

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA           :       CRIMINAL ACTION  
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MELVIN STEIN                         :       NO. 04-269-9

MEMORANDUM AND ORDER

McLaughlin, J.

September 19, 2005

Melvin Stein is charged in a second superseding indictment with conspiracy to launder monetary instruments and substantive money laundering. He has moved to dismiss the indictment or in the alternative for the government to turn over grand jury transcripts and documents in the case. The Court heard argument on the matter on September 14, 2005, and will now deny the motion.

The defendant has based his motion on the allegation that the government presented to the grand jury evidence of statements he made to the government during proffer sessions that the Court has subsequently held to be inadmissible under Fed. R. Evid. 410 and Fed. R. Crim. Proc. 11(f). In the alternative, the defendant seeks transcripts of certain grand jury proceedings as well as various other documents "which were filed in Mr. Stein's grand jury case and/or presented to the grand jury." The defendant also argues that the government has abused the grand

jury process by serving subpoenas in such a way as to make compliance with them impossible before the filing of the superseding indictment on May 19, 2004, or the second superseding indictment on February 9, 2005, respectively.

In its opposition to the motion, the government reiterates statements it made in court on January 20, 2005 -- that the statements made by Mr. Stein during the proffer interviews were not presented to the grand jury. The government informs the Court that the affidavit of Special Agent Lewis that forms the basis of the defendant's motion was filed ex parte with the Honorable Eduardo Robreno, and supported an application by the government for an order directing the Internal Revenue Service to disclose to the United States Attorney's office tax returns and return information under 26 U.S.C. § 6103(I)(1). This affidavit was not presented to the grand jury. The government does concede that at least some of the statements made in the affidavit of Special Agent Lewis were describing statements made by Mr. Stein during the proffer sessions.

The government also argues that no subpoenas have been improperly issued in this case. The government asserts that no grand jury subpoenas have been issued subsequent to the return date of the second superseding indictment. One of the subpoenas mentioned in the motion was a regular trial subpoena and the other three subpoenas listed in the defendant's motion were each

returnable on or before the date on which the second superseding indictment was returned. None of the subpoenas was issued later than February 3, 2005, with a compliance date of February 9, 2005.

The Court accepts all of the government's factual assertions concerning the use made of proffer statements of Mr. Stein as well as the facts concerning the service of the grand jury subpoenas. The defendant has presented no facts to undermine or call into question the facts asserted by the government. The defendant argues that even if the affidavit was not presented to the grand jury, it was presented in the context of the grand jury investigation and was a violation of Rule 410.

The Court starts its analysis with the observation that it is not clear to the Court that Rule 410 would apply to grand jury proceedings. Fed. R. Evid. 1101(d)(2) makes the Rules of Evidence, other than the rules with respect to privileges, inapplicable to proceedings before grand juries. The rules with respect to privileges are contained within Article 5 of the Rules of Evidence. Rule 410 is not included in this section. Because this issue was not raised by the government, the Court will assume for purposes of this motion that a grand jury proceeding is included within the prohibitions of Rule 410.

The Court concludes that no statements from the proffer interviews were actually given to the grand jury. The Court also

rejects the argument that using the proffer statements in an affidavit that lead to the obtaining of income tax records in connection with the grand jury investigation equates to presenting such evidence to the grand jury.

In any event, it appears that the government is correct that evidence subsequently ruled inadmissible at a trial that is presented to the grand jury does not affect the validity of the indictment. The government has cited several cases holding that even if evidence presented to a grand jury is later found to be obtained in violation of the defendant's Fourth or Fifth Amendment rights, the indictment is still valid. See United States v. Williams, 504 U.S. 36, 49 (1992); United States v. Calandra, 414 U.S. 338, 345 (1974); United States v. Busk, 730 F.2d 129, 130 (3d Cir. 1984); United States v. Miller, 116 F.3d 641, 662 (2d Cir. 1997). A court's finding that certain statements are protected by Rule 410 does not mean that there has been any violation of anyone's constitutional rights. If evidence obtained in violation of the Fourth Amendment may be presented to the grand jury, it appears that statements made in the course of a proffer could be presented to the grand jury without jeopardizing the indictment.

The Court also concludes that no subpoenas were improperly issued in this case. The fact that in some instances the subpoenaed documents were not physically produced until after

the return of the second superseding indictment does not constitute grand jury abuse. They sought evidence relevant to the grand jury investigation and were returnable on or before the day the grand jury returned the indictment. The grand jury that issued the subpoenas was still in session investigating additional activities of Mr. Stein and other individuals and the documents at issue continued to have relevance to that investigation.

At the oral argument on the motion, defense counsel argued that Special Agent Lewis' affidavit contained materially false statements concerning Mr. Stein's statements during the interviews. This issue was mentioned only in footnotes in the defendant's brief -- footnotes 5 and 6. The basis for the defendant's contention that the affidavit is false is that some of the statements therein are not contained in any of the interview notes or 302s of the conversations with Mr. Stein. At oral argument, defense counsel argued that the use of a false affidavit by the government was a due process violation. This is a separate issue from the pending motion.

At the oral argument, the Court asked that the 302s and interview notes concerning Mr. Stein's statements be given to the Court. The Court stated that it would review all of them and decide whether or not the information in the affidavit in question is fairly encompassed within the 302s and interview notes.

The Court has reviewed the 302s. The Court was not able to decipher the handwritten notes. It appears to the Court that most, if not all, of the incriminating statements appear in the 302s. The 302s describe the transactions regarding 1805 Tulpehocken Street, 1546 East Upsal Street, and the sale of a white BMW to Mr. Wilks. The 302s state that Mr. Stein said that he knew that Messrs. Thomas, Daniels, Wilks and Oliver were "drug traffickers." The Court has not been presented with any basis to conclude that Special Agent Lewis's affidavit is false.

An appropriate order follows.

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ORDER

AND NOW, this 19th day of September, 2005, upon consideration of defendant's Motion to Dismiss or in the Alternative for Turn Over of Grand Jury Transcripts and Documents (Docket No. 552), the government's opposition thereto (Docket No. 576), and after oral argument on September 14, 2005, IT IS HEREBY ORDERED that said motion is DENIED for the reasons stated in a memorandum of today's date.

BY THE COURT:

/s/ Mary A. McLaughlin  
MARY A. McLAUGHLIN, J.