

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

SCOTT BODLEY,

Defendant.

OPINION AND ORDER

13-cr-52-bbc

On May 15, 2013, the grand jury returned a 26-count indictment charging defendant Scott Bodley with various counts of tax fraud. Count one charges that defendant violated 26 U.S.C. § 7212(a), which prohibits corrupt endeavors to obstruct or impede the due administration of the Internal Revenue laws. Counts 2-16 charge defendant with submitting fictitious money orders to the IRS, in violation of 18 U.S.C. § 514(a). Counts 17-24 charge defendant with submitting documents containing materially false statements to the IRS, in violation of 18 U.S.C. § 1001. Count 25 alleges that defendant filed a false 2007 income tax return with the IRS, in violation of 26 U.S.C. § 7206(1). Finally, count 26 charges defendant with tax evasion, alleging that defendant willfully evaded his 2009 federal income taxes.

Defendant has filed several sets of pretrial motions which I address by type and docket number:

1. Discovery Motions Filed by Defendant's Former Attorney, dkt. ## 21-23

On December 5, 2013, when Christopher Duren still was representing defendant directly (Duren now is defendant's stand-by attorney), Duren filed three relatively pro forma

discovery motions. Dkt. ## 21-23. Although defendant has not pursued these motions, neither has he abandoned them. Given the government's explanation of its discovery practices at the January 8, 2014 telephonic scheduling conference with the magistrate judge, see trans., dkt. 31, at 7-10, the court will deny these three discovery motions as unnecessary.

2. Verified Amended Motion to Demand this Court Dismiss this Case with Prejudice, dkt. # 39

In what appears to be in large part a copy of a brief prepared for a different case, defendant contends that this court lacks jurisdiction over him because of procedural irregularities concerning the enactment in 1948 of Title 18, the federal criminal code. According to defendant, 18 U.S.C. § 3231, which confers subject matter jurisdiction to the district courts for federal criminal violations, is unconstitutional because it was never properly passed by both houses of Congress.

Numerous courts have considered this argument, and all have found it to have no merit. See, e.g., United States v. Penwell, 455 Fed. App'x 181, 183-84 (3d Cir. 2011) (providing string cite of cases); United States v. Fletcher, No. PJM-05-0179, 2014 WL 1292227, at *3 (D. Md. Mar. 27, 2014) (same); United States v. Collier, No. 00-CF-427, 2013 WL 5234245, at *3 (D. Nev. Sept. 16, 2013) (same); and other cases cited in the government's brief, dkt. #45, at 2-3. Indeed, the Court of Appeals for the Seventh Circuit has described defendant's jurisdictional attack as "unbelievably frivolous." United States v. Collins, 510 F.3d 697, 698 (7th Cir. 2007); United States v. Small, Fed. App'x 302, 303

(7th Cir. 2012); United States v. Campbell, 221 Fed. App'x 459, 461 (7th Cir. 2007).

Following the reasoning of these authorities, defendant's motion is denied.

3. Amended verified motion to dismiss indictment with prejudice and corresponding memorandum exceeding the statute of limitations, dkt. # 40

Although defendant has submitted a lengthy brief in support of this motion, he fails to develop any reasoned argument to support his position that the statute of limitations expired for the offenses charged in the indictment. Accordingly, he has waived any such challenge. United States v. Lamzotti, 205 F.3d 951, 957 (7th Cir. 2000) (“[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).”). Even if he had not waived it, however, the government has outlined the various counts of the indictment in its brief and has explained why the statute of limitations did not expire for each one. Having reviewed those arguments and authorities, I conclude that the government is correct. Accordingly, defendant's challenge to the indictment on statute of limitations grounds fails.

In addition to his statute of limitations challenge, defendant also appears to contend that count one of the indictment should be dismissed for improper venue. Dkt. #40, at 15. Defendant seizes upon the language alleging that the crime was committed “in the Western District and elsewhere,” arguing that the phrase “and elsewhere” is so vague that it could mean that he is charged with committing crimes on planet Mars.

Contrary to defendant's understanding, the indictment is not defective as it relates to venue. When assessing a pre-trial motion to dismiss an indictment for improper venue, the court must accept the factual allegations in the indictment as true. United States v. Clark, 728 F.3d 622, 623 (7th Cir. 2013) (citing United States v. Engle, 676 F.3d 405, 415 (4th Cir. 2012)). Congress has provided that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). Here, count one of the indictment charges that defendant corruptly endeavored to obstruct and impede the IRS in the Western District of Wisconsin and elsewhere. At trial, the government must establish at trial that at least part of defendant's criminal conduct occurred in the Western District of Wisconsin. For now, however, there is no basis to dismiss the indictment on vagueness grounds.

4. Amended verified motion to dismiss indictment with prejudice, dkt. # 41

In this motion, defendant argues that the indictment must be dismissed because of judicial bias and prosecutorial misconduct. (Again, most of defendant's brief appears to have been cut-and-pasted from a brief in a different case.) Neither of these arguments has merit.

a. Alleged judicial bias

Defendant argues that this court is not impartial because it is not following the Constitution and Supreme Court precedent. According to defendant, this court is not

fulfilling its obligation to ensure it has jurisdiction over the indictment. This argument hearkens back to defendant's first argument for dismissal, namely, that the entire federal criminal code is void because its passage was not in accordance with certain constitutional requirements. As discussed above, this motion has no merit. Accordingly, because I can discern no other basis for defendant's claim of judicial bias apart from his meritless jurisdictional argument, this motion will be denied.

b. Alleged prosecutorial misconduct before grand jury

Defendant argues that the prosecutor committed the following acts of misconduct: intentionally failed to present exculpatory and material evidence to the grand jury; acted as a fact witness; failed to obtain an order from the Office of the Attorney General of the United States that the indictment was authorized by the Department of Justice; failed to provide his State Bar Number on the indictment; and withheld grand jury records. In addition, he asserts that the grand jury failed to provide a concurrence form on the record and did not present the indictment in open court.

Defendant's arguments are either factually incorrect or without legal merit. First, with respect to exculpatory evidence, defendant fails to provide any evidence, much less allege, what exculpatory evidence the prosecutor withheld from the grand jury. Moreover, even if he was correct, a district court may not dismiss an otherwise valid indictment because the government failed to disclose substantial exculpatory evidence to the grand jury. United States v. Williams, 504 U.S. 36 (1992).

Second, the only fact witness the government presented to the grand jury was case agent Eric Kopp. Defendant has been provided with Kopp's transcript and accompanying grand jury exhibits as part of discovery. Defendant has not provided any evidentiary support for his allegation that the prosecutor testified as a fact witness.

Third, contrary to defendant's assertion, the Department of Justice's Tax Division did approve the charges in this case. Even if it had not, the failure of the department to follow its own internal guidelines would not be grounds to dismiss the indictment. See, e.g., United States v. Kelly, 147 F.3d 172, 176 (2d Cir. 1998).

Defendant's remaining arguments are equally groundless. No rule in this district requires counsel to include their bar numbers on their pleadings; defendant has no evidence to show that the court did not follow its standard practice in this case, which is to receive grand jury indictments in open court and to review each one to make sure the concurrence form contains the proper number of votes in favor of returning a true bill; and Fed. R. Crim. P. 6(e)(6) authorizes the government to keep the record of the grand jury proceedings sealed and in the government's possession.

In sum, because defendant has not put forth any evidence to support his allegation of prosecutorial misconduct, this motion will be denied.

5. Emergency mandamus and stay of proceedings, dkt. # 59

On October 21, 2014, defendant filed a motion seeking an immediate order staying the proceedings, on the ground that this court refuses to follow the Constitution and

acknowledge that it has no jurisdiction over the case. Although defendant filed this motion long after his June 30, 2014 deadline to file pretrial motions, because he has labeled it an emergency motion challenging this court's jurisdiction, I will address it briefly. It is unclear why defendant wants a stay and not dismissal. In any case, this motion is denied. This court takes its duty to follow the Constitution and Supreme Court precedent seriously, and it has done so and will continue to do so in this case. The fact that defendant has a different understanding of the law does not mean that he is entitled to a stay, dismissal or other extraordinary relief. His remedy is an appeal, which he is free to take if necessary at the conclusion of this case.

6. Untimely pretrial motions, dkt. ## 53, 55, 63-70 and 78

At a January 8, 2014 telephonic scheduling conference, the court re-set the schedule in this case a second time, providing defendant until June 30, 2014 to file his pretrial motions. Dkt. #30. The court set this distant date in order to provide the pro se defendant with sufficient time to review all of the government's disclosures and prepare his motions. (On August 11, 2014, the court amended the schedule a third time to provide defendant four more months to prepare for trial, but this did not affect the pretrial motions. Third Amended Scheduling Order, dkt. #58.

At the January 8, 2014 hearing, the magistrate judge suggested that defendant use his stand-by attorney as a resource for discovery review and motions practice, and defendant reported that he and Mr. Duren were working well together in that regard. The magistrate

judge also mentioned in passing the “Rule 12 bar” on pretrial motions. Hrg. trans., dkt. #31 at 34.

Defendant timely filed the pretrial motions that I have addressed earlier in this order. When, on August 14, 2014, defendant filed two new motions to dismiss (and an uncaptioned document offering legal argument) rather than reply briefs in support of his pending motions, the magistrate judge pointed out in an August 14, 2014 text-only order that these motions were untimely pursuant to Fed. R. Crim. P. 12(e) and the court would not consider them. Dkt. #57. Defendant never challenged this assertion; rather, he simply continued to file new pretrial motions, including an October 21, 2014 “emergency motion,” dkt. #59, that I have addressed above, eight more discovery and dismissal motions on November 17, 2014, dkt. ## 63-70 and a December 12, 2014 motion to dismiss, dkt. #78. As the magistrate judge pointed out in a December 15, 2014 text-only order, this motion also was untimely pursuant to Fed. R. Crim. P. 12(c)(3), which replaced Rule 12(e) on December 1, 2014. Dkt. #80. Because defendant has not shown good cause for filing any of these late motions, and because the motions have no apparent merit that would require closer analysis in the interests of justice, I am denying all of them as untimely.

ORDER

IT IS ORDERED that defendant's pretrial motions, dkt. ## 21-23, 39-41, 53, 55, 59, 63-70 and 78 are DENIED.

Entered this 31st day of December, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge