

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)
)
 v.) CRIMINAL NO. 00-176-3
)
 JOHN GAMBONE, SR., ANTHONY)
 GAMBONE, WILLIAM MURDOCK,)
 SANDRA LEE GAMBONE, JOHN)
 GAMBONE, JR., and ROBERT CARL)
 MEIXNER)

MEMORANDUM

Padova, J.

September , 2000

Before the Court is Defendant William Murdock's Motion to Dismiss the Indictment. The matter is fully briefed and ripe for decision. For the reasons that follow, the Court will deny Defendant's Motion to Dismiss the Indictment.

I. BACKGROUND

On April 6, 2000, the Government filed a multi-count indictment against Defendants John Gambone, Sr., Anthony Gambone, William Murdock, Sandra Lee Gambone, John Gambone, Jr., and Robert Carl Meixner. The indictment charges Mr. Murdock, an employee of the Gambone Brothers' Construction Company, with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and one count of subscribing a false individual income tax return, in violation of 26 U.S.C. § 7206(1).

In December 1995, a federal search warrant was executed at the office of the Gambone Brothers' Construction Company. (Def.'s Aff. ¶2.) Beginning shortly thereafter, and extending until early 2000, Mr. Murdock and a number of his co-employees were represented by Mr. Gerald Egan,

Esquire. (Def.'s Aff. ¶¶2,13.) Mr. Murdock alleges that, during this period, Mr. Egan failed to explain to him the danger of his being indicted if he did not agree to be interviewed by the U.S. Attorney's office. (Def.'s Mot. ¶5.) Mr. Murdock claims that Mr. Egan never informed him that he could possibly receive immunity from prosecution in exchange for his testimony about the alleged conspiracy. (*Id.*) Mr. Murdock claims that this, as well as the failure to explain to him the workings of the grand jury process, constituted ineffective assistance of counsel. He seeks to have the indictment against him dismissed on these grounds.

II. STANDARD

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. The purpose of the right to counsel is to guarantee assistance at trial, “when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.” United States v. Ash, 413 U.S. 300, 309 (1973).

Furthermore, the criminal defendant has the right to “reasonably effective assistance” of counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's performance was unreasonable under prevailing professional norms, and (2) there is a “reasonable probability that, but for counsel's unprofessional errors, the result would have been different. . .” *Id.* at 687-91, 694.

The two-part Strickland analysis, however, is unnecessary if the defendant's right to counsel has not attached. See Matteo v. Superintendent, S.C.I. Albion, 171 F.3d 877, 892 (3d Cir. 1999); In re Grand Jury Subpoena, No. 00-1622, 2000 WL 1073340, at *6 (3d Cir. Aug. 4, 2000). Thus, the initial inquiry must be whether the right to counsel had attached to the period in question.

III. DISCUSSION

The Sixth Amendment right to counsel attaches “only at or after the initiation of adversary judicial proceedings against the defendant.” United States v. Gouveia, 467 U.S. 180, 187 (1984); Kirby v. Illinois, 406 U.S. 682, 688 (1972). This right has been extended to certain “critical” pretrial proceedings, United States v. Wade, 388 U.S. 218, 224 (1967), where “the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused’s fate and reduce the trial itself to a mere formality.” Gouveia, 467 U.S. at 189 (citations omitted). That the right to counsel attaches only at the initiation of such adversary judicial proceedings is not a mere formalism, for it is only at that time that “the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.” Kirby, 406 U.S. at 689. Thus, the right to counsel “becomes applicable only when the government’s role shifts from investigation to accusation.” Moran v. Burbine, 475 U.S. 412, 430 (1986).

Defendant asserts that Mr. Murdock was entitled to a right to effective assistance of counsel during the grand jury investigation, prior to his arrest or indictment. The Court disagrees. During this investigatory period, Mr. Murdock had not yet been confronted by the procedural system in the way envisioned under the prevailing Supreme Court and Third Circuit tests. See United States v. Mandujano, 425 U.S. 564, 581 (1976) (concluding the Sixth Amendment counsel right had not yet come into play during grand jury period because no criminal proceedings had been filed against respondent); In re: Grand Jury Subpoena, 2000 WL 1073340, at *6 (3d Cir. Aug. 4, 2000) (holding the Sixth Amendment right had not attached prior to initiation of criminal proceedings); In re Special September 1978 Grand Jury (II), 640 F.2d 49, 64 (3d Cir. 1980) (“The Sixth Amendment right to

effective assistance of counsel does not apply to a grand jury investigation.”).

In support of the notion that the right to counsel applies to this situation, Defendant cites two cases in which courts recognized the attachment of the right to counsel pre-indictment. In Matteo v. Superintendent, S.C.I. Albion, 171 F.3d 877 (3d Cir. 1999), the Court of Appeals for the Third Circuit recognized the right to counsel for the defendant, who had been arrested and incarcerated, but not yet indicted. Id. at 893. In United States of America v. Fernandez, No. 98 CR 961, 2000 WL 534449 (S.D.N.Y. May 3, 2000), the U.S. District Court for the Southern District of New York held that the right to counsel attached to preindictment plea negotiations. Noting the availability of sentence reductions under the Sentencing Guidelines for cooperation and the potential impact of failing to cooperate, the court found it was malpractice for Mr. Fernandez’s lawyer to fail to give him timely advice about the importance of cooperating with the government. Id. at *1.

Neither the Matteo nor the Fernandez holding, however, applies to the facts of the case at bar. In Matteo, the defendant had been arrested and incarcerated for a one-week period. Similarly, in Fernandez, the defendant had been arrested, and the court ascribed the right to counsel to the eight-month period after his arrest and prior to his entrance of a plea. Mr. Murdock, in contrast, had not yet been arrested, and had yet to be confronted either formally or informally by any government attorneys.

Defendant also relies in part on United States v. Moody, 206 F.3d 609 (6th Cir. 2000), in which the Sixth Circuit Court of Appeals considered whether the right to counsel attached to pre-arrest, pre-indictment plea negotiations. The court expressed its sympathy for the defendant, as well as a desire to find that the right did attach. Id. at 615. However, the court ultimately concluded that the defendant was not entitled to effective assistance of counsel under legal precedent. Thus, Moody

does not assist the Defendant with his argument.¹

The Court determines that Mr. Murdock's Sixth Amendment right to counsel did not attach to the pre-arrest, pre-indictment period of the grand jury investigation. The Court lacks a sufficient legal or factual basis to extend the right to counsel to Mr. Murdock during this period. The Court therefore denies Defendant William Murdock's Motion to Dismiss the Indictment.

An appropriate Order follows.

¹The Defendant argues that the Court should ignore the holding in Moody and adopt the sentiment expressed that the right to counsel should extend to the pre-arrest, pre-indictment period. Even if the Court could ignore both the actual holding in Moody and legal precedent, which it cannot, Moody is distinguishable from the case at bar in that Mr. Moody had been interviewed by the FBI and the government several times in the course of the investigation and had been offered a specific deal by government prosecutors. Id. at 611. The court observed that it was "a mere formality" that the government had not yet indicted him at the time it offered him a deal and invited him to seek assistance of counsel. Id. at 615. Mr. Murdock, in contrast, did not have a single meeting or discussion with the government.

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ORDER

AND NOW, this day of September, 2000, upon consideration of Defendant William Murdock's Motion to Dismiss the Indictment (Docket No. 64), and the Government's Response (Docket Nos. 82, 83), **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

John R. Padova, J.