

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

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Criminal Action No. |
| |) | 10-00162-03-06/07-15/16-24/25-CR-W-FJG |
| SHAWN HAMPTON, |) | |
| NARICCO SCOTT, |) | |
| CALAH JOHNSON, |) | |
| MYLIN SMITH, |) | |
| THEODORE WIGGINS, |) | |
| TERRANCE BLEWETT, |) | |
| and |) | |
| TAISHA RUSSELL, |) | |
| |) | |
| Defendants. |) | |

ORDER CONTINUING CURRENT TRIAL SETTING

Before the court is a motion to continue filed by defendant Taisha Russell (document number 411). In support of the motion, defendant states as follows:

1. Ms. Russell is charged in Count One of a 17-count Second Superseding Indictment with conspiracy to distribute cocaine and crack cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). The Second Superseding Indictment was filed on June 7, 2011 and unsealed on June 10, 2011. The undersigned counsel was appointed to represent Ms. Russell on June 14, 2011. Arraignment was held before the magistrate judge on June 16, 2011. At arraignment, Ms. Russell entered a plea of not guilty to the count of the Second Superseding Indictment applicable to her. She was ordered released on a continuing bail bond.

* * * * *

3. Undersigned counsel has had less than a week to review the substantial discovery and asserts that this instant case requires further factual and legal investigation that necessitates the granting of a continuance. Counsel has met with Ms. Russell twice and intends to meet with [the] client numerous times prior to trial. The additional time is necessary to allow the defendant and her counsel to become completely prepared for trial. In counsel's humble opinion, failure to grant a continuance in this case would deny counsel the reasonable time necessary for effective preparation after taking into account the exercise of due diligence.

4. Ms. Russell acknowledges and waives her right to a speedy trial. This motion is not made to harass this Court, and it is in the interest of justice that it be granted in that the ends of justice served by granting such continuance outweigh the

best interests of the public and the defendants in a speedy trial pursuant to 18 U.S.C. § 3161(h)(8).

5. The undersigned counsel has spoken by telephone with Assistant United States Attorney Brent Venneman, and explained the necessity for this continuance. Mr. Venneman has no objection to this Motion for Continuance or the proposed February 2012 trial setting.

6. Undersigned counsel has corresponded via email with Mr. David J. Guastello, counsel for Mr. Terrance Blewett; Mr. Kurt D. Marquart, counsel for Mr. Calah D. Johnson; and Mr. Michael Walker, counsel for Mr. Theodore S. Wiggins. On behalf of their respective clients, there is no objection to this Motion for Continuance or a February 2012 trial setting.

7. [Mr. Daniel J. Ross, counsel for Mr. Shawn Hampton, notified the court that Mr. Hampton joins in this motion.]

8. Undersigned counsel has corresponded via email with Ms. Laine Cardarella, "stand by" counsel for Mr. Naricco T. Scott. While "stand by" counsel cannot voice an opinion with respect to this motion, Ms. Cardarella stated that she is under the impression that Mr. Scott, who is pro se, will object to any continuance. Undersigned counsel has not made any attempt to contact the pro se co-defendant, Mr. Scott. [Kurt Marquart, representing Calah Johnson, spoke to defendant Naricco Scott about a continuance, and Mr. Scott advised Mr. Marquart that he did not object to a short continuance.]

9. Undersigned counsel has corresponded with Mr. Alex S. McCauley, counsel for Mr. Mylin D. Smith. . . . Mr. Smith will object to any continuance; [however, Mr. McCauley does not have a scheduling conflict with the February 2012 trial docket.]

The Speedy Trial Act of 1974, as amended, mandates the commencement of the trial of a defendant within 70 days from the defendant's first appearance before a judicial officer of the court in which the charge is pending. In computing the 70-day time period, the periods of delay set forth in 18 U.S.C. § 3161(h) are to be excluded. Any period of delay resulting from a continuance granted at the request of a defendant is excludable if the court finds the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial, provided the court sets forth the reason for such finding.

Counsel for defendant Russell has had very little time to review the discovery which includes (according to the Stipulations filed on October 22, 2010, and November 24, 2010)

expert witness reports from experts in DNA, fingerprints, drug trafficking investigations, forensic chemistry for illegal drugs, and firearms; recorded telephone conversations of several defendants; video camera recordings of several defendants; wiretaps for all defendants except one; pen registers for several defendants; trap and trace devices for several defendants; surveillance film and video tapes; federal search warrants for three of the defendants; consent searches for ten of the defendants; searches incident to arrest on all defendants; custodial statements/admissions/confessions as to 11 defendants; non-custodial statements as to one defendant; proposed 404(b) evidence; Brady/Giglio material; and prior criminal convictions.

Title 18, United States Code, Section 3161(h) sets forth the periods of delay which are to be excluded in computing the time within which a criminal trial must commence.

Subsection (7) states in relevant part as follows:

- (A) Any period of delay resulting from a continuance granted by any judge . . . at the request of the defendant or his counsel . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. . . .

- (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

* * * * *

- (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

* * * * *

- (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii),

would . . . deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

Based on the above, I find that the amount of discovery and the complexity of the case due to the number of defendants justifies a continuance as counsel for defendant Taisha Russell was not appointed until June 14, 2011, and there is not sufficient time between that date and the current trial setting to effectively prepare for trial. Counsel needs time to review all of the discovery with his client, conduct independent investigation, and determine what pretrial motions if any should be filed. Government responses are required for each motion. The Magistrate Judge requires time to consider motions, hold any necessary hearings, obtain transcripts, and prepare orders or Reports and Recommendations. The parties are then entitled to file objections which must be considered by the District Judge so that rulings may be made prior to trial.

Trial delay due to an ends-of-justice continuance granted to a defendant applies to all of the codefendants as excludable time. United States v. Fogarty, 692 F.2d 542, 546 (8th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). In Fogarty, the court stated:

. . . The Act specifically addresses the application of exclusions to multiple defendant cases such as this one. Section 3161(h)(7) provides that a court shall exclude:

A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

We agree with the D.C. Circuit's view that "[this provision] is crucial in a case involving multiple defendants because it provides that an exclusion applicable to one defendant applies to all codefendants." United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980); accord, United States v. Manbeck, 514 F. Supp. 152, 154-55 (D.D.C. 1981). Applying this provision here, we note that: (1) Fogarty's severance motion was never granted and he was to be tried along with his coconspirator/codefendants; (2) the January 6, 1981 trial date was clearly timely as to Fogarty's codefendants who successfully sought continuances; (3) the district court

properly determined that the delay resulting from the granting of the continuance motions was reasonable.

However, defendant's waiver of her Speedy Trial rights is immaterial in this case since she is on bond. In Zedner v. United States, 547 U.S. 489 (2006), the Supreme Court pointed out that the public, and not just the defendant, is protected by the Speedy Trial Act:

[T]he Speedy Trial Act generally requires a trial to begin within 70 days of the filing of an information or indictment or the defendant's initial appearance, but the Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. . . .

Much of the Act's flexibility is furnished by § 3161(h)(8),¹ which governs ends-of-justice continuances. . . . This provision permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public's and the defendant's interests in a speedy trial . . .

If the Act were designed solely to protect a defendant's right to a speedy trial, it would make sense to allow a defendant to waive the application of the Act. But the Act was designed with the public interest firmly in mind. . . . That public interest cannot be served, the Act recognizes, if defendants may opt out of the Act entirely.

This interpretation is entirely in accord with the Act's legislative history. As both the 1974 House and Senate Reports illustrate, the Act was designed not just to benefit defendants but also to serve the public interest by, among other things, . . . preventing extended pretrial delay from impairing the deterrent effect of punishment. . . . The Senate Report accompanying the 1979 amendments to the Act put an even finer point on it: "[T]he Act seeks to protect and promote speedy trial interests that go beyond the rights of the defendant; although the Sixth Amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right -- which may or may not be in accord with society's." . . . Because defendants may . . . welcome delay, it is unsurprising that Congress refrained from empowering defendants to make prospective waivers of the Act's application. See S. Rep. No. 96-212, at 29 ("Because of the Act's emphasis on that societal right, a defendant ought not be permitted to waive rights that are not his or hers alone to relinquish").

547 U.S. at 497-502.

¹Subparagraph (h)(8) has been renamed (h)(7).

After considering all of the above, I find that the ends of justice served by removing this criminal action from the joint criminal jury trial docket which will commence August 1, 2011, and continuing the trial until the joint criminal jury trial docket which will commence February 13, 2012, outweigh the best interest of the public and the defendant in a speedy trial. I further find that, in accordance with § 3161(h)(7)(C), congestion of the court's calendar was not considered in deciding to remove this case from the joint criminal jury trial docket which will commence August 1, 2011. And finally, the delay due to this continuance applies to all of the codefendants as excludable time under the Speedy Trial Act. Therefore, it is

ORDERED that this criminal action is removed from the joint criminal jury trial docket which will commence August 1, 2011. It is further

ORDERED that this criminal action is set for trial on the joint criminal jury trial docket which will commence February 13, 2012. It is further

ORDERED that, pursuant to 18 U.S.C. § 3161(h)(7), the time between the date of this order and February 13, 2012, shall be excluded in computing the time within which the trial of this criminal action must commence.

/s/ Fernando J. Gaitan, Jr.
FERNANDO J. GAITAN, JR.
Chief United States District Judge

Kansas City, Missouri
July 6, 2011