IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

95-CR-0073-C-01

v.

UDARA ASELA WANIGASINGHE,

Defendant.

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Defendant Udara Wanigasinghe came to this country in 1990 from Sri Lanka to study at the University of Wisconsin-Eau Claire under a student visa that was to expire in April 1995. In March 1995, he allegedly engaged in a check kiting scheme involving several banks in the Eau Claire area. This led to his indictment in this district in August 1995, four months after he had left the United States. The government issued a warrant for defendant's arrest and entered it promptly into the National Crime Information Systems, but took no steps to locate defendant. The warrant came to the attention of border authorities and to defendant for the first time when he attempted to enter the United States through upstate New York in March 2007. Defendant is now facing trial on the indictment, which he has moved to dismiss on the ground that the government violated his right to a

speedy trial under the Sixth Amendment when it failed to locate him in Sri Lanka and extradite him for trial.

The United States Magistrate Judge considered the motion and wrote a comprehensive report in which he recommended, with reluctance, that this court grant the motion for dismissal. He viewed this result as required by Doggett v. United States, 505 U.S. 647 (1992), in which the Supreme Court held that the 8 1/2 years that passed between Doggett's indictment and his arrest was such an extraordinary delay that it violated Doggett's speedy trial rights, even if he could not show any actual prejudice resulting from the delay. In reaching this decision, the magistrate judge relied on documentary evidence tending to show that the FBI could have located defendant in Sri Lanka had it asked the University of Wisconsin-Eau Claire for his address or checked with the Sri Lankan embassy in Washington or looked for him on the internet. The magistrate judge concluded that the government's failure to take these steps or any others to locate defendant was negligent, that the negligence was not outweighed by any improper actions on defendant's part (the government adduced no evidence that defendant knew of his indictment and was making a deliberate attempt to elude arrest) and that so much time had elapsed between defendant's indictment and his arrest that prejudice was demonstrated as a matter of law.

Not surprisingly, the government objects to the magistrate judge's recommendation, but it has not yet filed formal objections to the recommendation. Instead, it has moved to

reopen the evidentiary hearing pursuant to 28 U.S.C. § 636(b)(1), to allow the magistrate judge to reconsider his June 29, 2007 recommendation and to extend the time the government may have for briefing the issue to the district court. Defendant has responded to the motion and has filed a motion of his own for leave to supplement his response brief.

In support of its motion to reopen, the government has submitted the affidavit of FBI Agent Dave Fitzgerald and has attached to it a record produced by the University of Wisconsin-Eau Claire. The government believes that this evidence contradicts information contained in two affidavits submitted by defendant in which he swore to the following: He left the United States in April 1995, when his visa expired. Before then, from January 1990 to April 1995, he attended the University of Wisconsin-Eau Claire. On his return to his home country of Sri Lanka in 1995, he resided at No. 28 Railway Ave., Colombo 05 Sri Lanka, and lived openly and publicly under his given name. In 2002, he decided to emigrate to Canada for a job prospect and was required to submit evidence of a criminal background check. The Federal Bureau of Investigation and the Wisconsin Department of Justice sent the results of their checks to his address in Colombo. During this time defendant was also in contact with the United States Embassy in Colombo. Moreover, from the time defendant left Eau Claire, he was in constant contact with the university, which had his contact information readily available from the registration office.

The government contends that the new evidence it wants to introduce will show that

when defendant averred that he was in "constant touch" with the university, he was not telling the truth. Defendant refutes that contention in part. He does not contest the government's assertion that he was not in "constant touch" with the university but he says that the university has always had in its possession his original application for admission that shows his parents' address as No. 28 Railway Ave. In a new affidavit, an employee of defendant's counsel's law firm avers that he obtained a copy of this application. It appears from the fact that the university could produce this application upon request that it has had it in its possession since 1990 and could have produced it earlier had it been asked.

I conclude that it is not necessary to re-open the evidentiary hearing to consider the evidence the government wants to introduce. I am prepared to find as a matter of law that the government is not negligent if it simply registers the warrant in the National Crime Information System and fails to take any other steps to locate and bring to trial the subject of the warrant when the subject is a non-citizen subject of a warrant who is in another country. By taking himself outside the jurisdiction of the United States, defendant is more to blame for the delay in his prosecution than the government. Therefore, he will have to show specifically that he will be prejudiced by the delay in his prosecution if he wishes to pursue his motion for dismissal of the charges against him.

DISCUSSION

The government's motion presents a chicken-and-egg problem. Although the parties want a decision on the need to consider the new evidence, that question cannot be answered without deciding how a claim like defendant's should be evaluated. That, in turn, requires deciding whether, as the magistrate judge held, Doggett requires dismissal of an indictment whenever the time between its return and the prosecution of the defendant is extraordinarily long, as it is in this case.

The facts in Doggett are relevant to this discussion, so I will summarize them. Marc Doggett was indicted in February 1980 on federal drug charges but left the country before he could be arrested. The Drug Enforcement Agency sent word of his outstanding arrest warrant to all United States Customs stations and to a number of law enforcement organizations and placed his name in the Treasury Enforcement Communication System and in the National Crime Information System. The TCES entry expired within the year.

The DEA learned in September 1981 that Doggett was under arrest for drug charges in Panama. Rather than asking for extradition, which it thought would be futile, the DEA asked Panama to expel Doggett to the United States when the proceedings had ended. Instead of complying with this request, the Panamanian authorities simply released Doggett and let him go to Colombia. On September 25, 1982, he returned through Customs in New York City and settled in Virginia, where he lived openly under his own name and stayed

crime-free and out of federal custody until September 1988, when he was located in the course of a Marshals Service credit check on persons with outstanding arrest warrants and arrested promptly thereafter.

The American Embassy in Panama had told the State Department of Doggett's departure from Panama to Colombia, but the information was never passed on to the DEA. The DEA never asked Panama to check into Doggett's status. In 1985, Douglas Driver, the principal agent investigating the original conspiracy involving Doggett, was assigned to Panama for reasons having nothing to do with Doggett. While in Panama, he learned that Doggett had been released and had gone to Colombia. Driver made no effort to confirm this information or to track Doggett's whereabouts, either in Colombia or in the United States.

In deciding the case, the Supreme Court adopted the findings of the trial court, which included the fact that Doggett had not known of the indictment against him until he was arrested in 1988. The Court examined the facts in light of the four factors governing a defendant's right to dismissal of criminal charges for violation of his right to a speedy trial, as set out in Barker v. Wingo, 407 U.S. 514 (1972): (1) whether the delay before trial was unusually long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether he suffered prejudice as a result of the delay. Id. at 530.

The Court found that (1) the delay in Doggett's case was long enough to cross the

divide between ordinary delay to "presumptively prejudicial" delay; (2) the government did not act with diligence to find defendant: "[f]or six years, the Government had made no serious effort to test their progressively more questionable assumption that Doggett was living abroad, and had they done so, they could have found him within minutes," Doggett, 505 U.S. at 652-53; and (3) because Doggett did not know of the outstanding warrant, he could not be held responsible for not asserting his right to a speedy trial. This left for consideration (4) Doggett's failure to show how he was prejudiced by the delay and "the role that presumptive prejudice should play in the disposition of [his] speedy trial claim." Id. at 656.

The Court discussed three hypothetical situations. The first is one in which the government has been diligent in its efforts to find a defendant. In that situation, the defendant would have to prove specific prejudice, because it is well accepted that pretrial delay can be wholly justifiable under certain circumstances, such as when the government is tracking down a defendant who is attempting to elude capture. The second involves intentional, bad faith delay of prosecution, which if it went on as long as the 8 1/2 years in Doggett's case "would present an overwhelming case for dismissal." Id. at 656. The third situation is negligence, which occupies the middle ground. Id. at 657. Negligence is an unacceptable reason for delay, although not as blameworthy as intentional delay; like intentional delay, however, if it results in a protracted delay, the presumption of prejudice

increases. If the delay is as long as in Doggett's case, the presumption of prejudice will require dismissal of the criminal charges unless the presumption is "extenuated," such as by the defendant's acquiescence, or "persuasively rebutted." Id. at 658.

From the lack of any discussion in Doggett about what kind of case the government might have been able to show, it appears that either it did not offer any or that the evidentiary showing it made was so obviously inadequate as not to require any comment by the Court. The absence of discussion leaves it unclear what the Court would view as a persuasive rebuttal of prejudice. The Court's emphasis was wholly on the length of time that had passed before defendant was found and arrested.

Doggett stands for the principle that the speedy trial clause of the Sixth Amendment is not limited to protection from "'undue and oppressive incarceration'" and "'the anxiety and concern accompanying public accusation,'" id. at 659 (quoting United States v. Marion, 404 U.S. 307, 320 (1971)), but imposes an obligation on the government to take reasonable steps to locate the persons it indicts and bring them to trial promptly. The Court was concerned about the effects of extended delay, which can impair a defendant's ability to defend himself and make him more vulnerable to conviction. Although the government has its own reasons for bringing cases to trial quickly before witnesses disappear or forget crucial facts about the case, the Court did not view the government's self-interest as sufficient protection of a defendant's right to a speedy trial. It refused to adopt Justice O'Connor's

view that "delay is a two-edge sword. . . . The passage of time may make it difficult for the Government to carry [its burden of proving guilt beyond a reasonable doubt]." Doggett, 505 U.S. at 659, O'Connor, J., dissenting.

