

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION NO. 08-493
v.	:	
	:	
AMIN A. RASHID	:	

MEMORANDUM OPINION

RUFE, J.

January 22, 2016

Defendant has filed *pro se* Motions pursuant to Federal Rule of Criminal Procedure 12(b)(2) and 12(b)(3) seeking to dismiss the indictment against him. The Government opposes the Motions. Because Defendant’s Motions are untimely and lack merit, they will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

On August 21, 2008, Defendant was charged by indictment with two counts of mail fraud, in violation of 18 U.S.C. § 1341, and one count of aggravated identity theft, in violation of 18 U.S.C. § 1028(A)(a)(1), (c)(5). On May 28, 2009, a superseding indictment charged Defendant with ten counts of mail fraud, in violation of 18 U.S.C. § 1341, eight counts of aggravated identity theft, in violation of 18 U.S.C. § 1028(A)(a)(1), (c)(5), and one count of forging or counterfeiting postal money orders, in violation of 18 U.S.C. § 500. The mail fraud counts in the superseding indictment alleged that Defendant “knowingly caused to be delivered by mail and commercial interstate carrier according to the directions thereon, and placed in a post office or authorized depository for mail matter” ten different letters.¹ In the aggravated identity theft counts, the superseding indictment stated that Defendant “knowingly and without

¹ Superseding Indictment 5/28/09, Doc. No. 63 at 4-5.

lawful authority transferred, possessed, and used, a means of identification of another person...during and in relation to mail fraud.”²

After a 10 day jury trial beginning on June 28, 2011, in which Defendant represented himself *pro se*, the jury convicted Defendant of nine counts of mail fraud and all eight counts of aggravated identity theft. The jury acquitted Defendant of one count of mail fraud and of forging or counterfeiting postal money orders. After litigation of Defendant’s *pro se* post-verdict motions, the Court sentenced Defendant to a total of 240 months of imprisonment, five years of supervised release, a special assessment of \$1,700 and restitution of \$782,391.³

Defendant then appealed his conviction and sentence, raising a number of issues on direct appeal, but not the issues of whether the indictment was defective and/or whether this Court lacked jurisdiction, even though these matters were raised pre-trial, during trial, and to a limited extent on post-trial motions.⁴ The Third Circuit affirmed his conviction and sentence on November 25, 2014.⁵ Defendant’s petition for rehearing *en banc* was denied on January 13, 2015 and the Circuit Court mandate issued on January 21, 2015. Defendant thereafter, on March 3, 2015, filed the Motions now before the Court. On March 30, 2015, Defendant also filed a petition for a writ of certiorari, which the Supreme Court denied on May 18, 2015.

² Superseding Indictment 5/28/09, Doc. No. 63 at 6.

³ Sentencing Tr. 7/22/13 at 149-58.

⁴ *United States v. Rashid*, 593 F. App’x 132 (3d Cir. 2014) *cert. denied*, 135 S. Ct. 2340 (2015). Def’s *Pro Se* Motion to Dismiss Defective Indictment Pursuant to Rule 12(b)(3)(B), Doc. No. 72; 3/22/10 Order, Doc. No. 115 (denying *Pro Se* Motion to Dismiss Defective Indictment Pursuant to Rule 12(b)(3)(B)); Def’s *Pro Se* Motion to Dismiss Defective Identity Theft Counts of the Superseding Indictment Pursuant to Federal Rules of Criminal Procedure 12(b)(3)(B); 6/12/13 Order, Doc. No. 408 (denying Motion to Dismiss Defective Identity Theft Counts). Defendant also filed motions to reconsider the Court’s denial of these Motions, which were also denied. *See* Def’s *Pro Se* Motion for Reconsideration of Denial of Motion to Dismiss Defective Indictment, Doc. No. 120; 4/28/10 Order, Doc. No. 132 (denying *Pro Se* Motion for Reconsideration); Def’s *Pro Se* Motion for Reconsideration of his Motion to Dismiss Defective Identity Theft counts, Doc. No. 417; 6/24/13 Order, Doc. No. 418 (denying Motion for Reconsideration); 10/9/12 Order, Doc. No. 321.

⁵ *Id.*

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 12(b)(2), “a motion that the court lacks jurisdiction may be made at any time while the case is pending.”⁶ Under Federal Rule of Criminal Procedure 12(b)(3), a defendant may file a motion alleging that the indictment is defective for failing to state an offense before trial.⁷

III. DISCUSSION

Defendant argues that this Court lacks jurisdiction and that the indictment fails to state an offense for two reasons. First, Defendant contends that the mail fraud charge in the indictment fails to state that Defendant used the United States mail. Second, Defendant argues that the aggravated identity theft charge in the indictment fails to state that the identity theft occurred in or affected interstate or foreign commerce.

A. Timeliness of Rule 12(b)(2) and 12(b)(3) Motions

The Court must first address whether Defendant’s 12(b)(2) and 12(b)(3) Motions are untimely, as the Government contends.

Defendant argues that his 12(b)(2) Motion is timely because his case was pending when the 12(b)(2) Motion was filed. Under Federal Rule of Criminal Procedure 12(b)(2), “motion[s] that the court lacks jurisdiction may be made at any time while the case is pending.”⁸ Defendant argues that his case was pending because the Motion was filed before the expiration of the deadline for filing a certiorari petition. The Government argues that Defendant’s case was no

⁶ Fed. R. Crim. P. 12(b)(2).

⁷ Fed. R. Crim. P. 12(b)(3).

⁸ Fed. R. Crim. P. 12.

longer pending because the Third Circuit affirmed his sentence and conviction and issued a mandate before Defendant filed this Motion.

The Third Circuit has not yet decided in a precedential opinion when a case is “pending” under Rule 12(b)(2), although the issue has arisen in two non-precedential decisions.⁹ In *United States v. Sturman*, which the Government cites in support of its argument that Defendant’s motion is untimely, the Third Circuit held that a case was no longer pending and thus that a motion under 12(b)(2)¹⁰ was untimely where it was filed after the Third Circuit had already affirmed the District Court’s judgment and issued a mandate.¹¹ In contrast, in *United States v. Blood*, after the defendant filed a petition for rehearing explaining that his motion under Rule 12(b)(2) was filed after the Third Circuit affirmed his conviction but before the time for filing a certiorari petition had expired,¹² the Third Circuit, without explanation, found that the defendant’s motion was timely.¹³ Without clear guidance from the Court of Appeals, this Court must determine whether the case was “pending” as contemplated by Rule 12(b)(2).

⁹ *United States v. Sturman*, 556 F. App’x 67 (3d Cir. 2014); No. 08-4101, *United States v. Blood*, 2009 U.S. App. LEXIS 9093 (3d Cir. Apr. 28, 2009). *See also United States v. Elso*, 571 F.3d 1163, 1166 (11th Cir. 2009) (holding that because the mandate had issued before the Defendant filed his motion, “[t]he district court lacked authority to hear it.”). Most courts in other circuits have addressed this issue only after years have passed between the conviction being affirmed on appeal and the 12(b)(2) motion being filed. *See e.g., United States v. Jones*, 510 F. App’x 772, 774 (10th Cir. 2013).

¹⁰ *Sturman* cites to Rule 12(b)(3), as the case was decided prior to the 2014 Rule amendments that relocated this provision to Rule 12(b)(2). *See* Fed. R. Crim. P. 12 advisory committee’s note to 2014 amendment (“As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.”).

¹¹ 556 F. App’x at 67.

¹² *See* Petition for Rehearing at 3-4, *United States v. Blood*, No. 08-4101, 2009 U.S. App. LEXIS 9093 (3d Cir. Apr. 28, 2009). The Defendant’s Petition and the Third Circuit’s opinion cite to Rule 12(b)(3), as this case was also decided prior to the 2014 Rule amendments that relocated this provision to Rule 12(b)(2). *See* Fed. R. Crim. P. 12 advisory committee’s note to 2014 amendment.

¹³ *Blood*, 2009 U.S. App. LEXIS 9093.

Black's Law Dictionary defines "pending" as "awaiting decision" or "remaining undecided."¹⁴ At the time Defendant filed his 12(b)(2) Motion, on March 3, 2015, the Third Circuit had issued the mandate and thus nothing was pending or awaiting decision. As Defendant filed his Motions before he filed his petition for a writ of certiorari before the Supreme Court, there was also nothing awaiting decision or to be decided before the Supreme Court. Because nothing was pending before this Court, the Third Circuit, or the Supreme Court when Defendant filed the Motions and because this Court is bound by the Third Circuit's mandate, Defendant's 12(b)(2) Motion is untimely.

Next, the Government contends that Defendant's 12(b)(3) Motion is untimely because the Federal Rules of Criminal Procedure require that motions claiming that the indictment fails to state an offense be made before trial.¹⁵ In 2014, the Federal Rules of Criminal Procedure were amended to require such motions to be made before trial.¹⁶ Even if this amendment does not apply to Defendant's 12(b)(3) Motion, his Motion is still untimely. At the time of Defendant's trial and conviction in 2011, Federal Rule of Criminal Procedure 12(b)(3) and Third Circuit precedent allowed motions claiming that the indictment fails to state any offense to be made at any time while the case was pending.¹⁷ For the reasons stated above, Defendant's case was not pending when his 12(b)(3) Motion was filed and it is also untimely.

¹⁴ Black's Law Dictionary at 1248 (9th ed. 2014). *See also Carlson v. Hyundai Motor Co.*, 222 F.3d 1044, 1045 (8th Cir. 2000).

¹⁵ Fed. R. Crim. P. 12(b)(3).

¹⁶ Fed. R. Crim. P. 12(b)(3); *see also* Fed. R. Crim. P. 12(b)(3) advisory committee's note to 2014 amendment ("Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the 'indictment or information fails ... to state an offense.'").

¹⁷ Fed. R. Crim. P. 12(b)(3) (2002); *United States v. Wander*, 601 F.2d 1251, 1259 (3d Cir. 1979) ("Failure of an indictment sufficiently to state an offense is a fundamental defect however, and it can be raised at any time.");

Moreover, Defendant's claims are likely waived for purposes of Rule 12(b) motions. Defendant has had multiple opportunities to raise any alleged defects in the indictment; despite having filed two motions to dismiss the superseding indictment under Rule 12, one before trial and one after trial, two motions for reconsideration of the Court's denial of these motions, and having appealed his conviction and sentence, Defendant failed to raise the claims he now raises in his earlier Rule 12 motions, motions for reconsideration, or on direct appeal. To the extent that he previously raised these issues, they have been decided in the direct proceedings. As piecemeal litigation is disfavored,¹⁸ these claims are thus better raised on a comprehensive, timely petition filed under 28 U.S.C. § 2255.

B. Merits of 12(b)(2) and 12(b)(3) Motions

Assuming *arguendo* that Defendant's Motions are timely and that this Court has jurisdiction to decide them, they are meritless. To prevail on the 12(b)(2) Motion, Defendant must establish that the Court lacks jurisdiction. He argues that the superseding indictment contains two defects that deprive the Court of jurisdiction. First, Defendant argues that counts charging him with mail fraud in violation of 18 U.S.C. § 1341 are defective because they do not state that Defendant used the United States mail, which Defendant argues is an essential element of mail fraud. Second, Defendant argues that the counts charging him with aggravated identity theft in violation of 18 U.S.C. § 1028(A)(a)(1), (c)(5), fail to state that the identity theft occurred in or affected interstate or foreign commerce.

In *United States v. Cotton*, the Supreme Court reversed the Fourth Circuit's holding that "an indictment setting forth all the essential elements of an offense is both mandatory and

¹⁸ *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, n.6 (3d Cir. 2001).

jurisdictional”¹⁹ and instead held that “defects in an indictment do not deprive a court of its power to adjudicate.”²⁰ As a result, Defendant’s claim that the superseding indictment was defective because it did not include essential elements of mail fraud and aggravated identity theft, even if true, fails to establish that the Court lacks jurisdiction and thus Defendant’s 12(b)(2) Motion will be denied.²¹

¹⁹ *United States v. Cotton*, 535 U.S. 625, 629 (2002) (quoting *United States v. Cotton*, 261 F.3d 397, 404 (4th Cir. 2001)). See also *In re Rinaldi*, 522 F. App’x 153, 154 (3d Cir. 2013) (per curiam) (holding that district court did not lack jurisdiction due to alleged failure of indictment to state a nexus to interstate commerce for drug trafficking offenses); *United States v. Vitillo*, 490 F.3d 314, 320 (3d Cir. 2007).

²⁰ *Cotton*, 535 U.S. at 630. See also *United States v. Hedaithy*, 392 F.3d 580, 588 (3d Cir. 2004) (holding that “indictment defects are not jurisdictional.”) (internal quotations and citations omitted).

²¹ To the extent Defendant is also alleging that the evidence presented at trial was insufficient to establish that the Defendant used the U.S. mail, this is not a claim that the Court lacks jurisdiction and thus is not properly brought on this Motion.

As to the merits of Defendant's 12(b)(3) Motion, Defendant argues that the superseding indictment fails to state an offense based upon the same two defects alleged in his 12(b)(2) Motion. This Court previously held, in denying Defendant's Motion to Arrest Judgment, that the superseding indictment is not defective for its failure to use the language "United States mail" or "postal service."²² Because the indictment distinguishes between mail and private commercial carrier, the Court held that the reference to mail in the indictment means U.S. mail.²³ Thus, this essential element was included in the indictment and the indictment was not defective.

Second, the indictment was not defective for failing to allege that the aggravated identity theft occurred in or affected interstate or foreign commerce. The elements of aggravated identity theft are: "(1) the defendant knowingly transferred, possessed, or used a means of identification of another person; (2) the defendant did so without lawful authority; and (3) the defendant did so during and in relation to certain enumerated crimes."²⁴ The indictment therefore adequately stated the elements of the offense.

²² 10/9/12 Order, Doc. No. 321 at n.1.

²³ 10/9/12 Order, Doc. No. 321 at n.1. To the extent Defendant also argues that the Court improperly constructively amended the indictment through its instruction to the jury that "we're talking about the United States Postal Service whenever you hear or deal with the mails," this contention also lacks merit for the reasons already stated in the Court's Order on Defendant's Motion to Arrest Judgment: "First, Defendant requested that the Court amend its instructions to include this language. The Court noted that this additional language was unnecessary because 'mail' clearly meant 'U.S. Mail,' but granted Defendant's request because the additional language did not change the meaning of the instruction. Second, for the reasons explained above, the use of 'mail' means 'U.S. Mail' as distinguished from items sent by private commercial carrier." See 10/9/12 Order, Doc. No. 321 at n.1 (internal citations omitted); Trial Tr. 7/11/11, Doc. No. 295 at 137.

²⁴ See *United States v. Roberts*, 597 F. App'x 72, n.7 (3d Cir. 2015) (internal citations omitted). Defendant cites to the interstate commerce requirement under 18 U.S.C. § 1028(c)(3)(A) to support his claim. However, Defendant was indicted and convicted under a separate section of the statute, 1028(A)(a)(1), (c)(5), that contains no such requirement. See also *United States v. Henderson*, No. 15-162-1, 2015 WL 5813305, at *3 (E.D. Pa. Oct. 5, 2015) ("We are unaware of any authority that supports Defendant's contention that the elements of the crime of aggravated identity theft include a requirement that...the production of the document occurred in or affected interstate or foreign commerce.") (internal citations and quotations omitted).

IV. CONCLUSION

For the reasons stated above, this Court will deny and dismiss Defendant's Motions pursuant to Federal Rule of Criminal Procedure 12(b)(2) and 12(b)(3) without prejudice to Defendant filing a timely petition under 28 U.S.C. § 2255. An appropriate Order will follow.

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ORDER

AND NOW, this 22nd day of January 2016, upon consideration of Defendant’s Motion to Vacate Conviction and Sentence and Dismiss Jurisdictionally Defective Indictment [Doc. No. 474], the briefing in support thereof, and the response thereto, it is hereby **ORDERED** that for the reasons set forth in the accompanying Memorandum Opinion the Motion is **DISMISSED** without prejudice to Defendant filing a timely petition under 28 U.S.C. § 2255.

IT IS SO ORDERED.

BY THE COURT:

/s/ **Cynthia M. Rufe**

CYNTHIA M. RUFÉ, J.