

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

UNITED STATES *
 *
 v. * Criminal No. 07-CR-186-SM
 *
 ROY WARREN, Defendant *
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MOTION TO DISMISS - MISUSE OF GRAND JURY

The Defendant Roy Warren respectfully moves this Court to DISMISS WITH PREJUDICE the outstanding indictment in this matter. In support thereof, the Defendant submits the following:

1. On August 30, 2007, a Complaint was issued charging the defendant with conspiracy to distribute and possess controlled substances while committing a home invasion on June 30, 2007. (Document 1). The Complaint was supported by a 12 page affidavit that included information allegedly obtained from the alleged victim of the offense and from two individuals who claim to have participated in the commission of the alleged offense.

2. The Defendant was arrested on the Complaint and brought to the court for an initial appearance on August 31, 2007. A temporary order of detention was issued (Document 6) and a detention hearing and preliminary hearing were scheduled for September 6, 2007.

3. On September 5, 2007, an indictment was returned and filed with the Court. (Document 9). The indictment charged the Defendant in two counts with Conspiracy to

Interfere with Commerce through Robbery contrary to 18 U.S.C. 1951 (Hobbs Act Robbery) and Conspiracy with the Intent to Distribute Controlled Substances contrary to 21 U.S.C. 846. The controlled substances that are the subject of Count II of the Indictment are listed and appear to be the same controlled substances that were the subject of the alleged Hobbs Act Robbery.

4. On September 6, 2007, a detention hearing was held and the Defendant was detained pending trial. (Document 11). The Defendant's girlfriend, Kristy Daniels, attended the detention hearing.

5. Ms. Daniels, at some point, received a subpoena to testify before the Grand Jury. See, Exhibit A. The date of service, at this time, is unclear to the defense but Ms. Daniels was required to appear for Grand Jury testimony on September 19, 2007. Ms. Daniels appeared at the United States Courthouse as required by the subpoena. Upon entry to the building her cellular telephones and digital camera that she had been carrying on her person were held by court security officers at the front entrance. It is believed that the items were initially held pursuant to standard security procedures. Ms. Daniels showed her subpoena to the court security officers and was directed to go to the United States Attorney's Office.

6. Once in the United States Attorney's Office, Ms. Daniels was escorted to a conference room. She reports that Assistant United States Attorney Terry Ollila (whom she recognized from the detention hearing) and two male agents were located within the conference room. The Assistant United States Attorney and the agents questioned her regarding the alleged home invasion that is the subject of the indictment in this case. Ms. Daniels believed that she and the Defendant had attended a party on the

date in question. She told the interrogators that she had photographs of the party on her digital camera.

7. Attorney Ollila asked where the photos were. Ms Daniels responded that her camera was at the security checkpoint at the entrance to the courthouse. Daniels was then escorted by one of the agents to the security checkpoint where she retrieved her camera and cell phones. She was escorted back to the United States Attorney's office with both items. Ms. Ollila and the agents reviewed the photos contained within the camera. They also reviewed phone number information contained within Ms. Daniel's cell phones. Ms. Ollila then issued another Grand Jury Subpoena to Ms. Daniels for production of the images contained within the camera. *See*, Exhibit B. Ms. Ollila kept the camera and advised Ms. Daniels that it would be returned once the Government had retrieved the photographs from the camera.

8. During the interrogation Ms. Daniels was asked numerous questions about the night on which the home invasion alleged in the indictment occurred. Attorney Ollila and the agents disputed the date with Ms. Daniels. Ms. Daniels advised Ms. Ollila that she did not think that the Defendant could have committed the alleged crime for a number of reasons one of which being that he was with her on the night that she believed to be June 29, 2007. In addition Ms. Daniels reports that Ms. Ollila asked a number of questions designed to intimidate her. For instance, Daniels claims that Attorney Ollila asked her why she was wasting her time with the Defendant and why she stayed with him. Attorney Ollila told Daniels that Daniels was risking her career, her job and everything. Attorney Ollila told Daniels that Daniels should think about her daughter and that the Defendant was a violent and threatening person.

9. Ms. Daniels was not brought before the Grand Jury to provide testimony and, to date, has not been requested to do so. Copies of Ms. Daniel's notes regarding her meeting with Assistant United States Attorney Ollila are attached as Exhibit C. An interview report from CDMA Investigations is attached as Exhibit D.

10. Ruth Warren, the Defendant's sister was also served with a subpoena to testify before the Grand Jury. She appeared as required. Upon entering the Courthouse she showed her subpoena to the court security officers who directed her to the United States Attorney's office. Ms. Warren brought photographs of a party at the home of Tina Linscott with her to the courthouse. Upon arrival at the United States Attorney Office, Ms. Warren met a white female with a tall thin build who appeared to be about forty years of age. She believes this woman to be Assistant United States Attorney Terry Ollila. Ms. Warren showed her photographs to Ms. Ollila. Attorney Ollila then brought in two males and identified them as FBI agents. Ms. Ollila and the agents became confrontational with Ms. Warren. They accused her of lying to them. She was also accused of scheming with Kristy Daniels to assist the Defendant with an alibi defense. Ms. Warren reports that she was extremely intimidated and frightened by the trio. She was threatened with federal charges. Ms. Warren explained that the photos had dates on the back sides of them demonstrating when they were developed. The interrogators insisted that she provide the original negatives for the photos. Ms. Warren had taken the photos with a disposable camera and did not recall if she had negatives for the prints. The prints were taken from her and she was permitted to leave. At no time was she brought before the Grand Jury for testimony.

11. Sometime prior to October 3, 2007, Ruth Warren was served with a second

grand jury subpoena. Exhibit E. This time the subpoena required her to appear on October 3, 2007, and to produce “any and all photographs (either in digital form or developed images) of a gathering and/or party at the residence of Tina Linscott.” See Exhibit E. Ms. Warren appeared as required with the photos and negatives. She was again directed to the United States Attorney’s Office. Ms. Warren provided the photos and negatives to the woman she believes to be Assistant United States Attorney Ollila and was then dismissed. At no time on October 3, 2007, was Ms. Warren brought before the Grand Jury for testimony. An interview report from CDMA Investigations is attached as Exhibit F.

12. On or about October 12, 2007, the Government, via e-mail, provided a package of discovery (consisting of 49 pages) to defense counsel. Exhibit G. The cover e-mail with said discovery stated: “It has come to the United States’ attention that Mr. Warren may well attempt to assert an alibi defense regarding his presence at 4 Americana Drive on or around June 20, 2007 (sic).” See, Exhibit H.

13. The discovery package did not contain reports of the interviews of Kristy Daniels or either set of photos. However the discovery package did include ten pages of Southwest Airlines business records regarding the travel itinerary of one, Kristy Johnson, for the dates of June 22, 2007 through June 25, 2007. See, Exhibit G, p. 22 - 32. (Kristy Daniels had told Attorney Ollila and the agents that Kristy Johnson a/k/a Kristy Burnett had flown in to New Hampshire and attended the party.) These documents bear a Southwest Airlines “case number” of 0921074. The documents appear to have been faxed to the United States Attorney’s Office on September 21, 2007. It is reasonable to believe that these documents were obtained through the use

of yet another Grand Jury subpoena in an effort to undermine the testimony and credibility of Kristy Daniels about an alibi defense to the indictment and to rebut the Defendant's possible alibi defense to the existing indictment.

14. The aforesaid discovery package also contained 6 pages of records from the Concord Area Trust for Community Housing. See Exhibit G, p. 33-38. The records pertain to a home buyer education course in which Kristy Daniels was enrolled. It is believed that Ms. Daniels told the prosecutor and the agents about this course when she appeared in compliance with her Grand Jury subpoena. Ms. Daniels explained that this was the weekend of the party and that the Defendant would have been caring for their child while she attended the course. At least one page of these records was printed on September 19, 2007. It is believed that these records were, likewise, obtained through the use of a Grand Jury subpoena in an effort to undermine the testimony and credibility of Kristy Daniels and to rebut the Defendant's possible alibi defense.

15. "It is a firmly entrenched rule that once a defendant has been indicted, a prosecutor may not use a grand jury's investigative powers for the purpose of securing additional evidence against the defendant for use in an upcoming trial." In re Grand Jury Proceedings, 632 F.2d 1003, 1041 (3rd Cir. 1980) *citing* United States v. Woods, 544 F.2d 242, 249 (6th Cir. 1976); United States v. Fisher, 455 F.2d 1101, 1104-05 (2nd Cir. 1976). See also, United States v. Doe, 455 F.2d 1270, 1273 (1st Cir. 1972) (It is improper to use the grand jury for the purpose of preparing an already pending indictment for trial). "It is improper to utilize a Grand Jury for the sole or dominating

purpose of preparing an already pending indictment for trial.” United States v. Doe, 455 F.2d 1270, 1273 (1st Cir. 1972). In this case the Government misused the investigative powers of the grand jury by using those powers to prepare for trial on the existing indictment and by using those powers to obtain documentary evidence designed to defeat the Defendant’s potential alibi defense to the already pending indictment. This misuse of the grand jury’s investigative powers clearly violated the Defendant’s right to due process of law and caused substantial prejudice. The Government’s misuse of the grand jury’s investigative power warrants dismissal of the indictment or alternatively suppression of all evidence and documents obtained by the Government through the misuse of such power.

16. The Government’s issuance of subpoenas for the purpose of obtaining interviews of potential adversary witnesses violated F.R.Cr.P. 17(a). The rule states:

A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and *command the witness to attend and testify at the time and place the subpoena specifies*. The clerk must issue a blank subpoena--signed and sealed--to the party requesting it, and that party must fill in the blanks before the subpoena is served.

F.R.Cr.P. 17(a)(*emphasis added*.) The rule does not authorize the Government to use grand jury subpoenas to compel witnesses to attend private interviews with government agents. See, United States v. Wadlington, 233 F.3d 1067, 1075 (8th Cir., 2000); United States v. LaFuente, 991 F.2d 1406, 1411 (8th Cir., 1993). Similarly, F.R.Cr.P. 17(c) governs the issuance of subpoenas duces tecum:

A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before

trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

The rule specifically envisions the subpoenaed documents be produced in court subject to the Court's further order regarding inspection of the documents. The Government failed to follow F.R.Cr.P. 17(c) and in fact used the grand jury subpoenas for the sole purpose of seizing evidence in the possession of witnesses. In fact at least one of the subpoenas duces tecum were issued "on the spot" for immediate production to the prosecutor of the subpoenaed evidence. See, Exhibit B. The use of grand jury subpoenas to obtain documents outside of the grand jury room and without production to the court is just as improper as subpoenaing witnesses for the purpose of private interview. The Government's blatant disregard of F.R.Cr.P. 17 warrants dismissal of the indictment. Alternatively, the evidence obtained by the Government in violation of F.R.Cr.P. 17 must be suppressed.

17. Finally, the Government's threats and *ad hominem* attacks on the witnesses and the defendant during the private interviews demonstrate a substantial link in a chain of prosecutorial misconduct. See, United States v. Morrison, 553 F.2d 223 (3d Cir., 1976); See also, United States v. LaFuente, 54 F.3d 457, 461-462 (8th Cir., 1995); United States v. Angiulo, 897 F. 2d 1169, 1192 (1st Cir., 1990) . The Government's threats against the witnesses and *ad hominem* attacks on the Defendant in combination with its disregard for the rights of the Defendant in the grand jury process and disregard of F.R.Cr.P. 17 warrant dismissal of the indictment. Alternatively, the evidence obtained as a result of the misconduct must be suppressed.

18. This is a dispositive motion and therefore the Defendant has not sought the assent of the Government hereto.

19. This motion contains sufficient supporting authority and further memorandum is not necessary at this time.

WHEREFORE, the Defendant respectfully moves this Court to grant the following relief:

1. Hold an evidentiary hearing on this motion; and,
2. GRANT this motion and DISMISS the indictment against the Defendant with prejudice; and,
3. Alternatively, suppress for all purposes, the evidence obtained by the Government as a result of the use of the grand jury subpoenas set forth above; and,
4. Grant such further relief as may be just.

Respectfully submitted,

Roy Warren, Defendant

By his Attorneys,

BRENNAN CARON LENEHAN & IACOPINO

Date: April 14, 2008

By: /s/Michael J. Iacopino

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Assented to Motion to Continue Trial for Ninety Days was served on the following person, even date herewith, and in the manner specified herein: electronically served through ECF: Assistant United States Attorney, Terry Ollila, James C. Cleveland Federal Bldg., 55 Pleasant St., Room 352, Concord, NH 03301-3941.