

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ALBERTO RODRIGUEZ-RODRIGUEZ,

Defendant.

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REPORT AND  
RECOMMENDATION

05-CR-113-S

REPORT

Before the court for report and recommendation is defendant Alberto Rodriguez-Rodriguez's motion to dismiss for improper venue, or in the alternative to transfer venue to the U.S. District Court for the Southern District of Texas. See Dkt. 8.<sup>1</sup> For the reasons stated below, I am recommending that this court deny Rodriguez's motion.

FACTS

The parties do not dispute the material facts. On December 3, 1993, Rodriguez, a Mexican national illegally present in Wisconsin, was convicted in the Grant County Circuit Court of first degree sexual assault of a child. After Rodriguez served his prison term, he was deported to Mexico.

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<sup>1</sup> Although I have the power under 28 U.S.C. § 636(b)(1)(A) to rule directly on the transfer motion, I am including it in this report and recommendation because it is related to the dismissal motion and it is more efficient in this particular case to combine consideration.

In March, 2005, Rodriguez surreptitiously re-entered the United States by crossing the Rio Grande River near Laredo, Texas. There is no evidence that Rodriguez passed through any border check points or encountered any law enforcement personnel while crossing the border.

On April 21, 2005, in Galveston, Texas, Rodriguez received a traffic citation from a local law enforcement officer. Rodriguez had no United States driver's license, so he provided the traffic officer with a Mexican Identification Card revealing his true identity. The traffic officer performed a records check and discovered an arrest warrant outstanding from Grant County, Wisconsin for failure to register as a sex offender. Wisconsin extradited Rodriguez back to Wisconsin on that charge. Rodriguez pled guilty and on July 26, 2005 was sentenced to 96 days in jail (time served). That same day, Grant County Jail employees notified the Bureau of Immigration and Customs Enforcement (BICE) that Rodriguez was present in their jail. BICE promptly took Rodriguez into federal custody.

On August 3, 2005, this district's grand jury returned the instant indictment against Rodriguez, charging that he had violated Title 8, U.S. Code, Section 1326:

On or about July 27, 2005, in the Western District of Wisconsin, the defendant, Alberto Rodriguez-Rodriguez, an alien who had previously been deported and removed, was found in the United States, after intentionally re-entering the United States without having previously obtained the consent of the Attorney General of the United States or the Secretary of the Department of Homeland Security for re-application for admission into the United States.

See Dkt. 5.

## I. Motion To Dismiss

Pursuant to F.R. Crim. Pro. 18, the government must prosecute an offense in the district in which it was committed. Rodriguez alleges that he was “found” in Texas as the result of the traffic stop. Therefore, he contends, prosecution for a § 1326 violation is appropriate only in the Southern District of Texas, not in Wisconsin. Rodriguez acknowledges that Seventh Circuit case law indicates otherwise, but attempts to distinguish his circumstances. This attempt is unavailing.

In *United States v. Herrera-Ordonez*, 190 F. 3d 504 (7th Cir. 1999), the court construed the verb “found” as used in § 1326 as a term of art and concluded that

An alien is “found” within the meaning of § 1326 when the INS [now BICE] both discovers his presence in the United States and knows that, because of his identity and status, his presence here is illegal.

190 F. 3d at 510. A court may determine BICE’s knowledge based on what BICE actually knew or what it should have known had it exercised the level of diligence typical of law enforcement authorities when investigating whether the presence of an alien is illegal. *Id.* at 510-11.

The key point of the Seventh Circuit’s analysis is that it is premised entirely on what the INS knew, not on what any other law enforcement agency knew or should have known. Notwithstanding Rodriguez’s argument to the contrary, this is the only logical and workable construction of the statute. Other law enforcement agencies have no direct jurisdiction or authority over immigration and deportation matters; indeed, state and local authorities have

none whatsoever. So, for § 1326 purposes, what such agencies know about a defendant's immigration status is immaterial until they alert BICE, the only agency that actually can do something about the situation.<sup>2</sup>

Finally, it makes no difference whether an allegedly illegal alien like Rodriguez is transported in custody by law enforcement agents from one district to another before he is "found" by ICE. In the Seventh Circuit's view, "whether an alien was in a particular location by choice has no relevance in venue determinations." *Id.* at 511.

In short, an alien is not "found" for § 1326 purposes until he is found by BICE. BICE "found" Rodriguez in this federal judicial district. Accordingly, this district is the proper venue for the instant prosecution.

## II. Motion To Transfer Venue

As a fall back position Rodriguez has moved pursuant to F.R. Crim. Pro. 21(b) to transfer this case to the Southern District of Texas "for the convenience of the parties and witnesses and in the interest of justice." Courts are to determine whether transfer is justified after considering all relevant factors. *In the Matter of Balsimo*, 68 F. 3d 185, 186 (7th Cir. 1995). Courts often employ the ten-factor test first set out in *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-44 (1964), although rarely is there complete

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<sup>2</sup> In a worst-case scenario of the sort hypothesized by Rodriguez in which another agency intentionally withheld information from BICE for unfair tactical purposes, perhaps a court, under the rubric of due process, would impute the other agency's knowledge to BICE. That's not the case here.

correspondence between these factors and the circumstances of a particular case. To the extent that the *Platt* factors apply here, they do not favor transfer. Rodriguez and his lawyer are present in this district. Rodriguez was “found” in this district. Witnesses, other than records custodians (who are unlikely to be needed at trial) are located in this district. Trial, if necessary, is imminent.

The remaining *Platt* factors are irrelevant with one possible exception: Rodriguez points out that some border districts, including the Southern District of Texas, are authorized to participate in a “fast-track” program for defendants in illegal reentry prosecutions. Under this program, at sentencing Rodriguez would receive a guideline calculation four levels lower than that possible in the Western District of Wisconsin. But even though this would be a tangible benefit to Rodriguez, to transfer a case on this basis alone would turn the fast-track program on its head. The whole point of the program is to process more quickly and efficiently the flood of illegal re-entry cases in the border districts. If other districts start sending all of their illegal re-entry cases to the states with fast-track programs, the result would be to slow down the border states.

In any event, now that the sentencing guidelines are merely advisory, the benefits of the fast-track program theoretically are available to defendants in other districts. Rodriguez certainly is free to ask this court to knock four points off of his guideline total in order to eliminate any unfair disparity between what the total is here versus the total in Southern Texas.

In sum, it is neither inconvenient nor unjust to try Rodriguez in this district.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Alberto Rodriguez-Rodriguez's motion to dismiss the indictment and deny his motion to transfer venue.

Entered this 12<sup>th</sup> day of October, 2005.

BY THE COURT:  
/s/  
STEPHEN L. CROCKER  
Magistrate Judge

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

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October 12, 2005

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Re: \_\_\_ United States v. Alberto Rodriguez-Rodriguez  
Case No. 05-CR-113-S

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 October 17, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 17, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for  
Connie A. Korth  
Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable John C. Shabaz, District Judge

