

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORLANDO LARRY,

Defendant.

OPINION AND ORDER

13-cr-130-bbc

Defendant Orlando Larry was found guilty by a jury of six counts of distribution of heroin and cocaine base. He has since filed two motions. The first is brought under Fed. R. Crim. P. 34(a)(2) to arrest the judgment of conviction entered in this case on June 10, 2014 and is based on his belief that no indictment was filed against him within 30 days of his arrest, in violation of the Speedy Trial Act, 18 U.S.C. § 3161. The second is brought under Fed. R. Crim. P. 29(c)(1) for a judgment of acquittal, on the ground that the evidence adduced at his trial did not support the jury's verdict of guilty.

Defendant has not shown that he is entitled to relief on either motion. Accordingly, sentencing will go forward on August 27, 2014, as scheduled.

A. Motion for Arrest of Judgment of Conviction

The basis for this motion is defendant's contention that this court lacks jurisdiction

over the charged offense because the indictment was not filed within the time limits set out in 18 U.S.C. § 3161, the Speedy Trial Act. The first sentence of the applicable provision, § 3161(b), reads as follows: “ Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or charged in connection with such charges.” Rule 34 requires the court to arrest judgment if the indictment does not charge an offense or, as defendant argues, the court lacks jurisdiction of the charged offense. Setting aside the questionable possibility that a court loses jurisdiction over a criminal offense when the Speedy Trial Act is violated, there are two other reasons why defendant’s claim fails.

First, according to 3 Charles Alan Wright & Sarah H. Welling, Federal Practice and Procedure, § 601 at 576 (2011), the purpose of Rule 34 is to give the trial judge a chance to invalidate a judgment when there is a fundamental error appearing on the face of the record, with “the record” referring only to the indictment, the plea, the verdict and the sentence. Defendant does not explain why this rule would apply to his claim that the court lacks jurisdiction over the case against him, when he is not alleging that a fundamental error appears on the face of the record. United States v. Zisblatt, 172 F.2d 740, 741 (2d Cir. 1949) (holding that challenge to judgment based on statute of limitations could not be entertained under Rule 34 because question could not be decided from face of indictment). See also United States v. Andreas, 39 F. Supp. 2d 1048, 1058 (N.D. Ill. 1998), aff’d, 216 F.3d 645 (7th Cir. 2000).

Second, even if defendant could avoid the force of the holding that Rule 34 challenges

are limited to the record, he cannot show that the government violated the Speedy Trial Act in his case. The government has submitted copies of reports filed by state and federal officers involved in defendant's arrest by members of the Dane County Drug Task Force and the federal Drug Enforcement Administration on August 28, 2013, that establish the motion's lack of merit. According to these reports, defendant was arrested during a traffic stop, then taken to the Dane County jail and booked in on a state probation violation warrant. On October 10, 2013, 43 days after defendant's arrest and while he was still in state custody, a federal grand jury returned an indictment against defendant. The next day, the United States Marshals Service took custody of him on a writ of habeas corpus ad prosequendum, 28 U.S.C. § 2241(c)(5). United States ex rel. Moses v. Kipp, 232 F.2d 147, 150 (7th Cir. 1956) ("A state which first acquires custody may 'lend' a prisoner to the federal government in order to afford him a speedy trial and for the convenience of witnesses.") On January 29, 2014, a state administrative law judge held a hearing in defendant's case, after which he ordered defendant's extended supervision term revoked and directed that he be placed in custody for 18 months plus one day. Dkt. #84 at 2 and attachments.

Defendant has not introduced any evidence showing that the government's submissions are erroneous or incomplete. Therefore, his case is governed by the holding in United States v. Clark,— F.3d —, 2014 WL 2535211 (June 6, 2014), that "the speedy trial protections of [18 U.S.C. § 3261] apply only to arrests made for federal charges—an arrest by a state officer on a state charge does not start the statutory clock." Even if a person is

arrested by federal agents, he cannot benefit from the protections of § 3161 if he is released immediately without the filing of federal charges. Id. at *2. “To qualify as a federal arrest and trigger the 30-day period under the Act, therefore, an arrest must be for the purpose of bringing federal charges, and charges must be ‘pending’ when the person is arrested.” Id.

Defendant does not discuss Clark. The most he says is that the facts of defendant’s arrest “are at best nebulous” and that it “cannot be categorically determined that [defendant] was taken into custody on a state Probation & Parole hold.” Dft.’s Reply Br., dkt. #87, at 1. Defendant suggests that the “clearer argument is that [defendant] underwent a traditional arrest with the intent to charge him federally,” id., in part because, as he says, he was arrested and booked into the jail before the warrant was issued, suggesting that the state probation warrant was not the real reason for the arrest. This argument is strained at best. As defendant concedes, the arresting officer reported that he was looking for defendant because defendant was being investigated by his state probation officer on drug charges “and the officer knew that there would be a warrant placed on [defendant] by his probation agent.” Dkt. #84-1 at 1. Moreover, after booking defendant the arresting officer he had checked with the state probation and parole office and learned that a valid parole warrant for defendant’s arrest was already in the system. This report is not contradicted by DEA Agent Craig Grywalsky’s statement in his own report that defendant was arrested on probable cause for distribution of narcotics and the state probation and parole office subsequently issued a warrant for his arrest. Id.

It appears that defendant was arrested for distribution of heroin and cocaine base,

as Agent Grywalsky wrote in his report, but the nature of the arrest does not determine whether it was an arrest for state or federal purposes. Such crimes could have been charged as federal crimes, state crimes or simply reasons to revoke state supervision. The evidence shows, however, that defendant was booked into the Dane County jail on a state probation warrant, not on federal charges, and that this booking did not start the running of the Speedy Trial Act clock. As a result, defendant has no valid claim that the October 10, 2014 indictment brought against him was untimely under the Act. His motion to arrest judgment will be denied on the grounds that the rule does not apply to defendant's claim and that, even if it did, defendant has not made the showing necessary to obtain the relief he is seeking.

B. Motion for Judgment of Acquittal

Once a jury has found a defendant guilty, it is exceedingly difficult for the defendant to show that he is entitled to a judgment of acquittal. In this case, defendant must show that the evidence introduced against him at his trial was so insufficient that no reasonable juror could have found beyond a reasonable doubt that he was guilty of distributing heroin or cocaine base, as charged in the six counts of the indictment. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In evaluating a defendant's showing, the court must view the evidence in the light most favorable to the government. Id.

In this case, the defendant's task is even more daunting than usual, given the kind of evidence adduced at his trial. An undercover officer identified defendant as the person

from whom she had bought heroin or cocaine base on the six occasions listed in the indictment and the person with whom she had had telephone conversations about drug purchases. Members of the surveillance team also testified, identifying defendant as the person they had seen meeting with the undercover officer. In addition, the government introduced into evidence photographs of defendant and his car at the scene of the drug deals described by the undercover officer. The evidence was more than sufficient to support the jury's verdict. Defendant's motion for a judgment of acquittal under Rule 29(c)(1) will be denied.

ORDER

IT IS ORDERED that defendant Orlando Larry's motion for arrest of judgment under Rule 34, dkt. #78, and his motion for judgment of acquittal, dkt. #77, are DENIED.

Entered this 30th day of July, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge