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

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAWRENCE T. KNUTSON,

Defendant.

REPORT AND RECOMMENDATION

03-CR-181-S

REPORT

Before the court for report and recommendation are defendant Lawrence Knutson's motion to suppress physical evidence discovered at a third party's house, and motion to dismiss the indictment on the ground of prejudicial pre-indictment delay. For the reasons stated below I am recommending that this court deny both of Knutson's motions.

On February 11, 2004, the court held an evidentiary hearing on Knutson's motions. Having considered the witness's testimony and demeanor, and having considered the parties' exhibits, I find the following facts:

Facts

On January 8, 1999, three masked men robbed the Security Bank in Sand Creek, Wisconsin. One of the robbers wore a denim jacket with a Harley logo on the back. Local authorities teamed up with the FBI to investigate. Within days, agents developed William Crowley as a suspect and promptly interviewed him; he denied involvement.

Other evidence developed in January 1999 pointed to Rick Myers as a second suspect in the bank robbery. In February 1999, agents interviewed Myers, who also denied any involvement in the bank robbery.

Agents developed other information pointing to Lawrence Knutson as a suspect. They interviewed him on February 23, 1999 and he denied involvement in any criminal activity following his recent release from prison.

As part of their investigation, agents interviewed associates of the suspects, including Keith and Mary Babler, who owned a home in Superior, Wisconsin. On February 23, 1999, agents spoke with Mary Babler, who reported that Myers and Knutson both previously had been staying at the Bablers' house, but that both had been taken back to jail (apparently on state matters unrelated to the bank robbery under investigation). She provided background information about Myers, Knutson and other clique members. Mary Babler told the agents that after Knutson and Myers were taken away, her husband Keith Babler had moved their clothes and other belongings in plastic bags in the garage. With the assistance of Babler's child and a family friend, agents dumped out the bags looking for an address book, which they did not find. The agents seized nothing.

On March 4, 1999 the agents returned to interview both Mary and Keith Babler. Among other things, Keith mentioned that when police had come to arrest Knutson at Babler's house, Knutson worried that if he wore his Harley jacket to jail, it would get lost or stolen. Knutson asked Babler to keep the vest for him and the police permitted Knutson to

hand it to Babler. After reporting this,, Keith retrieved Knutson's jacket from somewhere else in his house and showed it to the agents. Babler did this either on his on initiative or at the request of the agents; they did not order or demand that he produce Knutson's jacket for inspection. Agents photographed the jacket but did not seize it.

In the absence of any new leads or breaks, the bank robbery investigation languished. The agents had no further contact with Babler over the next several years, so they were unaware that he died on February 2, 2000.

On October 4, 2000, agents received a big break when Crowley submitted to an interview pursuant to a proffer agreement with prosecutors in a different case. Crowley provided details of the Sand Creek bank robbery, inculpating Myers and Knutson. Even so, the agents felt that Crowley's testimony was not strong enough evidence to charge the others, so they continued their investigation. They attempted to interview Knutson again on March 2, 2001, but were rebuffed. Next they attempted to interview Myers again on April 10, 2001, but were rebuffed.

Over two years passed. On August 1, 2003, while imprisoned in Michigan, Myers reached out to local authorities to admit his role in the Sand Creek bank robbery. The FBI jumped on this and with the month had obtained Myers' confession inculpating Knutson.

On December 3, 2003, the federal grand jury in this district issued a witness subpoena to Keith Babler requiring him to appear for testimony on December 11, 2003. On December 8, 2003, the agents learned that Babler had died almost three years earlier.

On December 11, 2003, the grand jury returned the instant indictment against Knutson, charging him with the January 8, 1999 bank robbery.

Analysis

I. The photograph of the jacket

Knutson seeks to suppress the government's photograph of his Harley jacket, arguing that it is the fruit of an unlawful search. Knutson is incorrect. Working from the outside in, Knutson *never* has had standing to complain about whom Babler invites into his own home and what he says to them. Although overnight guests have a limited right to challenge the search of their host's home, *see Minnesota v. Olson*, 495 U.S. 91 (1990), Knutson's tenure as the Bablers' houseguest had ended weeks before the agents visited, when Knutson switched accommodations to the Douglas County Jail.

Second, it is ridiculous for Knutson to imply that as a former houseguest, he ever had any right to bar the Bablers' front door to *anyone*, law enforcement or otherwise. It was the Bablers' house, and they could chat in their parlor with whomever they pleased. *See United States v. Aghedo*, 159 F.3d 308, 310-11 (7th Cir. 1998) (the more access and control one party has over thee premises in a shared residence, the lower the other party's reasonable expectation of privacy).

Third, there was nothing improper about Babler fetching and displaying Knutson's jacket to the agents. The probable cause and warrant requirements of the Fourth

Amendment do not apply when an individual with authority to consent to a search or a seizure does so. *See United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir. 2000). That's what happened here: Keith Babler, who had authority over his own house and authority over Knutson's jacket, produced the jacket for police inspection.

Different rules would apply if a closed, private container were involved. If Knutson had place his jacket in his suitcase and left the suitcase with Babler, then Babler could not have consented to the agents opening the suitcase. *See Melgar*, 227 F.3d at 1041-42. But that's not what happened here. Knutson simply had handed his jacket to Babler when the police took him into custody in mid February. From that moment on, Babler had actual possession of, and actual authority over the jacket. He was free to choose where to put the jacket and to whom to show it. Babler could have hung Knutson's jacket on a coat peg in the alcove, stored it in a plastic bag in the garage, tacked it over the fireplace as a piece of conceptual art, worn it to church, or even called the police to ask them to come look at it. Even if Babler had stored Knutson's jacket in a closed container for safekeeping, he had the actual authority to take it out later because he's the one who put it there, not Knutson. Knutson did not abandon his jacket by tossing it to his friend for safekeeping, but he abandoned any objective expectation of privacy in it.

For suppression purposes, it would not have mattered if Knutson *had* provided instructions to Babler about the jacket because Babler had apparent authority to show it to the agents. Either Babler fetched the jacket on his own or he agreed to fetch it at the agents'

request, but there is no indication that he said anything to the agents that would cause them even to suspect that he did not have authority to present the jacket to them for inspection. Therefore, it would have been reasonable for the agents to inspect the jacket even on the basis of Babler's apparent authority. *See See United States v. Rodriguez*, 888 F.2d 519, 523 (7th Cir. 1989) (requiring agents to dig beneath surface information furnished by consentor would make outcome of searches depend on niceties of property law far removed from concerns of Fourth Amendment).

In light of all this, there is no need to explore Knutson's claim that Babler was a police "agent" when he conducted "**the search of the vest**" in his own house. Defendant's Brief in support, dkt. 25 at 5, double emphasis in original. *See, e.g., United States v. Crowley*, 285 F.3d 553, 558 (7th Cir. 2002) (seizure by private party does not implicate Fourth Amendment unless party is acting as an "instrument or agent" of the government; defendant bears burden of proving private party acted as a government agent). *Id.* There was no unlawful search here from which the agents have to distance themselves by blaming Babler.

Similarly, there is no need to discuss at length Knutson's toss-away argument that Babler did not *voluntarily* consent to produce the jacket. Agent Pulver testified that he did, and Knutson has produced no conflicting evidence. Knutson complains that he is foreclosed from doing so because Keith Babler is dead; but Mary Babler also was present (*see* Gov. Exh. 3) and could have provided her opinion of the proceedings if it actually had been important to Knutson.

The bottom line is that the agents lawfully obtained their photograph of Knutson's jacket. There is no basis to grant his motion to suppress.

II. Pre-indictment delay

Knutson has moved to dismiss the charge against him on the ground of prejudicial pretrial delay. Such motions are paradigmatic longshots: although the right to dismissal exists in theory, neither the Court of Appeals for the Seventh Circuit nor the Supreme Court ever has dismissed an indictment on this basis. *United States v. Aleman*, 138 F.3d 302, 309 (7th Cir. 1998). In fact, in his reply letter (dkt. 27), Knutson concedes that he cannot win on this record.

A defendant's primary safeguard against unreasonable prosecutorial delay is derived from the applicable statute of limitations. Even so, the Fifth Amendment's due process clause plays a limited role in assuring that the government does not subject a defendant to oppressive delay. To establish a due process clause violation, it is a defendant's burden to prove that the delay caused actual and substantial prejudice to his right to a fair trial; if he meets this burden, then the government must establish that the purpose of the delay was not to gain a tactical advantage over the defendant. *United States v. McMutuary*, 217 F.3d 477, 481-82 (7th Cir. 2000). Defendant's burden is an exacting one, that requires a specific, concrete harm supported by evidence. Mere speculation is never enough, nor can the loss of cumulative testimony result in actual prejudice. *Id.*

Here, Knutson points to Keith Babler's death in February 2000 to establish actual prejudice to his defense. He claims that Babler was a necessary witness at his suppression hearing because Babler might have testified that he did not voluntarily consent to show Knutson's jacket to the agent. He further claims that Babler would have been a critical defense trial witness because he could testify that: Knutson never mentioned to Babler that he had committed a robbery; Babler never saw Knutson carrying with guns during that time; and around the time of the robbery Knutson had access to cash from international wire transfers sent to another friend by the friend's father.

The death of a potential defense witness does not establish actual prejudice unless his testimony would have affected the outcome at trial. *United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992). The testimony that Babler allegedly could have provided is speculative, probably inadmissible, and virtually irrelevant: the fact that Babler might have been able to testify to two negatives ("he never confessed to me, I didn't see him with guns") proves nothing. At best, it *might* impeach other witnesses who *might* testify that Knutson implicated himself in a bank robbery while Keith Babler was present. Other witnesses, such as Mary Babler or the friend with the money orders, could be subpoenaed to testify about Knutson's access to money; but in any event, none of these events is a significant brick in the evidentiary wall. The upshot of all this is, as Knutson put it in his first brief, is that at worst, Knutson has lost "*potentially* exculpatory evidence." Dkt. 25 at 7, emphasis added. This just isn't going to cut it.

Further, there is no evidence that the government delayed the indictment for an improper purpose. Knutson concedes this point in his reply letter, which dooms his motion.

The facts establish that the investigation and prosecution of the Sand Creek bank robbery case was hamstrung from the outset by the dearth of evidence. It was not unwise, let alone improper or malicious, for the government to wait to indict Knutson until both of his alleged compatriots implicated him. Even if the government had indicted Knutson after Crowley confessed in October 2000, it still would have been too late to help Knutson: Babler already had been dead seven months. The government did not even learn of Babler's death until December 2003. There is absolutely no evidence that the government delayed its indictment for an improper purpose. Knutson is not entitled to dismissal.

RECOMMENDATION

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

Entered this 4th day of March, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge