

relates to agricultural research materials, led to a one hundred page complaint which Blumberg drafted and filed pro se in Vermont in March, 1998. The defendants in that action include not only Dr. Leonard Perry, a professor at the university, but also certain governmental officials who are connected with the U.S. Department of Agriculture. The U.S. Attorney's Office in Vermont, through the person of Carol Shea, Assistant United States Attorney (AUSA), is representing those governmental officials in that lawsuit.

Mr. Blumberg alleges as part of his Vermont lawsuit that there has been criminal wrongdoing by some of the defendants in that action. He believes that he has been forced to act as a "private prosecutor" because of the unwillingness of the U.S. Attorney's Office in Vermont to investigate and/or prosecute his allegations. Part of the claim in Vermont involves an allegation of "civil racketeering" by certain individuals. The U.S. Attorney's Office in Vermont told Blumberg to put his complaints of criminal wrongdoing in writing. (Def. Ex. No. 5). According to Mr. Blumberg, however, the Office of the Inspector General had told him that no investigation would occur because of the civil complaint he had filed concerning the same activities.

After the commencement of his pro se lawsuit in Vermont, the Defendant received communication from the U.S. Department of Education regarding delinquent student loans. Frederick Emery, AUSA from Portland, Maine, ultimately became the attorney responsible for prosecuting a collection action against Mr. Blumberg. That action, *U.S.A. v. Blumberg*, Civil Action No. 99-0170-B was filed in the U.S. District Court, Bangor, Maine on July 1, 1999. Mr. Emery and the Defendant, appearing pro se, engaged in a number of settlement discussions surrounding that case. Mr. Blumberg's position was that the government owed him far more in

the Vermont lawsuit than he owed for student loans, and that when the Vermont lawsuit was resolved in his favor, he would be able to satisfy his student loan obligation.

In January, 2000, Mr. Emery, on behalf of the U.S. Department of Education, agreed to a stipulated dismissal of the student loan action. The reason for the voluntary dismissal was “for the purpose of allowing the parties more time to research and to attempt to resolve and settle the issues and debts involved in this case.” (Gov. Ex. No. 4). Consistent with the defendant’s testimony and the representations in Mr. Emery’s letter to the defendant of January 14, 2000 (Id.), it appears that Mr. Emery attempted to contact the Vermont U.S. Attorney’s Office in regard to the status of Mr. Blumberg’s civil action. Blumberg and Emery last communicated by letter on March 7, 2000, during the time period involved in the allegations in the indictment. (Def. Ex. No. 4). The communications between Emery and the Defendant had been cordial and the Defendant believed that Emery was a hardworking public servant who sincerely wanted to provide him with assistance.

At the same time in the first week of March, 2000, as the facts giving rise to these charges arose, the Defendant made a telephone call to the U.S. Attorney’s Office in Portland which a secretary there perceived as unsettling. On March 7, 2000, Mr. Emery returned Defendant’s telephone call and advised him that the secretary found his tone and manner disturbing and that he was to refrain from placing such calls to his office in the future. Later that same day the Defendant called the U.S. Attorney’s Office in Bangor and spoke with Jay McCloskey, the U.S. Attorney and Emery’s supervisor. McCloskey told Blumberg that the U.S. Attorney’s Office in Maine had no intention of interfering in the Vermont case.

In this case the Defendant is charged with violating 18 U.S.C. § 875 (c), by threatening over the telephone to kill a specific third person on three occasions. The threats were made over the course of a four day period in March, 2000. The Court found, at the time of the detention hearing, that the “weight of the evidence is strong based upon the defendant’s post arrest admissions.” The U.S. Attorney’s Office for the District of Maine has prosecuted at least sixteen other individuals for Threatening Communications from 1992-2000.

Discussion

The Defendant asks the Court to dismiss the indictment against him because it is based upon both selective and vindictive prosecution in violation of his constitutional rights. A prosecutor has broad discretion in the enforcement of the criminal laws. “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

I. Selective Prosecution

A decision to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Here the Defendant has not alleged any discriminatory classification, discriminatory intent, nor even that other persons in “similar circumstances” have not been prosecuted. In order to substantiate a claim of selective prosecution a criminal defendant must demonstrate both a “discriminatory effect” and a “discriminatory purpose.” *Wayte V. United States*, 470 U.S. 598, 608 (1985). Defendant has shown neither.

II. Vindictive Prosecution

In order to establish that he is entitled to relief under the doctrine of vindictive prosecution the defendant must show that the prosecutor used the charging process to penalize the defendant's exercise of constitutional or statutory rights. *Blackledge v. Perry*, 417 U.S. 21 (1974). Defendant apparently claims that he was indicted in Maine in retaliation for the civil suit he filed in Vermont. A defendant may show vindictive prosecution by: (1) producing evidence of actual vindictiveness sufficient to show a due process violation or (2) demonstrating that the circumstances show there is a sufficient "likelihood of vindictiveness" to warrant a presumption of vindictiveness. *United States v. Marrapese*, 826 F.2d 145, 147 (1st Cir. 1987).

In order to obtain an evidentiary hearing on a vindictive prosecution claim, a defendant must allege specific facts that raise the likelihood of vindictiveness. *United States v. Lanoue*, 137 F. 3d 656, 665 (1st Cir. 1998). Defendant has had the opportunity to incorporate by reference the testimony and exhibits offered at a Motion to Suppress hearing. The Defendant was also given the opportunity to make a proffer as to what additional evidence he would present were he allowed to conduct further discovery. He could cite no facts which would meet his burden of alleging specific facts that raise the likelihood of vindictiveness. *Lanoue*, 137 F.3d at 665. At best the Defendant can point to the fact that these charges were brought after he filed his civil lawsuit in Vermont. Assuming that he has a constitutional or statutory right to file a lawsuit, the mere fact that a criminal charge was brought after the civil lawsuit does not give rise to a presumption of vindictiveness. *United States v. Goodwin*, 457 U.S. 368, 382 n. 15 (1982) (presumption may not exist where "the only evidence [a defendant] is able to marshal in support of his allegation of vindictiveness is that the additional charge was brought at a point in time after his exercise of a protected right").

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 this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten 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.

Dated this 15th day of May, 2000.

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)

TRLLST BANGOR

CRIMINAL DOCKET FOR CASE #: 00-CR-10-ALL

USA v. JONATHAN BLUMBERG

Filed: 03/14/00

Other Dkt # 2:00-m -00012

Case Assigned to: JUDGE D. BROCK HORNBY

JONATHAN BLUMBERG (1)
defendant

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Pending Counts:

Disposition

18:875C.F INTERSTATE
COMMUNICATIONS - THREATS

(1 - 3)

Offense Level (opening): 4

Terminated Counts:

NONE

Complaints

Disposition

Counts I, II: communication of
threat in interstate
commerce in violation of Title
18, USC sec. 875(c).
[2:00-m -12]

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