

Question MPT-2 – February 2022 – Selected Answer 1

To: Lucas Pines

From: Examinee

Date: February 22, 2022

Re: Motion to sever in *State v. Ford*, 2021 CF 336

Argument:

I. Because the events of April 17 charge are unrelated to the events of the October 24 charge the offenses should not be joinder pursuant to Franklin Rule of Criminal Procedure 8(a).

The prosecution alleges that Ms. Ford knowingly sold 10 grams of a substance containing cocaine on April 17, 2021. The prosecution will rely on the sworn statement of Officer Diaz. Diaz alleged that he had an informant equipped with a camera and a fake \$100 bill. The officers were investigating suspected drug activity at the apartment of Ms. Ford's brother where Ms. Ford was staying on April 17. The prosecution will allege that the \$100 was received by Ms. Ford and handed to her brother in exchange for the 10 grams of a substance containing cocaine. The substance was tested and found to be cocaine.

The prosecution further alleges that on October 24, 2021 Ms. Ford knowingly possessed with intent to sell four kilograms of marijuana a controlled substance. The prosecution will allege that Officer Amanda Carter pulled Ms. Ford over while she was driving and that after obtaining Ms. Ford's license that she conducted a field sobriety test which Ford failed. Ford was subsequently arrested, placed in the back of Carter's squad car and then Ford's vehicle was searched. The prosecution will also allege on that same day that a firearm was found in her vehicle when the vehicle was searched after Ms. Ford was arrested for the four kilograms of marijuana. The prosecution will allege that Ms. Ford had a previous conviction for felony assault with intent to commit murder and therefore her possession of a firearm was a felony.

The April 17 charge should be severed from the charges on October 24. Rule 8(a) of the Franklin Rules of Criminal Procedure states that two or more offenses may be charged in the same indictment if they are of the same or similar character based on the same act or transaction or are connected with or constitute parts of a common scheme or plan. See *State v. Sayers*. The defendant bears the burden of establishing

impropriety of joinder. Id. Under this rule The April 17 charge should be severed. The events took place 6 months apart. They have nothing to do with each other. The April 17 charge involved cocaine. The October 24 charge involved marijuana. The April 17 charge involved the sale of drugs. The October 24 charge involved possession with intent to sell and possession of a fire arm. These things are not part of a common scheme or plan. They are wholly unrelated.

Saylers makes the point as well that we look to the affidavits. If an indictment does not provide sufficient facts to clarify the connection between the counts, the trial court can review other things such as affidavits in support of search warrants. The face of the indictment does not show the connection between the charges. Additionally even the affidavits of the police officers does not show a connection between the cocaine charge and the October 24 charges of the unlawful possession of a fire arm and the marijuana charge. At no point in the affidavits or the indictment is there even the allegation that Count 1 of the indictment has any relation or bearing to Count 2 or Count 3. Therefore pursuant to Rule 14 of the Franklin Code of Criminal Procedure, the relief should be granted to sever the defendant's trials. The consolidation for trial appears to prejudice the defendant and the face of the charges and affidavits do not show a connection. Because given these facts here as in Saylers there is no support for a conclusion that the charges warranted joinder under Rule 8(a) these charges should not be joined.

The prosecution may argue that they are related because both the April 17 and October 24 charge involve drugs. However that is not sufficient. As stated in State v. Saylers, the mere fact that two charges involved a bank robbery was not sufficient enough of a basis on which to join charges in a single indictment. In that case one charge is the robbery of a convenience store while the other is the attempted robbery of a hiker in a state park. The alleged crimes in Saylers took place two years apart.

Given the facts stated above about Ford's case, joinder is improper. Therefore, the April 17 charge should be severed from the indictment and tried separately. Ford will be able to meet her burden for severance.

II. Because joinder of the offenses violate rule 404(b) of the Franklin Rules of Evidence due to the inference that Ford is a bad person the charges in the indictment should be severed.

Rule 404(b) states that evidence of any other crime, wrong, or act is not admissible to prove a person's bad character in order to show that on a particular occasion the person acted in accordance with the character. In short the evidence presented may

make Ford appear to be a bad person and get the jury to convict solely on that basis. The jury may convict because Ford was only convicted of one offense. This is a valid basis to grant the motion to sever.

The prosecution will likely cite to State v. Ritter (2005) from the Franklin Court of Appeal. The court in that case held that while the jury cannot properly convict on the basis of more than one charged offense, that this rarely is a sufficient basis on which to justify severance. Thus the prosecution has a strong argument in this case. However Ritter is distinguishable. In that case Ritter was charged with two offenses. Our client is charged with three. And our client's prior felony assault will also be put on as evidence as well. Therefore there is a valid basis under rule 404(b) to sever.

Also the facts of Ritter are distinguishable from this case. In Ritter the defendant was tried separately on two charges of selling heroin. The evidence was admissible at the trial whether tried separately or together. That is not the case here. The cocaine evidence would not be admissible at the marijuana or gun charge trial. Therefore, Ritter is distinguishable.

III. Because joinder of the offenses violates rule 403 of the Franklin Rules of Evidence due to undue prejudice, confusion of the issues, and waste of time severance is necessary to avoid prejudicing Ford.

Rule 403 states numerous grounds to exclude otherwise relevant evidence. When the probative value of that evidence is substantially outweighed by the danger of unfair prejudice or needlessly presenting cumulative evidence, the evidence should be excluded. Here the multiple charges are needlessly cumulative. Ford is charged with three crimes here. That is needlessly cumulative. It is also possible that since there are two drug charges there is a substantial likelihood of confusing the issues. And the evidence is needlessly cumulative for the same reason. For example, the jury does not need to hear about the cocaine charge to make a fair verdict on either the marijuana or possession of a fire arm charge. It is highly prejudicial for the jury to hear all the charges in one trial. Hearing about two drug offenses in one trial might make the jury more willing to convict Ford on either charge or both charges. Furthermore, there is a high risk of prejudice for the jury to hear about the 2015 conviction for assault with intent to commit murder when the jurors decide whether she is guilty of the drug charges. For this reason severance is justifiable.

The prosecution will argue that the probative value is not "SUBSTANTIAL(LY)" outweighing of the risk of confusion of the issues, prejudice, or cumulative evidence. However given the risks stated in State v. Sayers of unnecessary association and

confusion this is likely to fail as an argument. The confusion of the issues is further compounded given the facts in this case. The prosecution intends to try the marijuana and felony possession of a firearm case together. The prosecution wants to show that the presence of the gun in the car proves intent to sell the marijuana found in the car. This is a key confusion of the issue. The firearm may have probative value of an intent to sell charge but that value is substantially outweighed by a risk of confusion for the issue. Possession with intent to sell has no need to demonstrate the use or possession of a firearm. Therefore the best solution is to sever the firearm case from the drug cases.

The prosecution may also argue that there is a high relevance in trying the cases together. See Ritter. However that argument is unlikely to be successful. Ritter was operating under a common scheme or plan to sell drugs from his car. Here, the facts are very different from Ford. Ford received money at her brother's apartment. Then 6 months later she was driving someone else's car and was ultimately charged with marijuana possession. Thus there is not a common scheme or plan here. Again, it is not the same drug - heroin both times - as in Ritter but different drugs - Marijuana and Cocaine.

IV. Because of precedent in the State v. Ritter case that illegal acts admissible in one trial if separate but inadmissible in another trial if the trials were separate and not joinder, the indictments should be severed.

State v. Ritter makes clear that prejudice may occur if proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense. In this case we have a situation where "evidence would have been inadmissible at a separate trial". In drug cases a prior assault conviction would not be potentially admissible unless Ford chooses to testify. Ford stated she wanted to testify in each case however a final decision has not yet been reached on this issue. Under State v. Ritter, it makes sense to sever. Regardless of whether the drug charges are tried separately or together, the fact remains that they should be severed from the felon in possession of a firearms case. The prior assault conviction would not be potentially admissible unless Ford chooses to testify in either drug case. However the assault conviction would be admissible in the firearm possession case. This is precisely what the State v. Ritter holding was against. Citing Ritter, the possession of a firearm charge should be severed from the drug charges.

The prosecution may argue that Ford may choose to testify in her own defense as to all three crimes alleged. However a final decision has not been reached on this yet. Ford could easily come to a different conclusion when made clear that if she testifies

in the drug charges that she would be subjecting herself to the assault conviction coming in when it otherwise wouldn't have to. Ford herself states that she was "very worried" the jury would hold it against her based on this previous conviction. Therefore the prosecution's argument here will not succeed.

The facts here are also similar to *State v. Pierce*. In *Pierce* the defendant was under two orders of protection. He was under the Lynn Order in 2009. It prevented him from contact with his former girlfriend. That order expired on January 31, 2010. There was another order the Stein Order on April 12, 2010. He was charged under a single indictment for possession of a fire arm while under an order of protection. Had the cases been tried separately, the evidence of the Stein Order would not have been admissible on the charge of violating the Lynn Order. This also applies to the facts of our case. Again the prior conviction for assault is not admissible in the drug cases unless Ford testifies. Ford is not guaranteed to do so at any trial. Therefore, the assault convictions should not come into the drug cases in those situations. That applies here just as it did in *Pierce*. Therefore the best remedy is to try the fire arm case separately from the drug charges. Therefore the motion to sever should be granted. In the same way that the jury in *Pierce* should have had no way to know of the Stein Order so should the jury in Ford's gun possession case have no reason to know of the prior assault if Ford does not testify.

V. Because a prior bad act - the DUI- is admissible evidence in the October 24 case but not the April 17 case, the motion to sever should be granted.

The Rules of Evidence in Franklin are identical to the Federal rules of Evidence. Prior bad acts are admissible evidence. These acts can be used against Ford. If Ford testifies they will be devastating on cross examination. The DUI took place on October 24. Ford was never charged with the DUI. However a prior bad act does not need to be charged to be admissible. It just needs to have been a bad act that occurred in the past. As per *Ritter* therefore the October 24 indictments should be severed from April 17. This is because the DUI is NOT a prior bad act with respect to the April 17 charge - because it occurred after April 17. However the DUI could be brought up in the October 24 trial for both the marijuana and possession of a fire arm charge. Because Ford's commission of that illegal act - DUI - would not be admissible for the April 17 charge but would be for the others, than pursuant to the holding in *Ritter*, the April 17 charge should be severed.

The prosecution could argue that it was not a prior bad or that the DUI was not charged. However this will be unsuccessful. The DUI was a prior bad act because it occurred before her arrest and charge of her marijuana and fire arm possession charge. And again the DUI need not be charged for it to be a prior bad act. Therefore the prosecution will lose this argument.

VI. Because of the precedent in State v. Ritter that a defendant may wish to testify in his own defense on one charge but not another and Ford has conviction testimony on one count but a strong need to refrain from testifying in the other, then the April 17 charge should be severed.

We know from the facts that the April 17 charge involves Ford's brother being alleged to have committed a drug deal. Ford was at her brother's place on April 17. If she testifies at trial, she may be implicating her own brother. This gives Ford a strong incentive to not testify at this trial.

The prosecution may bring up that Ford might want to testify at every trial. However again the prosecution is mistaken here. Once Ford has it explained that her testimony could harm her brother than she is likely to not testify at that trial.

This is in stark contrast to the October 24 charge. Ford stated that on October 24, 2021 she was driving alone on Highway 30 when she was pulled over by a police officer and given a field sobriety test. She was arrested and placed in the back of the police car. The officer searched the car and found marijuana, a small scale, and empty plastic baggies in the backseat of the car and a handgun in the trunk. The handgun was registered to her boyfriend Litton. Ford wants to testify that none of those things belong to her. She has important testimony and is strongly inclined (as per Ritter) to testify about the fact that none of those things belong to her.

The prosecution may argue that Ford is just as likely to not testify against her brother than her boyfriend. However, this is unlikely to be successful. Her brother is her own family whereas her boyfriend allowed her to drive a car filled with drugs, drug paraphernalia and a firearm despite Ford's history. Therefore, this argument will likely fail.

Question MPT-2 – February 2022 – Selected Answer 2

FILE MEMORANDUM

From: Lucas Pines, Deputy Public Defender

Date: February 22, 2022

Re: State v. Ford, 2021 CF 336

Argument:

Joinder was improper because the factors discussed in FRCP Rule 8 have not been established in favor of the prosecution.

According to Franklin Rules of Criminal Procedure (FRCP) Rule 8, an indictment may charge a defendant in separate counts with two or more offenses if the offenses charged (whether felonies, misdemeanors or both) are of: (i) the same or similar character, (ii) based on the same act or transaction, or (iii) are connected with or constitute parts of a common scheme or plan. Further, FRCP Rule 14 provides that if the joinder of offenses or defendants in an indictment appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendant's trials or provide any other relief that justice requires.

While, according to State v. Saylers, the defendant bears the burden of establishing the impropriety of the joinder, because Ms. Ford has established that none of the elements above are applicable to her case, joinder is not proper and her motion to sever should be awarded.

Because the indictment includes crimes of different names and different times, the court should review both the indictment as well as affidavits and other evidentiary information to determine whether joinder was proper:

As a preliminary matter, State v. Saylers provides that even when the crimes in the indictment have slightly different names, it is necessary to review other evidence (including affidavits) when making a determination on joinder. In Saylers, both crimes were called robbery (but in different places) and this was enough to warrant a reversal because the trial court reviewed only the indictment. In Ford's case the crimes charged are knowing sale of a controlled substance, possession with intent to sell a controlled substance and knowingly possessing a handgun with a felony record. As

these are sufficiently different, the court must review affidavits in addition to the indictment to determine whether joinder is proper.

Because the crimes alleged were different types of crimes, occurring at different times and in different ways, they are not of a similar character

As discussed in the Sayers case, even two crimes of robbery occurring at different places were not enough to show that they were sufficiently of the same character. Here, Ford is charged with knowing sale of a controlled substance, possession with intent to sell a controlled substance and knowingly possessing a handgun with a felony record. While the prosecution may argue that Ford's defense in both cases was similar in that she did not know what was happening in each, this argument should fail, as it discusses the Ford's potential defenses and state of mind as opposed to the crimes charged. Further, while the prosecution may cite Ritter in that handgun possession is important to drug distribution and in each of counts 1 and 2, there was some form of drug distribution (knowingly selling in 1 and possession with intent to sell in 2), this argument should also fail. The drugs in count 1 were of a different type and quantity than in count 2 (10 grams of cocaine in 1 and 4 kilograms in count 2). Further, Sayers notes that two years between alleged crimes is sufficient to find they are not sufficiently related. Here, there were four months between crimes, and while this is less than Sayers, the crimes are also not both robbery as in Sayers. Finally, the location and circumstances of each alleged crime were very different. In Count 1, Ford was at another person's home, while in Count 2, she was in a car.

Based on the foregoing, the crimes alleged were of a sufficiently different character.

The counts are not based on same act or transaction because they were different types, in different places, in different manners

Counts 1 and 2 were of different types of offenses, in different places and with different types of drugs and manner. Because of this, they are not the same act or transaction.

The prosecution will likely argue that Counts 2 and 3 were the same transaction. Ford will argue that because the gun was found in the trunk while the drugs and related items were found in the backseat, these are different occurrences.

The alleged crimes are not connected with a common scheme or plan because they are of different types in different places.

While the prosecution may argue that there is a common scheme to sell drugs around Hamilton county, as in Ritter, this argument should fail. In Ritter, the defendant sold heroin in the same neighborhood in both trials. Here, Ford allegedly sold cocaine and intended to sell marijuana. Further the cocaine was in the Primrose neighborhood while the marijuana was found in a car. Finally the car was owned by Ford's boyfriend while the Primrose house was her brothers.

Therefore, the alleged crimes are not part of a common scheme.

Conclusion

Because the prosecution cannot establish the three factors above, joinder is improper.

Severance should be awarded because joinder would be extremely prejudicial to the defendant based on the Ritter Factors.

According to State v. Ritter, there are three types of prejudice that could occur if separate offenses are joined: (i) the defendant is a bad person because he or she is charged with multiple offenses at once, (ii) proof of defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense, and (iii) the defendant wishes to testify in one charge but not in another. In case (iii) severance is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.

Severance is proper because it is likely that the jury will think Ford is a generally "bad person" based on being indicted for three crimes at once.

In Ritter, there were only two felony counts of heroin possession mentioned. Here, there are two drug-related counts and one weapon count. It is highly likely that the jury would believe the fact that Ford is charged with all three at the same time means Ford is a bad person and the jury would be prejudiced to think Ford committed all three crimes.

Severance is proper because proof of Ford's prior felony conviction and other drug counts would otherwise not be admissible in her drug trials.

Ford's prior felony conviction is necessarily introduced in her handgun possession count because it is necessary to prove the count. However, unlike in Ritter where the drug was more dangerous (heroin vs. marijuana) and Ritter likely owned the gun, Ford

did not own the gun or even the car she was driving. In fact, the gun was registered to her boyfriend. Because the probative value of the gun is not as high as in Ritter, this evidence would not likely be admitted in Ford's drug trials (if severed) and thus this prong is met. Further, unlike in Ritter where the probative value of the additional hereon charge was very probative because it went to plan

Severance is proper because Ford has convincingly shown that she has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.

According to State v. Ritter, a defendant may satisfy the third prong of prejudice by convincingly showing that she has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. Ford can establish this because she wishes to testify to discuss the circumstances surrounding her arrests and that did not know about the drugs in either case. If Ford's cases are severed, she will wish to testify with respect to the weapons charge and has a strong need to testify to explain that she did not own the gun and it was registered to her boyfriend. However, since Ford's evidence of a prior conviction may NOT be allowed in her drug-related charges as character propensity evidence under FRE 403 and 404, she has a strong need to refrain testifying in this instance.

Conclusion

Because Ford has met the prongs for severance as discussed above, the trial court should sever her trials.

Question MPT-2 – February 2022 – Selected Answer 3

February 22, 2022

Brief in Support or Severance in State v. Ford, 2021 CR 336

I. Statement of the case (omitted)

II. Statement of the Facts (omitted)

III. Legal Argument

A. Because the defendant must show the impropriety of joining two dissimilar charges in a single indictment, and Ms. Ford has done so because the two offenses charged are from two different dates, two different locations, and two

circumstances, the court should grant the motion to sever Count 1 and Count 2 of her indictment.

Under Franklin Rules of Criminal Procedure 8(a), two or more offenses may be charged in the same indictment if they are of the same or similar character and are based on the same act or transaction, or are connected with or constitute parts of a common scheme. FRCP 8(a). The defendant bears the burden of establishing the impropriety of the joinder. *State v. Sayers*.

The court in the case against *Sayers* said that in deciding whether chargers have been improperly joined, the court should limit itself to those facts in the indictment unless the indictment does not provide sufficient facts to clarify the connection between the counts. *Id.* In that case, the court may look to other documentary evidence such as affidavits in support of arrests or search warrants. *Id.*

In the *Sayers* case, the court reversed a conviction because the two charges had not been severed. *Id.* The first count was a robbery at a convenience store and the second of a hiker in another location on a different date. *Id.* The trial court erred because it based the joinder solely on the indictment which simply labeled the two as robberies. *Id.*

Here, Ford has a similar situation, where both the first and second count have to do with drugs. The first count is for knowingly selling cocaine at her brother's house in April, but the second was for knowingly possessing marijuana when it was found in her boyfriend's car that she was driving. The circumstances are months apart from each other and the first was for a sale and the second was possession in two different locations, and both were drugs that belonged to two different people.

While the prosecution may contend they are both related to drugs, the two charges are not related to each other failing under Rule 8a because the character even if both are drugs are not based on the same act or transaction. Additionally, they are not connected and they are not part of a common scheme.

Like *Sayers*, the joinder of counts one and two are too dissimilar to be joined together. Even on the plain face of the indictment itself, the court can clearly see that the two should be separated as there is no support for the court to conclude that they should be joined.

