

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL M. BERG, and
JASON A. JOHNSON,

Defendants.

ORDER

07-CR-42-C

Before the court in this drug conspiracy prosecution is defendants' motion to transfer venue pursuant to F.R. Cr. Pro. 21(b). *See* dkt. 22. (Johnson has joined in Berg's motion). The government opposes transfer. For the reasons stated below, I am denying the motion. Trial will proceed in this court on September 17, 2007 as scheduled.

Proper venue for criminal actions normally is in the district in which the offense was committed. *United States v. Morrison*, 946 F.2d 484, 490 (7th Cir. 1991). It is within the court's discretion under F.R. Crim. Pro. 21(b) to decide if, all relevant things considered, the case would be better off transferred to another district. *In the Matter of Balsimo*, 68 F.3d 185, 186 (7th Cir. 1995). When deciding transfer motions, courts often run a checklist of the ten factors enumerated in *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 244-45 (1964). No one of these factors is dispositive and it remains the court's job to determine which factors are most important in a given case, *see Morrison*, 946 F.2d at 489, n.1. Let's run through the list:

(1) Location of corporate defendant

There is no corporate defendant here, so this factor is irrelevant. I address the location of Berg in Johnson under (5) & (6), below.

(2) Location of possible witnesses

Defendants assert that “the majority of potential witnesses reside in Minnesota or are in federal custody.” The government contends that from the perspective of BOP and USMS, it is the same to transfer a federal prisoner to Madison, Duluth or the Twin Cities; therefore, this is not a concern. The government contends that most of its law enforcement witnesses reside in Wisconsin, although it doesn’t state whether they are geographically closer to the Minnesota federal courts. Defendant reply that this likely is the case, and I agree. I surmise, however, that because the law enforcement officers are professional witnesses in the sense that it is one of the job responsibilities for which they get paid, they will travel without (public) complaint to wherever the trial is held. The government is correct that this factor “slightly favors” venue in Wisconsin.

(3) Location of events likely to be in issue

According to defendants, the “overwhelming majority” of the alleged criminal acts occurred in Minnesota. The government responds that defendants’ role in the charge conspiracy was to transport methamphetamine from Minnesota to their alleged co-conspirator Paul Horvatic in Superior. So, as a technical matter, most of the acts alleged against these two defendants occurred both in Wisconsin and Minnesota. Of course, Superior is directly across the Bay from Duluth but well over 300 miles from Madison, so as a practical matter, a trial in Duluth would be closer to the relevant events. So, this factor, in isolation, favors transfer. It is not an important factor in a drug case because the actual location of events and the jury’s

familiarity with those locations is virtually irrelevant to the jury's understanding of the case and its ability to render a fair verdict.

(4) Location of relevant documents and records

Defendants concede that the documents at issue currently are with the U.S. Attorney in Madison but they assert that the documents easily could be transferred up to Minnesota. The government concedes that this is not a major factor in this case.

(5) Disruption of defendants' business

Defendants do not argue this point. It is not clear if either defendant even is employed while on pretrial release.

(6) Expense to the parties

The defendants currently reside in Superior with a third-party custodian; technically, they are in the Western District of Wisconsin, but they assert that if this case were tried in the Duluth branch of the District of Minnesota, they (and their family members) would not have to leave the Duluth/Superior metropolitan area, obviating the travel expenses associated with a three-day trial in Madison.

But no Article III district judges are assigned to the Duluth courthouse (Chief Magistrate Judge Raymond Erickson is the sole full-timer), so it is not clear whether this even is an option that could be exercised, or if so, how quickly a district judge from the Twin Cities could free

himself/herself to try this case in Duluth. Defendants do not address this directly, but they note that even the federal courts in the Twin Cities are closer to them than Madison.

Of course, if this case were to be tried in Duluth, then the government would incur the expense of sending its lawyers and witnesses up north, which would cost more than requiring the defendants to travel to Madison. If this case were to be tried in Minneapolis or St. Paul, then both sides would incur the costs of travel, but again, the government's costs would be greater because it would be moving and supporting more people.

Finally, it is worth noting that relative to the geographic vastness of the United States and its far-flung federal courts, defendants' transfer motion is a tempest in a teapot. We are talking about a five-hour car ride on major highways between Superior and Madison, or 2½ hours by car from Superior to Minneapolis/St. Paul, plus up to three days' room & board at low-cost motels and restaurants. Nobody has to get on a jet and fly to Puerto Rico, California, or even Chicago. No one has to pay big-city hotel and meal rates. All things considered, this factor favors not transferring this trial.

(7) Location of counsel

All of the attorneys are located in Madison. Moving the trial to any other location would inconvenience them. Although defense counsel are willing to travel north, they both are appointed, which means the taxpayers would be footing this bill. This factor favors staying put.

(8) Relative accessibility of place of trial

All of the courthouses under consideration are equally accessible to all concerned. This is a non-factor.

(9) Docketing conditions of the two courts

For some reason, defendants focus on the number of Article III federal judges sitting in Minnesota compared to Madison, or even Milwaukee. *See* dkt. 22 at 5. This is a pointless statistic. Right now this case is before *this* court, with active involvement by the only magistrate judge in this district and by this court's pretrial services and probation office. It is firmly scheduled for trial on September 17, 2007, four weeks from today. However speedy the federal court in Minnesota and however diligent and dedicated the judges and court employees, they cannot match this calendar.

Just like the defendants, the public has an interest in the speedy trial of this case, *see* 18 U.S.C. § 3161(h)(8)(A). F.R. Crim. Pro. 2 urges the just determination of every criminal proceeding, including simplicity in procedure and the elimination of *unjustifiable* expense and delay. Transferring this case to Minnesota would not accomplish these goals. It would be simpler, faster, and overall, less expensive, to maintain the status quo in this case. This factor militates strongly against transfer.

(10) Any other special factors that might affect transfer

Defendants claim that they are entitled to a trial by their “peers,” namely fellow Minnesotans. While this claim might resonate at a Bulldog/Yellowjacket hockey match, it is a laughable distinction in this context. Defendants, who are white, English-speaking U.S. citizens, already have significantly more in common with the jurors used in every federal court’s drug prosecutions than the vast majority of defendants. Defendants’ citation to the significant disparity in state-level incarceration rates between Wisconsin and Minnesota compares apples to oranges. Defendants’ purported concern about empaneling a measurably more “progressive” jury in Duluth, Minnesota than in *Madison, Wisconsin* of all places borders on the specious.

Conclusion

Having carefully considered all relevant circumstances, I conclude that neither the convenience of the parties nor the interests of justice militate toward transferring this case to Minnesota.

Therefore, it is ORDERED that defendants’ joint motion to transfer venue is denied.

Entered this 20th day of August, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge