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

UNITED STATES OF AMERICA,

Plaintiff,

SECOND REPORT
AND RECOMMENDATION

v.

04-CR-055-C

DAVID A. CARLISLE,

Defendant.

REPORT

Defendant David Carlisle is a postal worker accused of pilfering money from the Capitol Station Post Office. This is the second report and recommendation in this case and it addresses the dispositive motions Carlisle filed after the grand jury returned a new indictment against him containing additional charges. Pending are Carlisle's motion to dismiss all charges on the ground that the government improperly destroyed exculpatory evidence (dkt. 22), his motion to dismiss Counts One and Four for vagueness and for failure to charge a criminal offense (dkt. 26), and his motion to exclude at trial postal "POS ONE" business records because they are unreliable (dkt. 27).

For the reasons stated below, I am recommending that this court deny both motions to dismiss. Because both sides agree that the motion to exclude POS ONE evidence is akin to a motion in limine, and because the motion is still evolving, it does not require a report

and recommendation from me, and it is not ripe for final resolution in any event. I will discuss this briefly in Section III below.

I. Motion To Dismiss: Destruction of Evidence

Carlisle has moved to dismiss all of the charges against him because the postal service did not preserve videotapes recorded on August 14 and 18, 2003 by the five permanent surveillance cameras mounted at the Capitol Station. Those two days are when postal inspectors set up their own cameras which they focused solely on Carlisle and which they contend recorded Carlisle mishandling postal cash. The government acknowledges that it made no effort to preserve any tapes recorded by the permanent surveillance cameras; indeed, it claims that the postal inspectors never even reviewed these tapes, having decided prior to beginning their surveillance that these cameras would not capture anything useful to their investigation.[1]

Carlisle contends that the tapes from the permanent cameras, because they covered the entire station,

> would have provided strong evidence that any funds I put into my postal uniform pants pocket and were removed by me for legitimate purposes . . . and that placing the funds in the pocket was consistent with postal regulations that clerks not display cash in the presence of customers or in public areas at times

[1] Station Supervisor Ann McCredie told a defense paralegal that she was "99 percent sure" the surveillance tape was saved, *see* dkt. 23 at 3, but it turns out the McCredie was incorrect. The government does not have the tape.

> other than when transactions are made. Complete tapes from one or both of the days at issue will show me in the presence of customers or in the public areas of the station after I was alleged to have improperly taken money.

April 23, 2004 Carlisle affidavit, dkt. 24, at 2. Because these tapes no longer exist for Carlisle to review, he contends that he is entitled to attempt to establish that the government destroyed them in bad faith, which would allow him to establish his claimed violation of his right to due process.

To establish that the government violated a defendant's due process rights by destroying evidence, "the defendant[ ] must show that (1) the government acted in bad faith by not preserving evidence, (2) the exculpatory nature of the evidence was apparent before its destruction and (3) the defendant cannot obtain the same evidence elsewhere." *United States v. Andreas*, 216 F.3d 645, 659 (7th Cir. 2000). *See also United States v. Chaparro-Alcantara*, 226 F.3d 616, 623-24 (7th Cir. 2000)(It is the defendant's burden to establish bad faith, not the government's burden to prove its absence).

Carlisle asked for an evidentiary hearing on this motion. His position was–and remains–that he has established that the videos from the permanent cameras were "potentially useful evidence," and that therefore, "a hearing should be held primarily to determine good or bad faith." *See* Defendant's Reply Brief, dkt. 43, at 3.

But Carlisle was not–and is not–entitled to an evidentiary hearing until he meets his burden of making a prima facie showing of entitlement to the relief he requests. This requires Carlisle to present definite, specific detailed and nonconjectural facts to establish

that there is a disputed fact material to his due process claim. Vague or conclusory allegations won't cut it. *See United States v. Toro*, 359 F.3d 879, 884 (7th Cir. 2004).

At an April 27, 2004 telephonic status conference I determined that Carlisle had not made the required showing, so I declined to take evidence on this motion *See* April 27, 2004 order, dkt. 30. As stated in more detail at the conference, Carlisle has no independent recollection whether the recycled videos would have shown him interacting with other postal staff in a fashion that would establish Carlisle's defense that he had postal service money in his pockets for appropriate reasons. I also noted that the government had proffered that the postal inspectors would testify at any hearing that they never even attempted to preserve any tapes from the permanent cameras because their pre-surveillance inspection of these cameras convinced them that they would not capture anything of evidentiary value.

In his subsequent briefs, Carlisle has focused on persuading this court to grant him his evidentiary hearing on his motion. His main argument is that, pursuant to *Illinois v. Fisher*, ___ U.S. ___, 124 S.Ct. 1200 (2004), upon his showing that "potentially useful" evidence has been destroyed by the government, he at least is entitled to an evidentiary hearing to explore whether the evidence was destroyed in bad faith. This is incorrect for several reasons.

First, arguably establishing one element of the three part test (that the evidence was exculpatory), or maybe even two (that he cannot obtain the evidence by other means) does not give Carlisle the right to a discovery deposition to see if he can establish the third

element (bad faith). Carlisle has to make a prima facie showing on all three elements before the government is obliged to bring in its witnesses.

Do Supervisor McCredie's statements to the defense paralegal make this showing? No. It appears that McCredie was mistaken, and Carlisle does not contend otherwise. The government proffers that no one ever attempted to preserve these tapes. Can the court infer bad faith from the failure to preserve these tapes? No. The agents *have* tapes that focus specifically on Carlisle, so there is no reason to suspect that they intentionally avoided recording Carlisle's actions that day.

This is especially true given the wishy-washy nature of Carlisle's claim that potentially useful evidence might have been found on the recycled tapes. All Carlisle is claiming is that the permanent cameras would have shown that he was circulating with postal employees and customers in public areas of the post office. I doubt the government would contest this simple fact, and the postal inspectors probably can and will testify at trial that Carlisle did in fact circulate through public areas of the post office that day. Why is this exculpatory? Carlisle wishes to argue that his *intent* in putting postal money in his pocket was to have it available if he needed it for a legitimate business purpose, without having it visible. This chain of circumstances is so distant from the heartland protected by *Brady* that there is no way a postal inspector reasonably could have anticipated that this sort of a videotape would be considered by anyone as potentially exculpatory. So, there is no prima facie showing of bad faith, and thus no need for a hearing.

This segues to a reprise of my observation on April 27: Carlisle has not even established the exculpatory nature of the video. As Carlisle's attorney admitted on that date, Carlisle has no recollection that the tapes would show anything any actual interactions involving the pocketed money. *See, e.g.,* Defendant's Brief in Support, dkt. 35, at 9 (Carlisle "cannot specifically assert that [these tapes] would show him using the funds to make change or for any other specific reason.") For him now to claim that the tapes *might* have shown this would be mere speculation, which is not enough to obtain a hearing.

Carlisle attempts to surmount this hurdle by claiming that in denying the hearing on April 27 the court mistakenly focused on "materiality" when it should have focused on whether the tapes contained "potentially useful evidence," which he contends is a lower standard, pursuant to *Fisher*. But the dichotomy noted in *Fisher* was to clarify that a defendant was required to establish the government's bad faith whenever it destroyed evidence, except when that evidence was "materially exculpatory" as that phrase is used in *Brady v. Maryland*, 373 U.S. 83 (1963). By noting this distinction–which it admitted was sometimes difficult to discern–the *Fisher* Court did not water down the standards of *Arizona v. Youngblood*, 488 U.S. 51,58 (1988) or *California v. Trombetta*, 467 U.S. 479 (1984).

In *Youngblood*, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." The reason for this bad faith requirement is

> to limit the extent of the police's obligation to preserve evidence to reasonable grounds and confine it to that classes of cases where the interests of justice most clearly require it.

Fisher, 124 U.S. at 1202, quoting *Youngblood*, 488 U.S. at 58. So how different is "potentially useful" from "materially exculpatory"? Even the Supreme Court can't say for sure, but it would not seem to encompass the tapes from the permanent cameras that Carlisle wishes he could view. They could be potentially useful in the sense that they would corroborate Carlisle's testimony at trial that he circulated into public areas of the post office, but how could they corroborate his claim of subjectively pure motives in pocketing the money? It exceeds the "reasonable grounds" boundary of *Youngblood* to find that the inspectors had an obligation to preserve the tapes in this case.

If the court were to add *Trombetta (*a cousin case to *Youngblood*) back into the mix, things would look even worse for Carlisle. In *Trombetta*, the Court held that the loss or destruction of evidence does not implicate the due process clause unless the defendant can establish a conscious effort to suppress exculpatory evidence coupled with a showing of materiality, namely that the evidence possessed an exculpatory value that was apparent before the evidence was destroyed and to be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* at 488-89. *See also United States v. Folami*, 236 F.3d 860, 864 (7th Cir. 2001). If this is the standard, Carlisle cannot possibly establish that the tapes' exculpatory value was apparent before they were recycled.

So how is "materiality" in *Trombetta*, which requires a showing of bad faith, different from "materiality" in *Brady*, which does not? It's not clear, but on our facts, it doesn't have to be: Carlisle doesn't meet even the arguably lower threshold of *Youngblood*.

Two final points: first, it is not at all clear that the evidence Carlisle seeks from the tape cannot be obtained by another means: his own testimony. Carlisle certainly is capable of explaining where he went and what he did while working on August 14 and 18. Indeed, this is the *only* evidence of Carlisle's pure motives: even if the tapes could be viewed as corroboration of Carlisle's movements and actions, they would not have shown *why* Carlisle put the money in his pocket.

Second, what would be gained by holding an evidentiary hearing? The government has proffered what the inspectors would say: they determined beforehand that the permanent cameras were not close enough to the action to be useful to them, so they never even reviewed the tapes generated by those cameras. Even if they were wrong, how could such a tactical investigatory decision be deemed bad faith? How can the inspectors be held to have acted maliciously for having failed to preserve tapes that no one ever reviewed?

The bottom line is that Carlisle still has not made a prima facie showing of entitlement to the relief he is requesting, so he is not entitled to an evidentiary hearing and he cannot prevail on his motion to dismiss.

II. Motion To Dismiss Counts One and Four

Carlisle has moved to dismiss Counts One and Four of the indictment because they fail to allege a crime, and because the charges are unconstitutionally vague.

The challenged portion of both counts charge that Carlisle, as a postal employee, "knowingly and wilfully sold and disposed of postage stamps otherwise than as provided by regulations of the United States Postal Service," in violation of 18 U.S.C. § 1721, a Class A misdemeanor.

As Carlisle observes in his briefs, a charge is legally sufficient if it: 1) states each element of the crime charged; 2) provides adequate notice of the nature of the charges so that the accused may prepare a defense; and 3) allows the defendant to raise the judgment as a bar to future prosecutions for the same offense. *United States v. Fassnacht*, 332 .F.3d 440, 444-45 (7th Cir. 2003). A statute is unconstitutionally vague if it fails to provide the kind of ordinary notice that would allow ordinary people to understand what conduct it prohibits, or if it authorizes arbitrary and discriminatory enforcement. *United States v. Hausmann,* 345 F.3d 952, 958 (7th Cir. 2003).

At the court's order, the government identified the three regulations undergirding the charges: Regulation 151.42, 434.1 and 435.32(c). Regulation 151.42 requires postal retail service employees to use the POS ONE cash drawers for all daily retail service transactions as they occur, in order to protect postal funds collected in such transactions. Regulation 434.1 requires that, without exception each postal transaction at the POS ONE cash register

terminal must be entered into the cash register, using the appropriate codes because this is critical for tracking retail postage, merchandise and core mailing products sold by the postal store. Regulation 435.32(c) requires that postal window clerks must process each transaction on the POS ONE terminal at the time of sale.

Carlisle has a legitimate complaint that the government's notice on these matters was late in coming. The government's longstanding and unhealthy infatuation with elements-only indictments once again has trumped common sense and fairness. What could be the downside of adding to the challenged counts phrases to the effect of " . . . in that he violated Regulation 151.42 by wilfully failing to use the POS ONE cash drawer when he . . ."? The government's particularization of regulations in its responsive brief (dkt. 40 at 2-3) is a good start, but it's not enough. To ensure that Carlisle has the factual specifics he needs to defend at trial and to plead subsequent jeopardy, I am entering a separate order requiring a bill of particulars for Counts One and Four, pursuant to F.R. Crim. Pro. 7(f). This should be as simple as transferring grand jury testimony into a Rule 7 bill. This will be sufficient to cure the notice deficiencies of which Carlisle complains; since the challenged counts otherwise track the language of the statute, there will be no basis to dismiss either count as legally insufficient.

That leaves Carlisle's overarching vagueness challenge. Carlisle fine-tunes his argument in his reply brief to assert that it would be unconstitutional to hold postal employees criminally liable for even a knowing violation of any and every employment

requirement or procedure listed somewhere in a postal service handbook; to do so would not provide adequate notice of unlawful conduct and it would allow unbridled discretion in enforcement. *See* dkt. 43 at 2.

Carlisle would have a point if the statute only required a "knowing" violation of postal regulations, but it requires more: the violation must be "willful." In fact, it requires *both*, which is an indication that we are dealing with a high level of mens rea here. As the court observed in *United States v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998) (a fraud case),

> The term "wilfully" also has been interpreted as a requirement that a defendant know that he is doing something illegal where the text of the statute uses both the terms "knowingly" and "willfully." The joint use of the terms may demonstrate that "willfully" must mean something more than "knowingly."

Looking for guidance to another set of regulatory crimes, the mental state of willfulness is what criminalizes OSHA regulatory violations that otherwise would be punished administratively, and courts have found that this is sufficient to ensure fair warning of the boundaries of criminal conduct. *See, e.g.,United States v. Pitt-Des Moines,, Inc.*, 168 F.3d 976, 984 (7th Cir. 1999); *United States v. Ladish Malting,* 135 F.3d 484, 487 (7th Cir. 1998). In the OSHA regulatory arena, the Seventh Circuit has held that "it is best to treat willful as a synonym for knowing, and to equate knowledge with awareness of the essential facts and legal requirements." *Id.* at 490.

Willfulness is similarly defined in the arena of federal firearm regulation. In *Bryan v. United States*, 524 U.S. 184 (1998), the Supreme Court glossed the elements of a criminal

statute that prohibited willfully dealing in firearms without a federal license The Court stated that

> The word "wilfully" is sometimes said to be "a word of many meanings" whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. . . . As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose." In other words, in order to establish a "willful" violation of a statute, the government must prove that the defendant acted with knowledge that his conduct was unlawful.

Id. at 191-192.

So it is here. By pursuing criminal charges based on regulatory violations in this case, it will be the government's obligation to prove that Carlisle acted with knowledge that his conduct was unlawful. There is nothing vague about a statute that criminalizes a postal employee's knowing and intentional sale and disposition of government property (postage stamps) other than as provided by Postal Service Regulations.

Nothing in *United States v. Brown*, 716 F.2d 457 (7th Cir. 1983), cited by Carlisle, suggests otherwise. In *Brown*, the government charged a postal employee under 18 U.S.C. § 1711 with misappropriating a $394 check paid to the post office by a postal customer. The issue on appeal was whether, in the absence of direct evidence of misappropriation, there was enough circumstantial evidence to support the conviction. The court held that "standing alone, evidence that defendant failed to issue the required receipt would be insufficient to establish criminal wrongdoing by the employee." *Id*. at 461. Fair enough, but

100% irrelevant to the § 1721 charges against Carlisle. The crime charged here is not the misappropriation of money generated by the transaction, it is the intentional failure to follow known written procedures designed to track and account for government money. The distinction hinges on the higher mens rea: using Regulation 435.32(c) as an example, it is not unconstitutionally vague or somehow inequitable to criminalize a postal window clerk's knowing and willful failure to process each transaction on the POS ONE system at the time of sale.

In sum there is no basis to grant Carlisle's motion to dismiss Counts One and Four.

III. Motion To Exclude Evidence of POS ONE Records

Carlisle has moved to exclude "evidence of POS ONE records" on the ground that such evidence is "inherently unreliable when used for the purpose of providing evidence of guilt of a defendant in a criminal case." *See* Motion To Exclude, dkt. 27, at 1. Carlisle has requested a pretrial evidentiary hearing, asserting that the failure to hold a hearing "would violate his 5th and 6th Amendment rights, including his right to prepare a defense." Brief in Support, dkt. 35, at 10.

As both sides agree, this is not a motion to suppress, it is a motion in limine based on the alleged unreliability of the evidence. Additionally, the dispute is transmogrifying before our eyes: as Carlisle promised in his reply brief, yesterday afternoon (May 27, 2004),

he filed a new motion to compel POS ONE discovery (and a supporting affidavit), citing as authority F.R. Crim. Pro. 16(a)(1)(E)(ii), (a)(1)(F) and (a)(1)(G). *See* dkts. 45-46.

Because the government has not yet had time to advise Carlisle or the court whether it wishes to file a written objection to the new motion, I will not address it directly in this report and recommendation. All of the POS ONE disputes are part of the same package, so the court should wait until the matter is fully briefed before taking any additional action. Therefore, the court will stay any further discussion or analysis of the POS ONE dispute until the government has responded further (or declined to do so) early next week.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny both pending motions to dismiss.

Entered this 28th day of May, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge