

I Object!

– James Eckert, Esq.

Jury Trials on Violations and Misdemeanors

Sometimes a local Court may render its own verdict on violations which are tried along side misdemeanors. The Court of Appeals ruled yesterday on the legality of having a combined bench/jury trial: where the jury renders a verdict on misdemeanors, and the judge does so on violations.

People v Almeter involved assault and simple trespass, which occurred at the same time and place with the same complainant. These two charges were brought by separate accusatory instruments, but "proceeded, to all appearances, as one prosecution: the charges were listed together on several documents, including the police incident report, the arrest report, the appearance ticket and the order of protection" (*People v Almeter* 2009 WL 1765982, slip op 05203). The Court of Appeals opined: "To say that the defendant might reasonably have expected the charges to be tried together before a single fact finder, would not seem to venture too much." *Almeter* provides some guidance on this issue: under what circumstances is a defendant who is charged with both a violation and a misdemeanor entitled to a jury trial on both charges?

If the multiple counts are charged by **one accusatory**, the jury must determine guilt or lack of guilt on all charges. CPL § 340.40(3) provides: "A defendant entitled to a jury trial pursuant to subdivision two, shall be so entitled even though the information also charges an offense for which he is otherwise not entitled to a jury trial. In such case, the defendant is not entitled both to a jury trial and a separate single judge trial and the court may not order separate trials." "Not otherwise entitled to a jury trial" implies that the defendant becomes entitled to a jury trial by virtue of the two offenses being charged together. Peter Preiser's prescient practice commentary makes this clear "Subdivision 3 is designed to make it clear that the joinder of an offense for which a jury trial is not authorized with an offense triable by a jury does not furnish occasion for severance and separate trials. **The single trial must be a jury trial, unless the defendant waives a jury.**"

So the only issue is whether a Judge may render a verdict on violations in a jury trial on misdemeanors if the two are brought in separate accusatories. The Court of Appeals in *Almeter* does not come right out and forbid this practice, the basis of the decision is the late notice (mid-trial) that the court intended to render its own verdict. However, comments in the course of the decision make it clear that such a procedure is considered odd and is not favored.

First, the court ruled that "although consolidation was not specifically requested, the charges were prosecuted under a single docket number" - consolidation would result in a jury trial on all counts. The County Court which decided the intermediate appeal found that there was no prejudice to the defendant because he was acquitted of the one count tried before the jury, which implies that there might well be prejudice to the defendant from proof

on the violation - on which the jury will not render a verdict - is tried in the presence of the jury. There might well be a good basis for a severance motion if the two counts will be tried before different triers of fact, and real prejudice to the defendant if the jury hears proof on counts which it does not need to consider. I think there is a good argument that any case which is inappropriate for joinder is inappropriate for a joint trial - any other result would merely circumvent CPL 340.40(3).

Further, the Court of Appeals, in stating that it did not reach the issue of whether it is ever permissible to try some counts before a judge and some before a jury in the same trial, said "the court was obligated to inform the defendant and his counsel of this unique mode of proceeding from the outset". Again, the Court of Appeals' ruling was based on notice, but its reference to the proceeding does not indicate that it approves of the procedure. In the end, while the court discussed notice at length, and reversed based on lack of notice in *Almeter*, the tenor of the decision makes it clear that the court considered the procedure used to be peculiar, possibly prejudicial, and arguably inappropriate in all circumstances.

A violation charged in the same accusatory as a misdemeanor warranting a jury trial must be tried by a jury, not a judge, and violations charged in separate accusatories ought to be tried separately, or also by a jury, not a judge.