

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

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

REPORT AND RECOMMENDATION

This matter is currently before the Court on defendant Elder’s Motion to Dismiss the Indictment as to Defendant Elder Because of Government Misconduct (doc #93). For the reasons set forth below, it is recommended that this motion be denied.

I. INTRODUCTION

On February 6, 2008, the Grand Jury returned a twenty-four count indictment against Mary Lynn Rostie, Cynthia S. Martin, Troy R. Solomon, Christopher L. Elder and Delmon L. Johnson. Defendant Elder is charged in Counts One and Three through Ten of the indictment. Count One of the indictment charges a conspiracy to distribute controlled substances. Counts Three through Ten charge the distribution of controlled substances.

On October 21, 2008, an evidentiary hearing was held on defendant Elder’s motion to dismiss. Defendant Elder was represented by retained counsel John R. Osgood. The Government was represented by Assistant United States Attorneys Rudolph R. Rhodes, IV, and J. Curt Bohling. The Government called Diversion Investigator (DI) Judi Watterson of the Drug Enforcement Administration as a witness. The defense called Mark Reeder, a private investigator, to testify.

II. FINDINGS OF FACT

On the basis of the evidence adduced at the evidentiary hearing, the undersigned submits the following proposed findings of fact:

1. Judi Watterson has been a diversion investigator for the Drug Enforcement Administration (“DEA”) for 22 years. (Tr. at 3) As a diversion investigator, DI

Watterson enforces the laws and regulations pertaining to prescription controlled substances. (Tr. at 3) DI Watterson has been assigned to work on a criminal case involving defendant Elder. (Tr. at 3)

2. While working the case involving defendant Elder, DI Watterson made contact with a person named Diane Hearn. (Tr. at 3) Ms. Hearn is the office manager at Westfield Medical Clinic in Houston, Texas. (Tr. at 4) DI Watterson first sent Ms. Hearn a letter in 2006 requesting information as to when defendant Elder worked at Westfield Medical Clinic. (Tr. at 4) Ms. Hearn responded by letter advising that Elder had worked at Westfield Medical Clinic from approximately February 2005 through early March 2006. (Tr. at 4)
3. On July 10, 2008, DI Watterson and Special Agent (SA) Brendan Fitzpatrick traveled to Westfield Medical Clinic to meet with Ms. Hearn and determine whether or not she had an ability to recognize defendant Elder's handwriting. (Tr. at 5) Ms. Hearn already knew that Dr. Elder was under investigation because she had received a grand jury subpoena. (Tr. at 27-28) Ms. Hearn advised that she had seen Elder's handwriting during the course of his employment at the clinic as Elder had to sign time sheets, make notes in patient charts and write prescriptions. (Tr. at 5) Ms. Hearn told DI Watterson and SA Fitzpatrick that she was familiar with Elder's handwriting based on seeing it during their work relationship. (Tr. at 5)
4. DI Watterson and SA Fitzpatrick then showed Ms. Hearn copies of ten prescriptions related to the indictment in the instant case. (Tr. at 5-6) DI Watterson testified that if Ms. Hearn had said that she was not familiar with Dr. Elder's handwriting, DI Watterson would not have shown her the prescriptions. (Tr. at 22-23) The prescriptions contained handwriting on them, that is a patient name, the drug, directions for use and a doctor's signature. (Tr. at 6) Ms. Hearn affirmed that all of the prescriptions appeared to be in Dr. Elder's handwriting and have his signature. (Tr. at 6) Ms. Hearn did not equivocate; she was positive. (Tr. at 16) After she had identified Elder's handwriting, DI Watterson told Ms. Hearn that Elder had been indicted. (Tr. at 28)
5. Ms. Hearn's husband, a doctor, had some issues in the past with the DEA. (Tr. at 12-13) Ms. Hearn's husband's license was pulled as a result of the DEA investigation. (Tr. at 13) Sometime in 2000, he surrendered his DEA registration. (Tr. at 22) Mr. Reeder testified that it was explained to him that Ms. Hearn's husband was taken out of his office in handcuffs in front of his patients and his wife. (Tr. at 39) These issues were not discussed when DI Watterson and SA Fitzpatrick met with Ms. Hearn. (Tr. at 13)
6. DI Watterson told Ms. Hearn that it was possible that she might be contacted at some point in time by an investigator for the defense. (Tr. at 13) DI Watterson told Ms. Hearn that it was her choice as to who she wanted to speak with or not speak with. (Tr. at 13)
7. Mark Reeder testified that he called Ms. Hearn, advised her that he worked for Dr. Elder's attorney and said that he needed a few minutes of her time to ask her some questions about information contained in a report from the DEA. (Tr. at 35) Ms. Hearn told Mr. Reeder that "they" told her not to talk to him. (Tr. at 35) When asked who "they" were, Ms. Hearn said the DEA. (Tr. at 36) Mr. Reeder told Ms. Hearn that he did not think it was permissible for the DEA to tell her to whom she

could or could not talk and that she would be in Kansas City in a courtroom testifying about this. (Tr. at 36-38) At that point, Ms. Hearn told Mr. Reeder that she was not going to talk to him any more and hung up. (Tr. at 37) Mr. Reeder conveyed his conversation with Ms. Hearn to defendant Elder's attorney, John Osgood. (Tr. at 37)

8. On August 21, 2008, DI Watterson received a phone call from Ms. Hearn about a contact that she had received from the defense investigator. (Tr. at 23-24) Ms. Hearn told DI Watterson that she had been contacted by Mark Reeder, who was representing Dr. Elder, and that he wanted to talk to her, but that she did not want to talk to him. (Tr. at 24) Ms. Hearn told Ms. Watterson that she had told Mr. Reeder that the DEA had instructed her not to speak to any investigators. (Tr. at 24, 26) Ms. Hearn told DI Watterson that Mr. Reeder told her that there would be something filed. (Tr. at 32) DI Watterson testified that she had never given Ms. Hearn an instruction not to speak to investigators. (Tr. at 24)
9. DI Watterson called Assistant United States Attorney Rhodes and told him what had happened. (Tr. at 24) Mr. Rhodes gave DI Watterson Mr. Reeder's cell phone number and asked DI Watterson to call Ms. Hearn and ask her if she would call Mr. Reeder and let him know that it was her decision not to speak with him. (Tr. at 24)
10. DI Watterson called Ms. Hearn the next day, August 22, 2008, and asked her if she would be willing to call Mr. Reeder to let him know that it was her decision not to speak with him, but if she wanted to, she could speak with him; it was simply her choice. (Tr. at 24-25) Ms. Hearn told DI Watterson that she would call Mr. Reeder. (Tr. at 25) Ms. Hearn called DI Watterson later and told her that she had called Mr. Reeder and that he had been rude to her—that he did not want to hear what she had to say and that he just kept interrupting her. (Tr. at 25)
11. Mr. Reeder testified that Ms. Hearn called him and told him that she needed to clear a few things up. (Tr. at 37-38) First, Ms. Hearn told Mr. Reeder that she never told him that the DEA told her not to talk, but when pressed by Mr. Reeder, Ms. Hearn stated that she had misspoken—that the DEA had never told her not to talk. (Tr. at 38)
12. The subject Motion to Dismiss the Indictment as to Defendant Elder Because of Government Misconduct (doc #93) was filed on August 22, 2008.
13. DI Watterson testified that Ms. Hearn has never asked her for any kind of accommodation or special treatment as a result of being a witness in this case. (Tr. at 22)

### III. DISCUSSION

Defendant Elder requests that the Court dismiss the indictment against him because of interference by DEA agents with defendant's constitutional right to prepare and present a defense to the criminal charges in this case. (Motion to Dismiss the Indictment as to Defendant Elder Because of Government Misconduct (doc #93) at 1) Specifically, defendant argues that Ms. Hearn

informed Mr. Reeder that “she was informed by the DEA that a defense investigator would probably be contacting her in person or by telephone to ask her about her interview and ... that she should refuse to talk to the investigator or provide any information.” (Id. at 3-4) Defendant argues that he has a right to interview his accusers and if the government deliberately interferes with that right, it is government misconduct. (Id. at 4)

In United States v. Bittner, 728 F.2d 1038 (8<sup>th</sup> Cir. 1984), the court provided the following summary of the law with respect to the defendant’s claim that the government impermissibly interfered with his right to interview witnesses:

Although the prosecution and the defense have an equal right to interview witnesses in a criminal proceedings, the defendant’s right of access is not violated when a witness chooses of her own volition not to be interviewed. ... In this case, Brown [the victim] merely exercised her right to refuse to speak with Bittner’s attorney. Though the prosecution may not without justification interfere with a witness’ free choice to speak with a defense attorney, ... it does not appear in this case that the prosecution impermissibly interfered with Brown’s free choice. Rather, Agent Fennewald merely advised her of her right to decline interviews with Bittner’s attorney. Contacts of this nature do not constitute an impermissible interference with the defendant’s right of access to witnesses.

Id. at 1041-42 (citations and footnote omitted).

As in Bittner, the facts in this case suggest that the government did not interfere with defendant Elder’s right of access to Ms. Hearn. DI Watterson merely advised Ms. Hearn of her right to decline interviews with defense investigators. (See Fact Nos. 6 and 8, supra) “[T]he government does not interfere when it merely advises witnesses of their right to decide whether or not to submit to pre-trial interviews.” United States v. Davis, 154 F.3d 772, 785 (8<sup>th</sup> Cir. 1998), cert. denied, 525 U.S. 1161 (1999). While Ms. Hearn did originally tell Mr. Reeder that the DEA told her not to talk to him, it appears that Ms. Hearn chose of her own volition not to be interviewed by Mr. Reeder and merely tried to place the responsibility for that decision on someone other than herself. (See Fact No. 8, supra) Ms. Hearn later recanted this shifting of responsibility and told Mr. Reeder that she had misspoken and that the DEA had never told her not to talk. (See Fact No. 11, supra) There is no evidence before the Court that Ms. Hearn’s reluctance to talk to Mr. Reeder resulted from any interference by the government. Defendant’s motion to dismiss for government misconduct must

be denied.

#### IV. CONCLUSION

Based on the foregoing, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying the Motion to Dismiss the Indictment as to Defendant Elder Because of Government Misconduct (doc #93).

Counsel are reminded they have ten days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections to same. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

*/s/ Sarah W. Hays*  
SARAH W. HAYS  
UNITED STATES MAGISTRATE JUDGE