

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. :
 :
BRUCE STEWART, et al., :
 :
 Defendants. :

: Criminal Action No. 02-62-1 (JJF)

Colm F. Connolly, Esquire, United States Attorney, and Keith M. Rosen, Esquire, Assistant United States Attorney, UNITED STATES ATTORNEY'S OFFICE, DISTRICT OF DELAWARE, Wilmington, Delaware. Attorneys for Plaintiff.

Samuel C. Stretton, Esquire, West Chester, Pennsylvania. Attorney for Defendant Bruce Stewart.

L. Felipe Restrepo, Esquire, Philadelphia, Pennsylvania. Attorney for Defendant Tina Johnson.

Penny Marshall, Esquire, Federal Public Defender, FEDERAL PUBLIC DEFENDER'S OFFICE, Wilmington, Delaware. Attorney for Defendant Williesha Robinson.

MEMORANDUM OPINION

September 5, 2003
Wilmington, Delaware

Farnan, District Judge

Currently pending before the Court is a Motion to Dismiss Based on Outrageous Conduct by the Government and Its Agents (D.I. 99) filed by the Defendant Bruce Stewart. For the reasons discussed, the motion will be denied.

The Third Circuit has recognized that certain extreme circumstances warrant dismissal under the Due Process Clause for outrageous government conduct. The Third Circuit set out the limits of the "outrageous government conduct doctrine" in United States v. Nolan-Cooper, 155 F.3d 221, 232 (3d Cir. 1998). While recognizing the cognizability of such a claim, the Third Circuit noted that "the judiciary has been 'extremely hesitant' to uphold claims that law enforcement conduct violates the Due Process clause." Id. at 230 (citations omitted). In order to find a Due Process violation, the government activity alleged must violate a protected right of the Defendant. Id. at 229. In Nolan-Cooper, the defendant alleged that the undercover officer investigating her had engaged her in a sexual relationship to further the investigation. The Court held that in such circumstances the defendant must show the following in order to establish a due process violation under the doctrine:

- a. The government set out to use sex as a weapon in its investigatory arsenal, or acquiesced in such conduct once it knew (or should have known) that a relationship existed;
- b. The government agent initiated the sexual relationship, or allowed it to continue to exist, to achieve government ends; and

c. The sexual relationship took place during or close to the period covered by the indictment and was entwined with the events charged therein.

Id. at 232-233. In other words, in order to invoke the doctrine, Mr. Stewart must show that the government improperly used sex as an investigative technique against him, and thereby violated one of his protected rights.

By his motion, Mr. Stewart contends that the Indictment against him should be dismissed because of an alleged romantic relationship between Josette Jacobs and a police officer. The Court held a hearing on the motion on July 25, 2003. In that hearing both Ms. Jacobs and her "brother" Robert Harris testified about her purported romantic relationship with the officer. The record is replete with graphic allegations about the alleged physical relationship between Ms. Jacobs and the officer. However, the Court does not find the testimony, of Ms. Jacobs or Mr. Harris credible. Specifically, the Court finds that Ms. Jacobs had over a long period of time been an informant for the officer, but that no sexual relationship existed between them. The Court's finding is based on two specific grounds. First, the officer's credible testimony in which he denied any physical contact of a sexual nature between him and Ms. Jacobs. Second, the Government offered testimony and exhibits depicting distinct physical characteristics of the officer, which if Ms. Jacobs testimony were credible, would have been known to her. During her testimony Ms. Jacobs did not offer any evidence that would

establish her knowledge or awareness of the relevant physical characteristics. Further, when asked directly about these easily identifiable characteristics, Ms. Jacobs demonstrated a complete lack of knowledge of the characteristics she would have been privy to if she had been involved in an eight year sexual relationship as she alleged. (Tr. of July 25, 2003 Hearing at 177-178, 284).

In sum, the Court finds that Ms. Jacobs' allegations are not credible and the Court concludes Mr. Stewart failed to offer any evidence supporting his motion to dismiss. Based on the Court's findings that the allegations lack any credible factual support, the Court will order that the transcript of the July 25, 2003 Hearing to remain sealed.

An appropriate order will be entered.

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ORDER

At Wilmington, this 5th day of September 2003, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED THAT:

1) Defendant's Motion to Dismiss for Outrageous Government Conduct (D.I. 99) is **DENIED**;

2) The transcript of the July 25, 2003, Hearing shall remain **SEALED**.

 JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE