

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 PHILIP J. MONTEFIORE : NO. 97-105-01

MEMORANDUM AND ORDER

HUTTON, J.

March 30, 1998

Presently before this Court is the Defendant's Motion to Dismiss Indictment Pursuant to 18 U.S.C. § 3162(a)(2) and Further to Appoint a Court Physician to Examine the Defendant (Docket No. 34) and the Government's response thereto. For the reasons listed below, the defendant's motion is **GRANTED in part and DENIED in part.**

I. BACKGROUND

On March 4, 1997, a grand jury indicted and charged the defendant, Philip J. Montefiore ("Montefiore"), with multiple counts of making false statements in violation of 18 U.S.C. § 1001. On May 27, 1997, a grand jury returned a superseding indictment, charging Montefiore with eleven counts of making false statements in violation of 18 U.S.C. § 1001. On June 3, 1997, a grand jury returned a second superseding indictment, charging Montefiore with seventeen counts of making false statements in violation of 18 U.S.C. § 1001. In that indictment, the grand jury also charged

defendants Alfonzo Gallo and Richard Gallo (the "Gallos") with numerous counts of mail fraud and making false statements, under 18 U.S.C. § 1341 and 18 U.S.C. § 1001, respectively. Further, the grand jury charged Alfonzo Gallo with one count of obstruction of justice, under 18 U.S.C. § 1503. Following his indictment, Montefiore made his initial appearance in court on April 10, 1997. On March 13, 1998, Montefiore filed the instant motion with this Court.

II. DISCUSSION

1. Speedy Trial Act

The defendant argues that the indictment against him should be dismissed with prejudice due to violations of the Speedy Trial Act. Under the Speedy Trial Act:

[T]rial of a defendant charged in an . . . indictment with the commission of an offense shall commence within seventy days of the filing date (and making public) of the . . . indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161 (c)(1) (1985). However, certain periods of delay are "excluded . . . in computing the time within which the trial of any offense must commence." 18 U.S.C. § 3161(h).

Under Section 3161(h)(1)(F), the following period of delay is excluded from the seventy-day calculation: "delay resulting from any pretrial motion, from the filing of the motion

through the conclusion of the hearing on, or other prompt disposition of, such a motion." 18 U.S.C. § 3161(h)(1)(F). Further, "[a]ny pretrial motion, including a motion for the extension of time, is a pretrial motion within the meaning of Section 3161(h)(1)(F) and creates excludable time, even if it does not in fact delay trial." United States v. Arbelaez, 7 F.3d 344, 347 (3d Cir. 1993) (citations omitted). Under the Eastern District's Plan for Prompt Disposition of Criminal Cases ("Eastern District's Plan"), though, the period of delay under Section 3161(h)(1)(F) is limited to sixty days. Eastern District's Plan at 14, ¶ 6(a).

Moreover, a continuance may give rise to excludable time for Speedy Trial purposes. Under subsection (h)(8)(A), the following delay is excluded:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel . . . , if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A).

Further, Section 3161(h)(7) excludes a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not yet run and no motion for severance has been granted." "After defendants are joined for trial, an exclusion applicable to one defendant applies to all codefendants.'" Arbelaez, 7 F.3d at 346 (quoting United States v. Novak, 715 F.2d 810, 815 (3d Cir. 1983), cert. denied, 465 U.S. 1030 (1984)).

a. Montefiore's Continuance

In the instant case, Montefiore was arraigned on April 10, 1997, thus beginning the Speedy Trial Act period. 18 U.S.C. § 3161(c)(1). On April 28, 1997, the parties filed a Joint Motion to Have Captioned Case Declared Complex (Docket No. 4), wherein the parties agreed that "the case is so unusual and complex so as to necessitate a continuance beyond the time limits established by the Speedy Trial Act." Joint Mot. ¶ 2(c). This Court granted that motion on May 19, 1997, and later set July 28, 1997, as the date of trial. In the order granting the continuance, this Court set forth its reasons for finding that "the ends of justice served by granting this continuance outweigh[ed] the best interests of the public and the defendant in a speedy trial." Id. § 3161(h)(8)(A); see United States v. Montefiore, No. 97 Cr. 105 (E.D. Pa. May 19, 1997) (finding that the continuance was necessary because the "case taken as a whole

is so unusual and so complex, due to the number of defendants or the nature of the prosecution and other complexity, that it is unreasonable to expect adequate preparation within the periods of time established.") Thus, the period between May 19, 1997, the date of the order granting the continuance, and July 28, 1997, the date set for trial, is excluded for Speedy Trial Act purposes. 18 U.S.C. § 3161(h)(8)(A).

b. The Gallos' Continuance

On June 26, 1997, the Gallos were arraigned, thus beginning their Speedy Trial Act period. 18 U.S.C. § 3161(c)(1). On July 24, 1997, this Court granted the Gallos' unopposed motion for continuance of the trial date, finding that "the ends of justice served by granting this continuance outweigh the best interests of the public and the defendants in a speedy trial." Id. § 3161(h)(8)(A); see United States v. Gallo, No. 97 Cr. 105 (E.D. Pa. July 24, 1997) (finding that the continuance was necessary because the case was so unusual and complex and "to allow counsel adequate time to prepare."). On January 29, 1998, this Court listed the instant case for trial to commence on April 27, 1998. Thus, with respect to the Gallos, the period between July 24, 1997, the date of the order granting the continuance, and April 27, 1998, the date set for trial, is excluded for Speedy Trial Act purposes. 18 U.S.C. § 3161(h)(8)(A).

Under Section 3161(h)(7), a "reasonable period of delay" is excluded with respect to Montefiore, because he is "joined for trial with . . . codefendant[s] as to whom the time for trial has not yet run and no motion for severance has been granted." In this situation, "'an exclusion applicable to one defendant applies to all codefendants.'" Arbelaez, 7 F.3d at 346 (quoting United States v. Novak, 715 F.2d 810, 815 (3d Cir. 1983, cert. denied, 465 U.S. 1030 (1984))). As such, the exclusion applicable to the Gallos also applies to Montefiore. See United States v. Montefiore, No. 97 Cr. 105 (E.D. Pa. July 24, 1997).

Due to these continuances, the period from May 19, 1997, through the present is considered excluded time. Thus, less than seventy non-excludable days have expired for Section 3161(c) purposes. Therefore, dismissal of Montefiore's indictment pursuant to the Speedy Trial Act is clearly improper.

2. Appointing a Court Physician to Examine the Defendant

Montefiore states that he suffers from a life-threatening heart condition that makes him physically unable to stand trial. In support of this conclusion, Montefiore attaches a report from his cardiologist, dated June 5, 1997. Moreover, Montefiore includes reports indicating that he has been hospitalized on numerous occasions. Montefiore requests that the Court order an independent medical examination to confirm his physical condition.

Given the records attached to the defendant's motion, this Court grants Montefiore's request. However, to ensure that this issue is properly resolved in a timely manner, this Court directs Montefiore to make himself available to be examined by a court appointed physician on or before April 8, 1998.

An appropriate Order follows.

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O R D E R

AND NOW, this 30th day of March, 1998, upon consideration of the Defendant's Motion to Dismiss Indictment Pursuant to 18 U.S.C. § 3162(a)(2) and Further to Appoint a Court Physician to Examine the Defendant (Docket No. 34), IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED in part and DENIED in part.**

IT IS FURTHER ORDERED that the defendant **SHALL** make himself available for an examination to be performed by a court appointed physician on or before April 8, 1998.

BY THE COURT:

HERBERT J. HUTTON, J.