

FILED

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

JUL 10 2018

Judge Domenica Stephenson-1967

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiffs,

v.

DAVID MARCH,
JOSEPH WALSH, and
THOMAS GAFFNEY,

Defendants.

No. 18 CR 9700
Hon. Domenica A. Stephenson

**DEFENDANTS' RESPONSE TO THE STATE'S
PROFFER ON COCONSPIRATOR STATEMENTS**

Defendants, DAVID MARCH, JOSEPH WALSH, and THOMAS GAFFNEY, by and through their attorneys, BREEN & PUGH, JAMES MCKAY, and WILLIAM FAHY, pursuant to Rule 801(d)(2)(E) of the Illinois Rules of Evidence, the Due Process and Effective Assistance of Counsel clauses of the Constitution of the State of Illinois, hereby respond to the State's Proffer on coconspirator statements and respectfully request the Court enter an order denying the admission of any statements under the coconspirator exception to the hearsay rule, or in the alternative, require the State to supplement its proffer. In support thereof, Defendants show to the Court the following:

Introduction

In May 2018, Defendant Walsh filed, and Defendants March and Gaffney joined, his First Motion In Limine requesting the Court prohibit the State from eliciting hearsay testimony at trial. During the Court appearance, Defendants requested the State be required to file a proffer, similar to a "Santiago Proffer" routinely used in the Northern District of Illinois, regarding the admission of conspirator statements under Illinois Rule

of Evidence 801(d)(2)(E). See *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978). While the State maintained that such a procedure is not required in Illinois State courts, it nevertheless agreed to file a proffer to address the evidentiary concerns raised by Defendants.

On June 7, 2018 the State filed a proffer purportedly addressing the admissibility of coconspirator statements. The proffer summarizes the alleged conspiracy the State believes it will prove at trial, discusses the law regarding coconspirator statements, and sets forth facts the State asserts supports the admission of coconspirator statements. (Proffer at 1). According to the State, the proffer satisfies Defendants' request and also shows there is sufficient evidence to admit coconspirator statements at trial. *Id.* The proffer, however, is not responsive to Defendants' request and fails to show that any alleged hearsay statements are admissible under Rule 801(d)(2)(E).

Argument

Illinois Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is a statement of a coconspirator of that party made during the course and in furtherance of the conspiracy. IL R EVID Rule 801(d)(2)(E). For such statements to be admissible, the State must make a prima facie evidentiary showing, independent of the coconspirator's hearsay statement, of a conspiracy or joint venture between the declarant and one of the defendants. *People v. Duckworth*, 180 Ill. App. 3d 792, 795 (4th Dist. 1989). This showing requires the State to prove, by a preponderance of the evidence, that: (1) two or more persons intended to commit a crime; (2) they engaged in a common plan to accomplish the criminal goal; and (3) an act or acts were done by one or more of them in furtherance of the conspiracy. *People*

v. Leak, 398 Ill. App. 3d 798, 825 (1st Dist. 2010). “While evidence of a conspiracy can be totally circumstantial, such evidence must be sufficient, substantial, and independent of the declarations made in order to admit statements by a declarant under the coconspirator exception to the hearsay rule.” Duckworth, 180 Ill. App. 3d at 795.

The State’s proffer is incomplete as it does not identify Defendants’ alleged coconspirators nor the statements made during, and in furtherance of, the alleged conspiracy. It is impossible to discern from the State’s proffer how Defendants conspired with their alleged coconspirators when Defendants are unable to determine the identity of those individuals. Moreover, the proffer fails to establish, by a preponderance of the evidence, the existence of a single unified conspiracy, and fails to establish, through admissible non-hearsay evidence, that Defendants agreed to join the conspiracy.

For all these reasons, the Court should deny the admission of any alleged coconspirator statements, or in the alternative, require the State to supplement its proffer by identifying the alleged coconspirators and their statements, so that Defendants have the opportunity to more fully challenge the admission of such statements.

I. The State’s Proffer Is Incomplete and Prejudices Defendants’ Ability to Challenge the Admission of Alleged Coconspirator Statements

The purpose of requesting the evidentiary proffer was not only to give the State the opportunity to make a prima facie showing of the existence of, and Defendants’ membership in, the alleged conspiracy, but also to afford Defendants the opportunity to challenge the State’s proffered evidence and the admissibility of any alleged coconspirator statements prior to trial.

To challenge the existence of the alleged conspiracy or the admissibility of coconspirator statements, it is essential to know the identities of Defendants' alleged coconspirators and their statements which the State seeks to introduce at trial. Without such information, it is difficult to determine whether the State has made a prima facie showing independent of the hearsay statements, or whether a particular statement was made by a coconspirator during, and in furtherance of, the alleged conspiracy.

In its proffer, while the State summarizes evidence it believes shows the existence of a conspiracy and defendants' membership in that conspiracy, the State neglected to specifically identify Defendants' alleged coconspirators or their statements. This omission greatly prejudices Defendants in responding to the State's proffer.

First, without knowing the identity of those individuals the State believes to be unindicted coconspirators, Defendants do not have a meaningful opportunity to challenge a declarant's membership in the alleged conspiracy. If Defendants succeeded in showing to the Court that certain declarants were not members of the alleged conspiracy, their statements could not be admitted against Defendants without an alternative evidentiary basis. Second, without knowing the coconspirator statements the State intends to admit into evidence, Defendants cannot challenge whether a particular statement was made during and in furtherance of the alleged conspiracy prior to it being elicited at trial.

The State's failure to identify Defendants coconspirators and their statements puts both the Court and Defendants in the awkward situation of addressing the admissibility of statements after, or if counsel can anticipate a possible coconspirator statement is coming, immediately before, the statement is elicited. Rule 801(d)(2)(E) is

supposed to protect Defendants from the admission of improper hearsay statements, but requiring Defendants to analyze and challenge declarants and their statements during the trial will prejudice Defendants and defeats the protections of the rule.

Lastly, without knowing the identities of the alleged coconspirators and their statements, Defendants cannot determine whether the State's proffer is based on evidence independent of the hearsay statements.

II. The State's Proffer of Evidence Does Not Make a Independent Prima Facie Showing of a Conspiracy

The State asserts that the evidence at trial will show "that the object of the conspiracy was to conceal the true facts of the events surrounding the killing of Laquan McDonald by Officer Individual A in order to shield their fellow police officer from criminal investigation and prosecution." (Proffer at 11). The State's evidence, however, amounts to little more than an attempt to prove a conspiracy by association. While the State may rely upon circumstantial evidence to show the existence of a conspiracy, the State may not prove the existence of a conspiracy by simply piling inference upon inference and asking the Court to make unreasonable conclusions.

In this case, the State has asked the Court to find the existence of a conspiracy from circumstantial evidence, that even viewed as a whole, does not show any Defendant knowingly and intentionally entered into a conspiracy, with the intent to commit obstruction of justice or official misconduct, in order to conceal the facts surrounding the death of Laquan McDonald. Notably, the State does not identify when or how the alleged conspiracy began, its members, or when it ended.

The State argues that other courts have admitted coconspirator statements against Chicago Police officers who "conduct their activities in a suspicious nature."

(Proffer at 6, fn. 3). But the standard for a prima facie evidentiary showing is not whether a defendant's conduct was suspicious but whether there is sufficient and substantial evidence, independent of the hearsay statements, to prove the existence of the conspiracy by a preponderance of the evidence.

In each of the cases relied upon by the State, there was substantial evidence from which the Court found the existence of a conspiracy, including a failed attempt to commit the underlying offense, a plan to escape capture after the offense was committed, numerous meetings and phone calls planning the offense, phone records showing a defendant's proximity to his coconspirators during the commission of the offense, receiving counter-intelligence from a police officer and others, and laundering of proceeds of the conspiracy. See *People v. Leak*, 398 Ill. App. 3d 798, 790-791 (1st Dist. 2010); *U.S. v. Haynes*, 582 F.3d 686, 699 (7th Cir. 2009); *United States v. Patterson*, 171 F.Supp.2d 804 (N.D. Ill. 2001); *United States v. Wesson*, 33 F.3d 788 (7th Cir. 1994). In this case, the State's proffer is lacking similar substantial evidence from the which the Court can infer the existence of a conspiracy.


In the end, no one is told when the conspiracy began or ended, who participated, and what was said to further the conspirators' goals. There are no acts or words of Defendants which would show to the Court that they entered into a conspiracy to protect another police officer.

Conclusion


Wherefore, Defendants respectfully request the Court enter an order denying the admission of any statements under the coconspirator exception to the hearsay rule, or

in the alternative, require the State to supplement its proffer by identifying Defendants' alleged coconspirators and their statements.


Respectfully submitted,



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