

**UNITED STATES DISTRICT COURT**

**WESTERN DISTRICT OF VIRGINIA**

*Big Stone Gap Division*

**UNITED STATES OF AMERICA )**

**v. )**

**REPORT AND**  
**RECOMMENDATION**  
**Criminal No. 2:06cr00023**

**ROY SILAS SHELBURNE, )**  
**Defendant )**

*I. Background*

This case is before the court on the motion of the defendant, Roy Silas Shelburne, to dismiss the indictment, (Docket Item No. 65) (“Motion to Dismiss”), and the motion to exclude certain evidence, (Docket Item No. 66) (“Motion to Exclude”). The motions are before the undersigned magistrate judge by referral pursuant to Federal Rule of Criminal Procedure 59(b) and 28 U.S.C. § 636(b)(1)(B). The undersigned conducted a hearing on the motions on May 22, 2007. As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

*II. Facts*

In a 10-count indictment returned on October 17, 2006, by a grand jury sitting

in this district, Shelburne is charged with racketeering in violation of 18 U.S.C. § 1962(c), wire fraud in violation of 18 U.S.C. § 1343, mail fraud in violation of 18 U.S.C. § 1341, money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), transportation of stolen property in excess of \$5,000 in violation of 18 U.S.C. § 2314, healthcare fraud in violation of 18 U.S.C. § 1347, two counts of monetary transactions in excess of \$10,000 involving fraud in violation of 18 U.S.C. § 1957 and two forfeiture counts seeking forfeiture of certain property and assets under 18 U.S.C. §§ 982 and 1963.

A hearing was held before the undersigned on the Motion to Dismiss and Motion to Exclude on May 22, 2007. In its written response to the motions and at this hearing, the Government conceded that counts two, three, four and six of the indictment were duplicitous. The Government stated that it intended to seek a superseding indictment from the grand jury in June to cure this deficiency. The Government further agreed that the five-year statute of limitations contained in 18 U.S.C. § 3282 prevented the prosecution of the defendant for mail fraud, money laundering, interstate transportation of fraudulently obtained property in excess of \$5,000 and healthcare fraud as charged in counts three, four, five and six of the indictment for any acts occurring earlier than five years prior to the date of issuance of the indictment. The Government stated that it also intended to cure this deficiency through the issuance of a superseding indictment. The Government argued, and defense counsel conceded, that evidence of any such offenses occurring outside of this five-year period would be admissible, however, to prove the pattern of conduct required for conviction on the racketeering charge contained in count one of the indictment.

At this hearing, defense counsel also conceded that the indictment sufficiently charged the essential elements of various criminal acts alleged in the indictment. Defense counsel further conceded that, based on additional materials produced by the Government to defense counsel on the date of the hearing, the Government now had provided the defendant with notice of the alleged fraudulent acts sufficient to allow him to adequately prepare his defense.

All that being the case, the parties agreed that the only issue remaining to be addressed by the court at this time with regard to the motions was the issue of whether count five of the indictment should be dismissed for lack of jurisdiction. The defendant argues that count five of the indictment should be dismissed because the Government bases this charge on numerous interstate wire transfers of funds made by the defendant during 2002, 2003 and 2004, with none of these transfers individually equaling or exceeding \$5,000. The Government concedes that it has no evidence of any individual interstate transfer equaling or exceeding \$5,000.

### *III. Analysis*

Title 18 U.S.C. § 2314 makes it illegal to transport, transmit or transfer in interstate or foreign commerce any goods, wares, merchandise, securities or money of \$5,000 or more in value knowing the same to have been stolen, converted or taken by fraud. *See* 18 U.S.C.A. § 2314 (West 2000). Count five of the indictment alleges that Shelburne, from July 1998 to October 2006, “did unlawfully transport, transmit, transfer ... in interstate commerce ... by wire communication, knowing that said wire communication contained \$5,000 of funds that had been stolen, converted, and taken

by fraud.” Count five of the indictment does not identify the specific interstate transfers of funds which it claims violate 18 U.S.C. § 2314. The Government has, however, conceded that it has no evidence of any individual interstate wire transfer made by Shelburne which equaled or exceeded \$5,000. Instead, the Government has conceded that it intends to meet the \$5,000 jurisdictional limit contained in 18 U.S.C. § 2314 by producing evidence of multiple wire transfers by Shelburne aggregating more than \$5,000.

While Shelburne’s motion asks the court to dismiss count five of the indictment, the motion, in essence, attacks the sufficiency of the Government’s evidence. A motion challenging the sufficiency of the evidence may be considered prior to trial only where the Government is willing to stipulate or proffer the evidence it will present on the issue. *See United States v. Jones*, 117 F. Supp. 2d 551, 553 (W.D. Va. 2000). In this case, the Government stipulates that it has no evidence of any individual wire transfer equaling or exceeding \$5,000 and that the only way it can meet the \$5,000 jurisdictional amount required by this statute is by aggregating multiple wire transfers.

Title 18 U.S.C. § 2311 defines the term “value” used in § 2314 as “the face, par or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment...” In *Schaffer v. United States*, 362 U.S. 511, 517 (1960), the Supreme Court held that the value of merchandise shipped in different shipments to the same defendant could be aggregated to meet the \$5,000 statutory limit in § 2314. The Court reasoned: “A sensible reading of the statute properly attributes to Congress the view that where the

shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated. The Act defines ‘value’ in terms of that aggregate. The legislative history makes clear that the value may be computed on a ‘series of transactions.’” *Schaffer*, 362 U.S. at 517 (citing H.R. Rep. No. 1462, 73d Cong. 2d Sess., p. 2 (1934); H.R. Conf. Rep. No. 1599, 73d Cong., 2d Sess., p. 3 (1934)). *See also United States v. Martin*, 800 F.2d 560, 562 (6<sup>th</sup> Cir. 1986) (two separate checks sent on separate dates may be aggregated to meet \$5,000 jurisdictional requirement of § 2314); *United States v. Perry*, 638 F. 2d 862, 871 (5<sup>th</sup> Cir. 1981) (the value of stolen goods transported in different shipments in interstate commerce may be aggregated to meet the statutory minimum of \$5,000 when the goods are referred to in a single indictment and the shipments have enough relationship so that they may properly be charged as a single offense); *Andrews v. United States*, 108 F.2d 511 (4<sup>th</sup> Cir. 1939) (separate and distinct transactions or shipments may be aggregated to meet \$5,000 jurisdictional limit of § 2314 provided all are made pursuant to a single plan or agreement).

While the Government in this case concedes that it has no evidence of any single interstate wire transfer of \$ 5,000 or more, it argues that it has permissibly aggregated multiple transfers to charge Shelburne with one count of violating § 2314 because each of these transfers were made as part of a larger scheme or plan to defraud the Government and to hide the proceeds of that scheme. Under the language of the statute and the case law as outlined above, such an aggregation is allowed if the Government’s evidence can establish that the transfers were part of a common scheme or plan to defraud. Therefore, insofar as the Motion to Dismiss seeks to dismiss count five on the basis that multiple transactions cannot be aggregated to meet the

jurisdictional amount, the Motion to Dismiss should be denied as a matter of law. Furthermore, it appears inappropriate for the court to decide whether there is sufficient evidence of a common scheme or plan to defraud in allowing the aggregation of these transfers, since the Government's evidence on this issue is not properly before the court by way of proffer or stipulation at this time.

### **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Based on the parties' representations, the only issue remaining for the court to address at this time is the defendant's Motion to Dismiss insofar as it challenges count five of the indictment;
2. A motion to dismiss challenging the sufficiency of the evidence may be considered prior to trial only where the Government is willing to stipulate or proffer the evidence it will present on the issue;
3. To be convicted of the charge of interstate transportation of stolen property under 18 U.S.C. § 2314, the Government must prove the value of the property at issue is \$5,000 or more;
4. The Government concedes that it has no evidence of any single interstate wire transfer of \$5,000 or more by Shelburne;
5. The Government may aggregate separate and distinct transfers to meet the \$5,000 jurisdictional limit required by 18 U.S.C. § 2314, if the Government can show that these transfers were part of a common

- scheme or plan to defraud;
6. The Government has not proffered the evidence it could show as to whether these transfers were part of a common scheme or plan to defraud;
  7. Insofar as the Motion to Dismiss asserts that the Government cannot aggregate multiple transfers to meet the \$5,000 jurisdictional limit required by 18 U.S.C. § 2314, the Motion to Dismiss should be denied as a matter of law; and
  8. The Government's evidence is not properly before the court to allow it to decide whether this evidence is sufficient to prove that the multiple wire transfers alleged by the Government to satisfy the \$5,000 jurisdictional limit were part of a common scheme or plan to defraud.

### **RECOMMENDED DISPOSITION**

Based upon the above-stated reasons, the undersigned recommends that the court deny the Motion to Dismiss insofar as it seeks to dismiss count five of the indictment. Based on the parties representations and agreement, there is no need for the court to address the other issues raised by the Motion to Dismiss and the Motion to Exclude.

### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within ten days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, Chief United States District Judge.

The Clerk is directed to send certified copies of this Report and Recommendation to all counsel of record at this time.

DATED: This 25<sup>th</sup> day of May 2007.

/s/ Pamela Meade Sargent  
UNITED STATES MAGISTRATE JUDGE