

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEVEN K. DOUGLAS,

Defendant.

REPORT AND
RECOMMENDATION

05-CR-21-C

REPORT

The grand jury has charged defendant Steven K. Douglas with four counts of wire fraud and four counts of money laundering (plus a forfeiture count) based on an alleged fraud scheme involving a bank, a money order company, and Douglas's check-cashing company.

Before the court for report and recommendation is Douglas's motion to dismiss or redact the wire fraud counts. *See* Dkt. 8. I have included in this report Douglas's motion for a bill of particulars (dkt. 9) because it is related to the dismissal motion. For the reasons stated below I am recommending that the court deny both motions.

I. Background Facts

The indictment speaks for itself, but by way of synopsis, Counts 1-4 allege that at the time in question, Douglas was an owner and officer of a local check-cashing business called

“Madison’s Cash Express” (MCE). MCE had four branches and each branch had its own account with Firststar Bank (subsequently renamed U.S. Bank). MCE had a contract with Traveler’s Express/Wells Fargo to sell Traveler’s Express money orders. This contract provided that MCE would: sell Traveler’s Express money orders only for cash; remit sales receipts by wire transfer every week to Traveler’s Express; and not use Traveler’s Express’s checks for its own obligations or those of its owners or officers.

However, from January 2001 to September 2002, Douglas regularly directed MCE employees to issue Traveler’s Express money orders for no cash to straw purchasers, make these money orders payable to MCE, then forge endorsements on the back. Douglas deposited these forged money orders into MCE’s four Firststar accounts, falsely inflating them. Douglas paid Traveler’s Express for its money orders by wiring money to Traveler’s Express from MCE’s four Firststar accounts. According to the indictment, “In effect, Douglas used the funds of Firststar and Traveler’s Express without their authorization, and he placed them in the position of being unwitting, unsecured creditors of [MCE].” Dkt. 1 at 3.¹

Each of Counts 1 through 4 charges that on September 17, 2002, Douglas wired money from MCE’s accounts at Firststar to Traveler’s Express, in these amounts: \$278,955.30, \$344,102.05, \$334,318.41 and \$339,523.81 (presumably one wire from each of MCE’s four Firststar accounts). On or about September 17, 2002, Traveler’s Express

¹ Counts 5-8 allege that Douglas used Firststar funds generated by MCE’s kiting scheme to pay over \$70,000 of his personal expenses.

closed MCE's account and returned MCE's money orders to Firststar without honoring them. According to the indictment, Traveler's Express lost \$130,000 and Firststar lost \$700,000.

II. Motion To Dismiss or Redact Counts 1-4

Douglas sums up his ground for dismissal on page one of his motion/initial brief:

As a matter of law under the Uniform Commercial Code, Firststar/U.S. Bank ("the Bank") is a holder in due course and , as such, the indictment fails to demonstrate how the Bank was deceived and how its position was defeated, where, as here, the Bank cannot, as a matter of law, be defrauded.

Dkt. 8 at 1. Put another way, "In reality, it is Traveler's Express who intentionally violated the law by receiving payment and then dishonoring its own money orders." *Id.* at 2.² Thus, according to Douglas, the grand jury has charged wires (from Firststar) *and* fraud (toward Traveler's Express), but not fraud *by* wire, so the §1341 charges are deficient and must be dismissed. Alternatively, Douglas asks this court to strike Firststar from the indictment in order to prevent the jury from convicting Douglas on the basis of any acts other than those aimed against Traveler's Express.

Douglas's argument is premised on his contention that Traveler's Express violated the Uniform Commercial Code, as adopted by Chapter 403, Wis. Stats., by wrongfully stopping

² Douglas proffers that Traveler's Express chose to stop payment at this particular time because its financial exposure was minimized. This forced Firststar to absorb the loss caused by Douglas's kiting scheme because Traveler's Express already had received the proceeds from the dishonored money orders. *See* Dkt. 8 at 4, 6. Even if this is true, it is not subject to being proved during pretrial proceedings in a criminal case.

payment on its checks, which Firststar held in due course. Indeed, Douglas—with no discernible sense of irony—decries Traveler’s “wrongful and deliberate actions” of shifting the risk (of Douglas’s alleged fraud) to Firststar; after all, declaims Douglas, state laws prohibit a person from executing worthless checks! *See* dkt. 8 at 6. Therefore, posits Douglas, he cannot be held criminally culpable for the malfeasance of Traveler’s Express, which constitutes a separate offense to which he was not a party. All Douglas did was breach MCE’s contract with Traveler’s Express, which might trigger civil liability, but which does not rise to the level of a criminal violation.

If the court won’t buy this, then Douglas’s backup position is that any fraud in this case occurred only between Douglas and Traveler’s Express when he allegedly drafted bogus money orders on Traveler Express’s blank stock; his use of bank accounts to cash the checks was not in furtherance of any alleged fraud. *Id.* at 6-7.

The government demurs, contending that Douglas’s invocation of the UCC is a canard, the indictment is valid as written, Douglas actually seeks summary judgment, and the fraud scheme is proper and complete as charged. The government is correct.

An indictment is valid so long as it: 1) states each element of the offense charged; 2) provides sufficient information for the defendant adequately to prepare a defense; and 3) provides a sufficient basis for a judgment that would bar subsequent prosecution for the same offense. *See* F.R. Crim. P. 7(c); *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003). The review of a challenged indictment is pragmatic, not hypertechnical. *United*

States v. Smith, 230 F.3d 300, 305 (7th Cir. 2000). The test for validity is not whether the indictment could have been framed in a more satisfactory manner but whether it conforms to minimal constitutional standards. *United States v. Hausmann*, 345 F.3d 952, 955 (7th Cir. 2003).

There are four elements to a wire fraud charge: 1) The defendant knowingly devised or participated in the scheme to defraud or to obtain property by means of false and fraudulent pretenses, representations or promises; 2) These false representations or promises were material; 3) The defendant acted knowingly and with the intent to defraud; and 4) That for the purpose of carrying out the scheme or attempting to do so, the defendant caused interstate wire communications to take place. Counts 1-4 of the indictment returned against Douglas adequately set forth these elements and adequately outline the alleged scheme to avoid dismissal.

Douglas's holder in due course argument probably is misdirected, and it definitely is premature. The grand jury has charged Douglas with wire fraud, not bank fraud. The thrust of such a charge is the creation of the scheme to defraud; it is irrelevant to a mail fraud scheme whether any of the intended victims ever actually experienced a loss. *See, e.g., Borre v. United States*, 940 F.2d 215, 222 (7th Cir. 1991) ("It is not necessary that a plan actually result in financial loss as long as it is aimed at the fraudulent deprivation of some of the victim's money or property").

In *United States v. Franks*, 309 F.3d 977, 977 (7th Cir. 2002) the defendant was a disloyal employee who embezzled and deposited into her own bank account 449 checks in 14 months. The government charged her with mail fraud. Franks contended that there may have been fraud + mailings, but no mail fraud because the bank's mailing of the deposited checks for collection did not facilitate the deceit of her employer, it just adjusted the accounts among the potential victims, re-apportioning where the loss might fall. The defendant in *Franks* relied particularly on *Kann v. United States*, 323 U.S. 88, 94 (1944), which had held that because a bank that credited checks obtained by fraud was a holder in due course entitled to collect from the drawee bank, the scheme had reached fruition prior to mailing the checks for collection. The Seventh Circuit in *Franks* distinguished *Kann*, finding that by virtue of the UCC and Franks's use of her personal bank account, the scheme continued up through actual payment of the checks. *See* 309 F.3d at 978. "What is more, the offense defined by § 1341 is the *scheme* to defraud not the individual mailing in isolation." *Id.*, emphasis in original. The challenge in *Franks* was to the mailings, but the point remains: the big picture matters. It won't do for a defendant to parse an alleged fraud scheme into component parts and then focus on one specific subsection that appears to support his position.

As Douglas attempts to do here. The indictment against him alleges an ongoing, synergistic scheme dependent on circular interaction between MCE (and its straw purchasers), Firststar and Traveler's Express. Could the scheme have succeeded without

MCE's use of Firststar? Unknown at this time, but unlikely and, more critically, irrelevant: according to the indictment, Douglas chose to include Firststar in his ongoing scheme for the purpose of making it work better. It's hard for a check kite to fly unless there are two institutions to play against each other in some fashion. Given the nature of the charged scheme, Firststar cannot be written off as a mere conduit to Douglas's alleged fraud against Traveler's Express. Therefore, in this case it is irrelevant whether Firststar ultimately minimizes or eliminates its losses by establishing itself as a holder in due course.

This distinguishes Douglas's case from *United States v. Davis*, 989 F.2d 244 (7th Cri. 1993), in which the court held that the defendant had not committed bank fraud under § 1344 by opening a checking account for the purpose of running through it a fraudulently obtained IRS refund check. The court found that where a bank was a holder in due course of a negotiable instrument that had not been forged or stolen, § 1344 did not apply because "there is no way in which the fraud could have endangered the [bank]." *Id.* at 247. The court noted that perhaps if the government had provided other facts, then the result might have been different, but on the record as it stood, the bank fraud conviction was invalid.

Perhaps more importantly, the court upheld with minimal discussion the defendant's bank fraud convictions based on the deposit of forged money orders. *Id.* at 246, 247. The court in *Davis* did not provide enough facts to determine whether this was similar to the conduct alleged against Douglas in the instant case.

Which segues to the second point: Douglas's motion to dismiss is premised on as-yet unproved facts. Even if Firststar's status as a possible holder in due course made a difference as to whether it could be victimized in a mail fraud scheme, Firststar's status has not been proved. *See United States v. Davis*, 989 F.2d at 247. If it were to matter, the government would be entitled to establish that Firststar was not a holder in due course, or that some other factor put the bank at risk of loss.³ The indictment charges that Firststar lost \$700,000; Douglas may not prove otherwise in a pretrial motion. Challenging the government's ability to prove its case cannot lead to pretrial dismissal of a charge because summary judgment does not exist in criminal cases. *United States v. Thomas*, 150 F.3d 743, 747 (7th Cir. 1998).

Accordingly, I am recommending that this court deny Douglas's motion to dismiss or redact in all respects.

III. Bill of Particulars

Riffing off of his dismissal motion, Douglas has asked this court to order the government "to provide the details concerning how the conduct of the accused constitutes a wire fraud with respect to Firststar Bank." Dkt. 9 at 1. In a list that resembles a set of contention interrogatories in a civil case, Douglas asks for particulars such as these:

A. What acts evidence an intent by Douglas to defraud Firststar?

³ *See, e.g., United States v. Serpico*, 320 F.3d 691, 694-95 (7th Cir. 2003) ("risk of loss, not just loss itself, supports conviction for bank fraud . . . [P]rotection for financial institutions is much more effective if there's a cost to putting those institutions at risk, whether or not there is actual harm.")

D. Why is Firststar not a holder in due course?

E. Whose obligation did Traveler's Express stop payment on?

H. Which endorsements on money orders made payable to [MCE] were "forged," if any? And how was the forgery accomplished?

J. What allegations or facts exist to affect the legal rights of Firststar as a holder in due course under the [UCC]?

Id. at 3.

The government responds, correctly, that a bill of particulars under F. R. Crim. Pro. 7(f) is not designed to provide the defendant with a detailed disclosure of the government's witnesses, legal theories or evidentiary detail. *See Wong Tai v. United States*, 273 U.S. 77, 82 (1927). The Court of Appeals for the Seventh Circuit disfavors bills of particulars, deeming them unnecessary whenever the indictment sets forth the elements of the offense charged, the time and place of the accused's conduct which constituted a violation, and a citation to the statutes violated. *United States v. Fassnacht*, 332 F.3d 440, 446-47 (7th Cir. 2003). Because every valid indictment contains this information, it is difficult to envisage a circumstance in which a defendant in this circuit would be entitled to a bill.

Further, the government voluntarily has disclosed virtually all of the information that Douglas wants or might need by conducting open file discovery to accompany the relatively detailed set of allegations in its indictment. This is more than enough to obviate the need for a bill. *See, e.g., United States v. Canino*, 949 F.2d 928, 935 (7th Cir. 1991).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Steven K. Douglas's motion to dismiss or to redact Counts 1-4 of the indictment and deny his motion for a bill of particulars.

Entered this 27th day of June, 2005.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

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June 27, 2005

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Re: ___ U.S. v. Douglas
Case No. 05-CR-021-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 8, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 8, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge