

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

V.

CRIMINAL CASE NO. 3:07CR192-B-A

RICHARD F. "DICKIE" SCRUGGS,
DAVID ZACHARY SCRUGGS, AND
SIDNEY A. BACKSTROM

ORDER DENYING MOTIONS TO SEVER

Came on to be considered this day the separate motions of defendants David Zachary Scruggs and Sidney A. Backstrom to sever. The court has considered the arguments and authority cited by counsel and is ready to rule.

The defendants move to sever pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 provides, "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." The government joined the defendants and the offenses charged in the indictment pursuant to Rule 8 of the Federal Rules of Criminal Procedure. Rule 8 provides as follows:

Joinder of Offenses and Defendants

(a) Joinder of Offenses. 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.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants 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. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

The government notes that the offenses charged in the indictment “are of the same or similar character and are also based on the same series of acts and transactions constituting the conspiracy to corruptly influence a judicial officer of the State of Mississippi,” to deprive the State “of its intangible right to honest services,” and to engage in wire fraud.

As the Fifth Circuit stated in *U.S. v. Perez*, 489 F.2d 51, 65 (5th Cir. 1973), “[t]he general rule has been, and remains, that persons jointly indicted should be tried together, especially in conspiracy cases.” *See also Zafiro v. U.S.*, 506 U.S. 534 (1993) (“There is a preference in the federal system for joint trials of defendants who are indicted together.”). Analyzing Rule 14, the *Perez* court set forth the guidelines for determining whether to sever by stating:

To obtain a severance under Rule 14, the movants have the burden of convincing the court that without such drastic relief they will be unable to obtain a fair trial. A mere showing of some prejudice has usually been insufficient, for qualitatively it must be the most compelling prejudice against which the trial court will be unable to afford protection.

Perez, 489 F.2d at 65. (Citations omitted.) In *U.S. v. Park*, 531 F.2d 754, 761 (5th Cir. 1976), the court stated that “[u]nquestionably, the grant or denial of a Rule 14 severance is within the discretion of the trial court and that denial will not warrant reversal unless clear prejudice is shown.” The court then elaborated on the nature and degree of the prejudice which must be shown. The court stated,

The existence of prejudice, in large measure, depends upon the facts and circumstances of each case . . . and it is axiomatic that the granting of a severance is within the discretion of the trial judge The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review The defendant must show something more than the fact that “a separate trial might offer him a better chance of acquittal.”

Park, 531 F.2d at 762 (quoting *Tillman v. United States*, 406 F.2d 930, 935 (5th Cir. 1969), vacated in part on other grounds, 395 U.S. 830 (1969)).

The United States Supreme Court has stated that “[j]oint trials ‘play a vital role in the criminal justice system.’” *Zafiro*, 506 U.S. at 537 (quoting *Richardson v. Marsh*, 481 U.S. 200, 209 (1987)). Joint trials “promote efficiency and ‘serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.’” *Id.* (quoting *Richardson*, 481 U.S. at 210). The Court further stated,

We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence . . . The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.

Id. at 539.

Both defendants cite the Fifth Circuit case of *United States v. Tarango*, 396 F.3d 666 (5th Cir. 2005), in support of their motions to sever. In *Tarango*, a medical office manager was convicted of aiding and abetting a physician in submitting false claims to health care insurers; but, after the conviction, the district court granted the defendant’s motion for a new trial on the theory that the defendant was prejudiced by being tried with the physician – though the physician was tried in absentia – after the physician absconded prior to the start of the trial.

Despite the fact that *Tarango* and the present case both involve an alleged conspiracy, the court is unpersuaded by the defendants’ argument. In *Tarango*, the appellate court reviewed the district court’s decision to grant a new trial. The district court had based its decision in part on

the fact that “it became apparent as the trial progressed that the parties should have been severed....” *Id.* at 670. The notoriety attending to the physician’s absence at trial, when considered with other factors, led the trial court to determine that a severance should have been granted, but no such situation is present here.

In the present case, the government has filed its notice of intent to introduce evidence of similar prior bad acts against the defendants pursuant to Federal Rule of Evidence 404(b). Defendants Backstrom and Zach Scruggs contend that they will suffer undue prejudice as a result because the proffered 404(b) evidence is only admissible against Richard F. Scruggs. The government has stated, however, that this evidence implicates Zach Scruggs in addition to Richard Scruggs, and this court has ruled that the 404(b) evidence is admissible. Thus, this argument is now applicable only to Backstrom. Still, the argument is without merit and the defendants’ heavy reliance on *Tarango* is misplaced because *Tarango* is distinguishable from the present case. First, *Tarango*’s co-defendant – against whom the majority of the evidence was presented – was tried in absentia, leaving *Tarango* to face the jury alone. Second, the *Tarango* court noted that a disproportionately small number of witnesses testifying at trial – only five out of fifty – testified directly about *Tarango*’s involvement in the health care fraud scheme, leaving the testimony of forty-five witnesses to unduly prejudice *Tarango*. The government has stated that it intends to establish the 404(b) evidence through a significantly smaller number of witnesses – only two or three; and it will be made clear that Backstrom had no part in the 404(b) matter. Thus, the “spillover effect” present in *Tarango* will not be present here. Even the *Tarango* court noted that “a disparity of evidence in a trial involving multiple defendants does not in and of itself constitute prejudice.” *Id.* at 674. As the government states, “*Tarango* stands

merely for the proposition that a trial judge's decision with respect to severance considerations will not be disturbed in the absence of an abuse of discretion." For the reasons stated above, viewing the totality of the circumstances in the present case renders a different result. Further, the court will instruct the jury that the 404(b) evidence is not related to Backstrom. The court is confident that a reasonable jury will have no difficulty understanding that the evidence is only to be considered against Richard Scruggs and Zach Scruggs and will act accordingly.

The court is also unpersuaded by Zach Scruggs' argument that the father-son relationship between two defendants creates a serious risk of unfairness. The Eighth Circuit case cited by Scruggs, *United States v. Auerbach*, 745 F.2d 1157, 1159-60 (8th Cir. 1984), lends little support to his position. The court in *Auerbach*, a habeas corpus case in which a father was convicted along with his son of unlawful dealing in firearms, found that representation of the father and son by the same counsel resulted in a conflict of interest that denied the father effective assistance of counsel. According to the court, the record revealed that defense counsel faced "the dilemma of either pursuing or abandoning defenses and tactics that would help one defendant but hurt the other." The dilemma presented in *Auerbach* is specific to the facts of that case within the joint representation context and not present in the case at bar.

Backstrom and Scruggs also assert that they are entitled to a severance due to pretrial publicity but cite no authority other than cases cited in the defendants' motion for change of venue. The court denied that motion and found that the defendants had not presented evidence that the publicity surrounding this case is so prejudicial as to warrant a change of venue, and the court further finds that the publicity is not so prejudicial as to warrant a severance, especially in the absence of authority to support the defendants' argument.

For the foregoing reasons, the court finds that the defendants' motions to sever should be denied. It is, therefore, **ORDERED AND ADJUDGED**

that Defendant David Zachary Scruggs' motion to sever is **DENIED** and

that Defendant Sidney A. Backstrom's motion to sever is **DENIED**.

This, the 26th day of February, 2008.

/s/ Neal Biggers

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE