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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Case No. 08-00026-03,05-CR-W-FJC
)
TROY R. SOLOMON, and)
DELMON L. JOHNSON,)
)
Defendants.)

REPORT AND RECOMMENDATION

This matter is currently before the Court on Defendants Troy Solomon and Delmon Johnson's Motion to Dismiss (doc #156). For the reasons set forth below, it is recommended that this motion be denied.

I. DEFENDANTS' CLAIMS

Defendants claim the charges against them should be dismissed based on "Prosecutorial Misconduct stemming from abuse and misuse of discovery and the Fifth and Sixth Amendments to the United States Constitution." (Motion to Dismiss at 1) In support of the motion, defendants argue:

I.

The Defendants were originally indicted on February 5, 2008. Since that time, various discovery issues have been brought to this Court's attention regarding the timeliness of the disclosure of such material as is required. To illustrate this point, Counsel for Defendants received as recently as Monday, December 8, 2008 seven (7) computer disks comprising several thousand documents and an additional 175 pages of material. The prior Thursday, December 4, 2008, Counsel received the statements of Ada and Pleshette Johnson for the first time, despite the fact that the Government relied heavily upon those statements (which arguably contain *Brady* material) in its Second Supplemental Response to Defendant Solomon's Second Supplemental Motion to Suppress Evidence.

II.

The Eighth Circuit has echoed the principles protected and addressed in *Brady v. Maryland*, 373 U.S. 83 ... (1963). In *Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986), the Court held that evidence discovered, after the trial, of information known to the prosecution but unknown to the defense is a violation of due process. The Government's repeated pattern of trickling important information to the defense is disturbing. Additionally, contrary to the rule of law, the Government has tried to expand its case post-indictment beyond what is reasonable to prepare the instant indictment for trial. For example, use of a search warrant to avoid the protections afforded to defendant post indictment is akin to misusing grand jury or administration subpoena's to bolster a prosecution. The courts have held "it is improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial." See United States v. Dardi, 330 F.2d 316, 336 (2d. Cir.) cert denied, 379 US 845 (1964)(misuse grand jury subpoena); United States v. Lazar, 2005 US Dist Lexis 44213 (US Dist. Tenn. 2005) citing United States v. La Salle Nat. Bank, 437 US 298 (1978).

It is not implausible that the pace of the Government's production is indicative of an investigation that has yet to be fleshed-out. As such, Defendants are provided the information and evidence they are constitutionally entitled to only after the Government has decided what, if any significance the material has to them.

(Motion to Dismiss at 1-3)

II. DISCUSSION

In <u>Nassar v. Sissel</u>, 792 F.2d 119 (8th Cir. 1986), the court held that Nassar was not denied due process by the prosecutor's failure to disclose allegedly exculpatory evidence prior to trial. The court stated: "*Brady* does not require pretrial disclosure as long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence. Due process is satisfied." <u>Id.</u> at 121. Applying this test to the facts before the Court clearly demonstrates that defendants' right to due process has not been violated. The trial is scheduled to commence in July 2009. Defendants have ample time to make use of any evidence provided to them in December 2008.

With respect to defendants' second argument that use of a post-indictment search warrant is improper, defendants cite no authority for the proposition that a post-indictment search warrant is impermissible or improper. The cases cited by defendants do not deal with search warrants. Further, even if an improper search warrant was utilized (on which the Court has no evidence before it to so find), the appropriate remedy would appear to be suppression of evidence rather than dismissal of the case.

In conclusion, defendants argue that they "are provided the information and evidence they are constitutionally entitled to only after the Government has decided what, if any significance the material has to them." (Motion to Dismiss at 3) The Court sees this as an appropriate way for the Government to proceed as it is the Government's obligation in the first instance to determine whether information in its possession is <u>Brady</u> material which must be produced to defendants. While "the prudent prosecutor will resolve doubtful questions in favor of disclosure," "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."

III. 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 Defendants Troy Solomon and Delmon Johnson's Motion to Dismiss (doc #156).

¹United States v. Agurs, 427 U.S. 97, 108 (1976).

²United States v. Bagley, 473 U.S. 667, 675 (1985).

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