

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

UNITED STATES OF AMERICA)	Criminal No. 5:08cr00001-001
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
SPENCER JAY STONEBERGER)	By: Samuel G. Wilson
)	United States District Judge

This matter is before the Court on the motion of defendant, Spencer Jay Stoneberger, to compel specific performance of his plea agreement. Stoneberger, who was the recipient of a substantial assistance motion at his sentencing, maintains that he has rendered additional substantial assistance which obligates the government under his plea agreement to file a motion under Rule 35(b) of the Federal Rules of Criminal Procedure to permit the court to reduce his sentence further. He also contends that the government's failure to file the motion is arbitrary and capricious and violates his Fifth Amendment rights to due process and equal protection. The government has responded that it has not filed an additional motion because, it does not believe that Stoneberger has rendered additional substantial assistance and because Stoneberger violated his plea agreement by appealing his sentence despite having expressly agreed not to appeal. The court finds that under Stoneberger's plea agreement the government's decision not to file a substantial assistance motion is proscribed only by the requirement that the government act in good faith and not based on improper motivation. Moreover, even if Stoneberger had made the requisite threshold showing requiring the government to respond, the government's response is unassailable because the record discloses that Stoneberger violated the terms of his plea agreement by appealing his sentence. Accordingly, the Court denies Stoneberger's motion to compel the government to file a Rule 35(b) motion.

I.

A federal grand jury indicted Stoneberger, his wife Brandy Stoneberger, and eight other defendants for conspiracy to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 846 and for various other related offenses. The Stonebergers pled guilty to the conspiracy charge pursuant to written plea agreements. Their agreements provided that they would have the opportunity to provide substantial assistance in an effort to earn a substantial assistance motion, but that “the determination as to whether or not [their] efforts constitute ‘substantial assistance’ [would] be solely within the discretion of the United States Attorney’s Office.” They also agreed not to appeal their sentences and acknowledged that if they breached any provision of their agreements at any time the United States could “refuse to make a substantial assistance motion, regardless of whether substantial assistance [had] been performed or not.”

According to the evidence, Stoneberger was essentially the hub of the conspiracy. He was held accountable for no less than 5 kilograms of methamphetamine, managed or supervised no fewer than five individuals, and used minors as interpreters to facilitate drug trafficking transactions. His total offense level was 38 and his criminal history category II, which produced a guideline range of 262 to 327 months. His wife’s guideline range was 121 to 151 months. The government moved for downward departures as to both based upon their substantial assistance. The court granted the motion and sentenced his wife to 78 months and on July 31, 2008 sentenced Stoneberger to 170 months.

Despite his promise not to appeal his sentence, on August 8, 2008 Stoneberger filed a notice of appeal pro se essentially complaining about the length of his sentence as compared to his wife’s sentence.

On September 10, 2008 , Assistant United States Attorney, Jeb Terrien e-mailed Stoneberger's counsel, Dennis Heilberg, stating that he might need to call Stoneberger to testify against one of his co-defendants. Heilberg responded that he had been informed that the prosecution "might give some consideration for a Rule 35," although he acknowledged that no one had made "any promises beyond what [was] already in his plea agreement...." Heilberg followed up, however, by stating that if the government needed to call Stoneberger it would not be a problem. Minutes later, Terrien e-mailed Heilberg asking with whom he had spoken regarding a Rule 35 and asking if Stoneberger had "an appeal pending" before the Fourth Circuit. Approximately 15 minutes later Heilberg responded:

When I e-mailed you a while back, I brought up the possibility of Rule 35 and advised my client that, if he was needed to provide later assistance, you would consider it (but there are no promises). Please talk to your case agents. His appeal is pending (he filed pro se and I was appointed) but, if you will file a Rule 35 so that the Judge can shave some more time off, we expect to dismiss the appeal. Appeal will be wasteful but, without the Rule 35 consideration, there is nothing to lose (or gain) for my client with the status quo....

On September 30, 2008, Heilberg e-mailed Terrien asking what Stoneberger "would need to do to get some consideration for a Rule 35 Motion," noting that Stoneberger had been present and willing to testify at a recent sentencing of a co-defendant and had supplied information resulting in the arrest of another individual. Meanwhile, in violation of his agreement, Stoneberger pursued his appeal in the Court of Appeals, and on February 27, 2009, the government moved to dismiss Stoneberger's appeal based on his appeal waiver, which the Court of Appeals granted.

On April 10, 2009, the government moved pursuant to Rule 35 to reduce Brandy Stoneberger's sentence from 78 months to 62 months, which this court granted on May 19, 2009. Heilberg responded with an e-mail to Terrien on June 4, 2009 stating that he believed that his

client had cooperated as much and “arguably more” than his client’s wife and that Terrien should “do the same for him.” Terrien replied that same day that a Rule 35 Motion “[would] not be forthcoming.” Ultimately, Heilberg filed his current motion to compel the government to file a Rule 35 motion.

II.

In limited circumstances, a Federal District Court has the authority to review a prosecutor’s decision not to file a Rule 35(b) motion. The court has authority to review a prosecutor’s decision where: (1) the prosecutor’s discretion to file has been superseded by an agreement to file a Rule 35(b) motion; or (2) the prosecutor’s refusal to file “was based on an unconstitutional motive.” Wade v. United States, 504 U.S. 181, 185-186 (1992). See United States v. Snow, 434 F.3d 187, 191 (4th Cir. 2000). An unconstitutional motive would be, for example, one based on an impermissible factor such as race or religion, or a motive not rationally related to a legitimate governmental end. Wade, 504 US at 186; United States v. Butler, 272 F.3d 683, 686 (4th Cir. 2001). To trigger the court’s review of a prosecutor’s decision, however, the defendant must do more than claim he provided assistance or allege that the United States acted in bad faith. He must make a “substantial threshold showing” of one of the qualifying circumstances. Id. Here, Stoneberger has not made that requisite showing.

Stoneberger’s plea agreement obligated the government to move for substantial assistance only if, in its *sole* discretion, it concluded that he had rendered substantial assistance and then only if Stoneberger had kept his promises under the agreement. Although Stoneberger claims that the prosecutor acted arbitrarily and capriciously and in bad faith, the only bad-faith this record exhibits is Stoneberger’s bad faith in filing an appeal despite his promises not to do

so and pursuing that appeal for the purpose of leveraging a Rule 35 motion.¹ Consequently, the Court will deny his motion to compel.

III.

For the reasons stated, Stoneberger's motion to show cause and to compel the government to file a Rule 35 motion will be denied.

ENTER: This April 26, 2010.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

¹ The court does not intimate that Heilberg acted in bad faith. Stoneberger appealed pro se and counsel was obligated to pursue that appeal. See United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007) (counsel provided ineffective assistance by disregarding defendants unequivocal instructions to file notice of appeal, even though defendant had executed appeal waiver as part of his guilty plea).

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In accordance with the Memorandum Opinion entered today, it is **ORDERED** and **ADJUDGED** that the motion by defendant to show cause and to compel the government to file a Rule 35 motion is **DENIED**.

ENTER: This April 26, 2010.

UNITED STATES DISTRICT JUDGE