marcus.]

[A Brief Synopsis of the Facts]

This case began when a Maritime Patrol plane spotted the Hope II some 47 nautical miles north of San Blas, Panama. The ship was in an area commonly used by drug smugglers. As the plane approached, the ship changed course.The ship's automated information system, which broadcasts information about the ship's activities, was not active.

A radio transmission was sent to a nearby Coast Guard cutter that intercepted the ship and boarded it. A search of the ship revealed a hidden compartment in which 1,483 kilograms of cocaine were discovered. The eight members of the crew were arrested and brought to Tampa, Florida, where each of them was indicted for possessing cocaine with the intent to distribute while aboard a vessel subject to United States jurisdiction, under 46 U.S.C. §§ 70503(a) and 70506(a), and 21 U.S.C. § 960(b)(1)(B); and for conspiracy to possess cocaine with the intent to distribute, under 46 U.S.C. §§ 70503(a) and 70506(a)—(b), and 21 U.S.C. § 960(b)(1)(B).

Four of the defendants – Ferreras-Trinidad, Tous-Calle, Crespo-Marin, and Carcedo — pled guilty. Angulo, Acosta, Lopez and Varela opted for a jury trial. When it became known that Angulo intended to call a polygraph examiner to testify on his behalf,Lopez filed a motion for severance, which the district judge denied. During the trial and after the polygraph examiner had testified, Lopez renewed his motion to sever, with Acosta and Varela joining in the motion. Once again, the district judge denied the requested severance.

Each of the defendants was convicted and sentenced to 235 months' imprisonment on each count and five years' supervised release. The four defendants who had entered pleas of guilty and cooperated with the federal authorities each received a sentence of 63 months' imprisonment and five years' supervised release. [Yes, it pays to cooperate.]

After being convicted, each of the four defendants gave notice of appeal. On March 30, the United States Court of Appeals for the Eleventh Circuit affirmed each of their convictions, determining that the district court did not err in denying the motions for severance.

Judge Marcus' opinion reads, in part, as follows:

[The Testimony at Trial]

> … Crespo–Marin, testified that after pleading guilty and returning to the holding area, Angulo came up to him and they had 'a verbal fight.' Angulo allegedly called Crespo–Marin a traitor, which Crespo–Marin took to be a reference to his decision to plead guilty. According to Crespo–Marin, Angulo also said 'that he [Angulo] was a man that demanded respect,' and then Angulo threatened him by saying '[y]ou don't know who I am.' Another co-conspirator, Ferreras–Trinidad, testified that Angulo and Varela 'threatened to kill [him] 50 times over,' observing 'that [he] know[s] how [pleading guilty] is rewarded in Colombia,' and that when Ferreras–Trinidad pled he 'became a rat.' A third co-conspirator, Carcedo, added that Angulo told him he had thrown away the gloves and clothing he had worn while loading the drugs on board the ship in order to dispose of any evidence against him. An unrelated prisoner, Jose Yamir Lopez–Marrero, testified that while the crew was incarcerated at Pinellas County Jail awaiting trial, Varela explained the Hope II operation to him, including that the vessel had been headed for San Andrés Island where the crew intended to drop off the dope and then sail on to Costa Rica in order to pick up a load of gravel.
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> … Angulo swore before the jury that he never threatened anyone, and offered an entirely different version of the 'verbal fight' with Crespo–Marin. According to Angulo, Crespo–Marin had been rude to him, and Angulo simply responded, '[b]e respectful to me because I've always been respectful to you.' In fact, Angulo testified that it was Crespo–Marin who exclaimed that Angulo 'didn't know who he [Crespo–Marin] was.' As Angulo told it, this altercation had nothing to do with the criminal proceedings.
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> … [Angulo] swore that he did not know that there were any drugs on the vessel, had not been told anything about any drugs when he was hired or at any point thereafter, and had not been involved with the drug shipment in any way. Angulo also said that he had never before heard of the Hope II's prior drug run. He offered that he had only done maintenance work on the ship and later cooked for the crew. He further observed that he had been in the process of obtaining a new mariner's license to replace his expired one. Finally, Angulo testified that he had never been convicted of a crime and that he had no criminal record involving narcotics, but acknowledged that he had been detained once before in the Bahamas in 1998.
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> On cross examination, the prosecutor elicited details surrounding Angulo's prior detention, which had involved a load of drugs found on another ship, and

questioned him further about his role on the Hope II. *Angulo then called as a rehabilitative witness a polygraph examiner he had hired to conduct a polygraph test in preparation for trial. The polygrapher did not testify about the substance of the examination, but did opine that Angulo had been 'truthful when [he had] tested him on November 6th.'* (emphasis added)

[The Very Short Jury Deliberations]

The jury deliberated for only two hours before finding all four defendants guilty on both counts.

* * *

[Appellants Claim and the Court's Response]

Acosta, Varela, and Lopez first claim that the district court abused its discretion by refusing to sever their trial from Angulo's on the ground that Angulo's intended introduction of polygraph testimony would prejudice them. But they have failed to show that there was any likelihood that impermissible prejudice would arise from the polygraph evidence, or that they were in fact prejudiced in any way. (emphasis added)

[The Standard of Review]

The decision whether to grant a severance lies within the district court's sound and substantial discretion. *United States v. Lopez*, 649 F.3d 1222, 1235–36 (11th Cir. 2011). 'We will not reverse the denial of a severance motion absent a clear abuse of discretion resulting in compelling prejudice against which the district court could offer no protection.'*United States v. Ramirez*, 426 F.3d 1344, 1352 (11th Cir. 2005) (quotation omitted).

[Joint Trials]

'Joint trials play a vital role in the criminal justice system and serve important interests: they reduce the risk of inconsistent verdicts and the unfairness inherent in serial trials, lighten the burden on victims and witnesses, increase efficiency, and conserve scarce judicial resources.'*Lopez*, 649 F.3d at 1233. We have explained that 'defendants who are indicted together are usually tried together.'*Id.* at 1234 (quotation omitted). And '[t]hat rule is even more pronounced in conspiracy cases.'*Id.* This rule is not ironclad. *Id.Federal Rule of Criminal Procedure 14(a)* explains that

> [i]f 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.

[What a Defendant Must Show for the Court to Grant a Severance]

The circumstances justifying severance are 'few and far between'; a defendant seeking severance 'must carry the heavy burden of demonstrating that compelling prejudice would result from a joint trial.'*Lopez*, 649 F.3d at 1234 (quotation omitted and alteration adopted). To establish this level of prejudice, a defendant must show that 'a joint trial would actually prejudice the defendant and that a severance is the only proper remedy for that prejudice—jury instructions or some other remedy short of severance will not work.'*Id.*; *see alsoZafirov. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (noting that limiting instructions will often cure any potential prejudice resulting from a joint trial). It is not enough that a defendant argues he may have a better result had the trials been severed. *Zafiro*, 506 U.S. at 540, 113 S.Ct. 933 ('[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.').

[Four Instances where a Severance May Be Required]

We have identified four discrete circumstances in which severance may be required: where defendants rely on mutually antagonistic defenses; where one defendant would exculpate another in a separate trial, but will not testify in a joint setting; where inculpatory evidence will be admitted against one defendant that is not admissible against another; and where a cumulative and prejudicial 'spill over' may prevent the jury from sifting through the evidence to make an individualized determination of guilt as to each defendant.United States v. Chavez, 584 F.3d 1354, 1360–61 (11th Cir. 2009).*The final category is limited in application, because 'a court's cautionary instructions ordinarily will mitigate the potential "spillover effect" of evidence of a co-defendant's guilt.'United States v. Kennard*, 472 F.3d 851, 859 (11th Cir. 2006). (emphasis added)

[There Was No Abuse of Discretion]

The district court did not abuse its discretion when it declined to sever this trial. No antagonistic defenses, exculpatory testimony from co-defendants, or inculpatory evidence were at issue; the appellants can only argue that cumulative and prejudicial spillover warranted severance. But, for starters, our spillover precedent is generally concerned with circumstances in which 'overwhelming evidence of [a co-defendant's] guilt' might bias another defendant—not circumstances in which evidence of a co-defendant's innocence might spill over. *Lopez*, 649 F.3d at 1235 (emphasis added). In fact, as the Government points out, any spillover from the polygraph evidence suggesting Angulo's innocence might well have helped the other defendants in this case.

[The Polygraph Evidence and the District Court's Instruction]

Moreover, the district court made it clear that Angulo's polygraph evidence would only be allowed under 'very limited' circumstances: only if Angulo testified and his credibility was impeached could he then present evidence that he passed a polygraph test in an effort to rehabilitate his credibility. '[Testifying] [wa]s a prerequisite to the admission of [the polygraph] evidence'; a prerequisite none of the other defendants satisfied. The conditional and rehabilitative nature of the evidence in question made prejudicial spillover even less likely. We add that the trial court instructed the jury unambiguously to 'consider the case of each Defendant separately and individually,' and cautioned them that if they 'find a Defendant guilty of one crime, that must not affect [the] verdict for any other crime or any other Defendant.' And we have repeatedly said that '[a] jury is presumed to follow the instructions given to it by the district judge.'*Ramirez*, 426 F.3d at 1352; *United States v. Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008). (emphasis added)

[The Defendants Cannot Show Prejudice That Would Merit a Reversal]

Finally, it is patently clear that Acosta, Varela, and Lopez cannot show the requisite prejudice to merit reversal. *Seeid.* ('We will not reverse the denial of a severance motion absent a clear abuse of discretion resulting in compelling prejudice.' (quotation omitted)). Their argument is built on the possibility that the introduction of the polygraph evidence drew a distinction between Angulo and the other defendants in the minds of the jury, to their demonstrable detriment. But Angulo ultimately was convicted on <u>both</u> charged counts, just as the others were. On this record the defendants cannot show that the polygraph evidence helped Angulo—much less that the jury's rejection of that evidence was likely considered in relation to, or had any deleterious effect on, their verdicts. *The appellants have made no attempt to explain how Angulo's conviction (and the jury's concomitant rejection of his polygraph evidence) does not doom their allegation of prejudice, and so have failed to discharge their 'heavy burden of demonstrating compelling prejudice.'United States v. Browne*, 505 F.3d 1229, 1268 (11th Cir. 2007). On this record, we can discern no abuse of discretion in rejecting the severance application. (emphasis added)

[My Thoughts]

- When I read a case like *Mosquero*, I can only conclude that there is little logic or common sense in some of the decisions of the appellate courts in cases with severance issues. It would seem that a defendant would *always*have an unfair advantage over his co-defendants if he could call a polygraph examiner to bolster his truthfulness. Obviously, the Court could hang its opinion in *Mosquero* on the fact that the jury only deliberated two hours and convicted Angulo along with his co-defendants. That, unfortunately, is a hindsight analysis. Would the results in *Mosquero* been different if Angulo had been acquitted and the other defendants convicted? We'll never know.

- If you have a severance issue, please take the time to read *Zafiro* – and, maybe, let your client read it. There are far more motions for severance filed than there are severances granted.