

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDALL KOLODZIEJ,

Defendant.

REPORT AND
RECOMMENDATION

02-CR-96-S

REPORT

Before the court for report and recommendation is defendant Randall Kolodziej's motion to dismiss counts 1 and 3 for lack of venue (dkt. 17). Kolodziej has asked this court to stay its ruling on dismissal until it has decided his motion for a bill of particulars (dkt. 18), but the two are inextricably intertwined and Kolodziej is not entitled to relief on either motion. Therefore, I am reporting on both motions and recommending that the court deny them.

Count 1 of the indictment charges that from April 15, 2001 to March 21, 2002, in the Western District of Wisconsin, Kolodziej conspired with others known and unknown to the grand jury to distribute more than 100 kilograms of marijuana. Count 3 is a forfeiture count arising out of Count 1. Kolodziej argues that the government's evidence actually reveals the existence of two distinct and unrelated conspiracies, a smaller one operating

between Illinois and Wisconsin, and a larger one operating between Illinois and Arizona. Kolodziej acknowledges that the government's evidence alleges that he was involved in marijuana trafficking activity in Illinois, Wisconsin, and Arizona. He contends, however, that because his alleged acts were committed in furtherance of two separate conspiracies, there is no venue in this district to try or convict him for the Illinois/Arizona conspiracy, even under the "continuing crime" venue statute, 18 U.S.C. § 3237(a).

To establish his point, Kolodziej has requested a bill of particulars that specifies how the government intends to prove any connection between his activities in Wisconsin and his activities in Arizona. Upon receiving this information, Kolodziej would like to submit additional arguments in support of his motion to dismiss.

The government has responded by citing to the usual cases indicating that bills of particulars are not often granted because they rarely are necessary. The government further explains that it has provided open file discovery, so that any facts known to it are known to Kolodziej. Finally, the government objects to providing Kolodziej with its theory of prosecution on the conspiracy charge.

The government is correct. Kolodziej has no right, under the guise of a bill of particulars, to require the government to reveal the details of how it plans to prove its case. *United States v. Glacier*, 923 F.2d 496, 502 (7th Cir. 1991), *cert. denied* 502 U.S. 810 (1991). Kolodziej is entitled to know the offense with which he is charged, not all the details of how

the government will prove it. *United States v. Richardson*, 130 F.3d 765, 776 (7th Cir. 1997).

Therefore, Kolodziej is not entitled to a bill of particulars in this case.

Even if Kolodziej were to receive a proffer of the theory of prosecution, he could not possibly obtain pretrial dismissal of Count 1 (or its tag-along, Count 3). That's because Kolodziej is not entitled to a pretrial determination whether there is one conspiracy or two. This is a fact question reserved for the jury at trial. *United States v. Williams*, 272 F.3d 845, 862 (7th Cir. 2001). A pretrial determination of the existence, number and intersection of any conspiracies would require the court to apply the law to the facts to determine whether the government could meet its burden of proof at the trial. This is equivalent to civil summary judgment, a concept that does not exist in federal criminal jurisprudence. *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998).

Count 1 survives pretrial scrutiny if it sufficiently states the elements of the offense and alleges proper venue. *See United States v. Gallagher*, 602 F.2d 1139, 1142 (3rd Cir. 1979). Kolodziej cannot dispute that Count 1 *alleges* proper venue along with the minimal elements of a drug trafficking conspiracy. That is all to which he is entitled before trial. At trial, the court will instruct the jury about multiple conspiracies and venue if necessary; indeed, the court already has prepared draft jury instructions on these issues at page 11 of its submission to the parties, attached to the preliminary pretrial conference order (dkt. 22). Accordingly there is no basis to dismiss Count 1 or Count 3.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), and for the reasons stated above, I recommend that this court deny defendant Randall Kolodziej's motion for a bill of particulars, and deny his motion to dismiss Counts 1 and 3 of the indictment.

Entered this 27th day of November, 2002.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge