

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
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CARMEN GRICCO : NO. 01-90

MEMORANDUM

Padova, J.

November 27, 2002

Defendant Carmen Gricco was convicted by a jury on May 17, 2002, of one count of conspiracy to manufacture and distribute methamphetamine; one count of manufacturing methamphetamine; one count of possession of methylamine for use in the manufacture of methamphetamine; one count of money laundering conspiracy; nine counts of money laundering, aiding and abetting, and one count of possession of a machine gun. During deliberations and before the jury's verdict, Defendant pled guilty to one count of possession of firearms by a convicted felon. Before the Court is Defendant's "Motion for New Trial," the Government's Response thereto and letter dated November 22, 2002, and the testimony presented by both parties at the Hearing on the Motion held on November 21, 2002. For the reasons that follow, the Court denies the Motion in all respects.

I. Legal Standard

"On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Fed. R. Crim. P. 33. A new trial should be granted sparingly and only to

remedy a miscarriage of justice. United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994).

II. Discussion

Defendant contends that the Court should set aside his conviction and dismiss the indictment because the indictment was procured through the use of knowingly perjured testimony presented by Stephen DeMarco, Andrew Sidebotham, Special Agent Hodnett and Agent Agnew; the prosecutor knew or had reason to know that that grand jury testimony was perjurious; the prosecutor failed in the obligation to correct and suppress the said perjurious testimony; the Government had in its possession exculpatory evidence in the "form of a statement of one Emory Reed, wherein Mr. Reed identified a photograph of Stephen DeMarco with a person DeMarco identified as his 'partner' in his drug business, and that the person in that photograph was not the defendant," and the Government failed to inform the defendant of this information or to provide Defendant with the said photograph shown to Reed, in violation of its duty under Brady v. Maryland, 373 U.S. 83 (1963). (Def.'s Mot. at 2.) Defendant requests that the Court require the Government to provide to him transcripts of all testimony presented before both his original indicting grand jury and the grand jury that returned the Superseding Indictment, and that the Government provide the photograph shown to Reed. (Def.'s Mot. at 2-3.)

A. Indictment Based on Perjurious Testimony

Pursuant to Federal Rules of Criminal Procedure 12(b) and (f), challenges to an indictment for perjury and prosecutorial misconduct not raised pre-trial are waived. See, e.g., United States v. Louis Agnes, 581 F. Supp. 462, 478 (E.D. Pa. 1984); see also United States v. Harris, 293 F.3d 970, 976-77 (6th Cir. 2002); United States v. Ilonia, No. 96-4210, 1997 U.S. App. LEXIS, at *5-8 (4th Cir. Oct. 15, 1997); United States v. Serafini, 121 F. Supp. 2d 803, 806 (M.D. Pa. 2000). Rule 12(b) provides:

Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information . . .

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Fed. R. Crim. P. 12(b). Rule 12(f) provides:

Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

Fed. R. Crim P. 12(f). Here, Defendant failed to raise objections to the Indictment and Superseding Indictment based on perjurious testimony and therefore waived this objection. Defendant provides

no facts or reasons as to why he failed to raise this objection pre-trial. He thus fails to show cause for relief from such waiver. Accordingly, this aspect of the Motion based on alleged perjurious testimony during the grand jury proceedings is denied, pursuant to Federal Rules of Criminal Procedure 12(b) and (f).¹

B. Brady Violation

Defendant contends that the Government had in its possession exculpatory evidence in the form of a statement of Emory Reed, wherein Reed identified a photograph of Stephen DeMarco with a person DeMarco identified as his "partner" in his drug business, and that the person in that photograph was not Defendant. (Def.'s Mem. at 2.) Defendant alleges that the Government failed to inform

¹Accordingly, Defendant's request for transcripts for the grand jury proceedings is denied, since Defendant is barred from raising the perjury allegations. Furthermore, Defendant would be precluded from receiving the grand jury transcripts. There is a long-standing federal policy that grand jury deliberations require secrecy. See, e.g., In re: Grand Jury Matter, 682 F.2d 61, 63 (3d Cir. 1982) (citing Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979)). The burden is on the party seeking disclosure to show a particularized need for disclosure. United States v. Mahoney, 495 F. Supp. 1270 (E.D. Pa. 1980) (citing Douglas Oil, 441 U.S. at 222). The seeking party must show that the material sought is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request is structured to cover only material so needed. United States v. Lehr, 562 F. Supp. 366, 370 (E.D. Pa. 1983) (citing Douglas Oil, 441 U.S. at 222). Mere speculation of misconduct and improprieties does not suffice to support the required showing. See, e.g., United States v. Waskey, Cr. No. 98-189, 1998 U.S. Dist. LEXIS 11802, at *3 (E.D. Pa. Jul. 21, 1998); United States v. Mahoney, 495 F. Supp. 1270, 1273 (E.D. Pa. 1980); United States v. Bloom, 78 F.R.D. 591, 620 (E.D. Pa. 1977). Here, Defendant offers no facts whatsoever to support a particularized need for the grand jury transcripts.

Defendant of this information or to provide Defendant with the subject photograph shown to Reed, in violation of Brady v. Maryland, 373 U.S. 83 (1963). (Def.'s Mem. at 2.)

Christine Sykes, the Assistant United States Attorney originally handling this case, submitted an Affidavit dated November 4, 2002 ("Affidavit") pertaining to this alleged photograph and Reed information, which was admitted into evidence at the Hearing on the Motion.² The Affidavit states that Emory Edward Reed testified as a witness before a grand jury on October 6, 1999, during which time he testified about his relationship with an outlaw motorcycle club. During this testimony, Ms. Sykes asked Reed about a conversation he allegedly had with Stephen DeMarco, a coconspirator in this case who later became a cooperating witness for the Government, in the Federal Correction Institution at Fairton, New Jersey, during the summer of 1999. (Sykes Aff. ¶ 3.) The basis for Ms. Sykes' questions was an FBI 302 memorandum summarizing an interview of Reed conducted on September 22, 1999. (Id.) The FBI 302 report indicated that DeMarco had shown Reed a photograph of an individual DeMarco told Reed was his partner in the methamphetamine business. (Id.) Reed described the individual as a short, heavy-set, Italian white male. (Id.) When asked by the

²Ms. Sykes was unavailable to testify at the Hearing; upon agreement of both parties, the Affidavit was received into evidence on the basis that Ms. Sykes' testimony would be in accordance with the Affidavit.

agents if this individual's name could have been Carmine [sic] Gricco, Reed stated he believed that was the name of the person in the photo. (Id.) Based upon her reading of this FBI 302 report, Ms. Sykes asked Reed the following questions in front of a grand jury and he provided the following answers:

- Q: Did he [DeMarco] tell you anything about the supplier of the methamphetamine to he and Marla?
- A: No.
- Q: Did he tell you anything else about who he was working with in this methamphetamine business?
- A: She (sic) had a partner that he made some statements about, but wasn't very clear, you know, a guy was a partner, owns an after-hours club around the corner from the tattoo shop.
- Q: Okay. Well, he showed you a picture, didn't he?
- A: Yes.
- Q: And in this photograph, it was a picture of Stevie DeMarco?
- A: Marla.
- Q: And who else?
- A: I can't remember the guy's name.
- Q: And the individual who he referred to as his partner; is that correct?
- A: Right.
- Q: Does the name Carmen sound familiar to you?
- A: Carmen, yes.
- Q: And he pointed out Carmen in the picture?
- A: Right.
- Q: Had you seen Carmen before?
- A: No.
- Q: Can you describe Carmen in that picture?
- A: Stocky built buy [sic], heavy set actually. Looks like it could be Stevie's brother.
- Q: Okay. And what did Stevie tell you about Carmen in this picture?
- A: That they were at the Big Cahuna [sic] for it's some kind of tough man contest.

They went there by speedboat from Philadelphia.

Q: Whose boat was it?

A: It was Carmen's boat.

Q: And did he tell you that Carmen was involved in selling marijuana as well?

A: Yes.

Q: What did he tell you about that?

A: That Carmen was the biggest pot dealer around.

Q: Did Stevie tell you anything about what Carmen was going to do for him while he was in prison?

A: He would help Stevie with financially.

(Sykes Aff. ¶ 3)(citing N.T. 10/6/99, pp 54-56.)

The "photograph" was never marked as a grand jury exhibit, or shown to the grand jury because neither Ms. Sykes nor Reed had possession of the photograph. (Sykes Aff. ¶ 4.) Ms. Sykes has never seen the photograph, has never had possession of it, and it has never been in the Government's possession. (Id.) Ms Sykes understands that Reed never had possession of the photograph either; DeMarco had the photograph in his possession at the time Reed allegedly saw it. DeMarco showed it to Reed and retained it. (Id.) This October 6, 1999 grand jury testimony of Reed was presented to a predecessor grand jury, not to the grand jury that indicted Defendant.³

After DeMarco became a cooperating Government witness in the

³DeMarco was also indicted by a different grand jury from the one before which Reed testified on October 6, 1999. Eventually DeMarco pled guilty and became a cooperating government witness; he, however, was not cooperating with the government in October, 1999, when Reed testified. (Sykes Aff. ¶ 5.)

later part of 2000, the Government asked him if he had any photographs showing him with his drug trafficking associates. DeMarco stated that while he had photographs with him in prison near the beginning of his incarceration, he had lost those photographs as well as other personal items during the course of several prison transfers that followed his July 1, 1999 arrest. (Id. ¶ 7.) While he was able to secure some photographs that had been in the possession of his family and/or girlfriend,⁴ he had no recollection of showing Reed a photograph, and, if he did show him a photograph in jail, it would have to have been among the items lost. (Id.) Accordingly, the Government has never had possession of any photograph shown by DeMarco to Reed. (Id. ¶ 8.)

In Brady v. Maryland, the United States Supreme Court ("Supreme Court") held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). This duty to disclose includes impeachment evidence as well as exculpatory evidence. United States v. Boone, 279 F.3d 163, 189 (3d Cir. 2002) (citation omitted). "[T]he prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." United

⁴These photographs were provided in pre-trial discovery and introduced at trial as exhibits. (Sykes Aff. ¶ 7.)

States v. Thornton, 1 F.3d 149, 158 (3d Cir. 1993). Constructive possession means that "although a prosecutor has no actual knowledge, he should nevertheless have known that the material at issue was in existence." Id. (citing United States v. Joseph, 996 F.2d 36 (3d Cir. 1993)).

The Supreme Court has clarified a "Brady violation":

The term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence - that is, to any suppression of so-called 'Brady material' - although, strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Boone, 279 at 189-90 (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thornton, 1 F.3d at 158.

Defendant has failed to make a showing that the Government was ever in possession of the photograph or that the Government had access to it or to any other alleged statement by Reed. As

presented in the Affidavit, the Government questioned DeMarco about this photo and any other photos, and he turned over whatever photographs he was still able to produce - several photographs were lost during his transfer within the prison system. The Government turned over the entire Reed testimony and information, including the transcript from his grand jury testimony and the FBI 302 report, to Defendant more than two months before trial. Because Defendant fails to make a showing that the Government either possessed or had access to the subject photograph and alleged statement, the Court concludes that the Government did not withhold Brady material.

The Court also concludes that Defendant has failed to show that the subject photograph and alleged statement is exculpatory evidence amounting to Brady material. At the Hearing, Defendant testified that he never had such a picture taken, he never wore a "Big Kahuna" t-shirt, never owned an after-hours club near a tattoo shop, never attended a tough man contest and had a luxury cruiser, never a speed boat. No other "exculpatory" evidence was presented.

Moreover, even if such a photograph or alleged statement were available to the Government and were deemed Brady material, any failure to turn the items over would not amount to a "Brady violation." See, e.g., Boone, 279 F. 3d at 189-90. Neither the alleged statement nor the photograph is material. Reed did not testify at trial or even in front of the grand jury that indicted

Defendant. In light of the overwhelmingly incriminating testimony and physical and documentary evidence presented during the three-week trial, including evidence that a methamphetamine laboratory was set up in Defendant's house and an arsenal of weapons belonging to Defendant were found, such statement and/or photograph is insufficient to undermine confidence in Defendant's conviction.⁵

III. Conclusion

For the foregoing reasons, Defendant's Motion is denied in all

⁵Although Defendant does not specifically allege any "newly discovered evidence" in his Motion, to the extent that the Motion does raise any "newly discovered evidence," the Motion would be denied on that basis as well. To determine whether a new trial based on "newly discovered evidence" should be granted, courts apply the following five-part test:

(1) the evidence must be in fact, newly discovered, i.e., discovered since trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Jasin, 280 F.3d 355, 362 (3d Cir.), cert. denied, 2002 U.S. LEXIS 7594 (Oct. 15, 2002) (citations omitted). Defendant had actual possession of the grand jury testimony of Mr. Reed for more than two months before trial. See Govt.'s Mot, Ex. A, Letter to Mr. Shuman dated February 15, 2002, itemizing discovery materials handed over to defense, including item number 55 "Transcript of Grand Jury testimony of Emory Reed dated 10/6/99." Accordingly, any claim of "newly discovered evidence" obviously fails because this evidence was available well before trial.

respects.

An appropriate order follows.

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O R D E R

AND NOW, this 27th day of November, 2002, upon consideration of Defendant's Motion for New Trial (Docket No. 140), the Government's Response thereto and letter dated November 22, 2002, and the Hearing on the Motion held before the Court on November 21, 2002, **IT IS HEREBY ORDERED** that the Motion is **DENIED** in all respects.

BY THE COURT:

John R. Padova, J.