

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

WALTER BENZING,

Defendant.

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REPORT AND  
RECOMMENDATION

06-CR-111-C

REPORT

Before the court for report and recommendation is defendant Walter Benzing's motion to dismiss the indictment. Benzing contends that the indictment is duplicitous, legally insufficient, and barred by the statute of limitations. The government disagrees. For the reasons stated below, I am recommending that the court deny Benzing's motion.

The grand jury's May 11, 2006 indictment (dkt. 2) speaks for itself. By way of synopsis, the indictment charges Benzing with one count of mail fraud in violation of Title 18, U.S.C. §1341, with the alleged mailing occurring on December 24, 2001.<sup>1</sup> The grand jury has charged that Benzing created and executed a timber harvesting scam in northern Wisconsin running from September 6, 2001 through December 2001. The charged scheme had two components: first, Benzing allegedly forged a number of timber purchase contracts in which he falsely identified his company as the "buyer" and various actual landowners as the "sellers" of the right to harvest timber on their property. Benzing sold these forged

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<sup>1</sup> The sentence enhancer charged by the grand jury, 18 U.S.C. §3147(1), is irrelevant to dismissal.

contracts to Weyauwega Lumber, LLC and pocketed the proceeds. Second, Benzing lulled actual landowners into signing timber contracts with him, falsely promising to pay for their harvested timber. Benzing then sold these contracts to Weyauwega and pocketed the proceeds without paying the landowners what they were due.

The grand jury alleges that on or about December 24, 2001, Benzing, for the purpose of executing this scheme, caused to be mailed to David Alt a check from Benzing's account in the amount of \$18,500. (I surmise Alt was a landowner allegedly victimized by Benzing; the government makes passing reference to Benzing's check bouncing).

Benzing contends that the indictment is invalid because each of the alleged transactions is separate and could have been charged as a separate crime in state court. According to Benzing, charging all these alleged acts in one count violates the rule against duplicity. Benzing acknowledges that charging a single crime performed by different means is not duplicitous but contends that this is not what happened here.

As a fallback, Benzing alleges that the indictment describes two discrete schemes: one to deceive Weyauwega Lumber by misrepresenting the authenticity of forged contracts, and a separate scheme to deceive landowners by promising to pay them for their timber by keeping the proceeds for himself. According to Benzing, "there can be no single, overarching scheme when the nature of both the deception and the deceived parties is so radically different." Brief in Support, Dkt. 22, at 2. Benzing contends that, at best, this indictment charges a scheme to deceive David Alt (the recipient of the charged mailing) but not any

other landowner; it certainly does not encompass the alleged fraud scheme against Weyauwega, which Benzing contends is a separate scheme that was not furthered by Benzing's alleged mailing to Alt.

Finally, Benzing notes that if his alleged presentation of forged contracts to Weyauwega *could* be charged as federal crimes, all of these mailings occurred more than five years before return of this indictment. This bars prosecution under the statute of limitations, 18 U.S.C. §3282.

The government responds that, whatever Benzing's preferences as to how he should have been charged, the U.S. Attorney gets to draft the indictments. However else the government might have charged Benzing, it chose to allege a single, unified scheme that encompasses all of Benzing's alleged fraud against the landowners and Weyauwega. The government contends that Benzing's mailing to Alt was in furtherance of this unitary scheme. According to the government, although Benzing's scheme evolved over time, Benzing retained his single-minded purpose to defraud the timber company and the landowners as a mulcting middleman. Sometimes Benzing forged timber contracts, other times he obtained genuine contracts by fraudulent inducements, but the bottom line was the Benzing misappropriated the money that changed hands as a result of the forged and fraudulent timber contracts he had generated.

Finally, the government contends, *arguendo*, that even if the charge were duplicitous, the remedy is not dismissal. Either the government elects which charge it will pursue, or the

court instructs the jury regarding the need for unanimity when it decides whether defendant is guilty of the charged offense.

Benzing all but concedes that he is taking a flier on his motion. As the government notes, it is not duplicitous to charge a defendant with executing one scheme that had discrete components. *See, e.g., United States v. Folks*, 236 F.3d 384, 391 (7<sup>th</sup> Cir. 2001) (in drug case, “the government’s presentation of multiple factual scenarios to prove that offense does not render the count duplicitous”); *United States v. Buchmeier*, 255 F.3d 415, 421 (7<sup>th</sup> Cir. 2001)(in gun case, “an indictment charging multiple acts in the same count, each of which could be charged as a separate offense may not be duplicitous where these acts comprise a continuing course of conduct that constitutes a single offense”). More to the point in Benzing’s case,

Schemes to defraud by mail often are multi-faceted and therefore the various means used in committing the offense may be joined without duplicity.

*United States v. Zeldman*, 540 F.2d 314, 318 (7<sup>th</sup> Cir. 1976). So long as there is a sufficient nexus between the acts alleged as a unitary scheme, the defendant is clearly informed of the two-pronged nature of the alleged scheme, and the jury receives appropriate instruction regarding unanimity, any duplicity concerns are obviated. *Id.* at 317-18. As the court noted in *United States v. Berardi*, 675 F.2d 894, 897 (7<sup>th</sup> Cir. 1982), “The line between multiple offenses and multiple means to the commission of a single continuing offense is often a difficult one to draw. The decision is left, at least initially, to the discretion of the

prosecution.” A court should uphold this decision so long as it can guard against the duplicity concerns just noted. *Id.* at 898-99.

An objective reading of Count 1 establishes that Benzing was engaged in a single scheme that he executed by several means. Thus, the charged mailing encompasses the entire scheme and the statute of limitations is not implicated. Further, Benzing understands the nature of the various allegations against him, which the government has set forth clearly in Count 1. Finally, this court can and will provide thorough instructions to the jury on the requirement for unanimity in reaching a verdict on the charge. No additional action is necessary to protect Benzing’s rights in this case. Therefore, he is not entitled to relief on his motion.

#### RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend this court deny defendant Walter Benzing’s motion to dismiss the indictment.

Entered this 18<sup>th</sup> day of August, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge

August 18, 2006

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Re: \_\_\_ United States v. Walter Benzing  
Case No. 06-CR-111-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before August 28, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 28, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth  
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge