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

UNITED STATES OF AMERICA,

Plaintiff,

v.

HAI VAN TRAN,

Defendant.

REPORT AND RECOMMENDATION

06-CR-39-C

REPORT

This is the second report and recommendation in this case, which has transmogrified from a § 922(g) gun case into a drug conspiracy prosecution. Defendant Hai Van Tran has moved to dismiss the drug charge, arguing that the government promised him transactional immunity from drug charges in exchange for his testimonial proffer, then reneged. Tran wants specific performance of his contract. The government opposes dismissal, arguing that it never promised immunity and that Tran has suffered no prejudice as a result of his unilateral misunderstanding. As explained below, I conclude that the government never promised immunity to Tran, and Tran's genuine but mistaken belief to the contrary does not merit the requested relief.

FACTS

On February 10, 2006 FBI agents arrested defendant Hai Van Tran, a Vietnamese citizen, after searching his house during their investigation of a multi-state drug trafficking

operation. At that time the only charge against Tran was for unlawful possession of a firearm. Tran retained local attorney Tracey Wood to represent him in proceedings before this court. Assistant United States Attorney Jeffrey Anderson was (and is) prosecuting the government's case against Tran.

Following Tran's arraignment on the gun charge on February 23, 2006, Anderson approached Wood in the courtroom to solicit Tran's cooperation with the government's drug investigation. Anderson advised Wood that drug charges against Tran were imminent, that other suspects in the investigation already were cooperating, and that "this is his way out." Wood recalls Anderson promising that if Tran cooperated, the government would not bring drug charges against him. Anderson, however, did not actually make this promise.

Nonetheless, Wood left the courthouse believing that Tran could avoid indictment on a drug charge by proffering. She followed up by confirming with an immigration law specialist the importance of Tran avoiding a drug conviction in order to avoid automatic deportation. Attorney Wood also explained it to Tran this way: if he cooperated fully and truthfully, then the government would not charge him with drug crimes. Tran expressed his willingness to cooperate to Attorney Wood during a March 13, 2006 telephone call. Attorney Wood followed up with a March 13, 2006 letter to Tran advising him that "if you cooperate and give information about your drug dealings, as well as the drug dealings of other people, you will not be charged in a drug conspiracy." See Affidavit of Tracey A. Wood, Dkt. 62, Exh. D.

Tran was being detained at the Jefferson County Jail, so the government scheduled Tran's proffer session at that facility for April 6, 2006. Attorney Wood was not available that day, but rather than reschedule she hired a former associate of hers, Attorney Jacob Craft, to cover the proffer meeting for her. Craft had been an associate in Wood's law firm for approximately two years then left on good terms. Wood and her colleagues referred matters to Craft on an as-needed basis. Wood hired Craft simply to monitor the proffer. As she characterized it,

> His only responsibility was to stop the interview if it looked like the agents were unhappy with what Mr. Tran was saying.

Hearing transcript, dkt. 67, at 18.

Apparently the government was not aware in advance that Craft would be covering the proffer for Wood.

On April 6, 2006 at 9:12 a.m. the U.S. Attorney's Office telefaxed to Wood's office a copy of the proposed proffer agreement for Tran and Wood to sign.[1] Attorney Wood was not in the office that morning so her staff handed the letter to Attorney Craft, who took it with him to discuss with Mr. Tran at the jail prior to the proffer meeting.

The proffer letter (Def. Exh. 7) does not mention transactional immunity. In its first paragraph, the letter states that "Prior to making any decision regarding the defendant in

[1] It has been the 20-year policy of the U.S. Attorney's Office in this district to require written plea and non-prosecution agreements.

this case, the government seeks a proffer of his testimony." What the letter explicitly promises is that Tran's proffer will not be used against him directly or in aggravation of any subsequent sentence. The proffer letter advises that the government may indirectly use Tran's proffer statements, including pursuit of investigative leads that could result in the acquisition of evidence admissible against Tran. The proffer letter concludes:

> This letter contains the entire agreement regarding the defendant's proffer. No other promise or agreement exists between Hai Van Tran and the United States Attorney's Office regarding his proffer.

Exh. 7 at 2.

AUSA Anderson and Agent Mayers allowed Craft to speak privately with Tran prior to the proffer so that Craft and Tran could review the proffer agreement. Tran's understanding of his conversation with Craft was that "I have to sign it [the proffer letter] and tell the government the truth and I won't get charged with the drug case." Hearing Transcript (dkt. 67) at 35. Tran's English is shaky, leaving ample room to question his ability actually to comprehend the terms of the proffer letter he signed, and to question how effectively he was able to communicate with Craft during their private meeting.[2]

Tran signed the proffer agreement. Craft signed it as his attorney and presented it to AUSA Anderson. Craft did not broach with the government the topic of immunity for Tran in exchange for his proffer; his silence on this crucial issue leads me to infer that Craft

[2] Attorney Craft did not testify at the suppression hearing.

was unaware that Tran believed this was his deal. The proffer went forward as scheduled. The government has never alleged that Tran did not provide an adequate proffer.

On July 12, 2006, the grand jury returned a superseding indictment against Tran adding a drug conspiracy charge under 21 U.S.C. § 846. See Dkt. 50.

ANALYSIS

A plea agreement is a contract and its content and meaning are determined using ordinary contract principles. *United States v. Salazar*, 453 F.3d 911, 913 (7th Cir. 2006); *see also Santobello v. New York*, 404 U.S. 257, 261 (1971). That said, plea agreements are unique contracts to which special due process concerns for fairness; therefore, courts must consider the adequacy of procedural safeguards. *United States v. Sandles*, 80 F.3d 1145, 1147 (7th Cir. 1996), citation omitted. Non-prosecution agreements are handled the same way. *United States v. Traynoff*, 53 F.3d 168, 171 (7th Cir. 1995); *See also United States v. Eliason*, 3 F.3d 1149, 1152-53 (7th Cir. 1993)(due process concerns require that the government scrupulously keep perform any agreement concerning immunity).

Terms of any such agreement are interpreted according to their natural meaning. *United States v. Williams*, 198 F.3d 988, 992 (7th Cir. 1999). A court is not to require the government to do more than it intended: although a defendant need not prove an explicit promise by the government, he must establish something more than an unfounded unilateral belief that the government made a claimed promise in exchange for his cooperation. *Id*.

"Determining the existence and meaning of a plea agreement necessitates scrutiny of the parties' reasonable expectations, an objective standard. That requirement becomes especially compelling when the terms of an agreement are indefinite." *Carnine v. United States*, 974 F.2d 924, 930 (7th Cir. 1992).

Voidance and reformation are available remedies to a contract infected by a mutual mistake of fact; where there is a mutual misunderstanding as to the material terms of a plea agreement, the appropriate remedy is rescission, not unilateral modification. *Williams*, 198 F.3d at 994, quoting *United States v. Sandles*, 80 F.3d at 1148.

So the court must answer two questions: Did AUSA Anderson actually offered Tran transactional immunity? If not, was it nevertheless objectively reasonable for Attorney Wood to conclude that Anderson had done so? If the answer to either of these questions is "Yes," then the government is contractually bound to honor its offer in light of Tran's provision of consideration in reliance.

The answer to both questions is "No." Anderson never told Wood that Tran could completely avoid a drug charge in exchange for his proffer, and it would not be objectively reasonable to interpret Anderson's use of the term "This is his way out," by itself, as an enforceable offer of transactional immunity. This statement is subject to such a spectrum

of varying interpretations that it has no substantive meaning.[3] Obviously, the conversation consisted of more than this sound byte, but having heard from the two participants in this conversation and one interested observer, I conclude that Anderson made no explicit or implicit offer of transactional immunity.

Indeed, it would have been illogical for him to do this: first, for 20 years the policy of the U.S. Attorney's Office in this district has been to require written plea and non-prosecution agreements. To avoid exactly the dispute that has arisen in this case, it would make no sense for Anderson to make such an uncharacteristically generous offer during an informal conversation. Second, the government had no need to provide Tran a complete immunity bath: it already had informants and cooperators, and the strength of its case appeared to be snowballing. This is the sort of case in which we might just as easily have heard a variation of another ubiquitous and unenforceably vague government metaphor for cooperation: "get on the bus/train, or get left behind."

That said, it is obvious from Wood's subsequent words and deeds that she genuinely believed that Anderson had offered Tran transactional immunity on drug charges. But

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[3] As the court noted in *Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 357 & 58 (7th Cir. 2001)(a business contract case),

> A meeting of the minds on all essential terms must exist in order to form a binding contract . . .. Without an express statement of intent, the focus is on whether the contract is too indefinite to enforce. Thus, the existence or nonexistence of a contract turns on whether material terms are missing. And here, material terms are absent in spades.

Wood's subjective interpretation of the conversation did not create an enforceable contract. Apart from this, and perhaps more dispositively, subsequent events belied Wood's unilateral belief.

Even if this court were to find that the February 3, 2006 courtroom conversation should be interpreted as an unintended oral immunity offer, the government's April 6, 2006 proffer letter–which declared itself the exclusive agreement between the government and Tran–clearly did *not* promise, or even offer, transactional immunity to Tran.[4] To the contrary, it advised Tran that he still faced possible indictment for drug charges even if he proffered truthfully and completely.

The government transmitted this letter to Wood's office before Tran performed any substantive act in reliance on Wood's interpretation of (and Tran's belief as to) what the government had offered him. If Wood had read this letter before Tran's proffer, klaxons would have gone off in her head, and a pointed, clarifying conversation with Anderson would have followed in short order. The parties then would have proceeded in whatever direction corresponded to their new, more accurate view of where they found themselves.

