

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 08-00026-04-CR-W-FJG
)
CHRISTOPHER L. ELDER,)
)
Defendant.)

**UNITED STATES' SUGGESTIONS IN OPPOSITION TO
DEFENDANT ELDER'S MOTION TO DISMISS THE INDICTMENT BECAUSE OF
GOVERNMENTAL MISCONDUCT**

The United States of America provides the following suggestions in opposition to defendant Christopher L. Elder's motion to dismiss the Indictment because of alleged government misconduct.

Suggestions in Opposition

Factual background

On February 6, 2008, a Grand Jury in the Western District of Missouri returned a Twenty-Four Count Indictment naming defendants Mary Lynn Rostie, Cynthia Martin, Troy Solomon, Christopher Elder, and Delmon Johnson. They were charged with crimes arising out of their participation in a conspiracy to distribute controlled substances (hydrocodone, alprazolam, and Promethazine with Codeine). Defendant Christopher Elder ("Elder") is charged in nine counts. The Indictment alleges that Elder wrote unlawful and invalid prescriptions for thousands of dosage units of Schedule III, IV and V controlled substances. Count One charges all five defendants with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846. Counts Three through Six charge defendants Elder, Rostie, and Solomon with the

illegitimate distribution of Schedule III and IV controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Counts Seven through Ten charge defendants Elder, Rostie, Solomon, and Johnson with the illegitimate distribution of Schedule III, IV and V controlled substances and aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

On July 10, 2008, DEA Diversion Investigator Judi Watterson (“DI Watterson”) and DEA Special Agent Brendan Fitzpatrick interviewed Diane Hearn, clinic manager for Westfield Medical Clinic, in person in Houston, Texas. Dr. Elder worked at Westfield Medical Clinic in 2005. During the interview, DI Watterson asked if any defense investigators had contacted Hearn, and Hearn replied that none had. DI Watterson told Hearn that it was likely that investigators for the defense would contact her, and that it was Hearn’s choice whether or not to speak with a defense investigator.

On August 21, 2008, Hearn contacted DI Watterson by phone. Hearn said that she had been contacted by defense investigator Mark Reeder. Reeder works with counsel for Dr. Elder. According to Hearn, Hearn told Reeder that the DEA had told her not to talk to him. Reeder asked Hearn who at DEA had given this instruction, and Hearn refused to give a name, just saying it was DEA. According to Hearn, Reeder told her that the defense would file a motion concerning Hearn’s statement.

DI Watterson then spoke to one of the AUSAs assigned to the case, who gave DI Watterson Reeder’s cell phone number and e-mail address. On August 22, 2008, DI Watterson contacted Hearn by telephone. DI Watterson reminded Hearn that DI Watterson had told Hearn during the July 10 interview that it was Hearn’s choice whether to speak to the defense

investigator, and that Hearn had never been instructed not to speak to the defense. Hearn said that the mistake had been hers. Hearn took Reeder's cell phone number and said she would call him to clarify the situation.

Later on August 22, Hearn called DI Watterson. Hearn said that she had spoken by phone with Reeder, and that she told Reeder that she understood that it was her decision whether or not to speak to Reeder, and that she had made the decision not to answer his questions. Hearn told DI Watterson that Reeder had been rude during the phone call by trying to cut her off, and by telling her that he was not interested in what she had to say.

Argument

The United States did not interfere with Dr. Elder's ability to prepare his defense.

Without question, witness Hearn's initial statements to defense investigator Reeder caused understandable confusion. A full examination of the facts, however, reveals that the DEA Investigator properly advised Hearn at the first interview that it was Hearn's choice whether to speak to the defense, and that she reiterated that information to her after Hearn had mistakenly informed Reeder that DEA had instructed Hearn not to speak to him. Consequently, no violation of Dr. Elder's rights has occurred, and his motion to dismiss the indictment should be denied.

"[T]he defendant's right of access is not violated when a witness chooses of her own volition not to be interviewed." *United States v. Heppner*, 519 F.3d 744, 750 (8th Cir. 2008); *United States v. Bittner*, 728 F.2d 1038, 1041 (8th Cir. 1984). Nor does an agent advising a witness of her right to decline an interview with the defense violate any right of the defendant. *Id.* at 1042.

In this case, DI Watterson advised Hearn twice that it was Hearn's choice whether to speak to a defense investigator, at the first interview and again on August 21. Hearn admitted that telling Reeder that DEA had instructed her not to speak to him was her mistake. *See, e.g., United States v. Davis*, 154 F.3d 772, 785 (8th Cir. 1998) (witness admits he misspoke when he told a defense attorney that the prosecution had instructed him not to speak to the defense). Hearn called Reeder and informed him that she understood that the choice whether to submit to an interview was hers, but that she decided on her own not to do so. Nothing the United States has done has interfered with any right of Dr. Elder.

Indeed, since Hearn has made clear that she understands that she has the choice whether or not to speak to the defense, but she chooses not to do so, no remedy at all would be appropriate. *See United States v. Murdock*, 826 F.2d 771, 773 (8th Cir. 1987) (where witness would not have spoken to defense in any event, government could not have interfered with the defense's access to the witness).

CONCLUSION

The United States respectfully urges that Elder's motion to dismiss the Indictment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on September 9, 2008, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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