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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DARRELL KASNER,

Defendant.

REPORT AND RECOMMENDATION

06-CR-198-S

REPORT

The grand jury has charged defendant Darrell Kasner with one count of making false representations regarding work performed in connection with a federally-approved highway project in violation of 18 U.S.C. §1020. Before the court are Kasner's two motions to dismiss the indictment. *See* dkts. 7 & 8. In the first he argues that his activity has no nexus to interstate commerce, and the statute is unconstitutionally vague as written and applied.[1] In the second, Kasner challenges the sufficiency of the indictment under Rule 7(c) because it fails to allege the direct approval of the Secretary of Transportation, fails to allege any federal interest in Kasner's conduct, and because the government will be unable to prove these facts at trial.

The government responds that the statute is constitutional, the indictment is valid, and Kasner is not entitled to pretrial dismissal of the case simply because he disputes the government's ability to prove its case. The government is correct. I am recommending that the court deny both motions to dismiss.

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[1] Kasner originally challenged § 1020 under the Commerce Clause, but has withdrawn this challenge. *See* dkt. 13 at 6, n.1.

BACKGROUND FACTS

The charge against Darrell Kasner states:

> From in or about August 2002, to September 2003, in the Western District of Wisconsin, the defendant, Darrell Kasner, made false representations, false reports, and false claims, with respect to the character, quality, and quantity of work performed in connection with the construction of a highway project approved by the U.S. Secretary of Transportation. Specifically, defendant Darrell Kasner caused false certified payroll records to be submitted to the Wisconsin Department of Transportation falsely certifying that laborers performing work on the U.S. Highway 10 Project had been paid wages at rates not less than those required under the applicable contract provisions.

Indictment, Dkt. 2.

Section 1020 has three clauses. the government charged Kasner under the second clause, which states:

> Whoever knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation [shall be punished.]

18 U.S.C. §1020.

Without finding facts, but simply for the purpose of providing background, the charge arises out of two highway contracts between the State of Wisconsin Department of Transportation (WisDOT) and Ames Construction, Inc. as general contractor for improvements to U.S. Highway 10 in Winnebago County during 2002 and 2003. Both

projects were approved by the U.S. Department of Transportation. The approving official was Johnny M. Gerbitz, a field operations engineer. A March 2, 2001 approval and authorization form indicates that $5 million in federal funds were authorized to pay for one of these projects. *See* Supp. Aff., dkt. 14, attachment titled "Letter of Approval and/or Authorization" at 2.

According to documents prepared by government agents and submitted by Kasner in support of his motion, Kasner has a corporation that owns two dump trucks that provide transport services for hire to contractors in road building and other construction industries. In WisDOT and other federal aid jobs, Kasner's company is obliged to pay drivers who perform "covered work" the higher of federal or state prevailing wages and benefits, totaling about $30 per hour. To demonstrate compliance with applicable laws, subcontractors like Kasner must prepare and submit certified payrolls showing employee hours and wage rates to the prime contractor who in turn submits them to WisDOT. According to the government, Kasner reached oral agreements to hire drivers for his trucks for $12 to $14 per hour. Kasner then caused submission of certified payrolls to prime contractors and to WisDOT showing that his drivers worked fewer hours but were paid at the higher prevailing wage rate. To conceal this alleged underpayment, Kasner and his wife produced false driver time cards and false certified payrolls. A WisDOT audit claims that Kasner owes four drivers approximately $28,000 in back pay.

ANALYSIS

Kasner raises both fact-based and legal challenges to the indictment. Notwithstanding Kasner's protestations that this case is different, his fact-based claims are premature. As the government observes, an indictment need only state the elements of the offense (usually by tracking the statutory language), adequately apprise the defendant of the nature of the charge so that he may prepare his defense, and allow the defendant to plead the judgment as a bar to future prosecution. *See United States v. Sandoval*, 347 F.3d 627, 632 (7th Cir. 2003). The indictment returned against Kasner clearly passes all three parts of this test. Further, it is impermissible for the court to find material facts when considering a motion to dismiss. *See* F.R. Crim. Pro. 12(b); *United States v. Ladish Malting Co.*, 135 F.3d 484, 490-91 (7th Cir. 1998); *see also United States v. Sampson*, 371 U.S. 75, 78-79 (1962).

Kasner's first argument in support of dismissal is that his drivers on the Highway 10 projects were not "covered" workers because they did not fall within the ambit of the Davis-Bacon Act. Citing to *Frank Bros., Inc. v. Wis. Dept. of Transp.*, 409 F. 3d 880 (7th Cir. 2005), Kasner notes that the Davis-Bacon Act specifically excludes contractors and subcontractors or their employees engaged in "the transportation of materials or supplies to or from the site of the work." *Id*. at 882-83. The court in *Franks Bros.* noted that "establishing of prevailing wage rates and labor standards for indigenous workers is an area of traditional state regulation." *Id*. at 886.

The government, however, disputes Kasner's factual contention. It claims that it can prove at trial that Kasner's drivers were performing other work on site. *See* Response, dkt.

15, at 7. Kasner finds the government's position "peculiar" on many levels, including its insistence on waiting until trial to put its evidence on the table. Regardless of Kasner's opinion, there is no mechanism by which this court would be allowed to dismiss the charge against him before the government has presented its evidence to the jury.

Next, Kasner observes that the United States Secretary of Transportation (then Norman Yoshio Mineta) did not personally approve the Highway 10 construction projects. Kasner argues that absent personal approval by Secretary Mineta, the government cannot prove an element of §1020. The government responds that the Secretary may delegate signing responsibility. The government appears to be correct. *See* 49 U.S.C. §332(b) (Secretary may delegate functions); *United States v. Photogrammetric Data Services, Inc.*, 103 F. Supp. 2d 875, 879 (E.D. Va. 2000)(in § 1020 case, court accepts Secretary's delegate without comment); *cf. United States v. Lim*, 444 F.3d 910, 915 (7th Cir. 2006)(court cites to parallel C.F.R. section to define challenged term in the criminal statute). The regulatory authorization of the Secretary to delegate his responsibility appears to be sufficient to comply with §1020 in this case. I am not persuaded that the charging statute must be read so narrowly that it only applies to highway projects that the Secretary personally approved. This is not a basis to dismiss the indictment pretrial.

Next, in a footnote, Kasner offers a terse Fifth Amendment challenge to §1020, claiming that it is unconstitutionally vague both facially and as applied. His sole claim is that "the repeated use of the term 'any' encourages the arbitrary and discriminatory

enforcement of the statute." Brief in Support, dkt. 13 at 6, n. 1. The void-for-vagueness doctrine requires that a penal statute defined the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *See, e.g., Hoffman Estates v. Flipside, Rockford*, 408 U.S. 104 (1972). Kasner contends, however, that the overabundance of the adjective "any" in §1020 fails to provide constitutionally minimal guidelines to govern law enforcement, which in turn would permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections. Dkt. 13 at 6, n.1, *quoting Smith v. Goguen*, 415 U.S. 566, 575 (1974).[2]

The government responds that vagueness challenges not implicating the First Amendment must be analyzed as applied to the specific facts of the case at issue. *United States v. Lim*, 444 F.3d at 915. Here, other than his challenge to the word "any" in the statute, Kasner has not indicated how he was unable to discern what was prohibited, or how law enforcement agents could enforce §1020 arbitrarily or discriminatorily. For obvious, commonsensical reasons, federal criminal statutes are littered with the adjective "any" so as to encompass all behavior Congress intended to criminalize. *See, e.g.*, 18 U.S.C. §§ 701, 875(d), 1001(a) 1010, 2114(a) and 2251(a), just to pick a few from the code book. Citizens

[2] *Smith* is a flag etiquette prosecution in which defendant was arrested and criminally charged because he "did publically treat contemptuously the flag the United States" by wearing an American flag patch on the seat of his trousers, *id.* at 568, 570. The word "any" was present in the state statute but apparently did not concern the Court.

easily can conform their conduct to such statutes because they know that the prohibitions are broad and without apparent exception.

More to Kasner's point, which he never actually develops, I cannot see how such statutes fail adequately to apprise law enforcement agents of the limits of their authority. The statute at issue here has a *mens rea* requirement and covers discrete, concrete acts, notwithstanding so many "any"s. Kasner does not suggest any narrowing provisions that would make the statute less objectionable, and I cannot conjecture any. Certainly on these facts, Kasner cannot claim that he was unable to discern the illegality of his conduct, or claim that the agents have engaged in a standardless persecution of him for innocent behavior. The federal interest in this case may not be pellucid, but there is nothing persecutorial about investigating a wage scam supported by fraudulent documents. In short, § 1020 is not unconstitutionally vague.

This segues to Kasner's challenge to the federal nexus. He claims that his conduct is too attenuated from any federal interest to warrant prosecution by the United States. His argument relies on his version of the facts, including his assertion that the Davis-Bacon Act does not apply to his drivers. Kasner further alleges that the government suffered no financial loss as a result of his alleged conduct. Finally, Kasner points out that he had no relationship with the federal government: indeed, even the general contractor, Ames, had no contract with any federal agency for this project. The allegedly false payroll records in question were never provided to nor relied upon by any federal entity.

The government disputes Kasner's factual assertions. First, it claims that it can prove the Davis-Bacon Act's application to Kasner's drivers. It is not clear whether the government views this as a *necessary* finding; we will discuss this further when crafting the jury instructions. In any event, a factual dispute of this nature is not susceptible to determination by the court before trial.

The government acknowledges that the federal government suffered no financial loss as a result of Kasner's conduct, but asserts that the federal government retained an interest in insuring that the federal funds used in this project were properly administered. Again, the government appears to be correct. *See Photogrammetric*, 103 F. Supp. at 879; *see also United States v. Petullo*, 709 F. 2d 1178, 1180 (7th Cir. 1983) (In false statement case, federal nexus is provided by federal agency's retention of ultimate authority to insure federal funds are spent properly). Finally, as the government observes, §1020 can be violated without any showing of financial loss to anyone: false representations with respect to the character, quantity or quality of the work also are illegal.

In sum, Kasner has not established a legal or factual basis on which to obtain pretrial dismissal of the indictment. The court will define the critical terms in the jury instructions, the parties will present their evidence to the jury, and the jury will decide whether the government has proved the elements of the §1020 charge.

RECOMMENDATION

Pursuant to 28 U.S. C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Darrell Kasner's motions to dismiss the indictment.

Entered this 2nd day of March, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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March, 2007

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Re: United States v. Darrell Kasner
Case No. 06-CR-198-S

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 newly-updated 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 March 12, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by March 12, 2007, 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 John C. Shabaz, District Judge