2005 WL 236443
United States District Court,
S.D. New York.

UNITED STATES OF AMERICA,
v.
Richard MASEFIELD, Defendant.

No. 02CR441LAP.
|
Feb. 1, 2005.

OPINION AND ORDER

PRESKA, J.

***1** Presently before the Court is Defendant Richard Masefield's ("Defendant") motion to dismiss the two-count indictment against him on the grounds that the prosecution contravenes the principle of specialty governing Defendant's extradition from Australia to the United States. The Court finds that the principle of specialty has not been violated with respect to Defendant, and therefore his motion is denied.

I. *Background*

As set forth in the Declaration of Stanley J. Okula, Jr. dated November 1, 2004 (the "Okula Declaration"), Defendant is a citizen of New Zealand and a permanent resident alien of the United States. From 1993 to 2000, Defendant was paid hundreds of thousands of dollars in compensation that was knowingly not reported to the Internal Revenue Service ("IRS"). During those years, Defendant worked as an officer for Trafalgar Tours U.S.A. ("TTUSA"), a subsidiary of Trafalgar Tours International ("TTI"), both of which were corporate entities instrumental to a massive tax evasion scheme headed by hotelier Stanley S. Tollman and furthered by members of Tollman's immediate family. Defendant received this unreported income by opening a series of bank accounts in the Channel Islands and causing co-conspirators to send money from TTI accounts outside the United States directly to his Channel Islands accounts, rather than through his ostensible United States employer, TTUSA. Defendant filed tax returns in which this income, amounting to approximately $400,000.00, was knowingly omitted.

As further set out in the Okula Declaration, Defendant was first interviewed by representatives of the IRS and the United States Attorney's Office ("USAO") in connection with the Tollman investigation in late 2001. Defendant stated during the course of his interview that all of his TTUSA income was reported on his annual W-2 form. In late 2002, upon receipt of records indicating that Defendant had participated in the Channel Islands tax fraud conspiracy, a USAO representative contacted Defendant's New York attorney and requested that Defendant return to the United States from Australia. Defendant refused to return based on his belief that he could not be extradited from Australia.

The Okula Declaration continues that, as a result of Defendant's refusal to return voluntarily, the United States obtained an extradition warrant in March of 2003 based on a sealed complaint. (Sealed Complaint, Govt's. Ex. B.) The sealed complaint charged

Masefield with engaging in a single-object tax fraud conspiracy between 1993 and 2001 in violation of 18 U.S.C. § 371 (Count One) and with filing false tax returns from 1996-99 in violation of 26 U.S.C. § 7206(1) (Counts Two through Five). The sealed complaint was forwarded to the Commonwealth of Australia in March 2003 with a formal request for Defendant's extradition.

Mr. Okula states that upon receipt of the extradition request, Australian authorities determined that the crimes in the sealed complaint were covered by the United States-Australia extradition treaty and they commenced formal extradition proceedings by arresting Defendant. At this point, Defendant sought permission from the extradition courts in Australia to return to the United States voluntarily, but that request was denied. Defendant agreed not to contest his extradition, and accordingly, on April 19, 2004, the Commonwealth of Australia's Minister for Justice and Customs signed an extradition warrant surrendering Defendant to the United States to face the following charges:

> ***2** Conspiring to defraud and to violate certain laws of the United States, including offenses involving the signing, under penalty of perjury, and filing, of income tax returns that are materially false, in violation of Title 18, United States Code, Section 371 (one count);
>
> Signing, under penalty of perjury, and filing, of income tax returns that are materially false, in violation of Title 26, United States Code, Section 7206(1) (four counts).

(Surrender Warrant, Govt's. Ex. C.)

Finally, Mr. Okula relates, after Defendant's return to the United States, Defendant's counsel requested the USAO provide a letter indicating what Defendant's likely Sentencing Guidelines computaton would be. would be. The USAO provided the letter and thereafter presented to the Grand Jury a two-count Indictment ("Indictment"), returned in July 2004, charging Defendant with: (1) multi-object tax fraud conspiracy in violation of 18 U.S.C. § 371; and (2) a single false subscription charge, encompassing the period from 1993-2000, in violation of 26 U.S.C. § 7206(1). In response, Defendant filed the present motion, arguing that his prosecution violates the principle of specialty.

II. *Discussion*

The principle of specialty generally requires that an extradited defendant be charged only for the crimes on which extradition has been granted.[1] *United States v. Levy,* 25 F.3d 146, 159 (2d Cir.1994); *Ficcioni v. Attorney General,* 462 F.2d 475, 481 (2d Cir.1972). "Enforcement of the principle of specialty is founded primarily on international comity" and is premised on the notion that "[t]he requesting state must 'live up to whatever promises it made in order to obtain extradition because preservation of the institution of extradition requires the continuing cooperation of the surrendering state." *United States v. Saccoccia,* 58 F.3d 754, 766 (1st Cir.1995) (quoting *United States v. Najohn,* 785 F.2d 1420, 1422 (9th Cir.1986)).

Defendant contends that the Government has violated the rule of specialty by pursuing

charges in the Indictment that differ from those contained in the extradition warrant. Count One of the Indictment, the conspiracy charge, differs from the extradition warrant in that it alleges a multi-object conspiracy, as opposed to a single-object conspiracy, connecting Defendant to the larger Tollman tax evasion scheme.[2] Count Two of the Indictment, a single false subscription charge covering 1993-2000, differs from the extradition warrant that reflects four separate false subscription charges, one for each year between 1996 and 1999.

Defendant's challenge to the altered Counts One and Two raises one fundamental question with regard to both counts: does the principle of specialty require that a defendant be tried on precisely the charges contained in an extradition warrant or may the Government allege and prove facts in addition to those presented in the extradition request? The Court of Appeals has consistently found that the Government is not limited strictly to charges described in an extradition warrant but rather may include additional facts and additional charges as long as the statutory charge is the same. *See, e.g., United States v. Levy,* 25 F.3d at 158 (no violation of specialty where defendant was tried on CCE charge unmentioned in extradition warrant); *Ficcioni v. Attorney General,* 462 F.2d at 481 (no violation of specialty where defendant was extradited to stand trial on 1968-69 narcotics conspiracy in the District of Massachusetts and instead faced a 1970-72 conspiracy and substantive charge in the Southern District of New York); *United States v. Rossi,* 545 F.2d 814 (2d Cir.1976) (no violation of specialty where extradition charge covered 1969-72 and indictment covered 1965-73); *United States v. Flores,* 538 F.2d 939 (2d Cir.1976) (no violation of specialty where extradition charge covered 1970-71 and indictment covered 1968-71); *United States v. Paroutian,* 299 F.2d 486, 491 (2d Cir.1962) (no violation of specialty where defendant was extradited from Lebanon on narcotics trafficking and tried on two substantive narcotics charges); *see also United States v. Puentes,* 50 F.3d 1567, 1576 (11th Cir.1995) (no violation of specialty where superceding indictment returned after extradition extended conspiracy period by three years); *United States v. Andonian,* 29 F.3d 1432, 1435-37 (9th Cir.1994) (no violation of specialty where superceding indictment added overt acts to conspiracy charge on which defendant was extradited, as well as substantive counts); *United States v. Abello-Silva,* 948 F.2d 1168, 1174-76 (10th Cir.1991) (no violation of specialty where superceding indictment returned after extradition contained many additional facts but no new charges). Put simply, the Government may present additional facts or amplified allegations, "so long as [they are] ... *directed* to the charge contained in the request for extradition." Restatement (Third) of Foreign Relations Law of the United States § 477, comment c (2005) emphasis added).

***3** Defendant offers only a single case to challenge this well-established principle: *United States v. Raucher,* 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), a 19th century case dealing with violence on the high seas. The *Raucher* Court considered whether a sailor's extradition from Great Britain on a murder charge and subsequent indictment on a cruel and unusual punishment charge violated the

principle of specialty. In finding the extradition improper, the Supreme Court explained:

> [T]he [extradition] treaty only justified [defendant's] delivery on the ground that he was proved to be guilty of murder ... it does not follow at all that such magistrate would have delivered him on ... cruel and unusual punishment ... [a charge] of a very unimportant character when compared with that of murder."

Raucher, 119 U.S. at 432. The *Raucher* decision is less than current, and the relevant Second Circuit case law weighs quite heavily against the notion that specialty is violated where an indictment differs mildly from an extradition warrant.

On Count One of the Indictment, multi-object conspiracy in violation of 18 U.S.C. § 371, *Raucher* is no help to Defendant. *Raucher* cautions against a diminution in charge severity from extradition warrant to indictment-seeking to prevent a foreign extradition authority from granting extradition on a serious charge which is never actually pursued. This concern is not present here with regard to Count One, where Defendant is charged with violation of the same statute as that noted in the extradition warrant, 18 U.S .C. § 371, but faces a conspiracy charge where there are four objects alleged, not one (although as discussed above, the Government seeks no corresponding Sentencing Guidelines Offense Level enhancement). It seems unlikely that the Australian extradition authority would grant extradition based on a single-object conspiracy in violation of 18 U.S.C. § 371 but would not grant extradition on a multi-object conspiracy in violation of 18 U.S.C. § 371. This conclusion is bolstered by a close reading of the extradition warrant, which indicates some contemplation of the multi-object charge. The Australian Minister for Justice and Customs wrote that Defendant was accused of, "conspiring to defraud and to violate certain *laws* of the United States." (Emphasis added) (Def's.Ex. C.) Because Count One in the Indictment is, if anything, an enhancement, not a diminution, from Count One in the extradition warrant, and because the extradition warrant itself indicates that a multi-object conspiracy was contemplated by the extradition authority and because the same statutory violation is alleged, no specialty violation is presented.

On Count Two, the false subscription charge covering 1993-2000, Defendant seems to argue simultaneously that there is both an enhancement and a diminution from the extradition warrant to the Indictment that violates specialty. The allegedly objectionable enhancement is the inclusion of additional years in the false subscription count-1993-2000 as opposed to the 1996-99 period covered in the extradition warrant. The objectionable diminution refers to the reduction from four separate false subscription counts in the extradition warrant to only a single count in the Indictment.

***4** Defendant's enhancement objection to Count Two fails for the same reason that his objection to the Count One conspiracy charge fails. *Raucher* warns against the possibility of diminution of the charge, not enhancement. Further, the extradition authority was provided tax evasion information for the years 1993-2000, and the decision to grant

extradition was made with full knowledge of Defendant's tax evasion history.

Defendant's diminution argument more closely follows the logic of *Raucher,* but it too fails for several reasons. First, *Raucher* is immediately distinguishable from the instant case because it considered the very substantial difference in severity between the murder charge on which the defendant was extradited and the cruel and unusual punishment charge on which he was thereafter indicted and tried. Here, Defendant objects to the difference between the four tax evasion charges he was extradited for and the one tax evasion charge he presently faces. As will be explained below, the difference is in form only, at most *de minimis,* and thus the concerns raised in *Raucher* are not present here.

Additionally, Defendant is not in fact charged with a different offense in the Indictment from what was described in the extradition warrant; both accuse him of violations of 26 U.S.C. § 7206(1). Defendant notes that each false subscription count carries with it a minimum statutory term of three years imprisonment, meaning that Defendant potentially faced a 12-year term under the extradition warrant as opposed to a three-year term under the Indictment. However, the charge diminution that Defendant infers as a result is illusory. The Government's decision to consolidate the four false subscription counts into a single count is administrative, rather than a true charge diminution. Should the Government wish, it may return to the Grand Jury and seek a superceding indictment charging Defendant with four separate false subscription counts-the Government alluded to just such a possibility in its papers. (Govt's.Br., 8.) In fact, Count Two in the Indictment and Counts Two through Five in the extradition warrant are nearly identical. They are based on the same set of facts and contain the same statutory charge. Consequently, Count Two presents no violation of the principle of specialty.

IV. *Conclusion*

Accordingly, Defendant's motion to dismiss the indictment (Docket No. 205) is denied.

A conference shall be held on February 15, 2005 at 9:00 AM. In order to permit the parties to consider their positions in light of the above, time is excluded from calculation under the Speedy Trial Act from today to the date of the conference in the interests of justice.

SO ORDERED

All Citations

Not Reported in F.Supp.2d, 2005 WL 236443, 95 A.F.T.R.2d 2005-861

Footnotes

1 The threshold matter in this case is whether Defendant has standing to raise his specialty objection. Second Circuit Courts, however, are divided on this issue. *See* *Shapiro v. Ferrandina,* 478 F.2d 894, 906 (2d Cir.1973) (finding that specialty is a right of the asylum state, rather than a right of the accused); *United States v. Martonak,* 187 F.Supp.2d 117, 122 (S.D.N.Y.2002) (considering *Shapiro,* but finding that defendant has standing to raise specialty issue); *United States v. Nosov,* 153 F.Supp.2d 477, 480 (S.D.N.Y.2001) (noting disagreement among courts and addressing specialty

issue but concluding that defendant likely lacks standing). For the reasons set out in *Martonak,* Defendant may raise his specialty objections.

2 Charging Defendant with participation in a multi-object conspiracy rather than a single object conspiracy could potentially subject him to a greater prison term-perhaps a Sentencing Guidelines Offense Level of 22 and imprisonment of 41-51 months. However, the Government is prepared to stipulate that even the multi-object conspiracy charge, Defendant's Sentencing Guideline Range is the same as it would have been under a single-object conspiracy charge, resulting in a potential imprisonment of 15-21 months. In light of the Supreme Court's decisions in *United States v. Booker* and *United States v. Fanfan,* 534 U.S. ---- (2005) this argument virtually disappears. *See United States v. Booker,* No. 04-104, 2005 U.S. LEXIS 628 (U.S. January 12, 2005); *United States v. Fanfan,* No 04-105, 2005 U.S. LEXIS 628 (U.S. January 12, 2005).

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