

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH WAYNE ELLIOTT,

Defendant.

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Case No. 03-5023-01-CR-SW-RED

ORDER

Now before the Court is the Report and Recommendations (Doc. 79) of the Honorable James C. England, United States Magistrate Judge, on Defendant's Motion (Doc. 64) to waive appearance. In the Motion, Defendant requests that he not be required to be present to appear at his arraignment in the superceding indictment. Magistrate England entered an order cancelling the arraignment and setting a status conference hearing. The United States then requested and received sixty days to secure a noncustodial evaluation of Defendant and to file a status report.

The report was timely filed on November 16, 2004. *See United States' Status Report on Defendant Kenneth Wayne Elliott's Physical Ability to Stand Trial* (Doc. 72). The report argued that Defendant was able to stand trial, but stated that the "real issue" was whether the trial should be set here in Springfield, Missouri, or transferred to in the Middle District of Florida, where Defendant resides. The Government, in the report, conceded that Defendant's physicians agreed that Defendant would not be fit for travel and that if Defendant's subjective condition were accepted as true, travel would be an undue burden on Defendant's health. However, the Government argued, *inter alia*, a number of factors indicated that Defendant could stand trial, that delay would not help Defendant stand trial, and that a number of accommodations could be made to reduce any risks to Defendant's

health that a trial may cause. Finally, the Government indicated that “If Elliott consents to the transfer of this case to the Middle District of Florida for the purpose of standing trial in Orlando, the United States will also consent to this transfer.” *Id.* at 18.

Thereafter Defendant filed a Motion for Hearing and Request for Discovery, requesting a formal hearing on Defendant’s ability to stand trial and for the ability to depose medical experts and others providing information contained in the status report. Defendant also filed a notice of consent to transfer the case to the Middle District of Florida pursuant to Federal Rule of Criminal Procedure 21.

Magistrate England then issued his Report and Recommendation, recommending that the case be transferred to Florida and noted that “accommodations ... could be made to accomplish trial if it is held in the Orlando area.” *Report and Recommendation* (Doc. 79) at 2. The United States filed objections to the Report and Recommendation, arguing that Defendant should be tried in Springfield. The Defendant filed objections to the Report and Recommendation, arguing that the Report should be modified to allow a judge in the transferee court to determine whether Defendant is fit to stand trial.

Upon examination of the objections and the other evidence in the record, the court held a hearing via teleconference on March 8, 2005, concerning these issues. Having reviewed the record, for the reasons below, the Court finds that Defendant is physically capable of standing trial with sufficient accommodations, and ADOPTS the Report and Recommendation of the Magistrate that, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, the case be transferred to the Middle District of Florida for trial to be held in Orlando.

I. Standard of Review

On orders of relating to nondispositive, pretrial matters, a district court reviews a magistrate's decision where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Local Rule 74.1(a)(1). A magistrate's report and recommendation regarding dispositive orders are reviewed *de novo*. 28 U.S.C. § 636(b); Local Rule 74.1(a)(2). In this instance, however, Magistrate England issued a Report and Recommendation, commenting on Defendant's ability to stand trial and recommending that the trial be moved. The parties filed objections to the Report and Recommendation in accordance with the procedures relating to reports and recommendations of dispositive motions pursuant to § 636(b) and Local Rule 74.1(a)(2). Thus, although the issue objected to by the parties—whether the Defendant's case should be transferred to the Middle District of Florida—is nondispositive, it arises out of whether Defendant retains the physical health to stand trial, a dispositive issue. Out of an abundance of caution, the Court will treat the report and objections pursuant to § 636(b)(1)(B) and Local Rule 74.1(a)(2) and review the report and objections *de novo*. The Court's review must include *de novo* review of the magistrate's findings of fact, including any credibility determinations. *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003).

II. Analysis

The two issues discussed by the parties, and eluded to in the Report and Recommendation, are (1) whether Defendant is able to stand trial and (2) if he is able to stand trial, whether he is able to travel to Missouri for purposes of standing trial in Springfield, Missouri.

A district court is vested great discretion when deciding whether to postpone a trial due to a Defendant's health. The court should consider all the circumstances, including the medical evidence of a defendant's health, the defendant's current activities, any steps the defendant is taking

or refusing to take to improve his health, the measures that may be implemented to reduce medical risks of trial, and whether delay would be useful. Once the risk is evaluated, the court must weigh that risk against the demonstrable public interest. *United States v. Zannino*, 895 F.2d 1, 13 (1st Cir. 1990); *accord Clement v. United States*, 149 F. 305, 311-12 (8th Cir. 1906) (finding no abuse of discretion where district court denied a continuance upon finding that defendant's feeble condition was caused by age, would not improve over time, did not affect defendant's ability in court, and would be alleviated by shortening each day's trial session).

In this case, the evidence of record indicates that Defendant is able to stand trial. As the magistrate noted, Defendant has a number of health conditions, including chronic conjunctivitis, chronic prostatitis, advanced degenerative disc disease in the lower back, atherosclerotic coronary disease, and significant obstructive pulmonary disease. However, his treating physician has opined that Defendant would not tolerate "well" seven to ten hour sessions a day. The Government's records consultant, Dr. Riley, has concluded that attending trial would not increase any risk to Elliot's health. Additionally, Defendant's activities, as reported by the Government, indicate that he is capable of standing trial. Defendant does attend work, although not full-time; he walks short distances without assistive devices; he remains outside without continuous oxygen; and it is reported that he continues to smoke and does not attend therapy as requested.¹ Finally, there is no evidence indicating that Defendant's condition is likely to improve over time.

Defendant currently resides in Florida. His treating physician has advised that he would be unable to travel to Springfield to be present for his trial. The Government's records consultant,

¹ Defendant has filed a Motion (Doc. 73), requesting a hearing and the ability to depose the Government witnesses who have provided this information. Because this Court has decided to transfer the case to Florida, such a request, as made to this Court, will be denied.

crediting Defendant's complaints as true, deferred to the decision of the treating physician regarding Defendant's ability to travel. The Government has previously indicated that it would be willing to try Defendant in the Middle District of Florida in Orlando. *See, e.g., United States' Status Report on Defendant Kenneth Wayne Elliott's Physical Ability to Stand Trial* (Doc. 72) at 17-18 (noting a court's ability to transfer venue under Federal Rule of Criminal Procedure 21(b) and stating that if "Elliott consents to the transfer of this case to the Middle District of Florida for the purpose of standing trial in Orlando, the United States will also consent to this transfer"). Defendant then filed a Notice of Consent to Transfer, indicating he would be willing to transfer the case to the Middle District of Florida. (The Notice does not stipulate that the transfer is for "the purpose of standing trial.") The Government has subsequently argued that it would prefer a trial setting in Springfield.

Rule 21(b) of the Federal Rules of Criminal Procedure allows a proceeding to be transferred upon the defendant's motion to another district "for the convenience of the parties and witnesses and in the interest of justice." This provision has been used to transfer cases for trial when a defendant has been unable to travel to the district of indictment. *See, e.g., United States v. Lopez*, No. 40021-02-RDR, 2002 WL 31498984 at *3-4 (D. Kan. Sept. 5, 2002) (analyzing transfer under Rule 21 and finding that a Kansas case against a quadriplegic living in Arizona, who was unable to travel and required the assistance of others for all activities of daily living, including opening legal mail, should be tried in Arizona).

In this case, the medical evidence suggests that Defendant cannot travel. The Government has offered no evidence to contradict that assertion. The Government argues that a transfer would require as many as fifteen to twenty witnesses to travel from the southwest Missouri area to Florida for trial and would prevent Defendant from being tried in the district in which the bulk of the alleged

criminal activity took place. However, based on the evidence before the Magistrate and now before this Court, it appears that a transfer is an essential accommodation to assure that Defendant is able to participate in his trial. Giving the Defendant the benefit of the doubt, the Court will overrule the Government's objections and order that this case be transferred to the Middle District of Florida for trial in Orlando.

Defendant objects to the Magistrate's Report and Recommendation, arguing that it should be modified to exclude any finding that Defendant is capable of standing trial. Based on the record as developed before this Court, Defendant appears capable to stand trial. Thus, any modification in the Magistrate's Report and Recommendation is unnecessary. Defendant's objections shall also be denied. Accordingly, it is hereby

ORDERED that, upon a *de novo* review of the record, the Court **ADOPTS** the Report and Recommendation (Doc. 79) of the United States Magistrate, **DENIES AS MOOT** Defendant's Motion (Doc. 64) to waive appearance and Defendant's Motion for Hearing and Discovery (Doc. 73), and **ORDERS** that, pursuant to Rule 21 of the Federal Rules of Criminal Procedure, this case be **TRANSFERRED** to the Middle District of Florida for trial.

IT IS SO ORDERED.

DATE: March 9, 2005

/s/ Richard E. Dorr
RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT