UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 2:23-CR-00192-1**

KISHA SUTTON

GOVERNMENT'S RESPONSE IN OPPOSITION
TO DEFENDANT'S OBJECTIONS TO MAGISTRATE'S ORDER
DENYING DEFENDANT'S MOTIONS TO DISMISS FOR LACK OF VENUE

Comes now the United States of America, by Jonathan T. Storage, Assistant United States Attorney for the Southern District of West Virginia, and respectfully requests that the Court overrule the defendant's objections (ECF No. 204) to Magistrate Judge Aboulhosn's Order (ECF No. 203) denying the defendant's venue challenge.

I. LEGAL STANDARD

"The Federal Magistrates Act permits a district court judge to refer a pretrial suppression motion to a magistrate for the conduct of hearings, including evidentiary hearings." United States v. George, 971 F.2d 1113, 1117 (4th Cir. 1992), as amended (Aug. 12, 1992). "Upon the completion of hearings, the magistrate submits proposed findings of fact and recommendations to the court, which 'shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.'" Id. at 1117 (quoting 28 U.S.C. § 636(b)(1)). "After conducting de novo review, a 'judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.'" Id. at 1117-18 (quoting 28 U.S.C. § 636(b)(1)). "[A] district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate." Id. at 1118.

"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). "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.

"Venue must be determined from the nature of the crime alleged, determined by analyzing the conduct constituting the offense, and the location (or, if the crime is a continuing one, locations) of the commission of the criminal acts. If the crime consists of distinct parts, taking place in different localities, then venue is proper wherever any part can be proved to have taken place." United States v. Scott, 270 F.3d 30, 35 (1st Cir. 2001). "One of the elements of bank fraud is proof of a scheme to defraud." Id. at 36 (emphasis added).

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." Scott, 270 F.3d at 36; 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.").

"A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each." United States v. Midstate Horticultural Co., 306 U.S. 161, 166 (1939) (quoting with approval Armour Packing Co. v. United States, 153 F. 1 (8th Cir. 1907), aff'd, 209 U.S. 56 (1908)).

The Fourth Circuit has noted that "it was not always possible by the use of one analytical tool to discern the location of where a crime has been committed." United States v. Cofield, 11 F.3d 413, 417 (4th Cir. 1993), as amended (Jan. 5, 1994). "A review of relevant authorities demonstrates that there is no single defined policy or mechanical test to determine constitutional venue. Rather, the test is best described as a substantial contacts rule that takes into account a number of factors—the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate factfinding." Id. at 417 (quoting with approval United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985)).

"[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 841; see also Green v. United States, 309 F.2d 852, 857 (5th Cir. 1962) (holding that "the trial court erred in failing to submit the question of venue to the jury."). At trial, "[t]he burden is on the Government to prove venue by a preponderance of the evidence." United States v. Robinson, 275 F.3d 371, 378 (4th Cir. 2001).

"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).

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2. To convict a defendant of being an aider and abettor, the government must show that the defendant's conduct amounted to counseling, assisting, or facilitating the commission of a federal crime. See United States v. Honeycutt, 311 F.2d 660, 662 (4th Cir. 1962).

Title 18, United States Code, Section 2 "has been construed to permit the prosecution of an aider and abettor not only in the district in which he committed the accessorial acts but also in the district where the substantive crime was committed." United States v. Kilpatrick, 458 F.2d 864, 868 (7th Cir. 1972). "Congress has declared that an aider and abettor may be punished as a principal, and it follows that he may be punished in the same district as the principal." Id. at 868.

II. DISCUSSION

Because the government has properly alleged venue within the Southern District of West Virginia in the Superseding Indictment, the defendant's objections to Magistrate Judge Aboulhosn's Order should be overruled.

A. The allegations within the four corners of the Superseding Indictment unequivocally assert that the charged conduct occurred within the Southern District of West Virginia.

The starting point in considering a pretrial motion to dismiss for lack of venue is to examine the charging document. "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.

In the introductory paragraphs of the Superseding Indictment, each co-defendant and their role in the "scheme to defraud" is discussed. For example, in ¶ 9 of the Superseding Indictment, the Grand Jury alleges, while residing within the Charleston, Kanawha County, West Virginia, within the Southern District of West Virginia, "defendant SHAMIESE WRIGHT authorized defendant KISHA SUTTON to apply for a fraudulent PPP loan on her behalf. As a result, defendant SHAMIESE WRIGHT received fraudulent PPP loan proceeds and paid a portion of the proceeds to defendant KISHA SUTTON as a kickback for apply for the loan." ECF No. 68 at 32. These introductory paragraphs are incorporated by reference in each of the charged counts. Moreover, Counts Two through Ten specifically allege that the kickback payments to the defendant were initiated "within the Southern District of West Virginia." Thus, the Superseding Indictment is direct and clear in alleging that the charged conduct, which includes both conspiracy and aiding & abetting offenses, are sufficiently associated with the Southern District of West Virginia to withstand a venue challenge at this stage of the proceedings. Powers, 40 F.4th at 134 ("The court may not, at this stage, consider evidence beyond the indictment.").

B. The defendant's fixation on where the "essential conduct element" of an offense took place ignores the continuing offense character of the bank fraud statute.

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." Scott, 270 F.3d at 36; 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)). During the hearing on the defendant's motions to dismiss, the defendant conceded to the Court that bank fraud is a continuing offense for venue purposes. But the defendant's objections (ECF No. 204) to the magistrate judge's ruling make no mention of this fact.

The case law, as well as the applicable venue statute (18 U.S.C. § 3237(a)), are unambiguous that continuing offenses may be brought in any district where an offense is begun, continued, or completed. The defendant attempts to confuse offense elements for bank fraud with other, inapposite crimes. See, e.g., ECF No. 204 at 5 (discussing inapplicability of "preparatory acts" for venue purposes). Importantly, though, "[o]ne of the elements of bank fraud is proof of a scheme to defraud." Scott, 270 F.3d at 36 (emphasis added). In a bank fraud prosecution, the "scheme to defraud" is the offense conduct, and the United States Supreme Court has said as much. In examining the ways in which Congress changed the common law application of the certain fraud offenses (to include mail fraud, wire fraud, and bank fraud), the Supreme Court observed that by enacting the fraud statutes, Congress prohibited "the scheme to defraud, rather than the completed fraud." Neder v. United States, 527 U.S. 1, 25 (1999) (internal quotations omitted) (emphasis added).

As alleged in the Superseding Indictment, the "scheme to defraud" involved residents of the Southern District of West Virginia scheming with the defendant to apply for fraudulent PPP loans. The co-defendant's sent their personal information to the defendant in furtherance of the scheme, received illicit proceeds as a part of the scheme in the Southern District of West Virginia, and sent a kickback payment to the defendant for her role in "aiding and abetting" the scheme. Title 18, United States Code, Section 2 "has been construed to permit the prosecution of an aider and abettor not only in the district in which he committed the accessorial acts but also in the district where the substantive crime was committed." Kilpatrick, 458 F.2d at 868. Accordingly, under both a conspiracy theory and aiding & abetting theory, both of which are alleged in the Superseding Indictment as to the defendant, venue has been properly alleged.

III. CONCLUSION

For the reasons stated herein, the government respectfully requests that the Court overrule the defendant's objections (ECF No. 204).

Respectfully submitted,

LISA G. JOHNSTON
Acting United States Attorney

By:

s/Jonathan T. Storage
JONATHAN T. STORAGE
Assistant United States Attorney
WV State Bar No. 12279
300 Virginia Street, East
Room 4000
Charleston, WV 25301
Telephone: 304-345-2200
Fax: 304-347-5104
E-mail: Jonathan.Storage@usdoj.gov

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO MAGISTRATE'S ORDER DENYING DEFENDANT'S MOTIONS TO DISMISS FOR LACK OF VENUE" has been electronically filed and service has been made on opposing counsel by virtue of electronic mail this the 28th day of May, 2025, to:

Connor D. Robertson, Esq.
2702 Main Street
Hurricane, WV 25526
Email: cdr@croblaw.com

s/Jonathan T. Storage
JONATHAN T. STORAGE
Assistant United States Attorney
WV State Bar No. 12279
300 Virginia Street, East
Room 4000
Charleston, WV 25301
Telephone: 304-345-2200
Fax: 304-347-5104
E-mail: Jonathan.Storage@usdoj.gov