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United States District Court, E.D. Tennessee.

UNITED STATES of America, Plaintiff,
v.
Samer G. BAKRI, Defendant.

No. 3:00–CR–76–TAV–CCS–2.
|
Filed April 30, 2014.

Attorneys and Law Firms

Jimmie Baxter, Steven H. Cook, US Department of Justice, Knoxville, TN, for Plaintiff.

MEMORANDUM AND ORDER

THOMAS A. VARLAN, Chief Judge.

***1** This criminal matter is before the Court for consideration of the Amended Report and Recommendation entered by United States Magistrate Judge C. Clifford Shirley, Jr. (the "R & R") [Doc. 159]. In the R & R, Magistrate Judge Shirley recommends that the defendant's motion to dismiss for denial of speedy trial [Doc. 148] be denied. The defendant has filed an objection to the R & R [Doc. 160], and the government replied [Doc. 161].

I. Background

On May 2, 2000, the defendant and his brother were charged in a seventeen-count indictment [Doc. 2]. The defendant is charged with money laundering, conspiracy to commit money laundering, international money laundering, and interstate and foreign transportation of stolen money.

The crimes alleged in the indictment were committed between November 1993 and October 1995 while the defendant and his brother were operating a nightclub in Knoxville, Tennessee. The defendant was present when a search warrant was executed at the nightclub in 1996. Soon thereafter, the defendant fled to his home country of Jordan, and he has remained there since that time. Although the defendant has not reentered the United States, he has retained local counsel since 2000. Through counsel, the defendant moves to dismiss the indictment against him on the ground that his right to a speedy trial has been violated.

In the R & R, Magistrate Judge Shirley recommends that the Court deny the defendant's motion to dismiss because of the applicability of the doctrine of fugitive disentitlement [Doc. 159]. He finds that the defendant is a fugitive and that no special circumstances exist that warrant exception to the doctrine's application [*Id.*].

The defendant filed an objection to the R & R, asserting (1) that the magistrate judge erred in applying the doctrine of fugitive disentitlement because it has not been adopted by the Sixth Circuit, and (2) that the defendant is not a fugitive [Doc. 160].[1] The government filed a response rebutting the defendant's claims [Doc. 161].

II. Standard of Review

As required by 28 U.S.C. § 636(b)(1) and Rule 59(b) of the Federal Rules of Criminal Procedure, the Court has undertaken a de novo review of those portions of the R & R to which the defendant has objected, considering the R & R, the motion to dismiss, the parties' underlying and supporting briefs, the defendant's objections, and the government's response to those objections, all in light of the applicable law.

III. Analysis

While the defendant argues that the Sixth Circuit has not adopted the doctrine of fugitive disentitlement, the doctrine has been recognized by the United States Supreme Court. In *Molinaro v. New Jersey,* the Court stated:

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

***2** 396 U.S. 365, 366, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970). This statement is commonly characterized as the "doctrine of fugitive disentitlement." *United States v. Kashamu,* 656 F.Supp.2d 863, 866 (N.D.Ill.2009); *see also United States v. Eagleson,* 874 F.Supp. 27, 29 (D.Mass.1994). While the Sixth Circuit has not yet applied the doctrine to pretrial motions in criminal cases, like the one before this Court, the Sixth Circuit has recognized, accepted, and applied the doctrine in other contexts. *See Shigui Dong v. Holder,* 426 F. App'x 418 (6th Cir.2011) (applying doctrine to immigration appeal); *Garcia–Flores v. Gonzales,* 477 F.3d 439, 441 (6th Cir.2007) (same); *In re Prevot,* 59 F.3d 556, 562 (6th Cir.1995) (noting the doctrine is "long-established in the federal and state courts, trial and appellate," and applying the doctrine in the context of an International Child Abduction Remedies Act case). Moreover, other district courts have routinely adopted the practice of applying the doctrine in the pretrial motion context. *See United States v. Bokhari,* No. 04–CR–56, 2014 WL 37349, at *2 (E.D.Wis. Jan.6, 2014) (finding that "[c]ourts have applied the doctrine, as here, to pretrial motions in criminal cases" (citations omitted)); *United States v. Chung Cheng Yeh,* No. CR 10–00231 WHA, 2013 WL 2146572, at *2 (N.D.Cal. May 15, 2013) (same); *Kashamu,* 656 F.Supp.2d at 867 (holding "that the fugitive disentitlement doctrine can apply to pretrial motions in criminal cases, subject to the discretion of the Court"); *United States v. Oliveri,* 190 F.Supp.2d 933, 936 (S.D.Tex.2001) (recognizing that "[a]lthough the fugitive disentitlement doctrine is often invoked during the appellate process, it also applies to pretrial motions made by fugitives in the district courts"); *United States v. Stanzione,* 391 F.Supp. 1201, 1202 (S.D.N.Y.1975) (applying the doctrine and refusing to hear the defendant's motion to dismiss the indictment until he submitted to the jurisdiction of the court for full resolution of the case). Thus, the Court finds that the magistrate judge properly applied the doctrine of fugitive

disentitlement in examining the defendant's motion to dismiss.

The doctrine of fugitive disentitlement is a discretionary tool that "limits access to the federal courts by a fugitive who has deliberately fled from custody." *Kacaj v. Gonzales,* 163 F. App'x 367, 368 (6th Cir.2006); *see also In re Prevot,* 59 F.3d at 562. It is based upon the premise of mutuality. *Oliveri,* 190 F.Supp.2d at 935 ("[T]he fugitive disentitlement doctrine has come to signify the unwillingness of courts to waste time and resources exercising jurisdiction over litigants who will only comply with favorable rulings of the court."). "[U]ntil [the defendant] is willing to submit his case for complete adjudication-win or lose-he should not be permitted to call upon the resources of the court for the determination of selective claims." *Stanzione,* 391 F.Supp. at 1201.

***3** Applying the doctrine involves a two-part inquiry. The court must examine (1) whether the defendant is a fugitive, and (2) whether any special circumstances exist that warrant an exception to the doctrine's application. *Kashamu,* 656 F.Supp.2d at 867 (citing *Oliveri,* 190 F.Supp.2d at 936).

A fugitive is "someone who seeks to evade prosecution by either actively avoiding the authorities, or remaining in a geographic location that is out of the authorities' reach." *Id.* In the Sixth Circuit, specifically, the defendant must "conceal[ ] himself with the intent to avoid prosecution." *United States v. Greever,* 134 F.3d 777, 780 (6th Cir.1998) (citations omitted). "This intent can be inferred from the defendant's knowledge that he was wanted and his subsequent failure to submit to an arrest." *Id.* (citations omitted).

The defendant argues he is not a fugitive because "[h]e has at all times since his indictment been living openly in the Kingdom of Jordan" [Doc. 160]. He further asserts he left the United States when his visa was about to expire and that he cannot enter the United States because of the indictment against him.[2]

It is undisputed that the defendant left the United States after becoming aware of the investigation and the potential charges against him. The defendant also does not dispute that he has been aware of the charges against him since 2000 and has remained in Jordan despite that knowledge. Indeed, he has retained local counsel to represent him throughout the duration of this case. Moreover, and importantly, the defendant does not assert that he is willing to submit to the jurisdiction of the United States and be arrested; he asserts only that the United States has made no attempt to extradite him. The Court therefore finds that the defendant is avoiding prosecution and is, consequently, a fugitive.[3]

IV. Conclusion

In sum, after reviewing the record in this case, including the R & R, the objections, the underlying briefs, and the relevant law, the Court determines that the magistrate judge fully and appropriately considered the arguments in support of the motion to dismiss the indictment and properly recommends that the motion to dismiss be denied. Further, the Court finds the defendant's objections to the R & R without merit, as discussed in this

memorandum opinion and order. Accordingly, the defendant's objections to the R & R [Doc. 160] are **OVERRULED,** the R & R [Doc. 159] is **ACCEPTED in whole,** and the defendant's motion to dismiss [Doc. 148] is hereby **DENIED.**

IT IS SO ORDERED.

AMENDED REPORT AND RECOMMENDATION

C. CLIFFORD SHIRLEY, JR., United States Magistrate Judge.

All pretrial motions in this case have been referred to the undersigned pursuant to 28 U.S.C. § 636(b) for disposition or report and recommendation regarding disposition by the District Court as may be appropriate. This case is now before the Court on the Defendant's Motion to Dismiss for Denial of Speedy Trial [Doc. 148], filed on October 25, 2013. The Government filed a response [Doc. 152] on January 2, 2014. On February 17, 2014, the Defendant filed a reply [Doc. 155]. The Court has thoroughly reviewed the parties' filings and cited case law, and for the reasons set forth more fully below, the Court recommends that the Defendant's motion to dismiss be denied

I. BACKGROUND

***4** On May 2, 2000, the Defendant and his brother, Nazif G. Bakri, were charged in a 17–count Indictment. [Doc. 2]. The Defendant faces seven charges which include money laundering, conspiracy to commit money laundering, international money laundering, and interstate and foreign transportation of stolen money. These alleged crimes were committed between November 1993 and October 1995, while the Defendant and his brother operated a nightclub in Knoxville, Tennessee. In 1996, a search warrant was executed at the nightclub while the Defendant was present. Soon thereafter, the Defendant fled to his home country of Jordan where he has remained since 1996.[1] Although the Defendant has not reentered the United States, he has retained local counsel in this case since 2000. Through counsel, the Defendant now moves to dismiss the Indictment against him on the grounds that his right to a speedy trial has been violated.

II. POSITIONS OF THE PARTY

In his motion to dismiss and memorandum in support [Docs. 148, 149], the Defendant contends that despite the Government knowing his whereabouts for the past thirteen years, it has made no effort to extradite him in order to prosecute the case. The Defendant submits that the Government's gross negligence in failing to seek extradition has created a "strong presumption of prejudice" against him due to the extensive delay in this case. In addition, the Defendant has attached to his motion a copy of the Extradition Treaty between the United States and Jordan [Doc. 148–1] as evidence that the Government could have, but did not, extradite him.

The Government responds [Doc. 152] that the fugitive disentitlement doctrine prohibits the Defendant from litigating the merits of

this case as he has refused to submit to the jurisdiction of this Court. Moreover, the Government maintains that even if the Court were to entertain the merits of the instant motion, the motion should nonetheless be denied for two additional reasons: (1) contrary to the Defendant's contention, the United States has not been able to extradite the Defendant; and (2) balancing the factors set forth in *Barker v. Wingo,* 407 U.S. 415, 530 (1972), the Defendant's right to a speedy trial has not been violated.

In his reply [Doc. 155], the Defendant argues that an evidentiary hearing is not necessary in this case because it is undisputed that the Defendant has been under indictment during the entire pendency of these proceedings, he has been living openly at his home in Jordan, the United States and Jordan are parties to an extradition treaty, and the United States has made no attempt to extradite him. As a result of the foregoing, the Defendant argues that the Indictment should be dismissed.

III. ANALYSIS

In *Molinaro v. New Jersey,* our Supreme Court declined to hear a criminal appeal from a defendant who refused to surrender to state authorities. 396 U.S. 365, 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970). The Court explained,

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims.

***5** *Id.* at 366.

"The principle articulated by the *Molinaro* Courtthat those who have fled from the judicial process may not benefit from itis known as the 'doctrine of fugitive disentitlement.' " *United States v. Kasham u,* 656 F.Supp.2d 863, 866 (N.D.Ill. Sept.25, 2009). Based upon the premise of mutuality, the long-established doctrine, applied in federal and state courts, limits a fugitive's access to the courts where he or she is only willing to submit his or her case for adjudication for the limited purpose of obtaining a favorable outcome. *In re Prevot,* 59 F.3d 556, 562 (6th Cir.1995); *see United States v. Oliveri,* 190 F.Supp.2d 933, 935 (S.D.Tex. Sept.26, 2001) ("In the years since *Molinaro,* the fugitive disentitlement doctrine has come to signify the unwillingness of courts to waste time and resources exercising jurisdiction over litigants who will only comply with favorable rulings."). The doctrine is a discretionary tool that may be invoked by courts when a defendant refuses "to surrender as ordered." *Kacaj v. Gonzales,* 163 F. App'x 367, 368 (6th Cir.2006).

Although the Court of Appeals for the Sixth Circuit has not yet had the opportunity to determine whether the fugitive disentitlement doctrine applies to pretrial motions in criminal cases, other district courts have routinely recognized the practice with approval. *See United States v. Bokhari,* No. 04–CR–56, 2014 WL 37349, at *2 (E.D.Wis. Jan.6,

2014) (finding that "[c]ourts have applied the doctrine, as here, to pretrial motions in criminal cases"); *United States v. Chung Cheng Yeh,* No. CR 10–00231 WHA, 2013 WL 2146572, at *2 (N.D.Cal. May 15, 2013) (holding the same); *Kashamu,* 656 F.Supp. at 867 (holding "that the fugitive disentitlement doctrine can apply to pretrial motions in criminal cases, subject to the discretion of the Court"); *Oliveri,* 190 F.Supp.2d at 936 (recognizing that "[a]lthough the fugitive disentitlement doctrine is often invoked during the appellate process, it also applies to pretrial motions made by fugitives in the district courts"); *United States v. Stanzione,* 391 F.Supp. 1201, 1202 (S.D.N.Y. April 2, 1975) (applying the doctrine and refusing to hear the defendant's motion to dismiss the indictment until he submitted to the jurisdiction of the court for full resolution of the case). The Court finds the above case law persuasive and joins them in recognizing that the fugitive disentitlement doctrine applies to pretrial motions in criminal cases, subject to the Court's discretion.

Applying the doctrine to the present matter, the Court must now determine whether (1) the Defendant is a "fugitive," and (2) any special circumstances exist that warrant an exception to the doctrine's application. *See Kashamu,* 656 F.Supp.2d at 867 (citing *Oliveri,* 190 F.Supp.2d at 936). The Sixth Circuit has noted that a fugitive is one who "conceals himself with the intent to avoid prosecution. This intent can be inferred from the defendant's knowledge that he was wanted and his subsequent failure to submit to an arrest." *United States v. Greever,* 134 F.3d 777, 780 (6th Cir.1998). It is undisputed that the Defendant has been aware of the charges against him since the filing of the Indictment in 2000. Moreover, the Defendant has retained a local attorney throughout the legal proceedings of this case. Because the Defendant has remained in Jordan despite his knowledge of the Indictment, the Court finds that the Defendant has purposefully avoided facing the charges against him and is therefore a fugitive.

***6** The Court also finds that no special circumstances exist that would preclude application of the fugitive disentitlement doctrine in this case. In *United States v. Noriega,* the court found special circumstances existed to allow defense counsel to make a special appearance on his client's behalf in order to argue the validity of the indictment. 683 F.Supp. 1373, 1374 (S.D.Fla. April 28, 1988). Specifically, the district court found that special circumstances existed because the defendant was a *de facto* head of a foreign government, it was a case of first impression that involved "delicate issues," and the case was "fraught with political overtones." *Id.* at 1375. In *United States v. Shapiro,* the district court likewise refused to invoke the fugitive disentitlement doctrine on the grounds that mutuality concerns were alleviated due the defendant agreeing to surrender to the court's jurisdiction if the merits of his pretrial motion were decided against him. 391 F.Supp. 689, 693 (S.D.N.Y. Mar.24, 1975). Here, none of these circumstances exist. Nor is the Court aware of any other special circumstances in this case.

Accordingly, because the Defendant is a fugitive and no exceptions exist to the application of the fugitive disentitlement doctrine, the Court recommends that the Defendant's motion to dismiss be denied.

"[U]ntil [the Defendant] is willing to submit his case for complete adjudication win or lose he should not be permitted to call upon the resources of the court for the determination of selective claims." *Stanzione,* 391 F.Supp. at 1202. Therefore, the Court declines to reach the merits of the instant motion.

IV. CONCLUSION

After carefully considering the parties' filings, the Court finds that there is no basis to dismiss the Indictment. For the reasons set forth herein, it is **RECOMMENDED**[2] that the Defendant's Motion to Dismiss for Denial of Speedy Trial **[Doc. 148]** be **DENIED.**

Filed March 21, 2014.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1745659

Footnotes

1 The R & R was amended as a result of the defendant's motion to reconsider [*See* Doc. 158]. The defendant moved the magistrate judge to reconsider the initial report and recommendation on two grounds. First, the defendant asserted that the report and recommendation stated the defendant was arraigned on the charges against him, pleaded guilty for willful failure to pay personal income tax, and was sentenced on June 6, 2003, but that statement should have been with respect to the defendant's brother and co-defendant, Nazif G. Bakri. The magistrate judge agreed with the defendant and amended the report and recommendation to correct the error. Second, the defendant asserted that the magistrate judge mistakenly noted that he was ordered to surrender. The magistrate judge found that "this issue is one that is more appropriately suited for the District Court to address after the Defendant has filed an objection to the Amended Report and Recommendation raising such allegation of error." Upon review of the amended R & R, the Court finds that the defendant did not reassert this objection. The Court therefore considers it waived and declines to address it.

2 In support, the defendant cites *Dickey v. Florida,* 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), but that case is inapposite because it does not address the doctrine of fugitive disentitlement.

3 Because the defendant did not object to the magistrate judge's analysis of the second inquiry-whether any special circumstances exist that warrant an exception to the doctrine's application-the Court does not address it here. Nevertheless, the Court agrees with the magistrate judge's analysis regarding this second prong.

1 Nazif G. Bakri was arraigned on the charges against him, later entering a guilty plea for willful failure to pay personal income tax. He was sentenced on June 6, 2003.

2 Any objections to this report and recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Fed.R.Crim.P. 59(b)(2) (as amended). Failure to file objections within the time specified waives the right to review by the District Court. Fed.R.Crim.P. 59(b)(2); *see United States v. Branch,* 537 F.3d 582, 587 (6th. Cir.2008); see also *Thomas v. Arn,* 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (providing that failure to file objections in compliance with the required time period waives the right to appeal the District Court's order). The District Court need not provide de novo review where objections to this report and recommendation are frivolous, conclusive, or general. *Mira v. Marshall,* 806 F.2d 636, 637 (6th Cir.1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers,* 829 F.2d 1370, 1373 (6th Cir.1987).