Inevitably, the Court's decision leaves unanswered questions that arise when trying to apply the holding to different circumstances. One can infer from the Court's comment that, if Doggett had known of his indictment years before he was arrested, "Barker's third factor, concerning invocation of the right to a speedy trial, would be weighed heavily against him," id. at 653, that the Court would not require dismissal of an indictment in any situation in which the subject of the warrant is intentionally trying to elude capture. What is the consequence, however, in the situation in which the subject is not intentionally trying to elude detection or capture but takes steps that have that effect? If the government could not have found or arrested the subject even if it had taken reasonable steps to do so, is the subject still entitled to dismissal of the charges? Interesting as that question is, I will set it aside because it is not the one defendant's case presents. I will assume, as the magistrate judge did, that defendant would be able to show that the government could have found him had it tried.

The pertinent question for this case is whether it was negligent for the government not to undertake any efforts to find defendant in circumstances in which all available evidence showed that he has left the jurisdiction and, unlike Marc Doggett, had no reason

to return. In other words, when the subject of the indictment is a citizen of another country, here only by virtue of a special visa, is it negligent for the government to do nothing more than file the proper notices that will stop a non-citizen at the border? If the government does not pursue the defendant out of the country, does it give up all right to prosecute him if he does not come back to the United States for a decade or so?

The Court had no reason to address these questions in Doggett. However, it seems reasonable to infer from what the Court did say that it would not find the government negligent in a situation like defendant's, that is, a non-citizen who leaves the country and remains outside the jurisdiction of the United States during the entire period between his indictment and his arrest.

This conclusion is bolstered by the Court's focus on the six years that Doggett was living in the United States. For example, in considering the second criterion of Barker (reason for the delay), the Court said that "[f]or six years, the Government's investigators made no serious effort to test their progressively more questionable assumption that Doggett was living abroad." Id. at 652-53. This emphasis on the "progressively more questionable assumption" implies that a "progressively more likely assumption" would lessen the government's obligation to find the defendant. At a later point in the opinion, the Court referred to the same period of time, noting that Doggett would have faced trial *6* years earlier than he did had it not been for the government's oversight. This tends to confirm my

position that the Court did not expect the government to make efforts to locate Doggett when he was in Panama or in Colombia.

In fact, nothing in Doggett suggests an intent to impose on the government the obligation to take vigorous efforts to find and extradite non-citizens who have been indicted in the United States but by their own choice are living outside this country's jurisdiction. Indeed, it would be odd to say that such a person takes with him the right to be tried speedily under the Sixth Amendment. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (rejecting claim that Mexican national standing trial in United States had right to challenge constitutionality of search conducted in Mexico and confirming view expressed in Johnson v. Eisentrager, 339 U.S. 763 (1950), that organic law of United States has no extraterritorial reach).

In this case, the government's investigation of defendant's bank fraud disclosed that starting approximately one month before his visa was to expire, defendant allegedly defrauded at least five different banks by opening accounts, depositing forged and stolen checks and making quick withdrawals before the bad checks bounced. Around the end of April 1995, he returned to his homeland. The government had no reason to think he would return, especially given the timing of the crime. Moreover, unlike Marc Doggett, defendant was not within the United States or otherwise subject to its jurisdiction at any time between 1995, when he left the country, and 2007, when he tried to cross the border from Canada.

The record contains no evidence that he had relatives in this country. In these circumstances, it was not negligent for the government to limit its actions to posting the existence of an arrest warrant in the National Crime Information System, where it would be discovered if defendant ever tried to return to the United States. That defendant did not try to enter the United States for almost twelve years is no reason to bar the government from prosecuting him now that he is here.

Having reached the conclusion that the mere passage of time between defendant's indictment and his arrest does not require dismissal of the indictment against defendant, I see no reason for re-opening the evidentiary hearing. Evidence relating to what the University of Wisconsin-Eau Claire knew and could have disclosed to the FBI had its agents inquired about defendant is irrelevant to this analysis. It does not matter whether this new evidence bears on the truthfulness of defendant's averments in his affidavit, if the government had no obligation to pursue defendant out of the country.

Because I have reached this decision in the course of ruling on the government's motion to re-open and the parties had no notice that I would be reaching the merits of the magistrate judge's report and recommendation, I will not enter an order denying defendant's motion to dismiss the indictment but will allow both parties to submit new briefs on the ultimate outcome of defendant's motion. Although I am denying the motion to re-open, neither side is precluded from arguing the relevance of the new evidence, if they continue to

believe it does have relevance to their position.

ORDER

IT IS ORDERED that the government's motion to re-open the evidentiary hearing in this case to allow the admission of new evidence is DENIED. The parties are to observe the following briefing schedule on the Report and Recommendation entered by the United States Magistrate Judge: defendant's brief is due August 14, 2007; the government's brief is due August 28, 2007; and defendant's reply brief is due September 7, 2007. (I have reversed the normal schedule of briefing to give defendant the chance to file the first brief and the reply in light of my analysis of the motion's merits.)

Entered this 3rd day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge