IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA,

PLAINTIFF,

V. CASE NO.: 2:24-cr-00192

KISHA SUTTON,

DEFENDANT.

DEFENDANT'S OBJECTIONS TO MAGISTRATE'S ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS FOR LACK OF VENUE

Pursuant to 28 U.S.C. §636(b)(1) and Rule 59.6 of the Local Rules, Defendant, Kisha Sutton, respectfully makes the following objections to the ORDER (ECF 203) entered in this matter on May 20, 2025 denying Defendant's Motions to Dismiss for Lack of Venue. (ECF 185-193). For the reasons stated below, the Court should set aside the Magistrate's Order and Dismiss Counts two (2) through ten (10) of the Defendant's Superseding Indictment.

Kisha Sutton is alleged to have submitted false or misleading PPP loan applications by inputting personal information provided by her co-defendants. This was allegedly done to secure PPP funds, and in exchange, she is alleged to have received "kickback" money after the co-defendants' loans were funded. Based on this conduct, the Superseding Indictment accuses her of one (1) count of conspiracy to commit bank fraud and nine (9) counts of actual bank fraud.

Ms. Sutton challenges the Superseding Indictment by arguing that counts two (2) through ten (10) fail to allege acts that satisfy venue in the Southern District of West Virginia. The Magistrate's denial of the Defendant's argument seems to incorporate the essential conduct establishing venue for conspiracy into the essential conduct which establishes venue for bank fraud; however they are not the same. Additionally, in support of the denial, the Magistrate seems, at least in part, to rely on case law cited by the government which has nothing to do with the issue venue and or the "essential conduct elements" of bank fraud relative to venue for that crime. Because of these reasons, this Court should set aside the Order and dismiss counts two (2) through ten (10).

Legal Standard

This Court's review is de novo. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

Objections

I. An indictment that incorporates by reference paragraphs relevant to the charging of one crime (Conspiracy) into the charging of another crime (Bank Fraud) is not sufficient to satisfy Venue when the "essential conduct" of the crimes are distinct.

In the second paragraph under the "Discussion" section of the Magistrate's Order, the Magistrate correctly analyzes the allegations against Ms. Sutton charging Conspiracy with regard to venue. Most importantly, as identified by the Magistrate, the Indictment makes specific reference, in paragraph 1 of the Superseding Indictment, to Ms. Sutton conspiring with others "within the Southern District of West Virginia". At the Indictment stage, this is all that is needed to establish venue for the conspiracy count. This is because "venue is proper in any district in which some act in furtherance of the conspiracy was committed." *United States v. Moussaoui*, 591 F.3d 263, 300 (4th Cir. 2010); *United States v. Bowens*, 224 F.3d 302, 311 n. 4 (4th Cir. 2000) ("venue is proper for all defendants wherever the agreement was made or wherever any act in furtherance of the conspiracy transpires."). As noted by the Magistrate, undersigned counsel conceded this point at the Motion to Dismiss hearing. However, the Magistrate then seemingly rules that venue has been likewise established in the bank fraud counts simply because the conspiracy paragraphs are incorporated by reference into the bank fraud counts. Ms. Sutton respectfully rejects this position because the "essential conduct element" of conspiracy to commit bank fraud is different from the "essential conduct element" of actual bank fraud. The "essential conduct element" of conspiracy is the agreement; the "essential conduct element" bank fraud is the execution. Thus, the Indictment needs to specify allegations within the bank fraud counts to independently establish venue and to that, the Indictment is silent.

The Magistrate's analysis seemingly suggests that because the conspiracy theory necessarily matches up or aligns with the aiding and abetting theory of the bank fraud theory, that venue is sufficiently plead in the Indictment. ("As pointed out by the United States, this Count (and the remaining Counts) aligns with the conspiracy theory of liability to the extent that it also relies upon an aiding and abetting theory, which does not rely upon the actual physical presence of the Defendant within this District to establish venue.") But respectfully this is not the analysis because the venue analysis requires a review of the "essential conduct element" of each independent crime charged and we can't just rely on allegations incorporated by reference because they are similar theories of liability. Instead, the question is whether the separate crimes share similar "essential conduct elements". If conspiracy to commit bank fraud and the act of bank fraud's "essential conduct element" were the same, the magistrate's analysis would be correct. However, as stated above and argued previously, the "essential conduct element" of bank fraud is the execution and the "essential conduct element" of conspiracy is the "agreement".

As a result, because the "essential conduct element" for conspiracy and bank fraud are different, the face of the Indictment must make some allegation within the bank fraud counts that the "essential conduct element" of bank fraud was tied to the Southern District of West Virginia. In this case it does not.

II. The Indictment fails to specify any essential conduct of Bank Fraud that occurred in the Southern District of West Virginia.

The first reference to the Southern District of West Virginia comes in paragraph 1 of the Superseding Indictment alleging that Ms. Sutton and others conspired to commit bank fraud. As argued above, it is irrelevant to the bank fraud "essential conduct element" analysis that the conspiracy count included this jurisdictional tie to the Southern District of West Virginia and then incorporated it by reference to the other counts. The only other references to the Southern District of West Virginia in the Superseding Indictment come in the paragraphs alleging that Ms. Sutton's co-defendants were within the Southern District of West Virginia when they sent the "kickback" payments to Ms. Sutton in New Jersey. These "kickback" allegations are also irrelevant, because the "kickback" payments were merely acts in furtherance of the bank fraud execution. Fourth Circuit law clearly supports this analysis as acts in furtherance of the crime are not venue related conduct.

Maybe the easiest way to breakdown this Indictment is to consider the allegations in three parts:

First, the co-defendants in the Southern District of West Virginia devised a scheme whereby they would agree to commit bank fraud and to do so shared their personal information to Ms. Sutton in New Jersey so that she could type it into the loan application. This is what is called a preparatory act. "Acts which are merely 'preparatory' to the underlying offense and its essential conduct, however, cannot provide a basis for venue." *United States v. Sterling,* 860 F.3d 233, 241 (4th Cir. 2017) (quoting *United States v. Rodriguez-Moreno,* 526 U.S. 275, 279 (1999). "Acts which are merely 'preparatory' to the underlying offense and its essential conduct, however, cannot provide a basis for venue." *Id.* at 241.

Second, Ms. Sutton took the personal information of her co-defendants and submitted an application. This act is the "essential conduct element" of bank fraud as it is the execution of the previously devised scheme. "[V]enue is generally limited to the place in which the "essential conduct" elements of the offense occurred. *Id.* "In order to determine the propriety of venue, we must first identify the conduct constituting the offense and the location of the criminal acts." *United States v. Bankole,* 39 F. App'x 839, 841–43 (4th Cir. 2002) *citing United States v. Barnette,* 211 F.3d 803, 813 (4th Cir. 2000).

Third, after the PPP Funds were deposited into the co-defendant's accounts, the co-defendants provided "kickback" payments. The act of providing "kickback" payments are acts in furtherance of the bank fraud crime and cannot be used to analyze venue. "Similarly, acts which occur only in furtherance of the crime or after a crime is complete cannot provide a basis for venue because they are not essential to the underlying offense." *United States v. Jefferson*, 674 F.3d 332, 367 (4th Cir. 2012) (finding venue improper for a wire fraud case because although acts in furtherance of the crime occurred in the relevant district, "the physical act of transmitting the wire communication for the purpose of executing the fraud scheme," did not); *United States v. Harris,* No. 3:12-cr-170, 2013 WL 1790140, at *2 (E.D. Va. Apr. 26, 2013) (action taken after a crime is complete "does not qualify as essential conduct of the offense for the simple reason that the crime has already been completed").

In the Superseding Indictment, the only ties identified or alleged to the Southern District of West Virginia are the "kickback" paragraphs. (For example, paragraph 35 of Count 2 below). There is no mention of the Southern District of West Virginia within the essential conduct element paragraphs nor the sharing of information paragraphs. (Paragraph 31) Thus, the Indictment is defective and does not establish venue. Count 2, below, is representative of all of the bank fraud counts and it is clear from the allegations therein that there is no reference, other than the "kickback" payment paragraph, to the Southern District of West Virginia:

Count Two

29. The allegations set forth in paragraphs 1 through 28 are hereby realleged and incorporated herein.

30. Between no later than on or about April 19, 2021, and continuing until at least on or about May 21, 2021, defendants Kisha Sutton and Shamiese Wright, aided and abetted by each other, knowingly executed and attempted to execute the above-mentioned scheme.

31. On or about April 19, 2021, 2021, defendant Kisha Sutton caused the submission of a PPP loan application and a Schedule C to Financial Institution 3 on behalf of defendant Shamiese Wright and with defendant Shamiese Wright's authorization.

32. The application and the Schedule C stated that defendant Shamiese Wright was a sole proprietor of a business that was established on January 1, 2017. The application stated that in 2020, the business had a gross income of $75,000.00. As part of the application, a 2020 Schedule C was submitted listing gross receipts of $75,000.00 and a net profit of $48,750.

33. In fact, defendant Shamiese Wright did not have a business in 2020 with those gross receipts and profit. Defendant Shamiese Wright's 2020 tax return listed $21,716 in wages and no business income or expenses. Defendant Shamiese Wright applied for unemployment compensation throughout 2020 and stated, several times, that she was not self-employed.

34. Financial Institution 3 funded defendant Shamiese Wright's PPP loan for $15,625 on or about May 7, 2021.

35. Between on or about May 7, 2021, and on or about May 17, 2021, Defendant Shamiese Wright, **within the Southern District of West Virginia**, remitted $3,000 of the fraudulent PPP loan proceeds to defendant Kisha Sutton. Defendant Shamiese Wright spent the remainder of the PPP loan proceeds on personal, ineligible expenses.

In violation of Title 18, United States Code, Sections 1344 and 2.

III. The Indictment is defective on its face and there are no questions of fact on that issue.

The Magistrate ruled that the issues presented in Defendant's Motions to Dismiss are ultimately questions of fact. Ms. Sutton certainly agrees that whether or not the Government can prove venue is a question of fact to be determined by a jury; however, the issue of whether the Indictment sufficiently alleges venue is a question of law for the Court. Undersigned counsel recognizes that the arguments within the Defendant's Motion to Dismiss did raise questions of fact, but during oral argument on the Motion did recognize the proper analysis at this stage of the proceedings was on the four-corners of the indictment and tailored his argument to that end. Based on the arguments above, this Court should set aside the Magistrate's Order and Dismiss Counts two (2) through ten (10).

Conclusion

WHEREFORE, the Defendant respectfully requests the Court enter an Order dismissing Counts Two through Ten for lack of venue and for other such relief as is necessary and proper.

Respectfully submitted,
By Counsel

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CERTIFICATE OF SERVICE

I, Connor Robertson, certify that on the 23th day of May, 2025, a copy of the foregoing motion was served on the United States by ECF, to Jonathan Storage, Assistant United States Attorney to the following:

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