

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA,)

v.)

**CHARLES WESLEY GILMORE AND
WALTER LEFIGHT CHURCH,**)

Defendants.)

Case No. 1:00CR00104

Case No. 1:03CR30014

OPINION AND ORDER

UNITED STATES OF AMERICA,)

By: James P. Jones
United States District Judge

v.)

SHERI LYNN HOWELL NICHOLS,)

Defendant.)

Anthony P. Giorno and Rick A. Mountcastle, Assistant United States Attorneys, Abingdon and Roanoke, Virginia, for United States of America; Anthony F. Anderson, Roanoke, Virginia, and Stephen J. Kalista, Big Stone Gap, Virginia, for Defendant Charles Wesley Gilmore; James C. Turk, Jr., Stone, Harrison & Turk, P.C., Radford, Virginia, and Beverly M. Davis, Davis, Davis & Davis, Radford, Virginia, for Defendant Walter Lefight Church; Timothy W. McAfee, Norton, Virginia, for Defendant Sheri Lynn Howell Nichols.

Defendants Walter Lefight Church and Sheri Lynn Howell Nichols have filed pretrial motions seeking to terminate their prosecutions on the grounds of

prosecutorial misconduct or vindictiveness, relating in part to the indictment of Nichols for perjury after she testified as an alibi witness for Church at his prior trial that ended in a hung jury. In addition, Nichols claims that the government's failure to charge her earlier violated her right to a speedy trial. Finally, the government has moved in limine for an order prohibiting the defendants from presenting evidence or argument as to prosecutorial misconduct or vindictiveness to the jury.

Church, along with Charles Wesley Gilmore, is charged with various federal crimes arising out of the murders of Robert Davis, Una Davis, and Robert Hopewell on April 16, 1989, in Pocahontas, Virginia.¹ Samuel Stephen Ealy was tried for the murders in state court in 1991 but was acquitted. Thereafter, on December 13, 2000, a federal indictment was returned, charging Ealy and defendant Church with the killings.

After the federal indictment, at the request of the defendants and without objection by the government, the cases were severed for trial. Ealy was tried first and

¹ Specifically, Church and Gilmore are charged with conspiracy to murder Robert Davis in furtherance of a continuing criminal enterprise (Count One) (21 U.S.C.A. § 848(e)(1)(A) (West 1999)) and with killing Mr. and Mrs. Davis and Robert Hopewell in furtherance of a continuing criminal enterprise (Counts Two, Three and Four). Both defendants are also charged with killing Robert Davis with the intent to prevent him from communicating with federal authorities (Count Five) (18 U.S.C.A. § 1512(a)(1)(C) (West 2000 & Supp. 2003)), and Church is charged with killing Una Davis and Robert Hopewell to prevent their communication with federal authorities (Counts Six and Seven). The government is seeking the death penalty for Church and Gilmore under Counts One, Two, Three, and Four.

convicted and has been sentenced to life imprisonment. Church was thereafter tried, but the jury could not reach a unanimous verdict, and a mistrial was declared. Before Church's second trial was to begin, the government obtained a Superseding Indictment adding Gilmore as a defendant.

The government's theory of the case is that Gilmore, a drug kingpin, hired Ealy and Church to murder Robert Davis because Gilmore understood that Davis, a member of Gilmore's drug ring, was about to inform on him to federal authorities. According to the government, Ealy and Church killed Davis at his home in the early morning hours of April 16, 1989, and immediately thereafter murdered his wife Una and her fourteen-year-old son Robert because they had witnessed the murder of Davis.

At his first trial, Church testified and denied being involved in the crimes. He claimed to have spent the night of the murders with his girlfriend, Sheri Lynn Howell Nichols, at his home. Nichols testified as a defense witness and corroborated Church's alibi. She admitted that she had intentionally lied at Ealy's 1991 state trial, where she had testified that she spent the night with Church in an automobile. She claims now that she was with him at his home and that she earlier lied in order to conceal from Church's wife that she and Church had spent the night in the Church

home, while Church's wife was away. Following Ealy's 1991 trial, Nichols had been charged with perjury in the state court, but the charge was nolle prossed.

Following Church's mistrial, Nichols was indicted in this court for perjury. *See* 18 U.S.C.A. § 1623 (West 2000). At Nichols' request, and without objection by Church or the government, I consolidated her trial with that of Church and Gilmore.

In his Motion for Prosecutorial Misconduct and Supplemental Filing to Prosecutorial Misconduct Motion, Church seeks dismissal of the indictment against him on the grounds that the government has violated his due process rights by indicting Nichols for perjury and for suborning perjured testimony at Church's first trial by government witness Donald Toth. Nichols has filed a Motion to Dismiss, contending that the perjury charge against her should be dismissed because it is the result of a vindictive prosecution, with an aim to punish her for testifying for Church at his first trial and to prevent her from testifying at his second trial. An evidentiary hearing was held on these motions on February 5, 2004. By agreement, the parties submitted certain additional evidence thereafter, and the motions are now ripe for decision.²

² Church also contends that the government has violated his rights by failing to timely disclose exculpatory evidence relating to government witness Richard Laszcynski. At Church's request, I will reserve decision on this issue until Laszcynski has testified at trial. Church also claimed that the government has instructed the Bureau of Prisons to ignore defense subpoenas for records relating to government witnesses, but the disputes over those

The government's Motion in Limine was argued on February 10, 2004, and is also ripe for decision.

I

First, in regard to Church's motion, it is settled that a criminal defendant's rights under the Due Process Clause are violated when the government knowingly uses perjured testimony, *see Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935), or denies a defendant material exculpatory evidence accidentally or intentionally, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963).

As to the witness Donald Toth, I accept the government's argument that Toth's testimony regarding Church's involvement in a brawl in a bar in Anawalt, West Virginia, on April 5, 1992, on the whole was not inconsistent with Church's own testimony that he had been convicted of involuntary manslaughter and malicious wounding as a result of the incident. Furthermore, the claim of prosecutorial misconduct on this issue is tenable only if Church shows both that prosecutors knowingly used perjured testimony and that there is a reasonable likelihood that the

records have been resolved by the court or by agreement of the parties. In his supplemental filing, Church complained that he had not received the record of an FBI agent's interview of a new possible government witness, Patricia Sutphin, but that document has since been disclosed by the government.

false testimony could have affected the verdict. *See United States v. Agurs*, 427 U.S. 97, 103-04 (1976). Not only has Church not demonstrated that the government knowingly elicited untrue testimony from Toth, but he has also not shown, in light of all the other incriminating evidence presented during his first trial, that Toth's ostensibly inaccurate testimony would have convinced the jury to render a verdict of not guilty.

With regard to the indictment of Nichols, as later explained in this opinion, I find that the government has not engaged in misconduct. In addition, there is no ground at this point for arguing that the government's action in charging Nichols has deprived Church of any needed evidence. *See United States v. Teague*, 737 F.2d 378, 384 (4th Cir. 1984). Even as a defendant, Nichols may testify just as she did at Church's first trial. While the jury will be aware that she is charged with perjury, I do not find that Church's defense will thereby be burdened impermissibly. Indeed, Nichols' attorney advises that he intends to argue to the jury that she must be telling the truth since she has maintained her alibi statements even in the face of a perjury charge.

II

Nichols contends that the government has engaged in a vindictive prosecution by charging her with perjury after she testified on Church's behalf. Nichols argues that other persons have testified falsely in this case and have not been charged with perjury because their testimony was favorable to the government. Moreover, Nichols claims that the fact that she could have been prosecuted prior to Church's trial, based on her grand jury testimony, leads to the inference of vindictiveness. The government, on the other hand, contends that Nichols' allegedly perjurious testimony was central to the case and thus justified prosecution. In addition, it claims that following Church's mistrial, it discovered additional evidence directly bearing on Nichols' perjury from a witness named Charlene Carter Moye.

I find that the defendant has not shown an improper prosecution. The government's justification for prosecuting Nichols, and not others who may have testified falsely, is sufficient to overcome any implication of misconduct. While Moye's testimony has been attacked as weak and conflicting, her credibility is ultimately for the jury to decide. I accept the testimony of the FBI case agent at the evidentiary hearing that, while he had always been suspicious of Nichols' story, he reasonably relied on Moye's statement to him (which she repeated under oath before the grand jury) that Nichols was present in Pocahontas the night of the murders, and

thus could not have been with Church, as crucial additional evidence justifying Nichols' prosecution.

Nichols also claims that she has been prejudiced by the failure of the government to prosecute her earlier and that her rights under the Speedy Trial Clause have thus been violated. Nichols contends that although the federal government has known of her alibi statements since at least 1998 at the latest, and perhaps even earlier during the state prosecution, the present indictment against her was not returned until February of 2003.

Nichols' argument is without merit. The Speedy Trial Clause does not touch upon any pre-indictment delays resulting from extended criminal investigations and does not compel the government to hastily bring charges prior to thoroughly investigating the matter. *See United States v. Loud Hawk*, 474 U.S. 302, 312 (1986). "With no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending." *United States v. MacDonald*, 456 U.S. 1, 9 (1982).

III

The government has moved in limine for an order precluding the defendants from presenting evidence or argument to the jury that Nichols' indictment was the result of prosecutorial vindictiveness.

The government is correct that the question of prosecutorial misconduct is one for the court to determine and not the jury. *United States v. Northey*, 848 F.2d 199, 199 (9th Cir. 1988); *United States v. Berrigan*, 482 F.2d 171, 174-75 (3d Cir. 1973).

While recognizing this general principle, defendants Church and Nichols argue that they should be able to attack the credibility of government witnesses and bolster the credibility of their own witnesses by contrasting the prosecution of Nichols for perjury with the failure of the government to similarly prosecute its own witnesses.

It is normally not objectionable (subject to the duty of the court to control repetitive evidence) to ask one's own witness if she understands that she may be prosecuted for perjury for false testimony. *See United States v. Frietag*, 230 F.3d 1019, 1024 (7th Cir. 2000). Moreover, government witnesses may be questioned about their prior inconsistent statements. *See Fed. R. Evid.* 613.

The defendants wish to do more, however. As I interpret their argument, they want to prove that certain government witnesses have not been charged with perjury, as evidence of a benefit supplied to the witnesses in order to attack the credibility of

such persons. The government objects to any such evidence on the ground that it would then be required to offer rebuttal evidence of the reasons for not initiating perjury prosecutions, which evidence might require testimony from the present attorneys for the government.

I cannot at this point definitively limit the proper scope of examination of the witnesses, since the context at trial may be determinative. Unless it is reasonable inference, however, that a government witness has not been prosecuted for perjury in return for favorable testimony at this trial, I will prohibit evidence that the witness has not been so prosecuted. Such questions, absent a likely connection to credibility, would only confuse the issues and waste time. *See* Fed. R. Evid. 403.

IV

For the foregoing reasons, defendant Church's Motion for Prosecutorial Misconduct [Doc. No. 909] is DENIED, defendant Nichols' Motion to Dismiss [Doc. No. 109] is DENIED, and the government's Motion in Limine [Doc No. 1038] is GRANTED IN PART.

DATED: February 13, 2004

/s/ JAMES P. JONES
United States District Judge