

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES V. FRAZIER,

Defendant.

ORDER

06-CR-0221-C-01

Defendant James V. Frazier has filed three documents in recent days with questions relating to the hearing on his motion to suppress evidence, his desire to have counsel appointed to represent him and his concerns about his approaching trial. Defendant's case is scheduled for trial on August 6, 2007. Defendant is without counsel because he has expressed his inability to work with each of the three attorneys that have been appointed for him, even though he was told repeatedly that he would not have a fourth attorney appointed to represent him. (The third of his court-appointed lawyers stands ready to assist him at any time.)

A. July 17 Document

I will begin with the document dated July 17, which was not received by the court

until 1:09 on July 20, after the conclusion of the morning's hearing on defendant's motion to suppress evidence relevant to count 3 of the indictment. In this untitled document, defendant asked for "effective counsel," for a hearing on a motion for a downward departure. for the dismissal of the indictment, for suppression of evidence on counts 1, 2 and 3 of the indictment and for certain discovery.

1. Request for appointment of effective counsel

Defendant's request for the appointment of counsel will be denied. The court has appointed three of its ablest and most experienced lawyers to represent him and he has fired each of them. He knew before he fired the last one that he would not be assigned a fourth lawyer and he will not. I have no reason to think that he would have any more confidence in a new lawyer than he has had in the preceding three.

2. Motion for hearing on downward departure

This motion is premature. A downward departure relates to defendant's sentence. If defendant should be convicted after trial, I will consider his motion in sentencing him.

3. Motion for dismissal of indictment

Defendant asks for dismissal of the indictment against him on the ground that some

witness or witnesses gave false testimony to the grand jury. This motion will be denied. Defendant has not presented any evidence supporting his contention that any witness lied when testifying before the grand jury. From his statements at the evidentiary hearing, it appears that he believes that Officer Herro lied when she said that the dispatcher had described the vehicle seen at the site of the armed robbery. Officer Herro testified at the hearing that she had been mistaken about hearing a description of any vehicle. Such a misstatement is not uncommon. Even if defendant were able to show that it was an intentional misstatement, he would have a difficult time showing that it led the grand jury to indict him. The issue the grand jury had to decide before returning count 3 of the indictment against defendant was whether the government had shown probable cause to believe that defendant had possessed crack cocaine on the night he was stopped, not whether he was stopped legally before the discovery. United States v. Puglia, 8 F.3d 478 (7th Cir. 1993) (court cannot quash indictment on ground that government presented illegally obtained evidence to grand jury).

Defendant may use Officer Herro's misstatement to try to challenge the credibility of her trial testimony but he cannot rely on it to support a dismissal of the indictment.

4. Motion for grand jury sign up sheet

Defendant asks for a copy of the "grand jury member sign up sheet" so that he can

determine whether all of the same grand jurors were present at each time that the charges against him were discussed. That motion will be denied. There is no “perfect attendance” rule for grand jurors. United States v. Lang, 644 F.2d 1222, 1235 (7th Cir. 1981). “As long as a quorum was present at every session and at least twelve jurors voted to indict, both the Constitution and the [federal] rules were satisfied.” United States v. Provenzano, 688 F.2d 194, 201 (3d Cir. 1982). Defendant has not made even a colorable showing that fewer than sixteen members were present at any working session of the grand jury.

5. Motion to suppress evidence

The hearing on defendant’s motion to suppress evidence was held on July 20. I explained to defendant at length why the motion was denied.

In the July 17 document, he seems to say that he wants to suppress evidence relevant to counts 1 and 2. He has not explained what this might be. More to the point, he has not provided the court with a factual basis establishing a prima facie entitlement to the relief requested. United States v. Toro, 359 F.3d 879, 885 (7th Cir. 2004). Such a filing is required before a hearing will be held.

6. Motion for discovery

In the remaining portion of his document, defendant seems to be asking for various

kinds of discovery materials. The magistrate judge informed defendant in an order entered on July 14, that the deadline for seeking discovery and filing pretrial motions had passed. Out of an abundance of caution and concern for defendant's rights, however, the magistrate judge directed the government to provide expert reports along with Brady and Giglio material and any other disclosures it was willing to make. Defendant has not advised the court that the government has failed to comply with the magistrate judge's directive.

B. July 20 Document

In a document dated July 20, defendant says that he wishes to appeal the denial of his motion to suppress and have a new attorney appointed. Both motions will be denied. The motion for appointment of new counsel is denied for the reasons stated above. As to defendant's request to appeal: "[I]t is well settled that, as a general rule, a defendant in a criminal case may not take an appeal from an order denying a motion to suppress evidence." United States v. Davis, 1 F.3d 606, 607 (7th Cir. 1993) (citing DiBella v. United States, 369 U.S. 121, 131 (1962); United States v. Dorfman, 690 F.2d 1217, 1222 (7th Cir. 1982)). Exceptions to this rule exist, but they are limited and do not include pretrial suppression motions.

Defendant asks for an extension of time in which to file additional motions. That request will be denied. Defendant has been given time in which to file additional motions,

even though the time for filing such motions expired long ago.

C. July 21 Document

In this document, which defendant refers to as a brief, he elaborates on his motion to dismiss the indictment because of Officer Herro's allegedly false testimony and he asks that a hearing be set on the motion. That request will be denied. For the reasons explained above, I am not persuaded that defendant has any evidence entitling him to dismissal of the indictment.

ORDER

IT IS ORDERED that defendant James V. Frazier's motions to dismiss the indictment, for appointment of a fourth attorney, for a hearing at this time on a motion for downward departure, to suppress evidence on counts 1 and 2 of the indictment, for a grand jury sign up sheet, for discovery materials, to appeal his motion to suppress evidence relating

to count 3 of the indictment and for additional time in which to file pretrial motions are
DENIED.

Entered this 25th day of July, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge