

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
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 v. : No. 3:99cr85(EBB)
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 RODOLFO SEGURA, ET AL. :
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Omnibus Ruling on Defendants' Motions to Dismiss and Motions for
Bill of Particulars

Defendants Hector Barrientos and Jimmy Augusto Restrepo each move, pursuant to 18 U.S.C. §§ 3161-74, to dismiss the Second Superceding Indictment dated January 5, 2001 for violation of the Speedy Trial Act.¹ [Doc. Nos. 886 and 907] In addition, Defendants Hector Barrientos and John Elejalde each move, pursuant to Fed. R. Crim. P. 7, for a bill of particulars. [Doc. Nos. 892 and 899]. For the reasons that follow, Defendants' motions are DENIED as to Movants and as to all Defendants adopting such motions.

I. BACKGROUND

Defendants Barrientos, Restrepo, and Elejalde are three of thirty-six defendants indicted for an alleged drug conspiracy taking place in Fairfield, Connecticut, during 1998 and 1999. On

¹ Barrientos' motion is technically moot because he has since entered a plea of guilty to the Second Superceding Indictment. The Court rules on his motion, however, because several co-defendants have adopted it.

January 5, 2001, a federal grand jury returned a twenty-count Second Superceding Indictment, charging, among others, Barrientos, Restrepo, and Elejalde with one count of Conspiracy to Possess with Intent to Distribute Cocaine and Cocaine-Base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Barrientos, Restrepo, and Elejalde were also each charged with various substantive offenses in some of the remaining counts.

II. DISCUSSION

A. Bill of Particulars Motions

On November 1, 2000, the Court ruled on five bill of particulars motions and found that

[t]he charges in the Indictment, coupled with the discovery provided by the Government and the ample time to review that discovery, sufficiently advise the defendants of the specific acts of which they are accused. The materials provided by the Government to date include Title III affidavits, logs, and audio tapes, federal search warrant affidavits, surveillance reports, seizure of evidence reports, FBI reports, and laboratory reports. These materials set forth descriptions of the overall conspiracy, specific transactions transpiring during the conspiracy, types and quantities of narcotics, and more. These details are sufficient to satisfy the purposes of a bill of particulars and obviate the need for any further particulars.

United States v. Segura, No. 3:99cr85(EBB), at 2 (D. Conn. Nov. 1, 2000) (citations omitted). Nothing has changed since this prior ruling, except that the grand jury returned a Second Superceding Indictment, which, as the Government points out, contains more, not less, detail. Therefore, the Court adheres to its previous ruling, and finds, based on the reasoning and

authority stated therein, that the Second Superceding Indictment, and the discovery already produced, is more than sufficient to enable Defendants to prepare their defense, avoid unfair surprise at trial, and plead the defense of double jeopardy, if appropriate. Accordingly, Defendants' motions for bill of particulars [doc. nos. 892 and 899] are DENIED as to Movants, and as to all defendants adopting such motions.

B. Speedy Trial Motions

1. Speedy Trial Act Claims

The Speedy Trial Act, 18 U.S.C. §§ 3161-74 [hereinafter the "Act"], provides that, except for days deemed "excludable" from computation under the Act, all criminal defendants shall be brought to trial within 70 days of the date of their indictment or arraignment, whichever occurs later. See 18 U.S.C. § 3161(c)(1). Several circumstances, such as pretrial motions and hearings, create excludable time from this 70-day clock. See 18 U.S.C. § 3161(h). If a criminal defendant is not brought to trial within 70 non-excludable days from the indictment or arraignment, the Act mandates dismissal of the indictment upon a motion by the defendant. See 18 U.S.C. § 3162(a)(2). The defendant has the burden of proof to support a motion to dismiss for violation of the Act. See 18 U.S.C. § 3162(a)(2).

Here, Barrientos claims that his right to a speedy trial under the Act was violated on the grounds that, notwithstanding the number of defendants and complexity of this case, the "delay

has exceeded reasonable limits and those permitted by the Speedy Trial Act," (Def.'s Mot. to Dismiss [hereinafter "Barrientos' Mot."] at ¶ 7), and that he has been prejudiced by the delay because the Second Superceding Indictment includes a new count and enhanced penalties. (Barrientos' Mot. at ¶ 9.) Similarly, Restrepo claims that his rights under the Act have been violated on that grounds that "in good faith [] more than 70 days of non-excludable time . . . has elapsed[,] . . . he has not consented to any waiver of the Speedy Trial Act and he has never moved for a continuance." (Def.'s Mem. of Law in Support of Def. Restrepo's Mot. to Dismiss [hereinafter "Restrepo's Mem."] at 2.)

Although both Defendants generally claim that their speedy trial rights have been violated, neither Defendant identifies specific days of non-excludable time. Restrepo claims that "there have been periods of time in which no defendants had motions pending," but fails to specify those dates. (Def.'s Mot. to Dismiss Indictment and Superceding Indictment [hereinafter "Restrepo's Mot."] at 1.) In responding to these claims, the Government accounts for every day of the pretrial time period and argues that a "straight application of the various tolling provisions under the Speedy Trial Act undermines the defendants' claim of impermissible post-accusation delay." (Gov't's 2nd Omnibus Resp. to Defs.' Pretrial Mots. at 3.) Based upon careful review of the entire docket in this case, the Court agrees.

a. Commencement of the 70-Day Period

The 70-day clock begins to run on the date of arraignment. See United States v. Nixon, 779 F.2d 126, 130 (2d Cir. 1985); 18 U.S.C. § 3161(c)(1). Because “[a] superceding indictment inherits the clock of the original [indictment],” United States v. Gambino, 59 F.3d 353, 362 (2d Cir. 1995) (citation omitted), the Court will begin with the first arraignment on the first indictment. Since the date of arraignment is itself a proceeding, and as such excludable pursuant to section 3161(h)(1), the 70-day period in this case commenced on May 28, 1999, the day after defendant Van Turner entered a plea of “not guilty.”

b. Exclusion of Time Based on Removal Proceedings

Several defendants in this case were arrested in New York and New Jersey, and, pursuant to Fed. R. Crim. P. 40, were removed from those districts to the district of Connecticut. Section 3161(h)(1)(G) of the Act mandates exclusion for “any proceeding relating to . . . the removal of any defendant from another district under the Federal rules of Criminal Procedure.”

Of the out-of-state defendants removed under Rule 40, Carlos Bolanos Yusty was the first to be presented and arraigned in the District of Connecticut. Accordingly, the time period from May 28, 1999 through June 8, 1999, the day Yusty was arraigned in Connecticut, is excluded under section 3161(h)(1)(G).

c. Exclusion of Time Based on Complexity of Case

Pursuant to section 3161(h)(8)(A)-(B), the Court may grant a

continuance and exclude a delay from the 70-day clock based on the complexity of the case if the court finds that the ends of justice are served by such a continuance, and sets forth a reason for so finding. Some of the factors relevant to the complexity question are the number of defendants and the nature of the prosecution. While these provisions provide leeway, the length of an exclusion for complexity must be "limited in time" and must be "reasonably related to the actual needs of the case."

Gambino, 59 F.3d at 358. Continuances on the grounds of complexity pursuant to section 3161(h)(8)(A) may not be open ended, and "indefinite delay" will not be tolerated. See United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1197 (2d Cir. 1989).

Here, on August 5, 1999, the Court entered a Scheduling Order, and, noting the complexity of the case, determined that excluding the time from June 3, 1999 through September 1, 1999 would serve the interests of justice. Included in the Scheduling Order was a September 1, 1999 deadline for pre-trial motions and an October 1, 1999 deadline for the Government's response. Accordingly, due to the number of defendants, (thirty-six at that time), and the limited nature of the exclusion, the Court finds that the time period from June 3, 1999 through September 1, 1999 was, and continues to be, properly excluded from the 70-day clock under section 3161(h)(8)(A).

d. Exclusion of Time Based on Pretrial Motions

Pursuant to section 3161(h)(1)(F), "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion," is excludable from the 70-day time clock. In Henderson v. United States, 476 U.S. 321, 330-31 (1986), the Supreme Court held this time to be excludable without regard to the reasonability or necessity of the delay, and determined that the provision includes any time period after a hearing during which a district court awaits additional filings from the parties. Once all papers are filed on a motion, the Act allows the additional exclusion of up to 30 days while the court has the motion "under advisement." See 18 U.S.C. § 3161(h)(1)(J); Henderson, 476 U.S. at 329. The Second Circuit has held that "a defendant having made a motion cannot complain if its disposition is not expeditious; *all* the time consumed in deciding the motion is attributable to the defendant." Gambino, 59 F.3d at 359. When defendants, like the ones here, are joined in a multi-defendant case, time excluded from the 70-day period as a result of one defendant's motion is excludable as to all other co-defendants unless they have been severed.² See 18 U.S.C. § 3161(h)(7).

Here, the combination of a series of motions for extension of time and a steady flow of pretrial motions, some of which

² On November 28, 2000, the Court denied Defendants' motions for severance. [Doc. No. 818]

required hearings, consumed the time from September 1, 1999 through January 3, 2001. On September 16, 1999, the Government was granted leave to file an omnibus response to all Defendants' pretrial motions. During this time period, Defendants collectively filed over twenty-five motions for extension of time and over fifty substantive pretrial motions, three of which required hearings to be scheduled. The Government's omnibus response to these pretrial motions was filed on October 11, 2000, which placed them "under advisement" (for the excludable thirty days) of the Court through November 10, 2000, and the last of the required hearings was scheduled for January 3, 2001. A sample of Defendants' substantive pretrial motions demonstrates the excludability of this entire time period.

Between August 30, 1999 and September 1, 1999 alone, Defendants filed four motions for extension of time for pretrial motions, five motions to adopt pretrial motions previously filed, and one motion to suppress. Thereafter, within the initial two-week extension granted by the Court, five additional motions for extension of time were filed, three additional motions to adopt were filed, and fourteen new substantive motions were filed, including a severance motion and another suppression motion.

On October 29, 1999, Defendant Angel Rodriguez filed a motion for a determination of his competency to stand trial, which was granted by the Court. Thereafter, Rodriguez was evaluated by two different psychiatrists, and on October 3 and 5,

2000, a competency hearing was held. Post-hearing memoranda were required, and the Court issued its ruling, finding Rodriguez incompetent to stand trial, on November 14, 2000. Section 3161(h)(1)(A) specifically excludes all time resulting from proceedings concerning a defendant's competency, regardless of whether the delay is reasonable. See United States v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986). Accordingly, all of the time from October 29, 1999 through November 14, 2000 is properly excluded.

On November 4, 1999, Defendant Jose Orlando Pena filed a motion to suppress evidence obtained during a motor vehicle stop. Due to various extensions, a hearing on this matter was ultimately scheduled for January 8, 2001. Because Pena changed his plea to "guilty" on January 3, 2001, however, the hearing did not occur. Under section 3161(h)(1)(F) discussed above, therefore, the time period from November 4, 1999 through January 3, 2001 when the motion was terminated, is properly excluded. See Henderson, 476 U.S. at 330-31; Gambino, 59 F.3d at 359.

Throughout this time, the Court ruled on the remainder of the fifty plus pretrial motions including motions to sever and motions to suppress the wiretap evidence, ruled on various bond issues, and obtained C.J.A. attorneys in response to several motions to appoint, dismiss, and replace counsel.

- e. Exclusion of Time Based on Further Arraignments and Pretrial Motions

On January 3, 2001, a status conference was held and a firm jury selection date was set for April 2, 2001, (subsequently moved to April 4, 2001), with the trial to begin the following day. On January 5, 2001, a federal grand jury returned a twenty-count Second Superceding Indictment against fourteen of the original thirty-six defendants. These defendants were arraigned on January 8 and 10, 2001. Under section 3161(h)(1) discussed above, these two days, as court proceedings, are properly excluded from the clock.

At the time of arraignment, the Court set a Scheduling Order which required all pre-trial motions to be filed by January 27, 2001, and the Government's response to be filed by February 12, 2001. Beginning on January 24, 2001, Defendants collectively filed over twenty additional pretrial motions, five of which required the scheduling of hearings. The Government filed its response on February 12, 2001, which, under section 3161(h)(1)(J) discussed above, makes the time period through March 14, 2001 excludable since the motions were, during those additional thirty days, under consideration by the Court. The last of the five scheduled hearings was held on March 20, 2001, therefore, under section 3161(h)(1)(F) discussed above, the time through March 20, 2001 is properly excluded.

f. Total Time Tolled

Based on the above calculation, the time period from May 28, 2001, the day after the first Defendant's arraignment, through

January 3, 2001 is properly excluded from the 70-day clock as a result of removal proceedings, the complexity of the case, multiple pretrial motions, competency hearings, and suppression hearings. January 8 and 10, 2001 are properly excluded as proceedings, and the time from January 24, 2001 through March 20, 2001 is properly excluded as a result of additional pretrial motions, ineffective assistance of counsel hearings, and suppression hearings.

Assuming jury selection goes forward on April 4, 2001, Defendants' speedy trial rights under the Act will not have been violated. The time from January 4, 2001 through January 7, 2001 is not excludable, January 9, 2001 is not excludable, January 11, 2001 through January 23, 2001 is not excludable, and March 21, 2001 through April 3, 2001 is not excludable. By the Court's calculation, this only amounts to 32 days of non-excludable time. Accordingly, the Court finds that Defendants' speedy trial rights under the Act have not been violated.

2. Sixth Amendment Claim

In addition to his speedy trial claim under the Act, Defendant Restrepo claims that his Sixth Amendment right to a speedy trial has been violated. Restrepo bases this claim on the ground that there has been a lengthy delay, he did not cause the delay, and he may suffer prejudice if there are witnesses who can no longer testify. The Government argues that all Defendants, including Restrepo, are responsible for the delay, that no

Defendant asserted any speeded trial rights until January 24, 2001, and that nothing indicates any Defendants have been prejudiced by the delay.

The Sixth Amendment to the Constitution of the United States guarantees all accused persons the right to a speedy trial. See U.S. CONST. amend. IV. Unlike the specific time requirements and exclusions set forth in the Act, the Supreme Court has held that consideration of a defendant's Sixth Amendment speedy trial right involves a balancing test employed on an ad hoc basis in which the conduct of both the defendant and the prosecution are weighed. See Barker v. Wingo, 407 U.S. 514, 529-30 (1972); United States v. Jones, 129 F.3d 718, 724 (2d Cir. 1997). The four factors to be considered in making such a determination are 1) the length of delay, 2) the reason for the delay, 3) the defendant's assertions of his right, and 4) any resulting prejudice to the defendant. See Barker, 407 U.S. at 530; Jones, 129 F.3d at 724.

a. Length of Delay

As discussed above, the length of delay since the Defendants' arrests in May 1999 has been approximately 21 months. While the Court acknowledges the seriousness of this amount of time, both the Supreme Court and the Second Circuit have, in many instances, found no constitutional violation and upheld delays in excess of twenty months. See, e.g., Barker, 407 U.S. at 533-34 (five year delay); United States v. Vasquez, 918 F.2d 329, 337

(2d Cir. 1990)(26 month delay); Rayborn v. Scully, 858 F.2d 84, 89 (2d Cir. 1988) (seven year delay); Howard v. Lacy, 58 F. Supp. 2d 157, 167 (S.D.N.Y. 1999)(listing Second Circuit cases upholding lengthy delays). Therefore, the length of delay in this case does not itself support Restrepo's speedy trial claim.

b. Reasons for the Delay

In Barker, the Supreme Court instructed that "different weights would be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily . . . [, whereas] a valid reason, such as a missing witness, should serve to justify appropriate delay." Barker, 407 U.S. at 531. As detailed above, the primary reasons for the delay were complexity of the case, numerous pretrial motions, and several hearings. Since there is no indication, or even allegation, of deliberate delay on the part of the Government to hamper Restrepo's, or any other Defendant's, defense, this factor does not weigh in Restrepo's favor. See United States v. McGrath, 622 F.2d 36, 41 (2d Cir. 1980) (finding no speedy trial violation because, inter alia, "[t]here is no evidence of bad faith or deliberate delays here"); Howard, 58 F. Supp. 2d at 168 (finding no speedy trial violation since, inter alia, "nothing in the record indicates a deliberate attempt by the State to delay the trial in order to hamper [the] defense").

3. Assertion of Right

As to the third factor, the Barker Court stated that the

"more serious the deprivation, the more likely a defendant is to complain," and emphasized that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Barker, 407 U.S. at 531-32. Restrepo waited to assert his right until the twentieth of what by the time of trial will be a 22 month delay. The timing of this claim, on the eve of trial, weighs against a finding that Restrepo's right to a speedy trial was violated. See Vasquez, 918 F.2d at 338 (holding that "third factor . . . weighs heavily against [defendants] . . . [since they] waited roughly 22 months before advancing their speedy trial claims, and this hardly renders plausible their contention that an expeditious resolution of their cases was a matter of pressing constitutional importance to them"); United States v. Lane, 561 F.2d 1075, 1079 (2d Cir. 1977) (finding defendant's eve of trial speedy trial motion "indicative of an interest in having the indictment dismissed, rather than of an interest in expediting the proceedings"); Howard, 58 F. Supp. 2d at 168 (same).

d. Prejudice

In assessing the issue of prejudice, the Supreme Court has identified three interests underlying a defendant's right to a speedy trial: "i) to prevent oppressive pretrial incarceration, ii) to minimize anxiety and concern of the accused, and iii) to limit the possibility that the defense will be impaired."

Barker, 407 U.S. at 532. Of these, the Supreme Court held, "the

most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." Id.

Here, Restrepo has made no claim of specific prejudice to himself except that "[a]s to the prejudice resulting, it is hard to say if witnesses he would have called he can no longer call." (Restrepo's Mem. at 5) While Restrepo's pretrial incarceration has been a hardship, twenty-two months is not sufficiently serious on its own to cause a constitutional violation. See Vasquez, 918 F.2d at 338 (holding that 26 month pretrial incarceration, without more, "'does not approach the prejudice suffered by defendants in cases where we have found a speedy-trial violation'" (quoting Flowers v. Warden, 853 F.2d 131, 133 (1988))). Restrepo makes no claim of anxiety or concern, and the only allegation of an impaired defense is the possibility of the non-availability of unidentified witnesses. Accordingly, the Court finds that Restrepo has made no showing of prejudice sufficient to create a constitutional violation.

The Second Circuit has indicated that "[a]llthough a showing of prejudice is not a prerequisite to finding a sixth amendment violation, courts generally have been reluctant to find a [constitutional] speedy trial violation in the absence of genuine prejudice." United States v. Jones, 129 F.3d 718 at 724 (2d Cir. 1997) (quoting Rayborn, 858 F.2d at 94). The absence of this factor here, therefore, weighs against Restrepo's claim.

In sum, upon consideration of all the Barker factors under the specific circumstances of this case, the Court finds that Restrepo's constitutional right to a speedy trial was not violated.

3. Rule 48(b) Claim

Restrepo's final claim is made pursuant to Fed. R. Crim. P. 48(b), which provides that "[i]f there is unnecessary delay in presenting the charge to a grand jury . . . , or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment." Specifically, Restrepo argues that Count Fifteen of the Second Superceding Indictment, a new charge against him and Barrientos, should be dismissed because the Government waited 19 months after to his arrest to bring this particular charge. The Government argues that because Restrepo's other speedy trial claims fail, his Rule 48(b) motion should be denied. The Court agrees.

In United States v. Paredes-Batista, 140 F.3d 367, 376 (2d Cir. 1998) (quoting United States v. Simmons, 812 F.2d 818, 820 (2d Cir. 1987)), the Second Circuit found that a district court's decision not to exercise its discretionary power to dismiss a complaint for undue delay in prosecution was "entirely in keeping with proper 'caution in exercising this extraordinary power where laws and rules specifically designed to prevent pretrial delay [such as . . . the Speedy Trial Act] do not require dismissal.'" Here, because Restrepo has failed to show a violation of his

speedy trial rights under either the Act or the Constitution, the Court, exercising proper caution, declines to resort to this extraordinary power.

IV. CONCLUSION

For the reasons set forth above, Defendants' motions for bill of particulars [doc. nos. 892 and 899], and Defendants' motions to dismiss for speedy trial violations [doc. nos. 886 and 907] are DENIED as to Movants and as to all Defendants adopting such motions.

So Ordered.

Ellen Bree Burns,
Senior District Judge

Dated at New Haven, Connecticut, this ___ day of March 2001.