

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

UNITED STATES	:	CRIMINAL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
GENE BORTNICK.	:	NO. 03-CR-414
Defendant.	:	

ORDER MEMORANDUM

AND NOW, this 30th day of December, 2004, upon consideration of the Motion to Dismiss the Superseding Indictment filed by the Defendant on November 29, 2004 (Def. Mot., Doc. No. 113) and the Response in Opposition to the Motion to Dismiss the Second Superseding Indictment filed by the Government on December 7, 2004 (Gov't Opp'n, Doc. No. 126), it is hereby ORDERED that Defendant's Motion is DENIED.

Two separate grand juries have been empaneled in this matter.¹ After hearing the testimony of sixteen witnesses and F.B.I. Agent Leo Pedrotty, the first grand jury returned both the original indictment against Defendant and a superseding indictment against Defendant, the main addition to which was an additional count of bankruptcy fraud under 18 U.S.C. § 152(3). Gov't Opp'n at 2. The second grand jury, which was empaneled after the first grand jury expired, returned both a second and third superseding indictment against Defendant. *Id.* at 3 n.4. The second grand jury heard testimony identical to that heard by the first, as the Government simply

¹ In his Motion, the Defendant refers to three separate grand juries. For purposes of this Order, the Court will refer only to the first grand jury, which returned the original and first superseding indictment, and the second grand jury, which returned the second and third superseding indictments. As a result, the grand jury referred to in the Defendant's Motion as the third grand jury is referred to herein as the second grand jury.

read in the transcripts of each witness's testimony from the first grand jury. *Id.* Agent Pedrotty provided additional summary testimony. As a result, that grand jury returned the second superceding indictment. After this Court dismissed Count One of the second superceding indictment for failure to state a criminal offense, the second grand jury returned the third superceding indictment, which alleged additional facts with respect to the parent-subsiary relationship between First Union National Bank ("First Union") and Congress Financial Corporation ("Congress").²

The Defendant's Motion rests upon alleged false testimony presented to both grand juries by Agent Pedrotty. The Defendant has identified several issues on which they contend Agent Pedrotty knowingly offered false testimony: 1) whether the Loan Agreement between Congress and Defendant's companies ("Loan Agreement") permitted garments and fabric held outside the United States to serve as inventory underlying the loan ("eligible inventory"); 2) whether the Loan Agreement permitted inventory that was in-transit to serve as eligible inventory; 3) whether Mr. Bortnick acted with fraudulent intent; and 4) whether Congress was an institution insured by the Federal Deposit Insurance Corporation ("FDIC"). The Defendant argues that the indictment returned by the grand jury was based on substantial and material false testimony by Agent Pedrotty and, as such, must be dismissed. Def. Mot. at 28.

The Defendant also requests transcripts of all proceedings before the second grand jury, which returned the second and third superceding indictments. Though the Defendant currently possesses the transcripts of witness testimony before that grand jury, he requests transcripts of all

² The Court considers the third superceding indictment to address the concerns it voiced in its November 29, 2004 dismissal order (Doc. No. 115).

colloquies and other communications by the Government. Def. Mot. at 31. Defendant alleges that he needs a record of all statements made by the Government before the second grand jury, in order to determine whether other improprieties occurred before that body. Def. Mot. at 31.

I. Motion to Dismiss the Indictment

The United States Supreme Court has stated that a district court may not dismiss an indictment for prosecutorial misconduct pursuant to its supervisory power without a finding that such misconduct was prejudicial to the defendant. Bank of Nova Scotia v. United States, 487 U.S. 250, 255-56 (1988). The Supreme Court has articulated the standard of prejudice applicable to prosecutorial misconduct motions as follows: dismissal of the indictment is appropriate only when “if it is established that the violation substantially influenced the grand jury's decision to indict,” or if there is “grave doubt” that the decision to indict was free from the substantial influence of such violations. Id. at 256 (citing United States v. Mechanik, 465 U.S. 66, 78 (1986) (O’Connor, J., concurring in judgment)). An exception to this required showing of prejudice is made in cases where the “structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice.” Id. at 257. In United States v. Soberon, 929 F.2d 935 (3d Cir. 1991), the Third Circuit stated that “the presentation of . . . allegedly perjured testimony to the grand jury does not fall into the narrow category of cases in which dismissal of charges without a showing of prejudice is warranted.” Id. at 940. As such, the Court will apply the Nova Scotia standard to the instant Motion.

The Third Circuit has noted that indictments are rarely dismissed for prosecutorial misconduct. U.S. v. Cride, 633 F.2d 346, 354 (3d Cir.1980) (citing In re Grand jury Investigation (Lance), 610 F.2d 202, 219 & n.14 (5th Cir. 1980); United States v. Stanford, 589 F.2d 285,

298-99 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979)). This reluctance to resort to the extreme sanction of dismissing an indictment was demonstrated long before the Supreme Court’s articulation of the prejudice requirement in Nova Scotia, even in cases where the Third Circuit strongly condemned the actions of the prosecution team. See, e.g. United States v. Birdman, 602 F.2d 547 (3d Cir. 1979) (declining to dismiss the indictment where Justice Department special agent appeared in front of the grand jury as both prosecutor and witness in violation of professional standards); United States v. Serubo, 604 F.2d 807 (3d Cir. 1979) (declining to dismiss the indictment, but characterizing prosecutorial misconduct as “extreme” where prosecutor associated defendants with organized crime and graphically violent conduct before the grand jury); United States v. Riccobene, 451 F.2d 586 (3d Cir. 1971) (declining to dismiss the indictment where prosecutor informed the grand jury that a key government witness would not testify because the defendants were “connected with organized crime” and could harm the witness if he testified); United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967) (declining to dismiss the indictment where prosecutor was alleged to have called a witness, a known business associate of the defendant, a “thief” and a “racketeer” in front of the grand jury).

A. *Statements Relating to Overseas Inventory*

The Defendant asserts that Agent Pedrotty falsely testified in front of the first and second grand juries that the Loan Agreement did not permit inventory that was located outside the United States to serve as collateral for the loan, despite Agent Pedrotty’s knowledge that the Loan Agreement contained no such language. Def. Mot. at 2. The Defendant contends that Agent Pedrotty testified in this way to support the allegations that Defendant committed bank fraud, wire fraud, and money laundering by inflating the amount of eligible inventory on

certifications he submitted to Congress. Id.

A review of the Loan Agreement reveals that the document does not categorize overseas inventory as ineligible. Def. Mot., Ex. 5 at 4. There is, however, a factual dispute between the parties as to whether Congress' understanding was that such inventory could not serve as collateral for the loan. The Defendant claims, of course, that such inventory was eligible; the Government takes the opposing view. In his testimony before the second grand jury, Agent Pedrotty clearly communicated this difference in views and the basis therefore after being shown the Loan Agreement, which was given to the second grand jury as an exhibit:

Q. Turning to page four, there's a definition of eligible inventory; right?

A. That's correct.

...

Q. Based on your discussion with people from Congress Financial, what is the upshot of this language, in terms of overseas inventory?

A. That they would not finance on it.

...

Q. Just so we're clear, this particular paragraph, it doesn't say, quote, overseas inventory doesn't count; right?

A. Correct.

Gov't Opp'n, Ex. C at 12 , 13, 15. Later on in his testimony, Agent Pedrotty, when asked if the Defendant's position was that "overseas inventory is okay," replied that "That's what their [sic] trying to explain." Gov't Opp'n, Ex. C at 16.

The Defendant claims that the Loan Agreement definition of eligible inventory supercedes any other potential understanding of that term under New York law, and therefore Agent Pedrotty's testimony is still misleading. Def. Mot. at 11 n.5. However, the Loan Agreement also states that "General criteria for Eligible Inventory may be established and revised from time to time by [Congress] in good faith." Def. Mot. Ex. 5 at 5. Moreover, the overwhelming testimony presented at the grand jury was that Congress' business practice and

understanding of the agreement between Defendant and Congress precluded the use of overseas inventory by Defendant as eligible inventory.³ See Gov't Opp'n at 14. This Court believes that there is a question of fact as to whether the criteria for eligible inventory were revised to exclude overseas inventory; given the ambiguous nature of this issue, it would be difficult to characterize Agent Pedrotty's testimony that Congress understood overseas inventory to be ineligible as knowingly false. Setting aside whether Congress' interpretation was correct as a matter of New York State law, Agent Pedrotty correctly testified in front of the second grand jury to what Congress's interpretation actually was and how Defendant's position on that issue differed. As such, the Court finds that there is no misconduct on the overseas inventory issue upon which to premise a dismissal of the indictment.

B. Statements Relating to In-Transit Inventory

The Defendant claims that Agent Pedrotty falsely testified in front of the first grand jury that the Loan Agreement did not allow "in-transit" inventory to serve as collateral for the loan and that Agent Pedrotty read similar testimony from Congress auditor George Dobrick to the second grand jury. Def. Mot. at 3. As with the overseas inventory claim, the Defendant claims that this false testimony was given to support the bank fraud, wire fraud, and money laundering charges. Id.

Even if Agent Pedrotty's statements on the issue of in-transit inventory constituted prosecutorial misconduct, which the Court believes they do not, the Defendant has demonstrated

³ Testimony presented to the grand jury on this issue came from two Congress employees, two Congress auditors, and the president of an outside evaluation firm that inspected Defendant's inventory, whom Defendant allegedly informed that he was not able to borrow on overseas inventory. Gov't Opp'n at 15.

no prejudice as a result of these statements. The third superceding indictment makes absolutely no mention of “in-transit” inventory, much less in the counts detailing the allegations of bank fraud, wire fraud, and money laundering. It is difficult, then, to imagine that statements about the eligibility of “in-transit” inventory “substantially influenced the grand jury's decision to indict” as is required by Bank of Nova Scotia. There is no basis to dismiss the indictment on any of Agent Pedrotty’s statements to the grand jury regarding “in-transit” inventory.

C. Statements Relating to Defendant’s Criminal Intent

The Defendant makes two specific claims with regard to Agent Pedrotty’s testimony before the first grand jury: 1) Agent Pedrotty falsely testified that no back-up documents existed to support accounting entries made regarding shipments of fabric from one of Defendant’s companies to Unicom AP Chemical Corporation (“Unicom”) and 2) Agent Pedrotty falsely testified that the Defendant maintained two separate sets of books in order to conceal the various frauds his companies were perpetrating and that he used a computer back-up file hidden by “another password” to accomplish this task. Def. Mot. at 3. With respect to the second grand jury, Defendant claims that Agent Pedrotty falsely testified that 1) Congress was never informed that inventory existed overseas and 2) that Congress was never told of assets located overseas during the bankruptcy. *Id.* at 3-4.

1. Testimony Before the First Grand Jury

Both of claims regarding Agent Pedrotty’s testimony in front of the first grand jury relate to the fact that the computers of MGL Corporation (“MGL”), one of Defendant’s companies, had two separate files tracking inventory purchases and sales – a main file and a back-up file. The Government alleges that Defendant transferred a significant amount of fabric from MGL to

Unicom, another corporation run by Defendant, in violation of bankruptcy laws.⁴ Defendant has produced bills of lading, all dated December 1999, that reflect shipments of fabric from MGL to Unicom via a company called Distribution Experts. Def. Mot. at Ex. 20. These are the shipments reflected on one version of MGL's inventory file. Agent Pedrotty testimony, however, was not that no back-up documents existed to support the shipments of fabric whatsoever, but that no documents existed to support the shipments of fabric to Unicom as reflected on the other version of MGL's inventory file, which shows transfers beginning in January 1999 and continuing throughout that year. Agent Pedrotty, in fact, mentions the bills of lading from Distribution Experts in his testimony before the first and the second grand jury. Gov't Opp'n at Ex. B at 21-22; Ex. C at 33; 48-49; Ex. D at 11-12. There is no basis for a finding that Agent Pedrotty misled the grand jury on this issue, much less for a finding of prosecutorial misconduct.

Defendant's next claim centers on whether Agent Pedrotty misled the grand jury as to whether the password to the back-up file on the MGL computers was the same as the password to the main file. Agent Pedrotty testified that the passwords were different; the Defense maintains the passwords were the same and that Agent Pedrotty knew this. See Def. Mot. at 19. Even if this sort of misrepresentation rose to the level of prosecutorial misconduct, which the Court finds it does not, it certainly does not qualify as a statement that "substantially influenced the grand jury's decision to indict." Therefore, there is no basis for dismissing the indictment on this ground.

⁴ The Unicom transfers are also detailed in the bank fraud count of the third superceding indictment as part of Defendant's scheme to defraud Congress.

2. Testimony Before the Second Grand Jury

Both of Defendant's claims of prosecutorial misconduct before the second grand jury involve Agent Pedrotty's testimony as to Congress' knowledge of overseas assets and inventory of Defendant's corporations. First, the Defendant claims that Agent Pedrotty testified that Congress had no knowledge that Defendant's corporations had any inventory located overseas. Def. Mot. at 19. The Government does not dispute that Congress had knowledge of inventory located overseas, but claims that the snippets of testimony cited in Defendant's Motion are related to whether any overseas inventory was disclosed to Congress' auditors for purposes of their mandatory quarterly audits. Gov't Opp'n at 25-26. Agent Pedrotty's testimony on this issue arises during an explanation of how Congress' auditors performed a physical count of all eligible inventory on a regular basis. In so discussing, Agent Pedrotty testifies that, during these audits, the auditors were not informed of any overseas inventory. Gov't Opp'n, Ex. C at 14-15. Though Congress was aware that Defendant's company had overseas inventory, it does not necessarily mean that such inventory was disclosed to the auditors as part of the quarterly inventory counts. The Court finds no misrepresentation on the part of Agent Pedrotty on this issue.

Lastly, the Defendant alleges that Agent Pedrotty misled the second grand jury by testifying that Congress had no knowledge of any assets located overseas during the bankruptcy. Def. Mot. at 21. The Government responds that Defendant's references to overseas assets during the bankruptcy proceeding were too vague for Congress and the Bankruptcy Trustee to specifically locate assets to satisfy Congress' claims against Defendant. Gov't Opp'n at 26. Before the Grand Jury, Agent Pedrotty testified that Congress was "never told the location of any

assets [t]hey were told that there was inventory here and there but never given a location.” Def. Mot. Ex. 4 at 16-17. The Defendant attaches several letters from his civil attorney to the Bankruptcy Trustee and the attorneys for Congress, in which counsel apparently discloses that there are two companies in the Ukraine that hold some of Defendant’s assets, Def. Mot. Ex. 22; Ex. 23; Ex. 24. The letters, however, merely reveal that there are assets of Defendant’s companies somewhere in the Ukraine without disclosing a specific location. Moreover, one of the attached letters is written entirely in either Ukrainian or Russian; in a cover letter, Defendant’s counsel states only that “the gist of the notice is that the company is taking possession of goods to satisfy some alleged claim.” Def. Mot. Ex. 24. These communications do not contradict Agent Pedrotty’s above statement that Congress was told of “inventory here and there but never given a location.” The Court finds no misconduct on the part of Agent Pedrotty related to these statements.

D. Statements Relating to Congress Financial’s FDIC Status

The Defendant’s last allegation with respect to Agent Pedrotty is that he testified, in front of the first grand jury, that Congress was insured by the FDIC. Def. Mot. at 4. The bank fraud statute, 18 U.S.C. § 1344, requires that the defrauded institution be a “financial institution” as statutorily defined in 18 U.S.C. § 20; that definition includes, among other things, a bank insured by the FDIC. 18 U.S.C. § 20(1). The Defendant contends that this testimony was given to both the first and second grand juries in order to provide a basis for charging Defendant under the bank fraud statute.

To the extent that Defendant is arguing that Agent Pedrotty’s testimony on the issue of Congress’ status as a financial institution, or lack thereof, that argument is mooted by this

Court's Order of November 29, 2004 dismissing Count One of the second superceding indictment for failure to allege that a federally insured institution had been defrauded (Doc. No. 115). Therefore, the only argument Defendant can make with respect to this issue is that Agent Pedrotty misled the second grand jury with respect to Congress' status. An examination of his testimony of October 7, 2004 shows that Agent Pedrotty did not mislead the second grand jury:

- Q. Just to be clear, First Union Bank has a piece of paper that says First Union Bank is FDIC insured; right?
- A. Yes.
- Q. Congress Financial does not have such a piece of paper?
- A. No, they do not.

Gov't Opp'n, Ex. C. at 8, ¶¶ 18-24. The remainder of Agent Pedrotty's testimony before the second grand jury, prior to its issuance of the third superceding indictment, pertains to the relationship between First Union and Congress, and is based on information given him by a First Union Vice President. The United States Supreme Court has held that an indictment may be issued on the basis of such hearsay testimony in Costello v. United States, 350 U.S. 359 (1956).

The Court finds that any concerns articulated by the Defendant regarding Agent Pedrotty's statements to the first grand jury with respect to Congress' status as a financial institution are mooted by his truthful testimony to the second grand jury, which returned a third superceding indictment that charges Defendant with a cognizable count of bank fraud under 18 U.S.C. § 1344. See Third Superceding Indictment, Count I (Doc. No. 124). Therefore, there is no prosecutorial misconduct on the part of Agent Pedrotty with respect to this issue, nor is there any remaining prejudice flowing to Defendant from Agent Pedrotty's statements before the first grand jury.

II. Motion to Compel Production of Transcripts of Government Statements Before the Second Grand Jury

The proceedings of a grand jury are traditionally secret. See Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 218 n.9 (1979). (“Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye.”) (citations omitted). Federal Rule of Criminal Procedure 6(e) allows a court to allow disclosure of a grand jury matter “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.” Fed. R. Crim. P. 6(e)(3)(E)(ii). The United States Supreme Court has stated that defendants seeking access to grand jury materials must make a showing of particularized need. United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). Specifically, the movant must show that “the material they seek 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 their request is structured to cover only material so needed.” Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). The Third Circuit has stated that Defendants must produce evidence of a “substantial likelihood of gross or prejudicial irregularities in the conduct of the grand jury.” United States v. Budzanoski, 462 F.2d 443,454 (3d Cir. 1972) (citations omitted). Mere allegations or suspicions of impropriety are not sufficient to establish a cause for disclosure under Rule 6(e)(3)(E)(ii). Id.

Defendant claims, in his Motion, that the “undeniable pattern of the presentment of knowingly false testimony to three grand juries by the Government” establishes a particularized need for all statements by the government before the second grand jury. Def. Mot. at 31. The Court found above that Agent Pedrotty’s statements were not a basis for a finding of prosecutorial misconduct. The Court further finds that Agent Pedrotty’s statements were not part

of a pattern of knowingly false testimony before the grand juries empaneled in this case that would support the release of further transcripts to the Defendant. The only possible basis for the release of the government statements, then, would be alleged misconduct by the U.S. Attorney's Office, which the Defendant alludes to in his Motion. See Def. Mot. at 31. The Defendant has produced no evidence of any impropriety by the U.S. Attorney's Office, much less made a particularized showing of need on this basis.

As Defendant cannot carry his burden of showing a particularized need for the transcripts at issue, the Motion to Compel is denied.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss the Indictment (Doc. No. 113) is DENIED.

BY THE COURT:

Legrome D. Davis, J.