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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDRE G. SIMMONS,

Defendant.

ORDER

09-cr-122-bbc

On October 27, 2010, this court held a hearing on defendant Andre Simmons's various motions, including his motion for release on conditions. Simmons was present representing himself. Also present was Simmons's standby attorney, Paul F. X. Schwartz. The government was represented by Assistant United States Attorney Peter Jarosz. The court addressed these issues with the parties:

Dkt. 179: Simmons' Motion for Pretrial Release

The impetus for holding an in-person hearing was Simmons's motion for pretrial release so that he could prepare better for trial. *See* Dkt. 179. For reasons stated at the hearing, I denied the request. Although it would be much easier for Simmons to prepare his defense *pro se* if he were not in jail, there are no other reasons to release him from pretrial detention. He still presents a flight risk and a danger to the community, particularly in light of the government's proffer that several of its witnesses fear Simmons. Simmons's proposed release plan was not enough to overcome the factors pointing toward keeping him detained.

Dkts. 174, 177, 188, 189 and 197: Motions on which the district judge must rule

Simmons hinges his defense on his contention that all of the government's witnesses are lying about his alleged involvement in their crimes because the government has coerced them or has bribed them with benefits such as reduced charges or sentences. In dkts. 174 and 189, Simmons has moved for the court to grant transactional immunity to all of the government witnesses in order to free them from the government's improper influence. Alternatively, Simmons moves to dismiss the indictment based on his claim that the government coerced false testimony from the witnesses against him. In dkts. 177 and 188, Simmons has renewed his *Brady* demand, based on his belief that the government has withheld evidence of its improper coercion and bribery of the witnesses against him, has asked the court to suppress at trial any such false testimony against him, and asks the court to dismiss the indictment because the government has no proof against him other than this false witness testimony.

The court explained to Simmons that the district judge would have to rule on his dismissal and suppression motions, and that Judge Crabb almost certainly would deny them. First, the motions are too late under F.R. Crim. Pro. 12(e) because the deadline for filing motions to suppress and to dismiss passed over the summer, when Simmons still was represented by an attorney. The court (reluctantly) granted Simmons's request to represent himself at trial because he has a theory of defense that his attorney would not present. The court did not grant Simmons permission to file more pretrial motions. Apart from this, the government confirmed–again–that it has provided all of its *Brady* and *Giglio* material to the defense that it is holding nothing back, and the reason that Simmons has received no documents confirming his suspicions is because his suspicions are factually baseless. As explained at the hearing, Simmons is free to

attempt to impeach the credibility of the government's witnesses at trial, including attempts to get them to admit that they are liars. Simmons is free to argue to the jury that it should not believe the government's witnesses for whatever reasons he thinks are persuasive. Simmons is not, however, entitled to suppress any witness testimony at trial based on his assertion that the witnesses against him are lying.

I also predicted to Simmons that Judge Crabb almost certainly will deny Simmons's motions to immunize trial witnesses. First, criminal defendants have no right to immunize witnesses under the statute; second, courts do not have the power under the statute to grant *transactional* immunity (as opposed to *use* immunity) to anyone, which is all that would help Simmons if his theory has any support; and third, Simmons has not supported his theory with anything but his say-so, in the face of the government's denials.

Finally, on Monday, November 1, 2010, Simmons filed yet another motion to dismiss the indictment, *see* dkt. 197, in which Simmons essentially rehashes the August 15, 2010 motion to suppress (dkt. 110) filed by Simmons's attorney before Simmons chose to try this case pro se. Both motions assert that dismissal is required here because of outrageous government interference with the defense's ability to contact a key government witness, Kurt Schulte. This court denied the August 15 motion in a terse, eight-line order, noting that Schulte had sworn under oath that he did not want to talk to Simmons's investigator, which was Schulte's prerogative. *See* dkt. 121. In his renewed motion, Simmons parses telephone records, attempting to impeach the affidavits offered by the government in opposition to his first motion. This is the equivalent of re-arranging deck chairs on the Titanic. Schulte has made it crystal clear that he does not wish to speak with Simmons or his team, and this court has no reason to

doubt him. It will be up to Judge Crabb to rule on this motion, but I have no doubt that she will deny it.

Simmons is wasting precious time. Attorney Schwartz competently handled the motions phase of this prosecution, and that phase is over. Simmons chose to proceed to trial pro se because he has a theory of defense that Schwartz will not support. Simmons would be best served actually preparing for trial rather than searching vainly for a magic bullet that will make this case go away. It's not going away, it's going to trial on December 6, 2010.

Dkts. 175 and 178: Defense Trial Subpoenas

I spoke with Simmons about these motions during an ex parte portion of the hearing and I have entered an ex parte order commemorating where we have landed. Simmons should note that the court's response to his motions has changed somewhat, as explained in the after reviewing the applicable rule.

Dkts. 176, 183 and 190: Defense Expert Witnesses

Simmons moved for permission to hire experts to analyze the physical evidence (bags of crack and buy money) to prove that neither his fingerprints nor his DNA were present on any of these items. I denied these requests at the hearing, observing that the government has no evidence that Simmons's fingerprints or DNA are on the drugs, money, or anything else, so there is no government expert testimony that needs to be countered. Both sides are free–within whatever constraints the trial judge imposes–to argue to the jury what inferences the jurors should draw from the lack of fingerprint and DNA evidence. In any event, the government

usually objects to defense attempts to put before the jury any expert testimony that merely proves the negative, and the court usually grants such motions. Simmons may explore this with the trial judge at the final hearing.

In dkt. 183, Simmons moved for permission to hire a transcriptionist to transcribe all of the consensual recordings of meetings and telephone calls made by government investigators and witnesses in this case. Simmons reported that he has trouble understanding the electronic recordings and needs a written transcript to help him understand what is being said.

The government responded by acknowledging that, as often is the case, the covert recordings *are* hard to understand, sometimes descending into unintelligibility. As a result, it would be very time consuming to transcribe the recordings. The government's rough estimate is that the total length of all the recordings is around six hours, spread out over many short conversations. The government has provided Simmons with transcripts of the conversations it intends to offer at trial.

In light of all this, I told Simmons that the court would not authorize the wholesale transcription of every covert recording. The cost would be extraordinary and Simmons has not shown that the requested transcripts would be anything more than a convenience rather than a necessity. Further (and perhaps understandably, considering how Simmons has approached this issue), Simmons has not attempted to show that any of the un-transcribed conversations is admissible at trial. Simmons should keep in mind that the recording is the evidence and a transcript is merely an aid to comprehension. In other words, Simmons does not need a transcript in order to seek admission of a recording at trial. If Simmons thinks it is worth his time to continue to listen to the recordings, hoping to find something useful, that's his call to

make. Regardless, if Simmons wants any specific conversations transcribed, then he may present a narrower motion to obtain transcripts in which he provides a basis for the court to conclude that the specified conversations contain relevant, admissible evidence that justify the cost of transcription.

Holding a Final Pretrial Conference

Before the parties' final hearing with Judge Crabb, I must complete their final pretrial conference, at which we will finalize the voir dire questions, get an almost-final version of the jury instructions, and sort through the motions in limine to determine which of them will require rulings from Judge Crabb at the final hearing. The clerk of court soon will schedule the final pretrial conference in consultation with the parties and standby counsel. Both sides are free to use their previous submissions, but if they wish, they may supplement or replace these submissions. The filing deadline is noon on the last work day before the final pretrial conference.

Entered this 1st day of November, 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge