

JOINDER AND SEVERANCE

ABA STANDARD

PART I. JOINDER OF OFFENSES AND DEFENDANTS.

1.1 JOINDER OF OFFENSES.

TWO OR MORE OFFENSES MAY BE JOINED IN ONE CHARGE, WITH EACH OFFENSE STATED IN A SEPARATE COUNT, WHEN THE OFFENSES, WHETHER FELONIES OR MISDEMEANORS OR BOTH:

(a) ARE OF THE SAME OR SIMILAR CHARACTER, EVEN IF NOT PART OF A SINGLE SCHEME OR PLAN; OR

(b) ARE BASED ON THE SAME CONDUCT OR ON A SERIES OF ACTS CONNECTED TOGETHER OR CONSTITUTING PARTS OF A SINGLE SCHEME OR PLAN.

KANSAS CODE

Two or more crimes may be charged against a defendant in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. (K.S.A. 1971 Supp. 22-3202(1)).

COMMENT

The Standard is complied with. The Kansas code provisions relating to Joinder and Severance are part of the Kansas Code of Criminal Procedure of 1970 which become effective on July 1 of that year. Amendments to the code were passed in 1971. Because of their recent origin the code sections have not been extensively interpreted by the Supreme Court of the state. Rules 8, 13 and 14 of the Federal Rules of Criminal Procedure furnished some of the basic ideas that are implemented in the sections. In State v. Thomas, 206 Kan. 603, 481 P2d 964 (1971) the

Supreme Court of Kansas pointed out that the new code provision reflect what was essentially the prior case law of the jurisdiction. Thus, both Federal cases decided under the Federal Rules and Kansas decisions decided prior to the new code may be useful aids in resolving joinder and severance problems under the new code.

The rules governing joinder of offenses in Kansas have long been settled. Similar crimes, alleged to have been committed on different occasions, may be alleged as separate counts in a single information, as may dissimilar offenses constituting one comprehensive plan or transaction (State v. Neff, 169 Kan. 116, 218 P2d 248 (1950)). "The question of proper joinder of offenses rests in the exercise of sound judicial discretion and absent a clear showing of abuse of discretion the appellate courts will not reverse for failure to require an election." (State v. Neff, supra).

ABA STANDARD

1.2 JOINDER OF DEFENDANTS.

TWO OR MORE DEFENDANTS MAY BE JOINED IN THE SAME CHARGE:

(a) WHEN EACH OF THE DEFENDANTS IS CHARGED WITH ACCOUNTABILITY FOR EACH OFFENSE INCLUDED;

(b) WHEN EACH OF THE DEFENDANTS IS CHARGED WITH CONSPIRACY AND SOME OF THE DEFENDANTS ARE ALSO CHARGED WITH ONE OR MORE OFFENSES ALLEGED TO BE IN FURTHERANCE OF THE CONSPIRACY; OR

(c) WHEN, EVEN IF CONSPIRACY IS NOT CHARGED AND ALL OF THE DEFENDANTS ARE NOT CHARGED IN EACH COUNT, IT IS ALLEGED THAT THE SEVERAL OFFENSES CHARGED:

(i) WERE PART OF A COMMON SCHEME OR PLAN; OR

(ii) WERE SO CLOSELY CONNECTED IN RESPECT TO TIME, PLACE, AND OCCASION THAT IT WOULD BE DIFFICULT TO SEPARATE PROOF OF ONE CHARGE FROM PROOF OF THE OTHERS.

KANSAS CODE

Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts

or transactions constituting the crime or crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. (K.S.A. 1971 Supp. 22-3202(3)).

COMMENT

Kansas complies with the Standard. The Kansas statute follows closely the language of Federal Rule 8(b). While the Standard is drawn with greater particularity than the Rule, the comment to the Standard points out that it is not inconsistent with the rule but sets forth the specific instances to which the rule has been held applicable.

Until 1971, (See K.S.A. 1971 Supp. 22-3204), a defendant charged with an offense in Kansas had an absolute right to a separate trial. Hence there are no helpful Kansas cases dealing with joinder of defendants.

ABA STANDARD

1.3 FAILURE TO JOIN RELATED OFFENSES.

(a) TWO OR MORE OFFENSES ARE RELATED OFFENSES, FOR PURPOSES OF THIS STANDARD, IF THEY ARE WITHIN THE JURISDICTION OF THE SAME COURT AND ARE BASED ON THE SAME CONDUCT OR ARISE FROM THE SAME CRIMINAL EPISODE.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3202(1) cited at 1.1 supra.

COMMENT

The Kansas code complies with the Standard. The rule, as frequently stated in Kansas is:

"Where offenses constitute one comprehensive plan, transaction, or one offense is a corollary to the other they may be joined and this is true whether they be of the same general character or not." (State v. Neff, 169 Kan. 116, 218 P2d 248 (1950); State v. Martin, 175 Kan. 373, 265 P2d 297 (1953); State v. Coleman, 206 Kan. 344, 480 P2d 78 (1971)).

ABA STANDARD

(b) WHEN A DEFENDANT HAS BEEN CHARGED WITH TWO OR MORE RELATED OFFENSES, HIS TIMELY MOTION TO JOIN THEM FOR TRIAL SHOULD BE GRANTED UNLESS THE COURT DETERMINES THAT BECAUSE THE PROSECUTING ATTORNEY DOES NOT HAVE SUFFICIENT EVIDENCE TO WARRANT TRYING SOME OF THE OFFENSES AT THAT TIME, OR FOR SOME OTHER REASON, THE ENDS OF JUSTICE WOULD BE DEFEATED IF THE MOTION WERE GRANTED. A DEFENDANT'S FAILURE TO SO MOVE CONSTITUTES A WAIVER OF ANY RIGHT OF JOINDER AS TO RELATED OFFENSES WITH WHICH THE DEFENDANT KNEW HE WAS CHARGED.

KANSAS CODE

The court may order two or more complaints, informations or indictments against a single defendant to be tried together if the crimes could have been joined in a single complaint, information or indictment. (K.S.A. 1971 Supp. 22-3203).

COMMENT

The Kansas statute is consistent with the Standard, although it does not define the defendant's right to move for joinder. However, the existence of the power of the court to order consolidation for trial suggests that either the defendant or the prosecution may move for such relief.

In view of the provisions of the K.S.A. 1971 Supp. 21-3108 (2) (quoted at 1.3(c) *infra*), which bars subsequent trials for offenses which might have been included as other counts in the earlier prosecution, the defendant's failure to move for joinder probably would not waive any right arising under the statute.

ABA STANDARD

(c) A DEFENDANT WHO HAS BEEN TRIED FOR ONE OFFENSE MAY THEREAFTER MOVE TO DISMISS A CHARGE FOR A RELATED OFFENSE, UNLESS A MOTION FOR JOINDER OF THESE OFFENSES WAS PREVIOUSLY DENIED OR THE RIGHT OF JOINDER WAS WAIVED AS PROVIDED IN SECTION (b). THE MOTION TO DISMISS MUST BE MADE PRIOR TO THE SECOND TRIAL, AND SHOULD BE GRANTED UNLESS THE COURT DETERMINES THAT BECAUSE THE PROSECUTING ATTORNEY DID NOT HAVE SUFFICIENT EVIDENCE TO WARRANT TRYING THIS OFFENSE AT THE TIME OF THE FIRST TRIAL, OR FOR SOME OTHER REASON, THE ENDS OF JUSTICE WOULD BE DEFEATED IF THE MOTION WERE GRANTED.

KANSAS CODE

A prosecution is barred if the defendant was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution:

(a) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime or crimes of which evidence has been admitted in the former prosecution and which might have been included as other counts in the complaint, indictment or information filed in such former prosecution or upon which the state then might have elected to rely; or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the crime was not consummated when the former trial began. (K.S.A. 1971 Supp. 21-3108 (2) (a)).

COMMENT

Kansas fully complies with the Standard. Any subsequent prosecution for an offense within the scope of K.S.A. 1971 Supp. 21-3108 (2) is barred. (State v. Momb, 154 Kan. 435, 119 P2d 544 (1941)).

ABA STANDARD

(d) ENTRY OF A PLEA OF GUILTY OR NOLO CONTENDERE TO ONE OFFENSE DOES NOT BAR THE SUBSEQUENT PROSECUTION OF A RELATED OFFENSE. A DEFENDANT MAY ENTER A PLEA OF GUILTY OR NOLO CONTENDERE ON THE BASIS OF A PLEA AGREEMENT IN WHICH THE PROSECUTING ATTORNEY AGREED TO SEEK OR NOT TO OPPOSE DISMISSAL OF OTHER RELATED CHARGES OR NOT TO PROSECUTE OTHER POTENTIAL RELATED CHARGES.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas complies with the Standard. In State v. Ward, 198 Kan. 61, 422 P2d 661 (1967), the Supreme Court of Kansas said:

"The statute (K.S.A. 62-1449, now K.S.A. 1971 Supp. 21-3108(2)) was intended to supplement the existing law upon the subject of jeopardy, and by its language applies only where there is a trial and evidence of other offenses is admitted." See Pleas of Guilty.

ABA STANDARD

PART II. SEVERANCE OF OFFENSES AND DEFENDANTS

2.1 TIMELINESS OF MOTION; WAIVER; DOUBLE JEOPARDY.

(a) A DEFENDANT'S MOTION FOR SEVERANCE OF OFFENSES OR DEFENDANTS MUST BE MADE BEFORE OR AT THE CLOSE OF ALL THE EVIDENCE IF BASED UPON A GROUND NOT PREVIOUSLY KNOWN. SEVERANCE IS WAIVED IF THE MOTION IS NOT MADE AT THE APPROPRIATE TIME.

KANSAS CODE

Defenses and objections based on defects in the institution of the prosecution or in the complaint, information or indictment other than that it fails to show jurisdiction in the court or to charge a crime may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the complaint, information or indictment to charge a crime shall be noticed by the court at any time during the pendency of the proceeding.

A motion before trial raising defenses or objections to prosecution shall be determined before trial unless the court orders that it be deferred for determination at the trial. (K.S.A. 1971 Supp. 22-3208 (3) and (5)).

COMMENT

The Kansas code and case law complies with the Standard. While the statute does not state specifically when the motion for severance is to be filed, it may be assumed that the rule relating to motion practice generally would govern. In State v. Madden, 90 Kan. 736, 136 Pac. 327 (1913), the Supreme Court of Kansas held that the right to a separate trial is one that can be waived by failure to make a timely motion, and that after the trial had commenced severance became discretionary with the court.

ABA STANDARD

(b) IF A DEFENDANT'S PRETRIAL MOTION FOR SEVERANCE WAS OVERRULED, HE MAY RENEW THE MOTION ON THE SAME GROUNDS BEFORE OR AT THE CLOSE OF ALL THE EVIDENCE. SEVERANCE IS WAIVED BY FAILURE TO RENEW THE MOTION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas complies with the Standard. Assuming that motions for severance are governed by K.S.A. 1971 Supp. 22-3208, the court has the power to entertain such a motion after the trial has begun. In State v. Neff, (cited supra at 1.1), the Supreme Court stated that the trial court might properly wait until the testimony disclosed the relationship or want of relationship between the joined offenses before ruling on the question of joinder.

There is no authority in Kansas law that failure to renew a motion to sever constitutes a waiver. Under K.S.A. 1971 Supp. 22-3417 an objection is preserved for the record by the party's making "known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." A defendant who has made a sufficient pretrial motion for severance would apparently be able to question its denial or appeal, although no further action is taken by him.

Full compliance with the Standard would require a rule defining the defendant's right to move for severance during trial and providing expressly for waiver.

ABA STANDARD

(c) UNLESS CONSENTED TO BY THE DEFENDANT, A MOTION BY THE PROSECUTING ATTORNEY FOR SEVERANCE OF COUNTS OR DEFENDANTS MAY BE GRANTED ONLY PRIOR TO TRIAL.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas complies with the Standard in practice. Neither the Kansas cases nor statutes deal with limitations on the prosecutor's right to severance. However, the removal of a charge or a defendant from the trial after jeopardy has attached would probably terminate the prosecution as to the charge or defendant severed, unless requested or consented to by the defendant. The dearth of Kansas law on this subject may be the result of the prosecutor's control of the charging process, coupled with the limitations imposed by K.S.A. 1971 Supp. 21-3108 (2), quoted at 1.3(c), supra.

ABA STANDARD

(d) IF A MOTION FOR SEVERANCE IS GRANTED DURING THE TRIAL AND THE MOTION WAS MADE OR CONSENTED TO BY THE DEFENDANT, THE GRANTING OF THE MOTION SHALL NOT BAR A SUBSEQUENT TRIAL OF THAT DEFENDANT ON THE OFFENSES SEVERED.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas complies with the Standard. As the Kansas code is silent on the subject of the Standard, any bar to a subsequent trial would necessarily be based on the constitutional prohibition against double jeopardy. Double jeopardy is regarded by the Kansas courts as an

affirmative defense which may be waived by the accused. The defendant's motion or consent to the severance would probably be regarded as a waiver of the defense. (State v. Maxwell, 151 Kan. 951, 102 P2d 109 (1940); Cox v. State, 197 Kan. 395, 416 P2d 741 (1966)).

ABA STANDARD

2.2 SEVERANCE OF OFFENSES.

(a) WHENEVER TWO OR MORE OFFENSES HAVE BEEN JOINED FOR TRIAL SOLELY ON THE GROUND THAT THEY ARE OF THE SAME OR SIMILAR CHARACTER, THE DEFENDANT SHALL HAVE A RIGHT TO A SEVERANCE OF THE OFFENSES.

KANSAS CODE

No comparable code provision.

COMMENT

To the extent that the Standard confers on the defendant an unqualified right to severance, Kansas does not comply. See comment on State v. Neff, cited at 1.1 supra. From statements in the decisions, we may infer that the trial court may deny a defendant's motion to sever offenses when the facts justify such a denial.

ABA STANDARD

(b) THE COURT, ON APPLICATION OF THE PROSECUTING ATTORNEY, OR ON APPLICATION OF THE DEFENDANT OTHER THAN UNDER SUBSECTION (a), SHOULD GRANT A SEVERANCE OF OFFENSES WHENEVER:

(i) IF BEFORE TRIAL, IT IS DEEMED APPROPRIATE TO PROMOTE A FAIR DETERMINATION OF THE DEFENDANT'S GUILT OR INNOCENCE OF EACH OFFENSE; OR

(ii) IF DURING TRIAL UPON CONSENT OF THE DEFENDANT, IT IS DEEMED NECESSARY TO ACHIEVE A FAIR DETERMINATION OF THE DEFENDANT'S GUILT OR INNOCENCE OF EACH OFFENSE. THE COURT SHOULD CONSIDER WHETHER, IN VIEW OF THE NUMBER OF OFFENSES CHARGED AND THE COMPLEXITY OF THE EVIDENCE TO BE OFFERED, THE TRIER OF FACT WILL BE ABLE TO DISTINGUISH THE EVIDENCE AND APPLY THE LAW INTELLIGENTLY AS TO EACH OFFENSE.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas practice is consistent with the Standard. Severance is largely a matter of trial court discretion. While the criteria which guide the court in its exercise of discretion are not stated in the law, fairness to the accused is the overriding consideration.

ABA STANDARD

2.3 SEVERANCE OF DEFENDANTS.

(a) WHEN A DEFENDANT MOVES FOR A SEVERANCE BECAUSE AN OUT-OF-COURT STATEMENT OF A CODEFENDANT MAKES REFERENCE TO HIM BUT IS NOT ADMISSIBLE AGAINST HIM, THE COURT SHOULD DETERMINE WHETHER THE PROSECUTION INTENDS TO OFFER THE STATEMENT IN EVIDENCE AT THE TRIAL. IF SO, THE COURT SHOULD REQUIRE THE PROSECUTING ATTORNEY TO ELECT ONE OF THE FOLLOWING COURSES:

(i) A JOINT TRIAL AT WHICH THE STATEMENT IS NOT ADMITTED INTO EVIDENCE;

(ii) A JOINT TRIAL AT WHICH THE STATEMENT IS ADMITTED INTO EVIDENCE ONLY AFTER ALL REFERENCES TO THE MOVING DEFENDANT HAVE BEEN DELETED, PROVIDED THAT, AS DELETED, THE CONFESSION WILL NOT PREJUDICE THE MOVING DEFENDANT; OR

(iii) SEVERANCE OF THE MOVING DEFENDANT.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas complies in practice. There are no code provisions nor cases on the subject of this Standard. However, Kansas procedure has been adopted to comply with Bruton v. United States, 391 U.S. 123 (1968), which held it to be reversible error to admit at a joint trial a codefendant's confession inculcating the defendant who had not confessed. Also see K.S.A. 1971 Supp. 22-3204, quoted at 2.3 (b) *infra*.

ABA STANDARD

(b) THE COURT, ON APPLICATION OF THE PROSECUTING ATTORNEY, OR ON APPLICATION OF THE DEFENDANT OTHER THAN UNDER SUBSECTION (a), SHOULD GRANT A SEVERANCE OF DEFENDANTS WHENEVER:

(i) IF BEFORE TRIAL, IT IS DEEMED NECESSARY TO PROTECT A DEFENDANT'S RIGHT TO A SPEEDY TRIAL, OR IT IS DEEMED APPROPRIATE TO PROMOTE A FAIR DETERMINATION OF THE GUILT OR INNOCENCE OF ONE OR MORE DEFENDANTS; OR

(ii) IF DURING TRIAL UPON CONSENT OF THE DEFENDANT TO BE SEVERED, IT IS DEEMED NECESSARY TO ACHIEVE A FAIR DETERMINATION OF THE GUILT OR INNOCENCE OF ONE OR MORE DEFENDANTS.

(c) WHEN SUCH INFORMATION WOULD ASSIST THE COURT IN RULING ON A MOTION FOR SEVERANCE OF DEFENDANTS, THE COURT MAY ORDER THE PROSECUTING ATTORNEY TO DISCLOSE ANY STATEMENTS MADE BY THE DEFENDANTS WHICH HE INTENDS TO INTRODUCE IN EVIDENCE AT THE TRIAL.

KANSAS CODE

When two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney. (K.S.A. 1971 Supp. 22-3204).

COMMENT

Kansas practice probably conforms with the Standard. A Kansas prosecuting attorney may move for a separate trial of any one defendant who is charged jointly with another or other defendants. Neither the code nor the cases have articulated guidelines to be observed by the courts in ruling on such motions. The matter is one to be determined in the discretion of the trial court. See Speedy Trial.

ABA STANDARD

2.4 FAILURE TO PROVE GROUNDS FOR JOINDER OF DEFENDANTS.

IF A DEFENDANT MOVES FOR SEVERANCE AT THE CONCLUSION OF THE PROSECUTION'S CASE OR OF ALL THE EVIDENCE, AND THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT THE ALLEGATION UPON WHICH THE MOVING DEFENDANT WAS JOINED FOR TRIAL WITH THE OTHER DEFENDANT OR DEFENDANTS, THE COURT SHOULD GRANT A SEVERANCE IF, IN VIEW OF THIS LACK OF EVIDENCE, SEVERANCE IS DEEMED NECESSARY TO ACHIEVE A FAIR DETERMINATION OF THAT DEFENDANT'S GUILT OR INNOCENCE.

KANSAS CODE

No comparable code provision.

COMMENT

The Kansas practice is consistent with the Standard.

ABA STANDARD

PART III. CONSOLIDATION OR SEVERANCE ON MOTION OF COURT

3.1 AUTHORITY OF COURT TO ACT ON OWN MOTION.

(a) THE COURT MAY ORDER CONSOLIDATION OF TWO OR MORE CHARGES FOR TRIAL IF THE OFFENSES, AND THE DEFENDANTS IF THERE IS MORE THAN ONE, COULD HAVE BEEN JOINED IN A SINGLE CHARGE.

KANSAS CODE

See K.S.A. 1971 Supp. 22-3203, quoted at 1.3, *supra*.

COMMENT

Kansas partially complies with the Standard. Although the court's power to consolidate cases for trial is usually invoked by motion of the prosecution (State v. Browning, 182 Kan. 244, 320 P2d 844 (1958)), there is no apparent reason why it cannot be exercised on the court's own initiative.

The authority to consolidate cases for trial is limited to consolidation of charges against a single defendant (K.S.A. 1971 Supp. 22-3203). There is no authority to order the joint trial of separately charged defendants. This limitation is probably the result of the traditional rule followed in Kansas prior to 1971 which gave the defendant the right to a separate trial upon request. The 1971 amendment authorized the court to deny the request of defendant charged jointly with another for a separate trial, but it apparently did not empower the court to order the joint trials of separately charged defendants.

ABA STANDARD

(b) THE COURT MAY ORDER A SEVERANCE OF OFFENSES OR DEFENDANTS BEFORE TRIAL IF A SEVERANCE COULD BE OBTAINED ON MOTION OF A DEFENDANT OR THE PROSECUTION.

KANSAS CODE

No comparable code provision.

COMMENT

Kansas complies with the Standard.

