

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 14-60026-CR-ROSENBAUM

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UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SRDJAN JOVCIC

Defendant.

_____X

SRDJAN JOVCIC'S MOTION TO DISMISS INDICTMENT

Defendant, Srdjan Jovic through undersigned counsel moves to dismiss Counts One to Three, Four, and Seven of the Indictment. Counts One to Three charged Jovic with misuse of a U.S. Passport, in violation of 18 U.S.C. §1546(a), and Counts Four and Seven with Conspiracy to commit Marriage Fraud, in violation of 18 U.S.C. §371, 18 U.S.C. 1546, and 8 U.S.C. §1325(c).

Jovic contends that the Indictment is legally insufficient on its face because:

- (1) an alleged misuse of a U.S. Passport is not punishable under 18 U.S.C. §1546(a);
- (2) the U.S. Government is barred from prosecuting Jovic for violating 18 U.S.C. §1546(a) because the statute of limitation has expired; (3) Jovic lawfully obtained his

passport by producing a valid Certificate of Naturalization; (4) with respect to the two conspiracy charges, the indictment failed to state at least one essential element of the crimes charged; and (5) the indictment is based on evidence that is inadmissible at trial as it was obtained in violation of Defendant's rights under the Fourth Amendment of the U.S. Constitution.

I. A U.S. Passport is not a "visa, permit, or other document."

18 U.S.C. 1546(a), entitled "Fraud and misuse of visas, permits, and other documents," punishes:

"Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained."

18 U.S.C. §1546(a)

"Passport" is not included in the title the statute, nor anywhere in the body of

the statute. If Congress wanted to include U.S. Passports in the meaning of 18 U.S.C. § 1546(a), they would have included the word "Passport" in the statute.

Instead, Congress regulated the use of U.S. Passports by enacting 18 U.S.C. § 1541 to 1544 which exclusively concerned passports, and Section 1545 which deals with passports and safe conduct.

For whatever reason, the Government did not charge Jovcic with any of these offenses.

Furthermore, a Passport is not a "document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment *in the United States*"

A U.S. Passport is defined as "any travel document issued by competent authority showing the bearer's origin, identity, and nationality, if any, which is valid for the entry of the bearer into a *foreign* country." See 8 U.S.C. §1101(a)(30)

The U.S. Supreme Court opined that "[A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact." See Haig v. Agee, 453 U.S. 280, 292 (1981)

In United States v. Campos-Serrano, 404 U.S. 293, (1971), the U.S.

Government had charged the defendant for violating 18 U.S.C. §1546(a) for possessing a counterfeited alien registration receipt cards.

The U.S Supreme Court rejected the argument that an alien registration receipt card was among the “other documents” listed in the criminal statute, pointing out that the alien registration receipt card was specifically covered in § 1306.

In its opinion, the Court stated that

“While the apparent congressional purpose underlying §1546 would thus seem to bar an uncompromisingly literal construction, the precise language of the provision must not be deprived of all force. The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute. Accordingly, a ‘document required for entry into the United States’ cannot be construed to include any document whatsoever that the Immigration and Naturalization Service, from time to time, decides may be presented for re-entry at the border. The language of §1546 denotes a very special class of ‘entry’ documents - documents whose primary raison is the facilitation of entry into the country. The phrase, ‘required for entry into the United States,’ is descriptive of the nature of the documents; it is not simply an open-ended reference to future administrative regulations.” [emphasis added]

Id. at 298-299

U.S. Passports are specifically regulated in 18 U.S.C. §§1541 to 1544. Thus, according to the reasoning of the U.S. Supreme Court, a U.S. Passport cannot be included in 18 U.S.C. 1546(a) because (1) it is not listed in the statute, (2) the statute

must be interpreted by its actual words, and (3) U.S. Passport are specifically regulated in the immediately preceding sections of the statute.