Therefore, Count 1 and Count 2 should be severed because they are too dissimilar, and Ms. Ford has met her burden to show the impropriety of joining them albeit lawfully.

B. Because the cases against Ms. Ford will cause prejudice against her even when the two are lawfully joined, the court should grant her motion to sever since the two charges related to drugs, the two do not arise from a single transaction.

Rule 14 of the FRCP indicates that a trial court should sever counts for trial because a defendant can be prejudiced by the lawful joinder. FRCP Rule 14. Under FRE Rule 403, there are generally three kinds of prejudice that may occur if separate offenses, particularly those that are merely of similar character and do not arise out of a single transaction, are joined. FRE 403, State v. Ritter, Franklin Ct. App. 2005.

In the case against Ritter, the court worked its way through the three tests of prejudice that may arise when lawfully joined charges cause prejudice. Id. In that case, the court found that each sale of heroin made by Ritter was part of a common scheme and would have been admissible in a trial involving the other transaction. Id. Additionally, a charge of possession of a gun would also have been admissible. Id.

The severance test follows three steps.

1. The defendant could be prejudiced because the jury could conclude the defendant is a bad person when he is charged with more than one offense. In Ritter, the court found that even though that would have clearly been prejudicial, it is rarely a sufficient basis on which to justify severance.

Here, Ford is at the wrong place at the wrong time with the wrong people. First she is with her brother who sold and handed cocaine to an undercover informant and the informant handed the money to Ford. In the second she happened to be driving her boyfriend's car when she was pulled over for a traffic offense, and upon a search of the vehicle, the officers found the marijuana, a scale and baggies which all belonged to her boyfriend. These two circumstances paint a bad picture of Ford and would prejudice a jury against her no matter whether she truly had a hand in any of these incidents.

Therefore, although bad character rarely creates a sufficient bases to justify severance, it seems in this case the need is great because the jury will be prejudiced that Ford seems to wind up in bad places by association not by actual knowing participation.

2. The prejudice may occur when the defendant is guilty of one offense is used to convict him of another offense even though the evidence would have been admissible at a separate trial.

Here, the officer also found a handgun in Ford's boyfriend's car which also was registered to the boyfriend, but Ford has been charged with possession by a convicted felon because she has a previous conviction for assault with intent commit murder. The prosecution plans to use this information if Ford testifies, which she hopes to do because she wants to tell her story about each of the drug charges to help them understand her situation. If she would not testify, the information about the prior conviction likely would not be admissible.

Therefore, because Ms. Ford plans to testify in defense of the drug charges and the prosecution will impeach her with her prior conviction and that will be highly prejudicial especially because it would not be admissible otherwise.

3. The prejudice may result if the defendant wishes to testify as to one charge but not on the other and severance is warranted when the defendant makes a convincing showing that he has both important testimony concerning one and should refrain in the other.

Here, Ms. Ford has important testimony in defense of the drug charges, but she should not testify when it comes to the gun because it will be highly prejudicial because information about her prior conviction likely will be admitted.

Therefore, because Ford has two separate needs to either take the stand or not, all three charges should be severed to prevent extreme prejudice against her.

Evidence of possession of a weapon

When a jury learns of a separate offense committed by a defendant, the jury can be tempted to infer the worst about that defendant. *State v. Pierce*, Franklin Ct. App. 2011.

Under the *Pierce* case, a man who had two separate protective orders by two separate women, was charged with violating each at separate times. *Id.* Additionally, the court found that if it were not for the joinder of offenses in one indictment, the jury charged with whether he had violated the second would never have learned of the second.

Here, Ford is the same, if the jury who tries her case does not know about the drug charges against her and whatever those outcomes are, they will view the handgun possession by a felon in a more balanced light.

Therefore, the Count 3 handgun possession should be severed from the two drug counts resulting a full severance of all three counts against Ms. Ford.

IV. Conclusion

Because Ms. Ford meets all three tests of why joining the three charges creates an extreme prejudice against her especially under Count 3, the handgun possession, and because she has met her burden for showing that a lawful joinder results in putting two dissimilar drug charges together that do not share a common scheme, the court should grant her motion to sever and allow the three offenses against her to be each tried separately.