

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 02-13-B-S
)
PHILIP BUNNELL,)
)
Defendant)

RECOMMENDED DECISION ON MOTION TO DISMISS

This matter is before the Court on the Defendant's motion to dismiss (Docket No. 9) seeking dismissal of the indictment on five separate grounds. I now recommend that the court **DENY** the motion to dismiss.

BACKGROUND

Philip Bunnell is charged in three separate counts with knowingly possessing an image of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) on various dates stretching from June 10, 2000 to September 11, 2000. The facts giving rise to these charges first came to the attention of the Machias Police Department on July 3, 2000, when officials from the University of Maine at Machias alerted law enforcement officers to the possibility that Bunnell had used university computers to access pornographic materials on the internet. The Machias police alerted United States Customs' officials who conducted a preliminary review of the university computer allegedly used by Bunnell and concluded that the forensic examination revealed that the computer had been used to access images and listings associated with child pornography.

Scott Inman of the Machias Police Department then interviewed Bunnell on September 9, 2000, and Bunnell admitted to using the university computer to conduct research for a class on sexual abuse of children and incest he had taken. Bunnell told the officer that the professor who conducted the course knew nothing about his research and that he had also used his personal computer in his home to conduct additional research on the internet. Bunnell told the officer that his unfinished course paper was at his home.

Acting on the information he received during this interview, Inman sought and obtained, on September 11 and 12, 2000, two successive search warrants from a state court justice of the peace to search Bunnell's residential premises at 8 Harwood Street, Machias, Maine. Evidence seized included not only computer information relating to pornographic images but also "normal" photographs of at least one child displayed in the hallway of the home believed to be similar in appearance to that of a child depicted in a pornographic image displayed on the computer. The indictment against Bunnell issued on February 12, 2002.

DISCUSSION

Defendant has raised five separate grounds for dismissal of this indictment. The first two grounds assert that he has meritorious defenses to the charges based upon theories of "literary purpose" and "entrapment by estoppel." The second two grounds allege that the United States' improper conduct, its "spoliation of evidence" and "prosecutorial delay," warrant dismissal of the charges. Finally, Bunnell challenges the constitutionality of 18 U.S.C. § 2252A(5)(B).

A. Literary Purpose and Entrapment by Estoppel

Bunnell claims the sole purpose for his research and possession of the pornographic images was a “literary purpose” for education and that therefore the First Amendment of the United States Constitution shields his conduct from criminal prosecution. It is true that in one case in this district the court did recognize the possibility of a “literary purpose” defense and allowed the issue to proceed to trial. Following that defendant’s conviction after a jury trial, the issue raised on appeal related to the applicability of the literary defense with respect to the “acceptance of responsibility” downward adjustment under the U.S.S.G. § 3E1.1. United States v. Upham, 168 F.3d 532, 537 (1st Cir. 1999). In discussing that issue, the Court of Appeals for the First Circuit commented “it may be that going to trial solely to present this alleged defense falls within the spirit, if not the letter” of the guideline comment relating to the availability of the downward adjustment in the absence of a guilty plea. Id. at 538 (emphasis added). The First Circuit affirmed the district court’s conclusion that there was no factual predicate for the downward adjustment. Id. Upham hardly amounts to a ringing endorsement of the availability of the defense.

However, the First Circuit has suggested more forcefully that an affirmative defense might be successful in an 18 U.S.C. § 2252A/ § 2256(8)(B) prosecution if the material at issue had countervailing social value. United States v. Hilton, 167 F.3d 61, 74 (1st Cir. 1999) (acknowledging a belief that a First Amendment affirmative defense would be available vis-à-vis certain prosecutions but declining to define its “precise dimensions”). The United States Supreme Court’s recent offering in Ashcroft v. Free Speech Coalition, 535 U.S. ___, 122 S. Ct. 1389 (2002), overrules Hilton with respect to

holding that the prohibitions contained with 18 U.S.C. § 2256(8)(B) and § 2256(8)(D) are not overbroad and unconstitutional. However, the reasoning of the Free Speech Coalition majority and dissent opinions all support the notion that in a very narrow number of 18 U.S.C. § 2252A/ § 2256(8)(A) prosecutions the defendants could be entitled to press a First Amendment defense.¹

Assuming arguendo that the “literary purpose” defense has viability, Bunnell’s remedy is not dismissal of the charges at this juncture. In the present case the facts surrounding the creation of the research paper are very much in dispute. Bunnell contends he received permission to continue course work after the end of the semester and that in July 2000 he was working on completing his course assignments from the prior semester. The United States points out that its forensic examination of the seized computer shows that the paper was never created until July 16, 2000, three weeks after the university computer was seized and Bunnell had received counseling from university officials about his use of the computer. If Bunnell were able to raise the defense at trial, the factfinder would have to make a determination as to whether or not the research was undertaken for a literary purpose. Given the contours of this contest, the existence of a possible defense does not warrant pretrial dismissal of the charges.

The same rationale applies to Bunnell’s argument concerning his “entrapment by estoppel” defense. This defense clearly has been recognized and endorsed in the First Circuit. United States v. Ellis, 168 F.3d 558, 561 (1st Cir. 1999). To estop the

¹ The United States’ opposition to this portion of Bunnell’s motion cites to several cases in and from other circuits that have rejected the availability of the “literary purpose” or research defense in child pornography cases. See, e.g., United States v. Fox, 248 F.3d 394, 407-08 (5th Cir. 2001) (rejecting viability of a research defense with respect to a 18 U.S.C. § 2252A) vacated, __ S.Ct. __, 2002 WL 628661 (remanded for consideration in light of Ashcroft v. Free Speech Coalition, 535 U.S. __, 122 S.Ct. 1389 (2002)); United States v. Matthews, 209 F.3d 338, 342-50 (4th Cir. 2000) (discussing and rejecting literary and research defense vis -à-vis a 18 U.S.C. § 2252(a)(1),(2) conviction, acknowledging that the defense might be available in a case involving materials that had particularly compelling First Amendment import).

prosecution because of entrapment Bunnell must demonstrate “(1) that a government official told him the act was legal; (2) that he relied on the advice; (3) that his reliance was reasonable; and (4) that, given the reliance, prosecution would be unfair.” *Id.* (citing United States v. Smith, 940 F.2d 710, 715 (1st Cir. 1999)). However, Bunnell has not even submitted an affidavit establishing that anyone told him the conduct in question was legal. He asserts by way of argument that unknown Washington County Sheriff’s Department officials and certain university officials told him he could proceed with his research in the manner described. Bunnell seeks the criminal equivalent of summary judgment on the issue of whether the evidence supports the defense of “entrapment by estoppel” and he asks the court to find that it does based upon his conclusory assertions in a legal memorandum. The defense may well be available to Bunnell at trial, depending upon the evidence presented, but dismissal of the indictment is not warranted for this reason based upon the record before me.

B. Spoliation of Evidence and Prosecutorial Delay

Bunnell’s spoliation of evidence theory arises from his assertion that the officers conducting the search of his residence seized a manila envelope containing his research notes and materials and have refused to turn it over during discovery. The officers say they never saw nor seized a manila envelope and that the inventory returned to the court after the search supports their position. Bunnell’s position, without citation to any authority (perhaps because none exists), is that on this state of the record he is entitled to dismissal of the charges, based upon the theory that the United States has destroyed evidence favorable to Bunnell that it held in its possession. The United States’ position is that since there is no evidentiary basis to support Bunnell’s contention this claim cannot

support dismissal of the charges. The United States does not provide any case law on this issue either and I am unable to locate any cases that talk about the doctrine of “spoliation of evidence” in the context of a criminal proceeding.² The United States’ deliberate destruction of evidence favorable to the defendant in a criminal case normally arises in the context of a discussion of the constitutionally guaranteed access to evidence. See, e.g., Arizona v. Youngblood, 488 U.S. 51 (1988). Those decisions stress the importance of establishing bad faith on the part of the government, for example that the evidence was destroyed not as the result of some routine practice or run of the mill negligence but with the aim of directly denying the defendant his right to present favorable evidence. Id. at 57. Dismissal of the charges would only be warranted if there was a showing of deliberate bad faith; Bunnell has not presented any suggestion of such misconduct.

Although Bunnell does not directly address the issue, it appears to me that initially I must make a determination about whether an evidentiary hearing is warranted based upon what has been presented to me. The test for granting an evidentiary hearing in a criminal case is a substantive one, “did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?” United States v. Panitz, 907 F.2d 1267, 1273 (1st Cir. 1990). Of course Bunnell’s proffer put forth in his memorandum, coupled with the United States’ response indicates that there is clearly a dispute. What Bunnell has utterly failed to put forth in his motion is the existence of material facts that

² I would hazard a guess that the reason for the lack of case law on this subject might be that “spoliation of evidence” is a concept most commonly associated with civil cases. The First Circuit has many times visited the principles concerning spoliation of evidence and the evidentiary inferences that can be drawn as a result. The permissive (as opposed to mandatory) negative inference “springs from the commonsense notion that a party who destroys a document (or permits it to be destroyed) when facing litigation, knowing the document’s relevancy to issues in the case, may well do so out of a sense that the document’s contents hurt his position.” Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 177 (1st Cir.1998). Thus, assuming that Bunnell could make the necessary evidentiary showing regarding the deliberate destruction of evidence, under the “spoliation of evidence” doctrine, the result would be a jury instruction on the permissible negative inference. It would not lead to the dismissal of the charges.

could be resolved in a pretrial motion evidentiary hearing. He argues that a manila folder has gone missing, but he provides no affidavit regarding the contents of that folder, the date when it was last seen or used, the time period over which the folder was assembled, or any other credible detail about the genesis of this manila folder. On the other hand, the United States argues that there is both direct evidence -- the search warrant inventory -- and strong circumstantial evidence -- the research paper is devoid of any footnotes, citations, or references to research materials -- supporting its position that the manila research folder never was seen or seized by law enforcement personnel. Bunnell does not present anything about the bad faith of the officers other than a passing reference in another section of his memorandum to his belief that a police officer named Scott Inman made “significant personal and negative comments about the defendant in the community.” Other than that conclusory allegation, he gives no context or content to Inman’s alleged statements. He has not made a showing of material facts in dispute on the issue of the deliberate bad faith destruction of evidence favorable to Bunnell.

As a second tier of his governmental misconduct argument, Bunnell argues that the charges against him should be dismissed because of the pre-indictment delay. Generally the statute of limitations safeguards against the bringing of stale charges, but the United States Supreme Court has recognized that in cases of actual, as opposed to possible, prejudice the statute of limitations may not ensure that the charges brought against a defendant comport with constitutional principles of due process. United States v. Marion, 404 U.S. 307, 323-24 (1971). The First Circuit has clearly formulated the standard it applies to pre-indictment delay and has determined that “[t]o succeed on such a claim, a defendant must demonstrate ‘that the preindictment delay caused him actual,

substantial prejudice [and] that the prosecution orchestrated the delay to gain a tactical advantage over him.” United States v. Kenrick, 221 F.3d 19, 33 (1st Cir. 2000) (quoting United States v. Stokes, 124 F.3d 39, 47 (1st Cir. 1997)).³

In the present case Bunnell apparently believes that the government completed its investigation at the time of the September 12, 2000, search warrant. The United States offers an explanation for the approximately seventeen-month delay between the “completion” of the investigation and the return of the indictment. The computers seized pursuant to the search warrants were subject to a forensic analysis. The preliminary investigation results were furnished to the United States Attorney’s Office in December 2000 and grand jury subpoenas were issued and records were assembled. In August 2001 less than eight months later, the United States sent Bunnell a target letter and the court, at the government’s request, appointed counsel to represent him. Court appointed counsel communicated with the United States until February 2002, when defense counsel apparently temporarily lost contact with Bunnell and indicated to the United States that he was not authorized to resolve the case informally. The indictment was returned approximately two weeks later.

Bunnell makes a half-hearted attempt to show a prosecutorially orchestrated delay by referencing Officer Inman’s alleged statements about him in the community. He does not refute the United States’ assertions about the chain of events. To suggest that this delay represents a prosecutorial attempt to obtain a tactical advantage is fetching too far.

³ There is a lack of unanimity among the circuits as to the requisite state of mind needed to fall within the rubric of governmental misconduct in preindictment delay cases. See United States v. Gross, 165 F. Supp. 2d 372, 377-380 (E.D.N.Y. 2001) (discussing cases in Second, Fourth, Seventh, and Ninth Circuits that have dismissed indictments based on a standard other than governmental intent to achieve a tactical advantage and noting a variety of approaches most commonly employing a balancing test that weighs the actual prejudice suffered by the defendant against the reasons for the delay).

Bunnell's attempts to show actual prejudice are equally unavailing. He asserts the following: "Defendant has been unable to obtain a recollection of Dr. Kemp and the Government objects to her deposition. Phone records cannot be retrieved. Persons who gave Defendant permission previously are now running for cover and having memory lapses. ITV course records cannot be found. The list goes on and on." None of these conclusory allegations amount to a showing of actual prejudice. As I indicated in the motion denying the deposition of Dr. Kemp, there has never been a showing made that Dr. Kemp ever possessed any relevant or material evidence relating to this case. (Docket No. 45.) Therefore the fact that her physical condition has deteriorated in the last seventeen months (assuming that it has) can hardly be the basis of any actual prejudice. Bunnell knew in August 2001 that the government was investigating him in a formal manner. He knew long before this juncture that computers had been seized from his home. If this Dr. Kemp had some important information Bunnell could have spoken with her then and would now be able to explain exactly what it is that makes her a material witness. He has never told this court what it is that she supposedly would be able to testify to, except that it is "critical to the factual background." The reference to the witnesses who are "running for cover" apparently refers to university officials who are not willing to support Bunnell's version of events relating to his course work. I fail to see how this state of the evidence relates in any way to the delay in seeking an indictment.

The tangible, documentary evidence, phone records and ITV course records, have been sought by Bunnell pursuant to a subpoena duces tecum. Apparently he believes that these records can be located, but have not been produced because of witness recalcitrance. Even if the records are never produced, I am not exactly sure how the lack

of production actually prejudices Bunnell. He contends that the course records and phone records would corroborate his version of events regarding calls he made to obtain permission to research child pornography on the internet from the Sheriff's Department and extensions he received for the ITV coursework. He has never explained how these records would corroborate his story. It seems that the most the records would show is that a call was placed. The records would not prove the content of the call nor would the course records prove that Professor Lacey gave him permission to do anything. Bunnell has failed to show actual prejudice resulting from the delay in obtaining the indictment in this case.

C. Constitutionality of 18 U.S.C. § 2252A(a)(5)(B)

The indictment in this instance alleges the interstate transportation, specifically by computer via the internet, of “child pornography.” In the instance of Bunnell’s indictment “Child Pornography” is defined as a visual depiction of sexually explicit conduct where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2256(8)(A) (emphasis added). The indictment in this case tracks the language of sub-section (8)(A). As earlier remarked, the United States Supreme Court recently addressed the conduct at issue in sub-sections (8)(B) and (8)(D) and found that those statutory definitions were unconstitutionally overbroad in violation of the First Amendment. Free Speech Coalition, 122 S. Ct. 1389. Those § 2256(8) sub-sections, relating to visual depictions that “appear[] to be” minors engaging in sexually explicit conduct and “convey[] the impression” of a minor engaging in sexually explicit conduct are not implicated by the allegation in this indictment. See Hilton, 167 F.3d at 67 n.4 (noting that the Child Pornography Prevention Act has a

severability provision specifying that if a provision of the Act fails, “including any provision or section of the definition of the term of child pornography,” because it is held unconstitutional, the other terms of the Act, including the other definitional sections are unaffected). With respect to indictments such as this that allege that the production of the images involved the use of minors, the holdings of New York v. Ferber, 458 U.S. 747 (1982) and Osborne v. Ohio, 495 U.S. 103 (1990) still control, as the discussion of Ferber and Osborne in Free Speech Coalition indicates. See, e.g., 122 S. Ct. at 1396-97, 1401-02. Bunnell has not, at this juncture, presented any argument to support the conclusion that the statute is unconstitutional as applied to him.

Conclusion

Based upon the foregoing, I recommend that the court **DENY** the motion to dismiss.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court’s order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated May 1, 2002

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CJACNS

U.S. District Court

District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 02-CR-13-ALL

USA v. BUNNELL
02/12/02

Filed:

Dkt# in other court: None

Case Assigned to: Judge GEORGE Z. SINGAL

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Pending Counts:

Disposition

18:2252A.F ACTIVITIES RE MATERIAL CONSTITUTING/CONTAINING CHILD PORNO
(1 - 3)

Offense Level (opening): 4

Terminated Counts: NONE

Complaints: NONE

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