

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 04-43-B-W
)
CLIFTON DAVIS, et al.,)
)
Defendants)

RECOMMENDED DECISION

This matter is before the court on Motions to Dismiss the Superseding Indictment for Violations of the Speedy Trial Act filed by defendants DeLoatch (Docket No. 183), Andrews (Docket No. 185), and Davis (Docket No. 191). I now recommend that the court **DENY** all three motions.

FACTS

On April 21, 2004, all three defendants were arrested and charged by Complaint before the Magistrate Judge. On April 22, 2004, the Government filed a formal Motion for Detention as to each defendant. On April 23, 2004, within 48 hours of their arrest, defendants made their initial appearance before me. The detention hearing and preliminary examination were continued on request of the defendants. On April 29, 2004, after hearing, I issued an Order on Preliminary Examination and Detention, finding probable cause as to all three defendants and ordering detention as to Clifton Davis and setting conditions of release as to the other two defendants.¹

¹ All three defendants are currently incarcerated. Deloatch was never able to satisfy the conditions of release I set because he could not find a suitable third party custodian. Andrews was released to her mother in Massachusetts, but on October 29, 2004, made an oral motion to withdraw her bond and submit to detention in the face of a Government motion to revoke pretrial release.

On May 13, 2004, an indictment was signed by the Grand Jury Foreperson and on May 14, 2004, the indictment was entered onto the docket by the clerk. On May 19 and 20, 2004, defendants were arraigned on the original Indictment. On June 24, 2004, the United States Supreme Court issued its opinion in Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (2004). On July 1, 2004, the Government filed a Motion to Continue Jury Selection. On July 2, 2004, the Government's motion to continue was granted by the Court pursuant to a telephonic conference hearing at which all defendants entered their objections.

On July 8, 2004, a notice of hearing was forwarded regarding a Rule 11 hearing scheduled for July 12, 2004, for Defendant DeLoatch. On July 8, 2004, the Government filed a Motion to Continue the Plea Hearing as to DeLoatch. On July 8, 2004, DeLoatch entered his response in opposition to the Government's Motion to Continue the Plea Hearing. On July 9, 2004, the Court granted the Government's motion to continue over DeLoatch's objection.

On July 14, 2004, the grand jury returned a superseding indictment. The superseding indictment now charged that Defendants DeLoatch, Davis, Andrews and a new defendant, William Aherndt, knowingly conspired to possess with intent to distribute a substance containing cocaine and a substance containing cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and with possession with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. § 841(a)(1). The penalty provision applicable to Count One was § 841(b)(1)(B); the penalty provision alleged relative to Count Two remained § 841(b)(1)(C). The superseding indictment also added specific

sentencing allegations relating to drug quantity. The defendants filed separate motions to dismiss the Superseding Indictment alleging violations of the Speedy Trial Act.

DISCUSSION

In relevant part, the Speedy Trial Act provides that:

Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161(b).

All three defendants maintain they are entitled to dismissal of the superseding indictment on the basis that it was returned in violation of this statutory provision. Yet all three defendants also acknowledge a superseding indictment is “saved” if it comes within one of two exceptions. Several circuits have held that a superseding indictment issued more than thirty days after a defendant’s arrest which adds entirely new charges to those contained in the original indictment does not violate the Speedy Trial Act. United States v. Hemmings, 258 F.3d 587, 592 (7th Cir. 2001). In a similar vein, where a superseding indictment contains charges identical to those in the original indictment and is based on identical facts, the filing of a timely indictment tolls the 30-day Speedy Trial Act requirement. United States v. Mitchell, 723 F.2d 1040, 1044-45 (1st Cir. 1983).

The Government in its response (Docket No. 199) takes the seemingly contradictory position that this superseding indictment comes within both of the exceptions. The Government states that the addition of an allegation pertaining to cocaine base in the superseding indictment resulted in the addition of entirely new charges. (Gov’t. Resp., Docket No. 199, at 2.) The Government also says that the

superseding indictment is based on the same events and same charges and comes within the Mitchell exception. (Id. at 4.) Thus, it argues:

Here, the Superseding Indictment was indeed filed well over 30 days after the Defendant's arrest. However, "the First Circuit has held that a superseding indictment containing charges identical to those in the original indictment and based on identical facts is not subject to the thirty-day limit"; and this district has recognized that exception in the context now before the Court. See United States v. Brown, 335 F. Supp. 2d 146, 148 (D. Me. 2004) (citing United States v. Mitchell, 723 F.2d 1040, 1044-45 (1st Cir. 1983)).

(Id.)² I agree with the analysis in Brown and conclude that Blakely sufficiently changed the legal landscape, at least in this District, to warrant the Government's return to the Grand Jury to obtain a superseding indictment containing sentencing allegations. I do not think those allegations are "gilding" of the original charge as condemned by the Fifth Circuit in United States v. Bailey, 111 F.3d 1229, 1236 (5th Cir. 1997). The legal analysis of whether the sentencing allegations were required or not in a post-Blakely world remains unclear and the Government's return to the Grand Jury to obtain them does not mandate the dismissal of the indictment.

Conclusion

Based upon the foregoing, I recommend that defendants' motions to dismiss be **DENIED.**

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

² At oral argument I expressed some concern that this case did not fit within the Brown framework because the addition of a new defendant with more expansive conspiracy allegations involving cocaine base may have somehow reset the Speedy Trial clock for all defendants even though the statutory charges remain identical in both indictments. Both DeLoatch's counsel and the AUSA agreed that the Speedy Trial clock, vis -à-vis the time to trial in this case, should run from the original indictment for all defendants. Therefore the fact that this superseding indictment contains a newly named defendant conspirator is not relevant to the Brown analysis.

the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: January 6, 2005

Case title: USA v. DAVIS et al

Magistrate judge case number: 1:04-mj-00027-MJK Date Filed: 05/13/2004

Assigned to: JUDGE JOHN A.
WOODCOCK, JR

Defendant

CLIFTON DAVIS (1)
also known as
BOSS MAN (1)

represented by **JASON M. JABAR**
JABAR, BATTEN, RINGER &
MURPHY
ONE CENTER STREET
WATERVILLE, ME 04901
207-873-0781
Email: jason@jbrmlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Pending Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE -
CONSPIRACY TO DISTRIBUTE
AND POSSESS WITH INTENT
TO DISTRIBUTE COCAINE -
21:846 and 841(a)(1)
(1s)

21:841A=ND.F - POSSESS
WITH INTENT TO
DISTRIBUTE COCAINE, AND

Disposition

AID AND ABET - 21:841(a)(1)
and 18:2
(2s)

Highest Offense Level (Opening)

Felony

Terminated Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE
(1-2)

Disposition

**Highest Offense Level
(Terminated)**

Felony

Complaints

21:841A=ND.F - Possession with
intent to distribute cocaine (Cts. 1-
2)

Disposition

Assigned to: JUDGE JOHN A.
WOODCOCK, JR

Defendant

KELVIN DELOATCH (2)
also known as
JAMAL (2)

represented by **J. HILARY BILLINGS**
BILLINGS & SILVERSTEIN
6 STATE STREET
P.O. BOX 1445
BANGOR, ME 4402-1445
(207) 941-2356
Email:
billingsilver@peoplepc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Pending Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE --
CONSPIRACY TO DISTRIBUTE
AND POSSESS WITH INTENT

Disposition

TO DISTRIBUTE COCAINE -
21:846 and 841(a)(1)
(1s)

21:841A=ND.F - POSSESS
WITH INTENT TO
DISTRIBUTE COCAINE, AND
AID AND ABET - 21:841(a)(1)
and 18:2
(2s)

Highest Offense Level (Opening)

Felony

Terminated Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE
(1-2)

Disposition

**Highest Offense Level
(Terminated)**

Felony

Complaints

21:841A=ND.F - Possession with
intent to distribute cocaine (Cts. 1-
2)

Disposition

Assigned to: JUDGE JOHN A.
WOODCOCK, JR

Defendant

CHELSEA ANDREWS (3)

represented by **JAMES S. NIXON**
GROSS, MINSKY & MOGUL,
P.A.
P.O. BOX 917
BANGOR, ME 04402-0917
207-942-4644
Email: jnixon@grossminsky.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE --
CONSPIRACY TO DISTRIBUTE
AND POSSESS WITH INTENT
TO DISTRIBUTE COCAINE -
21:846 and 841(a)(1)
(1s)

21:841A=ND.F - POSSESS
WITH INTENT TO
DISTRIBUTE COCAINE, AND
AID AND ABET - 21:841(a)(1)
and 18:2
(2s)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE
(1-2)

Disposition

**Highest Offense Level
(Terminated)**

Felony

Complaints

21:841A=ND.F - Possession with
intent to distribute cocaine (Cts. 1-
2)

Disposition

Assigned to: JUDGE JOHN A.
WOODCOCK, JR

Defendant

WILLIAM AHERNDT (4)

represented by **NORMAN S. KOMINSKY**
P.O. BOX 2549
BANGOR, ME 04402-0922
(207)947-7978

Email: nskominsky@prodigy.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts

NARCOTICS - SELL,
DISTRIBUTE, OR DISPENSE --
CONSPIRACY TO DISTRIBUTE
AND POSSESS WITH INTENT
TO DISTRIBUTE COCAINE -
21:846 and 841(a)(1)
(1)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Plaintiff

USA

represented by **DANIEL J. PERRY**
OFFICE OF THE U.S.
ATTORNEY
DISTRICT OF MAINE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: dan.perry@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED