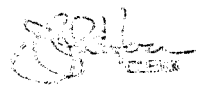


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
DEC 31 2008


UNITED STATES OF AMERICA,

CR08-50079

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY
PATTON, and VINE RICHARD
MARSHALL aka RICHARD VINE
MARSHALL aka DICK MARSHALL,

**UNITED STATES' MEMORANDUM
IN OPPOSITION TO DEFENDANT
MARSHALL'S MOTION TO
DISMISS DUE TO PRE-
ACCUSATORY DELAY**

Defendants.

COMES NOW the United States of America, by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and hereby files the United States' Memorandum in Opposition to Defendant Marshall's Motion to Dismiss Due to Pre-Accusatory Delay. The United States is requesting denial of Defendant Marshall's motion based upon the Defendant's failure to meet his burden that: (1) any delay resulted in actual and substantial prejudice to the presentation of the defense; and (2) the United States intentionally delayed his indictment either to gain a tactical advantage or to harass him. Defendant has failed to set forth sufficient evidence to support the necessity for further hearing on this matter.

On August 20, 2008, Defendant Marshall was indicted by the grand jury for aiding and abetting in the unlawful killing of Anna Mae Aquash on or about the 12th

day of December, 1975, in violation of 18 U.S.C. §§ 1111, 1153, and 2. On October 7, 2008, the grand jury issued a superseding indictment joining Co-Defendants Graham and Marshall for the unlawful killing of Anna Mae Aquash.

An indictment for any offense punishable by death, which includes § 1111, may be brought at any time without limitation. See 18 U.S.C. § 3281; Coon v. United States, 411 F.2d 422, 423 (8th Cir. 1969). A statute of limitations standing alone does not fully define a defendant's rights with respect to events occurring prior to indictment in that the Due Process Clause has a limited role to play in protecting against only the most oppressive delay. See United States v. Lovasco, 431 U.S. 783, 788-89 (1977); United States v. Gladney, 474 F.3d 1027, 1030-31 (8th Cir. 2007); United States v. Haskell, 468 F.3d 1064, 1070 (8th Cir. 2006); United States v. Sturdy, 207 F.3d 448, 452 (8th Cir. 2000); United States v. Taylor, 603 F.2d 732, 735 (8th Cir. 1979).

Procedures and burdens associated with examining a claim of pre-indictment delay are strict and clear in this circuit:

The Fifth Amendment's Due Process Clause protects a criminal defendant against unreasonable pre-indictment delay. Id. To prove a violation of his due process rights, [defendant] must establish the delay resulted in actual and substantial prejudice to the presentation of the defense and the government intentionally delayed [defendant's] indictment either to gain a tactical advantage or to harass him. Id. The court will inquire into the reasons for delay *only* where actual prejudice has been established. United States v. Sturdy, 207 F.2d 448, 452 (8th Cir. 2000). To establish actual prejudice, a defendant must identify witnesses or documents lost during the delay period. Id. However, actual prejudice cannot be established by defendant's speculative or conclusory claims of possible prejudice as a result of the passage of time. Id. The defendant carries the burden to show the lost testimony or information is not available through other means. Id.

See Gladney, 474 F.3d at 1030-31.

Defendant has failed to meet his necessary burden to demonstrate either actual prejudice or inappropriate intentional delay by the United States.

I. NO ACTUAL AND SUBSTANTIAL PREJUDICE

The gravamen of Defendant Marshall's claim for actual and substantial prejudice is based upon: (1) the loss of Defendant Marshall's mother, Cora Gallego, and stepfather, Joseph Gallego, who would testify the Defendant had a strong motive not to have any firearms in his home; (2) Arlo Looking Cloud's taped interview of November 17, 1994; and (3) Theda Clarke's infirmities due to age. See Marshall Memorandum in Support of Motion to Dismiss at p.4-5 (DE 97).

As for Defendant's mother and stepfather, Defendant Marshall significantly fails to claim or set forth any evidence that either were present at Dick Marshall's residence the evening he provided the gun, shells, and counsel to Graham, Clarke, and Looking Cloud. Defendant Marshall's claim that he had a strong motive not to have any firearms in his home does not carry his burden to show that information is not available through other means. See United States v. Sturdy, 207 F.3d at 452 (it is not sufficient for defendant to make speculative or conclusory claims of possible prejudice as a result of the passage of time). See also United States v. Brockman, 183 F.3d 891, 895 (8th Cir. 1999). Indeed, it does not require Defendant Marshall's mother nor stepfather to establish what Defendant's bond conditions were in his other murder case, and perhaps more importantly, whether Defendant Marshall breached these bond conditions.

On March 1, 1975, Dick Marshall shot and killed Martin Montileaux at the Scenic Bar. See State v. Marshall, 264 N.W. 2d 911, 914-15 (SD 1978). A jury convicted Dick Marshall of premeditated murder, which was affirmed by the South Dakota Supreme Court. Id. On or about December 12, 1975, the date of Defendant Marshall's alleged conduct associated with the death of Anna Mae Aquash, he was on pre-trial release awaiting his trial for the Montileaux murder. Defendant Marshall represents in his motion that apparently to satisfy a part of his pretrial release conditions, firearms in his residence consisting of a rifle and a shotgun, were taken to his mother and stepfather's residence. See Defendant Marshall's Memorandum, p.4.

The first flaw in Defendant Marshall's argument is that the murder weapon in this instance was a .32-caliber revolver, as opposed to a rifle or shotgun. He further fails to make mention of the additional rifles and revolvers in his possession during the high speed chase in the Montileaux matter on March 1, 1975. This included an H&R .32-caliber revolver, released from custody on or about June 1, 1975, approximately six months prior to Dick Marshall's conduct associated with the murder of Anna Mae Aquash. See id.; Graham discovery 04963. This, in combination with the significant fact that neither Defendant Marshall's mother nor his stepfather were at his residence on or about December 12, 1975, wherein it is alleged he provided the .32-caliber murder weapon, shells, and counsel, militates heavily against any prejudice.

Similarly, Defendant Marshall's concerns associated with Arlo Looking Cloud's interview of November 17, 1994, ring hollow. First, Defendant Marshall has the ability

to subpoena Arlo Looking Cloud at trial. Furthermore, Defendant Marshall has been provided the actual recording of the interview, a transcript of the interview, as well as all reports associated with the 1994 interview currently in the United States' control.

In relation to Theda Clarke, Defendant Marshall has been provided the report of the July 25, 2000, conversation between cooperating witness Maverick and Theda Clarke. In the context of discussing Anna Mae as an informant, Clarke made statements against interest, including: "yeah, that's why we did it and it wasn't ever going to happen again." See summary of Clarke meeting 01-22P21, Graham 04430. Defendant Marshall has been provided the name of the cooperating witness and has every right to subpoena said witness for trial or to otherwise cross-exam the cooperating witness to the extent the witness testifies at trial.

Defendant has failed to meet his burden to demonstrate actual and substantial prejudice obviating the need to inquire further into the reasons for delay. See Sturdy, 207 F.3d at 452 ("the court will inquire into the reasons for delay only where actual prejudice has been established").

II. NO INAPPROPRIATE INTENTIONAL DELAY

It is well-settled in this circuit that the appropriate standard once actual and substantial prejudice is established by the defense is that the government intentionally delayed the indictment either to gain a tactical advantage or to harass the defendant. See Gladney, 474 F.3d at 1030; Haskell, 468 F.3d at 1070; Sturdy, 207 F.3d at 452; and Brockman, 183 F.3d at 895. The United States is cognizant that in United States v.

Jackson, 446 F.3d 847 (8th Cir. 2006), the Eighth Circuit recognized that the Supreme Court has suggested *in dicta* that the state of mind prong might be satisfied if the government delay was “in reckless disregard of its probable prejudice impact upon the defendant’s ability to defend against the charges.” Id. at 849-50 *2 (*quoting United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) In U.S. Currency*, 461 U.S. 555, 563 (1983)). As demonstrated below, under either the intentional or reckless analysis, Defendant has failed to meet this high burden.

For important and obvious reasons, prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish a suspect’s guilt beyond a reasonable doubt. See Lovasco, 431 U.S. at 791. To artificially impose such a duty ““would have a deleterious affect upon both the rights of the accused and upon the ability of society to protect itself.” Id. (*quoting United States v. Ewell*, 383 U.S. 116, 120 (1966)). “From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilty beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited.” Lovasco, 431 U.S. at 791-92. As further recognized by the Eighth Circuit, investigative delay has consistently been held reasonable and in accordance with due process. See Taylor, 603 F.2d at 735 (other citations omitted).

The gravamen of Defendant Marshall’s claim of intentional bad faith or reckless disregard by the United States centers around a cooperating witness and Theda Clarke.

See Defendant Marshall Memorandum, p.6-7. Defendant Marshall once again conveniently ignores other significant and incriminating evidence associated with his conduct. See generally United States' Opposition to Severance, p.10 (Defendant Marshall's failure to recognize his own admissions against interest, coupled with additional witness discovery that has been provided, including eyewitness accounts from other individuals than Graham, Looking Cloud, or Dick Marshall).

Defendant Marshall made at least two significant statements to the cooperating witness on separate occasions. On July 27, 2001, Defendant Marshall, among other matters, confirmed Anna Mae's presence at his home during the time in question. See Exhibit 1 to the United States' Opposition to Severance. Defendant Marshall has this recording, as well as the complete transcript. Furthermore, Defendant Marshall is entitled to subpoena and/or cross-examine the cooperating witness associated with his statements. Defendant Marshall and the cooperating witness had a follow-up conversation for which Defendant has been provided the cooperating witnesses' handwritten notes. They discuss the baggage note, the .32-caliber weapon, and Defendant Marshall provides the response of "back in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." See Exhibit 3, United States' Opposition to Severance. Again, Defendant Marshall has the ability to subpoena the cooperating witness or cross-examine the cooperating witness regarding these statements.

Defendant Marshall's arguments relating to Theda Clarke again fail to establish either intentional or reckless delay. Defendant Marshall has the opportunity to subpoena or cross-examine the cooperating witness regarding Clarke's statements to the cooperating witness. Furthermore, Defendant Marshall has failed to establish a point in time for which he believes Theda Clarke would have been available and equally important, how her availability would in any way assist in his defense.

Finally, to further demonstrate that the investigative delay in this matter was in good faith, the United States is submitting under seal the grand jury testimony from August 20, 2008 (Graham 0487-04899).

III. CONCLUSION

The Defendant has failed to establish that any delay has resulted in actual and substantial prejudice to the presentation of the defense. At best, Defendant has set forth speculative or conclusory claims and has failed to show that any material lost testimony or information is not available through other means. Because Defendant has failed to establish actual and substantial prejudice, the United States is entitled to denial of Defendant Marshall's motion without further analysis.

Furthermore, the Defendant has failed to sufficiently establish the United States either intentionally or recklessly delayed the indictment to either gain a tactical advantage or to harass the Defendant. Any delay was appropriately investigative in nature.

Date: December 31, 2008

MARTY J. JACKLEY
United States Attorney



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CERTIFICATE OF SERVICE

The undersigned hereby certifies on December 31, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- U.S. Mail, postage prepaid
- Hand Delivery
- Facsimile at
- Federal Express
- Electronic Case Filing



Marty J. Jackley
United States Attorney