UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 2:24-CR-00192**

KISHA SUTTON, ET AL.

GOVERNMENT'S OMNIBUS RESPONSE IN OPPOSITION
TO DEFENDANT KISHA SUTTON'S MOTIONS TO DISMISS

Comes now the United States of America, by Jonathan T. Storage, Assistant United States Attorney for the Southern District of West Virginia, and submits this omnibus response in opposition to the following motions to dismiss: ECF Nos. 184, 185, 186, 187, 188, 189, 190, 191, 192, and 193. For the reasons stated more fully herein, the government respectfully requests that the Court deny each of the listed motions to dismiss.

I. BACKGROUND

On January 22, 2025, a federal Grand Jury returned a ten-count Superseding Indictment against defendant Kisha Sutton, charging her with conspiracy to commit bank fraud and aiding and abetting bank fraud. ECF No. 68. The essence of the government's case is that defendant Kisha Sutton conspired with other defendants named in the Superseding Indictment to apply for fraudulent COVID-19 pandemic Paycheck Protection Program ("PPP") loans. The government alleges that defendant Kisha Sutton received the personal identifying and bank account information from each of the defendants, filled out loan application documents and other financial forms on their behalf, and submitted them for approval. Once the loan was approved and the financial institution deposited the loan proceeds into the other defendant's accounts, the other defendants initiated "kickback" payments to defendant Kisha Sutton.

To date, two co-defendants, William Powell and Jasmine Spencer, have entered into plea agreements with the government, and they have admitted to scheming with defendant Kisha Sutton in relation to their individual PPP loans. See ECF Nos. 153 & 155. A third co-conspirator, Lydia Spencer, named but not charged in the Superseding Indictment, but she is under a plea agreement with the government and has admitted to scheming with defendant Kisha Sutton regarding PPP loans. See ECF No. 10, United States v. Lydia Spencer, Case No. 2:24-cr-00053 (SDWV).

II. LEGAL STANDARD

"When deciding a pretrial motion to dismiss an indictment for improper venue, the district court assesses only whether the allegations of the indictment, if true, would suffice to establish venue. The court may not, at this stage, consider evidence beyond the indictment." United States v. Powers, 40 F.4th 129, 134 (4th

Cir. 2022) (internal citation omitted). Likewise, in an appeal from the denial of a pretrial motion to dismiss the indictment, the Fourth Circuit will not consider the evidence that was presented at trial. Id. at 134.

"[T]he selection of venue in a bank fraud prosecution is governed by the general venue statute for federal criminal offenses, set forth in 18 U.S.C. § 3237." United States v. Bankole, 39 F. App'x 839, 842 (4th Cir. 2002). "[T]he submission of a venue question to a jury is a proper procedure when the facts underlying venue are disputed." Id. at 841. "Venue for a federal criminal prosecution is to be determined 'from the nature of the crime alleged and the location of the act or acts constituting it.'" Id. at 842.

Bank fraud is a continuing offense under 18 U.S.C. § 3237(a), and venue is proper wherever the offense was "begun, continued, or completed." United States v. Scott, 270 F.3d 30, 36 (1st Cir. 2001); see also Bankole, 39 F. App'x at 843 ("[The verdict] supports a finding that the bank fraud offense was begun in Maryland, continued into New Hampshire, and was completed in the Eastern District of Virginia." (emphasis in original)); see also United States v. Dupre, 117 F.3d 810, 822 (5th Cir. 1997) ("Bank fraud, false statement, and money laundering offenses are "continuing" offenses for purposes of § 3237.").

"For some offenses, there may be 'more than one appropriate venue, or even a venue in which the defendant has never set foot.'" United States v. Ebersole, 411 F.3d 517, 524 (4th Cir. 2005).

III. DISCUSSION

The motions to dismiss should be denied because (A) they were untimely filed and (B) the government has sufficiently pleaded venue for the ten counts charged in the Superseding Indictment.

A. Untimeliness

The Court should dismiss the motions to dismiss because they were filed untimely. The Court ordered that any pre-trial motions be filed no later than May 6, 2025. ECF No. 167 at 2. When no relevant pretrial motions[1] were filed by the deadline, the Court cancelled the pre-trial motions hearing. ECF No. 182.

Defendant Kisha Sutton has not sought relief from the Court's Order regarding the pretrial motions filing deadline. Moreover, she has not provided any reason for her untimely motions. Certainly, defendant Kisha Sutton was aware of the deadline, as she filed her second motion to continue the trial on the deadline date.

[1] On May 6, 2025, defendant Kisha Sutton filed her second motion to continue the trial date and all trial-related deadlines. ECF No. 179. Following the government's filed objection to that motion, the Court denied the continuance request. ECF No. 196.

The Court should not condone the unexplained violation of its scheduling orders, and the government requests that the motions be dismissed as untimely filed.

B. Venue Sufficiently Pleaded

The government has sufficiently pleaded venue for each of the ten counts of the Superseding Indictment: the opening paragraphs describe in detail the nature of the overall conspiracy and the scheme to defraud three separate financial institutions.

Defendant Kisha Sutton is the only named co-conspirator who did not reside within the Southern District of West Virginia during the relevant timeframe alleged in the Superseding Indictment. For example, "[a]t all times material to [the] Superseding Indictment . . . Defendant DAMISHA BROWN was a resident of <u>Charleston, Kanawha County, West Virginia</u>. Defendant DAMISHA BROWN authorized defendant KISHA SUTTON to apply for a fraudulent PPP loan on her behalf. As a result, defendant DAMISHA BROWN received fraudulent PPP loan proceeds and paid a portion of the proceeds to defendant KISHA SUTTON as a kickback for applying for the loan." ECF No. 68 at 6-7 (emphasis added). "Between on or about April 30, 2021, and on or about May 27, 2021, defendant DAMISHA BROWN, <u>within the Southern District of West Virginia</u>, remitted $3,500 of the fraudulent PPP loan proceeds to defendant KISHA SUTTON." ECF No. 68 at 24 (emphasis added). This language expressly links the conspiratorial conduct, as well as the aiding and abetting conduct, to the Southern District of West Virginia. And the same express linkages to the Southern District of West Virginia are alleged in each of the counts of the Superseding Indictment.

"When deciding a pretrial motion to dismiss an indictment for improper venue, the district court assesses only whether the allegations of the indictment, if true, would suffice to establish venue." Powers, 40 F.4th at 134. Taking the factual allegations contained in the Superseding Indictment as true, the government has met the very low bar of pleading venue in the Southern District of West Virginia for each of the charged counts.

Specific details or suggestions of evidence to be used at a later trial to establish venue are not required. Defendant Kisha Sutton, though, suggests that such detail is necessary to make the Superseding Indictment constitutionally sound. For example, in one of her motions, ECF No. 184, defendant Kisha Sutton states, "The Indictment does not indicate where the kickback payments were initiated, authorized or the servers from which they processed. Without this information, Ms. Sutton cannot determine whether the venue is appropriate, and for those reasons, the indictment is constitutionally defective." ECF No. 184 at 3. But the Superseding Indictment does allege that each of the kickback payments were initiated "within the Southern District of West Virginia." The government is under no obligation to identify in a charging instrument the exact, pin-pointed location where each act in furtherance of a conspiracy or an act to aid and abet a crime occurs. See Powers, 40 F.4th at 136 ("Our inquiry when assessing a challenge to the adequacy of the indictment is whether the Government has alleged that a crime was committed in the district, not whether or how the Government will prove that fact at trial. As explained above, the indictment here was sufficient because it alleged that [the] illegal acts occurred in the Eastern District of Virginia and elsewhere." (emphasis added)).

Defendant Kisha Sutton attempts through her motions to drag the Court into a fact-finding inquiry about what the government's evidence is or isn't that links the alleged bank fraud scheme to the Southern District of West Virginia. The Court should disregard these arguments because "[v]enue is a matter 'ordinarily decided by the jury.'" United States v. Taylor, 784 F. App'x 145, 151 (4th Cir. 2019). "[T]he submission of a venue question to a jury is a proper procedure when the facts underlying venue are disputed." Bankole, 39 F. App'x at 841.

The government submits that it has sufficiently pleaded venue within the Superseding Indictment as to all charged counts. To the extent defendant Kisha Sutton desires to challenge or test the government's evidence as to venue, which must be proven by only a preponderance of the evidence, she will have the opportunity to do so at trial.

IV. CONCLUSION

For the reasons stated herein, the government respectfully requests that the Court deny defendant Kisha Sutton's motions to dismiss. ECF Nos. 184, 185, 186, 187, 188, 189, 190, 191, 192, and 193.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "GOVERNMENT'S OMNIBUS RESPONSE IN OPPOSITION TO DEFENDANT KISHA SUTTON'S MOTIONS TO DISMISS" has been electronically filed and service has been made on opposing counsel by virtue of electronic mail this the 15th day of May, 2025, to:

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