

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ORDER

ALBERTO RODRIGUEZ-RODRIGUEZ,

05-CR-113-S-01

Defendant.

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Defendant Alberto Rodriguez-Rodriguez moves to dismiss for improper venue or in the alternative to transfer venue to the United States District Court for the Southern District of Texas. The government opposes these motions.

On October 12, 2005 the Honorable Stephen L. Crocker, United States Magistrate Judge, recommended that defendant's motions to dismiss the indictment and to transfer venue be denied.

On October 13, 2005 defendant objected to the Magistrate Judge's recommendation to deny his motion to suppress evidence. Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court reviews the report and recommendation and finds as follows.

FACTS

On December 3, 1993, defendant, a Mexican national illegally present in Wisconsin, was convicted in the Grant County Circuit Court

of first degree sexual assault of a child. After he served his prison term, he was deported to Mexico.

In March, 2005, defendant re-entered the United States by crossing the Rio Grande River near Laredo, Texas without passing through any border check points or encountering any law enforcement personnel. On April 21, 2005, in Galveston, Texas, defendant received a traffic citation from a local law enforcement officer who after performing a records check discovered an arrest warrant outstanding from Grant County, Wisconsin for failure to register as a sex offender.

Wisconsin extradited defendant back to Wisconsin on that charge. He pled guilty and on July 26, 2005 was sentenced to 96 days in jail (time served). That same day, Grant County Jail employees notified the Bureau of Immigration and Customs Enforcement (BICE) that defendant was present in their jail. BICE promptly took Rodriguez into federal custody.

On August 3, 2005, this district's grand jury returned the instant indictment against defendant, charging that he had violated Title 8, U.S. C. §1326.

#### MEMORANDUM

Defendant moves to dismiss the indictment for improper venue. Pursuant to Rule 18, Federal Rules of Criminal Procedure, the government must prosecute an offense in the district in which it was committed. Defendant was charged in an indictment with a violation of 8 U.S.C. § 1326 as follows:

On or about July 27, 2005, in the Western District of Wisconsin, the defendant, Alberto Rodriguez-Rodriguez, an alien who had previously been deported and removed, was found in the United States, after intentionally re-entering the United States without having previously obtained the consent of the Attorney General of the United States or the Secretary of the Department of Homeland Security for re-application for admission into the United States.

In United States v. Herrera-Ordonez, 190 F. 3d 504 (7th Cir. 1999), the court construed the verb "found" as used in § 1326 as a term of art and concluded that

An alien is "found" within the meaning of § 1326 when the INS [ now BICE] both discovers his presence in the United States and knows that, because of his identity and status, his presence here is illegal.

190 F. 3d at 510. An alien is not "found" for § 1326 purposes until he is found by BICE. BICE "found" Rodriguez in this federal judicial district. Accordingly, this district is the proper venue for the instant prosecution. The Court will adopt the Magistrate Judge's recommendation to deny defendant's motion to dismiss the indictment for improper venue.

Defendant also moves to transfer this case to the Southern District of Texas "for the convenience of the parties and witnesses and in the interest of justice." See Rule 21(b), Federal Rules of Criminal Procedure. The Court has established a ten-factor test to make the determination of whether a case should be transferred. Platt v. Minnesota Mining & Manufacturing Co., 376 U.S. 240, 243-44 ( 1964). These factors are: 1). Location of the defendant; 2)

location of possible witnesses; 3) location of events most likely to be an issue; 4) location of documents and records likely to be involved; 5) disruption of defendant's business unless the case is transferred; 6) expense to the parties; 7) location of counsel; 8) relative accessibility of place of trial; 9) docket condition of each district involved and 10) any other special elements that might affect the transfer. Defendant and his lawyer are present in this district. Defendant was "found" in this district. Witnesses, other than records custodians (who are unlikely to be needed at trial) are located in this district. Trial, if necessary, is imminent.

Defendant argues that were he to be tried in the Southern District of Texas, he would receive a guideline calculation four levels lower than that possible in the Western District of Wisconsin because that district is authorized to participate in a "fast-track" program for defendants in illegal reentry prosecutions. To transfer a case on this basis alone would defeat the purpose of the fast track which is to process more quickly and efficiently the flood of illegal re-entry cases in the border districts. If other districts start sending all of their illegal re-entry cases to the states with fast-track programs, the result would be to slow down the border states. Since the sentencing guidelines are now merely advisory, the benefits of the fast-track program theoretically are available to defendants in other districts.

Based on the Platt factors it is neither inconvenient nor unjust to try defendant in this district. The Court will adopt the

Magistrate Judge's recommendation to deny defendant's motion to transfer venue to the United States District Court for the Southern District of Texas.

ORDER

IT IS ORDERED that the Magistrate Judge's recommendation is ADOPTED.

IT IS FURTHER ORDERED that the defendant's motions to dismiss the indictment and to transfer venue are DENIED.

Entered this 14<sup>th</sup> day of October, 2005.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge