

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
ROBERT BRAND	:	NO. 15-346-3
BONNIE BOWSER	:	NO. 15-342-5

MEMORANDUM

Bartle, J.

March 2, 2016

Defendants Bonnie Bowser ("Bowser") and Robert Brand ("Brand") have filed motions to dismiss the indictment under Rule 12(b)(3)(A)(v) of the Federal Rules of Criminal Procedure due to purported "material and prejudicial errors before the Grand Jury." (Docs. ## 144 & 145).¹

The Government, on July 29, 2015, indicted five defendants: Congressman Chaka Fattah, Sr. ("Fattah"); Herbert Vederman ("Vederman"); Karen Nicholas ("Nicholas"); Brand; and Bowser. The indictment charges all five defendants with conspiracy to commit racketeering (18 U.S.C. § 1962(d)). It further accuses Fattah, Brand, Nicholas, and Bowser of conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349). Bowser, along with Fattah, is named in counts alleging: conspiracy to commit honest services wire fraud (18 U.S.C. §§ 1343, 1346, and 1349); conspiracy to commit mail fraud (18

1. Brand's motion is captioned as a motion to join Bowser's motion to dismiss.

U.S.C. § 1341); mail fraud (18 U.S.C. § 1341); and falsification of records (18 U.S.C. §§ 1519 and 2). In addition, Bowser is charged along with Fattah and Vederman with: conspiracy to commit bribery (18 U.S.C. § 371); bank fraud (18 U.S.C. §§ 1344 and 2); and false statements to financial institutions (18 U.S.C. §§ 1014 and 2); falsification of records (18 U.S.C. §§ 1519 and 2); money laundering (18 U.S.C. §§ 1957 and 2); and money laundering conspiracy (18 U.S.C. § 1956(b)).²

On August 20, 2015, the Government produced to defense counsel extensive discovery, including the transcripts of testimony presented to the Grand Jury that returned the indictment. Fifteen of these transcripts contained partial redactions. In the process of running word searches in the ".pdf" versions of these transcripts and copying parts of their text into "Word" documents, counsel for defendant Bowser discovered that some, but not all, parts of the redacted portions of the transcripts had become readable.

Counsel's review of these newly-visible portions of the transcripts apparently led him to suspect that the

2. The following Counts in the Indictment do not charge either Bowser or Brand: Count Seventeen (charging Fattah with bribery under 18 U.S.C. § 201(b)(2)); Count Eighteen (charging Vederman with bribery under 18 U.S.C. § 201(b)(1)); Counts Twenty-Four through Twenty-Six (charging Nicholas with wire fraud under 18 U.S.C. § 1343); Count Twenty-Seven (charging Nicholas with money laundering under 18 U.S.C. § 1957); and Counts Twenty-Eight and Twenty-Nine (charging Nicholas with falsification of records under 18 U.S.C. § 1519).

prosecutors had made misstatements of law and fact to the Grand Jury, that the prosecutors had improperly engaged in "legal communications" with the Grand Jury in the presence of witnesses, and that some witness testimony had been withheld from production. As a result, Bowser moved to compel the production of the redacted Grand Jury materials. Her motion was joined by Fattah, Brand, and Nicholas. Following a telephone conference with counsel for all defendants, the court ordered the production for in camera review of all of the disputed transcripts. The government promptly complied.

On December 16, 2015, we denied Bowser's motion. See Doc. # 113. We concluded that contrary to her assertions there was no evidence that any irregularities occurred in the Grand Jury proceedings or that any defendant was prejudiced by any misstatement by the prosecutor. We also determined that the prosecutor did not misstate the law of conspiracy when instructing the Grand Jury, nor did the prosecutor present unsworn testimony under the guise of legal instruction. Finally, we rejected Bowser's claim that it was improper for the prosecutor to engage in "legal communications" in the presence of Grand Jury witnesses who were also law enforcement personnel.

Bowser and Brand then filed the instant motions. Their argument, in essence, is that the indictment must be

dismissed due to the same purported irregularities described in their motions to compel.

Rule 12(b)(3)(A)(v) of the Federal Rules of Criminal Procedure permits a defendant to move for dismissal of an indictment due to "a defect in instituting the prosecution, including . . . an error in the grand-jury proceeding." Dismissal on this basis is not warranted, however, unless any such errors "prejudiced the defendants." Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988). Where the asserted irregularities are legal errors, a court should not grant a Rule 12(b)(3)(A)(v) motion unless "it is established that the violation substantially influenced the grand jury's decision to indict" or if "grave doubt" exists "that the decision to indict was free from the substantial influence of such violations." Id. (citing United States v. Mechanik, 475 U.S. 66, 78 (1986)).

For the same reasons that defendants were not entitled to view the redacted portions of the Grand Jury transcripts, they are not entitled to dismissal of the indictment on the basis of purported irregularities in the Grand Jury proceedings. As we stated in our opinion of December 16, 2015, there is nothing in the Grand Jury transcripts that would suggest that the prosecutor made any misstatements of law or fact or otherwise caused any irregularities prejudicial to the defendants. Further, as we have previously stated, our in

camera review of the Grand Jury transcripts makes clear that the prosecutor presented no unsworn testimony. Again, we conclude that no defendant was prejudiced by any error or irregularity before the Grand Jury, that no "violation substantially influenced the grand jury's decision to indict," and that there is no "grave doubt . . . that the decision to indict was free from the substantial influence of such violations." See Bank of Nova Scotia, 487 U.S. at 254.

In support of the instant motion, Bowser cites to several cases in which indictments were dismissed on the basis of misstatements of fact and law and other irregularities before the indicting Grand Jury. However, as we have already explained, no misstatements or other irregularities took place. See Bank of Nova Scotia, 487 U.S. at 254. As a result, all of the cases cited by Bowser, each of which involved prejudicial irregularities before a Grand Jury, are distinguishable.

In sum, the sealed motions of Bowser and Brand to dismiss the indictment under Rule 12(b)(3)(A)(v) merely repeat the arguments made by defendants in support of their previous motions to compel. We rejected those arguments in our December 16, 2015 decision, and we do so again now. The motions will be denied.

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ORDER

AND NOW, this 2nd day of March, 2016, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motions of defendants Bonnie Bowser and Robert Brand to dismiss the indictment pursuant to Rule 12(b)(3)(A)(v) of the Federal Rules of Criminal Procedure (Docs. ## 144 & 145) are DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.