

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA)
)
 v.) Criminal No.: H-92-152 (filed
) 1/25/93)
)
JOHN J. JOHNSON,)
)
 Defendant.)

**GOVERNMENT'S PROPOSED MEMORANDUM ORDER IN RESPONSE TO
DEFENDANT'S MOTION FOR DISMISSAL OF THE INDICTMENT**

Pursuant to the instructions issued by the Court in the hearing held January 14, 1993, in the above-captioned matter, the government hereby submits its Proposed Memorandum Order in Response to Defendant's Motion for Dismissal of the Indictment.

Respectfully submitted,

"/s/"

JANE E. PHILLIPS

"/s/"

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 v.) Criminal No.: H-92-152
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JOHN J. JOHNSON,)
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 Defendant.)

ORDER

This matter comes before the Court on Defendant's Motion for Dismissal of the Indictment. In the motion, the defendant alleges that the government interfered with his relationship with his attorney by making consensually-monitored recordings of his telephone conversations with a co-conspirator who was cooperating with the government's investigation of bid rigging among wholesale grocery distributors in the Houston area. Based upon the motion, the government's response, the defendant's reply, the evidence presented, the applicable case law, and argument by the parties, the Court finds that the motion should be denied.

FACTUAL BACKGROUND

In affidavits submitted by Duncan Currie of the U.S. Department of Justice, Antitrust Division; Gerald L. Burkhalter of the United States Department of Agriculture, Office of Inspector General-Investigations; and James Maurice Johnson, a co-conspirator in the bid-rigging scheme and cooperating

government witness, the government presented an outline of the events and circumstances surrounding the tape recordings that have not been materially disputed by the defendant. Those facts are summarized as follows:

In 1989, the Dallas Office of the Antitrust Division, United States Department of Justice, began a grand jury investigation into antitrust violations in the wholesale grocery distribution industry in the Houston area. As a result of the investigation, in August 1990, James Maurice Johnson (hereinafter "Maurice"), then the bid manager for the Houston Division of White Swan, Inc. and unrelated to the defendant, elected to cooperate with the government. He entered into a plea agreement filed March 12, 1991, and on April 2, 1991, he pled guilty before this Court to a one-count information charging him with rigging bids for the award and performance of contracts to supply wholesale grocery products to public school districts and other public entities in southeastern Texas.

The defendant, John J. Johnson (hereinafter "Johnny"), was vice-president of purchasing and the bid manager for Glazier Foods Company of Houston, Texas. He was identified by Maurice and others as a co-conspirator in the bid-rigging scheme. On July 7, 1992, Johnny was charged in a three-count indictment with bid rigging in violation of 15 U.S.C. § 1; making a false statement to a federal agency in violation of 18 U.S.C. § 1001; and conspiring to commit mail fraud in violation of 18 U.S.C.

§ 371.

On March 20, 1991, Maurice advised government attorneys that Johnny, whom he has known since the late 1970's, had recently been attempting to contact him by telephone, and he had not yet returned the call. The government then asked Maurice to make a consensually-monitored recording of his return call to Johnny to gather evidence about the bid-rigging conspiracy. After consulting with his attorney, Maurice agreed.

That same day, immediately prior to making the recording, the government attorneys and the case agent, Special Agent Burkhalter, met with Maurice to brief him on the purpose of the call and to instruct him on the proper procedures to follow in speaking with Johnny. At that time, the government knew that Johnny was represented by counsel. Maurice was advised by the government to elicit information only about Johnny and his employer's knowledge of and involvement in the bid-rigging conspiracy. The government instructed Maurice not to inquire about any communications Johnny had with his attorney, and also advised him not to participate in any conversations with Johnny that were not supervised and recorded by the government.

At the time the government was not aware that, in the preceding months, Maurice and Johnny had already had a number of private discussions about the investigation which were initiated by Johnny. Johnny knew that Maurice was cooperating with the government, and questioned Maurice during these discus-

sions about his talks with government attorneys, the information Maurice had disclosed about Johnny and others, and the progress and handling of Maurice's case. Also in these earlier conversations, Johnny expressed dissatisfaction with his attorney and asked Maurice for his advice. Maurice had advised Johnny to retain a new attorney and to cooperate with the government's investigation.

During the course of the first consensually-monitored conversation, which is the first tape recording at issue in these proceedings, Johnny again expressed his dissatisfaction with his attorney as well as his opinion that his attorney was trying to protect his employers, Thomas Glazier and Glazier Foods Company. Maurice responded to Johnny's questions and concerns about his legal representation the same way he had in the previous unmonitored conversations. Maurice advised Johnny to retain a new attorney and to cooperate in the government's investigation.

When the subject of attorneys arose during the March 21, 1991, conversation, the case agent signaled to Maurice not to pursue the subject. After the call was completed, he again instructed Maurice to avoid discussions regarding Johnny's relationship with his attorney.

During the evening of April 14, 1991, Johnny called Maurice at home to discuss his situation once again. The government was not aware of the call, and it was neither supervised nor

recorded by the government. During this discussion, Johnny again told Maurice that he was unhappy with the legal advice he had been receiving, and stated that he wanted to cooperate with the government. Maurice gave Johnny the same advice to cooperate as he had in their prior discussions.

On April 17, 1991, Maurice informed the case agent that Johnny had attempted to contact him with an urgent message, and a consensually-monitored recording was made of the return call, which is the second tape recording in question in these proceedings. During that conversation, Johnny again expressed dissatisfaction with his legal representation and suggested that Maurice speak with his attorney. When Johnny put Maurice on hold to try to contact his attorney, the case agent terminated the call.

Maurice states that he was never instructed or encouraged by the government to ask Johnny questions about his attorney or about his communications with his attorney. The government never advised Maurice to encourage Johnny to cooperate in the government's investigation or to retain a new attorney. In addition, Maurice never heard the government criticize Johnny's attorney or the advice Johnny was receiving from his attorney.

ANALYSIS

The defendant moves for dismissal of the indictment on several theories. First, he argues that government's use of a cooperating witness to record conversations with a suspect prior

to indictment, but after the suspect has retained counsel, violates Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility and related bar association rules which prohibit communication between an attorney and an adverse party the attorney knows to be represented by counsel. Second, he claims that the government, through the consensual recording, attempted to interfere with his relationship with his attorney in violation of his Fifth Amendment due process rights. Finally, the defendant argues that there has been a pattern of "outrageous government misconduct" throughout the investigation of this case that warrants dismissal of the indictment.

A. Disciplinary Rule Issue

The defendant claims that government's use of a cooperating witness to record conversations with a suspect prior to indictment, but after the suspect has retained counsel, violates Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility and related bar association rules which prohibit communication between an attorney and an adverse party the attorney knows to be represented by counsel. The government asserts that the consensual recording of the two telephone conversations between Maurice and the defendant was a legitimate investigative technique clearly authorized by law and in no way violative of DR 7-104(A)(1). The government points out that the conversations were recorded fifteen months prior to the defendant's indictment; that Maurice consented to the monitoring

of the calls; that both calls were made in response to attempts by the defendant to contact Maurice; and the case agent monitored Maurice's side of both conversations. In addition, the government points out that Johnny initiated both of the contacts, and that Maurice elicited evidence in the recordings pertinent to the investigation of the bid-rigging conspiracy as directed.

A number of other courts have been faced with the question of the applicability of DR 7-104(A)(1) to criminal investigations. The majority of these courts have determined that the rule was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel. See United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 152 (1990) (10th Cir. 1990); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852, 104 S.Ct. 165, 78 L.Ed.2d 150 (1983); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (per curiam); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920, 101 S. Ct. 3059, 69 L.Ed.2d 425 (1981); United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973), cert. denied, 415 U.S. 989, 94 S. Ct. 1586, 39 L.Ed.2d 885 (1974).

As the Ryans court observed, a broader interpretation of DR 7-104(A)(1) to extend its application to this type of investigative activity would seem inconsistent with the general view

expressed by the United States Supreme Court, as noted by the District of Columbia Circuit in Lemonakis:

[W]e cannot say that at this state of the Government's investigation of a criminal matter, the public interest does not . . . permit advantage to be legally and ethically taken of 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'

485 F.2d at 956, quoting Hoffa, 385 U.S. at 293, 302, 87 S.Ct. at 408, 413 (1966), cited in Ryans, 903 F.2d at 740. Here, as in Ryans, were this rule applied as the defendant urges, to prohibit any contact with the subject of an investigation once he or she retains counsel, investigators would be unduly restricted in their use of informants to gather evidence to further criminal investigations. Such a result is contrary to the public interest in fair and effective law enforcement.

The Court finds that DR 7-104(A)(1)'s proscriptions should not attach during the investigative process before the initiation of criminal proceedings. Ryans, 903 F.2d at 740.

In the present case, the contacts of which the defendant complains took place in March and April 1991, approximately fifteen months prior to his indictment in July 1992. There is no question that the adversarial process against him had not yet begun at the time the contacts were made. The defendant had not been charged, arrested or indicted, or otherwise "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Ryans,

903 F.2d at 740, citing Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (describing the onset of adversarial proceedings for purposes of the Sixth Amendment right to counsel); see also Fitterer, 710 F.2d at 1333 (rejecting contention that where counsel had been retained for grand jury investigation, DR 7-104(A)(1) was intended to restrict undercover investigations).

Accordingly, because the government's contacts with the defendant through the cooperating witness occurred prior to indictment, I find that the government's actions did not violate DR 7-104(A)(1).

B. Fifth Amendment Claims

Defendant next argues that dismissal of the indictment is appropriate in this case because the government, through the consensual recording, attempted to interfere in his relationship with his attorney, thus violating his Fifth Amendment due process rights. It should be noted from the outset that the standard for dismissal of an indictment is extremely high. "To constitute a constitutional violation the law enforcement technique must be so outrageous that it is fundamentally unfair and shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." United States v. Ofshe, 817 F.2d 1508, 1516 (11th Cir.), cert. denied, 484 U.S. 963 (1987), citing United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643 (1973).

The defendant has failed to demonstrate any outrageous conduct on the part of the government to warrant dismissal of the indictment against him. The evidence from the affidavits submitted by the government, which remain unrefuted by the defendant, indicate that the discussions in the tapes regarding the defendant and his attorney were never solicited or approved by the government. Maurice was appropriately instructed by the government not to question the defendant about his relationship with his attorney or communications between them. In fact, the government repeatedly told him to avoid this subject area. The government never directed or encouraged Maurice to advise the defendant to get a different attorney, or to tell him he was receiving bad advice from his attorney. Finally, the government never directed or encouraged Maurice to persuade the defendant to cooperate with the government's investigation. Maurice states that his advice to the defendant to cooperate with the government was strictly personal and based on his own experience and his friendship for the defendant.

It is also uncontroverted that on both occasions when recordings were made, Maurice was returning telephone calls from the defendant. Thus, the defendant, not the government, initiated the contacts with Maurice.

It is clear from the evidence presented that the defendant knew that Maurice was cooperating with its criminal investigation at the time the recordings were made. In fact, it was

because he knew that Maurice was cooperating that the defendant contacted Maurice on the occasions of both recorded conversations and on approximately six earlier occasions, to gather information about the extent of his cooperation, the government's knowledge and the progress of the investigation. It was likewise because of Maurice's cooperation that the defendant in these conversations inquired about Maurice's relationship with his attorney, and asked Maurice for advice about his situation with his own attorney. Maurice stated that in all of these conversations, he repeatedly gave the defendant the same advice reflected in the tape-recorded conversations. Notably, the defendant did not refute Maurice's account of these earlier telephone contacts and their consistency with the advice on the tapes.

Although the government was unaware of the earlier conversations between the defendant and Maurice when the tapes were made, it nonetheless properly instructed Maurice prior to returning the defendant's telephone calls to avoid discussions related to attorney communications, and the case agent consistently and actively directed Maurice away from this subject matter when it arose during the taping. However, the defendant repeatedly steered the conversation back to this topic, and Maurice elected to respond to the defendant's concerns with the same personal advice he had given previously, rather than terminate the conversation altogether and thus lose the oppor-

tunity to collect evidence about the bid-rigging conspiracy.

The fact that the issue of the defendant's attorney and his advice arose in the taped conversation, despite the government's instructions and admonitions against such conversation, does not automatically make the government responsible for either the conversation or the advice given therein. The government cannot be responsible for all actions taken by its cooperating witnesses. See United States v. Ryan, 548 F.2d 782, 791 (9th Cir. 1976) (holding that there was no due process violation where a government informant acting independently from the government urged an attorney to withdraw from his representation of a defendant). See also United States v. Simpson, 813 F.2d 1462, 1467 (9th Cir.), cert. denied, 484 U.S. 898 (1987); United States v. Prairie, 572 F.2d 1316, 1319 (9th Cir. 1978).

In fact, the record shows that the defendant voluntarily and repeatedly chose to confide in Maurice even though he knew he was cooperating with the government at the time. Given that the defendant knowingly assumed this risk, it cannot be said that the government took unfair advantage of him by recording his telephone conversations with Maurice. See Lemonakis, 485 F.2d at 956.

The facts in the record show that the actions taken by the government, in creating the consensually-recorded tapes, in instructing Maurice on the appropriate subject matter to discuss

and to avoid, and in actively warning him away from potentially inappropriate subject matter as it arose during the actual discussions with the defendant, were all lawful, responsible and appropriate. It was the defendant who injected into the conversation his concerns about his legal representation and cooperation with the government, and there is no evidence that Maurice's responses were anything but the personal advice he claims.

The defendant has proved no outrageous conduct attributable to the government, and therefore, he has shown no violation of his constitutional rights. As in Ryans, any "perceived threat to the integrity of the attorney-client relationship is outweighed here by the government's interest in effective law enforcement." Ryans, 903 F.2d at 740.

C. Outrageous government misconduct claim

Finally, the defendant argues that the Court should use its supervisory powers to dismiss the indictment against him because he claims the government is responsible for a pattern of unethical conduct throughout both the criminal and related civil proceedings. However, the court's supervisory powers allow the district court "to impose the extreme sanction of dismissal with prejudice only in extreme circumstances." United States v. Campagnulo, 592 F.2d 852, 865 (5th Cir. 1979). To warrant dismissal of an indictment on this basis, the defendant must show the prosecutorial misconduct is a long-standing or common

problem in the district, and actual prejudice resulting therefrom. United States v. Griffith, 756 F.2d 1244, 1249 (6th Cir. 1985).

In an attempt to demonstrate a pattern of ethical misconduct, the defendant cites a series of actions taken by the government throughout this investigation in connection with both the criminal and a related civil case, Alvin ISD et al. v. Sysco Food Services, Inc. et al., Civ. No. 90-3774 (S.D. Tex. filed Dec. 12, 1990). In July 1991, approximately four months after the recordings were made and a year prior to indictment, the government sought limited intervention in the Alvin case to stay discovery with the expressed purpose of protecting the criminal investigation. That motion was denied, and the government never became a party to that case. In July 1992, the government filed a motion requesting a hearing under United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), to resolve any potential conflict of interest in defense counsel's simultaneous representation of the defendant and his employers, Glazier Foods and Tom Glazier. The Court determined that such a hearing was appropriate and one was held in August 1992. The Court finds that these actions on the part of the government were legitimate and legal measures to represent its interests in the criminal investigation and these proceedings, and to protect the prosecution from possible later attack by the defendant. The Court finds no evidence of ethical misconduct on the part of the

government. Accordingly, the defendant has failed to make out any pattern of unethical conduct that warrants exercise of the court's supervisory powers.

The Court does not find persuasive the defendant's argument that the facts of the present case are "more egregious" than in three other cases, United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), United States v. Marshank, 777 F.Supp. 1507 (N.D. Cal. 1991), and United States v. Smith, Criminal No. F-9938-88 (S.C.D. 1989). In reviewing these cases, it is apparent that each is easily distinguished from the present facts.

Both Lopez and Smith involved post-indictment contacts between the government and the defendant, and as such implicated the defendant's Sixth Amendment rights. No such issue is presented in this, a pre-indictment case.

The Marshank case, a pre- and post-indictment case, is based on an extreme set of facts that likewise bears no resemblance to these facts. In that case, the government allegedly conspired with the defendant's own attorney to build a case against him and secure his indictment. The court found that, but for the unethical acts of defense counsel and the government in that case, the defendant would not have been indicted.

By contrast in the present case the record shows no collaboration between defense counsel and the government against the defendant. In addition, unlike the government's agent in

Marshank, Maurice was repeatedly warned to avoid attorney-related discussions with the defendant. Also, in the present case, the tapes in question were not used to secure an indictment against the defendant. Finally, instead of concealing or ignoring possible conflicts of interest in connection with the defendant's attorney-client relationship, here the government took action to ensure that possible conflicts were ascertained and brought to the court's attention following the procedures outlined in Garcia. The Court finds that the government's actions in this regard were entirely reasonable and necessary under the circumstances, and in no way constitute misconduct.

Just as the defendant has not shown the necessary pattern of prosecutorial misconduct, he has likewise failed to show the required actual prejudice to his ability to receive a fair trial. The actual prejudice showing is essential to justify dismissal of an indictment on either constitutional or ethical grounds. United States v. Morrison, 449 U.S. 361, 365-366, 101 S.Ct. 665, reh. denied, 450 U.S. 960 (1981). See also Bank of Nova Scotia v. United States, 487 U.S. 250, 255, 108 S.Ct. 2369, 2374 (1988); United States v. Weeks, 919 F.2d 248, 254 (5th Cir. 1990); United States v. McKenzie, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); United States v. Merlino, 595 F.2d 1016, 1018 (5th Cir. 1979); United States v. Acosta, 526 F.2d 670 (5th Cir.), cert. denied, 426 U.S. 920 (1976).

Even in cases where it is determined that the government deliberately obtained information in violation of a defendant's Fourth, Fifth or Sixth Amendment rights, the remedy imposed is not dismissal of the indictment but suppression of evidence. See Morrison, 449 U.S. at 365-366, 101 S.Ct. at 668; United States v. Fortna, 796 F.2d 724, 732 (5th Cir. 1986). Thus, lesser, more narrowly tailored remedies are likewise preferred over dismissal where unethical conduct has been charged. See, e.g., Bank of Nova Scotia, 487 U.S. at 255; 108 S.Ct. at 2374.

In this case, the defendant has presented no facts to show government misconduct or to demonstrate that he has been prejudiced in any way. Rather, he contends that the government's conduct caused him to question whether his attorney was looking out for his best interests, and has hampered his ability to assist his counsel in preparing his defense.

The Court finds no merit in this argument. The uncontroverted record indicates that the defendant's concerns about his legal representation began prior to the consensual recording by the government, because it had already been discussed in approximately six earlier private conversations between the defendant and Maurice that the government did not instigate and indeed knew nothing about at the time.

Moreover, the defendant demonstrated his confidence in his counsel by continuing to retain him despite any advice he received from Maurice until January 1992, when he was spun off

to another attorney, John Ackerman, and by then rehiring Mr. Androphy in early July 1992. See United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980). The defendant's confidence in counsel was once again affirmed in the Garcia hearing in this case, in August 1992, when he waived on the record any potential conflict of interest counsel might have through representation of his employers, Glazier Foods and Tom Glazier.

Thus, despite the misgivings voiced by the defendant on the tapes in early 1991, the record in the case indicates that the defendant forewent every opportunity to choose different counsel, and only began to complain of his relationship with counsel when the opportunity for dismissal of the indictment presented itself through discovery of the consensually-monitored recordings under Fed. R. Crim. P. 16.

Thus, the Court finds that the defendant has failed to demonstrate a pattern of government misconduct to justify exercise of the court's supervisory authority and he has suffered no actual prejudice from the consensual recording. Accordingly, dismissal of the indictment is inappropriate and unwarranted in this case.

WHEREFORE, it is hereby, this ___ day of _____, 1993, ORDERED that the Motion for Dismissal of the Indictment is DENIED.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Proposed Memorandum Order in Response to Defendant's Motion for Dismissal of the Indictment has been served upon and was sent by U.S. Mail, certified, return receipt requested, this 25th day of January, 1993, to:

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"/s/"
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