More importantly, it must be noted that Congress amended § 1546(a) in 1986, in response to the Supreme Court's decision in Campos-Serrano. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §103(a), 100 Stat. 3359, 3380.

The new version of the statute expanded the list of documents to include “border crossing card[s]” and “alien registration receipt card[s]” while still leaving out “U.S. Passports”.

Therefore, as a matter of law, Jovicic cannot be convicted of 18 U.S.C. 1546(a) for obtaining and/or misusing his U.S. Passport.

II. The statute of limitation for 18 U.S.C. 1546(a) has expired

The U.S. Government is barred from prosecuting the first three Counts of the indictment because the statute of limitation for this offense ran.

Under 18 U.S.C. §3282, the statute of limitation for the offense of Fraud and misuse of visas, permits, and other documents under 18 U.S.C. §1546(a) is 5 years.

The statute of limitation begins to run when the offense is first committed.

The indictment alleges that Jovicic misused his U.S. Passport because he obtained it by fraud. Again, even assuming that a U.S. Passport is within the scope of

18 U.S.C. § 1546(a), the conduct that could possibly be punished here is the obtainment by fraud of misrepresentation.

Jovcic obtained his U.S. Passport on December 28, 2007. If any factual misrepresentation was made from Jovcic when he obtained his U.S. Passport, he can't now be prosecuted because the 5-year statute of limitation ran.

Therefore, Counts one to three of the indictment should be dismissed as a matter of law.

III. Defendant lawfully obtained his U.S. Passport by producing a valid Certificate of Naturalization

Even if we assume, for the sake of the argument, that a U.S. Passport is within the meaning of 18 U.S.C. 1546(a), Jovcic did not obtain a U.S. Passport by fraud.

Jovcic obtained a U.S. Passport by producing Certificate of Naturalization No. 30862888. The validity of said Certificate has never been questioned by the U.S. Government.

Federal law provides a specific procedure for the revocation of a U.S. Certificate of Naturalization. 8 U.S.C. 1451(a) provides that:

“It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order

admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively” [...]

See 8 U.S.C. 1451(a)

In this case, the U.S. Government never sought to revoke Jovicic’s Certificate of Naturalization. Even assuming the truth of the Government’s allegations, Jovicic legally obtained and used a U.S. Passport by producing a valid U.S. Certificate of Naturalization to the Passport office.

Jovicic possesses and uses a U.S. Passport because he is a U.S. Citizen, and the U.S. Government cannot try to circumvent the requirements of 8 U.S.C. 1451(a).

Therefore Counts one to three of the indictment should be dismissed as a matter of law.

IV. Count four of the indictment should be dismissed because it does not state the essential elements of the conspiracy charge

In order to establish a conspiracy, the government must prove existence of agreement between two or more people to violate law of United States, that one of the

conspirators committed overt act in furtherance of that agreement, and that defendants knew of conspiracy and voluntarily participated in it. See U.S. v. Jobe, C.A.5 (Tex.) 1996, 101 F.3d 1046, certiorari denied 118 S.Ct. 81, 522 U.S. 823, 139 L.Ed.2d 39

In charging a conspiracy the indictment must distinctly and directly allege an agreement to commit an offense against the United States and inference and implication will not suffice. See United States v. Mathies, 203 F.Supp. 797, 801 (W.D.Penn.1962)

The general rule in reference to an indictment is that all the material facts (Fed.R.Crim.P. 7(c) says 'essential facts') and circumstances embraced in the definition of the offence must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. See Pettibone v. United States, 148 U.S. 197, 202, 13 S.Ct. 542, 545, 37 L.Ed. 419, 422

The indictment may incorporate the words of the statute to set forth the offense, but the statutory language must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. See Hamling v. United States, 418 U.S. 87, 117 (1974)

In the present case, the indictment fails to state facts in support of at least one essential element of the crime, to wit that Jovicic was aware of the alleged fraudulent scheme between Goran Bjelovic and Ljiljana Aleksic.

In fact, the indictment does not state any time or place where the alleged conspiracy took place; moreover, it does not state that Jovicic ever met or talked to co-defendant Ljiljana Aleksic.

Furthermore, the indictment fails to state at least one overt act that was committed in furtherance of the conspiracy.

Jovicic signed a Form I-864EZ, also called "Affidavit of Support" and an Interpreter Attestation and Acknowledgment Form in connection to the application of permanent residency of Mr. Goran Bjelovic.

The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

The Interpreter Attestation and Acknowledgment Form signed by Jovicic does not constitute an overt act, because he does not further any fraud. Jovicic only swore to accurately translate what Mr. Bjelovic was saying during the interview, while he did not, and could not vouch for the veracity of Mr. Bjelovic.

The signing of Form I-864EZ does not constitute an over act either, because it

does not further the commission of marriage fraud.

Form I-864EZ, is a form for *financial* sponsorship that needs to be filed in conjunction to Form I-485, Application to Register Permanent Residence or Adjust Status.

Form I-864 does not need to be filed, and does not have any impact on the adjudication of Form I-130, Petition for Alien Relative.

The validity of a qualifying family relationship is exclusively established by filing Form I-130 and any supporting documents. Supporting documents include: evidence of the marital union, such as pictures, joint bills, birth certificates of children born from the marriage. Form I-864EZ is not a supporting document, and does not need to be filed with Form I-130.

In other words, Form I-864EZ does not have any effect in the adjudication of Form I-130. It does not further approval of Form I-130, so that it cannot be considered an overt act even if the qualifying family relationship is invalid itself.

Therefore, Count 4 of the indictment should be dismissed as a matter of law.

V. Count seven of the indictment should be dismissed because it does not state the essential elements of the conspiracy charge

In order to establish a conspiracy, the government must prove existence of agreement between two or more people to violate law of United States, that one of the

conspirators committed overt act in furtherance of that agreement, and that defendants knew of conspiracy and voluntarily participated in it. See U.S. v. Jobe, C.A.5 (Tex.) 1996, 101 F.3d 1046, certiorari denied 118 S.Ct. 81, 522 U.S. 823, 139 L.Ed.2d 39

In charging a conspiracy the indictment must distinctly and directly allege an agreement to commit an offense against the United States and inference and implication will not suffice. See United States v. Mathies, 203 F.Supp. 797, 801 (W.D.Penn.1962)

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The indictment may incorporate the words of the statute to set forth the offense, but the statutory language must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. See Hamling v. United States, 418 U.S. 87, 117 (1974)

In the present case, the indictment fails to state that Jovcic committed at least one overt act in furtherance of the conspiracy.

The indictment states that Jovcic wrote a check to Branko Likic in the amount of \$1,500.

This cannot be considered an overt act. The term "overt act" means some type of outward, objective action performed by one of the parties to or one of the members of the agreement or conspiracy which evidences that agreement.

If Jovcic was really helping co-defendant Branko Likic obtain legal status by virtue of a fraudulent marriage, Jovcic would have received a payment in consideration of the help provided, and not the way around. The payment by check from Jovcic to Mr. Likic is not an overt act in furtherance of the alleged conspiracy to commit marriage fraud.

Therefore, Count seven of the indictment should be dismissed as a matter of law.

VI. The indictment should be dismissed because it is based on inadmissible evidence obtained in violation of Defendant's 4th Amendment rights.

The U.S. Government obtained the indictment against Srdjan Jovcic by using evidence, to wit intercepted phone conversations, that was obtained in violation of Defendant's rights under the Fourth Amendment of the U.S. Constitution. See

Defendant's Motion to Suppress Evidence.

CONCLUSION

For all the reasons above, Defendant Srdjan Jovcic requests that this Motion to Dismiss the indictment be granted.

Date: April 30, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the April 30, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record listed in the Service List below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

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