UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States	:	
	:	
v.	:	**No. 3:02cr81(JBA)**
	:	
Patrick Triumph	:	

Substituted Ruling on Motion for Reconsideration of Ruling on Motion to Dismiss Indictment on Grounds of Prosecutorial Misconduct [Doc. # 111]; Motion for Disclosure of Matters Occurring Before the Grand Jury [Doc. # 112]; Motion for Inspection and Discovery [Doc. # 113]; Motion for Preservation of Notes [Doc. # 118]; Motion to Dismiss Indictment Due to Speedy Trial Act [Doc. # 117]; Motion to Dismiss Indictment Due to Statute of Limitations [Doc. # 120]; Motion to Dismiss Indictment Due to Prosecutorial Vindictiveness [Doc. # 121]; Motion to Dismiss Counts 12, 13 and 14 of the Indictment [Doc. # 135]; Motion to Dismiss Counts 36, 37, 38 in the Indictment [Doc. # 122]; Motion to Suppress [Doc. # 124]

Defendant Patrick Triumph, who represents himself at this time, is charged with aiding and abetting the filing of false income tax returns, interference with administration of internal revenue laws, and failure to appear. On August 4, 2004, this Court granted defendant's motion to represent himself at trial, and evidence is scheduled to begin on August 25, 2004. Defendant has now filed several motions, which are decided as follows:

1. Motion for Reconsideration to Dismiss Indictment Due Prosecutorial Misconduct in the Grand Jury [Doc. # 111]

On February 25, 2004, this court denied the defendant's motion to dismiss the indictment due to prosecutorial misconduct after reviewing the sealed courtroom minutes of the grand jury proceeding. See Ruling [Doc. # 78]. The defendant now moves for

reconsideration, and states, without specificity, that he has "newly discovered evidence [which] reveals a myriad of abuses and misconduct of the Grand Jury by the Prosecutor." See Motion For Reconsideration [Doc. # 111]. The essence of the defendant's claim in his February 23, 2004 motion was that the indictment returned on March 21, 2002 was the product of prosecutorial misconduct because no grand jury proceedings were held on March 21, 2002. The Court reviewed the sealed courtroom minutes, which confirmed that the Grand Jury in fact convened with a quorum and returned a True Bill with a proper number of grand jurors concurring on March 21, 2002. As grand jury proceedings carry a "presumption of regularity," United States v. Torres, 901 F.2d 205, 232 (2d Cir. 1990) (citation and internal quotation marks omitted), and as defendant has provided no specific grounds for departing from the Court's earlier ruling, his motion for reconsideration is DENIED.

2. Motion for Disclosure of Matters Occurring Before the Grand Jury [Doc. # 112]

The defendant has moved for disclosure of a variety of matters occurring before the grand jury. The secrecy of grand jury proceedings is well established. See United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958); United States v. Johnson, 319 U.S. 503, 513 (1943). In certain circumstances, however, a court may order the disclosure of a grand jury matter. As Rule 6(e)(3)(E) of the Federal Rules of Criminal Procedure

provides, a court:

> may authorize disclosure – at a time, in a manner, and subject to any other conditions that it directs – of a grand jury matter: . . . (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.

Because of the "indispensable secrecy of grand jury proceedings," United States v. Johnson, 319 U.S. at 513, disclosure is permissible only "where there is a compelling necessity." Proctor & Gamble, Co., 356 U.S. at 681. Thus, grand jury proceedings "carry a 'presumption of regularity,'" and "a review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." United States v. Torres, 901 F.2d 205, 232-33 (2d Cir. 1990) (quoting Hamling v. United States, 418 U.S. 87, 139 n. 23 (1974); see also United States v. Wilson, 565 F.Supp. 1416, 1436-37 (S.D.N.Y. 1983) (denying motion to inspect grand jury minutes for lack of factual support to overcome presumption of regularity, noting that "speculation and surmise as to what occurred before the grand jury is not a substitute for fact"). Here, as the defendant not identified any particularized need for the grand jury materials he seeks, his motion for disclosure is DENIED.

3. Motion for Inspection and Discovery [Doc. # 113]

The Defendant has moved for inspection and disclosure of all Brady and Jencks Act material. As the Court's Standing Order on Discovery requires the disclosure of such material, and as the

Government has represented that it has provided discovery material in compliance with the Standing Order, and beyond the scope of the Standing Order, defendant's motion is DENIED as moot.

4. Motion for Preservation of Notes [Doc. # 118]

Defendant seeks an order preserving notes which may constitute Brady or Jencks Act material. The Government responds that it has complied in full with its Brady and Jencks Act obligations, and that notes that are incorporated into formal reports need not be preserved. See United States' Memorandum in Opposition to Defendant's Discovery Motions [Doc. # 127] at 7 (citing United States v. Elusma, 849 F.2d 76, 79 (2d Cir. 1988)(concluding no Brady violation resulted from the law enforcement agents' failure to produce their handwritten notes of interviews with potential witnesses, because "they need not preserve such notes if the agents incorporate them into formal reports.")).

In U.S. v. Scotti, 47 F.3d 1237 (2d Cir. 1995), the Second Circuit examined the circumstances in which handwritten notes could be deemed witness statements subject to disclosure under the Jencks Act and Fed. R. Crim. P. 26.2. The Court concluded, "[a]bsent any indication that an . . . agent signs, adopts, vouches for, or intends to be accountable for the contents of the notes, the rough notes taken in a witness interview cannot be

considered the agent's statement." Id. at 1249 (citations and internal quotation marks omitted). In addition, those notes which are "substantially verbatim recordings" may qualify as statements under Fed. R. Crim. P. 26.2(f). "Even if not an exact recording, the notes would be considered a substantially verbatim recital of the witness's statement if they could fairly be deemed to reflect fully and without distortion what had been said to the government agent and thus be used to impeach the witness's testimony at trial." Id. at 1249(citations and internal quotation marks omitted).

Here, the Government represents that it has preserved and disclosed to the defendant all notes that qualify as witness statements under Rule 26.2 and the Jencks Act, and has screened all notes for Brady and Giglio material. Nonetheless, as the defendant's motion seeks only to preserve these notes until the end of trial, defendant's motion is GRANTED.

5. Motion to Dismiss Indictment Due to Speedy Trial Act [Doc. # 117].

Mr. Triumph argues that the delay resulting from the court-ordered competency evaluation and the finding of incompetency denied him his right to a speedy trial. In particular, he identifies the following areas of non-compliance with the Speedy Trial Act subsequent to the determination of incompetency: First, defendant states that fifty days elapsed from the time the

Court found him incompetent and ordered him hospitalized on February 25, 2004 until the time he actually arrived at Butner Federal Medical Center on April 14, 2004. Mr. Triumph argues that only ten of these days is excepted for transportation under 18 U.S.C. § 3161(h)(1)(H). Second, defendant states that seventy days elapsed between the time he was found restored to competency on May 26, 2004 until the first day of jury selection on August 4, 2004. Mr. Triumph argues that only 10 of these days is excepted for transportation under 18 U.S.C. § 3616(h)(1)(H). Triumph acknowledges that the period of his confinement at Butner is exempted from the Speedy Trial Act, but counts 100 non-excludable days resulting from the Court's finding of incompetency, which he contends violates his Sixth Amendment right to a speedy trial.

The Government argues that this case is controlled by United States v. Vazquez, 918 F.2d 329 (2d Cir. 1990), in which the Second Circuit held that all delays resulting mental competency evaluations "are excluded from the running of the speedy trial clock, without any inquiry into the reasonableness of the delay." Id. at 333. Vazquez was limited to an evaluation of 18 U.S.C. §§ 3161(h)(1)(A) and (F), the provisions which exclude from the speedy trial clock proceedings to determine mental competency and delay resulting from any pretrial motion, but its reasoning applies here, where the delay resulted from the finding of

incompetency. As the Second Circuit in Vazquez concluded, where there is a specific statutory exemption from the Speedy Trial Act, the exclusion applies automatically, whether or not the delay was reasonable. See id. at 333. Here, 18 U.S.C. § 3161(h)(4) specifically excludes from the speedy trial clock "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." Thus, the entire period of time identified by Mr. Triumph, which includes the date when Mr. Triumph was found incompetent until he was found restored to competency, is excluded from the clock, regardless of its reasonableness. In light of this specific statutory exclusion, Mr. Triumph's arguments fail. Jury selection here began on August 4, 2004, nine days after defendant's stipulation to his restoration of competency.[1] Accordingly, defendant's Motion to Dismiss Indictment Due to Speedy Trial Act is DENIED.

6. Motion to Dismiss Due to Statute of Limitations [Doc. # 120]

Triumph argues that because the superceding indictment was returned on July 13, 2004, Counts One through Thirty Eight are

[1]The Court notes that Triumph's calculation of the date on which he was restored to competency is not supported by the record. The Certificate of Restoration of Competency was filed with this Court on June 29, 2004. See Certificate of Restoration of Competency to Stand Trial [Doc. # 103]. Mr. Triumph waived a second competency hearing and stipulated to the findings in the Certificate of Restoration of Competency on July 26, 2004. See [Doc. # 106].

barred by the statute of limitations, as they are claimed to have involved the aiding and assisting the filing of fraudulent tax returns in violation of 26 U.S.C. § 7206(2), offenses which carry a statute of limitations period of 6 years. Defendant's argument fails, as it fails to recognize the filing of the original indictment on March 21, 2002 tolled the applicable statute of limitations, and the superceding indictment relates back to the original date of return. "Once an indictment is brought, the statute of limitations is tolled as to the charges contained in that indictment." United States v. Grady, 544 F.2d 598, 601 (2d Cir. 1976). "When a superseding indictment supplants a pending timely-filed indictment, any charges in the superseding indictment that are neither materially broadened nor substantially amended from the earlier indictment relate back to the date of the filing of the earlier indictment. The superseding indictment continues its predecessor's tolling of the statute of limitations and inherits its predecessor's timeliness." U.S. v. Ben Zvi, 242 F.3d 89, 98 (2d Cir. 2001). Here, the date on the tax return or amended tax return at issue for each of the first thirty-eight counts of the indictment ranges from December 1996 through April 1997, and thus each count was timely brought within the six year statute of limitations at the time of the March 21, 2002 indictment. These thirty eight counts of the superceding indictment are identical to those in the March 21, 2002

indictment, making the same allegations about the same taxpayers and tax returns. Accordingly, they have inherited the timeliness of the original indictment.

The remaining counts brought for the first time in the superceding indictment, which was returned on July 13, 2004, are also timely. Count 39, charges the defendant with interfering with the administration of internal revenue laws, in violation of 26 U.S.C. § 7212, and carries a six year statute of limitations. This Count alleges conduct occurring in or about March 1998, and by virtue of the tolling of the statute of limitations that occurred during the 10 month period of defendant's flight from justice from July 10, 2002 through May 14, 2003, is timely.[2] See 18 U.S.C. § 3290 ("no statute of limitations shall extend to any person fleeing from justice."). Finally, Count 40, which charges the defendant with failure to appear under 18 U.S.C. § 3146(a)(1), an offense carrying a five year statute of limitations, is timely because it arises out of the defendants failure to appear in court on July 10, 2002 and July 17, 2002. Accordingly, defendant's Motion to Dismiss Indictment Due to Statute of Limitations is DENIED.

7. Motion to Dismiss Indictment Due to Prosecutorial Vindictiveness [Doc. # 121]

[2]If the defendant is acquitted on the failure to appear count, he may renew his motion as to the application of the statute of limitations in Count 39.

The defendant moves to dismiss the indictment due to prosecutorial vindictiveness, arguing that he never consented to the mental competency evaluation or to the declaration of mistrial, and that the return of a superceding indictment containing additional charges subsequent to the declaration of mistrial represents prosecutorial vindictiveness.

"Although the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor, the decision to prosecute violates due process when the prosecution is brought in retaliation for the defendant's exercise of his legal rights." U.S. v. White, 972 F.2d 16, 19 (2d Cir. 1992)(citations and internal quotation marks omitted). A vindictive motive may be found "where there is direct evidence of actual vindictiveness, or a rebuttable presumption of a vindictive motive may arise under certain circumstances." Id. (citations omitted). The Second Circuit has "limited the application of such a presumption to prosecutions brought after post-conviction activity of defendants." See id. (citing Lane v. Lord, 815 F.2d 876, 878 (2d Cir. 1987)). In Lane, the Second Circuit refused to apply this rebuttable presumption where the prosecutor lodged a superceding indictment with additional charges after declaration of a mistrial. As the Court explained, "[a]t least in the mistrial context, we believe that a threat of greater punishment is required to justify a 'realistic' apprehension of retaliatory

motive on the part of the prosecution. . . . [T]he Supreme Court emphasized that the prosecution creates an apprehension of vindictiveness by 'upping the ante' after a successful criminal appeal--charging a felony in the superseding indictment where the original indictment charged only a misdemeanor. In the absence of a prospect of exposure to increased punishment, we do not believe that a defendant's right to move for a mistrial is realistically chilled by the possibility of facing additional charges on retrial." Lane, 815 F.2d at 879 (citations and internal quotation marks omitted).

Here, the superceding indictment adds the charges of interference with administration and internal revenue laws and failure to appear. The Government states that both charges were brought as separate substantive charges in the superceding indictment to "ensure that they are appropriately taken into account at sentencing to the extent that [the Supreme Court's recent decision in Blakely v. Washington, 124 S.Ct. 2531 (2004)] is deemed to apply to the sentencing guidelines, whereas pre-Blakely these sentencing factors would have been determined by the Court post-conviction." United States' Memorandum in Opposition to defendant's Supplemental Motions to Dismiss Indictment in Whole and in part [Doc. # 137] at 2. As the new substantive charges would have been accounted for in sentencing at the initial trial, they do not create threat of greater

punishment that the defendant would have received at the first trial. Thus, because the new charges in the Superceding Indictment do not give rise to a rebuttable presumption of prosecutorial vindictiveness, and because Mr. Triumph has presented no direct evidence of prosecutorial vindictiveness, his motion is DENIED.

8. Motion to Dismiss Counts 12, 13 and 14 of the Indictment [Doc. # 135]

Mr. Triumph moves to dismiss Counts 12 through 14 of the Superceding Indictment on grounds that Booker T. Copeland, whose joint tax returns with his wife are at issue in these counts, has died, and therefore Mr. Triumph will not be afforded the opportunity to confront and cross-examine him as a witness. The Government responds that it does not seek to introduce any testimonial statements from Mr. Copeland, making Crawford v. Washington, 124 S.Ct. 1354 (2004), inapplicable. In addition, the Government argues that the due process requires dismissal of an indictment only "if it were shown . . . that the pre-indictment delay in this case caused substantial prejudice to [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." United States v. Marion, 404 U.S. 307, 324 (1971). Applying the prejudice prong of this test where a potential witness dies during the period of delay in bringing an indictment, the Seventh Circuit, for example, requires "proof that the missing witness

would have testified on the defendant's behalf, would have withstood cross-examination, and would have been a credible witness before the jury." See U.S. v. Canoy, 38 F.3d 893, 902 (7th Cir. 1994). Here, as the defendant has not identified what testimony he would have elicited from Booker Copeland or how it would have been helpful to his defense, and has not alleged that the Government intentionally delayed bringing the indictment in order to gain a tactical advantage, the defendant has not established a due process violation. Accordingly, defendant's motion to dismiss Counts 12, 13, and 14 of the Superceding Indictment is DENIED.

9. Motion to Dismiss Counts 36, 37, 38 in the Indictment [Doc. # 122]

The defendant's motion to dismiss Counts 36 through 38 of the indictment is unclear, but appears to argue that he or the taxpayer did not execute the tax return willingly or knowing that it was false. Such an argument is inappropriate at this pre-trial stage, as it depends on facts that will be developed at trial. Therefore, defendant's motion is DENIED without prejudice.

10. Motion to Suppress [Doc. # 124]

The defendant moves to suppress (1) the unsigned tax returns that the Government intends to offer at trial, (2) the tax returns of Booker and Laura Copeland, because Booker Copeland is deceased and unavailable as a witness, (3) receipts from the

"Homework Club," and (4) the testimony of witnesses Pekah Wallace, Ann Sabaaz, and Angella Downer. As to the unsigned tax returns, the defendant argues that the admission of such evidence would result in prejudice that exceeds the probative value of the evidence. The Court disagrees. The Government must authenticate the documents it offers, but provided it does so through witness testimony or the self-authentication provisions of Fed. R. Evid. 902(1) and 902(4), the tax returns are clearly admissible, and probative to the issue here of whether Mr. Triumph aided and abetted the filing of false income tax returns. While Mr. Triumph is free to cross examine witnesses or introduce evidence demonstrating that he lacked sufficient knowledge of the information in the tax return or the falsity of the information, based on the absence of signatures, there is no basis to preclude the admission of these tax returns. To the extent that Mr. Triumph implies that he cannot be held liable for aiding and abetting the filing of a false income tax return, he misstates the law. The cases on which defendant relies provide that a signature on a tax return in prima facie evidence that the signer knows the contents of the return, see, e.g. U.S. v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974); U.S. v. Harper, 458 F.2d 891 (7th Cir. 1971), or provide that the existence of a signature is not necessarily sufficient to impose liability, see, e.g. Bauer v. Foley, 404 F.2d 1215 (2d Cir. 1968); Toscano v. Commissioner, 441

F.2d 930 (9th Cir. 1971); the notion that the absence of a signature would render knowledge of the contents unprovable does not logically follow from these cases. As the Government points out, the circuit courts have consistently upheld the imposition of criminal liability for aiding and abetting the preparation or presentation of a false or fraudulent return, even where the defendant did not sign the return. See, e.g. United States v. Motley, 940 F.2d 1079, 1084 (7th Cir. 1991); United States v. Sassak, 881 F.2d 276, 277-78 (6th Cir. 1989); United States v. Williams, 809 F.2d 1072, 1095 (5th Cir. 1987).

Defendant's argument that the joint tax returns of Laura Copeland and Booker Copeland should be suppressed because Booker Copeland is deceased and unavailable to testify also lacks merit, as the Government does not seek to introduce any testimonial evidence from Booker Copeland, and therefore he is equally unavailable to both sides. For the reasons discussed in the Ruling on defendant's Motion to Dismiss Counts 12, 13 and 14 of the Indictment [Doc. # 135], see supra, defendant's evidentiary challenge is likewise denied.

Defendant's argument that the documents identified as "Homework Club" receipts should be excluded as hearsay is unfounded, given the Government's expressed intention to offer these receipts not for their truth, but rather as evidence of fabrication and obstructive conduct.

Finally, the basis for defendant's request to preclude the testimony of three witnesses is unclear. As the Government has expressed its intention to offer this testimony on matters such as false items the defendant is alleged to have put in their tax returns, and the defendant's efforts to cover up his misconduct, the anticipated testimony is relevant to the matters at issue in this trial. If the defendant has specific objections to particular aspects of the examination of these witnesses, they will be considered at trial.

For the reasons discussed above, defendant's Motion to Suppress is DENIED.

IT IS SO ORDERED.

/s/

_____

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut on this 24th day of August, 2004.