

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,) No. 5:06-cr-20582
Plaintiff,)
v.) DEFENDANT'S MOTION TO DISMISS
)
MICHAEL BURT,)
Defendant.)

COMES NOW the Defendant Michael Burt, by and through his counsel of record, and hereby moves this Court to dismiss the charges with prejudice. Defendant brings this motion because the government has repeatedly failed to comply with this Court's orders, to provide discovery, and to in any way prosecute this case. Recently, the government failed to comply with this Court's order (Doc. 20) to answer Defendant's motion for bill of particulars (Doc. 12).

Respectfully submitted this 4th day of May, 2007.

/s/ Alan S. Richey
Alan Stuart Richey
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MEMORANDUM

The indictment should be dismissed because the government has failed to timely prosecute this case, has failed to obey this Court's orders, and has refused to provide discovery. This has caused unnecessary delay and resulted in substantial prejudice to Defendant.

FACTS

The indictment in this case was filed with this Court on November 14, 2006 but appears to have been returned on November 4, 2006 (Doc. 3). The government never sought to arraign Defendant until it obtained a warrant on February 15, 2007 (Doc. 4). Defendant was not arraigned until March 1, 2007, nearly 4 months after the indictment was returned.

On March 10, Defendant timely filed a motion for a bill of particulars (Doc. 12). This Court ordered a hearing on the motion and ordered any response to be filed by April 2, 2007 (Docs. 13-14).

On about March 27, 2007, Defense counsel was in Detroit to try to obtain discovery which had not been disclosed (Doc. 18). On March 28, 2007, Defense Counsel spoke on the phone with Marc Baker, the CID agent handling this case, who said that he did not know what exhibits would be used and had been unable to meet with government counsel to put together the exhibits for trial; therefore, Defense could not view any discovery (Doc. 18). Later that day, government's Counsel informed Defense on the phone that he had been unable to review and prepare the exhibits with the case agent which the government planned on using for trial. Government's counsel informed the Defense that the government should be able to have discovery ready and

sent out to Defense in about 10 days (Doc. 18). The government has yet to provide any discovery.

On Saturday, April 14, 2007, ten calendar days before trial was scheduled to begin, the government filed a motion to continue the trial (Doc. 17).

On April 19, 2007, this Court granted the government's motion to continue trial and the motion for a bill of particulars (Doc. 20). This Court ordered, "The government shall file a bill of particulars within fourteen days from the date of this order." (Doc. 20) Fourteen days from the date of the Order was May 3, 2007. The government filed no bill of particulars on or before May 3, 2007.

ARGUMENT

THE INDICTMENT SHOULD BE DISMISSED BECAUSE THE GOVERNMENT FAILED TO PROSECUTE THIS CASE AND COMPLY WITH THIS COURT'S ORDERS.

Fed. R. Crim. Proc. 48(b) provides, "The court may dismiss an indictment ... if unnecessary delay occurs in: (3) bringing a defendant to trial." This rule "allows a court to dismiss an indictment on constitutional grounds." *U.S. v. Goodson*, 204 F.3d 508, 513 (4th Cir.2000), citing *Pollard v. U.S.*, 352 U.S. 354, 361 n.7 (1957). A district court also has "inherent power to dismiss an indictment for lack of prosecution where the delay is not of a constitutional magnitude." *Id.*; *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962). This authority allows a court "to administer its docket and preserve the integrity of the judicial process." *Id.*, at 514 (4th Cir.2000); see also *United States v. Hastings*, 461 U.S. 499, 505 (1983). See also *Speights v. Frank*, 361 F.3d 962, 964 (7th Cir.2004)(appeal dismissed for lack of filing a brief); *Connecticut v. Health Net, Inc.*,

383 F.3d 1258, 1260 n.1 (11th Cir.2004)(case dismissed for lack of prosecution for “failure to attend a docket call”); *Allen v. Calderon*, 408 F.3d 1150, 1152 (9th Cir.2005)(action dismissed under district court’s discretion “for lack of prosecution for failure to comply with a court order”); *Harrington v. City of Chicago*, 433 F.3d 542, 548 (7th Cir.2006)(death in family may not be sufficient excuse for lack of prosecution when a history of lack of prosecution exists, such as failure to provide discovery and failure to comply with court orders). A district court has broad discretion to dismiss an indictment with prejudice as long as the court makes a finding of prejudice or a substantial threat thereof to the Defendant. *Id.* ; see also

In this case, the government has failed to timely do anything to prosecute this case. Even though an indictment was filed on November 14, 2006, the government did nothing for three months, finally obtaining a warrant (without ever serving Defendant with the warrant) on February 15, 2007 (Doc. 4). The only other thing the government has done in this case is file a motion for a continuance (Doc. 17).

The government has failed to follow this Court’s orders. On March 10, Defendant timely filed a motion for a bill of particulars (Doc. 12). This Court ordered a hearing on the motion and ordered any response to be filed by April 2, 2007 (Docs. 13-14). The government failed to file any response, so the motion was granted (Doc. 20). This Court ordered, “The government shall file a bill of particulars within fourteen days from the date of this order.” (Doc. 20) Fourteen days from the April 19, 2007 Order was May 3rd. The government filed no bill of particulars on or before May 3, 2007.

The government has failed to provide any discovery in this case. As Defendant noted previously, the government has not reviewed or prepared exhibits for trial (Doc.

18). The government informed the Defense on March 28th that it should be able to provide discovery within 10 days (Doc. 18). No discovery has been forthcoming.¹

The government has not only failed to exercise due diligence, but it also seeks to prejudice Defendant. Defendant faces four counts of alleged criminal violations, but the government fails to explain those charges through a bill of particulars so he can be fully apprised of the charges and adequately prepare for trial. The failure to timely prosecute this case flies in the face of justice and in the face of Defendant's right to a speedy trial, a right guaranteed by the Constitution. The government seeks to override the Constitution and deprive Defendant of his rights. It also merely wants more time to prepare to convict Defendant on four felony criminal counts, all without providing anything to Defendant that it is required to or ordered to by this Court. All of this is either prejudicial to or a threat to prejudice Defendant.

CONCLUSION

Based on the foregoing, this Court should dismiss the indictment with prejudice because the government has failed to timely prosecute this case, has failed to obey this Court's orders, and has refused to provide discovery. This has caused unnecessary delay and resulted in substantial prejudice or a threat of prejudice to Defendant.

¹ A lack of preparation for trial on the part of the government precludes a finding of due diligence. *United States v. Crane*, 776 F.2d 600, 605 (6th Cir.1985).

Respectfully submitted this 4th day of May, 2007.

/s/ Alan S. Richey
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did electronically file the foregoing motion using the court's CM/ECF system which will send notice of the filing to the attorney of record for the plaintiff, Richard L. Delonis, and any other counsel of record through the CM/ECF system.

Dated this 4th day of April, 2007.

/s/ Alan S. Richey
Alan S. Richey