Unfortunately, Attorney Wood had a scheduling conflict on April 6, so she did not read this letter before Tran's proffer. Wood hired Jacob Craft, a trusted former colleague, to

[4] Tran was to receive partial use immunity for his proffer: as long as he stuck to his story, his proffer could not be used directly against him. The government proffers in its brief that it derived no evidence from the proffer, so there will be no indirect use of the proffer against him.

stand in for her and to monitor Tran's proffer in her absence. There is no indication that Wood advised Craft that transactional immunity was the *quid pro quo* for Tran's proffer. It is logical to presume that if Craft had been aware of this, then he would have broached the topic of immunity with Anderson before allowing Tran to proffer. Craft's failure to object leads me to infer that Craft had no reason to question the content of the routine-looking proffer letter that had been handed to him that morning.

In most cases, there still would have been one more safety net: the defendant himself likely would seek verbal reassurance from his attorney that the immunity agreement which they had discussed actually had vested; as a corollary to this, the defendant would want to know why the written proffer agreement didn't confirm the government's promise. Had Tran done these things, then Craft would have been alerted to the parties' misunderstanding and would have called off the proffer until the parties were in a position to determine if they actually had an agreement on immunity or not.

But bad luck hounded Tran like a terrier. As is clear from Tran's hearing testimony, because of his limited English skills, he did not understand the proffer letter he claimed to have read, and he was unable to communicate effectively with Craft. Tran thought that Attorney Craft told him just to sign the letter so that he could get immunity. It is extraordinarily unlikely that Craft misrepresented the situation to Tran in this fashion; I do not doubt, however, that Tran believes that this is what Craft said.

So, Tran made his proffer under the mistaken belief that he would receive transactional immunity in exchange. Tran argues that his proffer constitutes detrimental reliance on the government's offer that entitles him to specific performance of the agreement he (and Wood) believed had been reached. But because the government never offered Tran immunity, because there never was a meeting of the minds on immunity and because it was not objectively reasonable after provision of the proffer letter for Tran to believe that he had immunity, this court cannot order specific performance of the ephemeral immunity deal. Tran's remedy, if he has one, would voidance/recision of the proffer agreement.

At best, this would mean that Tran might be entitled to suppression of his proffer. On this record, it appears that the only reason that Tran agreed to proffer was because he thought it would result in transactional immunity from drug charges (which meant that he would not face automatic deportation).[5] Contrary to Tran's assertion in his reply brief, due process principles do inform the contract analysis at this point: a defendant's incorrect perception that he provided testimony under a grant of immunity might render the statement involuntary if this perception was reasonable. *United States v. Cahill*, 920 F.2d 421, 427 (7th Cir. 1990); *see also United States v. Danser*, 110 F. Supp.2d 792, 805 (S.D. Ind.

[5] It is worth remembering that Tran faced (and still faces) a gun charge that was not part of the proffer negotiations between the government and Tran's lawyers. Tran was more concerned about avoiding a drug conviction because this would result in virtually automatic deportation.

1999)(defendant's mistaken and unreasonable belief that the police promised him immunity in exchange for his statement does not make the statement involuntary).

But notwithstanding the genuineness of Tran's mistaken understanding of his situation on the morning of April 6, 2006, this understanding no longer was objectively reasonable after Tran read the proffer letter and talked to Craft. As a corollary to this, since *Cahill* was decided, courts have determined that a predicate to finding a statement involuntary is government misconduct. *United States v. Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000), *citing Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Here there was no government misconduct. Rather, it was business as usual for the government, which thought it had made a clear oral offer, which had presented a clear, exclusive written proffer letter, and which had no inkling that there was no meeting of the minds.

Finally, as the government points out, the only "prejudice" that possibly could result from the court's failure to void the proffer would be that Tran can be impeached with the proffer if he subsequently provides contradictory testimony. *See* dkt. 69 at 8. Calling to a fact-finder's attention the potential false statements of a defendant doesn't prejudice that defendant in any fashion cognizable under the Due Process Clause. Tran also claims that he has suffered the detriment of being branded a snitch; apparently his point is that he was willing to endure this danger in exchange for immunity, but not for a lesser price. Absent evidence that the government manipulated events to increase this danger in order to pressure

Tran to cooperate, this concern, however real, is at most a subjective motivation. It does not change the analysis.

In sum, neither contract principles nor the Due Process Clause entitle Tran to any relief on his motion.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above I recommend that this court deny defendant Hai Van Tran's motion to dismiss Count 1 of the superseding indictment.

Dated: January 14, 2007.

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

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January 16, 2007

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Re: U.S. v. Hai Van Tran
Case No. 06-CR-0039-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 newly-updated 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 January 30, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by January 30, 2007, 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