IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:11-CR-161
	)	
JOHNNY REID EDWARDS	)	

MR. EDWARDS' RENEWED RULE 29 MOTION FOR AN ACQUITTAL

INTRODUCTION

An extensive Rule 29 motion for an acquittal on all counts was made orally on Mr. Edwards' behalf on May 11, 2012, which was renewed after the evidence and verdict, and Mr. Edwards incorporates those arguments here. (5/11/12 Tr. at 3-99; 5/16/12 Tr. at 109-12; 5/31/12 Tr. at 19, 26.) Mr. Edwards appreciates the Court's invitation to supplement the oral motion with a written brief that is "directed primarily towards the venue issues raised by Counts 4 and 5." (Dkt. 315.) The Court is right to zero in upon the venue defects in Counts 4 and 5, as there was no evidence at trial that could support a finding of venue for either count.

ARGUMENT

I. VENUE DOES NOT EXIST IN THIS DISTRICT WITH RESPECT TO COUNTS 4 AND 5

Count 4 alleges Mr. Baron made expenditures that should be deemed campaign contributions to Mr. Edwards in 2007, and Count 5 alleges that he did so in 2008. The Indictment initially made clear that none of Mr. Baron's purchases took place in the Middle District of North Carolina, and the government's evidence at trial confirmed that.

(5/10/12 Tr. at 3-4 (listing exhibits); 89-142 (testimony of Agent Garey).) Paragraph 29 of the Indictment lists Mr. Baron's allegedly improper purchases in 2007-08, and none took place in this district. Indeed, all but one purchase is alleged to have been made in California, Colorado, or Florida. The only purchase connected in any way with North Carolina is a December 18, 2007 expense for "Chartered airfare from Raleigh, North Carolina, to Fort Lauderdale, Florida," but Raleigh is in the Eastern District, not this District. There is not a single alleged purchase by Mr. Baron in 2008 that took place, even in part, in North Carolina with respect to Count 5.

"It is settled that, in a criminal case, venue must be narrowly construed." United States v. Jefferson, 674 F.3d 332, 365 (4th Cir. 2012) (citing United States v. Johnson, 323 U.S. 273, 276 (1944)). Determining whether venue exists for an alleged crime requires a careful focus on the elements of the offense. That is because venue is determined based "on the nature of the crime alleged and the location of the act or acts constituting it." United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999). As the Fourth Circuit recently explained: "This inquiry is two-fold. We must initially identify the conduct constituting the offense, because venue on a count is proper only in a district in which an essential conduct element of the offense took place. We must then determine where the criminal conduct was committed." Jefferson, 674 F.3d at 365 (quoting United States v. Smith, 452 F.3d 323, 334-35 (4th Cir. 2006)); see United States v. Robinson, 275 F.3d 371, 378 (4th Cir. 2001) ("Venue on a count is proper only in a district in which an essential conduct element of the offense took place.").

The statute at issue in Counts 4 and 5 has just a single essential conduct element -- acceptance of the excessive contribution. 2 U.S.C. § 441a(f) provides: "No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section." (emphasis added); see also 2 U.S.C. § 437g(d)(1)(A) (providing that the violation of Section 441a(f) is only a felony if committed "knowingly and willfully" and the contributions aggregate to $25,000 or more within a calendar year). The Department of Justice (and specifically the Public Integrity Section that brought this case) itself acknowledges that the focus of the campaign finance laws for venue purposes is where the candidate accepts the contribution or, if it is a donor who is charged, where the contribution is made. "The campaign finance statutes focus on the 'making' and 'receiving' of contributions and expenditures, and venue generally exists where a prohibited transaction was made or received." DOJ, Federal Prosecution of Election Offenses 199 (2007) (attached as **Exhibit 1**). Similarly, the case law uniformly treats venue as the place where the contribution was made or accepted. See United States v. Passodelis, 615 F.2d 975, 977-78 (3d Cir. 1980) (rejecting venue for the crime of "making" a contribution in the place where the contribution was merely accepted); United States v. Chestnut, 533 F.2d 40, 47 (2d Cir. 1976) (venue for receipt of illegal contributions is the place where the contributions were received, not sent).

This is in keeping with the Supreme Court's directive that courts consider the verbs in the offenses in determining the "essential conduct elements." Rodriguez-Moreno, 526 U.S. at 280. The remaining elements of the offense, including the *mens rea* element and the $25,000 threshold, are merely circumstances elements that are not

considered in determining venue. See, e.g., United States v. Oceanpro Indus., Ltd., 674 F.3d 323, 329 (4th Cir. 2012) (explaining "'in any matter within the jurisdiction' of a federal agency is 'jurisdictional language [that] appears in a phrase separate from the prohibited conduct' and is simply a 'predicate circumstance' of the prohibited conduct. Similarly, the *mens rea* requirement would be a circumstances element that does not contribute to determining the *locus delicti* of the crime."); id. at 328 ("We interpreted Rodriguez-Moreno in [United States v. Bowens, 224 F.3d 302, 314 (4th Cir. 2000)], refining its rubrics by holding that the 'circumstance' elements of an offense, even if essential, are of 'no moment' to a venue determination.").

In Jefferson, for example, the Fourth Circuit vacated a wire fraud conviction obtained in the Eastern District of Virginia that was based on a phone call from Ghana to Kentucky. The Fourth Circuit held: "In a mail or wire fraud prosecution, the mailing or wire transmission itself -- i.e., misuse of the mail or wire -- has consistently been viewed as the *actus reus* that is punishable by federal law." Jefferson, 674 F.3d at 367. The government argued that part of the scheme to defraud that was manifested over the phone call occurred earlier in the Eastern District of Virginia, but the Fourth Circuit rejected that argument, emphasizing: "The scheme to defraud is clearly an essential element, but not an essential *conduct* element." Id. at 366 (emphasis in original). The Fourth Circuit explained "a conduct element is one of action, such as the act of putting a letter in the mailbox or making a telephone call. On the other hand, the element of devisal of the scheme 'connotes contemplation, not action.'" Id. at 367 (quoting United States v. Ramirez, 420 F.3d 134, 144-45 (2d Cir. 2005)).

The Second Circuit has also emphasized that "venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense." Ramirez, 420 F.3d at 141 (internal quotation omitted) (emphasis added). This principle was recently reaffirmed by the Second Circuit in United States v. Tzolov, 642 F.3d 314 (2d Cir. 2011). The defendants in that case were charged with securities fraud in the Eastern District of New York, but the fraudulent communications all emerged from the Southern District of New York. The only connection to the Eastern District was that the defendants "travelled through JFK airport on their way to meet with the investors." Id. at 318. The Second Circuit rejected venue on this basis, explaining: "At most, catching flights from the Eastern District to meetings where [the defendant] made fraudulent statements were preparatory acts. They were not acts 'constituting' the violation." Id. at 319.

II. NO ESSENTIAL CONDUCT ELEMENT FOR COUNTS 4 OR 5 OCCURRED IN THIS DISTRICT

The government acknowledges Mr. Edwards did not accept a campaign contribution from Mr. Baron in the Middle District of North Carolina, but instead claims he prepared to do so by placing a call to Mr. Young in the Middle District on December 14, 2007, asking him to call Mr. Baron "about the logistics of leaving." (4/24/12 Tr. at 36.) The government told the Court this call explaining that "Fred is going to take care of the arrangements" essentially "sets the whole thing in motion." (5/11/12 Tr. at 68.)

But this alleged conduct is, at most, the very sort of "preparatory act" or "devisal of the scheme" that the Fourth Circuit has rejected as a basis for venue. The government's argument is foreclosed by Jefferson, where venue could not exist in a wire fraud prosecution in the district where the scheme to defraud occurred, but only where the wire transaction took place. Jefferson, 674 F.3d at 367-68 (discussing Ramirez, 420 F.3d at 144-45). Indeed, the situation here is very similar to Tzolov, which held that venue exists only where a crime occurred and not where the preparations for travel to the scene of the crime were made. Tzolov, 642 F.3d at 319. The only essential conduct element of the crimes charged in Counts 4 and 5 was Mr. Edwards' alleged acceptance of illegal campaign contributions from Mr. Baron. Whether or not such crimes were planned in this District (they were not), there is no evidence that any alleged contribution was accepted by Mr. Edwards or his agent in this District.

To save the counts, the government also argues that venue exists because the crimes alleged are continuing offenses -- as explained below they are not -- but that cannot eliminate the defect in venue because no essential conduct element took place in this District. A continuing offense does not create venue wherever a defendant may go, but only creates jurisdiction where a crime is committed in multiple venues. Consequently, the government must still prove "an essential conduct element took place" in the venue where a continuing offense is charged. Ramirez, 420 F.3d at 139. Likewise, "[w]hether the crime be continuing or noncontinuing, … venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of it." Ramirez, 420 F.3d at 141 (internal quotations omitted). The government

seeks to engraft the notion of "overt acts" from conspiracy law into a substantive campaign contribution context, but there is no basis in the statute or caselaw for doing so.

III. COUNTS 4 AND 5 ARE NOT CONTINUING OFFENSES

Prior to this case, DOJ made clear that it did not believe the crime of accepting excessive contributions to be a continuing offense. DOJ explained:

> The campaign financing statutes focus on the "making" and "receiving" of contributions and expenditures, and venue generally lies where a prohibited transaction was made or received. While this presents no problems in cases involving intradistrict transactions, an appeals court has interpreted "making a contribution" so narrowly that serious difficulties may be encountered in establishing a centralized venue over multi-district FECA violations.

(Ex. 1 at 199 (citing Passodelis, 615 F.2d 975, and Chestnut, 533 F.2d at 47).) If DOJ considered these offenses as occurring not just where contributions are made or received, but wherever DOJ now claims there is a "seamless stream of conduct" (5/11/12 Tr. at 69 (Harbach)), the venue problem DOJ identifies with multi-district FECA violations would not exist. But the problem does exist -- as DOJ recognizes -- because each offense is distinct, which creates a distinct venue analysis for each contribution made or received. If these were continuing violations, there would be no venue problem in multi-district FECA violations because all violations could be prosecuted where any of the essential conduct elements occurred.[1]

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[1] The government depends entirely on this continuing offense theory with respect to Count 5 concerning the 2008 payments by Mr. Baron. The government has not identified

Yet, without any campaign finance case law to support it, and in contravention of DOJ's seminal guidance document, the government argues for the first time in this case that the crime of accepting illegal campaign contributions is a continuing offense. Not only do the long-standing precedents in Passodelis and Chestnut stand in its way, as DOJ previously acknowledged, so does the Supreme Court's decision in United States v. Cabrales, 524 U.S. 1 (1998). In Cabrales, the defendant was charged with money laundering for engaging in financial transactions with criminally-derived property. The criminally-derived property was obtained in Missouri, where the defendant was tried, but the financial transactions that were alleged to constitute money laundering took place solely in Florida. The Supreme Court refused to find the money laundering offense to be a continuing one that began when the criminally-derived property was generated, and held venue could not exist in Missouri. Id. at 8.

The Fourth Circuit adhered to the Cabrales analysis in United States v. Stewart, 256 F.3d 231 (4th Cir. 2001), but held that money laundering could be a continuing offense where the laundering transaction takes place in multiple venues (as opposed to where the criminally derived property originates in one venue and the laundering occurs in another). Id. at 239. That is similar to the situation in this case. While the flight Mr. Baron paid for arguably was a continuing offense in that it began in the Eastern

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anything but the 2007 call as the basis for venue, and argues only that by starting a chain of events with that 2007 call, venue is appropriate in this District for alleged violations that occur in the following calendar year. (5/11/12 Tr. at 68-69.)

District of North Carolina and ended in Florida, providing a basis for venue in either location, there is no venue in this District where only a preparatory act (a single telephone call) took place.

The expansive theory of continuing offenses the government seeks here also is inconsistent with the need to construe venue narrowly and to avoid double jeopardy issues. In Jefferson, immediately after discussing the continuing offense statute (18 U.S.C. § 3237(a)), the Fourth Circuit emphasized: "It is settled that, in a criminal case, venue must be narrowly construed." Jefferson, 674 F.3d at 365 (citing Johnson, 323 U.S. at 276). The Fourth Circuit also highlighted the double jeopardy problems that would arise from the government's continuing offense theory. Id. at 367-68. Section 441a(f) is violated each time a candidate accepts an illegal contribution, such that the receipt of multiple illegal contributions would constitute multiple crimes. But if the government's theory is correct and the offense is a continuing violation that applies to a "seamless stream of conduct" (5/11/12 Tr. at 69), then the acceptance of multiple illegal contributions would be only a single crime and double jeopardy would be implicated by charging the receipt of multiple illegal contributions as separate offenses. Such a conclusion is at odds with the plain language of the statute and they way it has been understood historically.

IV. AIDING AND ABETTING DOES NOT CREATE VENUE

The government also contends that venue exists under an aiding and abetting theory that Mr. Edwards caused Mr. Young to take actions in furtherance of accepting the payments based on the 2007 phone call. (5/11/12 Tr. at 68.) This is a co-conspirator

(overt act) analysis, but the argument does not apply in this context. Aiding and abetting liability attaches only to a person who assists a principal in committing a crime. Stewart, 256 F.3d at 244. The crime of accepting illegal campaign contributions is not a generally applicable crime, but applies only to a "candidate" and Mr. Edwards is the only candidate in this case. 2 U.S.C. § 441a(a)(f). Thus, Mr. Edwards can only be the principal. Because aiding and abetting liability could attach to Mr. Edwards only "if he induces a person in that class to violate the prohibition," and Mr. Young is not in that class of persons ("candidates") who can violate the statute, aiding and abetting Mr. Young is not a crime. Standefer v. United States, 447 U.S. 10, 18 n.11 (1980). (In theory, Mr. Young could be held liable for aiding and abetting the receipt of an illegal campaign contribution on behalf of a "candidate," but Mr. Young cannot commit the crime as a principal because he is not a "candidate.") Mr. Edwards is the only member of the class of persons who could violate the statute, and he cannot aid and abet himself.

CONCLUSION

Mr. Edwards is entitled to an acquittal on all the charges against him for the reasons stated by his counsel in his oral Rule 29 motion on May 11, 2012 and supplemented thereafter. As this written pleading demonstrates, such an acquittal is particularly warranted as to Counts 4 and 5 on the venue issue.

This the 11th day of June, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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This the 11th day of June, 2012.

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