

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TONY M. LISTER,

Defendant.

REPORT AND
RECOMMENDATION

04-CR-074-S

REPORT

On August 17, 2004, defendant Tony M. Lister filed a motion to exclude evidence at trial based on the government's failure to disclose all Rule 16 evidence by its June 1, 2004 deadline. *See* dkt. 40. For the reasons stated below, I am recommending that this court decline to suppress the evidence.

As outlined in Assistant U.S. Attorney Robert Anderson's July 15, 2004 letter (in the correspondence file), in response to repeated inquiries from opposing counsel, AUSA Anderson contacted the state agent involved (SA Ben Poller of the Narcotics Bureau of Wisconsin DOJ's DCI). Poller claimed to have dropped off his report of Lister's May 21, 2004 interview at the U.S. Attorney's Office in mid-June; no one at the U.S. Attorney's office remembers seeing it. AUSA Anderson obtained a copy of the report for the first time on July 14, 2004 and immediately provided it to Lister's attorney. Agent Poller also disclosed to the prosecutor on July 14, 2004 previously undisclosed tapes of conversations

between Lister and the informant. The government intends to use these materials against Lister at trial.

In response to Lister's motion to strike, the government apologizes for being lax in disclosing the tapes and Lister's statement but argues that suppression is too harsh a remedy because Lister has not been prejudiced. Lister rejoins that he is prejudiced because his pretrial motion deadline has passed, which prevents him from substantively challenging admission of the statement; in any event, suppression is necessary as a specific and general deterrent to similar abuses by government agents in the future.

This court takes a hard line on Rule 16 violations when prejudice has been shown, and the government's failure timely to disclose a defendant's statements to police or informants has the potential to be prejudicial. But the day after Lister filed the instant motion to exclude, the court granted his motion to postpone trial. *See* dkt. 45. The adjournment gives Lister six additional weeks to meet the newly-disclosed evidence. True, the motions deadline passed in July, but Lister did not even file the instant motion until a month after he received the report and the tapes. During that time Lister could have sought and obtained leave to file a late motion in the interest of justice. Lister, however, has not proffered any substantive ground for suppression and his decision to wait a month to raise this procedural violation reveals a telling lack of urgency.

So, even though the government has violated Rule 16, absent prejudice to Lister or some other aggravating factor, suppression is not warranted. *See United States v. Stevens*, ___

F.3d ___, Case No. 03-1104, slip op. at 6-7 (7th Cir. Aug. 19, 2004). That said, the court must impose at least a prospective sanction on the government to deter future Rule 16 violations. Therefore, if the court accepts my recommendation not to suppress, then I further recommend that the court put the U.S. Attorney's Office on notice that the next time an Assistant U.S. Attorney fails timely to meet his or her Rule 16 obligations and fails to establish good cause that would excuse the violation, the court will exclude the late-disclosed evidence from trial.

RECOMMENDATION

Pursuant to 18 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Tony Lister's motion to exclude evidence but that the court impose the sanction of exclusion in the next case in which the government violates Rule 16 without good cause.

Entered this 16th day of September, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge