

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

Colm F. Connoly, 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, Westchester, 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 the Motion to Dismiss Based on the Delay of Indicting the Defendant filed by the Defendant, Bruce Stewart (D.I. 93). For the reasons discussed, the motion will be denied.

I. Parties' Contentions

By his motion, Mr. Stewart contends that the Government's delay in indicting him violated his due process rights, and therefore, the indictment against him should be dismissed. (D.I. 120 at 1). Specifically, Mr. Stewart argues that the drug charges for which he was indicted in June 2002 were very similar to the drug charges that were brought against him in the United States District Court for the Eastern District of Pennsylvania which were dismissed on April 7, 2000. Id. at 17. Further, Mr. Stewart contends that from April 2000 until June 2002, the Government took no action to bring the drug charges against him. Id. In the interim, Mr. Stewart was charged in the Delaware state courts with attempted murder and in May 2002, found not guilty. Within approximately two weeks after his acquittal on the state charges, the instant drug charges were filed against him. Id.

Mr. Stewart contends that the delay will result in severe prejudice to him. For example, Mr. Stewart contends that he has difficulty recalling events on the specific dates alleged in the

Indictment during January, February, March and April 2000.

Further, Mr. Stewart contends that key witnesses to his defense have passed away during the two-year delay. Id. For example, Mr. Darnell Evans was killed in March of 2001, and Mr. Stewart contends that Mr. Evans would have contradicted and explained the conduct of two of Mr. Stewart's alleged co-conspirators who are now witnesses against him. Further, Mr. Stewart argues that Mr. Evans would have testified that Mr. Stewart was not involved in drugs and would have provided information about the harassment of Mr. Stewart by a police officer and the romantic relationship between the police officer and Josette Jacobs. Id.

In addition, Mr. Stewart alleges that between January and April of 2000, he spent a great deal of time with his grandmother, Evelyn Stewart and his aunt, Mary Waples who are now deceased. Mr. Stewart contends that these now unavailable witnesses could have offered testimony concerning his activities during the relevant time period and testified about his lack of involvement in a drug operation on the dates alleged in the Indictment. Id.

In response, the Government contends that Mr. Stewart has not met his burden of demonstrating that the delay unduly prejudiced him. (D.I. 121 at 2). The Government argues that for the court to dismiss an indictment based on delay, the Defendant bears the burden of demonstrating that the delay between the

commission of the crime and the indictment actually prejudiced him and that the Government deliberately delayed bringing the indictment in order to obtain an improper tactical advantage or to harass the Defendant. The Government argues that Defendant has failed to demonstrate these requirements, and therefore, his motion to dismiss should be denied.

The Government asserts that, although Mr. Stewart contends that his memory on the relevant dates is faded due to delay, the Supreme Court of the United States and the Third Circuit have made clear that merely raising the possibility of prejudice resulting from memories dimming, the loss of evidence or witness accessibility is insufficient. Id. at 4. In regard to his inability to remember events, the Government argues that the Defendant's testimony at the evidentiary hearing in this matter revealed inconsistencies where the Defendant was able to recall where he lived during the relevant time period, how he spent his days, how often he saw Darnell Evans and in what contexts and was able to recall events surrounding the date of his marriage. Id. (citing Transcript of May 1, 2003 Hearing ("Tr.") at 85-86, 112-115). The Government argues that the only specific facts the Defendant cannot recall relate to whether or not he traveled to Los Angeles during the relevant time period alleged in the Indictment. Id. Further, the Government contends that Defendant's allegation that he would not have testified at his

state trial if he had known that he was facing federal drug charges is legally and factually without merit, because the Defendant admitted on cross examination that he knew he would possibly be charged with drug offenses given that his wife was charged in May 2001 with related offenses. Further, the Government argues that the Defendant's decision to testify at his state trial was a voluntary act, and therefore, the Court should not find that the Defendant was prejudiced in this regard.

The Government also contends that Mr. Stewart has failed to meet his burden of proof with respect to the unavailable witnesses. The Government argues that in order to establish undue prejudice, the Defendant must show: (1) what the missing witness would have stated under oath; (2) how that testimony would be both beneficial to the defense and found credible by the jury; and (3) that the missing witness would have, in fact, testified on the Defendants behalf. Id. at 5. The Government asserts that the Defendant did not present any evidence from witnesses other than himself regarding the substance of Mr. Evans', Evelyn Stewart's or Ms. Waples' possible testimony. Id. Further, the Government contends that Mr. Stewart's testimony failed to specifically demonstrate how Mr. Evans' testimony would have been exculpatory. With regard to his aunt and grandmother, the Government contends that there is no evidence that these individuals would have been able to recall Mr. Stewart's presence

on any specific days and the Government argues that the testimony of these witnesses would have been cumulative alibi evidence, the loss of which is not unduly prejudicial. Id.

The Government also contends that the unavailability of a witness can only be blamed on prosecutorial delay if the witnesses passed away after the investigation was completed. In this case, the Government asserts that all of the witnesses passed away prior to the completion of the investigation, and therefore, their unavailability cannot be blamed on prosecutorial delay. Id. Finally, the Government argues that the record is devoid of any evidence that it deliberately delayed the indictment of Mr. Stewart to gain a tactical advantage and as a result, the motion to dismiss should be denied. Id.

II. Discussion

After considering the evidence and arguments of the parties, the Court concludes that the Defendant has not met his burden of proof with respect to demonstrating that the delay between the alleged crime and the instant Indictment unduly prejudiced the Defendant's defense or that the Government deliberately delayed bringing the Indictment in order to obtain an improper tactical advantage or to harass the Defendant.

A Defendant can demonstrate a due process violation attributable to delay between the alleged commission of a crime and an indictment only if he can show both "(1) that the delay

between the crime and the federal indictment actually prejudiced his defense; and (2) that the government deliberately delayed bringing the indictment in order to obtain an improper tactical advantage or to harass him." United States v. Beckett, 208 F.3d 140, 151 (3d Cir. 2000).

Mr. Stewart contends that he was unduly prejudiced by the delay because his memory about events on the pertinent dates alleged in the Indictment has faded. The Court finds this contention unpersuasive in light of Mr. Stewart's testimony to the contrary at the evidentiary hearing. Specifically, at the evidentiary hearing, Mr. Stewart testified about spending time with his wife, his aunt, his grandmother and Darnell Evans, and about some of the specific contacts he had with each of these individuals during the relevant time period; however, he testified he could not remember his whereabouts on the dates he is alleged to have traveled to Los Angeles as alleged in the Indictment. Further, the Court finds Mr. Stewart's contention that he was not expecting federal drug charges to be brought against him to lack credibility in view of the fact that his wife was charged with related offenses in May 2001.

With regard to the unavailable witnesses, the Court concludes that Mr. Stewart failed to testify with the requisite amount of specificity as to what the unavailable witnesses would have testified to and how their testimony would have been

beneficial to his case. The case law involving "deceased witnesses" teaches that in order to demonstrate that Mr. Stewart was prejudiced by the death of witnesses, he must establish (a) what the missing witness would have stated under oath; and (b) how the testimony would have been beneficial to the defense and found credible by the jury. See, e.g., United States v. Spears, 159 F.3d 1081, 1084 (7th Cir. 1999); United States v. Trammel, 133 F.3d 1343, 1351 (10th Cir. 1998); United States v. McDougal, 133 F.3d 1110, 1113 (8th Cir. 1998).

In this case, Mr. Stewart testified that his grandmother, Evelyn Stewart and his aunt, Mary Waples, would have testified that he was tending to them in the daytime from April until January 2000. (Tr. at 117-118). However, there is no evidence that Ms. Stewart or Ms. Waples would have been able to testify as to Mr. Stewart's presence on specific days in opposition to the Government's evidence of drug related transactions and travel. Further, the Court finds that the possible alibi testimony of these now unavailable witnesses is vague and falls short of meeting Mr. Stewart's burden of demonstrating actual prejudice. See, e.g., Sebetich, 776 F.2d at 430 (stating the likely insufficiency of "allegations that witnesses would have provided an alibi that are not targeted quite specifically to the time and location of the alleged offense.")

Further, with regard to Darnell Evans, Mr. Stewart testified

that Mr. Evans would have testified that Mr. Stewart was not running a drug operation, would have provided evidence that bias existed against Mr. Stewart by accused co-conspirators and would have provided testimony concerning a relationship between Josette Jacobs and a police officer whom Mr. Stewart contends harassed him. Although the proffer concerning Mr. Stewart's innocence and the bias of alleged co-conspirators is more detailed than previous ones, the Court finds that the proffered testimony of Mr. Evans is still too vague. The proffer contains no assertions of fact about specific events, days, or times. Further, the Government has alleged that Mr. Evans was a co-conspirator with Mr. Stewart, and most likely would have asserted his Fifth Amendment right not to testify. On these facts, the Court finds that Mr. Stewart has not demonstrated that Mr. Evans would have testified on Mr. Stewart's behalf and even if he would testify, Mr. Stewart has not demonstrated that the jury would find him credible given his alleged involvement. As a result, the Court concludes that Mr. Stewart has not met his burden of showing actual prejudice based on the unavailability of witnesses.

Further, the Court concludes that Mr. Stewart's contention that he is unduly prejudiced because he would not have testified during his state trial had he been aware of the potential federal charges must be rejected because there is no evidence that Mr. Stewart's testimony at the state trial was involuntary or

otherwise coerced.

Finally, even if Mr. Stewart could establish actual prejudice because of the unavailable witnesses and faded memories, the Court concludes that there is no evidence that the Government deliberately delayed the Indictment for a tactical advantage. Specifically, there is no evidence that the Government deliberately delayed the Indictment until after the deaths of Darnell Evans, Mary Waples and Evelyn Stewart. There is also no evidence that the Indictment was deliberately delayed until after Mr. Stewart's memory faded. Although Mr. Stewart has argued that federal authorities withheld his indictment in order to manipulate him into testifying about his drug activities at his state trial, the only support that Mr. Stewart provides for this contention is that people whom he believed were federal agents were present at his state trial and spoke to the state prosecutors. Mr. Stewart cannot identify who these people were or the basis for his concluding that they were instructing the prosecutors on what questions to ask him. In sum, there is no factual basis for the proposition that federal authorities delayed the indictment of Mr. Stewart to gain a tactical advantage.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

ORDER

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

IT IS HEREBY ORDERED that Bruce Stewart's Motion to Dismiss Based on the Delay of Indicting the Defendant (D.I. 93) is

DENIED.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE